trESS Training and reporting on European Social Security

European report 2011

Authors:
Yves Jorens and Jean-Philippe Lhernould

December 2011

Organisation and coordination of a network on the co-ordination of social security schemes within the European Union
Lot 1: Expertise in social security coordination
Project DG EMPL/E/3 - VC/2010/0436

Contractor: Ghent University, Department of Social Law, Universiteitstraat 4, B-9000 Gent

National Experts

Walter Pfeil	Austria
Elias Felten	Austria
Michael Coucheir	Belgium
Krassimira Sredkova	Bulgaria
Iliana Christodoulou-Varotsi	Cyprus
Kristina Koldinska	Czech Republic
Kirsten Ketscher	Denmark
Georg Männik	Estonia
Essi Rentola	Finland
Jean-Philippe Lhernould	France
Bernd Schulte	Germany
Konstantinos Kremalis	Greece
József Hajdú	Hungary
Gerry Mangan	Ireland
Stefano Giubboni	Italy
Sergey Maluhin	Latvia
Teodoras Medaiskis	Lithuania
Nicole Kerschen	Luxembourg
Joseph B Camilleri	Malta
Saskia Klosse	Netherlands
Gertruda Uscinska	Poland
Artur Soares	Portugal
Razvan Cirica	Romania
Iveta Radicova	Slovak Republic
Grega Strban	Slovenia
Christina Sánchez-Rodas Navarro	Spain
Ann Numhauser-Henning	Sweden
Simon Roberts	United Kingdom
Brynhildur Flóvenz	Iceland
Asbjorn Konstad	Norway
Silvia Bucher	Switzerland/Liechtenstein

Contents

Executive summary

I. Introduction

Nobody will ignore that the Coordination Regulations 883/2004 and 987/2009 play an important role and to a big extent contribute to the realisation of the fundamental aim of free movement, as enshrined in the Treaty on the Functioning of the European Union. As such, they also contribute to the development of the concept and reality of European citizenship. The Regulations are one of those instruments that are most closely related to our daily life.

The European Report 2011 is at a turning point, as it has now been more than one year that the new Regulations 883/2004 and 987/2009 entered into force. The fundamental objective of this new regulatory framework was to find solutions to common problems, to modernise the new Regulations and to simplify them, and to adapt the provisions where they were considered to be less effective. Whether these objectives have been reached, is as such not the question that has to be answered in this European Report. To what extent a new regulatory framework also leads to an improvement, compared to the former regulatory framework, is indeed a question that needs further research. The trESS reports are empirical and analytical and are not speculating as to whether the objectives were successfully fulfilled. The report therefore further focusses on the daily implementation problems of the Regulations within the different Member States. It should also be admitted that many reports made clear that there is still an important lack of clarity. Often, administrations are still dealing with the questions to what extent the new Regulations deviate from the previous ones.

The report focusses on problems encountered by administrations, citizens and is based on information gathered through the examination of literature, interviews with the different stakeholders involved in the implementation of the Regulations, some seminars organised in the countries, as well as case law at a national level. However, it has to be admitted that the number of cases on the new regulatory framework brought before the national courts is of course still limited. This is not surprising, as only one year has passed after the entering into force of the new Regulations. It will take an extra few years before we can see to what extent cases are challenged before the national courts and eventually, at a later stage, before the European Court of Justice. Nevertheless, one can already see some first indications that the number of cases is increasing and that several issues cause specificproblems in the countries concerned. This is in particular the case in those States where the Regulations, to a certain extent, only more recently entered into force. Several national reports contain a wealth of interesting cases, dealing with social security problems of migrant workers that often show that the application of the Regulations is still challenged and that the reality often goes beyond fiction.

II. General cross-cutting issues

Looking at the different problems of implementation, as will be further discussed in detailin the following chapter, we try to answer the question to what extent it is possible to identify more general cross-cutting issues. The most general conclusion could be taken already from the beginning: the social security Coordination Regulations and the system that was set up are an effective instrument and further play their important role in achieving the objective of free movement. This does of course not exclude that this framework has shortcomings or inconsistencies. The national reports shed some light on these elements.

It is clear that one may not approach the new regulatory framework with too high expectations as if now all problems and shortcomings would be solved. This is as such not the result of the insufficiency of the Coordination Regulation itself. Problems noticed are often those related to a non-compliance with the EU Regulations, while others are basically the result and the functions of the constraints, both political and practical, of a system of coordination. One may never forget that the Coordination Regulations only have, no matter how important it may also be, a kind of limited objective, i.e. coordinating national social security systems which are designed and evolve in a dynamic and constantly changing environment. Legal instruments, such as the Coordination Regulations, can only try to catch this dynamic world in which European citizens are moving, and are therefore confronted with the traditional problem of legal instruments, i.e. legal texts always come after reality.

In order to provide a general view on the problems referred to in the national reports, we would like to emphasise the two following general issues: the changing coordination regulations and thechanging national environment.

A. The changing national environment

The first regulations were adopted when there were only six Member States and a relatively limited number of social security schemes to be coordinated. During the last decades, the Coordination Regulations have always been able to adapt themselves to a growing number of social security schemes to be coordinated with a growing diversity. These social security schemes evolve and present the Coordination Regulations with several challenges. These challenges encompass the following:

- The *changing structure of social security schemes* in the Member States: in many more Member States devolutionary trends are taking place, leading to a further role of regional or even local levels in the administrations and development of social security systems. The competence for regions dealing with benefits like long-term care benefits or the growing role of local authorities in providing benefits dealing with certain minimum assistance schemes or disabled persons, do pose typical problems. Several problems can be encountered here (see e.g. Austria, Slovenia, Sweden). There is not only the issue of the application of the Coordination Regulation as such to some of these benefits, there is also the more fundamental European context with a growing pressure for the application of EU law to the intra-state context. Notwithstanding the fact that even in the recent case law of the European Court of Justice that deals with European citizenship, the basic principle that European Union law does not apply to intra-state arrangements is confirmed, it cannot be ignored that the borderlines of this principle become more and more narrow and under pressure. Should intra-state arrangements become subject to European coordination law one day? The question how to apply these principles in this context will become more and more important.
- A next challenge at national level relates to the further *development of the concept of social security benefits.* The European Coordination Regulations, just like all other international instruments, are still developed around a material scope of the nine traditional social security risks. The substance and context of national legislation however constantly changes, which leads to the development of a new kind of

benefits. New types of benefits, like parental benefits or long-term care benefits, do pose challenges to the Coordination Regulations, not at least as the coordination provisions are structured around these different kind of risks. Notwithstanding the inclusion of some of these (new) benefits, like parental benefits, into the Regulation, the borderline and distinction between these different kinds of benefits remains unclear. A burning issue is clearly the wide variety of different types of family benefits and measures taken to support family. The distinction between paternity, parental and family benefits is not always very clear. The classification of invalidity issues and rehabilitation in benefits is mentioned as problematic in many reports (see Switzerland, Finland, the UK) A very well-known aspect is the problem of long-term care benefits (see France, the Netherlands, Germany, Austria, Spain, Czech Republic, …), which also remains unsolved under the new Regulation. There is a growing recognition that the inventive, but necessary solution provided for by the European Court of Justice to link long-term care benefits to the sickness chapter, is far from convincing. Many different reports focus on the inconsistencies and gaps as a result of the non-coordination of these benefits. The possible application of the Coordination Regulations to benefits that could be considered as social advantages and all other kinds of social welfare benefits, is an important issue. As a lot of these benefits actually fall under other EU instruments, an application of the Regulation to these kinds of broader welfare benefits becomes more required.

- Linked to these challenges are issues related to *developments within the national social security systems.* One of the most important issues already mentioned in our previous reports, but more and more strengthened and confirmed, is the general idea of carrots and sticks in the social security benefits. Social security benefits are in the first place no longer seen as merely a financial compensation when a certain risk occurs, but play a fundamental role in a growing activation of human beings and labour market. In an increasing number of Member States and social security systems, measures of activation have been adopted, aiming at reducing financial impacts for social security benefits and allowing to let social security play the preventive role that it should. Employment related elements as conditions for entitlement to benefits, the objective to get people reintegrated in the labour market, the installation of rehabilitation measures in sickness cash benefit systemsor invalidity benefits do pose a lot of challenges to administrators, policy makers and the beneficiaries (see Finland, Sweden, …). How such measures should be coordinated, which is the responsible state, are only a few of the burning issues.
- Another issue one is more and more confronted with, is dealing with the *changing concept of the migrant worker* him or herself. Today, mobile workers are highly fragmented and extremely mobile. People are crossing the border to work, more and more at very short periods, rather than with the idea of a fundamental integration in the new host State. Journalists, artists, aircrew personnel,… are just a few examples of the new extremely mobile European citizens and do however further question the basic application of the Regulations. A general principle as the lex loci laboris, developed already more than 50 years ago, is still kept intact and is seen as a cornerstone of European social security law. Notwithstanding the reconfirmation of the lex loci laboris as the main principle, it cannot be ignored that a very strict application of these rules does challenge and question the appropriateness of some of these provisions.

B. The newcoordination rules

The national reporters were asked to explore the impact of the new regulations on national rules and practices. The point was to evaluate whether the difficulties observed under old regulations had been entirely or partly resolved. The national reports also contribute to a first evaluation of the new regulations. Among the questions raised were: are they well understood by stakeholders? Are there problems of interpretation of some new concepts/rules? Is the simplification process a source of smoother and more flexible

application of coordination rules or does it create uncertainty? Are there administrative problems making the concrete implementation of the new regulations difficult?

In this respect, the European Report reflects the ambiguity of the national reports. Indeed, if problems of implementation raised by national reports are sometimes clearly related to the new regulations (new rules of conflict law, new rules about unemployment benefits, principle of assimilation of facts, etc), they may at the same time concern both the new and the old regulations.For instance, some problems dealing with the concept of residence and of "family members", the status of pensioners, the access to cross-border healthcare were already known before Regulation 883/2004 entered into force and seem to remain even if the entry into force of new adapted rules has partly modified the nature of the problems encountered. Let us give an example: if there are still discussions about the concept of residence, the elements for determining residence provided by Article 11 renew the subject. Finally, it stems from national reports that, since many coordination rules have not been modified, important questions remain open to debate. For instance, the classification of and the distinction between social security, social assistance, and special non-contributory benefits (see Sweden, the UK, the Netherlands, …) and how national social security legislations should be classified under the Regulations and its different chapters, were, are and will presumably be a point of debate and discussion in the forthcoming years. The interaction between Coordination Regulations and other sources (Union citizenship, internal market rules, Directive 2004/38, Regulation 1612/68, etc) is another example.

If we try to summarise the impact of the new regulations on the difficulties listed into national reports, three categories can be distinguished:new problems deriving from new coordination rules; problems already known under Regulation 1408/71 but renewed under Regulation 883/2004;problems already known in the past and remaining exactly the same as under the old regulation.

If we go into more detail, it appears that many questions are raised in several reports.
A clear example is the principle of aggregation of periods (see Slovenia, Austria, Poland, Hungary, the UK, Lithuania, Greece, …) and equal treatment. These principles and its borderlines were put in a new daylight. Different reports question if aggregation can take place without lastly having fulfilled a period of insurance under the competent State. There is a growing debate on this issue that a kind of unconditional application of the aggregation principle would further limit the sovereignty of national legislators. Also in the field of equality of treatment and especially its related aspect of assimilation of facts and events, the borderlines are unclear. Although the principle of non-assimilation of facts is a logical consequence of an evolution of the case law of the European Court of Justice, the implication of this principle is looked at with a lot of interest but also with scepticism in the different reports (see Switzerland, Liechtenstein, the Netherlands, Austria, France, Sweden, …).Can this assimilation further limit the territoriality of national systems? How broad should this concept be interpreted? What are the borderlines of solidarity today under national social security schemes? Should national social security schemes be completely opened to a further European solidarity ?

The determination of applicable legislation for people who also obtain a benefit (the Czech Republic, Lithuania) or the determination of the place of residence for non-active people (Austria, Finland, France) and the pursuit of activities in two or more Member States (Belgium, Hungary, Lithuania, Poland, …) is often questioned as well.

With respect to the introduction of new provisions and concepts, several national reports indicate that problems are encountered when interpreting or implementing these provisions, e.g. health care provisions and pensioners (see Finland, the Netherlands, Sweden, France, Hungary, the Czech Republic), priority rules in family benefits and overlapping of family benefits (Austria, Lithuania, Sweden, Belgium, Luxembourg, …). There has been a call for a further clarification of concepts and rules under the Regulation. These difficulties also become even more complicated as several reports indicate that it is often difficult for national administrations to judge whether the new phrasing of certain provisions also indicates a

modification of the contents and the coordination principles. Many administrations are wondering to what extent the case law of the European Court of Justice, the most important source of interpretation of the coordination provisions, as judged under the previous Regulations 1408/71 and 574/72, is still valid under the new regulatory framework(see e.g. the discussion in Belgium, the Netherlands and Germany on the Miethe and Huijbrechts cases)? Or do the new coordination provisions deviate from the case law of the European Court of Justice? In some of these issues further investigation is required. A related issue is that the new Regulations often use a terminology the contents of which has to be further determined by national law. However, as the interpretation of these concepts under national law may differ from the interpretation under the Regulation (the most notorious example being “the concept of residence” (see Finland, France, the Netherlands, Lithuania, …), but also “a member of the family” (see Cyprus, Spain, Sweden, Slovenia, Austria, …), the uniform application of the Coordination Regulations is endangered. It is sure that these tendencies and interpretation issues have an impact on a possible smooth functioning of the Regulations.

An additional, very important element is the interface with other aspects of EU law. Since many years, it is clear that the Regulations are no longer the only instrument dealing with social security for migrant workers, as other areas of European law encroach. The influence of internal market rules on health care and European Court of Justice case law on European citizenship have already witnessed the increasing impact of social security by Treaty provisions. The relation with other secondary instruments, e.g. Directive 2011/24 (Slovenia, Belgium, Austria, …), Directive 2004/38 and the possible different concepts used between these other secondary instruments and the regulatory framework, on the one hand complicate the application of the Regulations and may lead to further legal uncertainty, but on the other hand also offers more rights and protection to the European citizens.

It is also noticed that the last few years, the Coordination Regulations have gained a further political interest, in particular as a result of changing economic environments. The fear that some of the provisions of the Regulations may lead to incentives for social tourism came clearly into the picture. The access of non-active persons to social security benefits, border shopping in sickness, or the export of “higher” social security benefits to states with “lower” social security benefits is an example of this political sensitivity.

III. The operationalimplementation of the EU coordination regulations in the EU/EEA Member States and Switzerland

A. Scope

1. Personal scope

a. Active persons

The application of the coordination rules to active persons does not raise many major problems.

Nevertheless, the distinction between employed and self-employed personsremains a topic that is brought before the courts. According to Belgian law, members of the board of directors of companies are presumed to be self-employed persons.As regards persons who manage a company liable to Belgian taxes, this presumption is irrefutable. This irrefutable character was deemed necessary to remedy situations where members of the board of directors, with the help of modern technologies, manage Belgian-based companies from abroad. Following a 2004 ruling of the Constitutional Court, this irrefutable presumption only applies to those who manage such a company from abroad and has been the subject of a ruling of the Labour Court of Appeal of Brussels, dated 11 March 2011 (R.G. No. 2010/AB/91), which has resulted in a reference for a preliminary ruling by the European Court of Justice (ECJ) (pending case C-137/11, *Partena*).

Other reports stress the importance of the distinction between employed and self-employed activities at national level (CY, CZ, FR, LT, SI) whereas in some others, this distinction is only relevant in the light of coordination rules (DK, SE).
The Swiss report refers to a case of the administrative Court of the Canton of Grisons.This court correctly added that, for the purpose of the determination of the legislation applicable according to Title II of Regulation 1408/71, the question of whether a person is employed or self-employed in the territory of another Member State is to be answered not under Swiss law, but under the legislation of that other Member State.

b. Non-active persons

The incorporation of non-active persons is in some reports indicated as a source of concerns.

The **definition of "non-active" persons** is problematic. The SI report points out the lack of legal clarity on the concept of non-active persons. In some other Member States, a definition of "non-active persons" has been provided. Czech institutions found a negative legal definition, according to which a non-active person is a person who is neither employed or self-employed, nor a civil servant, nor an unemployed person who would be entitled to unemployment benefits, nor a pensioner or a family member of such a person, and nor a student.It has also been agreed that as regards unemployment benefits, a family member who is not working will be considered as falling within the scope of Article 11(3)(e), even though he/she might be covered for healthcare by another State where his/her spouse carries out a gainful activity.Lithuanian legislation does not define any group of persons as "non-active". The main group of persons who are neither employed nor self-employed are children, pensioners, unemployed people, including non-working spouses, some groups of people in social exclusion, etc.

National reports deal with the impact of the extension of the scope of the regulation. In some countries, special rules were released to avoid that a non-active person would achieve the residence right because of the applicability of Regulation 883/2004, due to which social benefits can be obtained and therefore sufficient means can be proven. For instance, this applies to the Austrian supplement pension benefit. The Austrian authorities interpret Article2

of Regulation 883/2004 in such a way that the requirement that nationals of a Member State must reside in a Member State means that a legal status of residence in the sense of Directive 2004/38 must be proven. In France, Circular DSS/DACI No. 2010/461 of 27 December 2010 explains the consequences of extending the personal scope to non-active persons. It indicates that from now on, non-active persons who do not receive any benefit in cash and who cannot claim the status of dependent persons are covered by the regulation if they are or if they have been subject to the social security legislation of one Member State. The status of a non-active person has been subject to a circular which explains how Directive 2004/38 and Regulation 883/2004 should be combined. According to the French administration, the condition of "comprehensive sickness insurance" set by Article 7 of Directive 2004/38 can be met through the application of coordination rules. It is interesting to make a comparison with the example found in the SE report which points out the problems that may occur when deciding whether a non-active covered migrant is entitled to stay in Sweden. It is about the requirement of "sufficient means" for maintenance and how to calculate these. For instance, a pensioner from another Member State staying in Sweden is entitled to the hybrid benefit "Elderly Support" if the pension he or she receives is not sufficient. Shall the Elderly Support Benefit be taken into account when deciding whether the individual has sufficient means to stay in Sweden?

c. Family members

Few newproblems are highlighted.

The **definition of family members** is discussed in several reports. Some countries set a definition of family members according to the nature of benefits claimed (BG, LT, SE, SI, PL),other countries in a uniform way (CZ, DK, UK). Other reports refer to cases dealing with the scope of a family member, for instance with regard to the status of young children or adult children of insured persons (see CH report). Same-sex partners or even unmarried opposite sex partners may not be regarded as "family members" (CY), whereas the status of polygamist families is recognised (ES). In Sweden, it has been stated by the National Social Insurance Board that, in relation to family benefits both according to the new and to the old regulation, the other parent is regarded as a family member of the worker or Swedish resident parent only if they are in fact married or are living together. According to the SE expert, such rules can be contested since a parent is always the family member of the child and we are talking about "family benefits". Finally, some reports insist on the problems related to the definition of a member of the family who might be entitled to medical treatment which is governed by the law of the State of his or her residence, and not necessarily by the legislation of the competent Member State (paying for the benefits), nor by the legislation under which benefits are provided (SI). The same report considers that this situation could lead to forms of reverse discrimination.

One of the topics raised concerns **non-active family members**. In the Czech Republic, according to the inter-ministerial group on coordination of social security, the right to sickness benefits in kind is derived from the active family member and consequently his or her State of insurance is also competent for benefits in kind for the non-active person, whereas all other benefits shall be provided by the State of residence of the non-active person.Austrian authorities also apply Article 11 (3) (e) to family members who do not pursue any economic activity. The NL report says that the position of family members is not always clear: interpretation problems may arise especially when family members join civil servants or diplomats who are posted abroad. If the family members are not employed themselves and/or do not receive a social security benefit, they are in principle subject to the legislation of the Member State of residence on the basis of Article 11 paragraph 3 (e) of Regulation 833/2004.However, if the persons in question no longer "habitually reside" in the Netherlands, the question comes up how Article 11 paragraph 3 (e) of Regulation 883/2004 relates to the Dutch legislation.

Some old problems remain relevant to Regulation 883/2004. A Belgian court also had to remind that according to *Cabanis-Issarte*, the **distinction between personal and derived**

rights is only relevant for benefits reserved solely for workers - *quod non in casu*. Therefore, a person who resides in Belgium since 1990 with her Italian husband who draws an Italian pension complemented with the GRAPA and, who, herself, had never carried out any professional activity, can be granted the GRAPA since she is a family member of a worker. The French report introduces a case on the distinction between personal and derived rights as well, whilst the LU report presents cases on family benefits for natural children who have been recognised by their parents and who live abroad, the problem thereby being the definition of "mainly dependent persons".

d. Third country nationals

As it is pointed out in the Austrian report, the relationship between the residence right and the right to claim social security benefits is of major importance with regard to **third country nationals** since, according to Regulation 1231/2010, the extension of the personal scope of Regulation 883/2004 depends on the fact that the person concerned is legally resident in the territory of a Member State. In this respect, a series of cases are pending before the Austrian Administrative Court (*Verwaltungsgerichtshof/VwGH*) about the question to which extent EUcitizenship influences the right of residence of third country nationals if the latter is a family member of an EUcitizen.

The Polish report points out difficulties when the legal status of thirdcountry citizens is to be determined when they are employed by a Polish enterprise in order to be posted to Germany or another country. Should such a person, before being posted, perform work in Poland for a specified period of time and be insured?

Some countries have a broad interpretation of the concept of "**purely international situations**": Czech institutions apply the coordination regulations only to persons who participated in the social security system of a Member State and afterwards moved to another Member State, e.g. to the Czech Republic. This will not apply to people to whom the legislation of one Member State has already been applicable , after which this person moved to another country outside the EU and successively asked to be admitted into e.g. the Czech social security system as if the coordination rules would apply to such a person, which is not the case if there is no continuity. The Czech EHIC may be issued to a thirdcountry national if such a person was previously insured in the other Member State, or if he resides and works in the Czech Republic and at the same time performs gainful activity in the territory of the other State.On the same topic, the NL report cites a case of the (highest) national court, which in 2010 ruled that the State of residence is not obliged to apply the provisions of the Regulation to a thirdcountry national who lawfully resides in a Member State and who is employed in Switzerland.

For the Italian Ministry of Health (Ministry of Health note No. 1192/2011), the new regulations apply provided that thirdcountry nationals are already legally residing in the territory of the Member State and are therefore regularly enrolled in the lists of the local Public Health Agency (*Azienda Sanitaria Locale*) in Italy.

Concerning **Turkish citizens**, a judgement of the Austrian Supreme Court deals with the interpretation of Decision No. 3/80 of the Council of Association. In correspondence to the ECJ case law in the Sürül case (case C-262/96 Sürül [1999] ECR I-2685), the Court here stated that, on the one hand, Decision No. 3/80 has direct effect. One the other hand, the Court stressed that, to meet the personal scope, it is not important that the person concerned legally entered Austria rather than that he or she has legal access to the Austrian labour market. In this case, a Turkish person seeking asylum in Austria could claim Austrian family benefits on the basis of Decision No. 3/80 on the grounds that she is married to an employee with Turkish citizenship in Austria (OGH 10 Ob S 168/09t).

e. Civil servants

As regards the situation of **civil servants**, some countries reflected on the possible consequences caused by the new regulations on their status. Since 2006, in the Czech Republic, some employees had been treated as normal posted workers and the exception has been applied to them (Article 14(1)(a) and Article 17 of the 1408/71). It has been proposed to provide those employees with a civil servant status, according to Article 11(3)(b) of Regulation 883/04, in order to keep them within the Czech social insurance system.

2. Material scope

a. Benefits provided by local authorities

One typical problem is the classification of **benefits provided by local authorities**. In Austria, some doubts can be reported about the qualification of schemes with regard to a newly introduced scheme which is called *bedarfsorientierte Mindestsicherung* (means tested minimum assistance) and which was implemented in 2010. The scope of this new system is to reform the existing social assistance system. As social assistance falls within the competence of the local entities, also the bedarfsorientierte Mindestsicherung is organised by local law. Nevertheless, the local entities concluded an agreement to equal the single laws on local level (Article 15a-Vereinbarung),which all federal states except one have already implemented. However,due to the fact that the entitlement to bedarfsorientierte Mindestsicherung is granted objectively on the basis of a legally defined position, it is unclear if the respective benefits must be classified as social assistance or as social security benefits in the sense of Regulation 883/2004. In Slovenia as well, municipalities finance certain social services and can provide some additional benefits which could be classified as non-statutory. In Sweden, the General Swedish Income support (*försörjningsstöd*) is administered by the municipalities and is therefore not considered as a social security benefit but as social assistance. Consequently, the Municipal Attendance Allowance, special types of accommodation (care/nursing homes and services and treatment given to patients in their homes) for the elderly, for the chronically ill and for the disabled at municipal level, childcare facilities, certain housing benefits and the General Income Support (*försörjningsstöd*) are considered as social advantages covered by Regulation 1612/68. Part of the services for the elderly provided at municipal nursing homes – considered to fall under the scope of Regulation 1612/68 – is, however, of a medical nature and should actually be reimbursed by the pension country according to the Regulation. It can be difficult to distinguish between medical services and other services provided by the same institution.A recent Swedish case from the Supreme Administrative Court concerned Care Allowance, which is a benefit paid out to the carer in case of severe illness concerning a close relation (*närståendevård*) (case RÅ 2010 ref 52). The Court found that Care Allowance was a benefit covered by Regulation 1408/71 despite the fact that the benefit was not registered as a benefit under the regulation by the Government. It was found to be a sickness benefit in cash and it made no difference that the benefit was paid out to the carer instead of to the sick person him or herself – the aim was to provide care and support for him or her. The Slovenian report also introduces difficulties with the classification of some new allowances provided to persons who reach a certain age. These meanstested benefits providing a minimum income might be considered as social security benefits or as social assistance allowances.

Again in Austria, according to national law most of the **benefits for disabled persons** are granted by local entities on the basis of the local social assistance schemes. Due to the classification as social assistance the competent authorities do not export these benefits. The national classification must be called into question, because many of the granted benefits just tend to alleviate the burdens of care or rehabilitation and therefore are medically indicated. Furthermore, the benefits are granted objectively on the basis of a legally defined position.

Some Swedish benefits which are at the boundary between exportable and non-exportable social benefits have been classified either as social advantages falling outside the scope of the regulation – but within the scope of Regulation 1612/68 (for instance the Municipal Attendance Allowance) – or as sickness benefits in kind, which are not exportable according to the Regulation (for instance the Attendance Allowance).

b. Minimum income benefits

The classifications of allowances aiming to provide a minimum income are discussed. In many EU countries, the boundaries between social security and social assistance are blurred (UK).

The Swiss Federal Supreme Court declared that the statutory minimum according to the Federal Law on Occupational Benefit Plans concerning Oldage, Survivors' and Invalidity (as well as the Federal Law on Vested Benefits in Occupational Benefit Plans concerning OldAge, Survivors' and Invalidity) is within the material scope of Regulation 1408/71, whereas what is beyond the statutory minimum falls within the material scope of Directive 98/49. The Social Security Court of the Canton of Zürich qualified the cantonal and municipal additional benefits to pensions under oldage and survivors' insurance and under invalidity insurance as special non-contributory benefits according to Article 4 paragraph 2 (a) of Regulation 1408/71. The Court also noted that these benefits are similar to the supplementary benefits (under the Federal Law on Supplementary Benefits to the Oldage, Survivors' and Invalidity Insurance) provided for under cantonal legislation within the meaning of Annex IIa of Regulation 1408/71 as adapted by the Agreement on the Free Movement of Persons (AFMP). In Denmark, the temporary benefit for unemployed persons who have been accepted for a "flexible" job for 12 months (*ledighedsydelse*) is now defined as an unemployment benefit.

The flat rate rehabilitation benefit (*bruttorevalideringsydelsen*) has been defined as a benefit in kind. It should be noted that, according to the Danish report, its status as a benefit in kind could be called into question as it is awarded in cash.

In France,the *Revenu de Solidarité Active* (RSA), which replaced the former RMI (and also the API – single parent allowance), aims both to provide minimum income and to encourage beneficiaries to find or keep a job by means of the aggregation of the allowance and part of the activity income. Does the RSA fall within the material scope of Regulation 883/2004? In principle, the response should be negative since it does not refer to one of the risks enumerated in Article 3. Nevertheless, a definitive answer may depend on the beneficiary's individual profile. In any case, the RSA should be classified under "social advantage" in the meaning of Article 7(2) of Regulation 492/2011 (formerly Regulation 1612/68).

According to the Dutch report, the Dutch social assistance scheme, embodied in the *Wet Werk en Bijstand* (WWB), is considered as a pure social assistance scheme. Hence, this scheme is excluded from the material scope of the Regulation.

c. Other problems related to the classification of benefits

The classification of **invalidity benefits** may give rise to problems. According to Swiss rulings,medical measures under the Federal Law on Invalidity Insurance are sickness benefits within the meaning of Article 4,paragraph 1 (a) and Chapter 1 of Title III of Regulation 1408/71.Moreover, sickness benefits within the meaning of these provisions (in Chapter 1, cf in particular Article 24)also comprise auxiliary equipment according to the Federal Law on Invalidity Insurance.

The Finnish report indicates the challenge of classifying**invalidity and rehabilitation benefits**. Many Member States have tightened the conditions for invalidity pensions in recent years. These differences in categorising benefits are often fatal for migrant workers, e.g. if a person has,for a significant period of time, worked in a Member State with very strict

conditions for invalidity pensions and where benefits provided for persons under pensionable age are categorised as sickness cash benefits. If the person in question lives in a Member State where the conditions for invalidity pensionsare not as strict, he or she would not receive any compensation from the previous State of employment, because the legislation of that Member State is no longer applicable. This problem is described in more detail in relation to sickness cash benefits and invalidity. This discussion has also taken place in a Nordic *Gränshinder* expert group.The line between sickness cash benefits and disability benefits is unclear. Also in the Luxembourg report, questions are raised with respect to the legal nature of the "tide-over allowance", which is calculated like a pension and paid by the invalidity pension fund to registered jobseekers. The aim of this legislation is to protect workers who are not considered as invalids in the eyes of the law on invalidity, but who are nevertheless unable to resume their previous duties. In case it is not possible for the person to re-enter the labour market during the period for which full unemployment is payable, the person is entitled to the "tide-over allowance" corresponding to the amount of the invalidity pension. However, the worker must remain available for employment.

The UK report points out that the**Disability Living Allowance**, Attendance Allowance and Carer's Allowance do not fit comfortably into the Sickness Chapter as cash benefits for sickness under Regulation 883/04 are short-term income replacement benefits for people who are temporarily sick and are not generally exportable under EU law, while the Attendance Allowance, Carer's Allowance and Disability Living Allowance appear to have more in common with long-term disability benefits. The Child Poverty Action Group reports having received numerous calls from advice workers working with people over pension age asking for clarification.

Concerning **long-term care benefits**,in France, Circular DSS/DACI No. 2010/461 of 27 December 2010 includes the *Allocation Personnalisée d'Autonomie* in the scope of long-term care benefits. It furthermore mentions that it is a benefit in kind.
Again in France, the question is whether the French *Couverture maladie universelle complémentaire*, a meanstested and non-contributory scheme which provides **supplementary healthcare benefits** in kind for persons who reside in France, is covered by coordination rules. Some aspects suggest that it should be included in the material scope of Regulation 883/2004, such as its status as a public scheme that grants legally protected benefits in which basic health care institutions participate.

In Sweden, a very important reclassification of the Swedish**parental benefit** entered into force on 1 September 2011. Since then, this benefit should in its entirety be treated as a maternity/paternity benefit and not, ever since the *Kuusijärvi* case, as a family benefit. These reforms have been inspired by the ECJ's judgement in the case *Commission v EP and Council of EU* (C-299/05). According to the Swedish report, the Swedish authorities could be criticised for not providingthe individuals concerned the relevant information Information leaflets and guidelines were not fully amended by 1 September and there are no transitional rules.However, the new order applied to benefit days immediately after the indicated dates.Again in Sweden, among the family benefits we now find the municipal child raising benefit (*vårdnadsbridrag*).

The classification of **entire schemes** may be discussed. In France, the *régime local complémentaire d'assurance maladie d'Alsace-Moselle* (statutory supplementary healthcare scheme for the Alsace-Moselle region) is covered by coordination rules (Circular DSS/DACI No. 2010/461 of 27 December 2010).The voluntary scheme applicable to French persons who work abroad and managed by the *Caisse des Français de l'Etranger* (CFE) is covered by the regulation, even if it concerns activities accomplished abroad or by non-resident persons (Circular DSS/DACI No. 2010/461 of 27 December 2010).In addition, there are contractual schemes. In the Netherlands, there is a growing interest in modernising the social security system by seeking public-private solutions. As a result, the number of non-statutory benefits based on, for example, contractual (collective bargaining) arrangements, is

increasing. This may cause problems since non-statutory benefits do not fall within the material scope of the Regulation.

The Slovenian report provides a good example of a **supplementary scheme** which falls within the scope of Regulation 883/2004. Indeed, it extends to pensions from mandatory supplementary pension insurance, which is considered to be part of social security in Slovenia (although the prorata temporis method does not apply to this kind of pensions according to Annex VIII of the Regulation 883/2004). They are regulated in the Pension and Invalidity Insurance Act (ZPIZ-1) for persons performing heavy and health-damaging work, or work that cannot be performed after a certain age.

B. General principles

1. Equality of treatment

Even if the principle of equality of treatment does not raise much concern, a few allegedly illegal situations are spotted (in Slovenia, the law still includes some nationality clauses, however, they are not applied to EU and assimilated nationals: the legislator itself expressly prohibits such discrimination).

The Bulgarian report cites a national provisionpursuant to which “during their residence in the Republic of Bulgaria the European Union citizens and the members of their families, who are not European union citizens, shall have all rights and obligations according to Bulgarian legislation […] except the ones for which Bulgarian citizenship is required”. The direct application of Article 4 of Regulation 883/2004 supplements the national framework and could even override it, especially when persons are entitled under a foreign social security scheme and exercise their rights in Bulgaria.In Luxembourg, a new element of discrimination can be found in the new financial aid for young people in higher education replacing family benefits for children over 18 It is limited to young people in higher education in Luxembourg or abroad who have their legal residence in Luxembourg. Children of frontier workers residing in a neighbouring country are therefore excluded. The same applies to Luxembourg nationals who decide to reside in a neighbouring country of Luxembourg and who will further pursue their higher education in Luxembourg or abroad.

In Switzerland, the Federal Administrative Court followedthe Federal Supreme Court’s case law and declared in its Decision C-885/2009 of 30 November 2010 that the award of extraordinary pensions – provided for in invalidity insurance as well as in oldage and survivors’ insurance in favour of Swiss citizens only – may not be denied within the scope of Regulation 1408/71 on the grounds of a person’s foreign nationality (cf Article 3,paragraph 1 of Regulation 1408/71). Moreover, the entitlement to cantonal additional benefits to pensions under oldage and survivors’ insurance and under invalidity insurance provided for in the Canton of Zürich is in principle subject to the completion of a period of residence in this canton, which is 10 years for Swiss citizens and 15 years for foreigners. Since this difference of treatment constitutes (direct) discrimination – as the Social Security Court of the Canton of Zürich ruled in its Decision ZL.2009.00015 of 30 September 2010 – non-Swiss nationals within the scope of Regulation 1408/71 have to complete the same period of residence as Swiss citizens, i.e. a period of 10 years.

In some cases, the **condition of residence**however remainsa source of potential indirect discrimination. According to Lithuanian law, the insurance periods acquired before June 1991 in the territory of the Soviet Union are taken into account when a pensioner is granted a pension. This rule only applies to people who are permanent residents of Lithuania at the time the pension is granted. This means that persons who reside outside Lithuania, for example in another Member State, are treated differently from country residents. This may be seen as discrimination on the grounds of the place of residence.

The condition of residence may create risks of indirect discrimination in countries such as Sweden, where social security is based on a residence system. In Sweden, problems have hitherto especially occurred in connection with the parental benefit. Persons who have moved to another Member State during child leave and who are no longer working in Sweden have been denied parental benefits due to the Swedish residence condition. According to national rules, income-related parental benefitsare now a work-based benefit. However, there still is a residence condition for the child. Persons who stop working in Sweden and move abroad with their families may therefore still be denied aparental benefit. There is, however, a right to continued workbenefits during the three-month post-protection period and, according to the new regulation, the residence condition may not be upheld since persons receiving work-based benefits are still considered as employed, Sweden remaining the competent State.

In the UK, the "right to reside test", in relation to Directive 2004/38, is causing an increasing number of cases that deal with social security benefits.

Some reports introduce cases where**discriminations have been removed** by law or by the social security institutions. In Cyprus, Law 132(I)/2002 has amended the main statute in the field of social security, notably by abrogating provisions in this statute which were discriminatory on the basis of nationality.Now, the term "absence from Cyprus" is assimilated to the term "absence from another Member State".

In Sweden, national **qualifying periods** may also constitute indirect discrimination. This has particularly been the case with the income-related parental benefit, which presupposes 240 days of insurance for sickness benefits in cash prior to the birth of the child. Formerly, Swedish authorities demanded that at least the last day of insurance prior to the birth of the child should be fulfilled in Sweden in order to aggregate periods from another Member State. This condition is more difficult to fulfil for a migrant worker. After the ECJ's judgements in *Rockler* (C-137/04) and *Öberg* (C-185/04) this view has changed and the National Social Insurance Board now accepts that a person only has periods of insurance from another Member State in order to qualify for an income-related parental benefit. The person must, however, be covered by the work-based insurance.

In Switzerland, these are the tribunals which have put an end to discrimination based on nationality. In Decision C-5284/2008 of 3 December 2010, the Federal Administrative Court judged that a Swiss citizen cannot rely on Article 3,paragraph 1 of Regulation 1408/71 in proceedings against a Swiss institution. The Swiss report states, however, that a national of a Member State who is in a relevant cross-border situation can rely on this equality of treatment provision (against indirect discrimination) in proceedings against his or her Member State of origin.

2. Assimilation of facts

Assimilation of facts is often dealt with in the national reports. A great deal of concrete examples is provided.

Some reports state that national authorities and tribunals have a very restricted approach towards assimilation of facts (DK). According to the Polish report, one of the most frequent problems is the situation of persons receiving benefits from more than one country and/or receiving benefits when working (especially in case of the unemployment benefits).

The CZ report indicates that a question was recently raised in connection with the status of an employee under a contract on work performance. Such work is not insured under the Czech legislation, as it should be used for very short and unstable employment (only 150 hours of work per calendar year are envisaged by the Czech law – Article 75 of the Labour Code). In Slovakia this type of agreement exists as well, however, it applies to more hours of work (up to 300 hours a year). The question is whether and how to assimilate the facts

whenan employee of a Slovak company is active under the contract on work performance established under the Slovak legislation, if the activity is performed for the Slovak company exclusively on the territory of the Czech Republic, without the employee being posted. The question is whether Czech institutions should assimilate the type of contract or whether they should rather take account of the extent of the work. Consider, for example, a person who works 200 hours a year.If the type of agreement is decisive, he or she would be insured (as "contract on work performance" is not insured), but if the length of work is crucial, he or she would be (as 200 hours do lead to the insurance coverage). The Czech institutions did not find an entirely unified interpretation of coordination rules and national legislation as regards this issue. It has been recommended that in future similar cases a contract on work according to Czech legislation should be established – meaning that the institutions should take account of the factual circumstances of the case and decide whether such activity leads to insurance coverage under the Czech provisions.

Another example is drawn from the Czech report. A question wasrecently raised on the assimilation of facts in the field of health insurance. In the Czech system, if a person is a registered unemployed person, the State pays contributions for such a person. It is necessary to point out that the Czech unemployment benefits are not exported for the person concerned to another Member State when he or she is living there, but claims that the Czech legislation is still the relevant legislation. It is also unclear whether the State would also pay contributions when a person is registered as unemployed in another Member State. Czech institutions decided not to assimilate the facts in this case and for the purposes of health insurance decided to consider such a person as a person without a taxable income who has the obligation to pay his or her contributions himself.

The Finnish report provides another illustration in relation to persons residing in Finland and employed in Sweden,viz mariners. Because of the changes in the Swedish sickness insurance legislation of 2008, it has become apparent that people who reside in Finland and become sick are not eligible for sickness/rehabilitation cash benefits after the first three months, although their work relationship would still be valid in Sweden. The Swedish legislation requires that a person's possibilities to work for other employers should be evaluated after the first three months of disability. For a person resident in Sweden this requires contact with the employment office. In the Finnish legislation there is no such requirementconcerning employment offices, which means that the Swedish authorities considers the requirement as not fulfilled.

In France, according to Circular DSS/DACI No. 2010/461 of 27 December 2010, it is necessary, when periods of residence are required for the entitlement of a special non-contributory cash benefit listed in Annex X, to take account of all periods of residence accomplished in other Member States, even if they have not been accomplished under the social security legislation. Therefore, when an EU citizen claims the AAH (disabled adults' allowance) which is subject to a condition of prior residence of 3 months on the French territory, the French competent institutions must take periods of residence in other Member States into consideration.

The French administration gives another good example of a situation where facts should be assimilated. The pensionable age is lowered for insured persons who started their professional career very young. It would be discriminatory not to take the beginning of the career into account merely because it took place in another Member State (Circular DSS/DACI No. 2010/461 of 27 December 2010).Nevertheless, for the French administration the assimilation of facts must not be used instead of the system of aggregation of periods when the question relates to the duration of periods of insurance, professional activity or residence, except when the regulation allows a joint application of both principles.

The report from Liechtenstein shows that the principle of assimilation can work in two ways. According to the national legislation, the departure benefit (the benefit which the insured person is entitled to on departure from a provident institution before an insured event occurs) may be paid in cash if the claimant leaves the Liechtenstein-Swiss area permanently or if he

or she becomes self-employed, unless – in either case – the person concerned continues to be compulsorily insured for oldage, death and invalidity under the legislation of an EEA Member State. The question is whether the principle of assimilation of facts not only requires compulsory insurance in another Member State to be assimilated to that in Liechtenstein to the effect of excluding a payment in cash of the departure benefit in the case of a person leaving Liechtenstein, but whether it also requires taking up a self-employed activity in another Member State to be assimilated to that in Liechtenstein to the effect of rendering a payment in cash of the departure benefit possible even (in contrast with the Liechtenstein legislation) if the newly self-employed person is compulsorily insured for the risks concerned in another EEA Member State. A person who takes up a self-employed activity in Liechtenstein and continues to reside in this State can actually profit from the payment in cash of the departure benefit in spite of being compulsorily insured under the Liechtenstein law, owing to his or her self-employed activity as well as to his or her residence in Liechtenstein.

Can the principle of assimilation of facts **go against the person's interests**? In Slovenia, an important case was recently ruledby the Slovenian social courts. The first instance court held that the assimilation of facts (insurance in Austria) could lead to the denial of a prorata pension in Slovenia. The higher Labour and Social Court overturned this decision, essentially arguing that the coordination rules should have a positive outcome for a migrant and not vice versa. The Slovenian Supreme Court agreed with the first instance social court and denied a person still insured in Austria the right to a prorata oldage pension.

3. Aggregation of periods

The principle of aggregation is globally well applied in Member States. For instance, the Greek report (see also the Dutch report) states that Greek competent institutions respect the way periods of insurance are defined, recognised and taken into account under the legislation of other Member States involved (e.g. various assimilated periods), even if these periods were completed under the latter legislation, they would not be taken into account. Yet, specific issues may arise where "special provisions – status" on qualifying conditions are established for categories of insured persons. The Polish report raises more doubt about the way aggregation is completed by national institutions. In Hungary, it poses or will pose a difficulty that, in spite of the content of the Hungarian domestic regulations, the periods of employment completed in another Member State which should be considered only for the aggregation of entitlement should also be taken into consideration when the extent of the benefit is calculated.

Some other reports underline that the**new regulation may not always be clear**. For instance, one question was raised on whether Article 6 requires a minimum period of insurance pursued in the Member State which is the competent State for the aggregation of periods (AT).

Furthermore, new provisions for the periods spent on raising children are said to be difficult to interpret. Not all the Member States use the new form issued for this.Its use is problematic (HU).

In Slovenia, for entitlement to a flat rate meanstested state pension financed by the state budget, a person requires 30 years of registered permanent residence in Slovenia between 15 and 65 years of age and should not be entitled to any other pension. Residence in other Member States is also taken into account for this special non-contributory benefit. In addition, permanent residence (permit) is required in order to claim and receive the state pension. This means that not every EU citizen could come to Slovenia and immediately claim the state pension.

Sometimes, problems are solved directly by courts. The CH report mentions a case of 30 September 2010 on the cantonal and municipal additional benefits to pensions of the oldage

and survivors' insurance and of the invalidity insurance.Here, the Social Security Court of the Canton of Zürich ruled that periods of residence completed in another Member State are to be regarded as periods completed in the Canton of Zürich (Article 10a,paragraph 2 of Regulation 1408/71).

A dispute addressed by SOLVIT Cyprus is reported in the CY report. It concerned a Czech citizen who had worked in Crete, Greece, for a Cypriot company. The worker in question addressed the Ministry of Health in Cyprus for the issuance of an E104 on which insurance periods are recorded. There was a delay in the treatment of the application and by 3 September 2010, the date of receipt of the complaint by SOLVIT Cyprus, the matter was still pending. No application on behalf of the complainant had been detected at the Ministry of Health. All the information and assistance needed were given to the complainant in view of submitting an application afresh. The dispute was brought to an end on 11 October 2010.

Under Regulation 883/04, the Danish report states that the principle of aggregation for the entitlement to a social pension as expressed in Article 51 of the Regulation does not apply to family members or students. This means that family members and students will be required to have resided in Denmark for 3 years before they are entitled to a partial pension.

4. Export of benefits

If we leave aside the sensitive question of non-contributory benefits, the principle of export of benefits is well applied by Member States or by courts. The CH report refers to several cases where benefits, in principle restricted to the Swiss territory, have been declared as exportable to other Member States.

After the *Hendrix* casewhich dealt with**special non-contributory benefits in cash**, the Dutch national court declared the non-export clause of the Wajongbenefit not applicable in this particular case (CRvB 12-12-2008, USZ 2009/35). However, there are also examples of national caselaw where the national court came to another conclusion. In this respect, see for example CRvB 1-12-2010, USZ 2011/1.

The same solution may not apply to Switzerland, where special non-contributory benefits in cash are also provided. In Decision C-5797/2008 of 8 October 2010, the Federal Administrative Court decided that the helplessness allowance of the invalidity insurance was not exportable. By doing so, it followed the case law of the Federal Supreme Court, which had ruled that the helplessness allowance of the invalidity insurance and of the oldage insurance is – irrespective of its real nature (special non-contributory benefit under Art. 4 Para. 2a of Regulation 1408/71 or not) – non-exportable, because it is listed in Annex IIa to Regulation 1408/71 (Article 10a,paragraph 1 of Regulation 1408/71), as stipulated in the Protocol to Annex II to the AFMP.

The following interesting case of the French *Cour de cassation*on **old-age pensions**deserves to be reported. The widower of an Algerian national who is entitled to an invalidity benefit claimed the supplementary invalidity allowance which is listed in Annex IIa) of Regulation 1408/71. Her claim was turned down since her residence is set in Algeria. For the French court, the refusal is justified by the fact that the allowance is listed in Annex IIa) and therefore is not exportable (Cass. Civ. 2nd Chamber, 28 April 2011, case 10-30502). This case is not in line with former cases where the *Cour de cassation* ruled that the benefit is covered by thecooperation agreement with Morocco as long as falls within the scope of the Regulation, notwithstanding the fact that it is classified as a special cash non-contributory benefit (Cass. Social Chamber, 15 April 2009, case 97-20641). It is true that under the new association agreements, benefits listed in Annex IIa) are not exportable. However, the case of 15 April 2009 was based on the old association agreement. In addition, the *Cour de cassation* should have ruled on the base of the association agreement and not on the base of Regulation 1408/71, which was not applicable to the case.

The complex distinction between **sickness benefits in cash and in kind** may also create problems. In French law, a long-term care benefit called *allocation personnalisée d'autonomie* is subject to residence in France. The absence of exportability is explained by the legal classification as "benefit in kind". However, given the characteristics of these benefits, it may be classified as a benefit in cash under the coordination regulations. The same concern is raised with the*prestation de compensation* (third person assistance and equipment benefit for disabled), a benefit for disabled people. This benefit can be compared to the Swedish disability allowance, which is granted to disabled people whose mobility was reduced between the ages of 19 and 65, and which is intended to finance the care of a third person or to allow the disabled person to bear the costs owing to his or her disability and to improve that person's state of health and quality of life, as a person reliant on care.

A good practise deserves to be introduced. In Romania, the export of pensions is made in euros, pounds or US dollars, depending on the beneficiary's decision. Concerning **old age pensions**, the CZ report indicates that if the recipient's bank charges a fee for incoming transaction, the recipient has to bear this cost. One other problem worth mentioning in this regard are the very high bank transfer fees when paying benefits abroad. It is also interesting to see that, in the Czech Republic, a Certificate of Living which confirms that a pensioner is alive is compulsory for all pensioners who have their pensions delivered abroad, regardless of whether or not a convention has been concluded with the country in which he or she is residing.

C. Applicable legislation

Rules of conflict of law are well-known and well applied by Member States. Good practices are highlighted by some reports. However, in some situations often referring to specific cases, national reports focus on some difficultieswhich may have already existed under Regulation 1408/71; which are sometimes related to the interpretation of new provisions of Regulation 883/2004. In some cases, responses could be provided (or problems could be solved) by instruments such as the implementing regulation, the decisions of the Administrative Commission or the EC practical guide. Unfortunately, local or sometimes central institutions are not always familiar with these sources.

1. General rules

a. Lex loci laboris

This core rule is

well implemented. It is only with respect to specific situations that reports refer to some difficulties.
An implementing problem is reported between Austria and Germany with regard to the **lex loci laboris**and so called *geringfügig beschäftigte Personen*, which, according to Austrian law are employees who gain an income which does not exceed a defined amount. For the year 2011 the income must not exceed € 374.02 per month. In this case the person concerned is only included into accident at work insurance and not into health care, pension or unemployment. However, Austrian law provides the possibility of a voluntary health care and pension insurance, in which case also family members can be covered by health care insurance. The question is which provision concerning the applicable legislation applies to this group of persons? The Austrian authorities declared that in this case they apply the provision of Article 11 (3) (a), which means the lex loci laboris. Consequently, Austria is the competent State if the person concerned pursues an activity in Austria. The consequence of this legal interpretation, however,is that the person concerned is not covered by health care insurance according to Austrian law. Therefore, with regard to health care insurance this

group of persons must be considered as family members in the sense of Article (1) (i) Regulation 883/2004 to achieve health care coverage.

The lex loci laboris might be difficult to apply in the context of women in **parental leave**. According to the Czech report, a specific problem emerged in relation to Slovak female employees. There is a significant number of women who work as employees in the Slovak Republic and stay in the Czech Republic during their parental leave (which may last for up to three years of age of the child, while their employment relationship continues and is protected by the Slovak labour law). After the parental leave is over, they return to Slovakia and continue to work there. The Czech institutions are of the opinion that during the parental leave the applicable legislation does not change and Slovak legislation continues to be applied. However, the Slovak institutions do not share this interpretation. The Czech institutions are currently negotiating with the Slovak institutions in order to unify their interpretation of coordination rules in this field.

A similar problem is reported by the Lithuanian report. According to Lithuanian legislation, a mother (or father) who takes **childcare leave** remains formally in labour relations (employed), but does not perform the work (and does not receive the wage). If the father (or mother) works in another Member State, the legislation of that State should be applicable. However, that State may argue that a child stays with the mother (or father) in Lithuania, where he or she formally remains in labour relations and therefore Lithuanian legislation should be applicable. The Polish and the Finnish reports also raise this question.

The lex loci laboris application may also be difficult in countries where **social security is based on residence**. For instance, some challenges have been reported in situations of temporary stay and irregular employment relationships in Finland. According to national legislation, in order to become eligible for residence based benefits provided for by KELA, the residence criteria must be fulfilled. However, if a person does not permanently move to Finland and is covered by the Regulations, the person will be covered for benefits provided by KELA if he or she fulfils the minimum criteria set for employed persons. The person in question must have an employment contract for at least four months and must work at least 18 hours a week.Moreover, his or her salary must at least amount to the minimum salary determined in the labour market contract.If there is no such contract,the salary must at least amount to 1052 euros a month (for full-time work). If the actual amount of the hours of work is unclear, for example in companies hiring staff,the implementation is very laborious and it is unclear for the client what his or her rights are. This is a question that will be evaluated by the working group that is set to evaluate the need to change law on residence based social security.

The LU report points out the lack of rulesont**elework**. In 2005, Luxembourg social partners transposed the European Framework Agreement on telework and some firms offered their frontier workers to telework in their country of residence. According to Article 13,(2) (a) of Regulation 1408/71, the lex locis laboris changed from the Luxembourg legislation to the legislation of Belgium, France or Germany (among others). As a consequence, workers lost their status as cross-border workers and the advantages/benefits attached to it.

The payment of contributions can be problematic when the employer has no office in the country where the employee works. In Romania, there are several cases of persons working in Romania with a foreign employer who does not have a registered office in Romania, andcomplaining about the possibility of payment of social security contributions in Romania. The Hungarian report observed that in some cases contributions had to be paid in Hungary even when the claimant was employed abroad.

b. Lex domicilii

We know the application of the law of residence raises many questions concerning for instance the status of non-active persons. The distribution of the financial burden between

Member States is even more sensitive when the application of the law of residence is at stake. However most difficultiesreported are mainly dealing with the concrete application of the definition/concept of residence.

The Austrian report dealt with a question about the application of the principle of **law of residence** with regard to the inclusion of family members into health care insurance. Under Regulation 1408/71, family members residing in another Member State were entitled to benefits in kind provided by the Member State of residence on account of the competent State, provided that they are not already entitled to benefits in kind by the legislation of the Member State of residence. If e.g. a family resided in Austria, the father being insured in Germany and the mother in Austria, the rule was applied in such a way that the children were entitled to benefits in kind in Austria on account of the Austrian Health Care Insurance Carrier. Austrian authorities also applied this rule if the mother just started to pursue an activity in Austria and if the father was already insured in Germany. A comparable rule does, however, not exist under Regulation 883/2004. Therefore,the question is which State is the competent State for family members residing in another State than the competent State. In this case, the competent Austrian authorities refer to the provision of Article 11 (3) (e), which provides that the legislation of the State of residence is applicable to every person who is not already covered by lit a-d, without prejudice to any other provision of Regulation 883/2004. As a result, Austrian authorities still apply the provision of Article 19 (2) of Regulation 1408/71 by legal analogy to the before mentioned cases under Regulation 883/2004 as well.

The **concept of residence** raises many concerns. For instance, the Cypriot legal order uses the term residence (μόνιμη διαμονή), but does not define it from a legal point of view. The statutes involved merely use the term residence or notably distinguish between residence not exceeding three months, residence based on longer stays (e.g. a five-year residence) and permanent residence (μόνιμος κάτοικος).

The Finnish report also points out the problems related to the **definition of residence**. Several interesting examples are provided by this report. For instance,a person has worked and resided in Finland (Member State A) and is now unemployed. Member State B, which is the country of origin of the employee, however considers that the employee resided in Member State B while working in Finland. This means that Member State B has considered the employee to be across-border worker the whole time, whereas Finland has considered the person to have resided and worked in Finland. Consequently, Member State B has appliedArticle 65 of Regulation 883/2004 to the person and has started to pay unemployment benefits to that person while seeking reimbursement from Finland. Another interesting case deals with a student who movesfrom Member State A to Member State B to study there for one and a half years. According to the legislation in Member State A, the student is still considered to be residing in Member State A while studying in Member State B. This is regarded as in compliance with Article 11 of Regulation 987/2009. However, Member State B requires that Member State A issues an S1form for the student, as it considers that the student is residing in Member State B for Chapter 1 purposes. Member State B has not in any way indicated that it would consider the legislation of Member State B as the legislation applicable to the student according to Title II. It would seem to imply that "residence" as it is used in Chapter 1 has a different meaning than“residence” in Title II.

With respect to students again, the Dutch report introduces difficulties with respect to the interpretation of the **place of residence** of students who seize the opportunity to study in another Member State. For instance, does a Dutch student who studies in Germany for a period of four years still ‘habitually reside’ in the Netherlands? In the Slovenian report, the difficulty of the concept of residence is pointed out as in domestic law a distinction is made between permanent and temporary residence.

The French report mentions that the **concept of residence** as defined by Article 11 of Regulation 987/2009 can be compared with the French concept of residence included in Article R. 115-6 of the social security code: a person is considered to be resident in France if

he or she has his or her household or main place of stay on the French territory. The household is the place where the person normally stays, which is the habitual place of residence provided that the residence be permanent. The condition of place of main stay is met when the person him or herself is effectively present on the French territory. This condition is deemed to be met if the person stays at least 6 months (during a given year). The French definition does not seem incompatible with the EU one.

In Lithuania, the legislation has been amended to make sure that national institutions apply the **concept of residence**as defined in Regulation 883/2004. The Lithuanian report presents a case where a person declares her or his residence in two Member States and regrets the lack of rule to set the place of residence according to Regulation 883/2004.

c. Other rules of conflict

Concerning **seafarers**, the Cyprus report states that national law had to be amended by means of Law 114(I)/2010. Part (I)(2) of Table I referring to Article 3(2)(a) of said law currently stands as follows: "Employment of a person under a contract or under the circumstances referred to in the above-mentioned paragraph 1, when the said person falls in the scope of application of EC Regulation 883/2004, as it has been lately amended by EC Regulation 988/2009 and as it will be further amended or replaced, and serves as a master or crew member of a vessel under the flag of the Republic or as captain or crew member of an aircraft, whose owner or operator has their principal place of business in Cyprus". An article was added by the same amendment. Exempted employment includes the employment of a person "…(b) who is employed aboard a vessel under the flag of the Republic for a period which does not exceed six months, (c) who does not have his/her usual residence in Cyprus, and (d) who is insured in another country".

2. Posting

Many posting cases are clear and raise no problem. The new rules are considered to be a very positive input. Nevertheless, in some specific situations, the implementation of posting rules may remain difficult.

The proof of **substantial activities in the country of origin** of the employer may raise concerns. The Hungarian report provides a good example of the rules which are implemented to ensure that this requirement is fulfilled. If the employer only has administrative employees left at home during the entire period of the posting , or if the employer's activity in the other State is different from the activity pursued at home, Hungarian law may not be applied. Neither may it be applied if the employee does not have a legal employment relationship for 30 days before the posting, if he or she had already spent 24 months in the same State and if less than 60 days passed since his or her return, or if he or she concludes an employment contract with the company where he or she is posted. The Hungarian report refers to problems related to the evidence of continuous substantial activities of the posting undertaking before and throughout the whole duration of the posting.

In Lithuania, the scale of "substantial activity" was decreased from 20 to 10 per cent of the income of the enterprise;the employer is requested to fill in the extended questionnaire about the activity, income, etc; and the State Social Insurance Board is empowered to check the information at the workplace. The LT report introduces an interesting case: The Foreign Benefit Office evaluated that a part of an enterprise's income earned in Lithuania was less than 10 per cent of the total income and refused to issue a form E 101 according to Article 14, paragraph 2 of Regulation 987/2009. The Administrative Court did not argue against the application of the 10 per cent income as a criterion for "substantial activity".However, it decided that the "substantial activity" of the enterprise concerned was calculated in a doubtful way and that the Foreign Benefit Office should once more reconsider the issue of the requested form E101. After the reconsideration the decision of the Foreign Benefit Office was

confirmed – the “substantial activity” of an enterprise was not proven and the forms E101 were not issued. This case reasoned the necessity to establish the extended questionnaire mentioned above.

Some reports emphasise the criteria of **place of residence** and **link of authority** to define the posting. For instance, the Danish interpretation of a posted worker is a person who is employed in an EEA country different from the country where that person is normally employed. If the person becomes employed directly by the employer in the country of employment, this is no longer considered posting. A posted worker may reside in the country of employment or in Denmark and daily or weekly travel to work in the country of employment.

With regard to the **link of authority**, the Polish report cites an interesting case In its judgement of 5 May 2010,the Supreme Court expressed the following opinion: the coverage of the temporary workers by the applicable social security legislation – in case of workers employed solely for the purpose of performing work in another EU Member State, excluding the formal relationship that exists between the posting employer and the worker and the coverage by the state labour lawon job contracts, type of work, procedures for employment and redundancy – can only be classified as that of posting (designed for posted work) if the agency posting the workers does engage in ordinary (normal) economic activity in the posting (sending) country, where it should also hold its registered quarters, as such agency should not, for the purpose of such qualification, limit its activity to internal administrative and managerial procedures that are required simply to run the enterprise.

Concerning the **payment of the salary**, the Swedish report explains that if wages are paid by a subsidiary company in the country where the work is performed, there is no posting. If the wages are paid both by the holding company in Sweden and by the subsidiary in the other country, the situation may be classified as posting.

Another point discussed in the Austrian report is the question to what extent the **return of the posted person** to the Member State of residence affects the posting period of 24 months. Taking the intended maximum posting period into consideration, Austrian authorities consider an interruption of two months sufficient to let the posting period of 24 months start again. This is not the case if e.g. a posted worker returns to the State of residence for only three days after 20 months of posting and then returns to the receiving State for another 20 days. In this case for the second 20 days the receiving State is the competent State. Nevertheless, if after 20 months the person concerned returns for a period of two months, the posting period according to Article 12 of Regulation 883/2004 starts from the beginning again.

According to the Italian report, **an apprentice** does in principle not fall within the scope of the posting rules. The certification of posting may only be issued if the overseas activities carried out fall within a training programme and if the employer is able to present documentation proving the continuation of training abroad in the manner prescribed by Italian law. In the Portuguese report, questions are asked to what extent the posting provisions are applicable to temporary work agencies who post workers to other Member States for long periods, successively to several countries without having to come back after the conclusion of a contract.
According to Finnish national legislation the **family members** can still be considered as residing in Finland although they are staying abroad with a posted worker. A Member State has contacted KELA and is demanding an exception for these family members as well according to Article 16. This is indeed possible, but should the case not be solved by establishing by common agreement the centre of interests of the person concerned according to Article 11 of Regulation 987/2009? According to this Article it is firstly the national legislation which defines whether a person is considered as residing in a Member State or not. If the other Member State agrees with this then the case is clear, but if there are

different views the case should be settled taking into consideration the elements mentioned in Article 11.

The Dutch report points out that the application rules of the Regulation may clash with national legislation when family members join civil servants or diplomats who are posted abroad. If the **family members** are not employed themselves and/or do not receive a social security benefit, they are in principle subject to the legislation of the Member State of residence on the basis of Article 11,paragraph 3 (e) of Regulation 833/2004. However, if the persons in question no longer 'habitually reside' in the Netherlands, the question comes up how Article 11,paragraph 3 (e) of Regulation 883/2004 relates to the Dutch rules. Is it at all possible to offer the family members of civil servants and diplomats access to social security benefits under the Dutch scheme or are the family members subject to the social security scheme of the State of residence in any case on the basis of the Regulation?

The Czech report underlines that social security aspects of the posting of employees are interpreted in accordance with Regulation 883/2004 with the understanding that in the Czech Republic the definition of an employed person not only includes those in a legal labour relation, but also **partners and statutory representatives of limited companies and other persons who are considered to be employees** under the Sickness Insurance Act and under the Act on Public Health Insurance. Citizenship is disregarded. Furthermore, special attention is paid to the conditions in case of "letter box" companies and labour agencies. This also applies if work is performed in more than one Member State. In that case, the activities of such companies are checked in a more detailed way.

Administrative problems are also underlined, especially with respect to the A1 form. According to the Austrian report, the existing rules are not considered appropriate to avoid an abuse of this legal instrument even if it is appreciated from an administrative point of view that the maximum posting period has been extended to two years. Especially the binding effect of the A1 is assessed as excessive because the receiving Member State has no real possibility to challenge the decision of the sending Member State. This is due to the fact that, according to a spokesman of the Austrian Ministry of Labour, Social Affairs and Consumer Protection, the new dialogue and conciliation procedure on the validity of documents and the determination of the applicable legislation as laid down by CASSTM decision A1 is not operating appropriately. Especially the duration of the conciliation procedure is challenging the effectiveness of this legal instrument. The same applies to the fact that, according to CASSTM decision A1 Z4, the dialogue and conciliation procedure must be suspended in the event that the matter of the procedure has become subject of a judicial or administrative appeal procedure under national law in the Member State of the institution that issued the document in question. This rule enables employers to defer a final decision about the validity of an issued A1 form by involving national courts. At the moment, two dialogue and conciliation procedures have been initiated with Germany and Hungary, but a final decision cannot be expected in the near feature due to the above mentioned reasons. According to a spokesman of the Austrian Ministry of Labour, Social Affairs and Consumer Protection,the first experiences with the procedure are therefore negative.

Regarding **self-employed posting**, not much information is available. Some circularsdefine when the activity is similar to that of an employee or a self-employed person (IT). It shows the concern to faithfully apply new coordination rules.The Swedish report also stressesthe difficulty to evaluate the similarity of the activities carried out.

The NL report insists that the difference between the maximum duration of the posting and the maximum duration of the posting period according to **fiscal law** remains a problem For instance for international drivers: On the basis of the application rules of the Regulation, international drivers may, for example, be subject to the Dutch social security legislation. Consequently, social security contributions will be levied in the Netherlands. When taxes are to be levied in, for example, Germany, problems may arise, since Germany is entitled to levy taxes in retrospect over a period of three years. Consequently, the person concerned may be confronted with a considerable retrospective collection of taxes.

Posting leads to the **exemption of contributions** in the Member State where the activity is temporarily performed. The Italian administration has clarified the new procedures for contribution exemptions.

It is interesting to observe that, ahead of the entry into force of Regulation 883/2004 in the EEA countries,**Norway** accepts posting periods up to 24 months instead of applying Regulation 1408/71since 1 May 2010.

3. The pursuit of activities in two or more Member States

The rules of conflict of law have been modified by the new regulations. It is therefore understandable that some reports refer to concrete problems of interpretation and implementation. However, some other reports do not see any difficulty which tend to demonstrate that besides very specific situations due to administrative problems or unusual patterns of mobility, the new rules are applied in a satisfactory manner.

a. The existence of at least two activities

The **proof of two activities** is sometimes difficult to produce. In Austria, if a person pursues an activity in two or more Member States, Austrian authorities apply an observation period of 12 months. This means that an activity in two Member States must not be pursued continuously in parallel, but over a 12-month-period.
Concerning **marginal activities**, the Belgian report states that clerks are instructed to pay particular attention to situations where the completed questionnaire suggests the possible presence of “activities of a marginal extent”, as referred to in the practical guide, notably with a view to the application of Article 16(2) of the implementing regulation. The Czech and the Hungarian reports also mention the lack of clarity on the concept of “marginal activities”.

The Slovenian report introduces an interesting case: A woman was working 24 hours a week in Austria and 16 hours a week in Slovenia, where she permanently resided. According to Slovenian legislation and Regulation 883/2004, Slovenian legislation had to be applied according to the Higher Labour and Social Court.
The Polish report also refers to situations where persons become employed by two employers, one contract (performed abroad) providing more than 90% of the income. Article 13 (1) of Regulation 883-2004 is applicable here (work conducted for two employers in two different Member States: place of residence), so that the person in question remains insured under Polish legislation. Contributions are paid on the basis of the Polish income only.
In Sweden, the guidelines of the National Social Insurance Board mention that a person residing in Sweden can be considered as normally working in Sweden as long as he or she maintains a connection to the Swedish labour market while working in another country. The rules concerning post-protection are said to provide guidance in this regard. A person can thus be considered as normally working in Sweden when there are no more than three months in between the periods of work in Sweden. A person who receives a work-based benefit may also be regarded as normally working in Sweden.

The performance of a **substantial activity**is decisive according to Article 13 of Regulation 883/2004. As wages still differ greatly between the EU countries, Austrian authorities pay major attendance to the temporary dimension of the activity and not to the economic activity.

When it comes to the **pursuit of an employed and a self-employed activity**, the Swiss Federal Supreme Court ruled that a person who is employed or self-employed in Switzerland, where he or she resides, and who receives other income, as a limited partner from a limited partnership established in Germany, is subject to Swiss legislation according to Title II of Regulation 1408/71 (Moreover, Swiss legislation stipulates that the income derived from the German partnership constitutes an income from a self-employed activity subject to contributions to the oldage and survivors' insurance).Both the Lithuanian and the

Polish report mention problemswith some Lithuanian employers who claim that certain Polish self-employed persons had concluded labour contracts with them. For this reason, on behalf of the persons concerned,the Lithuanian employers request that Lithuanian legislation should be applicable to the persons concerned. Most of the workers of such Lithuanian companies are Polish taxi drivers, shoemakers, dentists, hairdressers, etc. The main reason behind this increase in this number of enterprises and workers seems to be to avoid paying the higher social insurance contributions in Poland. It is also noticed that one tries to find Lithuanian employers through mediation firms, advertiseshis or her services on the internet and promises lower social insurance contribution rates.

The Finnish report points out a problem which may be known in several Member States. In Article 11(2) of Regulation 883/2004 it is stated that "**persons receiving cash benefits because or as a consequence of their activity as an employed or self-employed person shall be considered to be pursuing the said activity**". This means that receiving cash benefits should be considered in equal terms with an actual employment. A person who receives cash benefits and works simultaneously in another Member State seems to be considered as working in two Member States.The applicable legislation would be the legislation of the Member State of residence. However,if a person receives cash benefits from one Member State (i.e. unemployment, sickness, rehabilitation or parental allowances), in most cases this means that the persons capability to work has been in some way decreased and it is important to make sure that the person in question stays in the labour market as long as possible. In this situation, the straightforward application of the legislation of the Member State of residence may not always be the best possible solution for the individual. The Polish report also refers to the problem of determining under what circumstances persons receiving a benefit in cash are to be deemed as employed workers or self-employed workers. Under Polish law, the entitlement to some benefits as e.g. sickness benefits or rehabilitation allowances will not be granted if a given claimant undertakes paid work or a gainful economic activity. On the other hand, in case of maternity benefits, the entitled beneficiary may also simultaneously perform paid work. Now, what is the applicable legislation? What happens if a person receives maternity benefits in one Member State and undertakes a gainful economic activity in another?Is the legislation to be determined on the basis of Article 11 (2) or on the basis of Article 13 (1), whereby the work is performed in more than one Member State so that the place of residence is taken as a determinant in deciding on the applicable law?

Also, it is often reminded that the distinction between simultaneous activities and posting is very narrow and difficult to implement (HU, PL). At least, the Hungarian report considers that a clear-cut definition of the registered office and of the place of business and the differentiation between them based on objective criteria may be of great help.

b. Administrative problems

It is not surprising that problems are reported in this area since the entry into force of new rules of conflict imply to change some administrative procedures and habits. The European Report provides a selection of examples of these problems.

The Finnish report states that before the decision can be madeon a **self-employed person** who pursues activities in different Member States, a lot of background information is needed.Consequently, decision-making can be time-consuming. The elements (Articles 14.8.b. and 14.9. of Regulation 987/2009) that are taken into account when determining the applicable legislation of the self-employed persons are more complex than the elements regarding employed persons. It would be useful to have more examples in the practical guide concerning these provisions.

The **provisional designation of the competent institution** provided by Articles 16(2) and (3) of Regulation 987/2009 causes many problems and their complexity is subject to criticism (NL, PL, HU).

The Belgian report stresses that, according to these provisions, it falls upon the Belgian RSZ/ONSS to provisionally determine the legislation applicable to people who reside in Belgium, but who are not subject to Belgian legislation according to Article 13 of Regulation 883/2004. This gives rise to procedural problems. The Cypriot reportmentions that companies who are registered in Cyprus, on behalf of their employees who work in two or more Member States, address the institution of residence in view of determining the applicable legislation, when the employee concerned is not employed in the country of residence, and that the latter's institution either does not reply at all or replies that, to the extent that there is no employment in the country of residence, Cypriot authorities are competent to determine the applicable legislation. As a result, there are cases where there is no confirmation on behalf of the institution of residence that the applicable legislation is the legislation of Cyprus, and the A 1 document cannot be issued.

The Finnish report also sees some practical problems in the implementation. The immediate and obligatory information of the institutions involved is seen as an improvement (HU). However, this can only be useful if not merely information contained in the portable document is transferred to the other institution, but also some more information or evidence. Furthermore, in case of multiple simultaneous activities in several Member States it already proved to be completely ineffective to be obliged to inform all Member States concerned. Most of the time the institution of the Member State where a small portion of the activity is performed, or where the employee only travels through, is unable to reach the person or even to identify him or her.

Moreover, the Hungarian report considers that it would be useful if the (provisionally) competent institution could inform the other Member States concerned, in addition to the A1 document, about the contribution rates and the procedure of contribution payment, for the employers in the other States must comply with these rules throughout the simultaneous employment as soon as the provisional determination becomes final.

In the Lithuanian report, it is stressed that the competent institutions of Poland maintain that Lithuanian legislation should be applicable for Polish self-employed nationals who have concluded employment contracts with enterprises registered in Lithuania. According to Article 16,paragraph 3 of Regulation 987/2009 this provisional determination is treated as definitive after two months as from the moment when the competent Lithuanian institution is informed about it. The competent Lithuanian institution claims that a two-month period is too short.

c. Specific activities

The status of some professional activities raises questions since the removal of an ad hoc rule of conflict. In some reports **travelling personnel** (truck drivers and flying personnel) is referred to. In Finland, quite a large share of drivers for Finnish transport companies reside in Estonia, work in other parts of Europe and do not perform a substantial part of their work in Estonia. This means that the legislation applicable is the legislation of the place of establishment of the employer, namely Finland. Finnish institutions have made a bilateral agreement with the Estonian institutions that for travelling personnel who reside in Estonia and who are employed by a Finnish company, the Finnish employer can apply for the decision from Finland and not from the State of residence.

The Hungarian report states that in most cases of road transport the places of residence of the employees coincide with the company's registered office or, if not, the employee seldom performs a significant amount of time in his country of residence. So, the applicable legislation is generally easy to determine if several Member States are regularly involved. However, if only two or three Member States are involved, and one of them is the worker's State of residence, the "elements" to be considered are already too complicated. Furthermore, the situation of the airline crew members is problematic, for in this particular sector it is a widespread phenomenon that the registered office of the airline company is situated in a country with low tax and contribution levels, whereby the real operation is

performed elsewhere. Here, it might happen that the employee hardly has any kind of connection with the social security system of the competent country.

The same type of problem is introduced in the Lithuanian report: workers who are resident in Lithuania and who are working for aircrafts of air companies registered abroad are not insured by Lithuanian social insurance institutions, since there are no representative offices of these air companies in Lithuania, so workers receive all requests, decisions about their work schedules, vacations, work conditions, etc from abroad. As they are employed abroad, they are treated as insured in the Member State where the air company is registered. Nevertheless, most flights of these air companies take off from Lithuanian airports, and workers perform not more than 25 per cent of their activities in the territory of the Member State where the air company is registered. The competent Lithuanian institutions insist that according to Article 13 of Regulation 883/2004 and Article 14,paragraph 8 of Regulation 987/2009, the substantial activity of these workers is performed in Lithuania and Lithuanian legislation should be applicable. The Maltese report also refers to some difficulties in relation to international transport workers, specifically air crew.

The status of **civil servants**is also mentioned in some reports. According to Article 13(4) of Regulation 883/2004 a person who is a civil servant in one Member state and who is simultaneously employed/self-employed in another Member State shall be under the legislation of the Member State to which the administration employing him or her is subject. In Finland, this new provision has caused some peculiar situations for people employed by universities. In the academic world people often work part-time and for different universities and distance work is common. Since 2010, personnel in Finnish universities has been under employment contracts and they are not considered as civil servants or as persons considered as such. In other Nordic countries university professors for instance are generally civil servants. The provision has for example led to the following kind of situation: a person mainly works in a Finnish university as a professor (employment relationship) and resides in Finland. He or shealso acts as a part-time professor in a Swedish university (considered as civil servants). The work for the Swedish university is mainly performed as distance work from Finland, but it also consists of teaching in Sweden a few times a year. According to Article 13.4,this person is under Swedish legislation because he or she works as a civil servant in Sweden and as an employed person in Finland, although the work in Sweden is only part-time. According to the Regulation, Member states may agree on exceptions according to Article 16 to the applicable legislation in order to avoid unreasonable situations, but in these cases a good solution may not be found even with an exception. It is not always known what the legal status of the work performed in the other Member State is (employment/civil servant).This must be resolved with the other Member States' liaison body before making the decision.

With regard to**researchers and artists**, the Greek report points out the difficulty of knowing the exact nature of the activity (employed/self-employed) and of adapting rules of conflict to very short periods of stay abroad (for artists).Another example are journalists, who are also known for their intense mobility**.**

Some reports point out situations where **Article 13is incorrectly applied**. According to the Finnish report, Article 13(1) can sometimes be applied in cases that could not be regarded as pursuing activity in two or more Member States. This has come up in cases where persons (who are employed by an international temporary personnel hiring company) have been sent to work in Finland for quite a long period of time; nevertheless, they have been issued E 101/A1 certificates on the basis of pursuing activities in different Member States. In these cases the provisions of posting could not be applied since the employees have never been insured in the Member States where the employer has its registered office. Therefore, some temporary personnel hiring companies may tend to "misuse" Article 13 of Regulation 883/04 in order to be able to choose an applicable legislation that is advantageous from the employer's point of view. Especially the phrasing in Article 14.5.b of the Implementing Regulation "irrespective of the frequency or regularity of the alternation" may lead to this kind of interpretation of Article 13. The Polish report also introduces situations where there is in

fact no simultaneous activity in two Member States: by “making up” an activity in another Member State, the purpose is only to avoid being obligatorily covered by the state social security legislation in Poland.

4. “Article 16”agreements

The Cyprus report gives an interesting example of such agreements. It was used in view of making a request to Greece to retroactively exempt the payment of social insurance contributions by Cypriots who work in Cyprus and are at the same time directors of companies in Greece. Under Greek law the persons under consideration were obliged to be insured in Greece as a result of the capacity of director. The exemption was asked for a period up to 1 May 2010. Upon application of Regulation 883/2004 the activity as an employee in Cyprus prevails and a certificate A1 is issued.

However, as pointed out in the Dutch report, most problems related to the **duration of posting** are solved by concluding Article 16 agreements. In general, these Agreements extend the posting period to a period of five years.

Article 16 agreements may be used to ensure the **continuity of the applicable legislation**. In this respect, the Polish report points out that institutions of some countries refuse to conclude such agreements although a change of social security scheme for such a limited period of time proves disadvantageous for the worker/insured. Recurrently, the refusal to conclude this sort of agreement under Article 16 results in workers being forced to return to Poland, which may be seen as reducing the right to the free movement of persons and services and as infringing the freedom of movement principle.

Sometimes, national rules set a **maximum duration of their agreements**. In Sweden, any agreement in accordance with Article 16 should in principle be for a maximum of five years.

The Czech report refers to a Czech and Slovak Republic agreement on a limited “general exception” applying to the Slovak workers employed by the employment agencies. This was agreed in 2007 and implemented in the course of 2008, in particular because a large number of Slovak employment agencies, which were posting their workers mainly from the Slovak Republic to the Czech Republic, had insured them in the Slovak Republic, although the Slovak institutions did not (and still do not) regard such cases as simple posting. This situation was thus not convenient for the posted workers as they became double-insured while not having a form E101SK. Therefore, the Czech and Slovak Republics agreed to provide each other with the possibility of general exceptions to the rules on applicable legislation with regard to the cases solved retroactively in said years.

In Italy, **a procedure of claim** has been provided by the administration: the requests for exemptions by the employer or by the person concerned must be submitted, if possible in advance, to the competent authority or body designated by the Member State for which the employee or interested person makes the request to apply the law (for matters relating to the INPS, the regional Directorates). This institution will,without delay, forward the request to the competent authority or body designated by the Member State of destination, sending its decision regarding the request for exemption with a specific form.

The Dutch report has doubts about how the application rules of the Regulation relate to the multilateral **Agreement on Social Security for Rhine Boatmen**, an agreement concluded between the countries on the Rhine (the Netherlands, Belgium, Luxembourg, Germany, France and Switzerland) on the basis of Article 16 of the Regulation. Within this context Member States are allowed to provide for exceptions to the application rules laid down in Article 11 of the Regulation. Persons pursuing activities as an employed (or self-employed) person on board of a vessel at sea are in principle subject to the legislation of the Member State under whose flag the vessel is flying (Article 11,paragraph 4 of Regulation 883/2004). The application rules of the Agreement deviate from this principle so as to ensure that all

those who pursue activities on the same ship, classified as a Rhine vessel, are subject to the same legislation. Can exceptions made in this way to the general application rules of the Regulation be called upon in situations in which parties are involved who did not sign the agreement? Is it possible to deviate from the rules agreed upon in the agreement, and if so, to what extent?

The **wording of Article 16** is sometimes criticised. The Lithuanian report says that according to the opinion of the Foreign Benefit Office, more elements are needed with regard to the criteria under which such request are agreed on, and with regard to which elements are an indicator that the agreement is in the interest of the worker concerned.

The Swedisch report gives an interesting example of**workers' interests**which might not be protected. If a person works both in Sweden and Denmark and lives in Sweden, Sweden is the competent State. This solution would bedisadvantageous for the Danish employer since the employers' contributions are considerably higher in Sweden. Therefore, there is a special arrangement for the persons working in the Öresund Region (Sweden-Denmark). The person and the employer may in certain situations apply that the legislation in the Member State where the employer is based should be applicable instead.

The UK has tried to address the lack of clarity on Article 16 by giving the following guidance on Article 16 agreements: "while administrative convenience may well result from agreements between Member States, the achievement of this cannot be the sole motivating factor in such agreements, the interests of the person or persons concerned must be the primary focus in any considerations. For example, if it is known that the anticipated duration of a posting for a worker will extend beyond 24 months, an Article 16 agreement must be reached between the posting State and State/s of employment if a worker is to remain subject to the legislation applicable of the posting State. Article 16 agreements might also be used to permit a posting retrospectively where this is in the interest of the worker concerned, e.g. where the wrong Member State's legislation was applied. However, retrospection should only be used in very exceptional cases. When it can be foreseen (or becomes clear after the posting period has already commenced) that the activity will take more than 24 months, the employer or the person concerned shall submit, without delay, a request to the competent authority in the Member State whose legislation the person concerned wishes to apply to him/her. This request should be sent wherever possible in advance. If a request for an extension of the posting period beyond 24 months is not submitted or if, having submitted a request, the States concerned do not make an agreement under Article 16 of the Regulations to extend the application of the legislation of the posting State, the legislation of the Member State where the person is actually working will become applicable as soon as the posting period ended."

5. Other issues

It is noted in the **Belgian report** that several countries' institutions still issue forms E101. It is reminded that this form contains a list of articles (of Regulation 1408/71) to be checked, indicating the situation in which it is to be used. The use of this form in situations governed by Regulation 883/2004 is not ideal.

Many other specific issues are summarised in national reports:

- It is difficult to deal with cases where persons receive income in Member States and countries outside of Europe.

- Employees and employers are often not aware of the fact that cross-border work has implications in terms of social security. HR departments do not always have a clear picture of their staff's employment situation (e.g. telework; attending meetings/conferences abroad, having a second job etc).

- The EU regulations on social security coordination are extremely complex and sometimes open to different interpretations, which results in discussions between Member States and complicates the job of inspection services.

- It is not always easy for foreign companies to properly follow and successfully complete the procedures regarding registrations and the calculation of contributions. Cross-border recovery of contributions is extremely difficult. This is exacerbated by the fact that under some national legislations the responsibility for paying contributions fully lies with the employer and that the employee is covered in case the employer failed to pay contributions.

- Issuing institutions do not always, or are not always in a position to, properly check whether the conditions for delivery of a certificate are satisfied. This is particularly so when the responsibility for the delivery of certificates is decentralised. In case of a difference of views, national institutions tend to give priority to issuing forms to the own posting undertakings, rather than to requests for examination and review from foreign counterparts.

- Language and interpretation problems often hinder the practical implementation/application of the rules.

- Monitoring the payment of contributions in the posting (competent) State is a matter for the authorities of that State. However, these authorities are not acquainted with the actual work schedule (full-time, part-time, weekend, overtime etc) in the State of destination, and with the salary that was paid for this work. An incomplete declaration of salary in the competent State is liable to create unfair competition and social fraud.

- In general, fraudulent schemes – posting agencies or interim agencies etc – are difficult to fight in a cross-border context.

- Concerning the specific case of Switzerland, the national report indicates that thousands of frontier workers residing in Italy and working in Switzerland did not request to be exempted from compulsory sickness insurance in Switzerland within the time limit fixed by Annex VI of Regulation 1408/71; nor did they take out such insurance in Switzerland. As an exception, they were given a new deadline to submit a request for exemption. Those who failed to submit such a request within the new time limit were assigned to a Swiss health insurer ex officio.

- Again with regard to Switzerland, the Federal Administrative Court had to deal with the cases of non-active persons who receive pensions due under the legislation of another Member State and who resided in Switzerland and had not yet reached the Swiss statutory retirement age. According to the provisions of the Swiss legislation, applicable on the basis of Article 13,paragraph 2 (f) of Regulation 1408/71, owing to their residence in Switzerland they were subject to compulsory insurance and liable to pay contributions under the Federal Law on Oldage and Survivors' Insurance. The court ruled that the Federal Social Insurance Office had acted correctly in rejecting their request for exemption from this legislation under Article 17a of Regulation 1408/71 and noted that the persons concerned will be entitled, on the basis of their contributions, to a Swiss oldage pension as soon as they reach pensionable age.

Some good practices deserve to be introduced. The Czech report mentions that the Czech Social Security Administration and its regional offices have developed a sophisticated centralised information system and detailed guidelines covering all situations in accordance with rules on applicable legislation. Each form E101CZ (and as of November 2010 each form A1) has its own unique evidence number automatically generated by the information system according to the predefined key. The Czech Social Security Administration has also separately developed special application forms for employees and for self-employed persons

applying to assess their cross-border situation. Data included in these forms enable, after checking by the administration, an evaluation of the fulfilment of all provisions as regards the Regulation as well as Decisions A2 and A3 of the Administrative Commission and the ECJ case law.

D. Various categories of benefits

1. Sickness benefits

a. Benefits in kind

Persons residing outside the competent State

The situation of **persons residing outside the competent State**remains a touchy subject. Some reports even wonder if the concept of residence within the meaning of the Sickness Chapter has a different meaning than according to legislation applicable. An example is provided by the Finnish report.

It has given rise to cases reported by the Swiss report. For instance, In a case of 3 December 2010 concerning an appeal against a decision of an invalidity insurance institution, the Federal Administrative Court considered that, in the absence of an urgent case, of an agreement between the States concerned (or between the competent authorities of those States) and of a prior authorisation by a competent Swiss institution according to Article 20 of Regulation 1408/71, the child residing in France with his parents working in Switzerland (frontier workers) has no claim against the competent – if there is one – Swiss institution to benefits for a medical treatment taking place in Switzerland in accordance with the provisions of the Swiss legislation (Article 19 of Regulation 1408/71). According to the Swiss report, it is however debatable if this conclusion is entirely correct.in view of Chapter 1 of Title III of Regulation 1408/71 and of Annex VI, “Switzerland”, point 4, of Regulation 1408/71 as adapted by the AFMP

Benefits in kind may require the application of the principle of **assimilation of facts**. The French report gives a good illustration. According to the French administration, the prior residence of 3 months in France required for the access to CMU (universal healthcare coverage) is subject to the principle of aggregation. Therefore, periods of residence accomplished in other Member States must be aggregated. However, periods of residence must be aggregated only if they have been “completed under the legislation of any other Member State”. The local healthcare institutions must therefore proceed to the aggregation only if periods of residence abroad “correspond to periods of sickness insurance” or “to periods during which the citizen could take advantage of sickness benefits”.

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

According to the Polish report, the situation of persons residing outside the competent State seems to be a source of many administrative difficulties due to the lack of efficient cooperation between national institutions.

Cross-border occasional healthcare

The lack of a commencement date for the validity of the EHIC is said cause problems (PL).

The Belgian report indicates that Belgium sometimes sees its **invoices** rejected by other States (notably Spain) which argue that the treatment was provided before the issuing of the EHIC.The Lithuanian report also shows there might be a difference between theoretical rules and applied rules. Indeed, in the case of occasional care a person presents an EHIC, receives treatment, and the competent Lithuanian institution (State Patient's Fund) reimburses the cost of this treatment. Despite this clear rule it happens that sometimes in other Member States the EHIC issued by the competent Lithuanian institution is not accepted and a person is asked to pay for occasional treatment. The cost is then reimbursed by the State Patient's Fund. The same problem arises with EHICs issued in Romania.

The Belgian report also mentions the phenomenon of "**border-shopping**". Border-shopping refers to the practice of persons insured in Belgium who go and buy medicines at pharmacists established (right) across the border in the Netherlands. Upon presentation of their EHIC, they receive the medicines as if they were insured in the Netherlands. As a result, Belgian authorities end up paying for medicines obtained pursuant to an incorrect and downright abusive application of Article 19 of Regulation 883/2004; this may involve paying for medicines to an extent which exceeds the Belgian coverage, or even paying for medicines that are not included in the Belgian pharmaceutical benefits package. Despite their efforts (including increased monitoring and entering into contact with a Dutch care insurer), the Belgian authorities have not managed to put an end to this practice.

Cross-border occasional care raises the question of the scope of the **basket of care**. The Danish report refers to the right to free abortion during a temporary stay in Denmark. According to the Ministry of Health and Interior Affairs it should not be considered a necessary medical treatment if women request an abortion for social and not for medical reasons during a temporary stay in Denmark. This also means that the European health card does not give access to abortion in Denmark unless for medical reasons.

In Slovenia, the legislation takes into account the EU coordination rules and stipulates that an insured person may claim the right to benefits in kind, which **become medically necessary**, taking into account the nature of these benefits and the length of stay. He or she may do so with physicians providing health care in the public network in an EU Member State or other States where EU law is applicable. In a case before the Social Court of first instance, the reimbursement of costs of urgent medical treatment in another Member State (Austria) was recognised, but not the transport costs to Slovenia, as it was not medically necessary (the return to Slovenia was at the express whish of the insured person). In another case, the Higher Labour and Social Court ruled that HIIS has to reimburse the costs of necessary medical treatment , the amount being equal to the amount the carrier in the Member State of stay (Germany) would pay for its own insured persons, and not equal to the amount the insured person actually paid as a private patient (he was not in possession of the EHIC). This case revealed another quite important problem. In some Member States the price for the same medical service may differ substantially if it has to be paid by the private patient or by the health insurance carrier.Another rather interesting case has been decided by the Slovenian Supreme Court. It argued that a Slovenian insured person who was injured on the Canary Islands could get urgent treatment there, but not the necessary (appropriate) one. Every insured person should have the right to the highest attainable standard of treatment. Hence, in the reverse situation, and by analogy to the rules, a Slovenian insured person temporarily staying in another Member State also has the right to necessary (appropriate) treatment in Slovenia. The health insurance carrier was obliged to reimburse the travel costs from the Canary Islands to Ljubljana. The question remains whether the Supreme Court has not misinterpreted the international standards and the Slovenian legislation in which the highest attainable standard of health is enshrined.

The Italian report indicates that the national administration has taken steps to confirm that the necessity of **care "on medical grounds"** should be established at the discretion of the doctor in the country of temporary residence.The ministry has also decided to intervene in

the field of indirect assistance and pricing, confirming the procedures to be followed in case of pricing with the E126 model. In particular, if the client has paid directly for the provision of necessary medical treatment based on the rates of the country of stay, the affiliated institution is required to reimburse the payment. In the event that the foreign State has no national tariffs (e.g. Spain), or if the patient has given his consent to the use of national rates, the new Community regulations confirm that it is necessary to use the rates in use in the client's country, without the 1,000 Euro limit set in the past by the Administrative Commission. It is now possible to request, where applicable, the refund directly from the institution in the place of residence. Therefore, also in France, where there is a system based on indirect care, the competent CPAM cannot refuse reimbursement and oblige the client to request it in their own country.

In Switzerland, the compulsory sickness insurance **bears the costs** of such treatments up to double the amount of the costs which would be reimbursed in Switzerland; it is considered to be an emergency if the insured person needs medical treatment during a temporary stay abroad and a return journey to Switzerland is not adequate; the rules on international mutual benefits assistance are reserved. The Federal Supreme Court has ruled that the applicability of the statutory tariffs of the State of stay according to Article 22,paragraph 1 (a)(i) of Regulation 1408/71 implies that the foreign provider provides its services under the social health care system of that State; if a private provider does not provide its services within the framework of the statutory/social system of coverage of health care costs and if it thus applies its own private tariffs, there is no room for mutual benefits assistance under Article 22,paragraph 1 of Regulation 1408/71. In such cases, the national Swiss provisions apply, so that the Swiss health insurer only bears the costs under the conditions and within the limits of national law.

The French and Luxembourg reports come back to the question of **biomedical analysis**. In Luxembourg, CAAS confirmed the refusal of the National Sickness Fund to reimburse costs of biomedical analyses made in a laboratory in France by arguing that a convention signed between the Sickness Insurance Fund and the National Health Laboratory organised a system for direct billing of this kind of costs relating to a programme of preventive medicine on antenatal screening of a congenital abnormality.Does this caselaw conflict with the ECJ ruling of 27 January 2011, European Commission v the Grand-Duchy of Luxembourg? Is the situation different due to the fact that biomedical analyses are part of a national programme of preventive medicine, in which the National Health Laboratory has been involved?

Courts remain vigilant. In Luxembourg, CAAS invalidated the refusal of the National Sickness Insurance (CNS) to reimburse **costs of stationary treatment** in a hospital in Germany. CNS argued that the patient did not get a prior authorisation from the Luxembourg institution and that, moreover, the care given in Germany had been chosen by the patient for 'personal reasons' (the German notion is *Wahlleistungen*). CAAS retained a slightly different version of what happened, namely that of an emergency. Therefore, the refusal to reimburse the costs had to be considered as an obstacle to the freedom to provide services (Article 49 EC). CNS had to grant the patient an additional reimbursement of costs, which would be the difference between, on the one hand, the reimbursement of the costs of the medical treatment in the Member State of stay according to the legislation of this State, and, on the other hand, the reimbursement of the medical costs according to the Luxembourg legislation in case of stationary treatment in Luxembourg. The amount of this additional reimbursement must be determined on the basis of the applicable charges in Luxembourg or by analogy, as if the patient got treatment in Luxembourg, by the competent institution in Luxembourg.

Finally, some cases of **false occasional care** are reported. The Slovenian report refers to Slovenian insured persons who gave birth in an Austrian clinic and thereby used their EHIC, although the time and method of birth were arranged beforehand. The health insurance carrier established that this was planned rather than necessary care.

Cross-border planned care

National administrations have sometimes taken administrative decisions to ensure the right implementation of applicable rules (IT, FR, PL). For instance, according to the Slovenian report, there are rules on the maximum permissible waiting times for certain health services and on the management of waiting lists. There are three degrees of urgency, viz urgent, fast, and regular. In an urgent case the medical service should be delivered immediately or within 24 hours and is not subject to waiting lists, in a case marked as fast it should be provided within three months, and in regular cases within six months. There are some exceptions. For instance, malign diseases the waiting time should not exceed one month, orthopaedic treatment 12 months, and e.g. when orthodontic treatment it should not exceed 12 (fast) or 18 months (regular).

The **prior authorisation** is still debated before national courts. In a case referred to in the Belgian report, the Labour Court of Appeal of Liège had to decide on the case of a resident of Eupen (a Belgian town near the German border) who had gone to Singen in Germany to undergo surgery. The sickness fund, which had already rejected the person's request for prior authorisation, refused to reimburse the costs of this treatment. The person challenged this refusal, arguing, among other things, that highquality care could only be given in Germany, and that the authorisation requirement is contrary to the free provision of services. The sickness fund, on its part, argued that the surgery could without any problem have been performed in Belgium and that Article 22 of Regulation 1408/71 is in conformity with the Treaty. The court confirmed that the prior authorisation was a lawful requirement in this case.

In another case cited by the Cyprus report, an issue arose with regard to the right of Cypriot citizens aged over 65 years to have their expenses reimbursed by the Cypriot State in the event of robotic prostatectomy performed abroad.The complainant was aged 69. As he was suffering from prostate, and according to his statement, the condition of his health could not afford any delays, he had a robotic prostatectomy at his own expense in London. When he addressed an application to the competent Cypriot authority in view of the reimbursement of relevant expenses, the application was rejected because under the Scheme on Financial Aid for Health Services that are not Offered by the Public Sector, only patients aged less than 65 years have the right to have their expenses reimbursed for robotic radical prostatectomy provided abroad, while patients aged over 65 years are subject to open radical prostatectomy, which is practised in Cyprus. There is no mention of coordination regulations or of coordination-related ECJ caselaw.

The Danish report reminds that if necessary treatment cannot be provided within one month in the Danish healthcare system, a patient has a right to treatment at a private clinic or hospital established in Denmark or a hospital/clinic established abroad. According to this rule, the patient can only be treatedin hospitals or clinics with which the region has established an agreement beforehand. A greater deal of agreements have been concluded with private hospitals and clinics in Denmark than with private hospitals and clinics abroad; almost 200 private hospitals/clinics established in Denmark, but only 6 hospitals/clinics established in another Member State.However, the government has announced and submitted a proposal, abolishing this extended free choice, so far until summer 2009. Moreover, as a result of the Decker and Kohll cases subsidies are now provided for the following services purchased abroad: general and specialist medical treatment for persons insured in group 2, dental assistance, physiotherapy and chiropractic treatment for persons insured in group 1 and 2.

The French *Cour de cassation* shows that the right to be reimbursed under the rules on the free movement of services remains subject to the compliance with requirements of the State of affiliation. Under French law, glasses are reimbursed if they have been prescribed by a doctor. Therefore, an insured person in France cannot be reimbursed for the purchase of glasses in Belgium for which he or she did not have a prescription. This ruling can be compared with Article 7§7 of Directive 2011/24.In another French case ruled by the *Cour de cassation*, a woman who was insured in France wished to deliver her second child in a "*maison de naissance*" (birth centre) located in Germany. She requested prior authorisation of the French competent sickness institution which turned it down. Despite the refusal, she

went to Germany and claimed reimbursement after her return, butthe French competent institution refused. Before the court of appeal, her request was denied as well, but the *Cour de cassation*quashed this decision. Indeed, whereas the court of appeal had considered that the institution where the care was provided is linked to a maternity and therefore the care should be considered as hospital care, the *Cour de cassation*accuses the lower court case of lacking precision since the classification of "hospital care" is decisive in this case. Therefore the Supreme Court has sent the case back to a lower court which will have to determine whether or not care was provided in a "healthcare establishment".

In Sweden, the case law makes reimbursement possible for medical care received abroad, even including care that could have been provided in Sweden within a reasonable time. Some guidelines name two alternatives with regard to planned care received abroad – (1) to apply for reimbursement for care provided (in accordance with case law related to Articles 56 and 57 of the TFEU) or (2) to apply for prior authorisation. Applying for prior authorisation in accordance with Article 20(1) in the Regulation can still be said to be recommendable, since the financial issues are then settled in advance. Authorisation to receive medical treatment abroad is granted only if it is included in the Swedish national medical service package and if it is provided for within the national medical service of the other State, and, if for some reason the care cannot be provided in Sweden within a normal time span. Prior authorisation can thus not be granted for private care (but private care can be reimbursed afterwards in accordance with the treaty provisions on free movement of services).The possibility to be granted medical care outside of the package, on the grounds that the medical care is different and better in the other Member State, is unlikely. If care received abroad is authorised, costs for travelling and housing can also be reimbursed – even for an accompanying person.

In the list of treatments for which a prior authorisation is required French law includes treatments which are not provided in hospitals. It refers to treatments requiring the use of major medical equipment statedin section II of Article R. 6122 26 of the Public Health Code: a scintillation camera with or without a positron emission coincidence detector; emission tomography;a positron camera; nuclear magnetic resonance imaging or spectrometry apparatus for clinical use; a medical scanner; a hyperbaric chamber; ora cyclotron for medical use. For the ECJ, this extension is compatible with EU law.

In France, the "*parcours de soins*" (referral procedure) applies only to persons who are resident in France. Therefore, pensioners whose residence is not located in France and whose care costs are borne by French institutions are in principle not subject to the referral procedure. However, if reimbursements are recurrently claimed over a period of 3 months, local healthcare institutions must report to the national healthcare institution and to the Ministry of Social Security.

Access to information is central to planned care. The Italian administration has recognised the need to make more information available to Italian patients, authorised by the local Public Health Agency(*Azienda Sanitaria Locale*)to seek medical care abroad, about the significant economic and logistical aspects related to the health care services they receive in another EU State. The Ministry recommends that local health authorities, during the preliminary investigation and before granting authorisation, inform the patient about the possible existence of foreign health care costs incurred personally and/or in advance, about any waiting lists (and the conditions necessary to be added), and about the date of surgery. To this end, the Ministry has made the required information forms available in Italian, English, French and German.

According to the Dutch report, the Ministry of Health Care issued a document that explains relevant ECJ case law on planned care. Thus, care insurers are offered a helping hand when it comes to interpreting the rules to be followed when planned care is obtained outside the competent State.

In France, depending on the type of care concerned, the competent institution to grant the authorisation will vary. Indeed, if the opinion of a national medical adviser is required for innovating treatments, the opinion is provided by the CNSE (healthcare institution competent for cross-border reimbursements) for medical assisted procreation and by local healthcare institutions for other treatments.

In the UK, the Department for Health Guidance for planned care advises patients to discuss their plans with their doctor before making any travel or medical arrangements. The doctor will then refer the patient to the local health commissioner who will discuss the options available and will confirm the following: the treatments they are prepared to fund, and the level of funding available; the exact amount of the reimbursement available; that the patient fully understands the conditions under which he or she will be treated abroad; any programme of aftercare or follow-up treatment that might be required upon return to the UK. If going down the S2 route patients are advised to apply to their local health commissioners for their written agreement to recommend funding for treatment. If the commissioner agrees that the patient should go abroad for treatment, the appropriate paperwork should be passed to the Overseas Healthcare Team in Newcastle. They will consider the issue of the S2 form to be taken to the other Member State for treatment.The local NHS (National Health Service) commissioner can only issue a reimbursement for up to the cost of being treated locally under the NHS. However, patients are advised to be aware that they will have to pay for the total cost of treatment upfront, and can normally only apply for reimbursement after their treatment has been completed and paid for.

Cross-border planned care may lead to the question of the determination of the **place of residence**. A recent case drawn from the Belgian report illustrates this matter. A Polish man has a 5-year Belgian residence permit and carries out self-employed activities in Belgium. His wife resides and works in Poland. The Polish authorities consider him resident in Poland, whereas their Belgian counterparts are of the opinion that the man resides in Belgium. The man needs to undergo surgery and wants to do so in Poland. The Belgian authorities refuse to deliver portable documents S2 (as the operation may well be performed in Belgium) and S1 (as the person resides in Belgium). The RIZIV-INAMI now liaises with the RSVZ-INASTI and its Polish counterpart in an attempt to solve this issue.

Rules applicable to pensioners

The new possibility, introduced by Regulation 883/2004, to levy **contributions from pensioners** residing in one Member State and drawing a pension of another Member State has been an important issue. The Austrian report provides that it has been announced that starting in September, the contributions will be levied with retrospective effect from 1 May. This new obligation to pay contributions from foreign pensions is believed to affect around 120,000 pensioners in Austria.Until now the Austrian legislator has failed to create a national legal basis for this rule. France and Belgium are in the same situation: Article 30 of Regulation 883/2004 cannot be implemented in practice.

Since 2009 Finland has had several meetings with German colleagues about the different views on which country is responsible for the **health care costs of pensioners** and which country the contributions should be paid to. These negotiations have led to a common understanding in most of the disputed cases. However, the negotiations have still left two disputes unresolved. The first disputed case concerns pensioners who only receive pensions from Germany, who reside in Finland and who haverequested sickness insurance in Germany. In the Finnish view, the costs for the health care of the pensioner should be borne by Germany and in the German view,they should be borne by Finland. The second disputed situation concerns pensioners who receive pensions from both Germany and Finland and who have first moved to Finland and requested health insurance in Germany and then moved back to Germany. In this case as well, the countries have different opinions on which country should bear the health care costs.

The Dutch report recalls that in exchange for the right to receive benefits in the State of residence at the expense of the Netherlands, **Dutch pensioners residing abroad** are to pay

Dutch Zvw contributions,which are levied on their income. Usually this implies that the contributionsare deducted from the Dutch old age benefit which most Dutch pensioners receive abroad.Belgian and German pensioners residing in the Netherlands are also subject to the Dutch Zvw. Hence, they also have to pay contributions on the basis of the Zvw. In addition, those who live in the Netherlands and worked in Belgium also have to pay a "*cotisation de solidarité*"on their Belgian pension to the Belgian pension provider. The question has been raised how this contribution is to be qualified. The relevance of this question is can be found in one of the basic principles of the Regulation that only one Member State can levy social security contributions. If the "*cotisation de solidarité*" can be classified as a social security contribution in the sense of the Regulation, this basic principle would be violated.

In Romania, if a **Romanian pensioner** is insured for health in another EU Member State, he or she will not pay health insurance contributions in Romania and will not be insured for health services in Romania. If a Romanian pensioner is not insured for health in another EU State he will pay health insurance contributions in Romania.

The Swedish report also points out a problem with regard to sickness insurance for **Swedish pensioners residing in Finland**. They are required to pay contributions for such benefits out of their pensions, whereas from the Swedish point of view these contributions can be considered paid because, throughout the years, (mainly) pay-roll taxeshave been paid by employers.

Consequently, the status of**pensioners**remains a very sensitive issue. A problemthat receives a lot of attention in the Belgian report is the Dutch position that the healthcare costs of Dutch residents who are entitled to a Dutch and a Belgian pension (former frontier workers), but who forego their Dutch pension are at the expense of Belgium, and this based on Article 23 of Regulation 883/2004. The Belgian authorities oppose to the Dutch interpretation, as they believe it undermines the neutral effect of the Regulation's conflict rules. Germany does not agree with the Netherlands either and also refuses to be financially responsible for the health care costs of the former German frontier workers residing in the Netherlands. This has also led to a complaint before the Commission. Belgian authorities are considering to propose an amendment to Article 28 of Regulation 883/2004, which deals with special rules for retired frontier workers.The Dutch report itself introduces difficulties. The Netherlands is listed in Annex IV of Regulation 883/2004. Consequently, pensioners who receive a Dutch pension and live abroad have access to health care in both the State of residence and the "pension" State. If the pensioner wants planned care in another State, he or she needs prior authorisation of the competent institution of that State (for the Netherlands: the CVZ). The procedure to be followed in these cases is not very efficient. For example, if a Dutch pensioner who lives in France wishes to undergo a medical treatment in Germany, he or she first needs to submit a request to undergo this treatment with the institution in France where he or she is registered as insured in the Netherlands. The French institution checks whether the treatment can be provided for in France within a timelimit which is medically justifiable, given the current state of health and the probable course of the illness of the person concerned. If this is not the case, the French institution will send the request to the CVZ (*College voor zorgverzekeringen*),which subsequently has to check whether the treatment in question is a benefit provided for in the German legislation. Authorisation can only be granted if this condition is fulfilled.

According to the Italian report, a**pensioner with two pensions**, one paid by Italy and the other by Germany (where the pensioner resides) who, by request, is exempt from payment of the contribution required by German law, cannot expect that the Italian Health Service assumes the costs of in-kind benefits granted to the pensioner and his family in the Member State of residence.

The Swiss report lists an interesting case.The Federal Administrative Court had to deal with the question of auxiliary equipment according to the Federal Law on Invalidity Insurance in favour of a French national residing in France who had been forced to give up her activity as

a frontier worker in Switzerland – she had never worked in France – owing to multiple sclerosis and who received a pension according to the Federal Law on Invalidity Insurance. The Court confirmed that the auxiliary equipment at issue (adaptation of the person's home to the needs resulting from her handicap) was to be qualified as a sickness benefit under Article 4,paragraph 1 (a) and Title III, Chapter 1 of Regulation 1408/71 (see I.A.2.a above). It ruled that the person concerned did not have a claim for the auxiliary equipment against the Swiss invalidity insurance, but had to approach the competent French institution, since she was not insured in the Swiss invalidity insurance but affiliated to the French sickness insurance.

The Czech report introducesa question which was raised recently on the health insurance of German pensioners who reside in the Czech Republic. These pensioners' insurance in Germany ended and after moving to the Czech Republic they require entering the Czech health insurance system on the basis of residence. According to the Czech institutions, these persons should be insured under the German health insurance system. As the German system of health insurance is quite complicated, there is an effort (by the Czech and also by the German institutions) to make these persons insured at least on a private basis. The Czech report also stresses the effort of information in relation to the entry into force of the new regulation: The new rules are explained and it is underlined that any **Czech pensioner who wishes to reside in another Member State** must present an E121 or S1 form in that State, so that he or she can claim health care in their State of residence, whereas the pensioner's right to the full health care of the State of insurance (Czech Republic) also remains in case such a pensioner returns (even if only for a visit).

According to the Finnish report, the implementation of Article 16(2) of Regulation 883/2004 is unclear in relation to a residence-based system. The same report considers that it is unclear whether Article 16(2) of Regulation 883/2004 applies only to these **special pensioners' schemes** mentioned in Annex 2 of Regulation 987/2009 or to all pensioners.

Another problem raised by the Finnish report is related to**pensioners who receive a pension only from country A**, where it is possible to quit the sickness insurance at the date of the change of residence. The basic procedure when a pensioner moves to Finland is to ask for a form E121, in order to apply Article 25 in 883/2004. However, if country A allows the pensioner to quit his or her sickness insurance at the date of the change of residence, it is unclear what the implication of this is in relation to the fulfilment of Article 25. It seems impossible to receive a form E121 from country A, although it is the only country paying a pension.Is the fulfilment of Article 25 – the cost responsibility between countries – conditional to the actual insurance of the person concerned? If Finland is the only country paying a pension to the pensioner, Finland is and considers itself to be the sole responsible State (according to Article 24 of Regulation 883/2004) for the costs of thebenefits in kind provided to this pensioner. The Finnish KELA automatically issues a form E121 and an EHIC to this pensioner at the date of the change of residence.

With the new regulation, France is competent to deliver the **prior authorisation for planned care to pensioners who reside outside of France** and who wish to be treated in another Member State (which is neither France,nor their State of residence). This new rule is a source of administrative difficulties in France. Questions raised include: In case of refusal, can a pensioner be compelled to be treated in France? How should transportation costs be covered? What if the State of residence considers that care is accessible on its territory? How should the period of instruction (limited to 14 days) provided by French law apply, especially in case of absence of response by the State of residence?

The Hungarian report raises problems related to **pensioners mainly caused by multiple residences**, i.e. in two or more Member States.The pensioners are not inclined to decide and the residence cannot be determined on the grounds of Article 11 of the implementing regulation.

The Lithuanian report introduces some cases of pensioners who were not able to prove that they are resident in Lithuania (no evidence of declared place of residence) and thereforethey were refused medical treatment.

Coordination with Directive 2011/24

With regard to **Directive 2011/24 on the application of patients' rights in cross-border healthcare** no major impacts are expected even if some countries are preparing a legislation to implement it (FI). Some reports indicate that the ECJ case law based on the free movement of services is well applied.

For instance, the Slovenian report refers to a case of the Higher Labour and Social Court abouta patient who received treatment in Austria and claimed the reimbursement of costs. The higher court overturned the decision of the first instance social court. It cited Article 49 TEC (applicable at that time), and cases Kohll, Müller-Faure/VanRiet,Geraets-Smits/Peerbooms and Watts. It established that ambulatory treatment can be a treatment in a hospital environment, without the need of at least one overnight stay in the hospital.Since for the ambulatory treatment prior authorisation is an inadmissible obstacle to the free movement of (medical) services, the mandatory health insurance carrier had to reimburse the occurred costs. Since then, also the latter reimburses outof patient costs without prior authorisation and without taking the case before the social court.

However, the implementation of the directive is problematic in some Member States (SI). This is due to the fact that the major part of the Directives' content is applicable law already (AT). In Belgium,the implementation of the Directive will not entail enormous changes when it comes to the reimbursement of cross-border care. Several aspects of the Directive, however, would need to be clarified, notably the relationship between the Regulation and the Directive. Moreover, the example is telemedicine, which is covered in Article 7(7) of the Directive, but which under Belgian legislation is not taken into account for the purposes of reimbursement. This could raise problems.

Financial aspects

With regard to the **calculation of reimbursement of costs** for provided health care benefits in kind by another Member State,according to Article 62 of Implementing Regulation 987/2009 the amount refunded has to be calculated on the grounds of the real expenses according to the accounting of the respective institution. Only in special cases may the calculation be done on basis of a lump-sum payment. Due to these new rules all Austrian regional entities competent for funding in-patient care changed their system of refund, except two of them. Consequently, the competent Austrian Ministry of Labour, Social Affairs and Consumer Protection was urged to inform about the legally very limited possibility of refund by lump-sum payment. Furthermore, the two remaining entities were invited to change their system as well, or to explain why a change is not possible and to declare in a comprehensive and transparent way which method of calculation has been used, especially whether the calculation is based on real data or on estimates.

The Austrian report raises the question whether the limitation of reimbursement to 80 per cent of the costs might be an obstacle for patients and contradictory to EU law.

The rules of priority in order to define the competent State are difficult to apply. The French administration indicates that healthcare rights based on residence (student scheme, CMU scheme: universal healthcare scheme, AME scheme: scheme for foreigners who reside illegally in France) are in second place after independent or derivative rights. Also, when rights are open in two Member States, dependent persons are subject to the legislation of the State of residence. In the specific case where both parents have rights in various Member States and one of them is a frontier worker, the principle of single legislation applicable must apply. In connection with other Member States, France decides to maintain the application of the State of residence if a right is open in this State.

Levying contributions abroad is sometimes problematic. For example, where a person just nominally works in Lithuania, but his or her main activity as a self-employed worker is in Poland, it is very difficult to levy contributions on his or her self-employment income in Poland. Usually, administration is unable to do this and persons use Lithuanian benefits in kind with almost no contribution for it.

b. Benefits in cash

The **classification of benefits** remains a central problem as the Dutch report shows. Problems may arise when someone lives in Germany and takes up a job in the Netherlands, whilst receiving a financial care allowance on the basis of the German legislation (*Pflegegeld*). Under German legislation, this benefit is regarded as a cash benefit which is exportable. However, by accepting a job in the Netherlands, this person becomes subject to the Dutch legislation pursuant to Article 11,paragraph 3 (a) of the Regulation. Consequently, the person concerned will lose the entitlement to the German *Pflegegeld*. The Dutch version of the German *Pflegegeld* is of a different nature. Unlike the German *Pflegegeld*, the Dutch version can only be used for assistance given by a nurse or a comparable professional caretaker or to reward a family member for help provided. For this reason, the Dutch version is to be classified as a benefit in kind. This example shows that a change in the applicable legislation can lead to a change in the qualification of a benefit.

The **principle of aggregation** usually raises no problems (RO). However, in Sweden, once a person has qualified for a sickness benefit in cash,certain protection rules apply.This means that a person will remain covered by the insurance at the same incomereplacement level following periods of pregnancy, childrearing, studies and unemployment. It is somewhat unclear how these rules apply in relation to migrant workers: for example, if such periods fulfilled in another Member State or in connection to moving/returning to Sweden may be taken into account. However, the Swedish Supreme Administrative Court did allow a shorter period without work in between work in Norway and Sweden according to those protection rules without lowering the sickness benefit.

The Belgian report introduces the aftermath of the **ECJ Leyman case**.The RIZIV-INAMI has not limited itself to merely addressing the ECJ's objections in the specific circumstances of the Leyman case.On the contrary, it has taken the opportunity to describe in much detail various issues – in particular the starting date of the invalidity (benefit) – in the different situations to which the combined application of Belgian and other Member States' sickness and invalidity insurance legislation can give rise.This in the context of the application of the coordination regulations to persons who, at the time they became incapable of work, were subject to another Member State's legislation. The circular distinguishes between four situations, depending on whether or not the periods of sickness and/or invalidity are recognised and covered (i.e. benefits paid) by the foreign institution. For each of these situations, the commencement date of the Belgian invalidity and the date at which the Belgian invalidity benefit becomes payable is explained and illustrated with examples.In general, the circular provides for the Belgian invalidity to commence at the same time as the invalidity pension in the other Member State. In case there is no entitlement to a foreign invalidity benefit, the Belgian invalidity commences at the end of the sickness period covered by the foreign institution. In the absence of a sickness benefit being paid out by that institution, the Belgian invalidity will start as of the second year of the primary incapacity.

According to the Slovenian report, the **Leyman case** could influence Slovenian legislation: invalidity might be established for an insured person, but a partial invalidity pension is paid from the day when he or she(partially) starts to work again. However, if he or shefalls ill in the meantime (and is not immediately capable of starting to work again), the sickness benefits are reduced already from the day the partial invalidity is recognised, hence possibly leaving the insured person without half an income.

Residence clauses are prohibited for sickness benefits in cash. In this respect, the Czech report refers to an interesting case concerning the so-called protection period which exists in the Czech sickness insurance system. The Czech Republic refuses to pay sickness benefits in cash to citizens of another Member State (lately this is Slovakia, but it regards all Member States) who finished their employment relationship in the Czech Republic and returned to their home country. Such a person who formerly worked in the Czech Republic is registered as unemployed by the foreign institutions. The Czech legislation does provide that after the employment relationship has finished the protection period applies to such a worker according to the sickness insurance legislation, so that if this person falls ill during this protection period, he or she is still entitled to sickness benefits. The Czech institutions argue, however, that the principle of just one applicable legislation should be applied in the cases described above. In this case, the applicable legislation is the one of the other Member State, as the person has been registered by the foreign institutions. The principle of equal treatment of persons residing in the Czech Republic (who would be entitled to sickness benefits) and persons with their residence in another Member State might be violated. The Greek report indicates that the export of cash benefits creates difficulties for Greece.
The Finnish report shows that the **coordination of rehabilitation cash benefits** from a competent Member State with benefits in kind from the Member State of residence in practice seems to be very challenging.Because of the changes in Swedish sickness insurance legislation starting from 2008, it has become apparent that people who reside in Finland but work or have worked in Sweden and become ill are not eligible for sickness/rehabilitation cash benefits after the first three months, although their work relationship would still be valid in Sweden. The Swedish legislation requires that a person's possibilities to also work for other employers in Sweden should be evaluated after the first three months of disability. For a person resident in Sweden this requires contact with the employment office. The Finnish legislation is not acquainted with this type of requirement for employment offices and therefore the Swedish authorities do not consider the requirement fulfilled.The legislation applicable to these persons have then been considered to shift from Sweden to their country of residence Finland.In the Finnish view they should be placed in the same situation as if they were residing in Sweden and have a right to the same possibilities for income as they would have in Sweden,because the legislation applicable should still be the Swedish. There now is an attempt to solve this problem with a bilateral agreement between Finland and Sweden.

A case from the French Supreme Court is worth being reported. It shows that the principle of **assimilation of facts** cannot compensate the misapplication of procedures required by the competent State. The local CPAM (healthcare institution) of Calais indeed refused to grant sickness benefits in cash to a Belgian national who works in France and whose medical examination had been processed in Belgium after she had been treated in a hospital there. The court of appeal confirmed that she was not entitled to any cash benefit. The decision is upheld by the *Cour de cassation,* which ruled that since she had not sent the extension of her work stoppage to the French healthcare institution, she was not entitled to any benefit. In addition, since the person had not informed the French institution about her place of residence, no inspection could be carried out which explains the absence of the provision of a benefit.

The **calculation of benefits** may give rise to problems. According to the Swedish report, difficulties may arise when dealing with a very short temporary employment. Normally, any employment is expected to last for at least six months in order to serve as the basis for an estimation of future income. However, when it comes to a migrant worker, under the Regulation,the future income is calculated as if their very short period of employment were intended to be permanent, a very generous principle which favours migrant workers compared to other workers in temporary employment.

Who should bear the **costs of the medical examinations**? According to the Polish report, institutions of some Member States refused to reimburse costs of medical examinations that were carried out at their request by Polish institutions of the place of residence for the purpose of establishing the entitlement to cash benefits on account of the short-term

incapacity to work under the legislation of the other Member State. In their opinion the request for reimbursement should always be sent via the liaison bodies. According to the Polish report, thisattitude is correct when dealing with the refund of material benefits, but not of cash benefits.

Information is crucial. In this respect, a good practise can be highlighted. According to the UK report, as part of the drive for improved cooperation between Member States, UK Decision Makers are required to make and notify the claimant of any decision on competency for claims to benefits which are taken in the UK but for which the UK is not the competent institution, unless it is clear that the claim was sent to the UK by mistake. The disallowance decision will include adetermination that the UK is not the competent State for a claim to that benefit andgive the normal appeal rights.

2. Long-term care benefits

a. Classification

A core problem is the **classification** of such benefits. The Austrian report mentions that the Von Chamier case was highly appreciated by the Austrian authorities because the ECJ had respected the different national long-term care systems. Nevertheless, with regard to the benefits in kind provided on local/regional level under Austrian social assistance schemes it is disputable if they really meet the qualification as social assistance according to Article 3 (5) of Regulation 883/2004. That is due to the fact that according to national law the entitlement on the one hand requires an individual and discretionary assessment of personal needs; on the other hand, the benefits are granted objectively on the basis of a legally defined position and are intended to improve the state of health and life of persons reliant on care.

The Spanish report highlights the practical problems encountered.As long as Spanish long-term care benefits cannot be qualified as social security benefits and as long asthey are not notified by the government as coordinated benefits, it is difficult to answer whether these principles are really applied in Spain.

b. Exportation

Another problem concerns the **residence or nationality clauses**. The Austrian report stresses that the *Landespflegegeld* still requires nationality or residence according to the respective regional legislation and therefore does not meet the demands of equal treatment.

In Belgium, since they were removed from Annex IIa to Regulation 1408/71, by Regulation 647/2005, the allowances for disabled persons (integration allowance and allowance for assistance to the elderly) are now **exportable**.With regard to the Flemish care insurance, persons living outside Belgium and subject to Belgian legislation on the basis of employment in Flanders or Brussels are contacted by the Flemish Care Fund with a view to their affiliation to a care fund of their choice. Every year, this concerns some 2500-3000 persons.

In the Cyprus report, a case was mentioned which may give the impression that the **exportation** of some long-term care benefits may be suspended after a certain period of time. The case was, however, not discussed in relation to coordination rules.

The Czech report indicates that care allowance is being **exported**, which in the majority of cases concerns neighbouring countries. However, the problem with the export of Slovak benefits to the Czech Republic is still ongoing. There are many Slovak pensioners who currently reside in the Czech Republic and have applied for the Czech care allowance. However, the Czech institutions are not providing those persons with the care allowance, arguing that they are not competent to do so. It should be the Slovak Republic to export the adequate benefits (cash care allowance, cash allowance for personal assistance and cash allowance to compensate higher costs) to the Czech Republic, as according to the ECJ case

law, these should be exported as sickness benefits. Nevertheless, the Slovak Republic maintains its own interpretation that those benefits are not long-term benefits which should be regarded as sickness benefits, but that they are benefits of social assistance and therefore not exportable to another Member State.

c. Overlapping

With respect to the **overlapping of benefits**,the implementation of Article 34 may require some new administrative provisions at national level.A possible reason for this is that according to the national legislation the institutions competent for health insurance are different from the institutions competent for the administration of long-term care benefits (AT).

The French-Luxembourg bilateral convention stipulates that when a person is entitled to the French APA on the basis of residence in France and to the Luxembourg equivalent of the APA on the grounds of a former professional activity, the APA should get priority over the Luxembourg benefit, which is granted only for the amount exceeding the APA.

The Dutch report stresses the **information** procedure between institutions in order to avoid overlapping. If the person concerned lives in the Netherlands, the CVZ is to inform the competent State without delay about any benefit in kind that this institution intends to provide for the purpose of long-term care and about the costs that are involved. This provision gives rise to practical difficulties for two reasons. Firstly because the Dutch health care scheme does not provide for long-term care benefits as such. Therefore, it is not always easy to assess whether a health care benefit in kind in the sense of the Dutch legislation serves the same purpose as a long-term care benefit would have under the legislation of another Member State. The second problem relates to the way in which long-term care is financed in the Netherlands. This factor entails that, in general, it is hard to indicate the exact costs of the benefits in kind provided for carepurposes. For this reason the Dutch institution in the place of residence is not always able to give the competent institution the information needed to prevent the overlapping of benefits.

The Belgian report introduces a recent reform of the Flemish care insurance scheme taking into account case C-212/06 and new rules of coordination. The modified Decree of 2011 now explicitly provides that, in conformity with the **principle of assimilation of facts**, in order to be entitled to benefits, a person must, for at least five years prior to the claim for reimbursement, have resided without interruption either in the Dutch-speaking region or the bilingual region of the Brussels-Capital or, as a person covered by a social insurance scheme, in a Member State of the European Union or a State of the European Economic Area (Article 5, 5° of the Decree of 30 March 1999, as amended). The decree also provides that insofar as affiliation to the scheme is concerned, the derived right of family members of frontier workers “follows” these workers’ own right. In concrete terms, family members of “outgoing frontier workers” (i.e. persons living in Flanders or Brussels, but working in another Member State) are exempted from affiliation, whereas family members of frontier workers working in Flanders (or Brussels) must (or may) join the scheme.

3. Maternity and equivalent paternity benefits

The Czech report indicates that due to new regulations, some people who were previously covered by the Czech health care insurance, have fallen under the legislation of the Member State where they reside. This concerns Czech citizens (mainly women) with permanent residence in the Czech Republic, but whose residence is however located in another Member State according to the coordination rules. The applicable legislation is different if they derive their rights from the rights of their spouse, or if they are regarded as a non-active person. No earlier than after the labour office has decided that the person is no longer entitled to parental allowance do the health insurance companies find out that they are no

longer competent, even regarding the health insurance for such a person. This problem is being tackled by competent health insurance companies in cooperation with labour offices.

According to the Finnish report, in the Nordic *Gränshinder* expert group there has been discussion about the implementation of the Norwegian father month. The Norwegian institution requires that in order for a father to receivehisfather month, the mother has to have worked in Norway. This would, however, seem as a case of assimilation of facts. For example, the father month should be awarded to a father who resides e.g. in Finland and works in Norway, and whereby the mother of the child fulfils the criteria of previous work set by Norwegian law although the mother has performed the work in Finland.

In Sweden, it is now recommended that in accordance with Preamble 20 of Regulation 883/04 the parental benefit (at minimum/guaranteed level) can still be paid to a family member/the other parent resident in another Member State, provided he or she is not him or herself entitled to such a benefit in the country of residence. This requires – as before, when the benefit was regarded a family benefit – that the insured parent transfers his or her days with parental benefit to the other non-resident parent. The benefit not being a family benefit, however, makes the special rules on the overlapping of such benefits irrelevant.Nevertheless, the problems with aggregation/assimilation of periods and facts in another Member State experienced in relation to the Swedish parental benefit scheme seem to persist. Particularly as regards the entitlement to an income-related parental benefit during the first 180 days of parental leave (which presupposes insurance for sickness benefits in cash during 240 days prior to the birth of the child). Some cases are pending before the ECJ.

4. Benefits in respect of accidents at work and occupational diseases

In general no major challenges have been reported.

The Belgian report stresses a problem with the application of **Article 36 of Regulation 883/2004**. In particular, it relates to the verification of the occupational character of benefits in kind provided in the State of stay or residence on behalf of the Belgian institution. Indeed, the Belgian institution is reportedly not always in a position to verify that such benefits in kind are linked with the occupational disease. In several Member States, benefits in kind for occupational diseases are reimbursed/covered by separate institutions, i.e. a general institution (competent for healthcare) and a specific one (competent for occupational diseases/employment injuries). It sometimes happens that the general institution claims reimbursement for the costs of care that cannot be manifestly linked to the occupational disease (e.g. a cancer unrelated to the professional disease). Typically, that institution (as opposed to the specific one) would refuse to provide the Belgian institution with proof concerning these benefits in kind, arguing that doing so would infringe data protection legislation. This puts the Belgian institution in a difficult position, unable to assess whether the claim is to be acted or not.

A typical problem of **lack of recognition of a diagnosis** provided by a doctor from another Member State is illustrated in the Cyprus report: a citizen with double citizenship (Norwegian and Cypriot) who had two accidents in Norway eight years before during his employment. As a result of this injury, the complainant has not been in a position to work since September 2003. The injury was first diagnosed in Norway, but as the applicant had to be examined further and the medical examinations in question could not be provided in Norway, the complainant had to undergo these examinations in Cyprus. The complainant himself as well as his doctor communicated the results to the competent body in Norway. The complainant also delivered the results of his examinations to the Social Insurance Services in Cyprus, and they were sent to the corresponding services in Norway. Although the complainant received an invalidity benefit in Norway for some time, at the present stage the competent services in Norway refuse to provide to him the benefit under consideration, because they do not accept the diagnosis that has taken place in Cyprus.They consider that it has not been proven that the injury was caused by an occupational accident.

The **calculation of benefits** may present difficulties when its amount is based on the last salary received in France and when the beneficiary has not been working in France but in another Member State for years. In this context, the person might receive a benefit which is not commensurate with his or her last income. Dealing with this question about the "asbestos allowance", the ECJ ruled that "Article 58(1) of Regulation 1408/71 […] interpreted in accordance with the objective set out in Article 42 EC, requires that […] calculation of the 'average wage or salary', within the meaning of the first of those two provisions, takes into account the pay that the person concerned could reasonably have earned, given his subsequent employment record, had he continued to work in the Member State in which the competent institution is situated" (Nemec, case C-205/05). The French ombudsman has highlighted the complexity of the method of calculation of the allowance, but neither Decree 99-247 (which sets rules of calculation) nor the implementing circular have yet been modified accordingly. In practice, it seems that the allowance is calculated by the competent institutions on the basis of the last salary received, even if it is not in France.

5. Invalidity benefits

The **evaluation of invalidity**traditionally remains a difficulty when implementing the coordination rules. The Austrian report refers to the relationship between Austria and the Czech Republic with regard to the question which Member State is the competent State for the evaluation in case of frontier workers: the State of residence or the State of employment. Who must bear the costs of the evaluation? Meetings were held between Austria and the Czech Republic in order to solve this question. Especially the relationship between Article 87 and Article 49 of Implementing Regulation 987/2009 was unclear. The legal opinion of the Austrian authorities is that Article 49 limits Article 87. Thus the State of residence is the competent State for the evaluation of invalidity and must therefore bear the costs. The evaluation must then be made available to the competent institution free of charge. In return, the competent institution must accept the content of the evaluation. The same was true under Regulation 1408/71. The new rules are not supposed to bring any changes. According to the interpretation of the Austrian ministry, the rule that the State of residence is the competent State also applies if the person concerned does not have any attending doctor in the State of residence.

In Italy, the administration stressed that the **assessment of invalidity** expressed by foreign institutions is only made to determine the entitlement to ordinary invalidity, and the "Tables" should not be applied for the award of disability pensions. The institute has further clarified that the opinions given by the French and Belgian institutions, limited to cases of expected agreement and provided they are not negative judgements or made on appeal, must be considered binding.

In Poland, the authorities accept**foreign medical documentation** drawn up in relation to the cooperation with the institution of another Member State, as well as medical examinations carried out on the territory of that Member State,.

The collaboration between Member States is complicated. According to the Lithuanian report, there are many difficulties when Lithuanian residents apply for disability pensions and have insurance periods in the United Kingdom. When the Lithuanian competent institution sends a form E213 LT to the competent institution of the United Kingdom, the person and Lithuanian competent institution are asked to present much additional information on the social status of the claimant, his or her accommodation, ability to move, etc. In the opinion of the Lithuanian institutions, these requirements exceed the rules set in former Regulations and even more exceed the requirements of Regulations 883/2004 and 987/2009.

The Dutch report recalls that the Netherlands is not listed in **Annex VII** and indicates problems related to this situation. Because the Netherlands is not included in the annex, the Dutch institution always makes its own assessment of the degree of incapacity/invalidity. If

the Dutch institution is not the competent institution, the institution of the competent State can re-examine the beneficiary in order to assess his or her physical or mental limitations. Yet, it will be difficult for this institution to carry out the required assessment on the income that he or she is able to earn despite the limitations, since this assessment is linked to the employment possibilities on the Dutch labour market. This procedure may also be quite burdensome for the person concerned. After all, his or her situation will be assessed on the basis of Dutch criteria, which may cause problems when he or she wants to contest the results of the assessment. Furthermore, his or her employment possibilities will be assessed on the basis of the Dutch labour market which may be less suitable for persons who are more likely to find a job in the State of residence.

The Swiss report gives a good example of the principle of **assimilation of facts**. According to the Federal Law on Invalidity Insurance, the acquisition of the right to an ordinary invalidity insurance pension is subject to the completion of a three years' period of contribution. In a number of judgements, the Federal Administrative Court declared that periods of insurance completed under the legislation of other Member States have to be taken into account as if they had been completed under Swiss legislation (Article 45 of Regulation 1408/71), with the exception of those situations where the Swiss contribution period amounts to less than one year (Article 48 of Regulation 1408/71). The Swiss report introduces some additional cases relating to the interpretation of Annex VI.

The Finnish report emphasises the problems related to the **coordination rules for pensions and cash sickness benefits being separate**. The report provides a good example: A 50-year old lady is insured in Finland when she becomes incapable for work. During her working career, she worked in Sweden for ten years . During the first year of incapability she gets a sickness cash allowance in Finland and after that Finland issues a fixed term pension (rehabilitation support) for the period in which she undergoes rehabilitation actions. The amount of the rehabilitation support depends on how many years the person in question has been insured in Finland and what income she has had. The 10 years in Sweden do not give her pension rights in Finland. Sweden as well considers the person incapable for work for a fixed term.Thus, she would in principle have right to a sickness cash benefit from Sweden. However, as cash sickness benefits are only paid by the country the legislation of which is applicable and only by one country at a time, she is not entitled to the Swedish sickness cash benefit. Sweden cannot grant the person an invalidity pension for her 10 years of work in Sweden, as there is no fixed term invalidity pension in Sweden for people over 30 years of age. Therefore,the person incapable for work only receives the rehabilitation support from Finland which is calculated solely on the basis of insurance periods fulfilled in Finland. Another problem raised by the Finnish report is due to the different criteria for indefinite invalidity pensions.

The **aggregation of periods** may raise problems. In Luxembourg, in order to calculate the amount of this tide-over allowance, Luxembourg's fund exclusively takes periods worked in Luxembourg into account. Periods worked abroad are explicitly excluded.According to the Luxembourg report, this is not compatible with EU rules of coordination.

According to the Dutch report, the differences in the definition of invalidity across the Member States can be a complication for a swift **assimilation of the facts**. This is especially true when a worker is entitled to pro rata benefits from several countries. The Netherlands is not listed in Annex VII of the Regulation and therefore not obliged to accept invalidityassessments of other Member States. This may result in situations in which, for example, the Dutch benefit administration, due to a change in the health condition, re-establishes a certain degree of incapacity for work that is not accepted by, for example, the German benefit administration. If this administration finds the person concerned not incapacitated for work, he or she will not be entitled to the German part of the invalidity benefit. Hence, a new calculation will be required. The need to re-calculate will pop up each time when the circumstances relevant for the entitlement or the benefit level change.

In principle, invalidity benefits are **exportable**. This is not challenged by the Member States. However, the UK report stresses that UK Decision Makers are reminded that the coordination regulations do not cover the Employment and Support Allowance (Income Related) which remains a special non-contributory benefit. There is a provision under domestic legislation for continued entitlement to Employment and Support Allowance (income related) during temporary periods of absence abroad.

6. Oldage and survivors' pensions

The principle of **assimilation of facts**gives rise to several questions. The Austrian report gives a good example of dealing with the supplement pension benefit (*Ausgleichzulage*) which is granted to pensioners with habitual residence in Austria drawing a low pension. The legal purpose of this benefit is to guarantee a minimum income/pension. The benchmark which is decisive for the entitlement to an *Ausgleichszulage* is determined by a national regulation in correspondence to the yearly living costs. For this benchmark only pensions and other income have to be considered and no other existing means. Furthermore, the benefit is granted objectively on the basis of a legally defined position. Due to this special character of the *Ausgleichszulage* it is considered to be a non-contributory cash benefit in the sense of Article 70 of Regulation 883/2004 and therefore it is enlisted in Annex 10.With regard to the principle of assimilation of facts it is controversially discussed in Austria if also a pension from another Member State fulfils this requirement for the entitlement to the *Ausgleichszulage*. This is due to the fact that a person who draws such a low pension that he or she is entitled to claim *Ausgleichszulage* can be considered as not having sufficient means. In other words, must the foreign pension be treated equally to an Austrian pension on the basis of Article 5 of Regulation 883/2004 so that the*Ausgleichszulage* must be granted, which means that the person concerned can provide sufficient means and therefore achieves the right to residence according to Directive 2004/38? A legal reaction to this situation has been the introduction of a more rigorous control mechanism regarding the habitual residence in Austria.

A good example of **assimilation of facts** is given by the French old age institution CNAV regarding the "*allocation veuvage*" (the widow allowance). According to Article 5 of Regulation 883/2004, the capacity of insured widow/widower is awarded to insured persons who were entitled to a pension equivalent to an old age, invalidity, accident at work for at least 3 months during the last 12 months preceding the death. This condition can be met if such pensions are provided in France or in any other Member State.

The principle of **aggregation**, usually well applied by Member States (RO), still gives rise to cases before domestic courts. In Austria, the Austrian Supreme Court ruled that the question whether and to what extend periods pursued in another Member State have to be considered has to be assessed by the legislation under which they were completed. Moreover, the decision of the competent institution about the quality of these periods is binding. In the concrete case the Spanish institution had declared that the pursued periods cannot be considered for the waiting period to a survivors' pension according to Spanish law. Therefore, the Austrian Supreme Court ruled that this also applies to the waiting period for a survivors' pension under Austrian law. In the Czech Republic, another issue related to the separation of the former Czechoslovak state emerged. Large state companies such as the Czechoslovak railway company, which normally resided in Prague even though they employed people from the whole of Czechoslovakia, have national branches, but did not have the whole range of powers, which was attributed only to the centre of the state company. The question that is raised today is whether the insurance periods aggregated during employment with such an employer are international periods (according to the site of the centre of the company), or just normal domestic periods (according to the site of the branch, which was also empowered to establish an employment relationship). The national courts are still divided. .The Swedish report highlights a new problem linked to the possibility for a spouse to transfer pension rights for child years to his or her spouse: May a spouse of a Swedish worker, residing in another Member State, rely on the Regulation to obtain pension rights for child-rearing years as a right derived from her husband?

The Lithuanian report refers to a problem of **application of the prorata principle**that may arise when some Member States apply the rule that more than one year of insurance is acquired in some professions (miners, etc) in one calendar year. Lithuanian legislation strictly states that only one year of insurance in one calendar year can be earned. So when a person earned, for example, 12 years of insurance in 10 calendar years of work in another Member State, only these 10 years are taken into consideration for the prorata calculation.

Some reports still mention the problem of persons who have an **international career** with periods of work both inside and outside the EU. Such a situation complicates the aggregation(FR).

In Italy, the INPS considered it appropriate to remind that the periods of **voluntary contributions** to overlapping periods of insurance completed in another Member State must be used both for the calculation of the independent pension and for the calculation of the prorata basis, excluding the corresponding periods of contribution performed abroad.

Some **administrative problems** are reported. The procedure of aggregation is said to be too time-consuming(LT).The considerable differences between the Member States in the rules on the protection of personal information is one factor that complicates the gathering of information to establish relevant facts (NL). The UK report mentions possible problems in the gathering of sufficient supporting evidence to validate identity details provided by the claimant. Fifty per cent of pension claims under the Regulations involve work in the UK and Ireland and these cases may create additional difficulties in that many of the workers may have come and gone several times during the course of their working lives and as a result may have very fragmented records. In a number of past cases the information provided by the customer and recorded on Form E 207 has been sketchy. Even where a National Insurance number is provided, supporting evidence may be required to verify that the NI number and the insurance account belong to the claimant, for example, previous addresses and employment records. The need for fuller details features in regular meetings between the UK's International Pensions Centre and its Irish counterparts. The UK considers the discussions to be very productive and "cooperation from the Irish authorities is excellent". The Greek report considers that a smooth implementation of the aggregation principle is not guaranteed by all Greek competent institutions concerned in the case of pensioners, subsequently exerting an economic activity.This would be caused by an interpretative approach followed by the Greek competent authority and the Greek liaison body (IKA-ETAM). The Finnish report raises one very practical question: shall information on insurance periods in the SEDs be divided on the basis that they are for the entitlement to a pension or for the calculation of pensions? The same report furthermore states thatthe implementation of child-raising periods according to Article 44 in Regulation 987/2009 is unclear.

The **calculation of the pension amount** may also be challenged before national courts. The Austrian report introduces such a case of the Austrian Supreme Court,in which it has been asked if the calculation of benefits on the grounds of the latest pension reform of 2008 complies with EU-law. The pension reform of 2008 increased pension benefitsby a certain percentage – the higher pensions y a higher percentage and the lower pensions by a lower percentage. A claimant,drawing a pension from Germany and from Austria, invoked a violation of EU law, asonly the Austrian pension was increased by a certain percentage according to the pension reform. The claimant argued that this rule implies the discrimination of migrant workers who draw pensions from different Member States compared to persons who draw a pension from Austria only. The latter see their pension increased by a higher percentage merely on the basis that they draw their pension from Austria solely. Furthermore, the claimant argued that the reform causes an indirect discrimination of women,as women generally draw lower pensions than men. Nevertheless, the Austrian Supreme Court stressed that, according to Regulation 1408/71 and Regulation 883/2004, foreign pension periods have to be considered only for the qualifying period for the entitlement to pension benefits. The calculation itself however follows the legislation of the competent State. This may in fact also be disadvantageous to migrant workers.

Nevertheless, this is the consequence of merely coordinating instead of harmonising social security systems. Furthermore, the pension reform of 2008 has to be considered an adaptation of the calculation in the sense of Article 51 of Regulation 1408/71. Therefore, a recalculation of the benefits on the basis of Article 46 Regulation 1408/71 is unnecessary and thus the adaption of the calculation only concerns the Austrian part of the pension. Nevertheless, the reproach of a possible indirect discrimination remains substantial.

The UK report indicates that the changes introduced by the Pensions Act in April 2010 have simplified the rules for **calculating pensions** under Regulation 883/04. Under the reform everyone with over one year's insurance now satisfies UK national law (and national law will always be as good as EU entitlement) unless a person has EU and UK insurance in a year which does not count as qualifying. Thus, there now are many fewer people who will require a prorata calculation under Regulation 883/04, as they will have entitlement under national law which provides for a better or equal rate.

The **export of pensions** is introduced from an interesting angle in the Belgian report. Since 2005, pensioners who receive a Dutch oldage state pension (AOW) receive a monthly allowance on top of their pension aimed at compensating the loss of purchasing power due to other policies.It amounts to EUR 34 a month irrespective of the level of the AOW. By the Act of 21 April 2011, the Dutch legislature replaced this scheme with a fiscal allowance. This fiscal allowance is payable to AOW beneficiaries who are resident outside the Netherlands, provided over 90% of their global income is subject to income taxation in the Netherlands. This legal change affects a significant number of retired frontier workers living in Belgium. It is therefore not surprising that associations of frontier workers, such as the *Vereniging voor Grensarbeiders*, have protested against this change, arguing that it is solely aimed at preventing the exportability of the purchasing power allowance. The Cyprus report refers to Cypriot low income pensioners who reside outside Cyprus (in Greece) and who are not granted the relevant allowance by Cyprus on the grounds of their low pensions/incomes. The position of the Cypriot Minister of Labour and Social Insuranceseems to be that Greek social insurance services are obliged to provide such allowance to the pensioners in question, since the latter permanently reside in Greece, in the same manner in which Cyprus provides such allowance to European low income pensioners permanently residing in Cyprus. The allowance in question in the Greek legal order is the social solidarity allowance for pensioners, which is a special non-contributory cash benefit. It is not clear to what extent the Greek social security services actually pay this allowance to the target group concerned. Other problems related to the exportation outside of Cyprus of pension rights acquired by public teachers are dealt with in the Cyprus report.

A problem with an **export** of an oldage pension was reported in the Lithuanian report. A person residing in Estonia received a prorata pension from Estonia and Lithuania and decided to leave to Ukraine. As Lithuania has an agreement with Ukraine to export the benefits, it was decided to export the Lithuanian prorata part despite the fact that a person moved from Estonia.

In the UK, a pension **exported** may be paid directly into a bank in the country the pensioner is living in or in the UK. Alternatively, the pension can be paid by payable order normally issued every four weeks. Payment is always made in Sterling. The DWP encourages pensions to be paid directly into a bank account as they consider this more secure, quicker and that it ensures a better rate of exchange and less commission charges than when the payment would be done by standing order.

The **right to postpone a pension claim** according to Article 50 of Implementing Regulation 987/2009 already existed under Regulation 1408/71 (cf Article 44). According to the Austrian report, the main problem with regard to Article 50 of Regulation 987/2009 is the lack of a maximum duration of suspension. This means that an application can be postponed without any time limit, also if the suspension of one's claim can oblige another Member State to provide benefits. If the person concerned already reached the age limit to claim a pension benefit of another Member State but suspends his or her application, can the foreign virtual

pension benefit be deducted from the Austrian benefit? It is assumed that if all requirements for the entitlement to benefits are fulfilled, the suspension of an application has to be considered as an abuse of legal measures.

The **payment of contributions by employers** is a source of problems. A French case showed that some employers whose registered office is located in a third country believe that they do not have to pay contributions for their employees who exercise their activity within the EU. This was the case for a Luxembourg employee of an American company. Before being dismissed, he had worked successively in Italy, Algeria, Spain (3 years), Germany (13 years), Argentina and finally in France.. The employer was convinced that the bilateral convention between France and the US exempted him from paying contributions in France.For the lower court, the employee had been subject to the law of each EU country where he had exercised his activity. This ruling is upheld by the French *Cour de cassation*. Firstly, it considers that the worker falls within the scope of the Coordination Regulation even if the periods of activity in the Member States were not consecutive. Indeed, for its application Article 2 of Regulation 1408/71 requires only two conditions: to be a national of a Member State and to be or to have been subject to the legislation of one or several Member States.
Concerning the specific case of Switzerland, the report introduces recent cases where the Federal Administrative Court declared that Regulation 1408/71 applies to all pensions the entitlement to which commenced after the AFMP entered into force. According to the Swiss report, it would not be correct of it should thereby mean to exclude the application of Regulation 1408/71 to pensions the entitlement to which arose prior to the entry into force of the AFMP.

7. Unemployment benefits

a. General principles

With regard to the implementation of Article 61 and the **principle of the aggregation of periods**, the Austrian administration applies the so-called “one-day-rule” (see also the Greek report). This means that for the application of Article 61 providing the aggregation of insurance periods or of periods of self-employment and dependent employment pursued in another Member State, one day of employment in Austria must be approved. The ‘one-day-rule’ does not apply to regular or irregular frontier workers under Article 65.The Greek report gives the example of the one-day-of-employment consequence, especially in the summer period during which Greece attracts many tourists and unemployed, the great majority of unemployed moving within the Community and easily satisfying the conditions for entitlement to unemployment benefits. This phenomenon has aserious financial impact on the scheme, taking into account that the persons concerned have paid all unemployment contributions to the corresponding insurance schemes of the Member States of origin – last employment, whilst for one day of contribution under the Greek scheme, the interested has a right to benefits even for a period of 12 months, without any mechanism of distribution, i.e.the sharing of costs.

The Swiss report refers to a caseon a Swedish national who, after the termination of her employment in Sweden, moved with her children to Switzerland, where her husband had taken up employment. It was ruled that the woman concerned was not entitled to a Swiss unemployment allowance because she had not been in any employment that was subject to contributions in Switzerland prior to becoming unemployed (Article 67,paragraph 3 of Regulation 1408/71). The relevance of this case is discussed in the Swiss report.The unemployment benefits are in principle calculated on the basis of the income of the last 12 months.

Another recent Swiss case is worth presenting. It concerns a German national who possessed a short-stay permit for a stay of less than one year and whose periods of insurance completed in Switzerland were not sufficient to achieve the minimum contribution period under Swiss unemployment insurance law. The periods completed in Germany were

not to be taken into account according to the transitional provisions of the Protocol. Therefore, the person concerned was not entitled to a Swiss unemployment allowance. The court ruled, however, that he had a claim for compensation of the damage arising from his late application for unemployment benefits in Germany. The competent Swiss institution had actually failed to inform him that he might not be entitled to Swiss unemployment benefits and omitted to fill in with him the form required to report the periods completed in Switzerland in order for them to be taken into account in Germany (cf, for this aggregation of periods, No. 1.2 under “Unemployment insurance” of the aforementioned Protocol).

Czech institutions recently had to solve the situation of a Czech citizen who worked in the UK for four years, then left to Croatia where he worked for one and a half years, and immediately after returned to the Czech Republic, where he applied for unemployment benefits. As there is a bilateral agreement between the Czech Republic and Croatia, it would be possible to aggregate both periods if the conditions are met. This was, however, not the case and therefore coordination rules were used. The question was whether it is possible to only take account of the British period according to Article 65(2) of Regulation 883/2004. According to Czech institutions, it is not, as the person was not insured during his last employment in one of the Member States. Such a person cannot claim employment benefits in the Czech Republic, unless at least a very short period of employment in the Czech Republic could be proven. If so, the British insurance periods would be taken into account and unemployment benefits would be provided.

The **administrative procedure of the aggregation of periods** is known to be too long. The Cyprus report introduces several cases of complaints by Union citizens because of a delay in the treatment of the application.

The Austrian reportindicates that some problems occurred implementing Article 61 with regard to the UK. This is because the UK approves periods of insurance for the whole year, which can cause **overlapping** with Austrian periods which have been pursued within the same year. In this case, Austrian authorities have to consider approved periods from the UK as far as to the first assessment of entitlement. Special rules also exist in relation to Finland. On another subject, the Belgian authorities take account of periods of self-employment (or “self-employed” insurance) for the purposes of determining the entitlement to unemployment benefits in Belgium.

With regard to the principle of **assimilation of facts,** Austrian authorities apply Article 5 of Regulation 883/2004 to facts which cause an extension of the relevant period in which the period of insurance, employment or self-employment must be proved. Even if Chapter 6 does not provide any special rule for this question, facts which occurred in another Member State and which under Austrian legislation would cause an extension of the relevant period must be considered due to Article 5 of Regulation 883/2004.

A nice example of **assimilation of facts** is provided by the Swedish report: the court considered work performed in Denmark as equivalent to work performed in Sweden in relation to the workcondition in the Swedish unemployment insurance. The case concerned a person who had been working full-time in Denmark and then – for a considerable time – half-time in Sweden. He now registered as partly unemployed. He did fulfil the minimum requirements only referring to his half-time job in Sweden, but then he had no right to a part-time unemployment benefit. It was thus more favourable for him to also take account of the period of full-time work in Denmark – then he was entitled to a part-time unemployment benefit. According to national rules, the most favourable alternative should be chosen. The Supreme Administrative Court thus stated that the period of full-time work in Denmark should be taken into account; nevertheless, regarding the amount of the unemployment benefit only the income of the work in Sweden should be taken into account.

In Sweden, the membership condition (one year of membership in an unemployment fund) is problematic. According to the wording of Article 61 of the Regulation, insurance periods completed in other Member States will be taken into account only if those periods would have been counted as periods of insurance had they been completed in the competent State.

A period of work and contributions is not sufficient according to Swedish legislation. The general Swedish view seems to be that even periods of work and contributions in other Member States will be taken into account when applying Article 61 to the membership condition. However, there is no more precise information on how the rules are actually applied by the different unemployment funds.There have been many cases on the question whether remaining as a member in a Swedish unemployment fund while working in another Member State is a way to meet the membership condition and qualify for a Swedish income-related unemployment benefit. The unemployment funds have argued that the membership in the Swedish unemployment fund ends when a person starts working in another Member State, irrespective of the fact that the person still pays the membership fee. A precondition for qualifying for the Swedish income-related unemployment benefit in these situations is, according to the unemployment funds, that the person applies in writing for a new membership when returning to Sweden. When this is not done in time, the income-related unemploymentbenefit cannot be granted.

Concerning the **calculation of benefits**, the Hungarian report highlights several administrative problems For instance, the separation of the previous form E301 into form U002 and form U004 has hindered smooth administration right from the beginning: it frequently happens that partner organs only send one of both forms upon request.Generally, it still takes a long time to receive the requested forms from the Member States, and for this reason awarding the unemployment benefit takes more time as well.For the rest, reports show compliance with EU law.

The Estonian report explains the following.Consider an insured person whoworked in Estonia for less than 12 months before becoming unemployed and who, prior to this period, worked outside of Estonia in another EEA country or in the Swiss Confederation.The average remuneration of that person per calendar day shall be calculated on the basis of payments made to that person in Estonia during the nine months of employment prior to the last three months of employment from which unemployment insurance premiums have been withheld. The months during which, based on the data in the unemployment insurance database, the insured person has been paid remuneration and the months entered in the database on the basis of data submitted by a competent authority of another EEA country or the Swiss Confederation are deemed to be the months of work for such person.

In Italy, the **calculation of benefits** is based on salaries received for work performed in the competent State.In determining unemployment benefits it is necessary to make calculations on the basis of earnings for the Italian insurance periods. It follows that, despite the periods abroad being subject to aggregation, the relative salaries do not assume any importance in determining unemployment benefits. An exception to this general rule are border workers and non-border workers for whom, for the purpose of calculating benefits, the institution in their country of residence takes account of the salary or professional income received in the Member State under whose legislation they were subject during their last employment or self-employment.
The French administration recalls that remunerations received in other Member States during the reference period are not taken into account.

b. Unemployed persons who resided in a Member State other than the competent State

Concerning **unemployed persons who resided in a Member State other than the competent State**, the Austrian administration applies Article 65 both to regular frontier workers, i.e. persons who meet the definition of Article 1 (f) of Regulation 883/2004, and to persons who do not meet the criteria of Article 1 (f), but who do provide a different State of employment and a different State of residence to which they return irregularly or after termination of employment. Due to this definition, this kind of irregular frontier workers mostly also have a second place of residence in the State of employment. Therefore, the mere fact that the person concerned also declared a place of residence in the State of employment is not sufficient to qualify the frontier worker as irregular. With regard to frontier workers,

especially the new rules on reimbursement of costs on the basis of Article 65 (6) (7) are evaluated very critically by national reports (AT, BE). For instance, Austrian authorities fulfilled the obligation of reimbursement of costs only if the person concerned could provide a minimum period of insurance of 28 weeks in Austria. Vice versa, the same applied for a call of reimbursement of costs if Austria has been the State of residence.
Because the condition of the minimum period of employment or self-employment is a point of discussion between the Member States and the Commission, the competent Austrian authority changed the administrative practice of reimbursement of costs. According to a new Austrian circular, all cases of frontier workers providing insurance periods of other Member States must be notified to the competent institution irrespective of the existence of a minimum insurance period.Austria would highly welcome a decision with respect to the following problems: the need of a minimum period of employment or self-employment for the applicability of Article 65 (6); the applicability of Articles 65 (6) and (7) in case of subsequent short periods of employment and unemployment; the definition of the moment when, according to Article 65 (7), a period of 24 months begins for the applicability of the reimbursement of costs for an extended period of five months; the applicability of Article 65 (6) (7) in case of subsequent periods of partial and whole unemployment and the modalities of calculating the maximum amount of reimbursement according to Article 70 of Implementing Regulation 987/2009.

The Belgian authorities seem to interpret paragraphs 6 and 7 in such a way that every new period of unemployment – regardless of its length – opens the possibility for a claim of benefits corresponding to a three-month period.

The Finnish authorities feel that Recommendation U1 is not necessarily sufficient to ensure that persons who partially work in another State than the State of residence remain subject to this latter State. According to Recommendation U1, a person who resides in another Member State, but who partially works in Finland should remain subject to his State of residence after an Article 16 agreement on applicable legislation has been concluded. Problems occur if the employer in Finland is not willing to pay contributions to the Member State of residence. Another obvious challenge or problem with the **reimbursement** is created when the two Member States in question do not agree on the Member State of residence. The Finnish report provides a good example. Member State A is the State of employment,but it is not clear whether the person is residing in this State or in a Member State B. It is in the interest of Member State B to state that this person has been residing in this State, because then Member State B is entitled to reimbursement from the State of last employment. Situations have been reported where a person who has worked in Finland has simultaneously received unemployment benefits from another Member State. Finland will in future make more efforts to exchange information concerning the legislation applicable and benefits paid. Finland and Estonia will have a meeting about this issue in October 2011.

As pointed out in the Polish report, the difficulty might beforehand be to define the **place of residence**. A Polish court ruled that having a flat in Poland while working in another Member State does not mean that the centre of somebody's interests is in Poland.

The Dutch report highlights a problem related to the interpretation of the **Huijbrechtscase** (C-131/95). One of the major changes in the new regime is that unemployed persons who receive unemployment benefits are regarded as employed persons and are therefore, in principle, subject to the legislation of the State of employment (i.e. the competent State). However, if unemployed persons lived in another Member State than the competent State during their last activity as employed persons, the legislation of the State of residence should be applied. This group is to receive benefits from the institution of the place of residence. In the Huijbrechtscase, the ECJ ruled that the State where the person concerned pursued his or her last activities as an employed person remains the competent State when an unemployed person belonging to this group decides to move or to return to the State where he or she lost his or her job. The UWV (a Dutch institution) believes that this ruling is no longer relevant in view of Article 11, paragraph 3 (c) and Article 65, paragraph 5 of the Regulation. Indeed, these provisions explicitly stipulate that the State of residence is to be regarded as the competent State as soon as an unemployed person receives an unemployment benefit in the

State of residence. For this reason, the UWV does not grant unemployment benefits to unemployed persons who temporarily worked and resided in the Netherlands, then lose their job and subsequently, after spending a period of time during unemployment in the State of residence (for example Belgium), decide to return to the Netherlands. However, there are situations in which the competent institution in the State of residence refers to the Huijbrechtscase, thereby stating that, in this case, the State where the person concerned has pursued his last activities as an employed person (in the example the Netherlands) should be regarded as the competent State. There are disagreements between e.g. the Netherlands and Belgium (the Belgian authorities still believe that the reasons, which led the ECJ to rule in **Huijbrechts,** are still valid), which causes situations where unemployed frontier workers who returned to the state of last activities are treated differently depending on whether they lived in Belgium or worked in the Netherlands or vice versa.

The Swiss Federal Supreme Court found that the decisive element for the application of Article 71 of Regulation 1408/71 was that during the last employment of the person concerned the State of employment and the State of residence were not identical. More precisely, the crucial factor is not that the State of employment and the State of residence are not the same, but that the competent State and the State of residence are different; this nuance is important in situations where the State of employment does not happen to be the competent State.

Some Member States provide a **definition of wholly/partially unemployed** (SI). The definition of “unemployment” may raise difficulties. The Slovenian report states that certain problems have been detected when coordinating unemployment benefits, especially in relation to Austria. Austrian bodies usually mark in a U1 (E301) form that the employment relation has ceased due to an agreement. In this case there is no entitlement to an unemployment benefit according to Slovenian legislation,although in many cases it is actually the business reason for terminating an employment contract (performing of seasonal work) according to Slovenian legislation.

What about **atypical frontier workers**? Whereas some countries still consider this category to exist (AT, CH), some others consider it no longer applies (BE, NL).As a result, the Belgian report provides that unemployed Dutch frontier workers residing in Belgium who, under the former rules, could be described as atypical frontier workers, now receive Belgian unemployment benefits, which, as a general rule, are lower than the Dutch benefits. The abandonment of the Miethe case law represents a financial burden for the Belgian authorities. For every single “Miethecase” who used to draw Belgian benefits and is now at the expense of the Netherlands in accordance with the general rule of Article 65 of Regulation 883/2004, there are 50 opposite cases where the financial burden now lies with Belgium (ca 1000/20 cases respectively). It is true, however, that the refund mechanism in paragraphs 6 and 7 of that Article somewhat attenuates the budgetary impact of the discontinuation of the Miethedoctrine (see also infra).

The Luxembourg report presents an interesting case about a **former frontier worker**. The *Cour de Cassation* confirmed a judgement of the CSAS, which invalidated a decision by the ADEM, the *Administration de l'Emploi*, refusing an unemployment benefit to a French frontier worker who transferred his permanent residence to Luxembourg after redundancy.The *Cour de Cassation* argued that Article 69 of Regulation 1408/71 did not apply.After this caselaw, Luxembourg changed its Legislation by theAct of 22 December 2006 on employment and introduced a new residence condition:” to be entitled to a full unemployment benefit, a worker must fulfil following conditions: (1....) 2. he/she must have his/her permanent residence (domicile légal) in Luxembourg at the moment of the notification of redundancy, in case of a permanent labour contract, or six month before the term of a fixed-term labour contract and he/she must have lost his/her job in Luxembourg, without prejudice to application of EU regulation or application of bilateral ou multilateral conventions”. In the comment on the bill in parliament, it was said that this change was justified by the decisionof numerous cross-border workers to transfer their permanent residence to Luxembourg during the dismissal

notice in order to get a better unemployment benefit in Luxembourg than in his or her State of origin.

Luxembourg also obtained an exception (Article 86) by which it could negotiate in the future bilateral agreements with its neighbouring countries (Belgium, France and Germany) on the application and the duration of the period referred to in Article 65, § 7. According to the Luxembourg report, this exception does not affect the rights of the unemployed. It is only a matter of reimbursement of costs between Member States. During the TRESS Seminar 2011, the representative of the Ministry for Social Security explained that Luxembourg will not sign three bilateral agreements, but one multilateral agreement with the three Member States. Germany plays the role of the leader.

Concerning **unemployment benefits for self-employed persons**, several problems are encountered, both with regard to the calculation of benefits of self-employed persons on the basis of an income earned abroad,andwith regard to the consideration of insurance periods covered abroad for the calculation of benefits on the basis of Article 61 of Regulation 883/2004 (AT).

Concerning the export of unemployment benefits, the Irish report mentions that there is a concern that the higher level of benefits exportable from Ireland, relatively to those payable in certain countries of origin, may act as a disincentive to seek work in the country of origin, which is compound by the high levels of unemployment and relatively low-wage employment in some of these countries, not at least as a result of the economic crisis and the fact that many more persons wish to seek work in another Member State or migrants who return to their country of origin.

The **extension of the export period to six months** is reportedly applied very differently in the various Member States. For instance, according to the Belgian report, the duration remains set at three months, but can be exceptionally extended to six months. This extension can also be applied for (also from abroad), provided the insured person encloses a positive opinion from the employment service in the State of stay, or submits proof of an intensive search or of clear and concrete chances to finding employment in the event of the extension being granted. In Romania,the period will be extended from 3 to 6 months at the request of the person sent to the territorial agency before the expiry of the initial term of three months. The Finnish report indicates that it is not possible to export the benefits for longer than three months. It seems that France will not stick to the coordination rules by allowing the exportation of unemployment benefits for a maximum period of 3 months. The right to export benefits can be claimed only one time between two periods of activity giving way to unemployment benefits, which might not be compatible with Regulation 883/2004. For unemployed persons going to another Member State, the Austrian report shows flexibility: with regard to the obligation to return to the competent State within three months, one week of tolerance shall be provided by the competent institutions.

The Swedish report raises the question about how to decide the competent State in situations of short temporary employments in another Member State.

Finally, some reports refer to the problem related to national activation measures in a cross-border context. For instance, the Belgian report considers that it seems logical that national measures consisting of reductions or exemptions of employers' social security contributions are applied exclusively to employers/employment liable to contributions in Belgium, whereas for other types of activation measures, the issue might be more complicated.

8. Family benefits

The national reports consider the new rulesto be clearer. Still, they introduce many difficulties.

In Belgium, several issues are reported when it comes to the rules applicable if the **applicable legislation and/or the competence to grant family benefits changes**. According to Article 59 of Regulation 987/2009, when the change occurs during a calendar month – irrespective of the payment dates of family benefits under the legislation of the Member States – the institution which has paid the family benefits by virtue of the legislation under which the benefits have been granted at the beginning of that month shall continue to do so until the end of the month in progress. With regard to how to apply this rule in case the event that causes this change occurs on the first day of the month, the Belgian RKW-ONAFTS has agreed with the Netherlands to follow its approach, implying that in those cases the change of competence has effect from the current month (rather than from the first day of the following month). In the relations with other countries, pending a uniform European solution, this approach is adopted insofar as the country whose legislation provides for an overlapping entitlement, also follows it. A further issue in Belgium concerns the so-called "quarterisation" of rights. This principle is laid down in Article 54 ECBA, pursuant to which an entitled person who opens entitlement to a child benefit in the course of a quarter, continues to open this entitlement for the rest of the quarter and for the subsequent quarter. As a result of the application of Article 59 of the implementing regulation, this quarterisation is applied in far fewer cases. The ministerial circular indeed states that, in case of transfer of competence (by priority right) from Belgium to another Member State in the course of a calendar month, Belgium is obliged to pay the child benefit until the end of the month in which the competence (by priority right) changes, without application of the quarterisation principle.

The wording of Article 68 (**overlapping**) may cause some problems of interpretation. The question is if the provision must be interpreted on the grounds of Title II of Regulation 883/2004, or on the grounds of the respective national system of the family benefits concerned. This question is especially important for those Member States, such as Austria, which grant family benefits mainly on the basis of residence. An interpretation of Article 68 on the grounds of national legal systems could lead to a change of the competent State.

The comparison of the entitlements between Member States presupposes that the national entitlement is precisely known. In Belgium, an example is given where domestic priority rules that are applied prior to the application of Article 68 of Regulation 883/2004 may lead to problematic situations. According to national law, the beneficiary who has priority may under certain conditions relinquish his or her priority to another beneficiary and this transfer of priority may also under certain circumstances be retroactive. This might lead to problems in the cross-border context. If the competent priority right pursuant to the Regulation shifts from Belgium to another country as a result of a transfer (e.g. from a right based on employment to a right based on pension), the institution of the latter is likely not to accept this change (let alone its retroactive effect).

The Austrian report provides the example of a family who resides in Austria, while the father performs an activity in Germany. Both in Austria and in Germany family benefits are mainly provided on the basis of residence. In this concrete example, an interpretation of Article 68 on the basis of national legal systems would cause the legal situation that the rights available in Austria and in Germany are payable on the same basis according to Article 68 (1) (b) of Regulation 883/2004, i.e. residence. Therefore, Austria would be the competent State according to Article 68 (1) (b) (i) of Regulation 883/2004 as the children of the family reside in Austria as well. Thus, Germany would not even be obliged to make differential supplement payments due to Article 68 (2). By contrast, if Article 68 is interpreted on the grounds of Title II of Regulation 883/2004, and especially Article 11, the family benefits available in Austria and Germany would be payable on a different basis; in Austria on the basis of residence, in Germany on the basis of an activity. That would create the legal situation that the competent State is Germany,because rights that are payable on the basis of an activity have priority according to Article 68 (1) (a).In Austria, this question was answered in favour of an interpretation on the grounds of Title II of Regulation 883/2004, so that now there is a change in the law regarding the priority, respectively regarding anti-cumulation rules in comparison to Regulation 1408/71.

The Lithuanian report indicates that **overlapping of family benefits** may happen when the mother (or father) of a child receives a Lithuanian child care benefit and at the same time works in another Member State. As a person on maternity leave, a parent is treated as working in Lithuania while working in another Member State. The place of residence of the child is not clear – it sometimes stays in Lithuania, sometimes in another Member State. In this case, a parent can claim family benefits in two Member States withholding the fact thata benefit is granted in another Member State. Due to the lack or delay of information from another Member State overlapping of benefits may arise.

In Sweden, the matter of **overlapping of family benefits** is still under scrutiny. A case presented considered two Member States, A and B, which both offered general child support and parental benefits at income-related and guaranteed level. The father worked in country A, where the family also resided, making A the primary State. The mother worked in country B – the secondary State due to pay additional benefits if higher. Considering Sweden is country A, what family benefits should be paid out in Sweden if the mother works in country B and has a right to income-based benefits there? According to Swedish legislation, the family is only entitled to the general child benefit. The income-related benefit is a personal benefit requiring that the parent in question also takes care of the child. The father is still working in our example and has not requested income-related benefits. The mother, on the other hand, is working in country B, which is the working State/competent State for her.In this case, she has no right to benefits in Sweden according to national legislation. Problems of interpretation have also arised if parents no longer live together. According to the Swedish National Insurance Board, divorced or separated parents are not family members and, consequently,parental benefits – until 2011-08-31 – and other family benefits may in this situation not be granted to the parent residing abroad as a derived right from the parent in Sweden. It is questionable whether this view is in compliance with EUlaw.

The Luxembourg report gives an interesting illustration of **overlapping**. the Court of Cassation confirmed a judgement of the CSAS, which invalidated a decision of the *Caisse Nationale des Prestations Familiales* (CNPF) regarding the Belgian 'time credit' (*'crédit temps'*in French). The CNPF considered that this 'time credit', taken for personal reasons, had to be qualified as a family benefit under Article 1 u) i) and Article 4 §1 h) of Regulation 1408/71 if an infant has been member of the household of the frontier worker. CSAS did not accept this argumentation.

The **overlapping of benefits** raises several additional problems, in particular as regards the calculation of the **supplement payment**. For instance, according to the Austrian report, Austrian authorities only apply Article 68 (2) to benefits of a comparable function.It is also unclear which income should be the basis of the calculation.Furthermore, it is not clear if the supplement payment has to be calculated on the basis of every single family member or on the basis of the whole family. Another open question is if the supplement payment has to be paid currently, i.e. normally monthly or also ex post. Some reports have a more optimistic analysis of this situation, considering that the situation has recently improved (BE).The Belgian report reminds that in a cross-border context, Belgian paid parental leave is not coordinated as a family benefit. This situation has been reported for several years now, but has not changed since. There are no instructions from the competent authority. As a result, Belgian paid parental leave is generally not taken into account for the purpose of determining the differential supplement in situations of overlapping entitlements. On the other hand, the benefit is paid to beneficiaries living in the EU/EEA/CH.

In Belgium, guaranteed family benefits, together with family benefits in specific granting situations (these include unemployed persons not entitled to unemployment benefits, prisoners, persons incapable of work not entitled to incapacity benefits etc) are categorised as rights on the basis of residence. For these entitlements, Belgium does not need to pay a differential supplement for children residing in another Member State.

The Greek report points out that the **overlapping of family benefits** from two or more Member States is quite rare, as far as OAED family benefits are concerned, because the OAED's legislation holds that the parent should be employed in Greece and his or her children should reside in Greece or another Member State. If the OAED is competent to pay the family benefit, the other Member State(s) is(/are) notified of the amount of said benefit in order to pay the difference to the beneficiary. That is because DLOEM family benefits are usually lower than the benefits of other Member States.

The application of the **principle of equality of treatment** can be identified with regard to non-active persons. The Austrian report gives the example of a Rumanian citizen.She lived in Austria for four years with her husband and children, one of them born in Austria, andwas denied family benefits due to the lack of sufficient means. The person concerned separated from her husband and did not perform any activity. She drew so-called `*bedarfsorientierte Mindestsicherung´* (means tested minimum assistance) as unemployment benefits were already drawn down. The claimed family benefits were denied with the argument that the person concerned had no right of legal residence in Austria due to the lack of sufficient means in the sense of Directive 2004/38. This example again shows the delicate relationship and reciprocity between the right of equality of treatment based on Regulation 883/2004 and the right of residence according to Directive 2004/38 on behalf of non-active persons.

The Luxembourg report gives a good example of refusal of **assimilation of facts**. The CAAS confirmed the refusal of the CNPF to grant family benefits to a young person aged over 18, because she no longer fulfilled the conditions to be entitled to family benefits as a student. In fact, the person obtained a bachelor's degree in Belgium and wanted to settle down as a speech therapist in France. She had to take a training course in France in order for her Belgian diploma to be recognised. The CNPF refused to assimilate the training course to higher education.

The **export of family benefits** still raises questions, especially related to the application of the Slaninaruling of the ECJ. In this case, the ECJ stated that a child residing in another Member State must be considered as a family member of its biological but divorced father who lives and works in Austria, and can therefore claim the export of Austrian *Familienbeihilfe* (family allowance) on the grounds of Article 73 of Regulation 1408/71. This is true provided that the biological (divorced) father is obliged to pay maintenance payments. According to the Austrian report, the Slaninaruling now gives the reason for the Austrian authorities to deny *Familienbeihilfe* (family allowance) to stepparents who live together with the child who is entitled to benefits in Austria if a biological parent lives and works in another Member State. The Austrian authorities competent for *Familienbeihilfe* (family allowance) interpret the Slanina ruling in the sense that the biological parents take precedence over the stepparents, even if the latter must be considered as family members of the child entitled to *Familienbeihilfe* according to national law (§ 2 (3) FLAG). The Austrian report considers that it is a source of legal disadvantages for patchworkfamilies with a cross-border element in comparison to patchworkfamilies without a cross-border element. The first cases dealing with this question are pending before the Austrian courts.

In Belgium, broadening the personal scope of the new regulations to all insured persons has led the RKW-ONAFTS to reconsider its policy on the **export** of guaranteed family benefits (which used to be an Annex IIabenefit). According to a circular, insured persons who receive guaranteed family benefits come within the scope of the new regulations, and these benefits will also be payable to persons residing in another Member State. At the same time it is stressed that, given the personal scope and the entitlement conditions of guaranteed family benefits, its exportability remains largely theoretical. No applications for the export of guaranteed family benefits have been recorded to date. The Irish report also mentions that the payment of child benefits in respect of children who reside in another Member State has become a source of controversy, partly due to the relatively high levels of child benefits in Ireland and the general impact of cutbacks in social protection entitlements. The government also made a commitment to examine the position and to raise the matter at EU level, notwithstanding the fact that a modification in the provisions would be very unlikely.

Hungarian family benefits for persons performing work in Hungary are paid and considered by the treasury with the same conditions even in those cases where the person's family permanently resides abroad. However, they (treasury) experience that certain Member States (Romania, the UK and in some cases Germany) only pay the benefits similar to child care allowances on condition that the family members of the person who works there and is a national of another Member State also reside there.

The Hungarian report stresses difficulties with Germany: in certain cases **reimbursement** concerning an earlier period is denied.The argument provided is that the beneficiary was already paid German benefits for that period, although a decree specifically provides that the institution responsible for payment shall deduct the sum to be reimbursed from arrears owed to the person concerned or from sums the payment of which is in progress. Therefore, earlier payments cannot be an obstacle to reimbursement in the case of continuous payment.

Posting still raises questions with regard to family benefits. According to the Luxembourg report, the CAAS confirmed the refusal of the CNPF to grant a family allowance and a child-raising allowance (in French *"allocation d'éducation"*) to a civil servant from Slovakia who was posted to EUROSTAT in Luxembourg, because he did not fulfil the condition of a "legal residence" in Luxembourg. The CNPF considered that he and his family remained under the Slovakian social security scheme, that the posting was of a limited duration and that the residence in Luxembourg was only of a temporary nature. As a consequence, he did not transfer his and his children's legal residence from Slovakia to Luxembourg. The French *Cour de cassation* had to rule in a debatable case about a woman who, for a period of one and a half years, went to Greece as a language assistant in a local high school. Her place of residence was situated in France before she moved to Greece with her children. The job was funded by an EU programme. The French local CAF refused to **export** the family benefits for the period corresponding to the stay in Greece. Strangely, the French Supreme Court ignores the coordination regulations and rules the case only on the grounds of internal legislation.It draws the conclusion that since she was not working under an employment contract, she could not be assimilated to a posted worker in the light of Article L761-1 of the French social security code. This case may not be compatible with coordination rules.

Some **administrative problems** are also encountered. For the Polish report, some administrative problems stem from the multiplicity of institutions responsible for family benefits (e.g. in Austria and Germany), which makes it impossible to determine the total amount of the benefit granted. The Italian report shows that the national administration has taken steps to clearly highlight the rules of the new Regulation to determine the applicable legislation as a priority and alternatively, in the case of benefits payable by more Member States for different reasons, or for the same reason (distinguishing cases of work activities carried out in two or more Member States, holding pension benefits in two or more Member States, of rights arising from residency). In terms of administrative procedure, the two-month delay provided for in Article 60(3) of Regulation 987/2009 is seen as unrealistic in practice; it is reportedly not applied in many countries (BE). The Hungarian report highlights several problems of administrative cooperation with foreign institutions. The Hungarian treasury's experience is that certain Member States only answer their questions after a long time or do not answer at all (Malta, Italy, Greece, Spain).Similarly, certain Member States do not answer if they do not agree with the Hungarian standpoint in a given case (Sweden, Germany).

In the Finnish report, the **different family concepts**that exist in different Member States are considered to complicate the establishment of the right Member state of primary competence, especially in situations where the parents are divorced and have new partners. In Finnish national law, a divorced parent/partner is not considered a family member. This problem has come across in a case about a mother who is a cross-border worker who lives with her child in Finland. The father of the child also works and lives in Finland and both parents are divorced. The mother's Member State of work stated that Finland is the primary competent Member State, because of the father´s work and the child´s residence in Finland.

As under Finnish social law, the father is not considered to be a member of the family, Finland is of the opinion that the mother´s Member State of work should be primarily competent, as it is the only Member State of work for this family.

E. Administrative cooperation and exchange of information

The need for administrative cooperation and in particular the fact that national social security institutions have an obligation to provide their beneficiaries with the required information, is made clear in an interesting court case in France. A Spanish national who resides and works in France informed the local family benefit institution that his children had moved to Spain. His family benefits were withdrawn on account of his children no longer residing in France. In May 2005, he claimed the family benefits on the grounds of Regulation 1408/71. He received a positive response from the local benefit institution, which however decided that he was entitled to family benefits only from May 2003 by application of a two-year prescription rule set in the French *code de la sécurité sociale*. The Court of Appeal turned down the request for financial compensation on the grounds that information on the EU regulation was available to the public and that the Spanish national had made no specific effort to get information on his personal situation and on the rights he could claim. The Court of Appeal was of the opinion that, for social security institutions, providing information is limited to general information. The highest court, the *Cour de cassation*, however considered that institutions in charge of the payment of social security benefits must provide beneficiaries information on their rights. As the local institution had not informed the Spanish national about the consequences of the application of the Regulation rule, the *Cour de cassation* did not follow the ruling of the Court of Appeal. Also the Swiss report mentions an interesting case in this respect. The Swiss federal supreme court had to deal with a German national in the possession of a short-stay permit for a stay of less than one year and whose periods of insurance completed in Switzerland were not sufficient to achieve the minimum contribution period under Swiss unemployment insurance law. The periods completed in Germany were not to be taken into account according to the transitional provisions of the Protocol. This was the reason why the person concerned was not entitled to a Swiss unemployment allowance. The court however ruled that the person concerned had a claim for compensation of the damage arising out of his late application for unemployment benefits in Germany. The competent Swiss institution had actually failed to inform him that he might not be entitled to Swiss unemployment benefits and omitted to fill in with him the form required to report the periods completed in Switzerland in order to take them into account in Germany.

The fundamental aim of the new Regulations to strengthen administrative cooperation between Member States is in different reports considered as a new general important principle of the coordination rules. The necessity to implement a new electronic computer-based system for the exchange of information, EESSI, is recognised as an important issue to reorganise and to optimise the operational sequences within and between the competent institutions. The advantages of this computer-based exchange of information are stressed in many reports. The following elements are pointed out as a big advantage: the prevention of errors by standardised procedures; the reduction of the administrative efforts for the competent institution; the fast exchange of information and the consequent shorter period of processing; the transparency of the procedure; the collection of national databases, especially to combat the abuse of legal instruments, and the improvement of the information or logistics. Notwithstanding the actual administrative burden that the preparation for such a system demands from the national authorities, the strengthening of this intensive administrative cooperation is considered to be necessary. All countries were however not confident of the actual use of paper SEDs. This does however not exclude that in many reports concerns were expressed about the too short transitional periods foreseen for implementing this system.