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Executive Summary

I Background

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

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

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

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

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

Some countries (Malta, Slovenia, Hungary) already had appropriate structures and

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

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

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

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

II Some general cross-cutting issues

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

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

In 1998, in order to make the Regulations "more efficient and user-friendly" and take account of changed circumstances the European Commission published its proposal for a new Regulation (COM(1998)0779) and following long discussions and negotiations, Regulation 883/2004 was adopted by The European Parliament and The Council on 29 April 2004. The new regulation will be effective from the date of entry into force of the new implementing

regulation. However, even before the Implementing Regulation has been adopted, several countries feel that not all of the problems encountered in coordination, will be completely resolved in the new texts. So there is continuing need for reflexion.

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

The personal scope of Regulation 1408/71 has itself expanded over time from coordinating social security for workers, refugees and stateless persons, and their families to include everyone; while the concept of European citizenship has opened up new routes to entitlement in addition to the traditional link to employment.

Changes in national legislation or circumstances

-The structure of social security schemes

One important issue concerns the way social protection systems are structured in the Member States and the impact this might have on coordination. Growing problems may be expected. We have already noted the potential challenges presented for the uniform implementation of the Regulations in countries where administration is devolved to local levels. In addition the further regionalisation of social protection is likely to present new challenges. While the Regulations currently coordinate national schemes, recent devolutionary trends in some Member States may lead to growing pressure for the application of EU law to intra-state contexts, in part through the growing influence of European citizenship. Should intra-state arrangements become subject to European coordination law, questions will follow about how to apply the principles and framework of coordination in this context. A recent case concerning Flemish long-term care insurance has flagged up some of the issues that are likely to arise in the application of community law to Member States with a decentralised structure (Belgium). Notwithstanding the still valid rule that the Regulation is not applicable in internal situations, the by analogy application of the coordination principles in an internal national context, is a source of growing complexity and unsolvable issue. This may lead to the inclusion of concepts hitherto unknown to the Regulation (Belgium).

-The Active Welfare State

A second important issue is the influence of the 'active' welfare state on coordination. The promotion of the active welfare state is leading a move away from social security schemes aimed at compensating losses consequent upon the realisation of specified risks and contingencies towards schemes concerned primarily with preventing the risk occurring in the first place. Many employment-related schemes require participation in work-related activities as a condition for entitlement to benefits. This increasingly includes not only employment allowances, but also, for example, invalidity benefits. These developments are likely to raise new issues around the classification of these types of benefits (UK), while cross border participation in work-related activities and rehabilitation measures will present policy makers and administrators with further challenges. The application of the principle that only one legislation is applicable in a situation where a person is performing part-time work in one Member State and receiving part-time sickness allowance or part-time rehabilitation allowance from another Member State, might not always be in the interest of the migrant worker (Finland). A problematic situation could occur where a person has resided in Member State A and worked in Member State B. In Member State B s/he receives a sickness or rehabilitation allowance and is also encouraged to take up part-time work, in order to promote her or his capacity to work and remain in the labour market for as long as possible. The person concerned is also considered to be insured under the pension insurance

scheme. A problem might arise when the person is taking up a part-time job in Member State A where s/he resides. A conflict might arise between the interest of remaining insured in Member State B, where the last period of full-time work was performed, however, it is not likely that the employer for the part-time work in Member State A would want to pay contributions to Member State B. Neither is it possible that the institution paying the sickness or rehabilitation allowance would pay contributions for the employment pension insurance to Member State A.

-Classification of benefits

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

It is perhaps not surprising that the classification of, and distinction between, social security, social assistance and special non-contributory benefits continues to be contested. However, work undertaken within the Administrative Commission and the developing case law of the ECJ has further clarified the demarcation lines between these types of benefits with the content of 'social security' continuing to expand. It is possible that a whole range of benefits and services belonging to the broad concept of social welfare will increasingly be brought within the remit of the Regulations. This may include, for example, social housing allowances, and advantages and services related to labour law. Defining the material scope of the Regulations will therefore remain an important and difficult task, not least because the concept of social security itself has a Community dimension.

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

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

-Changes in family law

Changes in family law in Member States, as well as definitions and arrangements, can also be expected to have an impact on the application of the Regulations. The impact of divorce and the rights of children and ex spouses raise issues for coordination with respect to family allowances, while questions of custody and the distribution of financial obligations can be complicated in a cross border context. Important questions concerning same sex marriage and partnerships are likely to move up the policy agenda. The risk of potential discrimination in the personal and derived rights of same sex couples, exercising their right to free movement, that may arise from the different civil statuses accorded to same sex couples in

the Member States has been noted in several member countries. The existence or not of a marriage link can affect the exercise of some of the rights acknowledged under the national legislations. For example, the position of a migrant worker who is married under a country that accepts same sex marriage and whose surviving spouse claims a survivor pension, under Regulation 1408/71 in a country whose laws are restricted to heterosexual marriage and partnerships.

Discrimination against same sex couples across Europe could present serious barriers to free movement. The impact of the interface of the plethora of partnerships statuses and benefit entitlement conditions could imply that some same sex couples exercising their right of free movement may find their status and entitlement changing as they move between different rights regimes to the detriment of their social security contribution record and entitlement to benefit (UK, Slovenia, Luxembourg, etc.). The recognition and status of transsexuals may also raise important questions for coordination. And there may also be issues for the the pension entitlements of surviving spouses of polygamous marriages that are not recognised by the Member States' legislation (Spain).

Relevance of the Regulations' provisions

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

-Flexible Migrant Worker

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

exchange of information concerning the existing rules as well clearer definitions of some of the existing concepts.

-Need for further clarification/definitions

Some of the concepts used in Regulation 1408/71 are unclear and/or controversial. For example it is likely that the concept of posting will remain a contested issue in the foreseeable future. Posting, initially introduced as an exception to the general rule, is now widely used, sometimes leading to the (incorrect) perception that it is itself the general rule. Even after the adoption of the 'Practical Guide for the Posting of Workers', Member States continue to interpret the concepts and practice of posting in a variety of ways.

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

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

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

-Smooth functioning of the Regulation

Regardless of the substantive content of the Regulations, the smooth functioning of coordination depends on effective cooperation between national administrations. Administration - based on E-forms - is sometimes a source of complication and delay and consequent difficulties for migrants in all Member States. It is of the utmost importance that further attention should be paid to the growing concerns about the administrative difficulties encountered when implementing the Regulations. An incorrectly completed E-form, missing data, delays in sending documents, the use of national forms annexed to E-forms, even on occasions non use of E-forms, can all inhibit and delay effective processing of a claim. Consequently there is considerable interest in the development of electronic exchange of information. This will not only speed up administration but could also avoid the practical problems identified above. However, effective electronic exchange of information depends on well organised and effective national administrations. Administrative decentralisation that is taking place in some Member States might introduce additional problems due to lack of

knowledge of the Regulations at local level combined with lack of clarity about roles and responsibilities. Again these developments point to the continuing need for wide dissemination of up to date information about the application of the Regulations.

The considerable differences between Member States concerning rules for the protection of personal information also complicates further gathering of data. It is reported that requests for information are sometimes answered only after a long delay, leading to gaps in protection. Although the ECJ attaches considerable importance to good cooperation between the Member States and considers this is often the first way to solve problems, it is nevertheless felt that this cooperation cannot be enforced and cooperation in this field often falls far short of what is required. In addition to effective cooperation between administrations there is also a perceived need for the Administrative Commission – as also pointed out by the ECJ - to play a more active role in resolving specific issues and conflicts in addition to its current role clarifying more general issues. A view is expressed that the Administrative Commission does not always play a strong enough role, leaving the countries concerned to bring infringement proceedings under Article 227 before the ECJ, which, however, is not a viable approach. These elements are the cause of growing frustration among national institutions and inspection services, which leads to avoidable mistrust and suspicion. On the other hand, it is generally felt that the necessary good cooperation between the different authorities and institutions in the Member States is an essential precondition for the good functioning of coordination. Good administrative cooperation is increasingly viewed as the fifth principle of European social security law. Further cooperation is also envisaged to combat fraud and protect revenue. Although it is generally felt that electronic exchange of information will be an important step in improving cooperation between Member States, it will not be sufficient in itself. It is, however, a source of frustration that the different national remedies against fraud, in particular in the areas of posting, cannot be applied in a European context, as they are not binding for companies, which operate from the territories of other Member States (Belgium). Adaptation of European instruments may be necessary in this respect.

Interface with other aspects of EU law

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

Provisions of the Treaty

People are increasingly relying directly on the Treaty provisions. For example, the influence of internal market rules on health care and ECJ case law on European citizenship are having an increasing impact on social security and consequently an indirect influence on the Regulations. There has been a view expressed by some that Article 18 of the Treaty provisions on European citizenship would only apply in cases that are not covered by the Regulations. This is not the case. However, as long as the provisions on European citizenship provide only additional protection to migrant workers the issue is less problematic than when the application of European citizenship comes into conflict with Regulation 1408/71. Recent cases before the ECJ suggest that the courts have tried to avoid giving more rights on the basis of Article 18 than derived from Regulation 1408/71. However, we can expect further developments in this area as the arguments made by the ECJ are likely to be tested in respect of Article 18 and further developments with reference to Article 18 can also be anticipated over the extent of coverage of non-contributory benefits. An important development taking place is the direct reliance on the general principles of free movement of persons (Art. 39) by European workers, in order to combat possible limitations to their fundamental rights, limitations that not only are the result of national rules, but also sometimes follow from the application of the EU Regulations themselves.

-Residence Directive 2004/38

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

-Boundaries between EU-instruments

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

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

A. Fundamental and general principles

1. Equality of Treatment

Equality of treatment is one of the four basic principles of coordination. This principle rules out both direct and indirect discrimination. There is little evidence in the national reports of direct discrimination on grounds of nationality. The very few examples include Belgian unemployment benefits and some benefits for family members in Slovenia. However, the reports present evidence of indirect discrimination, including, arguably, new residence conditions attached to some benefits in some Member States (Finland, Ireland, Sweden, UK). Sometimes it is, however, difficult to assess if migrant workers have the same access to social security benefits as national workers. A particular difficulty lies in distinguishing between different treatment of national workers and migrant workers that results from differences between the social security legislations of the Member States that are acceptable under EC law on the one hand and criteria, which must be considered as discriminatory under EC law on the other hand.

2. Export of Benefits

Article 10 of Regulation 1408/71 provides for portability of long-term (and to a lesser extent short term) benefits. Apart from the uncertainties surrounding the application of provisions on special non-contributory benefits there were few problems reported with export of benefits. One exception concerns the high fees some banks charge to make transfers of benefits that are payable abroad (Czech Republic, Romania). The traditional non-exportability of certain

benefits under the Regulation, such as special non-contributory benefits or unemployment benefits, could be increasingly questioned under the direct applicability of the general free movement principles of the EU Treaty. Recent ECJ case law, but also developments on the national level have made clear that even inclusion in Annex II a of the Regulation, exempting the national authorities from the obligation to export these benefits, is not necessarily the end of the story. Recent ECJ cases - *De Cuyper* or *Peterson* or *Hendrix* - have made clear that the non-exportability of certain benefits has to be looked at alongside the right of freedom of movement under Article 39 or the European citizenship under Article 18. Under these circumstances, conditions of residence can only be put forward if its object would be justified and proportionate to the objective pursued. This might end up in other results. Although, for example, in the *Hendrix* case the ECJ considered a benefit for young disabled people, listed in Annex II a of the Regulation as non-exportable, it however questions its compatibility with freedom of movement under Article 39. It was up to the national courts to answer and after weighing the national legislation in the light of these principles, the national court declared the non-export clause not to be applicable. Examples such as these have made it clear that the Regulations are no longer the only route for coordination of social security for migrant workers.

3. Applicable legislation

3.1 General introduction

a. Legislation applicable

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

b. Posting

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

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

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

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

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

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

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

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

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

Working in two countries

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

3.2 Application of Article 17 of Regulation 1408/71

Article 17 can serve as an exception to the provisions of Article 14.1(a) concerning posted workers. Many of the reports show that Article 17 is mainly applied in cases when individual exceptions from posting rules are claimed. However, Article 17 can also be used in other circumstances. For example, Bulgaria had experience with similar provisions before

accession in social security agreements with Germany and Austria. Bulgaria concluded special agreements containing transitional rules for converting decisions under these bilateral agreements into decisions under the Regulation. On the basis of the transitional agreements most of the posting certificates under the bilateral agreements were converted into agreements under Article 17 as they concerned periods that were often longer than prescribed in Article 14 and 14(a) of the Regulation. Many of the reports contain concrete examples of the application of Article 17. Denmark and Sweden have concluded an Article 17 agreement in order to make arrangements to accommodate the growing risks of working in two countries and the change of applicable legislation after the opening of the Oeresund bridge. France has concluded Article 17 agreements for major international companies or for very specific activities or situations.

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

4. Aggregation of periods

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

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

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

B. Scope of the coordination Regulations

1. Personal scope

The dichotomy between employed and self-employed persons and the difficulties also on a national level to make the distinction between who is employed and who is self-employed, not at least also as a result of the introduction of economic dependant persons, do lead to necessary problems. The fact that some activities might be considered to be activities as employed person in one State, but as self-employed in another, might induce companies to find ways to avoid payment of social security contributions by experimenting with different types of contracts. This, however, does not exclude the fact that the presumption that a certain activity is performed in the capacity of employed or self-employed person, is still quite often applied in an international situation, although this is contradictory to EU-law. In the past it has been questioned to what extent competent authorities have the right to challenge the classification given under the legislation of another Member State. An issue which has now been resolved following the *Hervin* and *Hervillier* cases. Many reports however identified the

growing influence of European Citizenship and show that restrictions in secondary legislation are being challenged by this increasingly powerful concept. Future impacts of Citizenship are difficult to predict. Another question raised in some reports concerns the different new forms of living together including same sex partnerships and marriage.

2. Material scope

Several reports show how the classification of benefits plays an important role in the correct application of the Regulations and there is a lengthy list of benefits and schemes that cause problems in relation to definition. It will perhaps not be surprising that most problems occur in relation to non-contributory benefits, for example, long-term care benefits and special benefits for disabled people as well as rehabilitation measures.

The introduction of a new benefit often raises questions about definitions and how to distinguish between social security, social assistance, mixed benefits and benefits which do not fall within the scope of the Regulation. Several of the national reports highlight that the distinction between social security, special non-contributory benefits and social assistance under the Regulation is not sufficiently clear. Social assistance benefits in the Member States are no longer discretionary and other traditional criteria to distinguish between social security and social assistance – for example, whether the benefit is means-tested or whether a non-contributory benefit provides only supplementary cover to contributory benefits - are no longer valid. Inclusion in Annex IIa of Regulation 1408/71 is not decisive as comparable benefits (even within the same country) may or may not be included in the Annex.

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

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

C. Other issues

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

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

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

A. Sickness and maternity benefits

1. Cross-border medical care under the Regulation

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

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

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

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

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

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

that all the costs of health care will fall upon the country of residence, although the pensioner might have contributed all his or her working life to other Member States' system. The possible outcome and the problems relating to a fair distribution of health care costs between Member States remains a subject of debate. It might be useful to further examine the problem of health care costs of pensioners.

B. Long-term care benefits

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

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

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

C. Maternity and paternity benefits

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

D. Invalidity

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

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

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

E. Old-age and death

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

1. Aggregation of periods

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

2. Calculation of benefits

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

3. Member States' co-operation

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

4. Modifications in pension systems

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

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

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

F. Accidents at work and occupational diseases

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

G. Unemployment benefits

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

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

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

H. Family benefits

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

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

Changes of family composition and arrangements can cause difficulties, particularly where the couple has separated and are working in different Member States. Divorced or separated parents are, according to the Swedish competent institution, not family members and family benefits may in this situation not be granted to the parent residing abroad as a derived right from the parent in Sweden. It is arguable that the child is a family member to both of its

parents, regardless of whether they are divorced or separated. Or another issue is the consequence of the fact that support is awarded to the parent, who contributes to bringing up the child financially, but does not actually raise the child (Hungary).

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

V The EU Regulation and international agreements

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

VI The Coordination Regulation and other parts of Community Law

It has already been noted that increasingly the social security coordination regulations are no longer the only instruments that deal with cross-border social security situations. People are increasingly relying on the direct application of the Treaty articles. For example, Article 39, and also Article 18 on European citizenship. The relationship between Article 18 of the Treaty and Directive 2004/38 has gained particular attention. New issues are being discussed such as the relative priority of Directive 2004/38 and Regulation 1408; the impact of Directive 2004/38 on inactive citizens and the necessity for non-active persons to prove that they have sufficient resources to be legally resident according to the Directive.

Disclaimer: the following country sheets contain an overview of the main problems and issues discussed in the Member States concerned. The number of pages are not necessarily proportional to the number of problems in the country. The information is received from data obtained and reports written by the national experts.

Country Reports 2008

The Implementation of Regulations 1408/71 and 574/72

AUSTRIA

IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Material scope

Classification of social security benefit

The Pensionsvorschuss (pension advance payment), which is a cash benefit that can be drawn by all persons who on the one hand meet the conditions for the entitlement to *Arbeitslosengeld* (unemployment payment) except the requirement of willingness and fitness to work and on the other hand have claimed an invalidity pension temporally limited for the period until the latter is granted or denied. Hence it combines elements of unemployment and pension benefits. It is now categorised by the European Court of Justice as an unemployment benefit (Case 228/07, Petersen).

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

Applicable legislation

Lex loci laboris

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

Posting: conditions

According to Austrian law a posted worker remains subject to Austrian legislation under § 3 (2) ASVG as long as the duration of posting does not exceed 5 years. This provision applies only in the case that Regulation 1408/71 or another bilateral convention is not applicable. The most debated problem in this context regards the question under which conditions a situation of posting in the sense of Regulation 1408/71 can be assumed. According to national case law the degree of remaining relationship to the country of residence for the duration of the posting period is of elementary importance. This assessment has faced criticism because of its lack of practicability by also including aspects that are not linked to the concrete posting agreement such as e.g. status of insurance before and after posting.

On the other hand, foreign workers who are posted to Austria remain under the legislation of their home country according to Article 14 Regulation 1408/71. In contrast employees of a foreign undertaking without a seat in Austria who are performing inland work are included

into national social insurance, when they are residing in Austria and are not already subjected to a foreign social security scheme. In this case, there is no duty for employers without a permanent establishment in Austria to pay social insurance contributions because it is the respective employee's duty. This judgement has been criticized because the court failed to adequately take into account Article 109 of Regulation 574/72.

Administrative formalities and cooperation

Although administrative formalities are considered to be complicated, it appears that Austrian employers are able to handle these difficulties (especially the use of forms E 101 and E 102). This also applies to posting to Austria.

Nevertheless it has been criticised that part of the necessary available information about posting to Austria is offered only in German. Problems regarding access to information have also been resolved with regard to the applicable minimum wages which are not conclusively presented in one single source but just by detailed request.

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

Persons staying outside the competent state

Austrian health care insurance bodies are confronted with severe practical problems regarding the concept of occasional health care. This is due to the fact that Austria has a notably high number of occasional health care treatments caused by the high number of ski accidents in the Alpine winter tourist areas. The main problem in this context is that the reimbursement of costs by the competent Member States is not processed or at least delayed. Furthermore the procedure of reimbursement is considered to be rather complicated and too long (average duration lasts up to three years). That has led to the situation in which Austria has stipulated agreements with several Member States (e.g. Ireland) with the declaration of dispensation with reimbursement. In this case the citizen of the respective Member State is treated like a national and all costs are borne by the state providing the occasional health care.

Planned health care abroad and article 49 EC

The rulings in *Kohll* and *Decker* did not attract as much attention in Austria as in some other Member States, e. g. Germany. This is because Austrian health insurance before these judgments did (and still does) not distinguish between treatment abroad and those in Austria. In both cases the Austrian law provides for the reimbursement of 80 per cent of the costs that the competent health insurance institution would have had to pay for treatment by a *Vertragsarzt* (physician who has a permanent contract with that institution, cf. §§ 338 *et seq.* ASVG).

Nevertheless there are some concerns in Austria raising that the limitation of reimbursement to 80 per cent of the costs might be an obstacle for patients access to cross border health care. The Austrian Constitutional Court did not consider the limitation to 80 per cent as a violation of the fundamental right to equal treatment between *Vertragsärzte* and *Wahlärzte* (physicians without a permanent contract with the respective social insurance body). The Constitutional Court concluded that the limitation does not violate the fundamental right to equal treatment, however, the court made no comment about the compliance of this provision with EC law.

Long-term care benefits

Classification as benefits in kind or cash

Both *Bundespflegegeld* (long-term care benefit at federal level) and *Landespflegegeld* (long-term care benefit at state regional level) are classified as health care benefits in cash. Benefits in kind are only provided on local/regional level under social assistance schemes.

Export of benefits

Landespflegegeld is subject to nationality or residence conditions under the respective regional legislation and therefore does not meet the demands of equal treatment. Because of the ruling of the ECJ in the *Hosse*-case (C-286/03) these provisions do not apply to EU/EEA nationals.

Old-age and death

Award of supplement

Austrian legislation provides a supplementary benefit, the *Ausgleichszulage*, for pensioners with a pension under € 747 (figure for the year 2008 for single pensioners without any maintenance obligations) in the amount of the difference to the above mentioned benchmark. The classification of the *Ausgleichszulage* as a non-contributory benefits has been confirmed by the ECJ in the *Skalka*-case (C-160/02). Therefore it is not subject to the material scope of Regulation 1408/71 and the export-obligation.

Accidents at work and occupational diseases

Accidents while travelling

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

Unemployment benefits

Unemployment benefits for the self-employed persons

Since 2008 self-employed persons are covered by unemployment insurance under certain conditions. Some groups such as freelancers who (often) work according to the same principles as dependent workers are explicitly treated as such in terms of unemployment insurance. In this context it is questioned whether periods of self-employment before the year 2008 should also be taken into consideration as qualifying periods.

Assimilation of facts

In practice, the assimilation of other facts (e.g. military service in another Member State) seems to be provided for. However, there are still some problems as the following case demonstrates: The VwGH ruled that periods of self-employment pursued in another Member State do not prolong the reference period for completing the qualifying periods as provided for unemployment benefits under the AIVG: The Court decided that under § 15 (5) AIVG only

periods of self-employment in Austria give rise to extension of the reference period laid down in the law; this could not be considered as discriminatory or as a violation of the principle of assimilation of facts, since Article 9a of Regulation 1408/71 only refers to periods during which certain benefits have been drawn and periods devoted to the upbringing of children but not to periods of self-employment pursued in another Member State.

BELGIUM

IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Personal scope

Employed and self-employed persons

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

Family members and survivors

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

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

Material scope

Benefits concerning new risks

Pre-retirement schemes

The pre-retirement scheme comprises statutory unemployment benefit, and an additional benefit, which is granted by the former employer, or, in some cases, an industrial fund. The additional benefit is granted to frontier workers and migrant workers who have been employed in Belgium and who are entitled to unemployment benefits under the legislation of an EEA Member State. It is calculated as if it were granted in Belgium, *i.e.* as if it were paid in conjunction with a Belgian unemployment benefit.

Problems are mostly caused, however, by anti-cumulation rules in other Member States.

Further to Dutch anti-cumulation rules, the Belgian additional benefit is deducted from part of the Dutch statutory unemployment benefit (*i.e.* the additional benefit which is granted on top of the regular benefit if the latter is below a certain amount). Sometimes, the Dutch authorities may refuse to consider the worker's unemployment to be involuntary, resulting in denial of unemployment benefits. They are also reported to deny unemployment benefits upon consideration of the fact that the worker is exempt from the requirement of searching for a job.

Applicable legislation

General introduction

Specific issues

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

Partly as a result of recent ICT possibilities, *telework* is becoming increasingly common.

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

Working in one Member State only

Posting Conditions

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

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

Prohibition of replacement

The policy of the RSZ – ONSS is fairly flexible on this point. If one person replaces another, their periods are counted together. However, it is difficult for the authorities to check whether the original posting period is exceeded. Journalists often violate the rule of prohibition of replacement. For the time being, the RSZ – ONSS does not seem to take specific action against this.

Administrative formalities and cooperation

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

The following case illustrates the consequences of the *Herbosch Kiere* ruling of the ECJ. The RSZ – ONSS finds that a German worker is sent to work in Belgium by a company which manifestly does not fulfil the criterion relating to the habitual pursuit of significant activities.

The RSZ – ONSS enters into contact with the *Krankenkasse*. In its answer, the latter institution confines itself to stating that it cannot verify whether the company has indeed substantial activities in Germany. And there is an end to the matter.

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

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

Working simultaneously in two or more Member States

Either as an employed or as a self-employed person

One of the most problematic aspects of the rules determining the applicable legislation is to know at what point several periods of posting need to be considered under the provisions dealing with simultaneous employment in two or more Member States. For example is a person living in Belgium who is posted by her or his employer to another Member State several times a year for short periods. Where is the threshold? The policy of the RSZ – ONSS is to treat circumstances as falling under the scope of Article 14(2)(b) after approximately 8 assignments abroad a year.

It may also be noted in this regard that several periods of posting may also trigger the application of Article 14c.

International transport workers

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

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

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

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

Persons residing out of the competent state

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

Problems have occurred in relation to Ireland, the UK and Spain. Belgian insured persons who go to work in these countries, while maintaining their domicile in Belgium (and remain in the national register), are often refused a form E106 by the institutions of the States concerned. According to the latter, these persons reside in the territory of the competent State, as a result of their working there.

The Belgian insurance institutions report that recently the institutions of Ireland and France, in particular, have taken a tougher stance when it comes to delivering forms E104 and E106.

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

Special rules for frontier workers

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

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

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

Persons staying outside the competent state
Concept of occasional health care

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

Belgian authorities are concerned about a recent phenomenon, commonly called “Grenshopping”, involving abuse of the EHIC by some Belgian insured persons. Persons insured in Belgium go and buy medicines at pharmacists established (immediately) across the border in the Netherlands. Upon presentation of their EHIC, they receive the medicines as if they were insured in the Netherlands, i.e. often free of charge.

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

Long-term care benefits

Aggregation of periods

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

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

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

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

Finally, the confirmation by the ECJ that the benefits provided by the Flemish care insurance are sickness benefits, also implies, in accordance with the *Hosse* case law (C-286/03), that

the amendments introduced by the 2004 Decree concerning regards migrant workers should be extended to the members of their families.

Invalidity

Export of benefits

Belgian law does not allow a disabled person to accept new (part-time) employment unless prior authorisation is granted by the medical insurance adviser of the *mutuelle*. In other Member States, such as France, the Netherlands, Germany and Italy, such authorisation is not required.

This may lead to problems whenever an insured person who has been granted a Belgian invalidity benefit moves to another Member State and wishes to resume part of her or his professional activities.

Assimilation of facts

Some problems with regard to classification arise, especially when workers are entitled to benefits from Germany, Greece and Italy, in addition to Belgian benefits. With regard to the application of national anti-cumulation rules, the national courts have to rank benefits according to national law. Community law is irrelevant in this matter. This principle sometimes leads to surprising results.

Under Belgian law, the cumulation of invalidity benefits leads to the application of a national anti-cumulation rule (a foreign benefit is deducted from the Belgian benefit), whereas cumulation of an invalidity benefit with an old-age pension is permitted, provided a ceiling is not reached.

In some Member States, invalidity benefits are limited in time, pursuant to either an administrative decision (Germany, Greece) or the law itself (Italy). In Italy, extension of the benefits is subject to a new application. Sometimes, this turns out to be quite problematic owing to the fact that decisions are always made with retroactive effect.

Accidents at work and occupational diseases

Assimilation of facts

Assimilation of facts seems to cause some problems with regard to occupational diseases. This is caused by the lack of a Community concept of such diseases.

Some Member States only recognise diseases mentioned on a specific list, whereas others have an open system which requires proof that the employee's illness is linked to her or his occupation.

Belgium has a mixed system. It has a list of officially recognised occupational diseases, and if an employee can prove that their illness/condition was caused by their occupation, s/he will also be considered to have an occupational disease.

The different concepts may lead to refusal to undertake medical examinations, required by the competent authority of another Member State. Examinations are sometimes refused because a recognised occupational disease in one Member State may not be recognised as such by the State where the patient has to be examined.

Unemployment benefits

Aggregation of periods

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

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

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

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

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

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

In practice, however, the Belgian authorities are not reluctant to grant full unemployment benefits if precise information as to the employee's situation, and more precisely the status of termination proceedings in the Netherlands, is provided.

Family benefits

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

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

BULGARIA

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

Reimbursement of benefits

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

EHIC-fee: In Bulgaria, patients had to pay a fee to receive the EHIC, contrary to the Decision of the CASSTM on the EHIC. In the meantime, the Director of the National Health Insurance Fund has announced that funds have been free to make the card free of charge due to a change in the Law on the Budget 2008 for the NHIF.

Double insurance: Bulgaria was allowing double health insurance, based on Bulgarian citizenship and on residence. Bulgaria tried to settle this prior to accession. In a clause in the Law on the Health Insurance it was held that people under the coordination rules are not obligatorily insured. This was supplemented by an entry into Annex XI.

Complaints were noticed of Bulgarian students in Germany, as the German institutions obliged students to certify the EHIC and to get insurance in Germany for 50 EUR a month. Bulgaria reported this to the European Commission. A German colleague admitted that these contributions were indeed wrongly collected and it was suggested to ask for reimbursement via E104's. Consequently, during recent months a large number of E104's have been issued. Other institutions, such as the Belgian and the French, ask a student for an E106 or an E109-form. But Bulgaria refuses these requests as there is no legal basis for this.

Old-age and death

Assimilation of facts

Before the Bulgarian court, a case was discussed, in which the assimilation of facts was central, relating to the refusal of a pension benefit. One of the conditions of a pension benefit, is that insurance should be terminated at application. But the applicant was still insured in the Czech Republic. That fact was assimilated by the Bulgarian institution and his pension application was denied. This assimilation of facts was thus an obstacle to being awarded a pension under the national insurance scheme.

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

CYPRUS

IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Material scope

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

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

Applicable legislation

General introduction

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

Cyprus has a very strong maritime position.

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

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

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

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

Another issue which is of interest with regard to *Cypriot* seafarers in the light of the smooth operation of the Regulation stems from the following context: while the bilateral convention between Cyprus and Greece concluded in 1979 excluded seafarers from its scope, Regulation 1408/71 provided a legal foundation for the pension rights of Cypriot seafarers

with service in Greece, which was extensively applied. Cypriot maritime labour having worked in Greece as well as their beneficiaries claiming an entitlement, were informed about their rights on the basis of the Regulation via appropriate campaigns, and 600 applications were reported to have been submitted.

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

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

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

Working simultaneously in two or more Member States

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

Other issues

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

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

actual fact, employed or not. If the employer in Cyprus denies that such employment has taken place, it is difficult to substantiate the case from a legal point of view, moreover because the main witness resides outside Cyprus.

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Invalidity

Bilateral agreement between Cyprus and Greece

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

THE COORDINATION REGULATIONS AND INTERNATIONAL AGREEMENTS

Bilateral conventions on social security with other EU Member States

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

An issue arises with regard to public teachers who were first employed as such on the territory of Greece or Cyprus, and then continued their pathway in the other country involved, where they retired. Upon entry into force of Regulation 1408/71 in Cyprus, a divergent interpretation of applicable rules has been reported between Cyprus and Greece, which results in a differentiated treatment of teachers/civil servants involved, depending on whose country's territory they retire. Cyprus applies since 1.5.2004 Regulation 1408/71 concerning social insurance of civil servants who are subject to the Social Insurance Scheme; in addition to this, in virtue of the above-mentioned law of 1997, the service of public teachers provided in Greece, who retire in Cyprus, is considered pensionable by Cypriot authorities. In the equivalent situation in Greece, Greek legal order applies Regulation 1408/71 only, and does

not apply the bilateral agreement of 1994. As a result, as of 1.5.2004 public school teachers who exercise their right of free movement between the countries involved, and retire in Greece, are subject to a differentiated treatment as compared to those who retire in Cyprus.

CZECH REPUBLIC

IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Personal scope

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

Applicable legislation

Working in one Member State only

Lex loci laboris

The lex loci laboris principle is incorporated into Czech legislation.

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

Posting conditions

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

Application of Article 17

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

Other issues

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

Another question arises in connection with the regulatory fees (co-payment) that are to be paid by a patient every time when s/he makes a visit to a doctor, stays in hospital or where a doctor prescribes him/her medicine. From the point of view of coordination, these regulatory fees should be treated as co-payment for health care and citizens from another Member State who are treated on the territory of the Czech Republic will have to pay the regulatory fees as do Czech citizens. There is a ceiling of 5,000 CZK per year payable in regulatory fees and any excess is returned to the patient by the competent institution.

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

Member States' cooperation

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

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

One question that has not yet been solved, it is whether or not to reimburse autopsies. Within the Czech health insurance system, an autopsy is covered and therefore shall be also coordinated. Other countries however do not cover autopsy costs from their health insurance system and argue that sickness benefits in kind are provided to persons who are alive and who need health care to improve their health situation. This condition is not fulfilled in the case of an autopsy. The Czech authorities are considering the possibility of excluding the financing of autopsies from the Czech health insurance system and to solve the problem in this way.

BENEFITS IN CASH

Member States' cooperation

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

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

Long-term care benefits

Classification as benefit in kind or in cash

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

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

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

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

Member States' cooperation

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

Invalidity

Member States' cooperation

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

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

Old-age and death

Assimilation of facts

There is a long-lasting and unresolved problem with regard to Czech and Slovak pensions. There are two different legal opinions of the Supreme Administrative Court and the Constitutional Court. The issue is however a bilateral rather than a European one. The dispute is about applying Art. 20 of the Agreement between the Czech and Slovak Republics on social security after the split of the two countries. This agreement introduced a rule on the aggregation of periods acquired during the existing Czechoslovak state. Due to different economic development, the rule turned out not to be convenient to some people who worked in the Slovak Republic but who were Czech citizens and then returned to the Czech Republic and continued to live there. As a result, such people have been receiving a lower pension than other pensioners who acquired just Czech periods and have received a Czech pension. Some of these people asked for compensation and the Czech Social Security Administration refused to give it to them. As already mentioned, the problem has not yet been resolved. There are some signs that a similar problem has recently emerged in Slovakia as well.

Studies abroad are a general problem for pensions in the Czech Republic. There is a possibility of taking account of periods of studying abroad in the legislation but these provisions are not applied. They are linked to CZ citizenship and are thus “intended to serve only CZ nationals”, but what does EU law say about this? Other issues for the coordination of pensions are the difference between bilateral agreements and Regulation 1408, the treatment of childrearing periods, the treatment of student periods abroad (cf. student period in Poland when applying for CZ pension), the recalculation of insurance periods (Article 15, 3 of 574/72, how should periods be recalculated?), inclusion of repaid periods (CZ national wanted to include A German employment period for the calculation of his pension, but this period of contributions was reimbursed by Germany during his employment – the court decided that it could not be aggregated as the period must be confirmed by the competent Member State according to Article 48), the minimum period of insurance (6 months in bilateral agreements; 1 year in 1408), percentages in the calculation of pensions (in CZ, a percentage of the average monthly income determines the pension – if the applicants stay for many years abroad, the pension is calculated from income of many years ago, which is not much) and the combination of early pensions and gainful employment (a person has no right to apply for the early old-age pension in CZ when she or he still works in Austria).

In 1992, CZ and SK went separate ways and in both countries the social protection system stemmed from the 1988 Social Security Act. So they used the same legislation as a starting point, but amended it further on in time, according to their own needs. There is the bilateral agreement on social security between CZ and SK. Article 20 was optimal when the agreement was prepared and more employers were established in CZ and more SK workers worked in CZ. As to periods of insurance before the division, those were the responsibility of the Member State where the business had its address. If no such address existed, there was a reference to the permanent address of the worker. Article 26 used to add to the SK pension up to the CZ pension level. In February 1993, there was the currency split. Both the countries used Act 100 of 1988 but they were differently amended. The increase in payments was greater in CZ and there were different values of the Crowns. 1 CZ Crown was 1.20 SK Crown. These issues also affected the pension paid by the SK Republic. On 1st January 1995, CZ adopted a new Pensions Act, resulting in a new basis of the amount of the pension. On 1st January 2004, SK introduced a new Pensions Act, in a period where citizens began to have higher income. CZ said that the SK pensions were lower than the CZ pensions; this has been reversed but only for those who had a higher income over the years, resulting in higher SK pensions. In May 2004, the EU regulations became applicable and thus also Annex III. According to this, Article 12, 20 and 33 of the bilateral agreement remained in force.

In CZ, some people feel discriminated against regarding the payment of pensions to SK. According to the Constitutional Court, the CZ citizen must have the same pension as s/he would have had according to the agreement, but the one calculated in SK can be lower. CZ citizens cannot be refused a CZ pension, regardless where they have worked before. Before 1993, the pension was not recalculated. Internal guidance was issued and now the CZ

citizens have a right to the difference for the period before 2004. But after the 2004 SK Pension Law and with the SK economy booming, the situation may be reversed and the Slovak may have a right to a top-up.

The question remains whether this treatment of supplementing CZ citizens is discrimination towards other EU citizens.

DENMARK

IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Personal scope

Third-country nationals

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

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

Material scope

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

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

Social security

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

Social Assistance

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

Although outside the regulatory scope of 1408/71, it should be noted that the status of social assistance in relation to EU law has undergone a process of clarification. Danish social assistance benefit is divided into two main schemes; cash social assistance benefit and introductory benefit. Introductory benefit is paid to persons who have resided outside Denmark more than seven years of the last eight years and grants a considerably lower monthly amount than cash social assistance. The residence criterion of seven years is, however, waived for EU citizens provided EU law entitles them to cash social assistance

benefit. The specific circumstances under which EU law waives the national residence criteria has, however, been unclear. The case has been brought before the Social Appeals Board which clarified that when the person qualifies as worker within the meaning of Regulation 1612/68, the national residence clause is overruled. This occurs when a person enters an employment relationship in Denmark although the employment is only for a brief period (of a minimum of 10 weeks). The person will be regarded as a worker from the first day of employment and then be entitled to the higher cash social assistance benefit without complying with the domestic seven years rule. This clarification substantiates that residence criteria for social benefits are contested, but used as entitlement conditions, although its relation to international law at times is intensively debated. The introductory benefit has been much debated in Denmark and criticised for its de facto discriminatory effects.

Benefits concerning new risks

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

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

Other issues

National rules against overlapping

Social pension

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

However, the decisions from the National Appeals Board have now been overruled by Danish legislation. The Act on Social Pension now states that when the length of residence is calculated, periods in which social pension rights are also earned abroad are not taken into account.

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

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

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

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

Concept of occasional health care

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

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

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

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

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

Planned health care abroad, article 49

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

ESTONIA

IMPLEMENTATION OF THE GENERAL PROVISIONS

Applicable legislation

Working in one Member State only

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

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

Application of Article 17

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

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

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Old-age and death

Last year, the Tallinn Civil Court had to decide on a case concerning the export of an old-age pension and the application of the Regulation's transitional provisions. The case concerned persons who were granted Estonian old-age pensions. They resided in Estonia until 1996. In that year, they informed the Social Insurance Board (ENSIB) of their intention to move to Russia. The payment of their pension was discontinued from October 1996 as the Estonian legislation in force in 1996 made the award of pensions contingent upon residence in Estonia. It turned out that the persons concerned actually moved to Germany. Upon Estonia's accession to the EU, the pension payment was restarted, by virtue of Article 10 of Regulation 1408/71. The pensioners at issue claimed payment of their pension retroactively,

for the period October 1996 - May 2004. Their claim was rejected by the ENSIB. The Court found in favour of the ENSIB, referring to Article 94(1) of Regulation 1408/71, according to which “no right shall be acquired under this Regulation in respect of a period prior to 1 October 1972 or to the date of its application in the territory of the Member State concerned”.

FINLAND

IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Material scope

According to the judgement C-299/05 of the ECJ the Finnish child care allowances were not considered to be special non-contributory benefits and could therefore no longer be listed in Annex II a of the Regulation 1408/71. The Finnish legislation concerning the child care allowance has been abolished. The replacement benefit is the disability benefit for children under 16 years. Finland has deleted the old child care allowance from Annex IIa and will not try to include the replacement benefit into the Annex. Finland will not try to get the new disability allowance for over 16 year olds in to Annex IIa either as it is comparable to the Swedish disability allowance which was considered by the ECJ not to be an Annex IIa benefit

Applicable legislation

Working in one Member State only

Lex loci laboris

The main problems relate to situations where the person coming to Finland for a short period of time:

- does not fulfil the minimum criteria (in *soveltamisalaksi*) for being insured in Finland, or
- fulfils all the criteria during work, but who after a short employment period is not considered to be residing in Finland either under national legislation or the community concept of "centre of interests" when applying article 13.2.f

The same problems relate to situations where a person who has been insured in Finland goes to work in another Member State for a short period of time, but does not fulfil the criteria set out in the legislation in the other Member State. The rules on legislation applicable clearly state that if the Member State where the person concerned is performing his/her economic activities that is the competent Member State, but the person concerned does not get any rights to benefits from that Member State. In these situations people who have been covered under the Finnish residence based system often demand to continue to be covered under the residence based system. These persons may still be considered to be residing in Finland according to Finnish national legislation. The Social Insurance Institution has in these situations still considered these persons to be covered under the residence based system, if the person can show, that his/her intention is to stay abroad for a maximum of one year and where the person can state that he/she does not full fill the criteria for insurance in the Member State where the work or the activity as a self-employed person is performed. New forms of mobility create further problems.

New forms of mobility create the necessary problems:

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

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

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

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

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

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

Work performed for companies hiring staff.

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

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

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

Special rules for specific categories of persons

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

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

Working simultaneously two or more Member States

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

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

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

Workers

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

Pensioners

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

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

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

minimum payable amount for National Pension is 5,93 e per month) and then get a substantial employment pension from Germany.

BENEFITS IN CASH

A question that has come up in the Nordic working group for rehabilitation is the following which relates also to legislation applicable:

Practical implementation of the new type of benefits as cash sickness benefits

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

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

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

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

For the time being the Social Insurance Institution (Kela) has instructed its administrators to apply Article 19.2 in a way that only one Member State will pay its cash benefits at a time.

Invalidity

Medical examinations and administrative checks

Some of the major problems for individuals who are claiming invalidity pension from a another Member State and residing in Finland is that in the course of the assesment process in the other Member State Finland often pays sickness allowances or unemployment benefits to the person. When the invalidity pension is granted retroactively from the other Member State the benefits granted in Finland will have to be recovered from the individual in question. The current procedure in Article 111.1 of Regulation 574/72 can only be applied in situations where the benefits paid from the two Member States are both pensions. When the benefit from the other Member State is a different type of benefit than the benefit granted retroactively from a Member State only article 111.2 of Regulation 574/72 can be applied. This often means in practice that a recovery procedure between the institutions is not

possible because it is not often possible according to the national legislation of the Member State paying the benefit retroactively. The national recovery procedure is much more burdensome for the individual because s/he may have to pay back benefits that s/he has received for a longer period and that have been vital for her/his income e.g. sickness allowance or unemployment benefits. If the arrears of benefits could have been reduced (e.g. the sickness allowance) from the arrears of invalidity pension the other Member State starts paying out to the individual, the individual would not have to pay back benefits that s/he may already have spent.

Additional remarks

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

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

FRANCE

IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Material scope

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

The *Revenu Minimum d'Insertion* (RMI), a benefit which guarantees a minimum subsistence allowance for all people who have a stable and lawful residence in France, does not fall within the material scope of Regulation 1408/71.

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

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

General Principles

Equality of treatment

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

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

Export of benefits

Most of benefits granted by French social security schemes can be exported according to the provisions of Regulation 1408/71. However, some sensitive questions remain.

If family allowances are exportable since *Pinna I* (41/84) and *II* (1/88) cases, some family benefits related to childcare, listed in Annex II ("complément de libre choix de mode de

garde" / supplementary open choice of child care allowance), are subject to a condition of residence.

After *Perez Naranjo* (C-265/05), it is now clear that French special non contributory benefits listed in Annex IIa are not exportable. Nevertheless, the list of benefits included in this annex has not been updated. The exportability of the *allocation de solidarité aux personnes âgées* (Solidarity Allowance for Elderly People) is therefore at stake.

The same question arises about the *prestation de compensation* (third person assistance and equipment benefit for disabled), a benefit for disabled people. Could they be considered to be sickness benefits?

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

Applicable legislation

Working in one Member State only

Posting, conditions

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

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

Other issues

Financing of social security benefits

After the ECJ ruled that French authorities have failed to fulfill their obligations by requiring persons who reside in France and work in another EU member state to contribute to the CSG and CRDS [Case C-34/98 *Commission des Communautés européennes v. République française* [2000] ECR 995] ; Case C-169/98 *Commission des Communautés européennes v. République française* [2000] ECR 1049], the domestic legislation was amended.

Although the new legislation meets the requirements of the ECJ and puts French law in conformity with Regulation 1408/71, a doubt has arisen regarding the opposite situation: should CSG and CRDS be levied when the workers are residing in another Member State and employed in France? In a case regarding a French worker employed in France and residing in Belgium, the highest Court ruled that CSG had to be levied, as if French legislation is applicable under article 13 of Regulation 1408/71, which was obviously the case, the entire legislation must apply, notwithstanding domestic provisions applying a criterion of residence (*Cour de cassation, 2nd Division, 8 March 2005, Société Dalle v. Urssaf Lille*). Some commentators disagree with this case and consider that, if French law is applicable, the criteria which it sets should be respected and, therefore, CSG and CRDS should not be levied when persons reside abroad.

With regard to freedom of services and freedom of establishment, some doctors, dentists and medical workers move to France in order to start up in practice. When they emigrate from Germany, the same issue has been arising for years: due to the extraterritorial application of some German social security schemes, self-employed migrant workers refuse the affiliation to French social security because of their ongoing affiliation to the German scheme. The *Cour de cassation* proposes a solution which may not comply with Regulation 1408/71. In its latest decision, the *Cour de cassation* stated that a German dentist who started a practice in France doesn't have to be insured by the French social security scheme since she remained covered by the compulsory German scheme, although she was no longer living and working in Germany (*Cour de cassation, 2nd Division, 20 January 2004, Caisse autonome de retraite des chirurgiens dentistes (CARCD) v. Mrs. Schonfelder*).

Concerning a lawyer simultaneously registered at a French bar and a Spanish bar, the *Cour de cassation* ruled that he had to pay invalidity-death contributions to the French special compulsory scheme since he was entitled to its benefits (*Cour de cassation, 2nd Division, 5 April 2007, n°06-10709*). This case, based on Treaty provisions, goes against principles on legislation applicable set by Regulation 1408/71.

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

Concept of occasional health care

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

Long-term care benefits

Should the “*allocation personnalisée d'autonomie (APA)*”, a French benefit granted to dependant persons, be exportable? It could be argued that it is a cash sickness benefit. Although Article L232-2 of *Code de l'action sociale et des familles* asserts that the *APA* has the character of a benefit in kind, the national classification has no influence on the application of Regulation 1408/71. Therefore, it might be questioned whether Article L232 of *Code de l'action sociale et des familles*, which stipulates that the *APA* is provided to persons who have a stable and lawful residence in France or its territories, complies with Regulation 1408/71 which prohibits clauses of residence.

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

Old-age and death

Differences in pensionable age

Problems arise due to the difference in pensionable age between France (age 60) and other EU countries.

A labour contract had been breached by the employer on the grounds that the employee had accumulated a sufficient amount of 'quarters' of contribution to be granted a "full rate" French pension at the age of 60. If a pension granted by the competent French institution is calculated in proportion to the amount of contribution the employee has accumulated in France, should periods completed in another Member State (in this case, the Netherlands) be taken into account for the calculation of the "full rate" pension, which allows the employer to force the employee to retire?

The employee argued that the French pension office should not have taken into account the periods of contribution completed in the Netherlands in order to calculate whether the employee had reached the "full rate" level, as he could not ask for a retirement benefit in the Netherlands before the age of 65. Therefore, he claimed that he had been subject to an unfair dismissal. However, the *Cour de cassation* confirmed the ruling of the Court of Appeal: Articles 3 (1), 45 and 49 of regulation 1408/71 do not preclude French legislation from taking account of periods of contribution completed under the legislation of another Member State for the acquisition of the right to an old-age pension in France and for determining the rate of the pension [*Cour de cassation, Social Division, 17 May 2005, X... v. Société Emballages Keyes*]. This rule applies even when the claimant is not entitled to an old-age pension before the age of 65. Therefore, even if the French pension is calculated only on the basis of periods completed in France, the employee in this case has been lawfully required to take retirement.

Although this decision goes against the worker's interests, it complies with the principles of Regulation 1408/71.

Family benefits

Export of benefits

Some family benefits are granted only to persons who reside in France or its territories.

According to Annex VI of Regulation 1408/71 (also see Circulaire 2004-02 of 20 January 2004), the *complément de libre choix du mode de garde* (supplementary open choice of child care allowance) is only provided to persons whose residence is in France. This restriction may not be compatible with Regulation 1408/71 as interpreted by the ECJ in *Maaheimo*.

The export of other family benefits, such as the *allocation parentale d'éducation* (child-raising allowance) and the *complément de libre choix d'activité* (Supplementary open choice of activity benefit) has been acknowledged by the French administration (Circular CNAF n°2004/2, 20 January 2004). The *allocation de présence parentale* (parental presence allowance) is also exportable (Circular CNAF 2003/18, 23 July 2003). Circular 2005/287 of 21 June 2005 acknowledges that since 5 May 2005, the *allocation parentale d'éducation* (Child-raising Allowance) and the *complément de libre choix d'activité* (Supplementary Freedom of Choice of Activity Benefit) can be exported.

THE COORDINATION REGULATIONS AND OTHER PARTS OF COMMUNITY LAW

The Coordination Regulation and Article 18 EC

The impact in France of the ECJ cases related to European citizenship in combination with social security benefits remains hard to evaluate. There are many schemes or benefits for which entitlements are based only on residence: e.g., family benefits and health care benefits, but also welfare benefits such as “*RMI*” (*Revenu Minimum d’Insertion*), “*APA*” (*Allocation Personnalisée d’autonomie*) or “*Prestation de compensation*”. These schemes and benefits, mainly funded by income taxes and indirect taxes, are subject to a means test of which the purpose is (1) to determine whether the person is eligible, or (2) to define the amount of contributions.

In order to take account of Article 18 of the Treaty and Directive 2004/38, the French administration has redefined in Circular 2007-418 of 23 November 2007 the rules of access to the CMU (universal healthcare coverage based on residence) and CMUC (supplementary CMU) for inactive EU citizens. The administration makes a distinction between inactive citizens according to whether they plan to stay or set their residence in France in the future or have already established their residence in France.

- For the first category, the CMU is denied since Directive “residence” provides that the right of residence is subject to possession of health care coverage and sufficient resources for themselves and their family members not to become a burden on the social assistance system. A long stay in France will not open any rights. EU citizens coming to France to seek a job may also never have access to CMU coverage. For EU citizens staying in France for less than three months, the CMU is denied.
- For the second category, which includes EU citizens who previously had sufficient resources and healthcare coverage, the CMU can be provided to them without causing them to lose the right of residence. They have to show that they have been victims of an “accident of life” (such as job loss, death of their partner, etc.) and that they have resided for at least three months in French territory. The right of residence is maintained as long as they do not become an unreasonable burden on the social assistance system of France. In addition, the administration provides a more favourable treatment for inactive EU citizens who, before the law was passed, were already affiliated to the CMU scheme despite the fact they did not comply with Directive 2004/38 standards.

The *circulaire* gives rise to many questions. In particular, since the statutory CMU scheme is contributory (only beneficiaries who have resources below a given level are waived from contributions), it can be questioned whether it falls within the scope of social assistance under Article 24(2) of Directive 2004/38. Therefore, the French *circulaire* could be contrary to the directive concerning the status of jobseekers and EU citizens staying for less than three months. In addition, the condition of three months prior residence required by decree to access the CMU scheme could be considered as creating indirect discrimination based upon nationality prohibited by Article 6 of the Treaty and by Article 3 of Regulation 1408/71. In other words, since the CMU is a universal scheme based on contributions, it should be possible for inactive EU citizens who have sufficient income to be affiliated to it. The affiliation will then establish their right to reside in France. Another question among others is how Article 13(2) f) of Regulation 1408/71 influences the application of the CMU provisions.

More generally, several benefits are now subject to a prior condition of three months residence in France: the *RMI* (minimum income allowance), the *AAH* (disabled adult allowance), the *API* (single parent allowance) and the *CMU* (see Article R380-1 of Code de la sécurité sociale). A proposition of law, which was finally withdrawn, provided that all family benefits would be subject to such a condition. Regarding the *RMI*, the *AAH*, the *API* and the *CMU*, the condition of prior residence is valid if the benefits concerned fall within the scope of “social assistance” in the context of Article 24(2) of Directive 2004/38. Whether the condition of prior residence complies with Article 18 of the Treaty and with Regulation 1408/71 must also be considered.

Circulaire 2008-24 of 18 June 2008 issued by the *Caisse Nationale d'Allocations Familiales* completes the French administrative policy. By stating that affiliation with the CMU scheme does not correspond to health care coverage which justifies the right of residence and therefore the entitlement to family benefits, does the CNAF go against Directive 2004/38 and, in some situations, Regulation 1408/71? The CNAF points out that if EU citizens are subject to a condition of prior residence in France of three months for access to RMI, API and RMI, this condition is not required of citizens who are workers or former workers. EU citizens who came to France as jobseekers are denied family benefits as long as they are still looking for employment.

GERMANY

IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

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

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

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

General Principles

Equality of treatment

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

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

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

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

Long-term care benefits

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

Old-age and death

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

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

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

Unemployment benefits

Germany has recently introduced different measures for labour market activation and employment promotion ("Hartz-reforms"). Some of these are allowances which can be granted to workers and employees as well as employers, e. g. to compensate partly for loss of income during periods of part-time work or to stimulate employment in regions or industries with specific problems. Community law has not been discussed so far, though cross-border activities might be initiated in this respect, too, both from employees and from employers.

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

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

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

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

GREECE

IMPLEMENTATION OF THE GENERAL PROVISIONS

Applicable legislation

Working simultaneously two or more Member States

Either as an employed or as a self-employed person

Researchers:

The researcher, who is moving to a Greek university (usually because of the European programme Marie Curie) for a few months research up to 2-3 years, could be characterized as an employee, while the university could be characterized as the employer. However, his or her affiliation with the social security of IKA-TEAM presupposes participation in competitive examination and is extremely problematic, if not impossible.

Moreover, the fulfillment of the preconditions of the system above can lead to the hiring of another candidate. The solution to this problem is, in this respect, the affiliation of the researcher to the OAE (old TEVE), as s/he has the status of self-employed person. Thus, what it constitutes a "solution" for the flexibility of the hiring (sector of employment) turns out to become a "problem" in the framework of the Community coordination.

Artists:

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

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

As an employed and as a self-employed person

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

The other States' social security pension funds always claim that, in those cases, no part of the activity takes place in our country, provided that the contract between the employer and the journalist regulates the work of the last one on behalf of the first in one or more particular Member States. Therefore, either the general rule of *lex loci laboris* of Article 13, paragraph 2, element a) of the Regulation 1408/71, as for the territory of their own State, without any further activity in a third Member State, either the above mentioned Article 14 (2)(b)(1) should

apply in such case. However, insurance should take place in their own legislation, provided that, according to their opinion, the journalists reside within the territory of their own country, practising there a part of their activity and, at the same time, practising activity in one or more third countries.

Application of Article 17

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

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

Reimbursement of benefits

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

BENEFITS IN CASH

Export of benefits

An issue that has to be further discussed at Community level is coordination under Chapter 1 (Title III) of the Regulation of benefits for disabled persons mainly, which have been excluded from Annex IIa (Regulation 647/04). From now on, those benefits are considered as sickness benefits in cash and are exportable. Greece is particularly concerned about the practical problems that have to be solved since "*exportation*" of such allowances implies internal

coordination between three competent authorities (Ministry of Employment and Social Protection, Ministry of Health and Solidarity, Ministry Finance and the Ministry of Interior and Public Administration), all competent institutions, concerned at a time and the municipalities (in Greece, these allowances are paid by the local authorities of the place of residence of the insured).

Invalidity

Assimilation of facts

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

Unemployment benefits

Aggregation of periods

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

HUNGARY

IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Personal scope

Family members and survivors

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

General Principles

Aggregation of periods

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

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

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

Applicable legislation

Working simultaneously two or more Member States

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

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

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

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

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

Planned health care abroad

Under the Regulation:

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

BENEFITS IN CASH

When it comes to exchanging information with other institutions, E-forms are used, which are cumbersome, difficult to understand and known to slow down the process. The translation of forms E213 (detailed medical report) may take months. In some cases, there are also legal objections which need first to be reviewed, which results in even longer processing periods.

Form E205 (insurance history) is another important form. Problems arise with E205DE forms; because of the differences between the German and the Hungarian system, periods completed in Germany cannot always be taken into account for in the Hungarian system.

Bilateral agreements provide for dispensing with form E211.

Invalidity

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

National rules against overlapping

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

Member States' cooperation

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

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

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

Old-age and death

Questions have arisen whether only Hungarian or also foreign unemployment benefits should be taken into account when assessing whether there is a case of prohibited overlapping.

Unemployment benefits

Problems are related to the length of the administrative procedures, which takes 30 to 60 days. This is often due to incorrectly or illegibly completed forms or even wrong forms. It is also found that insured persons are sometimes reluctant to provide the necessary information, notably the mean average salary, required by form E301.

IRELAND

IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the co-ordination Regulations

Material scope

Introduction

In 2006 the Government introduced a new scheme, early childcare supplement. This is regarded as being within the Regulations. Its exportability is a matter of political controversy.

Classification of social security benefits

The decision of the Government to reclassify domiciliary care allowance and blind welfare allowance raises the issue whether a similar decision in relation to supplementary welfare allowance in particular, a decision to transfer responsibility from the Health Service Executive to the Department of Social and Family Affairs, means that the question whether supplementary welfare allowance will remain outside Regulation 1408 may have to be reviewed. It is now regarded as a minimum income payment.

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

After the revision of Annex II a, several benefits were recategorised. However, the new classification results in some similar benefits being classified differently, e.g. carer's allowance (excluded) v. carer's benefit (sickness), IDMA (sickness) v. DA (special). In the light of the recent Hosse judgement, there is a question as to whether the remaining Annex IIa benefits and the carer's allowance are, in fact, social security as they are arguably paid on the basis of a legally defined position and cover one of the enumerated risks. DSFA states that it does not believe that the Hosse case has any implications for Ireland and that a further re-classification of Irish special non-contributory benefits is not envisaged.'

General Principles

Equality of treatment

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

'In addition to general questions about the interpretation of the term 'habitual residence', the application of the presumption, etc., insofar as persons are covered by EU law, there are a number of issues concerning the HRS. In particular, persons entitled to family benefits (within the meaning of 1408) under EU law obviously cannot have the HRC applied to them. In addition, Case C-138/02 Collins (involving similar UK legislation) indicates that a habitual residence test must be applied in a proportional manner.'

A review of the Habitual Residence Test was undertaken within the Department, and a six chapter report was produced in response to a direction given by the Minister in 2005. This report led the Government to move towards putting the details of the test onto a statutory footing. The 2004 Act, as carried over into the Social Welfare Consolidation Act, 2005, did not contain any guidance on what the test actually meant, other than making provision for a presumption of habitual residence. Section 30 of the Social Welfare and Pensions Act 2007 directs that, apart from the presumption, the persons responsible for determining whether a person is habitually resident within the State shall take into account

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

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

Since the 2007 amendment to the habitual residence provision, most of the criticisms voiced in Parliament have tended to focus on the impact that the Habitual Residence Test has had upon the availability of child benefit in respect of children whose immigrant status has not been established.

Applicable legislation

Working in one Member State only

Administrative formalities and co-operation

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

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

Another problem relates to Latvians working in Ireland. When going on holidays in Latvia, do these workers need an EHIC issued by the Irish institution? They are already entitled to benefits under the Latvian scheme, by reason of their nationality. Can Latvia then apply the provisions of its own legislation, which supposedly offers better conditions? The answer to this question is straightforward. By virtue of Article 13(2)(a) of Regulation 1408/71, the Latvian workers are subject to Irish legislation. When they come back to Ireland, they have to apply for an EHIC in Ireland. The Regulation does not preclude the Latvian institution from providing more favourable treatment, but in that case, it loses the possibility to claim a refund from the Irish institution. However, the Latvian institution cannot decide to give the workers a Latvian EHIC.

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

Regulation. However, if a person from the Czech Republic was able to prove weekly trips back home as mentioned above, the HSE would issue the E106. This is another example of the problems dealing with the interpretation of the concept of residence.

Another problem is encountered in Ireland where nationals of EU Member States for whom Ireland is the competent State, ask the Irish institution for a form E106 so as to be entitled in their respective Member States to full health care coverage. Notably Belgians insist that they are allowed to have an E106 as this seems to be standard practice between Belgium and other countries. The Irish institution's policy is to turn down requests for forms E106 in those situations, save where the applicant can prove that she or he is a frontier worker. Only once, a form E106 was given to a Belgian who was able to demonstrate that he returned to Belgium once a week.

Unemployment benefits

In Ireland the accession of Romania and Bulgaria gives rise to new issues concerning access to unemployment benefits for these nationals. Romanian and Bulgarian nationals must continue to apply for work permits to participate in the Irish labour market. Bulgarian/Romanian nationals other than workers or self employed persons (i.e. those seeking work or people who are inactive or family members of workers) have the right to reside in Ireland as EU Citizens but do not have access to the labour market (without a work permit). Consequently he or she would not have the opportunity to build up an entitlement to social insurance benefits. Such persons will not become eligible for Jobseeker's Allowance as s/he would not be considered to be available for employment.

ITALY

IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

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

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

General Principles

Equality of treatment

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

Aggregation of periods

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

Luxembourg’s judges reversed a previously established interpretation trend and affirmed the principle whereby the social security authorities of a Member State are actually required, under Article 39 ECT, to take account, for purposes of the acquisition of rights to old-age benefits, of contribution periods completed in a non-member country by a national of a second Member State in circumstances where, under identical conditions of contribution, those authorities will take such periods into account where they have been completed by nationals of the first Member State, pursuant to a bilateral convention concluded between the first Member State and the non-member country. Without prejudice to the possibility of invoking objective justifications against it, the refusal to proceed to such a “multiple aggregation” in favour of nationals of a Member State not party to the bilateral international convention would violate the fundamental principle of equal treatment laid down in Article 39 of the Treaty. It is in fact self-evident that the notion of “legislation” contained in Article 1(j), of

Regulation 1408/71 could not produce an effect that is contrary to this fundamental principle by denying the entitlement to a “social advantage” that would be reserved to nationals of the first Member State in the same contributory position.

Starting from the premise that “the totalisation principle has found application in our legal system only in the cases for which it is expressly provided for, in terms that are not always homogeneous”, and that, therefore, it is “not a general principle of our legal system” but represents “on the contrary, the exception”, the Supreme Court of Cassation concluded that, in this case, “the periods of insurance completed in non-Community countries cannot be aggregated - for the purposes of aggregation as provided for and regulated by the Community legal system - although they can be aggregated with other periods of insurance completed in Italy (or in any other Member State of the European Union) pursuant to an international convention, ratified and made enforceable”. To that effect, a decisive aspect in the grounds for the judgement was the adoption of a concept of applicable legislation referred to in Article 1(j), of Regulation 1408/71 that was patently in contrast with the notion that had meanwhile been adopted by the ECJ in *Gottardo*.

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

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

LATVIA

IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Material scope

Benefits concerning 'new risks'

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

General Principles

Aggregation of periods

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

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

Applicable legislation

Working in one Member State only

Other issues

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

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

Persons staying outside the competent State

Concept of occasional health care:

The definition of emergency medical assistance is provided in the Law on Medical Treatment. It is defined as assistance to victims (persons who have been taken ill) in a

critical state of danger to life or health, provided by persons specially prepared (trained, equipped) for such cases with relevant qualifications in medicine who in accordance with such qualifications have a legal liability for their actions or omissions and the consequences of such actions or omissions.

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

Planned health care abroad

Under the Regulation:

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

In Latvia, problems may arise because Latvian legislation guarantees a very broad range of health care services. The Basic Care Programme (the health care minimum) defines a basket of health care services to be guaranteed and covered by the state health care budget. The Basic Care Programme includes emergency care, treatment for acute and chronic diseases, prevention and treatment of sexually transmitted diseases and contagious diseases, maternity care, immunization programmes and provision of pharmaceuticals free of charge for entitled groups. However, in practice the state is not able to ensure the provision of all formally guaranteed services due to limited resources. There are long waiting lists for some forms of treatment, for instance for endoprosthesis. Under Regulation 1408/71 the authorization may not be refused where the person cannot be given a treatment within the time normally necessary for obtaining the treatment in question taking account of a person's current state of health and the probable course of the disease. In practice, the Health Compulsory Insurance State Agency issues E 112 forms mainly in cases when requested medical treatment could not be provided in Latvia.

Invalidity

Member States' cooperation

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

In 2007, cooperation with other Member States has improved, although major problems still exist with Finland and Sweden where the competent authority refuses to provide form E 213 free of charge.

Unemployment benefits

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

LITHUANIA

IMPLEMENTATION OF THE GENERAL PROVISIONS

General Principles

Equality of treatment

Some problems are noticed with implementation of this principle.

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

Applicable legislation

Working in one Member State only

Lex loci laboris

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

Posting

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

In the Lithuanian guidelines to posting, there is no specification or no link between significant activities and the number of employees of a company, which raises discussions. The requirement of turnover is regarded in a certain period of activities. The difference between the various social security systems of the Member State is noticed. A good illustration is the example of an individual who is employed in Lithuania (LT), who is also a board member of the company in Latvia and is given a certain bonus. According to LT legislation, social insurance contributions are not taxed on such bonuses. This is a matter of discussion and there is no solution. A second example is of an E101 received in LT, which is checked by LT specialist administrators. They often find out that these individuals are heads of office or managers of companies and according to the LT legislation, contracts have to be concluded with such individuals. Then Regulation 1408/71 is not applicable. This takes a lot of time. The third example is that E101's often are not filled in properly and are lacking information and then it is very difficult to analyse them. Also the application of Article 14, bis, 1 a, can cause problems. According to these rules, the LT administration rarely issues these kind of forms so more experience should be shared in this respect.

Problems relate to self-employed persons leaving LT to work as an employed person in another MS. According to the rules in the Regulation, it is the law of the country where the

worker is an employed person that is applicable. An E101 form has to be issued in the country where s/he is employed. But MS such as the UK and Ireland refuse to do this. Is it correct that in Lithuania, the administration only requires an E101 form from the country where s/he is employed?

Working simultaneously two or more Member States

The following problems were identified. The person is working in LT and in Estonia at the same time and the two MS do not know that s/he is working in another MS, so s/he gets benefits from both the MSs. If a person is working Latvia and working in Lithuania and s/he applies for a sickness benefit in Lithuania, Lithuania can discover that s/he is permanently resident in Latvia. Then Latvian legislation should be applicable and the Lithuanian administration can decide not to award the benefit to that person. A real practical case illustrates the problem. A person was working in Bulgaria and in Lithuania. As Bulgaria joined the EU only recently, they did not have the applicable legislation rules in place before. So the Lithuanian legislation tried to solve the problem with an Article 17 Agreement on the working periods. In scenario nr. 2, under which the applicable law is established, the cases can be solved applying the coordination rules. But before these procedures were established in Lithuania, the cases of simultaneous employment were not dealt with properly.

A lot of problems are faced in the procedure to collect social insurance contributions in Lithuania. The potential insurants have to be registered in the Lithuanian tax payers register. One of the ideas, based on simple legal logics, may be contained in a decision of the Constitutional Court of 12th March 1997. When a person pays contributions, then the period is treated as a work record, but the Constitutional Court decided that it is in contradiction with the Social Insurance Law. That is why the definition of working record or working period has to be refined when the insured person pays her/himself or when the employer pays the contribution or they should pay the contributions which are established by law. E.g. if under Lithuanian legislation an E101 is granted, Lithuanian legislation is applicable for that person taking account of the decision of the Lithuanian Constitutional Court. When the foreign employer pays the salary but does not pay social insurance contributions for a period, that period will be included into the work record of the worker for the calculation of her or his pension.

Application of Article 17

Cases are encountered in which the companies do not perform any significant activities in LT according to the practice of the administration. These apply for the exception of Article 17. However, they do not fulfil the requirements of Article 17, as this can only be the case in certain situations. But the definitions related to this topic are not very clear. Another problem is the lack of clear rules on the period within which the other competent institutions should give its consent on applying the Article 17 exception. Sometimes this takes months, causing all kinds of inconveniences for employers, employees and for the LT administration.

Other issues

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

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

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

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

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

How are « first pillar bis » funded schemes coordinated ? For example, it is not clear how to aggregate insurance periods when a person worked in the Member State where he/she had earned only certain real (or notional) savings, but not insurance period. It does not happen in the case of Lithuania where person earns insurance record despite the fact he /she had opted-out from the part of social insurance. But it may create problems for Lithuanian national who was for several years insured abroad and earned only notional savings there.

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN CASH

Additional remarks

Polish competent institution refuses to issue form E 116PL (medical report) without refunding. According to the decision of Lithuanian state social insurance headquarters this action of Polish competent institution is illegal (not in line with Article 105 of Regulation). Finally, person insured in Lithuania and who got sick in Poland can not receive Lithuanian sickness benefit as there is no issued form E 116PL.

Old-age and death

Equality of treatment

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

Additional remarks

The widow(er)'s pensions were recently reformed. As before the reform, pension is granted to widow or widower if deceased spouse had earned required number years of insurance for disability or old-age pension. But the calculation of pension amount was changed into flat rate. Year of insurance in EU are also taken into account to decide on the right to get pension. On the other hand, widow or widower may apply for pension in other EU state, and may get there pension granted, but Lithuanian flat pension will not be decreased due to this reason – it is still flat amount. So overlapping of benefits may arise.

Accidents at work and occupational diseases

Equality of treatment

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

Unemployment benefits

LT has to wait a long time (sometimes 5-6 months in comparison with the two weeks the LT administration takes for this procedure) to get the necessary information for E301 or E303 forms. If you have to pay unemployment benefits and have to wait so long for the correct information, employers become annoyed and aggressive on the method of working. But the LT administration does not have the answer, as there is no period established within which an answer should be received from other competent institutions.

Another problematic situation is that of the UK refusing to register LT unemployed people and they are not being paid unemployment benefits (UB). When they return, the LT administration does not know what it should do: pay for the whole six months, only for the three remaining months or should it not pay at all? The LT administration asked why the UK refused, but it did not get any answer.

LUXEMBOURG

IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Personal scope

Members of the family

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

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

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

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

Applicable legislation

General introduction

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

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

It must also be mentioned that a natural person or a corporate body, who/which wants to settle in Luxembourg, must get an authorisation for settlement from the Ministry for Middle Classes. This authorisation is only given if he/she or it has his/her or its actual head office in Luxembourg. The law determines four criteria by which a registered office (*siège*) can be defined:

- existence of operational facilities
- actual exercise and permanent character of management
- keeping of all documents linked to the activities in this place
- continuous presence of a person authorised to commit the company towards a third party.

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

This has generated some case law.

Working in one Member State only

Posting

To determine if an undertaking has “*usually significant activities*” for the posting provisions in the State where it is established, the competent institution of this Member State must examine the whole body of criteria which characterises the activities of the company. A non exhaustive list of criteria has been indicated:

- the place of registered office and of management,
- the number of the administrative staff working respectively in the State of settlement and in the State of posting,
- the place where the posted workers were appointed
- the place where most of the contracts had been signed between the company and its clients
- turn-over realised during a significant period in the different States of activities.

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

The following criteria were taken into account to judge that there was no proof of a “*usually significant activities*” in Luxembourg:

- a non significant activity in Luxembourg (*one single site, where four persons are working only during weekends*)
- a reduced administrative staff working in the State of settlement (*only one person, who is residing in Belgium, where he has also another job*)
- unoccupied offices (*result of several investigations at the place of registered office*).

Working simultaneously two or more Member States

Either as an employed or as a self-employed person

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

A person was not affiliated to the Luxembourg social security system as:

- the purpose of the undertaking was not to take stakes in other companies, but to design shops

- the clients are prospected in several countries, but essentially in Belgium
- the company had never had offices in Luxembourg,
- the job of the employee consisted in making a feasibility study in order to create a transport company in Luxembourg and to develop an international clientele,
- he prospected clients mainly in Belgium, where he was residing.

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Invalidity

Aggregation of periods

Problem of non-coordination for calculation of the 'tide-over allowance'

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

Unemployment benefits

Equality of treatment

Law on employment introduced a new residence condition:

"...to be entitled to a full unemployment benefit, a worker must fulfil following conditions:
(1....)

2. he/she must have his/her *permanent residence (domicile légal)* in Luxembourg at the moment of the notification of redundancy, in case of a permanent labour contract, or six month before the term of a fixed-term labour contract and he/she must have lost his/her job in Luxembourg, without prejudice to application of EU regulation or application of bilateral or multilateral conventions".

In the comment in the Bill in Parliament, it was said that this change was justified by the fact that numerous cross-border workers decide to transfer their permanent residence to Luxembourg during the dismissal notice, in order to get a better unemployment benefit in Luxembourg than in his/her State of origin.

Does new Article L. 521-3 comply with the principle of equal treatment? It is possible for Luxembourg unemployment institutions to require from a European citizen a permanent residence at the moment of the notification of redundancy in case of a permanent labour contract or six months before the term in case of a fixed-term labour contract?

Family benefits

Creation of a new family benefit, the "child boni"

In December 2007, Luxembourg created a new family benefit, called "*boni pour enfant*"

Child boni is the counterpart of the abolition of income tax classes based on children in the household. There are no more reductions of personal income tax due to children in the Luxembourg income tax legislation.

The Law introduced a new benefit for each child under the twofold condition that the family pays income taxes in Luxembourg and that the child is entitled to Luxembourg family benefits. It is a lump sum benefit, the same for all children. *Child boni* is granted without any application. It is automatically paid to the recipient of the family benefits.

Problems with application to frontier workers and other migrants:

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

Until now, some frontier workers, entitled to the “*additional amount*”, did not yet get *child boni*. The CNPF argues that this problem will be solved before the end of 2008.

MALTA

IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Personal scope

Introduction

In some very minor areas, the Maltese institutions still consider themselves to be on a learning curve and do not yet consider themselves to have extensive experience. This is mainly due to Malta's small size, resulting in a very small number of claims for certain types of benefits.

Applicable legislation

General introduction

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

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

Other issues

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

Pension System Review and the Introduction of the 2nd and 3^d Pensions

It is proposed to introduce a mandatory 2nd pension scheme and a new third pillar scheme on a voluntary basis.

At present it would appear that neither the proposed second nor third pillar scheme will fall within the material scope of Regulation 1408/71.

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

Persons residing outside the competent state

Workers:

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

Planned health care

Under Article 49 EC:

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

THE NETHERLANDS

IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Personal scope

Employed and self-employed persons

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

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

Family members and survivors

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

General Principles

Export of benefits

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

Applicable legislation

Working in one Member State only

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

opinion that this provision includes the family members of the persons concerned. It is still unclear whether family members are thus only included in the German health care insurance or covered for all branches of the German social insurance system.

Working simultaneously two or more Member States

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

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

Recent case law of the national court shows that this does not solve all problems. For someone who runs a business in Germany, but buys supplies in the Netherlands, for example, the question may arise as to whether both activities are so closely connected that it is justifiable to conclude that this person does not actually perform activities in the Netherlands. In that case, the German legislation would apply according to Article 13 (2) (b) of the Regulation. However, if both activities are assessed separately, the Dutch legislation would be applicable on the basis of Article 14 (b) (2) of the Regulation. The Dutch Court followed the latter approach, thereby taking into account that Article 14 (b) (2) of the Regulation only requires that someone who is engaged in self-employment, performs a part of his or her activities in the State of residence. The German legislation would only be applicable if the person in question did not perform any activity in the State of residence, which is not true in this case.

Application of Article 17

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

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

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

Special rules for frontier workers

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

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

Dutch frontier workers who are employed in Belgium or Germany are subject to the social insurance legislation of the State of employment. On the basis of the Regulation, they are entitled to claim benefits in the Netherlands. However, to exercise this right, they are to join a particular care provider (CZ). When their partner works in the Netherlands, it is quite possible that the partner is affiliated with another care provider. This does not only complicate the situation of frontier workers, but may also imply that frontier workers are to take out supplementary insurance on the basis of conditions which are less favourable than those for residents, since CZ is not inclined to offer frontier workers collective reductions for a supplementary insurance package.

BENEFITS IN CASH*Export of benefits*

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

Additional remarks

As for the right to continued payment of wages in case of illness, problems may arise when employees do not fall under Dutch Labour Act (BW), in which the employers' obligation to pay is founded. In accordance with the Convention of the Law applicable to Contractual Obligations of 19 June 1980, employers and employees can choose the applicable law (Article 3). For instance, a Belgian employer and employee may decide to remain subject to Belgian social security law when the worker starts to work in the Netherlands. In such situations, Belgian social security schemes will continue to apply, in accordance with the posting rules of Regulation 1408/71 (Article 14(1)(a)). However, after the maximum period of posting has expired or if posting is not possible, this person is subject to Dutch social security law, which excludes him or her from the right to sickness benefit, as s/he is engaged by an employer on the basis of a valid employment contract. In the case of sickness, the employer is, after four weeks of sickness, not liable anymore to pay wages under Belgian labour law; Belgian social security is not applicable and the Dutch Sickness Benefits Act excludes the employee from benefit.

Invalidity

There is a waiting period of two years, before benefits under the Wet WIA can be claimed. This waiting period corresponds with the employers' obligation to continue the payment of wages during the first two years of illness. This scheme may cause problems when persons

are entitled to a sickness benefit in another Member State with a maximum duration of less than two years, which is to be followed by a Dutch invalidity benefit. In that case, he or she is no longer entitled to the sickness benefit, whilst at the same time not being entitled to the Dutch invalidity benefit yet.

Old-age and death

Difference in pensionable age

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

Member states cooperation

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

Unemployment benefits

Export of benefits

Recent case law shows that the benefit administration has to take great care in tracking down the facts which may lead to the conclusion that a person is not entitled to receiving an unemployment benefit on the basis of Article 69. This is even more so, if the person in question is ill when he leaves the competent State apparently with its permission, as is evident from the E-119 form that the competent State issued before the applicant left. If the person concerned recovers afterwards, and registers as a person seeking work with the employment services of the Member States to which he or she has moved, the benefit administration of this country cannot refuse the payment of the unemployment benefit on behalf of the competent State on the basis that the required E 303 form is missing and that the person concerned has not been available to the employment services of the competent State for at least four weeks after becoming unemployed. The national court ruled that such a statement not sufficiently reckons with the fact that the person concerned was ill when he left the competent State. Moreover, it ignores the fact that Regulation 574/72 requires the benefit administration to ask for the E-303 form itself if the applicant is not able to submit such a form. Under these conditions, the benefit administration cannot stand by its decision to refuse payment of the benefit and should reconsider its refusal to pay in the light of the courts ruling.

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

This interpretation squares with the De Laat case, in which the ECJ, referred to in a preliminary ruling, considered that a worker who has no longer any link with the competent State should be seen as a fully unemployed person (Case C-444/98 [2001], ECR I-2229). Hence, the unemployment benefit should be paid by the State of residence. Unfortunately the benefit administrations of the Netherlands and Belgium tend to give a different interpretation to this ruling. In situations in which a worker, who used to work on a full-time

basis, continues to work for his employer in a part-time job, the Dutch authorities take the view that the person concerned is to be regarded as a partially unemployed person, which implies that the State of employment is to pay the benefit. The Belgian benefit administration, on the other hand, depart from the fact that a person in that situation has lost the opportunity to be employed on a full-time basis and therefore should be regarded as a fully unemployed person, which means that the State of residence has to be pay the benefit.

What happens if a person remains employed in the State of employment, albeit on a part-time basis.

Unemployment benefits for frontier workers

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

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

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

Additional remarks

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

Family benefits

The concept of family benefits and family allowances

Next to the child benefit which can be awarded under the AKW, the Dutch legislation includes a tax-based family allowance, which offers financial support to families with children. As from January 1st 2008 this allowance takes the form of a budget per child (kind gebonden budget). This budget has replaced the Dutch child tax reduction (kinderkorting). Entitlement to the child budget is linked to the entitlement to the Dutch child benefit. Consequently, the budget can be qualified as a family benefit in the sense Article 4 (1) (h) of the Regulation. Contrary to the child benefit of the AKW, the child budget (or allowance) depends on the income level of the family. If the income level exceeds a certain threshold, the budget will not be granted. This system may have certain advantages for those who live and work in the Netherlands. However, migrant workers may be worse off than before January 1st 2008. For a person who lives in the Netherlands and works in Belgium, this new provision may imply that the child budget is not paid out, due to the fact that the child benefit to which this person is entitled under the Belgian legislation is higher than the sum of the child benefit and the allowance which the person concerned would have received if the Dutch rules were applicable.

POLAND

IMPLEMENTATION OF THE GENERAL PROVISIONS

Applicable legislation

Working in one Member State only

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

Posting

Administrative Formalities and cooperation

The legislation regarding posting has brought to light the following problems:

1. Social insurance institution should check if a given employer posting his/her employees to other Member State habitually carries out in Poland the so called "significant business activity". It includes:
 - information regarding total turnover in a typical time period in each of the considered Member States,
 - number of employees staying in posting Member States compared to number of posted employees.

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

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

Every Member State has its own interpretation of these criteria.

In addition, the social insurance institution issuing Form E 101 should be competent not only in the area of social insurance but also tax law and accounting in order to check a turnover in a given undertaking¹.

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

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

¹ Problems related to application of the Decision No 181 were raised during the seminar in Warsaw, June 12, 2005. Written questions were sent to European Commission.

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

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

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

Interpretation problems have an effect on health benefits, but also on the application of bilateral agreements. There are e.g. problems with Germany and Norway. E.g. with regard to family benefits (FB) for a posted worker in Germany, the FB has to be provided by the Member State in which the migrant worker works. The granting of these benefits keeps on causing problems for Polish workers. This will certainly be a discussion point with the German colleagues. As to unemployment benefits (UB), workers coming back to Poland have not been provided with sufficient information in Germany on their rights. They are e.g. not aware of the fact that they can keep their German UB for three months to come and look for a job in Poland or another MS. Also problems with regard to the payment of contributions remain on the scene in the relation with Germany. Poland is planning to sign a bilateral agreement with Germany with regard to information exchange in the field of family benefits.

Working simultaneously two or more Member States

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

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

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

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

A farmer who resides in Poland working on his/her farm and who simultaneously conducts non-agricultural business activity in other Member State is able to continue his/her insurance in Polish social security scheme for farmers provided he/she meets the required conditions. These conditions are the same as for persons working on the farm and simultaneously conducting business in Poland; i.e. they concern certain limits of income from business activity in the previous calendar year and final dates for submission of documents. To find out under which legislation this farmer would fall, is not an easy task. First the state of residence is important, then the state in which he performs activities to a larger extent. To determine in which MS the agricultural activities are larger, if he performs them in two or more, it is not easy to make the assessment. This is difficult, as for farmers income tax is not calculated on the basis of income tax. The surface of his farm is taken into account to do that. On August 24, 2005 the law on social security scheme for farmers has changed, new provisions require from farmers to conduct non-agricultural business activity in Poland in order to remain in social insurance scheme for farmers. Those farmers can conduct non-agricultural business activity also in other Member State and they will be still covered by Polish social insurance scheme for farmers. Those farmers who conduct non-agricultural business activity exclusively besides Poland's borders will not be able to remain in the Polish social insurance scheme for farmers regardless if the permission for conducting this activity was obtained in Poland or abroad.

Application of Article 17

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

Member States' cooperation

Some problems appear in relation to the cooperation relating to the posting of workers on a basis of article 17 Regulation 1408/71. It often happens that the permission to conclude the agreement under the article 17 comes with a significant delay in relation to the date of the commencement of work. The lack of quick answer leaves the worker without E 101 form. Because of that it is not certain to which legislation he/she is going to be subject. It has significant consequences in relation to health care during this period. National Health Fund is issuing a European Insurance Health Card on the basis of E101 form, therefore the longer the worker lacks the form the longer it is not known to which legislation he/she is going to be subject to. He/She is not able to take advantage of health care benefits in the state of posting during that period. Therefore, it seems reasonable to introduce the deadlines for issuing permissions to conclude agreements under the article 17, as well as in other similar cases. The problem of the delay occurs also in relation to other benefits, such as accident or sickness benefits.

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

Aggregation of periods

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

Planned health care abroad

Under the Regulation

Polish relevant institutions presented the following problems:

- difficulties with receiving the reimbursement for the costs of planned medical treatment from claimants living abroad
- difficulties with obtaining the confirmation for financing the planned medical care according to coordination rules (form E 112)
- numerous cases of claiming the right to medical care under the form E 112 when treatment should be based on an EHIC card (necessary treatment in case of emergency, accidents). Accepting Polish patients without the form E112 and then asking Polish institutions to send the form.

A different matter is the verification of whether benefits granted based on EHIC card (European Health Insurance Card) were the right kinds of benefits or whether those were planned treatments. This is the case especially with giving birth to a child at a physiologically accurate time and the cost of care at that time.

BENEFITS IN CASH

Aggregation of periods

Farmers covered by voluntary sickness and maternity insurance are entitled to sickness and maternity benefits provided the insurance period directly proceeding sickness or childbirth was no shorter than 12 months of unbroken coverage. It should be underlined that the law on social insurance of farmers defines „insurance” as social insurance of farmers in the meaning of this law and it does not provide for aggregation of insurance periods completed under different title. However, taking under consideration the general principle of coordination stating that citizens of another Member State shall be treated equally as Polish citizens, we should assume that when determining unbroken 12 months insurance period for a given farmer we shall also include unbroken insurance period of this farmer completed in another Member State.

Medical examination and administrative checks

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

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

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

Member States' cooperation

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

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

Unemployment benefits

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

Family benefits

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

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

Nevertheless some Member State institutions do not communicate to the institutions competent in Poland about granting entitlements to family benefits to the persons working in

such Member State, do not reply to the inquiries of the Polish competent institutions or reply with significant delay.

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

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

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

PORTUGAL

IMPLEMENTATION OF THE GENERAL PROVISIONS

General Principles

Aggregation of periods

Under the Civil Servants Special Scheme the qualifying period can be completed by means of aggregation of periods accomplished under the general scheme. The inclusion of the civil servants scheme in the material scope of Regulation 1408/71 allows aggregation with periods accomplished in other Member States.

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

Applicable legislation

General introduction

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

The following problems occur:

- Can an undertaking of a Member State that is carrying out work in the territory of another Member State engage a worker residing in this Member State and register that worker within the social security system of the first Member State (where the undertaking is established) and ignore Article 13 – 2-a), considering that the worker is “posted” under Article 14-1-a)?
- Difficulties in relationships with institutions or authorities of other Member States: it is necessary to say that some authorities of some Member States, in cases considered suspicious don't consider themselves bound to the decisions of the ECJ under which E-form E-101 issued by a competent institution is binding for all institutions, until a resulting dispute is resolved under the supervision of the competent bodies. In such cases, undertakings cannot operate on the territory where services were carried out and also cannot receive from the local contractor payments corresponding to services already completed. In certain situations, Portuguese institutions are confronted with authorities that seem not to be institutions with competence in the field of social security and that are very demanding in questions related to the labour force.

Duration

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

Working simultaneously two or more Member States

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

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

Equality of treatment

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

Member States’ cooperation

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

Reimbursement of benefits

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

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

Old-age and death

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

Institutions also increasingly write directly to insured persons in order to obtain additional information. The latter often do not understand the requests and sometimes end up seeking professional assistance which is expensive but not always very effective. A solution could be to develop dual forms for the exchange of information. In addition to a common form, identical to all Member States and containing basic requests for information required by all institutions, each Member State could create complementary forms containing specific requests for information necessary for the application of its legislation. These forms could be downloaded from a protected site hosted by the CASSTM.

Problems also arise with respect to the “*unified pension regime*”. This is an internal, Portuguese system of coordination for persons who have been insured both under the general system and the special system for civil servants. This national coordination system encompasses “workers who in addition have an entitlement under a social security system of a country with which Portugal is bound by an agreement”, i.e. also workers covered by Regulation 1408/71. Access to the unified pension regime is subject to an insurance period of 60 months (accomplished under the general and special system). It seems that periods completed outside Portugal are not taken into account for the purposes of assessing fulfillment of this minimum period. Thus, it has happened that when workers covered by Regulation 1408/71 who were last insured under the Portuguese special system submit a pension claim to the General Pension Fund (i.e. the competent institution for pensions for civil servants, CGA), the Fund applied Regulation 1408/71 but not the unified pension regime. The workers had to introduce a separate claim *a posteriori* with the National Pensions Centre (i.e. the competent institution for the general scheme, CNP).

Foreign periods are not taken into account for the purposes of satisfying the 60-month condition for the unified pension regime. There is a discussion if this is contrary to the Regulation.

Unemployment benefits

Additional remarks

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

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

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

2nd: When a recently employed person becomes unemployed in Portugal and doesn’t complete the qualifying period for benefits and aggregation of periods is necessary it may happen that no remunerations are registered in Portugal in the reference period established for the calculation of benefits (art. 68 of Reg. 1408/71 establishes that only the remunerations registered in the competent institution must be considered). This is a serious problem for the unemployed person because aggregation of periods can be useless as

benefits can't be calculated. Portugal in view to protect workers in such situation provided specific legislation on the subject (Decree-Law 46/93, of February 20th) in two perspectives:

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

ROMANIA

IMPLEMENTATION OF THE GENERAL PROVISIONS

Applicable legislation

Working in one Member State only

Posting - Conditions

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

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

During the posting, the subordination relations between the employee and the employer must be maintained – the individual work contract is concluded either for undetermined period or determined period of minimum 3 calendar months over the posting deadline, and the employee is not in the trial period when they apply for posting or during the posting;

The posted employee cannot be sent to replace in the same position another person whose posting duration has expired;

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

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

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

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

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

Old-age and death

Another sensitive topic is the export of pensions. It is a known fact that Romania lags behind in comparison with other states. The main obstacle was the non-reaction from the financial and the banking institutions, which were not interested in a partnership with the pensions house, even though the legislative framework had been created since 2006. Until the end of 2007, no partners were found. This is of course a totally new situation as well for the banks as for the pension house, but a solution is in sight. The Romanian banks wanted an overview of the full pension received from other Member State of the EU and therefore they need information on the banking account, but the banks did not want to enter this partnership. Especially where the institution wants information on their business figures to keep track of how many pensioners are clients, the banks refused cooperation. The pension house clarified the procedure and tried to merge the IT systems in order to enable information flow.

Unemployment benefits

The main provisions and forms dealt with are Article 67 on aggregation (E301) and Article 69 on looking for a job in another MS (E303). There were very few requests for forms E301, mainly due to the very low amount of the Unemployment Benefit (UB) in Romania. There were no big problems with the issuing of forms in Romania. The only difficulties that were met related to the sending of forms by mail and due to post problems the waiting times for the receipt of benefits were extended. As to Article 69, also very few E303's were issued by the Romanian institutions. This is also due to the low UB in Romania, so it is very difficult to go to another MS with this amount of money. Some people came to look for a job from a MS with rather high UB. These people are not willing to give up the foreign UB for the much lower salaries in Romania. That is a big problem. But according to Romanian legislation, an unemployed person cannot refuse a job offer because his foreign UB is higher than the salary of the job he was offered. Can an unemployed person with good skills and

qualifications refuse a job with a very low pay? For this reason, the payment of UB is suspended in Romania. If people refused, the Romanian institutions contacted the competent institutions on the refusal and the benefits were suspended. As regards foreign citizens looking for a job in Romania, the biggest problem is that they do not speak Romanian and Romanian employers are not eager to take on workers not speaking the language. Also the mediation and training services of the Romanian institution are offered in the Romanian language, so they cannot be followed by persons not able to understand it. All in all, most of those foreigners are paid the benefit during 3 months and they do not find work in Romania. Sometimes the cooperation with other institutions is not ideal, but e.g. with Germany the relations are very good.

SLOVAKIA

IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Personal scope

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

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

Material scope

Classification of social security benefits

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

Benefits concerning 'new risks'

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

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

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

Additional remarks

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

Applicable legislation

Working in one Member State only

Posting

Administrative formalities and cooperation

Problems remain with regard to issuing the E101 form in cases in cases where the employer does not request it from the relevant office of the Social Insurance Agency well in advance or fails to request it altogether. Most problematic are situations in which an insurance incident has occurred and the employer only requests a form E101 afterwards (ex post). These types of cases are solved individually, as if the employee and employer fulfilled valid conditions for issuing the E 101 Form. The issue of an E 101 form is very carefully checked to see if there is an "organic bond" between employer and employee.

Working simultaneously two or more Member States

Some institutions are not able to find out whether an employee is gainfully working in another Member State, because the forms do not cover this type of situation. Such situations occur frequently, especially as regards frontier workers.

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

Persons residing outside the competent State

A problematic issue is the exercise of healthcare rights by migrant workers insured in another Member State. These problems usually arise in the area of private health care providers (who are connected to the public healthcare insurance system). A possible cause is higher administration formalities or late payment for these patients.

Since January, 1 2008 the insurance companies ask all workers registered with an E106 form to provide details of dependent family members. The Ministry of Health of the Slovak Republic obliges healthcare providers to draw up a special invoice for family members and to declare it separately to the insurance companies. This procedure is applicable also in the case of urgent care.

Special rule for frontier workers

The problems identified above are typical for family members of frontiers workers; even though they are not working, they are subject to the legislation of the State of employment. They are entitled to full healthcare in the Member State of residence. Most of the time, in order to circumvent the unwillingness of private physicians to provide them with care, these family members make use of the possibility to be insured in the Slovak Republic according to national Law (f.e. mothers on maternity leave). National Slovak Law does not contain a definition of the term "family health insurance" derived from gainfully employed members of the family. Every person is insured personally and independently. The State pays out the insurance for certain persons such as dependent children, parents on maternity leave and others.

The EHIC is a known document. In the Slovak Republic it is handed out for a maximum period of 5 years. A patient receives health care if s/he submits the card to the provider; the

latter is not obliged to check the validity of the card. This system is sometimes abused: the card is used after the period of insurance or when the patient is already insured in the Member State of residence. The number of cases of abuse is increasing. Procedures to fight it are established on a bilateral basis and a fine for abuse is put in place.

Old-age and death

Assimilation of facts

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

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

The Social Insurance Agency as well as the Courts have solved the question of the sum of the Early Old-Age Pension. Most cases were between the Slovak and the Czech Republic. Both Czech and Slovak legislation regulate the conditions for early pension benefit before pensionable age. One of the conditions to claim the Early Old Age Pension is that its amount must be higher than 1.2-times the subsistence minimum. In most cases the sum of the pension benefit according to the Slovak Law is lower, which is a reason to refuse the claim, even if as a result of the receipt of a similar benefit from another Member State this threshold is reached. It is said that aggregation of benefit amounts is not provided for, only aggregation of periods and equal treatment of facts. This question came before the Court. As the decision of the Court is not made public, it is plausible that the Social Insurance Agency was put in the wrong by the Court and that its decision was annulled.

Family benefits

The Slovak Republic operates an individual healthcare insurance system. The State pays the contributions for defined groups of people.

As of January 1, 2008 Slovak Healthcare Institutions require from all workers registered with E106 form to inform them about all existing family members fulfilling the condition of dependent child. According to the application of the form, these family members would be insured in the particular institution of the Member State. At the same time, the E106 form will be registered at the Slovak Health Insurance Agency.

An amendment of the Social Security Law will come into effect on January 1, 2009. The conditions for claiming parental benefit will be changed. Only persons taking care of the child personally and on a daily basis will be eligible.

SLOVENIA

IMPLEMENTATION OF THE GENERAL PROVISIONS

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

Scope of the coordination Regulations

Personal scope

The Same Sex Partnership Registration Act determines the right to maintenance between the same sex partners. They are assimilated with family members according to Labour Relations Act, Patient's Rights Act and Social Assistance Act. However, they are not covered as family members or survivors in social insurance schemes. The reverse discrimination can take place if same sex partners according to the legislation of other Member State enjoy the status of family members.

- In practice problems relate to the identification of persons performing self-employed activities in the territory of Slovenia, and establishing whether they are also self-employed or employed in the Member State where they reside or in other Member State. That is especially the case when determining whether Slovenia is primarily or secondary responsible for providing family benefits. E.g. it is difficult to establish, whether one of the partners is performing economic activity in some other Member State (when another partner and a child reside in Slovenia), and how should this economic activity be assessed.
- The differentiation between employed and self-employed status is questionable for persons that stipulated an employment contract with an employer in Italy or Germany, who have residence in Slovenia and who de facto work in Slovenia. They do not have the self-employed status according to national legislation of Slovenia. New flexible working patterns (e.g. tele-work) open new questions on applicable legislation.
- Additionally, problems have already appeared in mandatory health insurance, where a partner is insured as a family member, if it is ascertained that s/he lived in cohabitation with the insured person for at least two years. It is difficult to get data on cohabitation from the other Member States.

Material scope

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

General social assistance is not covered by the Regulation 1408/71. In Slovenia it is regulated by the Social Assistance Act. Monetary social assistance is hence means-tested and financed from the State budget (non-contributory in nature). Entitled are Slovenian nationals with permanent residence in Slovenia. Foreigners are entitled when they are integrated in the society. It means that they have to be in a possession of a valid permanent residence permit. Monetary Social Assistance is outside the material scope of the Regulation 1408/71. However, classification of social services might be more difficult. The general question might be, do they fall within the ambit of the right to social security or not.

Benefits concerning new risks

There might be questions and discussions related to the social services of general interest and (family or social assistance) benefits guaranteed to the providers of such services. E.g. according to the Parental Care and Family Benefits Act, one of the parents is entitled to a

Partial Payment for Lost Income, if s/he has terminated the employment contract or started to work part time in order to take care of the severely disabled child. Nationality and residence conditions are required. Further, according to the Social Assistance Act, a severely disabled adult person is entitled to a Family Assistant who provides care and help to the disabled person.

The costs of unemployment insurance and parental care insurance are covered in a small part from contributions, and the other part is covered by the State budget. Parental care insurance is not administered by specialised social insurance carrier, but by local Centres for Social Work and the Ministry of Labour, Family and Social Affairs. Nevertheless, it could still be argued, that these are social insurances and undoubtedly covered by the material scope of the Regulation 1408/71.

General Principles

Equality of treatment

Similar to nationality, permanent residence requirement may present an obstacle in accession to social insurance or in acquiring some benefits for non-nationals. It is applied mainly to the benefits for family members (e.g. entitlement to health care, family benefits). The condition of permanent residence does not apply to the persons covered by the Regulation 1408/71, but can have negative effects for non-EU nationals, mainly for nationals of the new states of former Yugoslavia, if there is no bilateral agreement on social security between Slovenia and the new state (there are no agreements with Serbia and Montenegro). As a principle, prohibition of discrimination on the ground of nationality is a two-way prohibition. Nationals of the respected State and nationals of other (Member) States have to be treated equally. In case of migrant workers from other Member States the prohibition appears to be only one-way prohibition. Distinctively from other international legal instruments, EC law promotes mobility (mainly of active persons). They should not be treated less favourably as nationals of the respected State, but they might be treated more favourably. E.g. a migrant worker may enforce the right to an out-patient (ambulant) treatment at the physician of her or his choice. Insured person in Slovenian mandatory health insurance, who has not moved, may do so only at a contracted physician (by the HIIS).

Aggregation of periods

In the interpretation of the Regulation 1408/71 the question of aggregation of period of the first year of child's life in pension and invalidity insurance, which were obtained while being subject of the legislation of another Member State in which these periods are not taken into account, may arise. The question of overlapping may arise as well. For entitlement to flat rate means-tested State Pension, financed from the budget, for persons not entitled to any other pension, a period of 30 years of registered permanent residence in Slovenia between the 15 and 65 years of age is required. The question may arise whether residence in other Member State should be taken into account as well. It is a categorical social assistance benefit (special non-contributory benefit), which is coordinated, although some special coordination rules apply (especially concerning the applicable legislation and export of benefits). However, taking into account residence in other Member State would not be an appropriate solution, as than almost every EU national would be entitled to a Slovenian State Pension.

Applicable legislation

Working in one Member State only

Lex loci laboris

Some problems arise in determining the competent state of family benefits in case two Member States are (one primarily and the other secondary) determined as competent states. Also the officials implementing the Regulation 1408/71 expressed a need to get relevant

information on legislation, economic activities, and entitlement to family benefits in other Member States.

The majority of problems related to the implementation of the Regulation 1408/71 concerns the determination of the applicable legislation for persons who are or could be subject to legislation of two or more Member States (Articles 14 to 14f of the Regulation).

Main problems are related to technical modes of collection of contributions from other Member States and individuals by the Slovenian tax authority. Amendments to social security legislation are prepared to provide legal basis for the tax authority.

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

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

Concept of occasional health care

An insured person can be referred for treatment abroad as well, if treatment is not available in adequate extent in Slovenia. The problem in Slovenia until now was, that there are no national waiting lists for different medical treatments (except for open heart surgery and a few other treatments). Different hospitals have different periods of waiting. The patient has the right to choose any hospital in Slovenia in which s/he wants to be treated. Therefore, it can be assumed that the patient would have the right to treatment abroad only, if the waiting time in all hospitals in Slovenia exceeds the time normally necessary.

In February 2008 the Patient's Rights Act was passed in the parliament. The Patient's Rights Act became applicable on 26. August 2008. It foresees the establishment of a national waiting list.

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

A recent problem is that pregnant women attend private clinics, especially in Austria to give birth. They presented the EHIC and the HIIS was asked to cover the costs.

In cases when women are not staying in an EU Member State, but go there only to give birth, the abuse of the rights by insured persons (Article 22(1)(a) of the Regulation 1408/71) and abuse by the health care providers is quite evident. In Slovenia there are sufficient obstetric facilities in gynaecological and maternity hospitals in all geographical regions of Slovenia. All women in Slovenia give birth in hospitals specialised for childbirth.

It should be also noted that in compliance with national rules the costs of childbirth in a private clinic in Slovenia, that has not stipulated a contract of concession with the HIIS, would not be covered by the later.

Another problem relates to Slovenian students in Italy. Their EHIC is not accepted and E 109 form (or other form confirming permanent residence) is demanded. They argue that in a case a student is studying in another Member States for (2 or 3) years, this cannot be interpreted as stay (temporary residence).

The EHIC and its appropriate use should be more promoted.

Planned medical care

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

Under article 49

Slovenian public and competent institutions are aware of the ECJ rulings (C-372/04). However, very rarely planned health care required in another EU Member State without prior authorisation and reimbursement demanded.

A case is known before the national court with respect to the notion “without undue delay”. Waiting period for an MRI of 23 months after the knee injury (21 months after the referral) was according to the Court unreasonably long and could cause damage to the insured person’s health. However, the Higher Labour and Social Court (Psp 848/2007, 15.5.2008) annulled the decision of the first instance Court and returned the matter to the same Court for a new decision. It has argued, that it remained unclear, why the claimant insisted for an MRI in Ljubljana, where the waiting period was the longest.

Additional remarks

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

If it would probably be interpreted (in competent EU institutions) that according to the rules on free movement of health services, a person insured in Slovenia and residing in Slovenia, may choose a personal general practitioner (and other personal doctors the insured person has to choose) in another Member State. It is argued that this interpretation would open many questions and cause many problems. It could result in a breach of the basic principle of equal treatment of persons insured in the public health insurance in Slovenia and treated in Slovenia according to the national legislation, and rules and persons treated in other Member State, who have the same kind of health problems.

Question was raised, whether travel expenses should be reimbursed, when a person claims reimbursement of health care costs under Article 49 EC for unauthorised planned care. Travel costs are reimbursed according to Slovenian legislation, when health care in another Member State is planned and authorised.

BENEFITS IN CASH

Additional remarks

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

Maternity and paternity benefits

Definition and classification

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

Old-age and death

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

Some forms are considered to be long and complicated.

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

Award of a supplement

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

Unemployment benefits

Main issues

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

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

Family benefits

Definition and scope

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

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

Overlapping of family benefits

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

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

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

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

SPAIN

IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Personal scope

People living together in wedlock

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

Polygamy and Community Law

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

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

Material scope

Benefits concerning 'new risks'

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

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

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

General Principles

Equality of treatment

After the new regulation concerning partial retirement introduced by the 40/3007 Act came into force, pensioners who opt for this kind of retirement must, among other requirements, to

have worked for at least six years in the firm. It is likely that this requirement not only contravenes the free movement of workers but also may be indirectly discriminatory as it will be more difficult to meet for EU workers than for Spanish workers.

Applicable legislation

Working in one Member State only

Posting

Conditions

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

Other issues

Financing of social security benefits

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

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

Pensioners

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

Levying of contributions

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

Unemployed persons

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

Planned health care abroad

Government and not to the Self-governing Communities.

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

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

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

BENEFITS IN CASH

Long-term care benefits

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

Family benefits

Definition and scope

It is becoming increasingly complicated to distinguish between family benefits regulated by the Social legislation that are paid for child birth or adoption and the legislation that provides for lowering of taxes in the same cases.

In other words, when child birth or adoption takes place in Spain, their parents are entitled to a reduction of taxes. The amount is standard for all people (it is not means-tested). Only when the parents are not obliged to pay taxes, is this subsidiary amount paid as a non-contributory family benefits (economic one-off benefit). It should be pointed out that in both cases the entitlement criteria for the payment and amount are the same.

SWEDEN

IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Material scope

Some Swedish benefits are located in the border area between exportable and non-exportable social benefits. However, these benefits have not been notified as hybrid benefits. The Swedish authorities have classified them, either as social advantages falling outside the scope of Regulation 1408/71 but within the scope of Regulation 1612/68 (for instance Municipal Attendance Allowance), or as sickness benefits in kind, which are not exportable according to the Regulation (for instance Attendance Allowance). General Swedish Income Support is not a social security benefit. It is administered by the municipalities and regarded as social assistance.

Elderly Income Support Benefit, a means-tested and residence-based benefit designed to complement general statutory pension schemes, which was introduced on 1 January 2003, is also registered as a special non-contributory benefit in Annex IIa to the Regulation.

General Principles

Export of benefits

The Social Security Act contains a special chapter on the exportability of social security benefits. According to national rules, residence-related benefits are not exportable to a migrant worker or the members of his family who reside in another country, nor is the residence-based pension. Compliance with EC law is achieved through direct application of EC law.

Applicable legislation

Working in one Member State only

Lex loci laboris

A person who is resident in Sweden is affiliated to the residence-based part of the social security system. The residence-based insurance presupposes residence in Sweden, which is defined in the Social Security Act. A person who leaves Sweden for less than one year, is still considered resident in Sweden. A person who comes to Sweden to stay for more than one year, is considered resident in Sweden. Persons covered by the Regulation, however, are covered by the residence-based part of the social security system in accordance with article 13(2)(a) of Regulation 1408/71. The residence requirement for benefits within the scope of the Regulation can thus not be upheld.

Posting - Conditions

The decisive element is that wages are paid by the Swedish employer. The rules on posting are applicable even if the posted worker has been employed in order to work in the other country. However, the worker must be covered by the Swedish social insurance system when the posting takes place. If wages are paid by a subsidiary company in the country where the work is performed, there is no posting. If the wages are paid both by the holding company in Sweden and the subsidiary in the other country, the situation may be classified

as a posting. In some cases, it may be difficult to distinguish between a business journey and a posting. In order to qualify as posting, there must be a special agreement concerning the place of work, the wages during the work abroad, housing, etc.

Application of Article 17

As regards frontier workers, an Article 17 agreement exists between Sweden and Denmark, according to which there is *no* shift to the legislation of the State of residence provided the activity which is taken up in that State accounts for less than 50% of total activity and is for less than 3 months

Other issues

National rules against overlapping

The Social Security Act contains one general anti-cumulation rule which is applied to work-related benefits. According to the main rule, there is a “post-protection period of three months” after the work in Sweden has ended. However, Swedish insurance will cease to apply at an earlier date if the insured person begins to work in another country and is covered by corresponding insurance in that country or if there are other particular reasons.

On 1 July 2008 the legislation concerning Sickness Benefit in Cash was sharpened considerably. Previously, there was no limit in time as regards sickness benefit, which had implications also in relation to the coordination Regulation. A person could remain covered by Swedish legislation for an indefinite time due to a period of sickness. This is now limited. As regards the application of the coordination Regulation, there is thus now a clear limit as to how long a person will be covered by Swedish legislation due to a period of sickness.

Concerning health care abroad (Article 49 EC), there has for several years been discussions about inserting an authorisationsystem in national legislation. According to the latest proposal, authorisation will be granted only if the person is resident in Sweden, the treatment would have been wholly or partly financed by the Swedish health care system, the treatment is accepted in Sweden or within international medical science and such treatment can not be granted within normal time. The proposal has not yet led to any legislation.

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN CASH

Equality of treatment

All persons employed in Sweden, irrespective of residence, are entitled to the Sickness Benefit in Cash. Once a person has qualified for Sickness Benefit in Cash there are protection rules meaning that a person will remain covered by the insurance during periods of pregnancy, child-rearing, studies and unemployment. It is unclear how these rules apply in relation to migrant workers, i.e. if such periods fulfilled in another Member State or in connection to moving/returning to Sweden may be taken into account. This has particularly been the case as regards entitlement to income-related Parental Benefit (which presupposes insurance for Sickness Benefits in Cash for a certain period prior to the birth of the child) and benefits based on article 71 and 25 in Regulation 1408/71 (unemployed workers who have worked in another Member State while residing in Sweden).

Export of benefits

According to the Social Security Act Sweden will probably continue to be the competent state for persons who have transferred their residence to another Member State as long as the claimant is entitled to sickness benefit, i.e. during the ongoing sickness period. When the sickness period ends, the responsibility for social security benefits is transferred to the new residence state even if the person concerned has not taken up any gainful occupation in that state.

Long-term care benefits

There is one sickness benefits in kind that has posed special problems in relation to the exportability rules; Attendance Allowance. Attendance allowance is a social security benefit financed by state revenue.

Invalidity

Evaluation of invalidity

The person's work capacity shall be examined in relation to the labour market as a whole (not only in relation to previous employment). If the person still has the ability to perform some kind of work, such as a less physically demanding job, invalidity benefits are not granted. For persons residing abroad, it might be more difficult to examine the work capacity and also to perform the necessary rehabilitation measures. If a person is entitled to part time invalidity benefit and starts working in another country part time, the question of competent state might be problematic.

Old-age and death

Calculation of benefits

The coordination rules for pensions from different countries (especially Article 46 of the Regulation) more or less assume that a statutory pension is either a pension calculated in relation to the number of qualifying years, or a flat-rate pension independent of the duration of the periods completed. The earnings-based Swedish pension scheme does not fit into any of these two categories. The amount of benefit is not in any formal way related to the number of qualifying years. The crucial thing is the value of the aggregated pension rights at the time when the pension is claimed. Part of the pension is invested in a prefunded branch, where the amount of pension is calculated in the same way as under a private insurance scheme.

The new Swedish pension system is extremely flexible. There is no fixed pensionable age. A person who goes on working after attaining the "normal" pensionable age, continues to accumulate new pension rights. A claimant can choose to take out a fraction of the accrued pension rights, i.e. $\frac{1}{4}$, $\frac{1}{2}$ or $\frac{3}{4}$ of a full pension. He/she can also choose to claim a pension from only one of the two branches of the scheme (the PAYG-branch and the prefunded branch) and postpone payments from the other branch. A claimant can also stop a pension already in payment, for instance when he/she gets a new job. How should the Regulation's rules be applied in such situations? Will pensions from all other member countries have to be recalculated each time a pensioner changes the way he uses his Swedish "pension capital"? Furthermore, the amount of pension from the prefunded branch will depend on the value of the fund when the pension is drawn. If the pension has not been re-calculated into a pension with fixed annuities, the amount of pension will vary each month. The rules of the Regulation are simply not compatible with such pension schemes.

However, there are no difficulties for calculating the Swedish earnings-based pension in accordance with the Regulation. Since the pension is based on life-long earnings with no "maximum qualification period", calculation in accordance with national rules will result in the

same amount of pension as the pro rata temporis calculation under Article 46(2) of the Regulation.

Additional remarks

The rules on pension rights for child-raising years under the Swedish pension scheme are very generous when compared internationally.

However, these provisions were not designed to enable persons, who work in Sweden only for a short period of time and then move to another country, to accrue pension rights for child years under the Swedish system. For that reason there is a rule, which requires that both the parent and the child must reside in the country in order to be entitled to pension rights for "child years". Obviously, this provision cannot be applied to persons within the scope of Regulation 1408/71. However, there is also another condition: the beneficiary must have been accredited a pensionable income of a certain level for at least five years before the age of 70. Aggregation may be used to fulfil this condition.

There is a possibility of transferring pension rights for child years to a spouse, as long as the conditions above are fulfilled. The construction of the child years can thus be said to lie in the border line between old age pensions and family benefits. This poses special problems in relation to Regulation 1408/71. May a spouse to a Swedish worker, residing in another country, rely on the Regulation to obtain pension rights for child years as a derived right from her husband?

Unemployment benefits

Aggregation of periods

There have been many cases concerning the question whether remaining as a member in a Swedish unemployment fund while working in another Member State means qualifying for Swedish Income-related Unemployment Benefit. The unemployment funds have argued that the membership in the Swedish unemployment fund ends when a person starts working in another Member State, irrespective of the fact that the person still pays the membership fee. A precondition for qualifying for Swedish Income-related Unemployment Benefit in these situations is, according to the unemployment funds, that the person applies in writing for a new membership when returning to Sweden.

Unemployment benefits for frontier workers

According to the Regulation, persons who have previously been working in another Member State while residing in Sweden are entitled to Swedish unemployment benefits. They are then also entitled to sickness benefits (Article 71 and Article 25 in Regulation 1408/71) There are several cases concerning unemployed persons who want entitlement for Sickness benefit in Cash, as this is also a condition for receiving Parental Benefit at income-related level. When there is a gap between the ending of the work period in the other Member State and the period of unemployment, such as periods of child rearing, the persons risk falling outside the scope of the articles. They are then not entitled to Sickness Benefit in Cash or Parental Benefit at income related level. This is questionable based on the equality of treatment principle, as the protection rules in the Swedish sickness insurance would have applied if they had worked in Sweden and become unemployed. According to the protection rules, persons who interrupt work due to pregnancy, child rearing, unemployment and studies remain covered by the insurance for Sickness Benefit in Cash.

Family benefits

Aggregation of periods

The principle of the aggregation of periods will play a significant role for migrant workers in this branch of social security. According to case law, the principle of aggregation applies

provided that the claimant was insured in the Swedish system *the last day before the child was born*. Transferring residence to another country may result in an interruption of the insurance period.

The abovementioned practice to require insurance in Sweden the last day before the birth of the child has been debated. The ECJ has ruled in two cases concerning the Swedish qualifying period for parental benefit (*Rockler* C-137/04 and *Öberg* C-185/04). The ECJ found that it would constitute a barrier to the free movement of workers if aggregation was not allowed.

The question of aggregation of periods in Regulation 1408/71; whether the last day of insurance before the birth of the child must be fulfilled in Sweden, was however not solved since the cases involved persons who had been working in the European Communities and who were not covered by Regulation 1408/71.

The Supreme Administrative Court found that the demand for at least one day of insurance before the birth of the child could not be upheld. The judgement is a bit surprising, since the claimant had not started to work in Sweden and was not covered by the work-based Swedish insurance, which is a precondition for receiving Income-Related Parental Benefit.

Overlapping of family benefits

Some of the problems which may arise are connected with the fact that Swedish Parental Benefit is an individualised benefit, which is awarded to the parent, not to the family. From the Swedish point of view, there is no violation of the single state rule if one of the parents draws parental benefit based on previous work in Sweden, while the other parent draws another kind of parental benefit from another country for the same child. Each parent has her/his own Competent State.

According to Regulations 1408/71 and 574/72, there are situations when a supplement shall be paid from the country with the highest family benefits. The fact that some countries have classified their parental benefits, similar to the Swedish, as maternity benefits instead of family benefits may lead to an unfair outcome of these rules. In this aspect, it is also a problem that the Swedish Parental Benefit is income related and that family benefits in some other states are to some extent means-tested.

Modification of the family situation

Problems of interpretation have arisen concerning parents who no longer live together. According to the National Insurance Board, divorced or separated parents are not family members and Parental Benefit (and other family benefits) may in this situation not be granted to the parent residing abroad as a derived right from the parent in Sweden.

It is questionable whether this view is in compliance with EC-law. Regarding family benefits, the child could be regarded as the beneficiary.

UNITED KINGDOM

IMPLEMENTATION OF THE GENERAL PROVISIONS

Scope of the coordination Regulations

Personal scope

Third country nationals

The UK has made clear in the Council that it will not opt in to the extension of the scope of Regulation 883/2004 to third country nationals because of the inclusion of non-actives under the Regulation. This will mean that the UK will continue to use Regulation 1408/71 for third country nationals.

Material scope

Social security benefits, special non-contributory benefits and social assistance. The boundaries between social assistance and social security in the UK are blurred. Income Support is a non-contributory means-tested benefit and plays two roles. In one of its roles it acts as social assistance. However, because UK contributory benefits are low it is also used to top up pensions, and for people with disabilities and lone parents who are not required to be available for work. Income based JSA is also non-contributory and means tested and replaces contributory JSA when entitlement to that benefit expires after six months.

General Principles

Equality of treatment

Pension Credit and Gender Discrimination

There are two components of the Pension Credit: A guaranteed level of income below which no pensioner should see her or his income fall; and a savings credit designed to 'reward' claimants who have modest levels of income from a state retirement pension or from occupational or personal pension schemes. The UK considers the Pension Credit to be a 'special non-contributory benefit' under Regulation 1408/71. There is an important gender dimension to the Pension Credit. Whereas 85 per cent of men reaching retirement age in 2005 had an entitlement to a full basic State Pension, this compared with only 30 per cent of women. As a result of changes to the basic State Pension it is expected that around three-quarters of women reaching State Pension age in 2010 will be entitled to a full basic State Pension, compared with around half of women who would have been without the changes. It is estimated that over 90 per cent of women (and men) reaching State Pension age in 2025 will be entitled to a full basic State Pension. In the meantime the introduction of Pension Credit has improved the position of women, with two-thirds of recipients being female (White Paper, 2006). However, it could be argued that in making the Pension Credit non-exportable women are indirectly discriminated against as it is mainly women rather than men who cannot as a consequence take this component of their pension with them if they wish to retire abroad.

Discrimination against same sex couples

The Civil Partnership Act 2004 amended the charging Regulations to include the words "civil partner" after the word "spouse" wherever it occurs. These changes are taken into consideration in the 2007 amendment to the National Health Service (Charges to Overseas Visitors) so that civil partners are treated the same as spouses in charging for healthcare treatment. An exemption from charges will extend to a civil partner in all cases where it would do so to a spouse. Civil partners will have to show evidence of their legal partnership to be considered eligible for free treatment, in the same way as spouses do currently.

The Act also requires that unions comparable to civil partnerships authorised under the legislation of other countries must also be recognised.

Recognition of same sex couples' civil status varies between Member States. Some countries accord same sex marriage; others have same sex civil union/partnership laws; while others do not allow registration of same sex relationships but provide some benefits for same sex partners. Some EU member countries do not recognise same sex relationships.

Social security entitlements mediated by the various civil statuses accorded to same sex couples within the EU Member States present serious barriers to free movement.

Right to Reside

The Child Poverty Action Group (CPAG) argues that the Right to Reside Test is having a major impact on EEA nationals in the UK and in particular on pregnant women. CPAG believes that a person who had worked in the UK and who is off work due to sickness or pregnancy, even if their contract is ended, should be able to receive Income Support under Regulation 1408/71 and would then gain a right of residence as a self supporting EEA national. However, this view is not accepted by the Department for Work and Pensions (DWP).

There is also the question of what is required by people who are self supporting to satisfy the requirement to have sickness insurance. The view of CPAG is that being covered under Regulation 1408/71 should be sufficient while the view of DWP is that something other than being insured under 1408/71 is required.

The Administrative Commission Ad Hoc Group on Combating Fraud and Error

The Administrative Commission Ad Hoc Group on Combating Fraud and Error was initially proposed by the UK with a brief to analyse the nature and extent of the problems concerning fraud and error within the different Member States related to cases determined under Regulation 1408/71, or where payment is made in another state by virtue of Regulation 1408/71.

Aggregation of periods

Main Issues

Are Disability Living Allowance, Carers Allowance and Attendance Allowance cash benefits for sickness or long-term disability benefits? (see Chapter 2 below)

Applicable legislation

Standard de-minimis period for when to obtain an E101

Observations and comments from representatives of international business are that there is no standard de-minimis period for when to obtain an E101. A common question is...when does a business trip become a short term assignment and therefore an E101 is needed? Representatives of international business suggest that a standard period accepted and consistently applied in all countries would help.

Graduate recruitment

Many multi national companies recruit graduates from universities across the EU/EEA with part of their graduate 'induction' often being a requirement to work in several countries for short periods for, perhaps, the first 2 - 3 years of employment. Where graduate recruits enter a UK employment contract and the UK company 'posts' them to several countries for short periods, HM Revenue and Customs (HMRC) is not, according to some business

representatives, amenable to allowing Article 14.1(a) to apply unless the person works in the UK for many weeks/months first. According to some representatives of international companies this gives the employee a fragmented insurance record at the beginning of their career and significant administrative problems in paying the host country contributions where the host entity does not include the employee on the local payroll.

People who normally work in two or more Member States

There are sometimes compliance problems with people who normally work in two or more Member States and are no longer resident in the UK, but who wish to be UK insured because the UK is cheaper than the Member State they are in. HMRC suggests that “these people also sometimes seem to have difficulty accessing family benefits in other Member States.”

People working on the Continental Shelves, especially in the North Sea.

Representatives of international business suggest that there is an inconsistent approach to whether Regulation 1408/71 is applicable to each country’s ‘own shelf’ and how to treat employees moving regularly from one ‘shelf’ to another.

Working in one Member State only

There are technical-legal problems for employees moving around, but a lot of the problems are typically administrative. Extra costs, waiting periods, procedures, exacerbated by the lack of knowledge of the rules by the employer and the employee. The solutions here are not to change the rules, but better cooperation between the national institutions, better exchange of information and improve the information for employers and workers.

National Insurance Numbers

HMRC carried out an extensive study using market research and external consultants that identified an issue with the issue of National Insurance Numbers - the process can, at times, be slower than employers would like. These are administrative issues and steps are being taken by the DWP to speed this process up. As a result of this study, foreign language provision in Community languages has also been improved.

IMPLEMENTATION OF THE PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

Sickness benefits

BENEFITS IN KIND

Concept of urgent health care

There are still occasions when other member countries (for example Austria and Germany) do not accept a UK EHIC. The UK has raised this at the Audit Board at the European Commission to ensure that healthcare providers in all Member States understand the rules.

Since April 2008 the UK now requires people from another Member State who need urgent treatment in the UK to present an EHIC because without this the Department of Health cannot recover costs. An EU national who needs urgent treatment but does not have their EHIC will be treated in the same way but may have to pay the hospital and recover the costs from their own administration on their return.

Reimbursement of benefits

The UK has difficulty establishing accurate actual costs in order to make its claims on other Member States. It invariably seeks to apply the terms of Regulation 574/72 in accordance with Article 36 of the Regulation. The UK uses a mixture of cost waivers (Luxembourg and Denmark) actual costs, 'constructed' actual costs and lump sums. Agreements are concluded bilaterally and vary from country to country. Procedures vary from country to country and groups covered.

Cash Sickness benefits

Regulation 647/2005 amended Annex IIa to reflect a series of ECJ judgements. However, the UK continued to list Attendance Allowance, Carer's Allowance and Disability Living Allowance as special non-contributory benefits.

The Judgement in Case C-299/05 delivered on 18th October 2007 found that these benefits – with the exception of the mobility component of Disability Living Allowance - are sickness benefits within the meaning of Article 4 (1) (a) and are therefore exportable.

As a result of the Judgement the conditions of entitlement for Attendance Allowance, Carer's Allowance and the care component of Disability Living Allowance (the mobility component of Disability Living Allowance has not been affected by the judgment) have been amended so that it is no longer necessary to:

- be normally resident in Great Britain
- be in Great Britain
- have been in Great Britain, Northern Ireland, the Isle of Man, Jersey or Guernsey for at least 26 weeks out of the last 52 weeks

The ECJ judgment should impact not only on people currently in receipt of one of the relevant benefits but also those who have already gone to live abroad, on a temporary or permanent basis and who subsequently become eligible for one of the relevant benefits. However, DWP is still considering the legal implications for people who are already living in another EEA State or Switzerland and wish to claim from abroad. This includes people who wish to claim for the first time and people who have received benefits in the past which stopped when they moved to an EEA state or Switzerland. The question of backdating of claims is under discussion.

It could be argued that Attendance Allowance, Carer's Allowance and Disability Living Allowance do not fit comfortably into the Sickness Chapter, as cash benefits for sickness under 1408/71 and the chapter on sickness may not be the appropriate framework for coordination. Further policy discussions are likely to examine how best to treat these and similar benefits under Regulation 883/2004.

Invalidity

Employment and Support Allowance is a new integrated contributory and income-related allowance that from October 2008 will replace Incapacity Benefit and Income Support paid on the grounds of incapacity for all new claimants.

To date the Personal Capability Assessment, which, like the Work Capability Test, is also based on tests of functionality, has given rise to some difficulties. The standard form for reporting examination, the E 213 is considered by the UK to be incompatible with the 'Personal Capability Assessment' and requested in 1994 that the Commission introduce a non-standard E form for the UK. The Commission did not want to set this precedent but asked the other member countries to look favourably on the new UK format.

Many country's administrations have agreed to complete the UK form instead of the E213 and in these circumstances the arrangement generally work well

In countries where agreement has not been reached the DWP is able to commission reports from doctors independently, although this is more costly and time consuming. In Spain where caseloads are relatively high, the DWP has identified specific English speaking doctors who have agreed to carry out these reports for a set fee, this limits the costs and makes administration easier.

The requirement to undertake work-related interviews, agree an action plan and participate in some form of work-related activity as a condition of entitlement to the Employment and Support Allowance is likely to present new administrative challenges - and perhaps some issues around the classification of the new benefit - in cases where the recipient has or wishes to export her or his allowance to another member country. If a similar scheme exists in the host country then one solution would be to require the person to engage with the requirements of that country's scheme. However, as this type of scheme is not widespread in the EU, this is likely to provide a solution in some cases only. Where the country of residence does not have a similar scheme, it is not yet clear how the requirement to undertake a work-focused interview may be addressed. However, more difficult would be where the claimant is then required to participate in some form of work-related activity. Requiring someone in receipt of Employment and Support Allowance to undertake that activity in the UK would restrict the exportability of the benefit. It is not clear yet how this conditionality will be satisfied where UK customers live abroad. The Department for Work and Pensions argues that the present coordination regime does not address this issue and DWP expects this will have to be addressed at the level of the Administrative Commission.

Old-age and death

Pension credit

Pension Credit was introduced in October 2003 and is designed to ensure that people over the age of 60 have a minimum income. People who are temporarily absent from the UK can continue to receive Pension Credit. However according to Age Concern problems occur in getting Pension Credit reinstated after an absence from the UK, causing significant problems for those who regularly spend part of the year abroad. According to Age Concern, delays in processing claims and lack of information surrounding Pension Credit means that people who are spending part of the year abroad can wait months for Pension Credit to be reinstated when they return (Age Concern, 2008 a; 2008b). DWP suggest that as the period of 'temporary absence' has been extended to 13 weeks (from October 2008) most issues on re-claim should be removed for the majority of people who are in receipt of Pensions Credit and go abroad as most will do so within the 13 week period.

Pensions Act

The changes introduced by the Pensions Act in April 2010 will simplify the coordination rules and many fewer people will require a pro-rata calculation under Regulation 1408/71 Article 46(2), as they will have entitlement under national law which provides for a better or equal rate.

Family benefits

Additional remarks

Family benefits for family remaining in another member state

CPAG (Child Poverty Action Group) report a number of calls regarding people who would qualify for Child Benefit or Child Tax Credits for children living in other Member States. However CPAG say that the UK refuse to pay on the basis that the children are the responsibility of another person (usually a grandparent) and that the grandparent should make a claim in the other Member State. The benefit rates in the other Member State (often A8 states) are not as high as UK benefits so the parents feel they are losing out. They are paying tax in the UK but cannot access UK family benefits – although in point of fact, UK family benefit legislation does not link entitlement to such support to liability to tax. The

children are usually staying with a grandparent until the parents get settled in the UK, or the parents may not intend to settle in the UK but return after a period of work.

HMRC has pointed out that if the claimant in the UK satisfies all of the relevant conditions of entitlement, then family benefits would be awarded. In principle, HMRC would not inform a claimant that they are ineligible for a family benefit because the children in another Member State are being looked after by a third party.

THE COORDINATION REGULATIONS AND OTHER PARTS OF COMMUNITY LAW

The Coordination Regulation and Article 18 EC

A specific problem has come up between the UK and France with regard to UK pre-pensioners receiving CMU (couverture maladie universelle, universal coverage for sickness in order to give entitlement to everybody on the territory) who wanted to renew their residence card. France refused to renew the residence card of the UK pre-pensioners (not a pensioner, so not within the coordination system), as, according to the French authorities, 2004/38 permits France not to grant social assistance, which means according to the French administration, that they are not allowed to remain in France. The problem was first a UK-France one, but the European Commission has received a large number of complaints. There has been discussion in the European Commission with the services responsible for the free movement of citizens and thus for Directive 2004/38 over the relative priority of Directive 2004/38 and Regulation 1408/71.