trESS Training and reporting on European Social Security

Impact assessment of the revision of selected provisions of Regulations 883/2004 and 987/2009

Analytical Study 2013

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INTRODUCTION

Within the framework of the trESS project, the European Commission mandated an Ad Hoc Analytical Study Group of trESS experts to analyse four potential amendments to Regulations 883/2004 and 987/2009. In particular, trESS was requested to contribute to the assessment of the impact of the revision of Regulations 883/2004 and 987/2009 with regard to Articles 13 and 32 of Regulation 883/2004 and Articles 65 (1) and 87 (6) of Regulation 987/2009.

In the framework of the discussions on Miscellaneous Amendments 2011/2012, the Member States requested specific amendments to Articles 13 and 32 of Regulation 883/2004 and Article 87 (6) of Regulation (EC) No. 987/2009. As a rule, the Miscellaneous Amendments refer to regular and technical updates of the social security Coordination Regulations for which no impact assessment is required. However, the Commission considers that the proposed changes of these three provisions require specific analysis due to their, more than purely technical nature.

The proposal for an amendment to Article 65 (1), sentence two of Regulation 987/2009 is an initiative by the Commission. This provision was intended to guarantee that in exceptional circumstances, where there were difficulties to calculate average costs within the deadline set in the first sentence of this provision, a Member State could still send its claims. The current wording referring to 'a previous year' can lead to the interpretation that any previously and last published average costs could be used if a Member State did not respect the deadline described in sentence 1.

This Ad Hoc report is based on the request for these concrete amendments provided by the Member States' delegations in the respective notes to the Administrative Commission: note AC 17/11 with regard to Article 13 of Regulation 883/2004; notes AC 485/11, AC 603/11 and AC 657/11 with regard to Article 32 of Regulation 883/2004; and note AC 160/11 with regard to Article 87 (6) of Regulation 987/2009. It also builds on the discussions of the Administrative Commission on the proposed changes (notes AC 10/11 and AC 339/11).

In order to analyse the proposals for amendments, the Ad Hoc Group has, for each of the provisions concerned, worked out in detail a contextualisation of the proposal in the current – and former, when referring to the situation under Regulation 1408/71 – legal framework and provided a description of the problems with the existing rules.

However, the core of this report is, for each proposal, a legal analysis of the proposal and its assessment using different fixed criteria ('clarification', 'simplification', 'protection of rights', 'administrative burden and implementation arrangements', 'risk of fraud and abuse', and finally 'potential financial implications'). If trESS considers that the proposed amendment could be modified or improved, this suggestion is explicitly indicated in the report.

To the extent that the report was, as much as possible, based on the background provided and on desk-top research a mapping was included of the specific impact of the proposed amendments in the different Member States. This mapping exercise found its limits in the information that was made available to the Analytical Study Group (i.e. the above mentioned notes of the Administrative Commission) and in the information that could be retrieved – for each proposal separately and on an individual basis from the experts of the Ad Hoc Analytical Study Group and the representatives of the national administrations – from the Member States who were actively involved in the debates of the Administrative Commission and who wanted to share their opinion for the purposes of this report.

The present report's main purpose is to give a first overview of the most important legal, administrative and practical challenges related to the analysed proposals. Without the intention of

being exhaustive in tackling the aspects connected to the potential introduction of the amendments, the reported issues should serve as the basis for further reflection and as an important next step in the further law-making and policy debate.

PROPOSAL FOR AN AMENDMENT OF ARTICLE 13 OF REGULATION 883/2004

A. Context of the proposal for an amendment

1. The current legal framework

Title II of the Regulation constitutes, according to settled case law,[1] a complete and uniform system of conflict rules. The aim of these rules is to ensure that citizens[2] moving within the European Union are subject to the social security scheme of only one Member State, in order to prevent that the national legislation of more than one Member State is applicable and to avoid the subsequent complications of such a situation.

In order to achieve the above mentioned aim, the basic rule is that an employed or self-employed person is to be subject to the legislation of the Member State in which he or she works[3] (Article 11 (3) (a) of the Basic Regulation (BR)), i.e. the *lex loci laboris* principle. For economically inactive persons, the ground rule is that they are subject to the social security legislation of their Member State of residence (Article 11 (3) (e) BR), i.e. the *lex loci domicilii* principle. Specific rules are provided for specific categories of persons (e.g. civil servants, flight and cabin crew) and for situations in which these basic rules are not fit to serve free movement in the best way. This is e.g. so for situations of simultaneous activities in different Member States as an employed and/or self-employed person (Article 13 BR).

In the current legal framework, no special rules – neither in Title II on the determination of the applicable legislation nor in Chapter 6 of Title III on the coordination of unemployment benefits – are laid down for specific circumstances in which, for instance, a person receiving the benefits also performs activities as an employed or as a self-employed person in another Member State. In such a situation, the existing rules with regard to simultaneous employment[4] are the only available framework.

From Article 11 (2) BR it can be deducted that a person receiving unemployment benefits – a benefit received as a consequence of a former activity – is still considered to be pursuing the former activity for the determination of the applicable legislation. The same goes for e.g. temporary sickness cash benefits, maternity benefits or benefits in respect of accidents at work. Without special circumstances, this will result in the further application of the *lex loci laboris*, i.e. the social security legislation of the Member State where the worker was active before he became unemployed. For persons receiving unemployment benefits under the legislation of their Member State of residence in accordance with Article 65 BR, Article 11(3) (c) BR provides that such persons are to be subject to the legislation of that Member State.

Under Regulation 1408/71, a person receiving unemployment benefits was not yet explicitly considered as pursuing the former activity for the determination of the applicable legislation. Indeed, the predecessor of Regulation 883/2004 did not make a clear distinction between economically active and economically non-active persons for the determination of the applicable legislation. Its Article 13 (2) (f) stated that a person to whom the legislation of a Member State ceased to be

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1 See, to that effect, in particular, case C-276/81, *Kuijpers* [1982] ECR 3027, paragraph 10; case C-202/97, *FTS* [2000] ECR I-883, paragraph 20; and the case law cited; as well as case C-404/98, *Plum* [2000] ECR I-9379, paragraph 18.

2 As the case law is only related to Regulation 1408/71, this sentence was updated from 'workers' to 'citizens'.

3 See case C-101/83, *Brusse* [1984] ECR 2223, paragraph 15.

4 See Article 13 BR.

applicable, without the legislation of another Member State becoming applicable to him or her in accordance with the other conflict rules, should be subject to the Member State of residence. This rule was introduced after case law of the Court of Justice of the European Union (CJEU) had demonstrated that the absence of a rule for non-active persons was a loophole with substantial impact on the free movement of persons.

The rule of Article 13 (2) (f) could be applied to 'post-active persons', but did not solve all coordination questions with regard to economically inactive persons. Persons who had never pursued an activity could not appeal to Article 13 (2) (f) and the old Regulation did not give any further definition of the categories of persons who should be considered economically active or inactive persons. This was clearly repaired by Article 11 (2) and, specifically for unemployed persons within the scope of Article 65 BR, Article 11 (3) (e) BR.

Article 13 (2) (f) thus provided a rule for some economically inactive persons and was definitely not applicable to unemployed persons, as they could not be regarded as persons to whom the legislation of a Member State ceased to be applicable. On the contrary, according to Article 1 of Regulation 1408/71, an unemployed person had to be regarded as an employed or self-employed person due to his or her insurance for one or more contingencies covered by the branches of a social security scheme for employed or self-employed persons. As opposed to the general conflict rule of Article 11 (3) (e) BR, Regulation 1408/71 contained specific rules in the different coordination chapters for unemployed persons.[5]

2. Problems with the existing rules

It is exactly the lack of specific rules for determining the applicable legislation in the particular situation of persons receiving an unemployment benefit and simultaneously performing economic activities that creates coordination problems. Whereas this is unproblematic when the activity is performed in the Member State providing the benefits, legal and practical issues do arise when a person receives unemployment benefits in one Member State and exercises economic activities in another Member State.

Under the old Regulation, such situation had to be considered under the existing framework as described above. Departing from the *lex loci laboris,*[6] the sole legislation applicable should be the legislation of the Member State in which the – albeit minor – activity is performed. This is rather straightforward.

However, both the Administrative Commission and the European Commission were of the opinion that it is in the interest of the unemployed person to deviate from the main principles in this situation. Consequently, for reasons of better coordination and simplification, it was deemed that the person should be subject to the legislation of the Member State providing the unemployment benefits, both for the benefit receipt and for the performed activity. For example, consider a person who receives unemployment benefits in his or her Member State of residence, Belgium, and takes up a minor activity in The Netherlands for a Dutch employer. Belgium should continue paying the unemployment benefits, the Dutch employer should pay contributions in Belgium, and the person should be fully subject to the Belgian social security system.

With a view to the above considerations and for lack of any provisions in Regulations 1408/71 and 574/72, Recommendation No. 18 was adopted, inviting the Member States to apply this desired

[5] See Articles 25 (2), 39 (6), 45 (6) and 72a of Regulation 1408/71.
[6] See Article 13 of Regulation 1408/71.

derogation from the *lex loci laboris* by means of bilateral agreements. To our knowledge, no such bilateral agreements have been concluded since the adoption of Recommendation No. 18.[7]

With the introduction of Regulation 883/2004, which entered into force on 1 May 2004 and has been applicable since 1 May 2010, it was established that an unemployed person should be regarded as still performing the former activity as a result of which he or she is receiving benefits. This provision unambiguously guarantees the further application of the social security legislation of the former State of activity. For frontier workers and other 'cross-border workers', specific rules are provided.

However, when an unemployed person takes up a minor[8] activity in another Member State than the Member State from which he or she receives unemployment benefits, a literal reading of Article 13 BR leads to a coordination result which has not been anticipated in the current rules. As the benefit receipt also has to be considered as the performance of an activity, the coordination rule for the determination of the applicable legislation in case of simultaneous employment indeed applies.

A concrete example can illustrate this. A person residing in Member State A has worked for 7 years in that Member State and has become unemployed. He receives unemployment benefits from the Unemployment Office of Member State A. However, the national legislation of Member State A provides that it is allowed to combine reduced unemployment benefits with a minor (as to earned income and/or as to time spent) activity. In that regard, the person takes up an activity in the neighbouring Member State B, where he works only 1 day per week and for which the earned income does not exceed the income limits fixed in the national legislation of Member State A. According to a literal reading of the Regulation, that person has to be regarded as performing simultaneous activities as an employed person in 2 Member States and, consequently, the provisions of Article 13 BR have to be applied.

It is apparent that the literal reading of Article 11 *juncto* 13 BR is not in line with the *ratio legis* of both provisions. Article 11 lays down that an unemployed person receiving benefits is still to be regarded as pursuing the said activity for the purposes of the application of Title II. In a literal interpretation, Article 13 sets specific rules only for persons who normally pursue their activity in two or more Member States, envisaging situations of persons who are 'actually' working, i.e. pursuing economic activities in one of more Member States, or an equivalent situation (still having the status of an employed person under social security legislation). This excludes situations in which a legal fiction leads to equalling benefit receipt with pursuing an activity which is in actual fact not pursued anymore. On top of that and still according to a literal interpretation, the meaning of 'substantial activities' in Article 13 would be violated, as a non-existing activity would be chosen as substantial over an existing, albeit minor, ongoing activity. The same goes for the term 'employer', which would be used for an entity which is in actual fact a 'former employer'.

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7 Recommendation No. 18 of 28 February 1986 concerning the legislation applicable to unemployed persons engaging in part-time professional or trade activity in a Member State other than the State of residence, OJ C 284/4 of 11 November 1986.

8 For the sake of clarity and completeness, it should be noted that the concept of 'minor activity' in this report should not be confused with the concept of 'marginal activity' as referred to in Article 14 (5) (b) IR and defined in the Practical Guide. An activity that is considered as 'marginal' is not taken into account for the determination of the applicable legislation under Article 13 BR anyway. The term 'minor' in the report only refers to the quantitative requirements in national social security legislations with regard to a professional activity next to the receipt of unemployment benefits. The use of this term is also based on the assumption that an unemployed person will lose his unemployment benefits as soon as his new employment exceeds these quantitative restrictions. In that case, the existing problems tackled by the analysed proposal for amendment do not arise.

For frontier workers, a particular problem has to be pinpointed, as they receive unemployment benefits from their Member State of residence for an activity pursued in their last State of employment. If they take up a new activity in that latter State, an additional problem of interpretation can be detected. In fact, the legal fiction of Article 11 (2) BR in combination with Article 11 (3) (e) could be interpreted in different ways for the application of Article 13. On the one hand, one could argue that a frontier worker who takes up a job in the last State of employment is working in two Member States if he or she should be considered as pursuing an activity in his or her Member State of residence due to the benefit receipt there. On the other hand, one could also argue that a frontier worker who takes up a job in his or her last State of employment, has two activities in his or her Member State of last employment if he or she should be considered as still pursuing his or her former activity in his or her Member State of last employment. According to the latter interpretation, this should lead to the application of the social security legislation of the Member State of last employment and the current minor activity, by virtue of the *lex loci laboris*. The Regulation does not offer a solution for this problem of interpretation.

Aware of these problems, Recommendation No. U1[9] – by analogy of its predecessor Recommendation No. 18 – emphasises that it is in the interest of the persons concerned to remain subject to the legislation of the Member State of residence. To enable this, the Recommendation also invites the Member States to conclude agreements on the basis of Article 16 BR. However, to our knowledge, no such waiver agreements have been concluded yet.

It is useful to see the impact of the literal reading of the current text of the Regulation on the envisaged situations. Consider the example of a wholly unemployed person who receives unemployment benefits in Member State A (as the Member State of last employment or the Member State of residence), who combines this with a minor employment in another Member State, possibly the Member State of residence, the Member State of last employment or a third Member State:

Unemployment situation	**Minor employment in MS A**	**Minor employment in MS B**	**Minor employment in MS C**
Worker working in MS A, residing there and becoming unemployed (UB in MS A as MS of last employment)	Subject to legislation of: MS A (*lex loci laboris*)	Subject to legislation of: MS A (substantial activities in MS of residence)	Subject to legislation of: MS A (substantial activities in MS of residence)
Frontier worker[10] working in MS B, residing in MS A and becoming wholly unemployed (UB in MS A as MS of residence)	Subject to legislation of: MS B (employer outside MS of residence)	Subject to legislation of: MS B (employer outside MS of residence)	Subject to legislation of: MS A (two employers outside MS of residence)
Non-frontier worker working in MS A, residing in MS B, becoming unemployed and chose to look for a job in MS A	Subject to legislation of: MS A (*lex loci laboris*)	Subject to legislation of: MS A (employer outside MS of residence)	Subject to legislation of: MS B (two employers outside MS of residence)

[9] Recommendation No. U1 of 12 June 2009 concerning the legislation applicable to unemployed persons engaging in part-time professional or trade activity in a Member State other than the State of residence, OJ C 106/49 of 24 April 2010.

[10] For frontier workers, we have taken the interpretation that they should be considered as pursuing their former activity in the Member State of last employment.

(UB in MS A as MS of last employment)			
Non-frontier worker working in MS B, residing in MS A, becoming unemployed and chose to look for a job in MS A (UB in MS A as MS of residence)	Subject to legislation of: MS B (employer outside MS of residence)	Subject to legislation of: MS B (employer outside MS of residence)	Subject to legislation of: MS A (two employers outside MS of residence)

3. Description of the proposal for an amendment

The proposal was made by the French delegation in the Administrative Commission, in Note AC 017/77 of 3 January 2013. The delegation suggested to include a specific supplementary measure in Article 13 BR to systematically resolve the above mentioned situations by referring to the legislation of the Member State of residence. The delegation proposed a textual version for a new paragraph in Article 13:

'*A person receiving unemployment benefits in cash from one Member State and who is pursuing an activity as an employed person and/or as a self-employed person, which is cumulative with such benefits, in another Member State shall, in respect of the pursuit of that activity, be subject to the legislation of the Member State which pays the unemployment benefit.*'

The French delegation added that this would not only remove the ambiguity of such situations in a simple and logical way, but would also make it possible to revoke Recommendation No. U1, as it would no longer serve any purpose.

At the Administrative Commission meeting of 15 and 16 June 2011, the French AC note was supported by a majority of delegations. The Commission confirmed that the French proposal was in line with the logic of Regulation 883/2004 and Recommendation U1 and could agree to the proposal if it was supported by a majority of delegations. The Chair of the Administrative Commission concluded that the proposal was supported in general, but that further improvement of the draft was necessary.

B. Analysis of the proposal for an amendment

1. Legal analysis of the proposal

In order to make the legal analysis of the proposal, it is indispensable to assess it in the light of the spirit and goals of the Coordination Regulations. Next to the overarching objective of accommodating and facilitating the free movement of EU citizens, also the relevant general principles of coordination should be taken into account in this assessment.

As stated in Recommendation U1, it is necessary to establish which legislation is applicable to persons receiving unemployment benefits from one Member State and pursuing an economic activity in another, in order to prevent conflicts of law. This is indeed the first goal of the Regulation's title on applicable legislation and in this sense, the proposal clearly fits in this framework.

As the prevention of conflicts of law is not a goal in itself, but a means to remove restrictions to the free movement of persons within the EU, this is the first reference to be made. It follows from Article

45 TFEU that the free movement of workers is one of the cornerstones of the internal market. This provision entails the right to accept offers of employment actually made, to move freely within the territory of the Member States for this purpose and to stay in a Member State for the purpose of employment. The rights of unemployed persons moving around within the EU to find and pursue an economic activity are thus directly accommodated by this Treaty Article, as was confirmed by the CJEU.[11]

Moreover, taking into account related fields of competence of the European Union, it is clear that the situation of unemployed persons should be tackled with priority. In the context of the proposal, it should be recalled that the EU's social and economic policies have been and still are dominated by the goals of the Union with regard to employment, as expressed in Article 5 TFEU ('*coordination of employment policies*') and Article 9 TFEU ('*a high level of employment*'), as further detailed in the Treaty chapter with relation to employment policy (Articles 145-150 of Title IX TFEU). Besides this, EU law is also clearly heading in the direction of a greater attention to the further facilitation of the free movement rights of jobseekers, especially via the case law of the CJEU.[12] In that regard, it seems self-evident that the European Union cannot leave a possible hindrance to finding employment in another Member State untouched by not acting if there is a risk of conflicts of law for unemployed persons finding their way back to the labour market.

The proposed amendment deviates from the *lex loci laboris* principle understood *stricto sensu*. In the envisaged situations, the unemployed person receiving benefits from a Member State and taking up a new employment in another Member State is in reality only pursuing an economic activity in the latter Member State. Moving away from the legal fiction in Article 11 (2) BR, the logic of the Regulation would rather point to the prevalence of the legislation where the economic activities are performed.

That said, in some situations a derogation from the main principle is possible as long as there is a clear justification for such special rules, e.g. for the posting rules ('*promotion of the free movement of services*') or the rules on simultaneous employment (*lex loci laboris* principle unworkable). In that perspective, both the Commission and the Member States agree that, in the envisaged situations, the applicability of the legislation of the Member State of residence is '*in the interest of the unemployed person*'. However, the relevant documentation (Recommendation No. 18, Recommendation U1, French AC note) does not give any further guidance on what exactly the '*interest of the unemployed person*' is understood to mean.[13]

It is true that the shift to the social security system of the Member State in which the minor activity is performed would complicate his or her overall situation. The proposal clearly serves the stability and continuity of the legislation applicable to unemployed persons.

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[11] See case C-85/96, *Martinez Sala* [1998] ECR I-2691.

[12] See the citizenship case law since *Martinez Sala*, and specifically for unemployed persons, see case C-138/02, *Collins* [2004] ECR I-2703 and case C-22/08 and C-23/08, *Vatsouras and Kapoutantze* [2009] ECR I-4585.

[13] This is probably to be read in line with what the CJEU decided with regard to unemployed frontier workers. It held that – as to receiving unemployment benefits – '*a frontier worker lives in the Member State in which he, his family and his friends reside and in which he carries on his social and political activities*'. The goal of the Regulations' provisions is furthermore to '*ensure that migrant workers receive unemployment benefit in the conditions most favourable to the search for new employment: that benefit is not merely pecuniary but includes the assistance in finding new employment which the employment services provide for workers who have made themselves available to them*'. Most likely, the unemployed person's interest of receiving unemployment benefits in his or her Member State of residence is transferred by analogy to his or her interest to also remain subjected to the legislation in that Member State.

If one would deviate from this choice for continuity and stability, two alternative scenarios are thinkable to increase the focus on the principle of the *lex loci laboris*.

The first would be to shift the full competence for social security purposes to the Member State where the (minor) activities are performed, either meaning a loss of unemployment benefits or a shift of the obligation to pay those benefits to the new Member State of employment. However, this scenario seems to be difficult to reconcile with the overall aims of the coordination system. Whereas the complete loss of the benefits should self-evidently be avoided, also the competence shift for granting the unemployment benefits to the Member State of (self-)employment seems rather hard to reconcile with the principles of coordination and with the Member States' interests, unless this Member State of new employment is the Member State of last employment of a frontier worker.

Another option would be to keep the responsibility to grant the unemployment benefits with the Member State of residence and to shift the overall competence for social security purposes to the Member State of (self-)employment. Although it would not be in line with the principle of applicability of one single legislation, this application of the *lex loci laboris* would not be insurmountable, as the subjection to the legislation of a Member State which is not the Member State of residence is self-evidently fully covered by the coordination rules. In that regard, 'the interest' of the person does not necessarily lie in the subjection to the *lex loci domicilii*. As the coordination rules fully accommodate the situation of residing in a Member State other than the competent Member State for the other social security benefits, the full application of the *lex loci domicilii* is not indispensable and could thus be limited to the granting of unemployment benefits.

Finally, this proposal should be assessed in the light of the plans of the European Commission to revise the unemployment chapter. In this regard, and although it is not carved in stone that the Commission will hold on to its original proposal, it is not excluded that the earlier proposal of the Commission to strengthen the *lex loci laboris* principle in the unemployment chapter, by removing the special rules for frontier workers in order to make the Member State of last employment responsible for granting unemployment benefits, will be put on the agenda again. In this regard, it would be somewhat contradictory to support the analysed proposal with the statement that it is in the interest of the person to be fully attached to the Member State of residence, while future legislation would find its foundations in the idea that it is the last Member State of employment which should be the competent Member State.

2. Assessment of the proposal

As a preliminary remark to the concrete assessment of the proposal in line with the suggested criteria, it cannot be ignored that it should be assessed whether the envisaged situations cause substantial coordination problems. Legislation should not be aimed at rather marginal or non-existing phenomena, as it needs a certain foundation before it is drafted.

Taking into account that the Member States had already issued a recommendation about this topic under Regulation 1408/71 and have re-adopted it with Recommendation U1 under Regulation 883/2004, it may be presumed that the social security authorities are confronted with this on a regular basis. However, if a quantified assessment would result in the conclusion that the occurrence is very low or the coordination problems are manageable, the current situation of recommending the conclusion of bilateral agreements where necessary could be sufficient.

a. Clarification

The proposal intends to clarify the legal framework covering situations of receipt of benefits combined with a minor employment in another Member State. The current situation, in which the literal reading of the Regulation leads to a substantial amount of questions, is definitely unsatisfactory.

It goes without saying that the proposed amendment would clarify the coordination framework for the envisaged situations, as it contains a clear conflict rule. Its existence would remove all doubts about the possible interaction between Article 11 and Article 13.

Although Recommendation U1 recommends the Member States to already choose the solution which is also put forward in the proposal, this is only a non-binding administrative recommendation. A conflict rule in the text of the Regulation would make the proposed solution legally binding, enhance the overall attention paid to such situations and would certainly lead to more compliance at the level of the Member States' social security authorities.

b. Simplification

In line with the above comments on the clarifying effect of the proposal, the removal of all doubts with regard to the application of Title II to the envisaged situations for unemployed persons, would also simplify the text of the Regulation as such. Moreover, it would prevent the Member States' social security authorities from having to take into account both the text of the Regulation and, in support of that, the text of Recommendation U1. The deletion of 'interpretative rules' such as those in the recommendation is a simplification in itself.

However, it should be emphasised that, whereas the proposed amendment as such would lead to clarification and simplification for the envisaged situations, it might not result in an overall clarification and simplification of the coordination rules. As the proposal only tackles situations of persons receiving unemployment benefits in combination with a minor activity, it leaves similar situations in which other cash benefits are received in combination with a minor activity untouched.

Indeed, similar issues arise for persons receiving other cash benefits, which – according to Article 11 (2) BR – leads to the application of the legal fiction that they should be regarded as still pursuing the former activity. This is for example the case for persons receiving sickness benefits in cash and performing a minor activity (rehabilitation measures), for persons receiving maternity benefits in combination with the further execution of an economic activity (e.g. maternity benefits as an employee in one Member State and activities of self-employment in another Member State) or family benefits (parental leave).

The fact that the Regulation would only deal with the situation of unemployed persons could lead to a more complex situation of coordination, lacking a general rule for situations of receiving short-term cash benefits in one Member State in combination with economic activities in another Member State. In essence, this could lead to at least two different interpretations. The first would be that, as the Regulation would only contain a specific rule for receipt of unemployment benefits, the literal reading of Article 11 BR *juncto* Article 13 BR should apply to other cash benefits. The second would be that, as the receipt of other cash benefits is in fact similar to the receipt of unemployment benefits, the conflict rule for the receipt of unemployment benefits should be applied by analogy in situations having regard to other cash benefits. Such divergence in interpretation would threaten the uniform implementation of the coordination rules concerned.

In this regard, further reflection about similar situations with other cash benefits is needed before action is taken for the specific situations envisaged by the proposal, as this would threaten both the clarifying and simplifying character of the amendment.

c. Protection of rights

As to the protection of rights, the proposal should be assessed in the light of its impact on the EU citizens involved in the envisaged situations.

Broadly speaking, the introduction of a clear conflict rule as such is beneficial for the protection of rights of citizens. As it would remove ambiguity and confusion about the subjection to the social security systems of the Member States, citizens' entitlements should be better protected. Unclear rules always tend to result in poor administration of individual files and a loss of rights. On top of that, the introduction of a new rule in the Coordination Regulations would make the envisaged situations the centre of the attention for everyone dealing with EU social security coordination, more than the adoption of a Recommendation in the Administrative Commission.

However, as already mentioned it can be observed that the choice for the subjection of the person to the legislation of the Member State granting the unemployment benefits is not necessarily the first and foremost best solution from the perspective of the protection of rights. If the person concerned is subjected to the Member State where he or she performs his or her economic activity, the coordination framework guarantees that he or she would not lose out on entitlements. Objections would rather be of an administrative nature.

Next to this, the fact that the person concerned found the minor activity outside his or her Member State of residence, is at least a beginning of proof that he has good chances of re-integration in that labour market. As this minor activity could switch to full employment, this could lead to the conclusion that it might be better to make the person subject to the legislation of the Member State where he or she performs his or her economic activities. This would also increase his or her integration in that Member State and would be a solution that comes closer to the *lex loci laboris* principle.

Also from a protection of rights perspective, it should be noted that from an employer's viewpoint, the proposal leads to the obligation for the employer to pay social security contributions in the Member State granting the unemployment benefits. This means that he would also have to be registered as an employer there and fulfil all required administrative obligations. It is not excluded that this might prevent certain employers from hiring persons receiving unemployment benefits in another Member State.

d. Administrative burden and implementation arrangements

The proposal is without doubt the best way forward from an administrative point of view. In the first place, it could avoid that the Member States' social security authorities have to conclude bilateral agreements on the basis of Article 16 BR to provide a settlement in the envisaged situations. However, it might well be that bilateral agreements would still be necessary after the introduction of the French proposal.

In the choice between the application of the legislation of the Member State granting the unemployment benefits and the *lex loci laboris*, it is obvious that the first option is simpler from an administrative point of view. This avoids all the coordination-related administration of residing in a Member State which is not the competent Member State. In this regard, one can think of the export of sickness benefits and family benefits or the reimbursement procedures for sickness benefits in kind provided in the Member State of residence.

Besides that, the specific situation of receiving unemployment benefits would even complicate the administrative situation, as the subjection to the *lex loci laboris stricto sensu* could lead to an obligation of the Member State granting the unemployment benefits to deduct the social security contributions due from the benefits and proceed with their payment in the Member State where the economic activities are performed.

With regard to the administrative implementation of the proposal, it should be assessed whether a specific A1 form is necessary. Under Regulation 1408/71, a specific E101 form was attached as an annex to Recommendation 18, which was not repeated upon adoption of Recommendation U1.

e. Avoiding the risk of fraud and abuse

The proposal would without doubt be beneficial in the light of combatting fraud and abuse. The detection of benefit fraud is high on the agenda in most Member States, certainly in current times of economic and social crisis and the subsequent challenges for the state budgets. The fraudulent (i.e. unreported or under-reported) combination of receiving unemployment benefits and economic activities is a known phenomenon. It is apparent that the risk of this fraud is higher in cross-border situations. Due to the lack of sufficient administrative cooperation between the Member States' social security authorities, such fraud remains an EU-wide topic.

The proposal would create a better view on the phenomenon and would enhance administrative cooperation in this area and would therefore contribute to a better view on the envisaged situations.

f. Potential financial implications

With the available material for analysis, it is difficult to predict any potential financial implications in an accurate way. However, it can be derived from the expected implementation of the proposed amendment that this would probably cause the least additional administrative costs. If the Member State granting the unemployment benefits is the competent Member State for all other social security matters, the administrative procedures behind this are quite straightforward. This would be different if the choice would be made to shift the competence to the Member State of the minor activity, as this requires the initiation of the coordination mechanisms for persons residing outside the competent Member State.

3. A mapping of the impact in the Member States

Based on the note in the Administrative Commission, it is impossible to make a correct mapping of the impact of the proposal in the different Member States. To do so, further statistics and examples of relevant coordination problems would have to be analysed. Moreover, a true impact assessment would require a thorough analysis of the national legislation with regard to unemployment benefits in all the Member States.

However, it can already be derived from the MISSOC tables that in approximately one third of the EEA States there would be zero impact, as accumulation of an unemployment benefit with earnings from employment or self-employment is prohibited anyway. Indeed, in ten countries this accumulation is not possible without losing the concerned benefits (BG, CY, CZ, EE, HU, IT, LV, LT, MT, RO for employed persons). In other countries, the accumulation is possible but restricted by conditions with regard to the period of time in which the accumulation takes place, the income earned from the employment and/or the simultaneous reduction of the benefit (AT, BE, FR, DE, EL, IS, LI, LU, PL, RO for self-employed persons, SK, SL, ES, CH, NL and UK). In a third group, accumulation is only possible with partial unemployment (DK only in specific cases, FI, IE, NO, PT, SE).

C. Conclusion

1. General evaluation of the proposal for an amendment

In general, the proposed amendment would certainly improve the coordination system of Regulation 883/2004, as several questions regarding the interaction between different provisions of Title II on the determination of the applicable legislation would be answered. This would lead to a clarification and simplification of the rules, but would first and foremost enhance the protection of unemployed persons in the specific situation in which the receipt of unemployment benefits in one Member State is combined with taking up a minor activity in another.

However, one major obstacle should be emphasised. As the proposed amendment only concerns the situation of unemployed persons, the proposal lacks a holistic approach, as it leaves aside the reflection about the combination of receiving other cash benefits with a minor activity in different Member States. The fact that the solution provided for unemployment benefits is potentially part of a bigger challenge with cash benefits, the size of which is also not known, is probably the biggest flaw in the current proposal.

In that regard, it would be recommendable to start a reflection process about the coordination problems with regard to the receipt of cash benefits in one Member State and taking up employment in another Member State.

2. Alternative or adapted proposal for an amendment

From a purely theoretical perspective and especially from the perspective of the protection of rights, it would not make much difference whether the competence for other social security benefits goes to the Member State granting the unemployment benefits or to the Member State where the person is pursuing an activity. In this sense, the proposal could be altered as follows:

'*A person receiving unemployment benefits in cash from one Member State and who is pursuing an activity as an employed person and/or as a self-employed person, which is cumulative with such benefits, in another Member State shall, in respect of the pursuit of that activity, be subject to the legislation of the latter Member State. This does not detract from the concerned person's entitlement to unemployment benefits in the first Member State*.'

Predominantly from the perspective of avoiding administrative burden and cumbersome compliance issues, it is recommendable to give full social security competence to the Member State which grants the unemployment benefits, as is the case in the analysed proposal. We deem the French proposal to be the most straightforward option from a legal-practical point of view and in this sense it should get preferential treatment in comparison with other scenarios which can be put forward from a theoretical point of view.

However, as the latter does not take into account the distinction between wholly unemployed persons and partially unemployed persons, we would suggest to reconsider the exact wording of the

proposal to take this distinction into account. In this sense, the proposal could be amended as follows:

'A wholly unemployed person receiving unemployment benefits in cash from one Member State and who is pursuing an activity as an employed person and/or as a self-employed person, which is cumulative with such benefits, in another Member State shall, in respect of the pursuit of that activity, be subject to the legislation of the Member State which pays the unemployment benefit'.

Finally, it should be noted that the current proposal does not take into account potential problems with the accumulation between other short-term cash benefits in one Member State and a minor activity in another Member State. Without having analysed this in all its effects at the current stage, as such assessment did not fall within the scope of analysis, the proposal could be rephrased to:

'*A person receiving benefits in cash, as described in the first sentence of Article 11 (2) of this Regulation, from one Member State and who is pursuing an activity as an employed person and/or as a self-employed person, which is cumulative with such benefits, in another Member State shall, in respect of the pursuit of that activity, be subject to the legislation of the Member State from which grants the said benefits in cash*'.

As a general recommendation, it will be necessary to map the existing coordination problems with regard to the accumulation of receiving short-term cash benefits in one Member State and the pursuit of economic activities in another Member State. Such holistic approach would prevent that the amendment of the Regulation would appear to be a partial reparation of a bigger undetected problem.

PROPOSAL FOR AN AMENDMENT OF ARTICLE 32 OF REGULATION 883/2004

A. Context of the proposal for an amendment

The possible coexistence and overlapping of independent rights and derivative rights to sickness benefits for family members may require the establishment of a priority rule to determine the competent State which should bear the cost of these benefits. However, this rule has to take into account multiple and variable scenarios: independent rights based on the insurance of the family member as a worker, student, pensioner *etc*; independent rights based solely on residence in a State that recognises these benefits for this reason; rights derived from one parent or from both; residence of parents in different States (A and B); residence of the family member with one of the parents in State A, in State B, or alone without parents in State C. Consequently, any rule or alternative will have to manage numerous options and alternatives and, in any case, will always be confronted with pros and cons and will have to overcome some gaps or difficulties during its implementation.

Article 32 (1) BR takes this issue into account and introduces a general priority rule (independent rights first) and an exception (derivative rights only when the independent right is based directly and solely on residence).

As a precedent of Article 32 BR, we could mention Article 19(2) of Regulation 1408/71, which establishes:

'The provisions of paragraph 1 shall apply by analogy to members of the family 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.
Where the members of the family reside in the territory of a Member State under whose legislation the right to receive benefits in kind is not subject to condition of insurance or employment, benefits in kind which they receive shall be considered as being on behalf of the institution with which the employed or self-employed person is insured, unless the spouse or the person looking after the children pursues a professional or trade activity in the territory of the said Member State.'

In its Article 32, Regulation 883/04 in principle follows the general idea of Article 19 (2) of Regulation 1408/71, presenting, at the same time, a clearer wording and a more precise distinction between independent and derivative rights, prioritising the first ones. However, and despite the recognition of the improvement of the new wording, for some Member States, there are still gaps (overlapping of derivative rights) that need to be filled and cases that need to be resolved. In fact, three countries (Germany, Slovakia and Poland) have submitted notes to the AC, proposing possible amendments to Article 32 for a more accurate and uniform application of this coordination rule. Moreover, this problematic situation, already complex under Regulation 1408/71 becomes even more complex under the BR, which includes in its personal scope both active and non-active persons, making it necessary to seek clear rules of priority or conflict.

1. The current legal framework

Article 32 of the BR establishes:

'1. *An independent right to benefits in kind based on the legislation of a Member State or on this Chapter shall take priority over a derivative right to benefits for members of a family. A derivative right to benefits in kind shall, however, take priority over independent rights, where the independent right in the Member State of residence exists directly and solely on the basis of the residence of the person concerned in that Member State.'*

With this provision, the legislators attempt to resolve some potential problems generated by the overlapping of independent and derivative rights, prioritising the former. However, taking into account that some States have a legislation that acknowledges sickness benefits based solely on residence and that in many cases the legislation of these States does not make distinctions between independent and derivative rights, in some situations an exception is introduced that changes the prioritising in favour of derivative rights. For instance, if a family member is or can be considered as a worker or a pensioner and is entitled to sickness benefits under this condition (pensioner or worker), independent rights take priority. However, this rule of priority of independent rights has, as it was already mentioned, one exception when the independent right in the Member State of residence exits **directly and solely** (no work, no pension) on the basis of the residence of the person concerned in that Member State.

Article 32 (1) has not created big difficulties of interpretation. In this respect, the notes of Germany, Slovakia and Poland do not emphasise special problems with the wording of paragraph 1. In fact, this priority rule applies also in some domestic legislation. However, the notes did point out the existence of a gap or lacuna in the event of overlapping of derivative rights.

The second paragraph of Article 32 is a little bit more complicated.

'2. Where the members of the family of an insured person reside in a Member State under whose legislation the right to benefits in kind is not subject to conditions of insurance or activity as an employed or self-employed person, benefits in kind shall be provided at the expense of the competent institution in the Member State in which they reside, if the spouse or the person caring for the children of the insured person pursues an activity as an employed or self-employed person in the said Member State or receives a pension from that Member State on the basis of an activity as an employed or self-employed person.'

To resolve possible overlapping of two derivative rights, Article 32 establishes a, certainly complex, priority rule that prioritises the State of residence of the family member under three conditions:

- The legislation of the family member's State of residence does not make the entitlement to sickness benefits in kind conditional upon activity as an employed or self-employed person.
- The spouse or the person caring for the children of the insured person pursues an activity as an employed or self-employed person in the said Member State or receives a pension from that Member State on the basis of an activity as an employed or self-employed person.
- The spouse or the person caring for the children of the insured person resides with the family member in the said Member State.

Maybe an example could help for a better understanding of the concrete situation. The father works and is insured in State A. The mother works and resides in State B with the family member. State B recognises sickness benefits based on residence. By applying Article 32 (2), State B would be considered as competent and would bear the cost of the sickness benefits.

Probably, the reason that moved the legislators to adopt this provision was that if the family member resides with one of the parents in a Member State with a system based on residence, the family member could have a double right, independent on basis of his or her residence, and derivative from the parent with whom he or she lives.

Perhaps this was the reasoning that inspired the Commission's original proposal of this provision:

'Where the members of the family reside in the territory of a Member State under whose Legislation the right to benefits in kind, including death grants, is not subject to conditions of insurance or employment, the benefits in kind provided to them shall be considered as being on behalf of the institution which administers the legislation pursuant to which the person is insured, unless the spouse or the person looking after the children pursues an activity as an employed or self-employed person in the territory of the said Member State'

In general terms, the Council and the Parliament have accepted this proposal with some formal amendments that do not change the main meaning of the text.

2. Problems with the existing rules

However, unfortunately this provision (Article 32) does not solve all cases. Let us imagine the same scenario as above. The father is working and is insured in State A. The mother works and resides in State B with the family member. State B recognises sickness benefits based on insurance or employment. In that case, Article 32 does not establish any priority rule. As an indirect consequence the family member or his or her representative may in principle choose (option) between the derivative rights of State A ad the derivative right of State B, which implies a certain gap, intentional or accidental, that opens the door to complex situations. We could still expand the complexity: the father lives and works in State A, mother lives and works in State B and the family member resides in State C. Again there is an overlapping of derivative rights and the person concerned could choose between State A and B as the competent State.

Article 32 (2) has limited its scope to some specific situations and has left some cases unsolved, perhaps rather opting for the interest of the family member than legal certainty. In fact, a priority rule is only established when the family member resides in a State that recognises the right to sickness benefits based on residence, provided that one of the spouses works and resides in that State. In other cases, Article 32 opens the door to a choice between two derivative rights.

Three countries have raised issues regarding the application of Article 32 BR The Federal Republic of Germany presented its note 485/11, pointing out the need to complete Article 32, taking into account that this provision does not determine the priority when there are two derivative rights**.** This situation can be considered as a gap**.**

Poland (note 603/11) and Slovakia (note 657/11) shared the concerns of the German delegation, although they offer different solutions to the problems exposed.

Article 32 BR implies a significant advance in terms of clarity and precision compared to the previous Article 19 of Regulation 1408/1. However, as is reflected in the German, Polish and Slovakian notes, there still are problems and gaps that require solutions and improvements in the wording of this provision.

The first issue to be addressed is the right option for the family member, when there is a double right derived from the father and the mother who work in different States and the family member resides with one parent in a State that recognises sickness benefits based on employment or self-employment. In such a case, the person concerned has a right of option, since Article 32 does not provide any rules of priority. Moreover, this right of option may be exercised on multiple occasions, where the competent State may be changed at will. All this implies an option '*à la carte*' and the possibility of forum shopping.

Moreover, the establishment of the competent State not only implies which State must bear the costs of the family member's benefits in kind or in cash (including possible long-term care benefits). It also affects the application of another provision of the BR, for instance, Article 18 (1) in relation to Article 17.

'An insured person or members of his family who reside in a Member State other than the competent Member State shall receive in the Member State of residence benefits in kind provided, on behalf of the competent institution, by the institution of the place of residence, in accordance with the provisions of the legislation it applies, as though they were insured under the said legislation.'
(Article 17)

'*Unless otherwise provided for by paragraph 2, the insured person and the members of his family referred to in Article 17 shall also be entitled to benefits in kind while staying in the competent Member State. The benefits in kind shall be provided by the competent institution and at its own expense, in accordance with the provisions of the legislation it applies, as though the persons concerned resided in that Member State.'*
(Article 18.1).

Indeed, if the family member for example resides with his or her mother who works in State B, the legislation of which is based on employment or self-employment, and if the father works and resides in State A, this family member could have an option between two derivatives rights (State A and State B). If the person concerned chooses State B, where he or she resides, he or she will be entitled only to the benefits of State B. However, if State A is chosen, the family member will be considered a resident in State B, while the competent State will be State A. In this case, the person concerned will always be entitled to all benefits in kind in his or her State of residence (see Article 17) and, at the same time, may exercise the right established by Article 18 (1) (benefits in kind in State A as the competent State while staying there). This means overprotection as a consequence of the person's right of option. Logically, in most cases State B will be chosen as the competent State. It has to be pointed out that this right, referred to in Article 18 (1), applies neither to the father nor the mother, considering that as they reside in the competent State, Article 18 (1) is not applicable to them.

One of the greatest achievements that can be attributed to the BR is the elimination of the possibility of double insurance which, exceptionally, subsisted in Regulation 1408/71. At the same time it has reinforced the objective elements for the establishment of the competent State (see, for instance Article 11 of Regulation 987/09 or the new Article 13 after its amendment by Regulation (EU) No. 465/2012). Finally, let us also recall the elimination of the right of option of Article 16 of Regulation 1408/71 for persons employed in diplomatic and consular posts, leaving only the option for the auxiliary staff of the European Communities due to their special status.

In this line of action, and taking into account the need to avoid discretion in favour of objectivity and rationality, the possibility should be examined to eliminate the right of option which is, in some cases, indirectly recognised in Article 32 BR for members of the family.

Following this line of reasoning, it should be highlighted that Article 32, probably unintended, establishes a special double insurance. The first one, which corresponds to the competent legislation which has been chosen, is clear. The second one remains hidden, veiled, implicit, concealed, but may at any time emerge and become competent legislation depending on the will, wish or interest of the person concerned. In this sense and compared to the possibility of choice provided to the auxiliary staff of the European Communities, it has to be emphasised that, according to Article 16, this option may be exercised one time only and, once made, the right of option is extinguished. To the contrary, Article 32 BR does not mention deadlines and does not limit the number of times this right can be exercised or changed. Consequently, there is a legal uncertainty that does not seem consistent with

the general principles of the BR. Of course, in most cases this option '*à la carte'* will not take place. However, this possibility should be in any case removed in order to prevent fractures of and cracks in the BR.

Article 32 (2) can be examined from another perspective. In fact, this provision provides a different treatment for schemes based on residence, employment or self-employment. Maybe now is the moment to analyse whether a homogeneous treatment for all kind of schemes would be desirable. It is true that it could be argued, as opposition, that in schemes based on residence it is possible that for a family member there could be an independent right based on residence and, at the same time, a derivative right, for instance via the parents. Moreover, this difference of treatment between States based on residence or insurance was already established in Regulation 1408/71. However, it can be questioned whether this argument is consistent enough to justify this difference of treatment.

It could be also mentioned that, in fact, States based on residence must bear additional charges that do not apply to States with schemes based on employment. Again, this can be illustrated with an example. A father works and lives in State A (entitlement based on employment), the mother works and lives with the child in State B (residence-related). State B will be always competent. Now we introduce a slight difference. The father works and lives in State A (employment-related), the mother works and lives with the child in State B (employment-related). An option for State A or State B is open. This situation could be considered as a small transgression to the neutrality (schemes based on residence are penalised) of the coordination provisions and, indirectly, could affect the total freedom and autonomy of Member States to plan and design their own social security systems.

Before continuing with this critical approach, the possible implications and consequences for the family member of a modification of Article 32 should be examined. To this end, and notwithstanding that we can later on go into this point in more detail, it has to be admitted that the lack, in some situations, of a rule of priority in case of overlapping of derivative rights implies an overprotection (possible option) that does not seem justifiable, especially when neither of the parents have this right. In fact, it seems that this possible right of option is the consequence of a gap due to this lack of priority rules rather than of a decision of the legislators to intentionally award this option right.

As a defensive argument to maintain the provision as it is now the famous *Delavant* case could be used indirectly. In this ruling, the CJEU established:

'*Article 19(2) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as codified by Council Regulation (EEC) No 2001/83 of 2 June 1983, is to be understood as meaning that when a worker resides with the members of his family in the territory of a Member State other than the Member State in which he works, under whose legislation he is insured by virtue of the regulation, the conditions for entitlement to sickness benefits in kind for members of that person's family are also governed by the legislation of the State in which that person works in so far as the members of his family are not entitled to those benefits under the legislation of their State of residence.'*[14]

It seems that in this judgement the CJEU assumes double, successive legislations. Firstly, the legislation of the State of residence ('*in so far as the members of his family are not entitled to those benefits under the legislation of their State of residence'*) and secondly, the legislation of the employment State ('*are **also** governed by the legislation of the State in which that person works'*), which is activated when the first one (State of residence) does not provide certain rights. However, this statement cannot be extended to Article 32, since in this ruling the CJEU wanted to avoid a total

[14] C-451/93, *Delavant* [1995] ECR I-01545.

lack of protection, while what we are discussing here, concerning Article 32, is a problem of overprotection.

What is intended by the proposals for an amendment of Germany and Poland (with the support of Slovakia) is to establish a rule of priority when there is overlapping of derived rights. This will increase legal certainty and avoid situations of overprotection that do not seem consistent with the general principles the BR is based on Probably, Member States would in general terms agree on this approach. However, as it has become clear in the German, Polish and Slovak notes, the solutions are multiple and not all of them may meet the necessary consensus for approval.

3. Description of the proposal for an amendment

In its note 485/11, the German Delegation presented a draft proposal.

'Article 32 (1a)
A derivative right to benefits in kind for members of a family based on the legislation of the Member State of residence shall take priority over a derivative right based on the legislation of another Member State.'

As a response to the German note, the Polish Delegation presented its note 603/11, which emphasises that the German proposal would, in some cases, lead to undesirable and questionable situations from the point of view of an equitable distribution of financial burdens between Members States. The Polish delegation illustrates this statement with an example: a child is resident in country A, together with the mother who is covered by the health insurance as an unemployed person; the father is employed in country B.

According to the Polish note, a rational and equitable solution would be one which ensures that the cost of the health care provided to a family member would, in the first instance, be borne by the country whose system receives actual income in the form of contributions/taxes related to employment or to an activity of self-employment. Only in the second instance would it be necessary to apply the criterion proposed by Germany (place of residence of the family member), i.e. in cases where both persons from whom a person may derive his or her right, are insured as a result of employment or an activity of self-employment.

Poland, proposes an addition to Article 32 of Regulation (EC9 No. 883/2004 in its note:

'1.a) A derivative right to benefits in kind for a family member of a person (who is) insured by virtue of employment or self-employed activity shall take priority over a derivative right for the family member of a person insured by virtue of other circumstances.
1.b) In cases where it is impossible to establish priority on the basis of the preceding paragraph, priority shall be given to the derivative right to benefits for a family member in the country of residence.'

Finally, the Slovakian delegation presented note 657/11, which gives some comments on the notes of Germany and Poland. Concerning the German note, the Slovakian delegation states that it can be possible that parents are subject to two different legislations (the father employed in Member State A, the mother employed in Member State B) and that the whole family has its residence in Member State C. In this case, paragraph 1 of Article 32 would be applicable and, taking into account the German proposal, there will still be a choice for a family member to which legislation he or she is subject (Member State A or Member State B). As a result, there is still a gap that has to be filled. Furthermore, the Slovakian delegation agrees with the Polish delegation (AC 603/11) that the costs

of health care provided to a family member should, in the first instance, be borne by the country whose social insurance system receives actual income in the form of contributions/taxes related to employment or an activity of self-employment.

B. Analysis of the proposal for an amendment

1. Legal analysis of the proposals

The proposals submitted (proposal 1 by Germany, proposal 2 by Poland/Slovakia) should address five basic questions deduced from the notes presented. The first (Germany) refers to the need to establish a priority rule between two possible derivative rights. The second (Germany), closely related to the first, has to do with the possible right of option for family members between two derivative rights. The third (Poland) wishes to ensure that the cost of health care provided to a family member is, in the first instance, borne by the country whose system receives actual income in the form of contributions/taxes related to employment or an activity of self-employment. The fourth (Slovakia) refers to family members who reside in a State other than the State of residence of their parents. One last question, raised in the preceding paragraphs, would be the convenience of a homogeneous treatment for the legislations based on employment or residence.

We have to examine whether proposals 1 and 2 give an answer to all these questions.

The first issue is illustrated with a concrete example in the German note. The father is employed in Member State A, the mother in Member State B. The residence of the family is situated in Member State B. In this case, where both parents are employed, State B would under the proposal 1 and 2 always be considered competent. However, if we change the example and the father works in State A and the mother is insured in State B, where she resides with their children as an unemployed person without receiving cash benefits, the result can be different: State A would be competent in proposal 1 and State B in proposal 2.

Regarding question number two (right of option), the establishment of a priority rule in both proposals would lead to the elimination of this right of option. Consequently, legal certainty would be gained.

In relation to the third question (priority for the employment), proposal 2 responds and deals with the concerns raised in the Polish note. However, proposal 1 does not, taking into account that the German proposal is much more general and does not deal with the distinctions mentioned (paying of taxes or contributions) in the Polish note.

The fourth question is illustrated perfectly in the Slovak note (the father is employed in Member State A, the mother is employed in Member State B, and the whole family resides in Member State C). Not one of the proposals responds to this concern.

With regard to the fifth question (homogeneous treatment), both proposals offer the same treatment for systems based on employment or residence.

2. *Assessment of the proposals*

a. Clarification

Both proposals close gaps and are, in our opinion, more complete and clearer than the current wording of Article 31 (2). Moreover, they follow the approach of the BR of introducing objective elements and restricting unjustified option rights. Legal certainty is gained as well, as a consequence of the elimination of possibilities of discretion.

b. Simplification

It has to be admitted that both proposals simplify the text. In fact, paragraph 2 of Article 32 can be deleted. Proposal 1 is simpler than proposal 2, but both can be considered simpler than the current text.

c. Protection of rights

The current wording of Article 32, which does not set a general rule of priority between derivative rights (exception is paragraph 2), indirectly opens an option for the person concerned. This situation can be considered as overprotection. The main issue here is to assess whether this overprotection is necessary, justifiable or desirable. Actually, it seems that this overprotection is more the result of a gap than having been created intentionally.

From another perspective, considering the protection of rights, transitional provisions would be needed, taking into account the change of the competent State. We suggest something similar to what was established in Regulation 988/2009 and 465/2012 concerning Article 87:

'*If, as a result of this Regulation, a person is subject to the legislation of a Member State other than that determined in accordance with Title II of Regulation (EEC) No 883/04, that legislation shall continue to apply while the relevant situation remains unchanged and in any case for no longer than 10 years from the date of application of this Regulation unless the person concerned requests that he/she be subject to the legislation applicable under this Regulation.'*

d. Administrative burden and implementation arrangements

No problem is expected to arise.

e. Avoiding risk of fraud and abuse

Both proposals could combat potential misuse (or, better said, misapplication) that could be generated as a result of the right of option indirectly established in the current Article 32.

f. Potential financial implications

There would be no significant financial implications, taking into account that in any case one Member State has to be responsible and competent. There are no additional costs but, in some situations, there would be a different distribution of costs, as explained here below.

3. *Mapping of the impact in the Member States*

It is almost impossible to make a precise evaluation of the impact in the different Member States. In some cases, the State of residence of the family members will have to assume some additional costs. However, the priority of employment or self-employment over any other circumstances, as the Polish delegation demands, could reduce and balance the costs, without it being possible, right now, to distinguish between States that could have advantages or drawbacks.

C. Conclusion

1. General evaluation of the proposal for an amendment

We will not enter into the quantitative impact of the problem here, but rather in its qualitative significance. Indeed, what matters with regard to the proposals made is that **a gap is filled and legal certainty increased.** Most of the problems envisaged and mentioned in the preceding paragraphs could be solved. Moreover, the proposals simplify the text and the wording of Article 32. Summarising, we could positively conclude that these proposals have more advantages than disadvantages.

Moreover, in a concrete way, we envisage the following advantages in both proposals:

a) The legal uncertainty in determining the competent State is removed. Indeed, applying these proposals a competent State is established in the event of overlapping of derivatives rights.
b) The right of option disappears, as the provision in most cases provides fixed rules to establish the competent State.
c) The general principles of the Regulation are better responded to, eliminating options and the possibility of forum shopping.
d) Schemes based on residence or employment are treated in the same way.
e) Financially, they are neutrally balanced.

As disadvantages we could mention:

a) People concerned may feel that their rights are reduced (former overprotection).
b) Transitional periods are required taking into account that the competent State can change if these proposals were adopted.
c) The problem raised by the Slovakian delegation is not solved. If, for instance, the mother works in State A, the father in State B, and the family member in State C, no priority rule is established.
d) The German proposal (the first) does not deal with the problems mentioned in the Polish note, taking into account that in case of overlapping of derivatives rights, the State of residence is always competent irrespective of whether contributions or taxes are paid or not.
e) The Polish proposal could lead to problems of interpretation (‘*a derivative right for the family member of a person insured by virtue of other circumstances’)* and conflicts between Member States. It cannot be excluded that the words ‘*by virtue of other circumstances’* are controversial.

2. Alternative or adapted proposal for amendment.

We have tried not to invent new formulas. Our idea was to pick out and choose solutions that have already been tested and proven. To this end, we were inspired by the philosophy of Article 68 BR which establishes a priority rule in case of overlapping of family benefits. Our proposal follows a different approach to the proposals presented by Germany, Poland and Slovakia although the final result will, in many cases, be very similar. In this respect, it has to be noted that benefits in kind for a

family member could take into account the provisions established with regard to overlapping of family benefits. In fact, the problems are comparable to those related to derivative rights. Indeed, these rights may be derived from the mother, the father or from both. However, the main difference is that Article 68 BR covers benefit in cash and in our case, in Article 32, we deal with benefits in kind. For this reason, some adjustments and adaptations were needed.

Adapting this article to sickness benefits in kind and taking into account the concerns of Germany, Poland and Slovakia, an alternative proposal can be presented.

2. *Where the family member could be entitled to derivative rights according to the legislation of more than one Member State, the following priority rules shall apply:*

a) *In case of derivative rights available on different bases, the order of priority shall be as follows: firstly, rights available on the basis of an activity as an employed or self-employed person, secondly, rights available on the basis of receipt of a pension, thirdly, rights available on the basis of residence.*

b) *In case of derivative rights available on the same basis, will be applicable, as subsidiary criteria, the place of residence of the family member provided that one of the spouses or the person caring for the insured person pursues an activity as an employed or self-employed person in that Member State or receives a pension from the said Member State on the basis of an activity as an employed or self-employed person.*

c) *In cases where it is impossible to establish priority on the basis of the preceding paragraph, will be applicable, as last criteria, the longest period of insurance or residence under the conflicting legislations.*

To check our proposal we can make the same exercise as we did with the other proposals analysed in the preceding paragraph. This means that the proposal should address five basic questions deduced from the notes presented. The first (Germany) refers to the need to establish a priority rule between two possible derivative rights. Our proposal responds to this concern. The second (Germany), closely related to the first, has to do with the possible right of option for family members between two derivative rights. Our proposal eliminates this possibility. The third (Poland) wishes to ensure that the cost of health care provided to a family member is, in the first instance, borne by the country whose system receives actual income in the form of contributions/taxes related to employment or an activity of self-employment. This is no problem in our proposal. The fourth (Slovakia) refers to family members who reside in a State other than the State of residence of their parents. Our proposal responds to this concern, taking into account that (c) is a conflict rule that establishes a priority between two possible competent Member States. For example: the mother works in State A; the father works in State B; the child resides in State C. The longest period of insurance or residence in State A or B will establish the competent legislation. One last question, raised in preceding paragraphs, would be the convenience of a homogeneous treatment for the legislations based on employment or residence. Our proposal does not make a difference between schemes based on employment and schemes based on residence.
All advantages mentioned in point 1 under this conclusion can be applied to this proposal. However, the proposed text could be considered too explanatory and would need some further simplification.

A second proposal for Article 31 (2), i.e. the German proposal amended to meet the Slovakian concerns:

2. *Where the family member could be entitled to derivative rights according the legislation of more than one Member State, a derivative right based on the legislation of the Member State of residence*

shall take priority over a derivative right based on the legislation of another Member State. However, in cases where it is impossible to establish priority on the basis of the preceding phrase, will be applicable, as supplementary criteria, the longest period of insurance or residence under the conflicting legislations.

A **third proposal, i.e. the Polish proposal amended to meet the Slovakian concerns**

31.2 Where the family member could be entitled to derivative rights according the legislation of more than one Member State

a) *the derivative right from a person insured on the basis of an activity of employment or self-employment shall take priority over a derivative right from a person insured by virtue of other circumstances.*

b) *In cases where it is impossible to establish priority on the basis of the preceding paragraph, priority shall be given to the derivative right from the person insured in the Member State where the family member resides. However, in cases where it is impossible to establish priority on the basis of the preceding phrase will be applicable, as supplementary criteria, the longest period of insurance or residence under the conflicting legislations*.

A last remark

Finally, for all proposals, the title of Article 32 should be changed. The title of the current provision is 'Prioritising of the right to benefits in kind – Special rule for the right of members of the family to benefits in the Member State of residence'. Our suggestion is '***Prioritising of the right to benefits in kind***'.

PROPOSAL FOR AN AMENDMENT OF ARTICLE 65 OF REGULATION 987/2009

A. Context of the proposal for an amendment

1. The current legal framework

Pursuant to Article 35 (1) BR, benefits in kind provided by a Member State's institution on behalf of another Member State's institution under the sickness chapter '*shall give rise to full reimbursement*'. The reimbursements are determined and made '*either on production of proof of actual expenditure, or on the basis of fixed amounts for Member States the legal or administrative structures of which are such that the use of reimbursement on the basis of actual expenditure is not appropriate*' (Article 35 (2) BR). This provision also applies to sickness benefits in kind related to accidents at work and occupational diseases (Article 41 BR). These principles are implemented by Chapter 1 of Title IV ('Financial provisions') of the Implementing Regulation (IR). This Chapter is divided into three sections: Section 1 deals with reimbursement on the basis of actual expenditure; Section 2 deals with reimbursement on the basis of fixed amounts; and Section 3 refers to common provisions.

Concerning reimbursement based on fixed amounts (Section 2), Article 63 IR provides that '*the Member States whose legal or administrative structures are such that the use of reimbursement on the basis of actual expenditure is not appropriate, are listed in Annex 3 to the implementing Regulation*'. These Member States listed are the following: Ireland, Spain, the Netherlands, Portugal, Finland, Sweden, the United Kingdom, Cyprus (as of 1 January 2013) and Norway (as of 1 June 2012).

Article 64 IR determines the calculation method of the monthly fixed amounts and the total fixed amount. The method is based on the annual average cost per person. In this respect, three age groups are used: persons aged under 20; persons between 20 and 64; and persons aged 65 and over. The annual average cost per person for each age group is obtained by dividing the annual expenditure on all benefits in kind provided by the institutions of the creditor Member State to all persons in the age group concerned subject to its legislation and residing within its territory by the average number of persons concerned in that age group in the calendar year in question. A reduction is applied to the monthly fixed amount and in principle amounts to 20 %. The reduction is equal to 15 % for pensioners and members of their family when the competent Member State is not listed in Annex IV to the BR. For each debtor Member State, the total fixed amount for a calendar year is the sum of the products obtained by multiplying, in each age group, the determined monthly fixed amounts per person by the number of months completed by the persons concerned in the creditor Member State in that age group.

The average cost as calculated by countries listed in Annex 3 to the IR needs to receive prior approval at EU level. In this respect, Article 65 (1) IR requires each country to notify the Audit Board of the annual average cost per person in each age group for a specific year at the latest by the end of the second year following the year in question. Once the **calculation methodology** is agreed by the Audit Board, the average cost is subject to this body's approval every year. For instance, the 2013 average cost will have to be notified by December 2015. Countries therefore have two years at the most to proceed to the notification. If the notification is not made within this deadline, the annual average cost per person which the Administrative Commission has last determined for a previous year will be taken (Article 65 (1) IR). The annual average costs must be published each year in the Official Journal of the European Union (Article 65 (2) IR). Claims of fixed amounts for a calendar year are introduced to the liaison body of the debtor Member State within the twelve month period during which the average costs for the year concerned were published in the Official Journal (Article 67 (2) IR).

Decision S7 of 22 December 2009 set transitory rules aiming to extend the new rules to claims which should have been subject *ratione temporis* to the old Regulations. In particular, Decision S7 considers that '*all claims for reimbursement on the basis of fixed amounts published after 30 April 2010 shall be subject to the new rules of procedures*'. Decision S7 is an administrative source of law and is not legally binding.

2. Problems with the existing rules

The main difficulties stem from the fact that some of the countries among the nine countries applying the fixed costs system do not notify the average cost every year. Which consequences should such an abstention have? On the grounds of Article 65 (1) IR, which states that '*if the notification is not made by this deadline, the annual average cost per person which the Administrative Commission has last determined for a previous year will be taken'*, some countries argue that average costs notified in the past can be re-published in the Official Journal. For instance, a Member State which has calculated its last average costs for 2011 (notified by the end of 2013) may base its claims for subsequent years on this amount, provided that the 2011 average costs are re-published each year.

This interpretation may result in a risk of a gap between the average costs used as a reference for claims and the real costs. The debtor country would have to reimburse a different amount than what it should have paid if the average costs had been updated by the creditor country.

3. Description of the proposal for an amendment

The proposal of the Commission is to rewrite Article 65 (1) IR with one single modification: '*if the notification is not made by this deadline, the annual average cost per person which the Administrative Commission has last determined for* ***the*** *previous year will be taken*'.

The objective pursued by the rewording (from '***a*** *previous year*' to '***the*** *previous year*') is to limit in time the approval of the lump sum. If it remains possible to approve the average costs of a said year for the next following year, the re-approval will not be permitted for subsequent years. In other words, the abstention from calculating average costs for a second year running will prevent a country from introducing claims corresponding to this exercise.

For example, if the average costs have been last calculated by a country for the year 2014 (they must have been notified before the end of 2016), they will be a relevant basis for 2014 and 2015 reimbursement claims, but not for 2016. Indeed, no re-publication in the Official Journal will be authorised in the absence of average costs calculated, notified and approved for 2015 or 2016. If deadlines for notifying the average costs for 2016 are not met after re-publication of the 2014 costs for 2015, this country loses any possibility to claim reimbursement for that year.

It has been agreed by the Audit Board (see note AC 240/13) that this proposition, such as presented in note AC 185/13, is to be applied already, on a temporary basis.

B. Analysis of the proposal for an amendment

1. Legal analysis of the proposal

With regard to reimbursements of benefits in kind between institutions, the new Regulations tried to reach two objectives: to make average costs as close as possible to actual costs, and to speed up the reimbursement process. The proposed amendment to Article 65 (1) IR can be analysed in the light of these two objectives.

a. Making average costs as close as possible to actual costs

The search for the closest proximity between average costs and actual costs is strongly supported by the new Regulations. By stating in Article 35 (1) BR that the benefits in kind '*shall give rise to a full reimbursement*', the goal is to ensure that no unfair charges remain on the shoulders of the non-competent country. Reversely, the objective of a full reimbursement implies that no undue claims be paid by the competent country.

The structure of Title IV, Chapter I IR shows that the system of reimbursement between countries is based on a common rule and on an exception: the actual amount of the expenses for benefits in kind shall be reimbursed to that institution by the competent institution, **except** when the fixed amount system is applicable (Article 62 (1) IR). Based on this common rule/exception principle, Section 1 of Chapter I deals with '*Reimbursement on the basis of actual expenditure*', while Section 2 indicates that fixed amounts may be restricted to countries defined negatively as those '*whose legal or administrative structures are such that the use of reimbursement on the basis of actual expenditure is not appropriate*'. Under the old coordination rules, if both methods (actual expenditure/fixed amounts) were on an equal footing (the refunds were determined and made '*either on production of proof of actual expenditure or on the basis of lump-sum payments*', see Article 36 of Regulation 1408/71), it was already required that '*the lump-sum payments shall be such as to ensure that the refund is as close as possible to actual expenditure*'.

Full reimbursement between countries is an important matter of concern in the Coordination Regulations. By giving priority to the 'actual expenditure' system over the 'fixed amounts' one, the new Coordination Regulations emphasise the need to achieve full reimbursement.

Making sure that reimbursement claims are as close as possible to actual costs is also an expression of the Treaty principle of 'sincere cooperation' between Member States (Article 4 (3) TEU). Social security institutions must take adequate measures to avoid voluntary or involuntary risks of overpayments by other countries. Article 76 BR echoes the principle of 'good cooperation'.

The proposed amendment, which replaces 'for **a** previous year' by 'for **the** previous year', would indeed reach the objective of a closer proximity between reimbursement and actual costs, since the reference year for past average costs would not be any previous year but the last year.

b. Speeding up the reimbursement process

If we look back at the old Regulations 1408/71 and 574/72, there was no specific deadline with regard to the reimbursement between institutions (with the exception of Article 100 of Regulation 574/72, which has never been applied in practice). Pursuant to Articles 93ff of the old IR, a country was able to submit claims years after average costs for a said year. The invoice could therefore be issued by the creditor country many years after the benefit in kind had been granted to the beneficiary. These delays caused many administrative difficulties which Recommendation No. 20 of 31 May 1996 of the Administrative Commission tried to address by requiring that institutions which have provided benefits in kind had to submit their claims before the end of a period of one year following the calendar half year in which the benefits were provided.

The new Regulations intend to put an end to these lengthy procedures. Article 66 IR lays down the following principle: '*The reimbursements between the Member States concerned shall be made as promptly as possible*'. In order to attain this objective, some procedural rules have been introduced by the new IR. First, the notification of average costs must be made at the latest by the end of the second year following the year in question (Article 65 (1) IR). If not, the annual average cost per person which the Administrative Commission has last determined for a previous year will be used. Second, claims of fixed amounts for a calendar year must be introduced to the liaison body of the debtor Member State within the twelve month period following the month during which the average costs for the year concerned were published in the Official Journal (Article 67 (2) IR). Third, the claims must be paid to the creditor Member State by the debtor institution within eighteen months of the end of the month during which they were introduced (Article 67 (5) IR). Finally, interests may be charged on late payments (Article 68 IR).

The proposed amendment which replaces '*for **a** previous year*' by '*for **the** previous year*' will contribute to the objective of speeding up the reimbursement process. It will also give more legal certainty to the debtor countries.

2. Assessment of the proposal

a. Clarification

In the absence of notification of average costs within the deadline, the annual average costs of '*a previous year*' are published in the Official Journal. The expression '*a previous year*' may be understood in different ways, depending on the interpretation (literal or teleological) chosen.

Let us recall that in the initial proposal for an implementing regulation, the Commission had proposed the following wording: '*If notification is not made by this deadline, the annual average cost per person for **the** previous year will be taken*' (Com (2006) 16 final). In its first reading, the European Parliament made an amendment aiming to replace '*the*' by '*a*'. This amendment was approved by the Council (see common position 4/2009 adopted by the Council on 17 December 2008). The Regulation was voted including this wording.

The **teleological approach** favours a narrow interpretation: '*a previous year*' would exclusively refer to '*the previous year*'. One can suspect that the European Parliament did not pay attention to the potential impact of the distinction between '*a*' and '*the*'. The teleological interpretation is supported by Article 35 BR, which requires that the benefits in kind '*give rise to a full reimbursement*'. Article 63 IR also establishes that the fixed amount '*shall be as close as possible to actual expenditure*'. However, this narrow interpretation can be challenged by a linguistic analysis. From a grammatical point of view, no confusion exists between '*a previous year*' and '*the previous year*'. Whereas 'a' is an indefinite article, 'the' is definite. Furthermore, by mentioning '*a previous year*', does Article 65 (2) IR consider only the last year (= the last time) for which average costs were notified by the country or does it refer to average costs notified any previous year as well (i.e. any previous time)? The first interpretation, which is narrower, could be preferred as it is in line with the objective of the new Regulation to make average costs as close as possible to actual costs. Nevertheless, from a linguistic perspective, 'a' is equivalent to 'any'. This would imply that countries could choose from past average costs.

The advantage of the proposed amendment (which goes back to the Commission's initial proposal in 2006) would be to resolve these major problems of interpretation of Article 65 (2) IR, principally the opposition between countries in favour of the teleological reading and countries defending a literal interpretation.

Amending Article 65 (1) IR in the way proposed by the Commission would not create any incoherence in the structure of Section 2 or in the whole chapter of the IR dealing with the reimbursement of the cost of benefits. It would also be consistent with the principle of 'full reimbursement' set out in Article 35 (1) BR as well as with the objective of Article 63 (2) IR according to which the fixed amount should be as close as possible to actual expenditure.

b. Simplification

The current system of reimbursement on the basis of fixed amounts is quite complex. It requires a notification per country, a double approval (of the calculation methodology and of the amount) by the Audit Board, an adoption by the Administrative Commission and a publication in the Official Journal. In order to base claims on previous average costs, the only formal legal duty is to have a re-publication in the Official Journal of these past average costs (Art. 65 (2) IR). Still, it seems difficult to avoid the intervention of the Administrative Commission, and probably also of the Audit Board, prior to re-publication. At least, Article 65 IR does not require a country to justify the absence of notification or to prove that there was no change compared to the last year in which average costs were notified and approved.

The amendment envisaged by the Commission would be a strong incentive for a notification to the Audit Board at more regular intervals. As a consequence, the full procedure involving the Audit Board and the Administration Commission would be implemented more often. The goal or the result of the amendment is not simplification, but it would at least create only limited additional complexity since in the current system all bodies are already involved.

c. Protection of rights

Article 35 BR (and implementing measures) deals with reimbursements between institutions. These rules therefore do not concern benefit in kind beneficiaries. Access to benefits in kind in a cross-border situation is exclusively organised by Section 1 and Section 2 of Chapter 1, Title II BR. Therefore, there is no direct consideration of protection of rights.

d. Administrative burden and implementation arrangements

The amendment will have a direct impact on the administrative burden for the countries that opt for the fixed amounts. As already said the amendment would make it possible to re-use notified average costs for a said year only for the following year. Until notification of new average costs, no claim could be introduced. This would be the result of the combined application of Article 65 and Article 67 (2) IR, in accordance with which '*Claims of fixed amounts for a calendar year shall be introduced to the liaison body of the debtor Member State within the 12-month period following the month during which the average costs for the year concerned were published in the Official Journal of the European Union*'.

The amendment would not make it compulsory for countries to notify costs every year. Nevertheless, countries who fail to notify on a regular basis would bear financial consequences for they would lose the right to reimbursement. This means that, in practice, countries using average costs would be highly encouraged to proceed to annual notifications. Therefore, there is an additional burden.

Still, the additional administrative burden does not appear to be disproportionate. First, the right to introduce claims would be lost only if countries abstained from notifying average costs two consecutive years. It would even be possible to notify average costs every two years without losing

the right to introduce claims. Second, if the reimbursements are determined and effected either on production of proof of actual expenditure or on the basis of fixed amounts, Article 35 (3) BR states that '*Two or more Member States, and their competent authorities, may provide for other methods of reimbursement*'. This provision, which offers flexibility, is at the disposal of countries having trouble to calculate average costs. Third, the additional administrative burden is commensurate with the objectives pursued by Article 35 (1) BR and Article 63 IR, which build a '*full reimbursement*' system implying that when fixed amounts are the basis of reimbursement, they should be '*as close as possible to actual expenditure*'.

However, by replacing '*a*' by '*the*', would the financial consequences of the additional administrative burden be too heavy, namely the total and definite loss of claims for all the years following the year after which the average costs were notified for the last time? For instance, if the average costs were lastly notified for the year 2010 (no notification for 2011), all claims relating to year 2012 would be lost if no further notification occurred by the end of the year 2014. Since the annual average costs for a specific year must be notified to the Audit Board at the latest by the end of the second year following the year in question, there is no possibility of retroactive notification. However, this is also true for actual costs (see below 3.1).

If the EU legislator considers that the new system could create harsh consequences for countries who failed to notify new average costs, additional amendments to Article 65 (1) IR could be explored. These amendments would be designed to soften the additional burden on countries due to the substitution of '*a*' by '*the*'. Two alternatives could be suggested:

1° in exceptional circumstances duly justified by the country and subject to a prior approval by the Audit Board and by the Administrative Commission, an additional period of time for notifying average costs, exceeding the two-year period granted by Article 65, could be given;

2° in exceptional circumstances duly justified by the country and subject to the prior approval of the Audit Board and the Administrative Commission, a country could be allowed to use past average costs as '*provisional average costs*' in order to introduce claims for a said year. On the basis of real average costs calculated later on, final claims will be adjusted.

e. Avoiding the risk of fraud and abuse

In principle, risks of fraud and abuse concern only individuals, not countries or national social security institutions. Therefore, this is not relevant in the assessment of the amendment of Article 65 (1) IR.

f. Potential financial implications

The objective of the amendment is to encourage countries using the average costs system to notify their average costs more often. In this respect, the administrative costs will be higher. Will the raise of the administrative costs be in proportion to the objectives pursued?

In order to answer the question, it is necessary to compare the financial costs of both systems of reimbursement. All in all, it seems that the actual costs system is more expensive to apply than the fixed costs system. Indeed, once the average costs are determined, it is easier for the country to introduce their claims based on fixed costs. Such a system avoids all problems related to the amount and to the identification of the real costs. If this conclusion is right, the raise of the administrative costs for countries applying the fixed costs system would be justified.

Even if countries using average costs can rightly argue that the setting-up of a methodology and its implementation is time-consuming and raises specific problems, it is necessary to remind oneself

that the CJEU rules as a principle that '*according to the case-law of the Court, a Member State may not plead practical or administrative difficulties in order to justify non-compliance with the obligations and time-limits laid down in Community directives. The same holds true of financial difficulties, which are for the Member States to overcome by adopting appropriate measures*'.[15]

3. A mapping of the impact in the Member States

A minority of countries are involved in the average costs system: Ireland, Spain, the Netherlands, Portugal, Finland, Sweden, the United Kingdom, Cyprus and Norway. The number of countries subject to the common rule of 'actual costs' is growing since Italy and Malta asked to be removed from Annex 3 IR and apply actual costs as of 1 January 2013. Therefore, only nine countries out of 32 fall within the scope of this procedure of reimbursement of costs.

Also, some countries which had trouble calculating the average costs for periods preceding the entry into force of Regulations 883/2004 and 987/2009 have joined the actual costs system (BG, LV, RO, MT). This could mean that the amendment would impact on a limited number of countries.

Furthermore, some of the Member States using the fixed costs system do not have difficulties to present their average costs in time.

C. Conclusion

1. General evaluation of the proposal for an amendment

From a legal point of view, the amendment of Article 65 (1) IR makes sense. It is consistent with the general aim of full reimbursement and, where claims are based on average costs, with the necessity to set them as close as possible to actual expenditure. The amendment is also in line with the general aim of mechanisms of reimbursement of sickness benefits in kind: they should guarantee a full reimbursement and, where claims are based on average costs, be as close as possible to actual expenditure. The amendment is coherent with one of the principles that underlie the Coordination Regulations, i.e. to guarantee a fair distribution of costs and charges between countries. The search for real costs is supported by the Treaty principle according to which '*The institutions shall practice mutual sincere cooperation*' (Article 4 (3) TEU). The amendment would contribute to speeding up reimbursements and would give more legal certainty to the debtor countries.

A key point is that the amendment would clarify the meaning of Article 65 IR. Its current wording is not adapted to situations in which countries fail to notify their average cost every year. In addition, the teleological interpretation of Article 65 (1) IR, according to which '*a*' is equal to '*the*', is fragile since it goes against the letter of the text. If the objective is to refer exclusively to '*the previous year*', it needs to be written as such in the text.

The amendment is also coherent with regard to stringent rules applicable to countries subject to the actual costs system. Claims based on actual expenditure must be introduced to the liaison body of the debtor Member State within twelve months following the end of the calendar half-year during which those claims were recorded in the accounts of the creditor institution (Article 67 (1) IR). Claims introduced after the deadline are not considered (Article 67 (3) IR). The right to charge on the basis of average costs is a privilege which requires countries listed in Annex 3 to make all the necessary efforts to set fixed amounts as close as possible to actual expenditure.

[15] Case C-187/98, *Commission v Greece* [1999] ECR I-7713.

The amendment would not simplify the rules applicable, but it would not make them more complex either. If it were established that the administrative burden of countries would significantly increase, this effect would not be sufficient to support the *status quo ante*. Even if the proposal could slightly increase the financial burden on some countries, this argument is not decisive especially since the system based on actual costs seems more costly to apply from an administrative point of view.

2. Alternative or adapted proposal for an amendment

Even though it is necessary to keep in mind that reimbursement on the basis of real costs is the common rule, whereas the reimbursement on the basis of fixed costs is the exception, additional amendments to Article 65 IR can be envisaged. The goal of these amendments would be to soften the impact of the limited effect in time of previously notified average costs. Two alternative propositions could be discussed: 1° in exceptional circumstances, an additional period of time for notification could be granted subject to a prior approval by the Audit Board and by the Administrative Commission; or 2° subject to the prior approval of the Audit Board and the Administrative Commission, a country could be allowed to use past average costs as '*provisional average costs*' in order to introduce its claims for a said year (final claims will be adjusted later on).

Another amendment could be envisaged in order to avoid that countries would believe that, once the average costs of the previous year have been re-published, these average costs would become the new average costs because they have been again formally approved by the Administrative Commission. Therefore, these old average costs could be re-published again the next year as '*average costs for the previous year*'. The consequence of this interpretation would be that the same average costs would be re-publishable year after year. The additional amendment would consist of saying that re-publication for the next year can only concern average costs which went through the entire process from calculation (under the Article 64 IR rules), to notification, to approval. Therefore, the following words could be suggested: '*if the notification is not made by this deadline, the annual average cost per person which the Administrative Commission has last determined for* ***the*** *previous year will be taken. Average costs of a said year can only serve the purpose of the next year*'. As a consequence, the abstention from calculating average costs for a second year running will prevent a country from introducing claims corresponding to this exercise.

PROPOSAL FOR AN AMENDMENT OF ARTICLE 87 OF REGULATION 987/2009

A. Context of the proposal for an amendment

In 2009, the Czech Republic was determined as the leading delegation for the preparation of an AC decision on administrative costs according to Article 76 (2) of Regulation 883/2004. In its note 407/09 of 21 September 2009, the Czech Republic (hereinafter the 'Czech note') presented the 'Analysis on the possibility of reimbursement of mutual administrative assistance between institutions'. This analysis identified different forms of mutual administrative assistance between institutions and proposed which administrative assistance expenses should be reimbursed and which should remain free of charge. The analysis proposed two possible general criteria: refunding forms of assistance, for which the requested institution uses outsourced services, or defining certain categories of assistance costs which should always be reimbursed. In connection to the latter, the note identified three types of assistance: assistance including a medical examination and an administrative check, assistance including recovery, and administrative assistance in a stricter sense.

In relation to medical examinations and administrative checks, the note proposed to consider that medical examination costs should not be reimbursed if the Member State who carries out the examination needs the result as well in order to assess entitlement under its own social security scheme.

As can be deduced from the above mentioned, the proposal for an amendment of Article 87 IR, which implements Article 76 (2) BR, is part of a broader reflection of the above mentioned Czech note on administrative cooperation and assistance in general.

1. The current legal framework

The principle of sincere cooperation can be found already in primary EU law as well as in some other documents.

a. The principle of sincere cooperation in the EU Treaty

The principle of mutual administrative cooperation has been laid down in Article 4 (3) TFEU, which reads:

'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'

The principle of sincere cooperation was one of the leading principles since the beginning of the European Communities. In fact, in one very old case,[16] the CJEU saw the principle of sincere cooperation as a crucial one. Even if the case dealt with the cooperation between the Commission and Member States, it might be useful to recall the characteristics of sincere cooperation put forward by the CJEU. In the *Imm* case, a national court requested a communication of certain information in the Commission's possession in order to exercise the powers conferred upon it by national law. The Commission hesitated to provide the national court with such information, but the CJEU stated that

[16] Case C-2/88, *Imm* [1990] ECR I-4405.

the requested information should be provided, as it did not involve any risk that the Commission encroached upon the powers of the national authorities. Even if this judgement is about the cooperation between Community institutions and national authorities, it is worth mentioning it because of the definition of sincere cooperation. The CJEU stated that the Community institutions are under a duty of sincere cooperation with the judicial authorities of the Member States, and that a refusal to provide a national judicial authority with documents might be justified only by legitimate grounds connected with the protection of the rights of third parties or if the disclosure of this information could interfere with the functioning and independence of the Community, in particular by jeopardising the accomplishment of the tasks entrusted to it.

In connection with the principle of sincere cooperation, a series of applications are pending before the CJEU, again concerning the cooperation among EU institutions. The Commission brought the Council to Luxembourg, asking the CJEU to state a breach of EU law, including the principle of sincere cooperation. The Commission has contested four Council decisions relating to aid of the same type in the area of agriculture granted by the Republic of Latvia (C-118/10), the Republic of Lithuania (C-111/10), the Republic of Poland (C-117/10) and the Republic of Hungary (C-121/10). In all of the actions the Commission puts forward four arguments, respectively stating a lack of competence on the part of the Council to adopt the challenged decision, misuse of powers, breach of the principle of sincere cooperation between institutions and a manifest error of assessment. In his opinion on case C-117/10, Advocate General Mengozzi states that he does not consider '*that the obligation of sincere cooperation between institutions or the principle of institutional equilibrium, on the basis of which the inter-institutional dialogue must take place within the European Union's decision-taking system, can require an institution to refrain from exercising, without exceeding the limits thereof, a power which it possesses, which is exceptional and derogates from the rules governing the field at issue, in order to permit the institution which enjoys general competence in the field to exercise that competence.*'[17] In case C-158/06 the CJEU stated, that *'it follows from the principle of cooperation laid down in Article 10 EC that the Member State concerned may be held financially liable for the amounts not recovered in order to give effect to the Community's right to obtain repayment of the amount of the assistance*.'[18]

No other relevant judgement has been found that would provide a definition or some characteristics of the principle of sincere cooperation.

b. The principle of mutual administrative assistance in the Coordination Regulations

Article 76 (2) BR reads:

'*For the purposes of this Regulation, the authorities and institutions of the Member States shall lend one another their good offices and act as though implementing their own legislation. The administrative assistance given by the said authorities and institutions shall, as a rule, be free of charge. However, the Administrative Commission shall establish the nature of reimbursable expenses and the limits above which their reimbursement is due*.'

The principle of good cooperation can be deduced also from the general provision of Article 2 IR, which states: '*For the purposes of the implementing Regulation, exchanges between Member States*'

[17] Opinion of Advocate General Mengozzi in case C-117/10, *European Commission v Council of the European Union* [2013], delivered on 17 January 2013, paragraphs 80-84.

[18] Case C-158/06, *ROM-projecten* [2007] ECR I-5103, paragraph 33.
Article 10 EC: '*Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this treaty*.'

authorities and institutions and persons covered by the basic Regulation shall be based on the principles of public service, efficiency, active assistance, rapid delivery and accessibility, including e-accessibility, in particular for the disabled and the elderly.' Paragraph 2 of the same provision reads: '*the institutions shall without delay provide or exchange all data necessary for establishing and determining the rights and obligations of persons to whom the basic Regulation applies. Such data shall be transferred between Member States directly by the institutions themselves or indirectly via the liaison bodies*.'

Medical examinations and administrative checks have a specific regime, however. Article 82 BR reads: '*Medical examinations provided for by the legislation of one Member State may be carried out at the request of the competent institution, in another Member State, by the institution of the place of residence or stay of the claimant or the person entitled to benefits, under the conditions laid down in the Implementing Regulation or agreed between the competent authorities of the Member States concerned*.' Article 87 IR then defines specific rules for medical examination and administrative checks. In general, if a recipient or a claimant of benefits, or a member of his or her family, is staying or residing within the territory of a Member State other than that in which the debtor institution is located, the medical examination or the administrative check will be carried out, at the request of that institution, by the institution of the beneficiary's place of stay or residence.

Paragraph 6 of Article 87 IR regulates the reimbursement of the expenses: '*As an exception to the principle of free-of-charge mutual administrative cooperation in Article 76(2) of the basic Regulation,* ***the effective amount of the expenses of the checks*** *referred to in paragraphs 1 to 5* ***shall be refunded to the institution which was requested to carry them out by the debtor institution*** *which requested them*.'

Article 87 is not a unique exception to free of charge administrative cooperation between Member States. Article 85 IR regulates the costs related to recovery, where an agreement on reimbursement is allowed under certain conditions. Paragraph 2 of this provision reads: '*Mutual assistance afforded under this Section shall, as a rule, be free of charge. However, where recovery poses a specific problem or concerns a very large amount in costs, the applicant and the requested parties may agree on reimbursement arrangements specific to the cases in question*.'

For the sake of completeness, it shall be recalled that Regulation 574/72 provided that administrative checks and medical examinations must 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.[19] The old IR also stated that these examinations and checks must be carried out at the request of the institution responsible for the payment of benefits by the institution of the place of stay or residence of the recipient,[20] and that when carrying out a medical examination the requested institution must act in accordance with the procedures laid down by its own legislation.[21]
The Commission proposal for the new IR did not include any provision on the reimbursement of medical examinations or administrative checks performed on request. It only stated that 'the institution of the place or stay or residence shall forward a report to the debtor institution that requested the check.'[22]

[19] See Article 105 of Regulation 574/72. The second paragraph of this provision opens a space for bilateral agreements, in which it is possible to agree on a different way of reimbursement, or to waive it.

[20] See Article 51 of Regulation 574/72.

[21] See Article 115 of Regulation 574/72.

[22] See Article 82 (2) of the Proposal for a Regulation of the European Parliament and of the Council laying down the procedure for implementing Regulation (EC) No. 883/2004 on the coordination of social security systems, COM (2006) 0016 final.

c. Principle of cooperation in other EU instruments

The principle of cooperation in a broader sense is also laid down in several other EU instruments, as well as in other documents of international law. It seems useful to mention at least some of them at this point.

Article 4 of Directive 96/71/EC[23] provides for mutual administrative assistance, which shall be provided free of charge. This assistance includes cooperation between the public authorities and shall in particular consist in replying to these authorities' reasoned requests for information about the transnational hiring-out of workers, including manifest abuses or possible cases of unlawful transnational activities.

Article 10 of Directive 2011/24/EU[24] also provides for mutual assistance and cooperation, which includes cooperation on standards and guidelines on quality and safety and the exchange of information, especially between the countries' national contact points, including on provisions on supervision and mutual assistance to clarify the content of invoices. The directive does not even mention that the mutual assistance and cooperation is to be free of charge.

Also in other areas than those connected to rights of persons, the principle of exchange of information is regulated as free of charge mutual cooperation. In the field of VAT tax, Article 39 of Regulation 1798/2003[25] provides that Member States must waive all claims for the reimbursement of expenses incurred in applying this Regulation except, where appropriate, in respect of fees paid to experts.[26]

Furthermore, Directive 2010/24/EU includes Article 20(2), which reads, in a similar way as Article 85 IR, as follows: '*Member States shall renounce all claims on each other for the reimbursement of costs arising from any mutual assistance they grant each other pursuant to this Directive. However, where recovery creates a specific problem, concerns a very large amount in costs or relates to organised crime, the applicant and requested authorities may agree reimbursement arrangements specific to the cases in question*.'

Article 18 of Directive 76/308/EEC[27] reads: '*Member States shall renounce all claims upon each other for the reimbursement of costs resulting from mutual assistance which they grant each other pursuant to this Directive. However, the Member State in which the applicant authority is situated shall remain liable to the Member State in which the requested authority is situated for costs incurred as a result of actions held to be unfounded, as far as either the substance of the claim or the validity of the instrument issued by the applicant authority are concerned*.'

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[23] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

[24] Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare.

[25] Council Regulation (EC) No. 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No. 218/92.

[26] It could be added at this point, that there is also an international instrument – the OECD Convention on Mutual Administrative Assistance in Tax Matters. Article 26 of this Convention states that unless otherwise agreed bilaterally by the Parties concerned a) ordinary costs incurred from providing assistance must be borne by the requested State; and b) extraordinary costs incurred from providing assistance must be borne by the applicant State.

[27] Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties.

The CJEU did not have to solve any important case on mutual assistance and its reimbursement. There are some CJEU rulings that deal with similar issues, like the *Paletta* case,[28] but in this case the question concerns medical certificates and not medical examinations performed by an institution of a State different than the competent Member State.

From the above mentioned it seems clear that the principle of mutual cooperation is a necessary condition for any international exchange of people, goods or services. This mutual cooperation is considered as being free of charge. The above mentioned documents include just few exceptions to this rule. In fact, the principle of free of charge administrative cooperation is a fundamental one, so that a possible reimbursement is allowed only if bearing the costs would constitute an unjustified burden for the requested institution. Article 87 (6) IR is in line with this idea.

2. Problems with the existing rules

In August 2009, the Austrian delegation presented a note[29] in which it expressed doubts about the current wording of Article 87 (6) IR with regard to applications for invalidity pensions. The Austrian note gave an example of an invalidity pension that is applied for on the basis of insurance periods completed in a number of Member States. The institution at the place of residence may refuse the claim for legal reasons alone (e.g. because the qualifying period has not been completed). In the Austrian delegation´s view, the institution at the place of residence is, according to current rules, not obliged to have a medical report drawn up at its own expense simply because the competent institutions in other Member States require this medical information in order to establish whether an entitlement to benefits exists under their legislation. Institutions in other Member States, however, take the view that the institution at the place of residence has a blanket responsibility to have medical reports drawn up as soon as possible and at its own expense, irrespective of whether or not it needs these reports itself.

It seems there are interpretation problems with the IR. These are sometimes solved by bilateral agreements between institutions, if these institutions consider it necessary to clarify mutual relationships in this regard.[30]

The Austrian delegation therefore proposed that in a decision of the Administrative Commission, or in the new IR itself (e.g. in Article 87), it should be made clear that no institution is obliged to have medical reports drawn up at its own expense if it does not itself have any need of them. This does not, however, affect the obligation under Article 87 of the new IR requiring the institution at the place of residence or place of stay to prepare a medical report at the request of another institution subject to reimbursement of the costs incurred.

The Czech delegation accepted this idea and in its note proposed to consider exceptions to the rule of reimbursement of actual costs connected to requested administrative checking of the curative regime of a person temporarily on sick leave (which happens rarely) and of medical examinations costs if the Member State who carries out the examination needs the result as well in order to assess the entitlement under its own scheme. According to the Czech note, there is a strong need for a uniform opinion, in order to prevent unnecessary and never-ending disputes between institutions. In addition, the note states that it should be clarified as to when the requesting State does not have an obligation to reimburse a medical examination to the State of residence.

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[28] C-206/94, *Paletta* [1996] ECR I-02357.

[29] Note from Austria of 27 August 2009, No. 344/09

[30] For example, the Czech Republic has such agreements with Austria, Germany and Poland.

In fact, in practice it happens that the competent institution has to request a medical examination in the State of residence, and that in this State the institutions for example use outsourced services causing the costs of such an examination to be very high. It seems legitimate not to be willing to bear such costs if the requested institution uses the results for its own purposes as well.

3. Description of the proposal for an amendment

One of the results of the work of the Czech Republic, as the leading delegation for the determination of reimbursable expenses as stipulated in Article 76 (2) BR, was the proposal for an amendment to Article 87 (6) IR. In its note 160/11 of 31 March 2011, it proposed to add a sentence to the existing provision, so that the provision would newly read:

'6. As an exception to the principle of free-of-charge mutual administrative cooperation in Article 76(2) of the basic Regulation, the effective amount of the expenses of the checks referred to in paragraphs 1 to 5 shall be refunded to the institution which was requested to carry them out by the debtor institution which requested them. ***However, if the institution which was requested to carry out the check or examination uses the findings also for the determination of entitlements of the person concerned under the legislation it applies, it shall not claim the expenses referred to in the previous sentence.'***

In its reasoning, the Czech delegation points out that it would not be reasonable that the requested institution charged the requesting institution for the check/examination which is to be carried out under its own legislation anyway. The Czech delegation considers this proposal as contributing to legal certainty and recalls that other delegations agreed to the interpretation reflected in the proposed amendment during the discussion on Article 76 (2) BR. A strong need for a uniform opinion, in order to prevent unnecessary and never-ending disputes between institutions, was presented as another reason to amend Article 87 (6) IR as proposed. The interpretation of Article 87 (6) should, therefore, be clarified as to when the requesting State does not have an obligation to reimburse a medical examination to the State of residence.

B. Analysis of the proposal for an amendment

1. Legal analysis of the proposal

The provision, an amendment of which is proposed, constitutes an exception to the general principle of free of charge mutual cooperation between institutions. This way, the current rules solve the main question whether the medical examination provided on the request of another Member State should be charged or not. The legislators gave a positive answer to this question in order to avoid unnecessary and often very high costs of medical examinations for the requested institution, which does not need such an examination for its own purposes.

As has already been stated above, the interpretation of the existing rule contained in this provision sometimes creates problems when the requested institution needs the medical examination also for its own purposes and asks for the reimbursement anyway, only because it was requested to perform such an examination by another institution. Such behaviour seems to be unjust and to be going against the principle of good cooperation.

In the reasoning to the proposed amendment, legal certainty is presented as the main argument to amend Article 87 (6) accordingly. Will legal certainty really increase with the proposed amendment? In our view, after the proposed amendment, it would really be clearer that the requested institution

is not to claim any reimbursement if it uses the results of the examination or check for its own purposes.

Nevertheless, there is doubt whether such a rule cannot be deduced from the already existing provision of Article 87 (6) IR, which provides that effective amount of the expenses of the checks shall be refunded to the requested institution. Could it not be said that if the requested institution needs the medical examination also for its own purposes, all the documents should be already included in the file and so no effective costs actually arise? Article 87 (6) IR might already provide the needed rule that the costs for medical examination and administrative checks should be reimbursed only if they arise as the effective amount of the expenses, or better said as an additional cost, which would otherwise not be spent, as the medical examination or administrative check would not be needed.

The teleological interpretation of the current wording of Article 87 (6) leads to the conclusion that the main aim of this provision is to define an exception to the free of charge principle. The second aim of the provision is to limit the exception to the effective amount of the expenses of the checks, which shall be refunded to the requested institution.

The legislators probably wanted to define the exception to the free of charge principle, but at the same time make it really limited – only to the effective amount of the expenses. From this point of view, the proposed amendment seems to be in line with the will of the legislators, as it further limits, or better said specifies, the limit to the exception already determined by the current wording of Article 87 (6). If the literal interpretation of the current wording of Article 87 (6) is used, the will of the legislators to limit the exception from the free of charge principle is even clearer. By using definite articles and the word 'effective' interpreted as 'additional', the legislator already sets a real limit: '***the effective*** *amount of* ***the*** *expenses*'. In fact, if the provision is interpreted literally, it should already be sufficient to come to the conclusion that an institution that uses the medical examination or administrative check for its own purposes did not meet the condition of '*the effective amount of the expenses*'. Another interpretation could lead to unfair enrichment. If the interpretation of the already existing provision could be sufficient (which seems so), it might be preferable to issue a decision of the Administrative Commission instead of amending the EU Regulation.

Another argument to have a second thought on the proposed amendment is the logical concept of the IR as such. Article 87 (6) includes an exception to the free of charge rule. In the last sentence of this provision, another exception to this exception would be included. At a first glance, the amended provision is quite difficult to read, as it becomes quite long and not very understandable.

If it is agreed among the Member States that a clarification of the existing rule is needed anyway, an alternative wording might be considered.

On the other hand, it should be underlined that the proposed amendment actually reinforces the principle of free of charge mutual assistance, as it reduces the possibility of reimbursement of costs for medical examinations or administrative checks.

2. Assessment of the proposal

The proposed amendment can be assessed in more detail from different points of view.

a. Clarification

As regards the clarification of the proposed amendment, the sentence added is sufficiently clear. Adding the proposed sentence to the provision contributes to the clarity of the rule that only the effective amount of the expenses can be charged.

However, some doubts could exist about a future interpretation of the term 'determination of entitlements'. In order to make the proposed amendment really work and contribute to the clarity of the provision, it is necessary that there is an agreed interpretation of what 'determination of entitlements' means in this context. In addition, there might be other issues not linked to entitlement. In fact, there might be some Member States who understand this term to mean also the calculation of benefits, where others might not.

Moreover, it should be noted that the provision as a whole would be quite long after the proposed amendment.

b. Simplification

The question is whether the proposed amendment would really simplify the application of the current provision of Article 87, and also of some other provisions of the IR.

This question can legitimately arise, as the proposed amendment makes Article 87 (6) longer and therefore perhaps more difficult to apply. Also, the proposed amendment would introduce an exception to an already defined exception, which might specify the exception to the free of charge administrative cooperation principle on the one hand, but might be difficult to apply to all possible situations on the other hand.

It does not really look like the proposed amendment would simplify the current practice of coordination.

Moreover, as the overview of the positions of some Member States shows below, this question does not constitute a real problem to many of them. Article 87 would be made longer to address the specific need of a limited number of countries.

c. Protection of rights

The rights of persons are not at stake in this proposal. Still, protection of rights can be envisaged from a more administrative point of view. For sure, if the amended provision were rightly applied, the rights of the institution requesting medical examination abroad would be better protected if it did not have to bear the costs if that the institution which provides the medical examination needs it also for its own purposes. It is, however, questionable how this will be proven and checked. It was already said that the only interpretation of the current Article 87 (6) IR could lead to the conclusion that only the effective amount of the expenses can be reimbursed.

Moreover, the question is whether after the amendment of the IR it could not be asked to better and more often prove the effective costs spent by the requested institution. If so, this might slow down the whole procedure for the migrant citizens and could therefore have some negative impact on citizens' rights.

d. Administrative burden and implementation arrangements

If the procedure slowed down, this would probably be because of the increased administrative burden for the institutions. After the proposed amendment, the requested institution could be asked to prove that it did not use the result of the examination or check for any determination of entitlements under its own legislation.

This might also raise the question whether Member States would need to adapt their own administrative procedures at national level and if so, whether they are ready to do so.

e. Avoiding the risk of fraud and abuse

The proposal does not concern fraud and abuse as such. From an administrative angle there is probably no increased risk of fraud and abuse compared to the current wording of Article 87 (6) IR. Already now the requested institution is able to charge medical examinations, even though it uses the results for its own purposes. Such behaviour is against the spirit of good cooperation. The proposed amendment could underline the already existing principle. After the amendment the risk of fraud and abuse might diminish, as it will be expressly written in the IR that the country that uses the results of the checks for its own purposes cannot charge the requesting Member State.

It might happen, on the other hand, that the requesting institution, in order to avoid payment for the medical examination, would try to prove that the requested institution used the findings for its own purposes. This however is quite a hypothetical reflection.

f. Potential financial implications

The proposed amendment would probably not increase the costs of the procedure, as these must be incurred anyway. The only question is who will bear them. The proposed rule should work already now, so no significant financial implication should be caused by the proposed amendment.

3. A mapping of the impact in the Member States

In the Czech note No. 407/09, the Member States were asked to react to proposals presented in the note and to provide their views on several alternatives proposed as possible solutions to some identified problems. Based on an analysis of the notes from the Member States which reacted to the note of the Czech leading delegation, a mapping of the possible impact in some Member States can be made, assuming that those Member States that reacted saw a possible impact of changing Article 87 (6) on their practice. First, it should be stated that the issue of reimbursable costs for medical examinations and administrative costs seems to be an issue only for some Member States, i.e. those which are often requested to perform medical examinations or administrative checks.

All seven Member States that responded to the Czech note underlined the principle of mutual administrative cooperation, which should be, as a rule, free of charge. The United Kingdom[31] pointed out the spirit and letter of Article 76 (2) of Regulation 883/04 and expressed its opinion that any action taken by a Member State falls within the responsibilities of that State, and that meeting the costs forms part of those responsibilities. The UK furthermore stated that administrative assistance is not only provided as a matter of obligation, but in the spirit of cooperation and goodwill which should form the basis of effective cooperation and coordination. Portugal's note[32] added to this

[31] Note from the United Kingdom of 13 November 2009 504/09.
[32] Note from Portugal of 20 November 2009 518/09.

point, stating that if administrative assistance is not mainly free of charge it could even undermine the principle of the new Regulations providing for reinforcement of mutual cooperation. Moreover, as the Swedish delegation recalled,[33] a complicated system of reimbursement of administrative expenses runs the risk of becoming an administrative burden itself.

Reimbursement as an exception – only on request of the other institution
Member States accept reimbursement as an exception, e.g. if a claim for invalidity is at stake. France,[34] for example, mentioned that only the costs of medical checks or expert medical opinions which correspond to a check or expert opinion explicitly requested by one institution from another in addition to the pension claim file itself should be reimbursable. the entire medical part of the file should be free of charge. Spain[35] seems to be of the same opinion, stating that the 'cost of additional specific examinations and check-ups for pensioners from other Member States resident in Spain, carried out for the sole purpose of meeting particular requirements of the legislation of the Member State requesting them, should be borne by the requesting institution'. Germany[36] mentions costs of 'purchased' types of administrative assistance that should be reimbursable by the requesting institution. Also Poland[37] stated that the reimbursement should apply to the costs of administrative assistance that generate additional expenses for an institution and that result solely from the requesting institution's needs.

The effective amount of the expenses for medical examinations
The Polish delegation expressed its opinion[38] on the expenses of medical examinations as an exception to the free of charge principle and argued that the effective amount of the expenses must be refunded. The principle of refunding the effective expenses should apply both to cases in which the institution of the Member State where a person stays performs a medical examination using an external entity's services, and to cases in which the institution of the Member State where a person stays performs a medical examination using the services of doctors employed by the institution.

However, Portugal[39] recalled that not all Member States make use of outsourcing services and that it is difficult or almost impossible to assess the real cost relating to staff or resources involved when providing administrative assistance, apart from the fact that costs vary significantly in the Member States. Mutual assistance is reciprocal and should therefore be free of charge as much as possible. The Portuguese delegation recommended to reflect further on establishing some proportionality criteria since in practice there might be a high number of administrative assistance requests from some Member States, which could create difficulties for institutions in the other Member State, especially if those requests do not relate to their normal internal tasks. This may cause an administrative burden also involving high costs.

If medical examination for a Member State's own needs: no reimbursement
Only a few Member States expressed their opinions on the proposed rule that no reimbursement should be required if the medical examination is also used by the requested institution in order to apply its own legislation.

The UK[40] agreed with the Czech suggestion that if a State has carried out a medical examination for the application of its own legislation, it should not seek reimbursement from any other Member

[33] Note from Sweden of 24 November 2009 573/09.
[34] Note from France of 27 October 2009 453/09.
[35] Note from Spain of 12 November 2009 478/09.
[36] Note from Germany of 13 November 2009 484/09.
[37] Note from Poland of 18 November 2009 514/09.
[38] Note from Poland of 18 November 2009 514/09.
[39] Note from Portugal of 20 November 2009 518/09.
[40] Note from the United Kingdom of 1 February 2010 029/10.

State using the same report. The delegation also pointed out that there is probably no particular need for further clarification, as Article 87 (6) seems to be unambiguous in cases where the requested State has no need of the report for the application of its own legislation. Also the Finnish note[41] recalled that Article 87 (6) of Regulation 987/2009 already makes an exception to the principle of free of charge mutual administrative cooperation. The note agrees with the analysis of the Czech delegation that, when a Member State requests a medical examination to be done in the Member State of residence which does not carry out such examination for its own purpose, the requesting Member State is to reimburse the effective amount of the expenses of the examination to the Member State of residence. Conversely, when medical examinations are carried out in the Member State of residence which will use the results of such examination for the application of its own legislation, the Member State that requested the examination has no duty to reimburse the costs. This conclusion seems to be possible to draw from the already existing provisions.

The German delegation, in its reaction to the Czech note,[42] argued that the wording is not clear enough, as it might be difficult to prove whether the requested institution used the results of the examination to apply its own legislation.

The Greek note[43] recommended to clearly regulate situations in which a claim for an invalidity pension is filed to the institution or to the liaison body of the State of residence and in which it is demonstrated that there is no right or possibility for the claimant to get an invalidity pension from the State of residence. In this case, the question arising is whether the institution of the place of residence should examine the claimant in order to send the medical expert opinion together with all the papers and the initial supporting documents of the claim. Another question could be whether it is legal to request the reimbursement and whether the other State has the right to refuse this reimbursement.

From the above mentioned it seems clear that the problem of reimbursement of medical examinations and medical checks is probably not an EU wide problem, but a problem that affects a limited number of Member States. It furthermore seems that even though some Member States agreed with the Czech analysis of the principle of mutual administrative assistance, not all of them share the view that it is really necessary to amend Article 87 (6) IR. Some Member States expressed the already above mentioned opinion, that the current wording of this provision already provides a possibility of interpretation in the way that an institution, which needs the examination also for its own purposes should not be allowed to request reimbursement. It should furthermore be taken into account that there is a significant number of Member States who did not react to the Czech note, so the problem is probably not considered a hot issue by these countries.

C. Conclusion

1. General evaluation of the proposal for an amendment

As has been shown in this part of the report, the principle of free of charge administrative cooperation is such a fundamental principle that a reimbursement is allowed only if bearing the costs constitutes an unjustified burden for the requested institution. The current wording of Article 87 (6) IR is in line with this idea, and it seems that the proposal was also lead by this idea. In fact, the proposal tries to avoid an unjustified burden also on the side of the institution, which has no other

[41] Note from Finland of 1 February 2010 033/10.
[42] Note from Germany of 25 January 2010 025/10.
[43] Note from Greece of 3 February 2010 038/10.

way than to request a check in another Member State. It is undisputable that for some Member States it is a problem if they have to bear costs of medical examinations which they have to request in order to determine entitlements under their own legislation. If these examinations are very expensive, which is often the case, it is understandable that a proposal as presented by the Czech delegation might be welcomed by some (probably not many) Member States. The proposed amendment is sufficiently clear and could in a way really contribute to legal certainty.

However, a crucial question remains, i.e. whether such an amendment is worth its cost. In fact, there are some doubts, which were presented throughout the report:

- The amendment actually constitutes an exception to an already defined exception to a general and very important principle of free of charge mutual administrative cooperation.
- Article 87 (6) would be quite long after the amendment and not very easy to read, interpret and apply.
- The issue is hot only for a limited number of countries.
- The problem could be solved by bilateral agreements, or by a decision of the Administrative Commission instead of amending the IR.

2. or adapted proposal for an amendment

It seems sufficient to interpret the term 'effective costs' accordingly (if necessary based on the decision of the Administrative Commission), instead of amending the IR. The effective costs might, for example, be interpreted (if the proposal is used) as costs spent in order to perform the necessary medical examination or administrative check when the results are not used also for the requested institution's own purposes.

If Article 87 (6) IR has to be amended in order to really clarify that the requested institution should not ask for a reimbursement of the costs which would arise anyway, the following proposals for an amendment might be considered:

6. As an exception to the principle of free-of-charge mutual administrative cooperation in Article 76(2) of the basic Regulation, the effective amount of the ***additional*** *expenses of the checks referred to in paragraphs 1 to 5 shall be refunded to the institution which was requested to carry them out by the debtor institution which requested them.* ***However, if the institution which was requested to carry out the check or examination uses the findings also for the determination of entitlements of the person concerned under the legislation it applies, it shall not claim the expenses referred to in the previous sentence.***

or

*6. As an exception to the principle of free-of-charge mutual administrative cooperation in Article 76(2) of the basic Regulation, the effective amount of the expenses of the checks referred to in paragraphs 1 to 5 shall be refunded to the institution which was requested to carry them out****, unless the institution uses the findings also for its own purposes,*** *by the debtor institution which requested them.*