trESS Training and reporting on European Social Security

# Think Tank Report 2010

## *Analysis of selected concepts of the regulatory framework and practical consequences on the social security coordination*

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**Project DG EMPL/E/3 - VC/2009/1325**

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# INTRODUCTION

In order to contribute to successful implementation of the new Regulations, the trESS think tank has been asked to provide analysis and highlight practical consequences of the following selected concepts of social security coordination:

Assimilation of facts

Long-term care

Members of the family

Residence

Child-raising periods

# ASSIMILATION OF FACTS

***References***

- Art. 5 Regulation 883/2004 (general principle) and art. 21 (2); 36 (3); 56 (1) c; 60 §3 Reg. 883/2004 and art. 22 §2 Regulation 987/2009 (concrete applications).
- Recitals 9, 10, 11 and 12 Preamble Reg. 883/2004.
- Case Law: (under Regulation 1408/71) *Kuyken* C-66/77; Kenny C-1/78; *Roviello* C-20/85; *Wolf and Others* C-154 and 155/87; *Paraschi* C-349/87: *Bronzino* C-228/89; *Gatto* C-12/89; *Öztürk* C-373/02; *Lepore and Scamuffa* C-46/92; *Comm. V. Belgium* C-278/94; *Ioannidis* C-258/04; *Mora Romero* C-131/96; *Elsen* C-135/99, *Kauer* C-28/00; *Duchon* C-290/00.

## 1. ORIGIN AND LOCATION OF THE CONCEPT

### 1.1 History under Regulation 1408/71 to Regulation 883/2004

The right to payment of social security benefits is not only conditional on the fulfilment of certain periods of insurance/residence, but often also determined by and dependent on a whole set of facts, events, situations etc… Most often these conditions are territorially limited, a logical result of the national competence of Member States to determine the content and organisation of their social security schemes. It is, however, clear that recognising different judicial effects, depending on the place, i.e. the territory where such particular facts, events or situations occur, could lead to negative consequences for migrants. The exclusive "national" determination of these conditions could exclude migrants from access to national social security benefits. In the absence of a general clause in the Regulation or the Treaty obliging social security institutions to take into account situations, events or facts that took place in another Member State it was necessary to look for other principles to circumvent the application of the principle of territoriality.

The Court of Justice found this principle in equal treatment, which implies not only that nationals of Member States are treated in the same way as nationals of the host State, but also that facts, events and situations that occurr in another Member State should be assimilated to similar facts, events and situations that take place in the competent State. This is nothing more than the theory of the mutual recognition or equivalence of situations. The acceptance of this principle did, however, not come without a struggle, in particular in the field of social security law. Whereas in the field of free movement, the Court of Justice[1] quickly recognised that the principle of equal treatment implies "the obligation to recognise the assimilation of facts" (see eg. *Ugliola (C-15/96)*. In this case the Court of Justice assimilated periods of military service accomplished abroad to those fulfilled in the competent State, in order to allow a migrant worker to benefit from the same labour conditions; or for example *Scholz*, C-419/92 that where the previous employment in the public sector is taken into account when recruiting staff, no distinction may be made whether such employment was in the public sector in that State or not; see also the same reasoning for promotion on grounds of seniority, Case Schöning C-15/96), in the field of social security the answer from the Court of Justice was less straightforward. At least in the beginning, the Court was rather hesitant to recognize an assimilation of facts. In *D'Amico(C-20/75)*, the Court of Justice did not find that the territorial link that requires,

[1] Although a legislative attempt to codify this principle in Regulation 1612/68 was never successful (COM (98) 394 final, introduction new art. 7 §5 equivalence of situations for professional purpose "Where working conditions, professional advancement or certain advantages accorded to workers depend, in a Member State, on the occurrence of certain facts or events, any comparable facts or events which have occurred in any other Member State shall entail the same consequences or confer the same advantages accorded."

that for the acquisition of the right to early retirement pensions, the person concerned should have been unemployed for a certain length of time in the competent State, must be disregarded. A few years later, the Court followed the same reasoning with respect to the award of unemployment benefits for former students who have never been employed and decided that neither the EU Treaty, nor the Regulation requires that studies completed in another Member State must be treated as if they have been completed in an establishment of the competent State (cf. Case *Kuyken*). Whereas in the first case, the Court of Justice found that the principle of aggregation of periods was not applicable, in the second case the Court confirmed that the condition of completion of a period of study in an establishment of the competent State applied equally to the Member state's own nationals and to nationals of another Member State. Maybe the fact that, under to the Regulation, unemployment benefits are closely related to the territoriality principle influenced the Court in this respect.

In later cases, the answer from the Court of Justice became even more complicated. In the *Kenny* case (C-1/78) the Court had to deal with the question: to what extent imprisonment in another Member State should be assimilated with imprisonment in the competent State, where this situation leads to a suspension of a right to benefits. According to the Court, an assimilation of facts in this situation – and as long as the provision concerned does not discriminate vis-à-vis nationals of other Member States – is neither forbidden by community law, nor is it obligatory to accord the same effects to these foreign circumstances.

Later on however, the Court of Justice confirmed on a more consistent basis that the non-assimilation of facts or situations that occurred abroad as a condition for opening the right to social security benefits, might be a form of indirect discrimination or an impediment to freedom of movement. Developments with respect to the internal market and European citizenship have strengthened this tendency.

Clear examples can be found in the cases *Roviello*, *Wolf and others* and *Paraschi*. In the first case (Roviello C-20/85), the Court declared a special provision adopted by Germany in implementation of the Regulation to be invalid, as it provided that for entitlement to a pension in respect of incapacity for work that depends on a reduction in the capacity to work, only activities that were subject to insurance under German legislation would be taken into account. As this condition by its nature is essentially to the detriment of migrant workers, it is a covert form of discrimination. In the case *Wolf and others* (C-154 and 155/87) the Court found that a Member State may not refuse to exempt self-employed persons, working within its territory, from paying contributions provided under its national legislation for self-employed persons, where these activities are coupled with employment as a salaried worker, where this is not the case when employment was carried out in the territory of another Member State. Such a provision clearly results in placing persons who carry out an occupational activity outside the territory of the competent state at the disadvantage.

The case *Paraschi* (C-349/87) is paramount in this respect. The Court emphasises that conditions governing the right or obligation to become a member of a social security scheme, are a matter to be determined by the legislation of each Member State, always provided that there is no discrimination in that connection between the nationals of the host State and those of other Member States. Although the Court confirmed that a Member State is allowed to amend the conditions for granting an invalidity pension (even by making them stricter, by providing for a reference period prior to the occurrence of invalidity during which the insured persons must have exercised an activity) this can only be done on condition that the amended provisions do not give rise to any overt or disguised discrimination between community workers. This is, however, the case when certain events can prolong the reference period, when completed under the conditions envisaged in the German legislation, whereas that possibility does not exist when those events occurred in the worker' s State of origin.

Over the years, in many more cases, the Court of Justice was in favour of assimilation of facts or events, as it helped to implement the principle of free movement of workers. As such the Court considered the following to be contrary to free movement of workers in the field of social security:

- the condition for granting family benefits that a member of the worker's family must be registered as unemployed with the employment office for the territory in which that legislation applies, when that member of the family is registered as unemployed in another State (cases *Bronzino C-228/89*, *Gatto C-12/89*);
- where entitlement is conditional upon having received, prior to the application for a pension, unemployment insurance benefits from that Member State alone (Case *Özturk*: in this case, the Court applied the principle of assimilation through the non-discrimination clause of Decision 3/80 of the EU Turkey Ankara Agreement. Today, Turkish nationals can also rely on Regulation 859/03 on condition that they have been circulating between two Member States);
- the requirement that for periods of invalidity to be treated as periods of employment for the calculation of an old-age pension, a person has to be employed in that State, when they became incapable of work (see cases *Lepore* and *Scamuffa C-46/92*);
- the requirement that a person has completed secondary education in an establishment in the competent State to obtain an interim allowance for young people (see *Commission vs Belgium*, *Ioannidis*);
- the condition for an extension of the right to an orphan's benefit for persons whose training has been interrupted by military service, that the military service had to be fulfilled in that State (*Mora Romero C-46/92*).

A special example of the assimilation of facts is the assimilation of child-raising periods for the purpose of old-age insurance. In the Case *Elsen* (C-135/99) the Court declared invalid a national German provision, according to which child-raising periods completed outside the competent State, can only be assimilated to contributory periods under the competent State, if the parent has performed activities as an employed or self-employed person during the period that was devoted to child-raising or immediately before the birth of the child in the country of residence. The applicant was, however, employed during that period, not in her country of residence, but in Germany. The competent institution of a Member State therefore has to take into account – as though they have been completed in the national territory – periods devoted to child-rearing completed in another Member State by a person, who – at the time when the child was born – was a frontier worker employed on the territory of the first State and residing on the territory of the second Member State.

In another case (*Kauer, C-28/00*) the assimilation of child-raising periods fulfilled outside the competent State to periods of paid contributions was only possible if the person concerned was entitled to maternity benefits under the legislation of that State. A similar condition was not required where the children were educated in the competent country. Such conditions that made a distinction between national and foreign periods, were often justified by the national legislation on the basis of the requirement to have a sufficient link with the social security legislation of the competent State. These conditions were, however, considered by the Court of Justice to be contrary to free movement. This case law raised concerns about the avoidance of a possible double accounting of child-raising periods.

But it is not only national provisions that must respect the principle of assimilation of facts, but also the Coordination Regulations have had to be modified in order to take this principle into account. In the case *Duchon (C-290/00),* the Court of Justice declared the previous Article 9a of Regulation 1408/71 to be invalid, precisely because it provided for an exception to the principle of assimilation of facts. This article is contrary to the free movement of workers insofar as it excludes the possibility for a prolongation of the reference period during which the qualifying and the acquisition of a right

to a pension must have been completed when an occupational disability pension under an accident at work scheme was received from another Member State.

The case law of the Court therefore appeared to evolve through the application of the non-discrimination principle, and in the absence of a general assimilation clause, towards a broad interpretation of assimilation of facts, obliging Member States, when applying their national legislation, to give to facts and events that took place in another Member State, the same legal consequences as a comparable fact and event occurring on the territory of the State responsible for the benefits.

The fact that Regulation 1408/71 did not contain such a general principle did not, however, exclude that this technique received its application in a lengthy list of provisions, covering a wide variety of situations, relating to, for example, the place of residence of the beneficiary (Art. 9 §1, Art. 10); the place of residence of the members of the family (Art. 58 §3, Art. 68 § 2, Art. 39 § 4); the requirement for granting benefits in case of occupational diseases that the disease in question was diagnosed within a specific period following cessation of the last activities of employment (Art. 57 § 3) or that a benefit was subject to the condition that an activity was pursued for a certain length of time (Art. 53 §4); the place of death of a person (Art. 65); the number of the members of family for determining the amount of benefit (Art. 23, Art. 68); the prolongation of a reference period (Art. 9 a); the receipt of a benefit as a condition of entitlement (Art. 10 a, § 3); or, for example, with respect to exemption or reduction of taxes in respect of certificates or documents (Art. 85 §1) or claims, declarations or appeals that have to be submitted to an institution within a certain period of time(Art. 86), etc.

Many of these provisions, however, also deal with the aggregation of periods that could be seen as a particular implementation of the principle of assimilation of facts, which also explains the difficulty in making a distinction between assimilation of facts and totalisation of periods.

# 2. INTERPRETATION OF THE PRINCIPLE UNDER REGULATION 883/2004.

## 2.1 Text of Article 5

It is this case law as described above that is now reflected in Regulation 883/2004. As confirmed in the Preamble to Regulation 833/2004 "this principle should be adopted explicitly and developed, while observing the substance and spirit of the legal rulings" (Recital 9).

*Article 5: Equal treatment of benefits, income, facts or events*
Unless otherwise provided for by this Regulation and in the light of the special implementing provisions laid down, the following shall apply:
(a) where, under the legislation of the competent Member State, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation shall also apply to the receipt of equivalent benefits acquired under the legislation of another Member State or to income acquired in another Member State;
(b) where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory.

The adoption of specific horizontal provisions on assimilation of facts is, therefore, not only a simplification with respect to the old regulation codifying the case law of the Court of Justice, but also implies another status as a fundamental principle and instrument of coordination. It is notable that where in the initial proposal of the Commission this principle was seen as a separate paragraph and annex to the principle of equality of treatment, in the process of negotiation it was extended by

the European Parliament and, in the end, accepted as a separate provision, on an equal status with the other horizontal provisions of non-discrimination and totalisation.

## 2.2 An absolute principle?

It is therefore a guiding principle for the national administrations in the application of the coordination provisions. The acceptance of the assimilation of facts as a fundamental principle of coordination, may as such contribute to further legal certainty, but less clear is how absolute this principle is. Are all exceptions to this principle forbidden? Is it relevant that assimilation of facts is now a fundamental principle and no longer an application of the non-discrimination principle? This would, to a large extent, limit the sovereignty of the Member States to determine the conditions of their social security system and put beneficiaries in a much stronger position. It seems dangerous to follow this approach. Such an absolute interpretation would also imply that any formal discrimination would as such be forbidden, whereas, according to the Court of Justice, covert forms of discrimination, contrary to open discrimination, might in certain circumstances, still be permissible in cases where a justification can be found. The Preamble to Regulation 883/2004 clearly states that in the light of proportionality, care should be taken to ensure that the principle of assimilation of facts or events does not lead to objectively unjustified results or to the overlapping of benefits of the same kind for the same period, clearly indicating that this principle may not lead to unjustifiable, disproportional effects. This would also be in line with the general non-discrimination principle of Regulation 883/2004, from which it is accepted, although not explicitly written down in the text, that justifiable exceptions might be possible. The search for an acceptable justification is however far from being an easy task, not at least as the general justifications known in case of open discrimination, like public order, public safety and public health, are not of any relevance in social security, and that other measures of justification are often difficult to find. The question regarding the application of measures of justifications implies a three-part test, where it must be demonstrated that the measure concerned is taken to achieve the general interest, is necessary, and whether the means chosen are in proportion to the pursued objective. This is the application of the principle of proportionality that limits to a large extent the Member States in the exercise of their powers. Purely economic objectives are not accepted as a justification in the general interest (see Case *Bond van Adverteerders; Collectieve Antennevoorziening Gouda C-288/89; Syndesmos C-398/95*), or considerations of a purely administrative nature (*Terhoeve C-18/95, Borawitz C-124/99, Gottardo C-55/00*).

As mentioned before, the case law on the application of the principle of non-assimilation in the field of child-raising periods has led to concerns about a possible double counting of these periods. A basic question is to know to what extent foreign events or facts also have to be honoured by the State that is not competent at that moment? It should be made clear that the Member State is not responsible for every period of child-raising somewhere in the European Union, but that in one way or another this Member State must still have some competence.

For that reason and as the general rule of article 5 does not provide a satisfying answer to the specific problems of coordination of these periods, a priority rule was accepted, according to which, where under the legislation of the Member State which is competent, no child-raising period is taking into account, the institute of the Member State, whose legislation was applicable to the person concerned because of pursuing an activity as an employed or self-employed person at a date when the child-raising period started to be taken into account, shall continue to be responsible for taking into account these child-raising periods as child-raising periods under its own legislation, as if this child-raising took place in its own territory (Art. 44, 2 IR 987/2009). So, it is only in exceptional cases (when the State of residence does not consider child raising periods) that the State where the activity was performed, would remain competent.

## 2.3 Positive and negative application

It might be asked to what extent the principle of assimilation of facts may lead to negative consequences for migrant workers? Would it be contrary to the aim of the Regulation, which is precisely to improve the free movement of persons, when someone would lose national benefits in case a foreign fact or situation would be taken into account? Would the Petroni principle – according to which someone cannot be deprived of national acquired rights - oppose the assimilation of facts?

It does not seem that anything forbids that the principle of assimilation of facts may be used to restrict migrants' rights and as such does not lead to an outcome in favour of the migrant work. Already the *Kenny* case (C-1/78) is an example of that, where imprisonment was leading to a suspension of benefits. Not applying the assimilation of facts, might lead to far-going consequences. Let us take the following example: for obtaining a means-tested benefit, a Member State takes income into account. Not applying this principle might lead to a situation where the person would obtain a means-tested benefit even if he or she would also receive an income abroad. To the same extent, the fact that, for example, a person has an insurance status in another Member State may be used to deny a pro-rata pension in the competent State, where it is a national condition that a pensioner has to retire and may have no insurance status.

## 2.4 Practical application of the principle

The new horizontal principle looks as well to the assimilation of social security benefits or income (§ a) as to the occurrence of certain facts or events (§ b).

The situation under §a covers, in particular, cases where the right to a certain benefit is dependent on a certain judicial situation, as for example, the receipt of a benefit (see for another benefit e.g. Case *Özturk C*-373/02; unemployment allowance for obtaining an early retirement pension; or a similar family benefit for obtaining a child care allowance, case *Klöppel C-507/06*). We could also think about the situation where a parental allowance is paid after receipt of a maternity benefit or a supplementary pension (if covered under Regulation 883/2004) after receipt of a statutory pension; other possible situations are:

- a benefit is only paid in case the beneficiary receives an income less than a certain amount (income-tested benefits). Income received in another State has to be taken into account. The same applies, for example, with respect to differences in amounts in benefits that depend on the income from the family members;
- the condition to have studied in the competent State should be considered to be fulfilled if someone studied in another Member State;
- a certain benefit is only paid from the moment another benefit is suspended: for example, a child-raising benefit is not paid as long as a maternity benefit is received; or an old-age pension is not paid as long as an invalidity pension is received; or an unemployment benefit when an incapacity for work benefit is received. Receipt of foreign benefits should be taken into account. This situation is not new as application of this principle could be found in the anti-cumulation provision of Art. 12 §2 of Regulation 1408/71;
- a person active in Member State A receives a pension benefit from another Member State. According to the legislation of State A, this State pays the social security contributions of those people who receive pensions. Does this State have to pay the contributions from a person who works in State A, but receives a pension from another Member State? The answer is yes, but it must be remarked that this State is the competent State, as an activity is carried out here, even if a pension is received in another Member State and this in accordance with Art. 11,3a of Regulation 883/2004.
- prolongation of a reference insurance period in case the period of insurance has been interrupted by certain situations giving right to other benefits (eg. child-raising benefits); or

for example, a Member State requests 3 years of insurance within the last 5 years and periods of sickness or unemployment prolong these 5 years. Then periods of unemployment or sickness in another Member State also prolong this period correspondingly
- the condition that a person has to have income from work in the competent State to open a right to benefit. Income received in another State should be assimilated;

The situation under § b covers cases where the right to a benefit is dependent on certain factual elements such as the accomplishment of military service or the prolongation of an orphan's benefit (see eg. *Mora Romero C-131/96*) or secondary education (*Ioannidis C-258/04*). Other possible situations are:

- the requirement to have fulfilled studies in the competent State; being registered as a jobseeker in that State or to have undertaken certain examinations in that State; or being recognised as disabled;
- the performance of an activity resulting in the granting of a particular benefit also applies in the case where a gainful activity is fulfilled in another State;
- the entitlement to the benefit is dependent on a particular status of the person concerned immediately before submitting the application. The fact that someone had the same status in another Member State should be assimilated.

# 3. EXCEPTIONS TO THE PRINCIPLE

## 3.1 Explicit exceptions and conditions

Notwithstanding the general horizontal character of the rule on assimilation of facts, this provision has certain exceptions. In the first place, there are some exceptions that are explicitly mentioned in the Regulation, in particular with respect to the calculation of cash benefits where this is based on the average income or an average contribution and where the income or contributions will only be taken into account under the legislation of the competent State (eg. Art. 21 (2); Art. 36 (3); Art. 56 (1) c; Art. 60§3). If, for example, the amount of a pension is determined on the calculation of the 5 highest years of income, income obtained in another member State may not be assimilated.

In addition, the Regulation sometimes clarifies the conditions under which the principle of assimilation of facts applies. According to Art. 14 §4, in case of access to a voluntary insurance or optional continued insurance which is conditional on residence in a Member State, assimilation can only apply to persons who have been, at an earlier stage, subject to that State's legislation as an employed or self-employed person. Other examples can be found in Art. 40 §3, dealing with the assimilation of accidents at work or occupational disease that arose later in another State, Art. 51 §3, with respect to the assimilation of periods for obtaining an old-age pension and Art. 22 §2 of Regulation 987/2009, dealing with the right to sickness benefits-in-kind for a pensioner.

## 3.2 Relation between assimilation of facts and the other horizontal principles

The principle of assimilation is, at least according to the Preamble of the Regulation, further limited by and made subject to the other general principles of aggregation of periods and applicable legislation. Both of these general principles therefore have priority. In addition, this principle may not lead to objectively unjustified results.

### *3.2.1 The principle of applicable legislation*

According to Recital 11 of the Preamble of Regulation 883/2004 the principle of assimilation cannot render another Member State competent. An institution may not become competent as a result of

the application of the principle of assimilation of facts. This implies that an assimilation of facts can only be undertaken by an institution that is, at the moment the facts or events occur, already competent. So, it is always the competent State that must assimilate facts in another State with its own periods. It cannot be that another State would become liable or competent. This principle, therefore, only deals with the fulfilment of the qualifying conditions in the competent State and not with the determination of the competent State. Take, for example, the case when a person lives in Member State A and works simultaneously in two States, i.e. in Member State A, where s/he performs a limited activity and in Member State B, where s/he primarily works. It is not the idea that, for example, the income received in Member State B should be assimilated to the income in Member State A, which would imply that substantial activities are performed in the Member State A of residence and as such no longer in Member State B, but now Member State A would become competent. Or, for example, the case where someone was working and living in a Member State, but where s/he now receives unemployment benefits. Having become unemployed, s/he returns to live in his/her country of origin. This country cannot become competent, just by the assimilation of facts.

### *3.2.2 The principle of aggregation of periods*

Another principle which should not be mixed with assimilation of facts, is the general principle of aggregation. The principle of assimilation may not be used for the creation of periods of insurance, according to Recital 10 of the Preamble to Regulation 883/2004. Periods completed under the legislation of another Member State should therefore be taken into account solely by applying the principle of aggregation of periods.

So, without any doubt, this distinction between the principle of assimilation of facts and aggregation is one of the most difficult ones. This is not surprising, taking into account that the principle of aggregation is as a matter of fact nothing more than a particular application of the general principle of assimilation of facts. The idea of aggregation is exactly that periods, fulfilled in different Member States, are assimilated, so that the beneficiary can satisfy the condition of a minimum length of insurance periods. The only difference might be seen in the obligation under aggregation to take into account all periods communicated by other Member States without further seeking correspondence with the periods of insurance under the legislation of the Member State which has to take these foreign periods into account while under assimilation all elements and details of the facts, situations etc. always have to be exactly the same as under the legislation of the Member State which applies this principle.

The principle of aggregation therefore has priority over the principle of assimilation of facts and – in principle - it is only through this first principle that periods accomplished in another State should be taken into account.

If, according to the national legislation of Member State A, it is required for obtaining a benefit that the person concerned fulfils 24 months of insurance in the last 60 months before application of the benefit, the competent State may take periods of insurance fulfilled in another State into account to fulfil this condition of 24 months. This is the application of the principle of aggregation of periods. The condition for taking into account these periods is, however, that in that other State, they are considered as periods of insurance.

Only existing insurance periods may be aggregated, but no new ones created. In the *Adanez Vega* case (C-372/02), the Court of Justice determined that military service fulfilled in Spain should not be assimilated with military service in Germany, the competent State, unless the military service in Spain was also considered as an insurance period in Spain. Nevertheless, the borderlines between the principles of assimilation and aggregation are not that clear. It seems clear according to this case law that assimilation cannot lead to a result that where a national legislation grants periods for

military service in that Member State military service in another Member State has also to be taken into account by that Member State (even if it is the Member State competent for calculating a pension). But what to say of a situation where periods of military service are only treated as periods of insurance if periods of employment have been completed before or after such military service and a person has only exercised the military service there but has been gainfully active all his/her life in another Member State? It could certainly be argued that in such a case assimilation has to apply and these periods have to be created.

For example, in the competent State A, child-raising periods would be considered as periods of insurance. Child-raising periods fulfilled in other States could be aggregated only on condition that in the other State child-raising periods would also be seen as periods of insurance. Assimilation may indeed not lead to a situation, where facts, such as raising of children, would be taken into account as periods of insurance, when these facts would not be seen as a period of insurance in the country where they are fulfilled. This would contradict the national competence of Member States to determine themselves the qualification of periods.

So the purpose of the principle of aggregation is not to create the status of insured person, rather it presupposes it. This seems to lead to the idea that a Member State can only apply aggregation if previously at least one period has been completed under its legislation (1 + x rule). Although this is certainly defensible and logical, it remains however unclear if this condition is required by the provisions on aggregation. Indeed, in the wording of article 6 of Regulation 883/2004, the competent institution may also proceed to aggregation for the "coverage of its legislation". This is new, compared to what was written under Regulation 1408/71, and it is unclear what the meaning and origin is of this provision. Let us take the situation that a scheme requires as a condition for affiliation a period of previous insurance in that state: for example, the legislation of a scheme for self-employed persons requires that the person concerned must have been covered as a worker for 5 years previously and such a person comes from another Member State (where s/he has been covered as a worker for more than 5 years) and immediately starts an activity as a self-employed person. Or, for example, the situation where entitlement to a parental benefit requires that the person was previously insured in this country for a certain period, and the person concerned who was insured in another Member State, comes to reside in this first State without becomingactive (first State is competent on the basis of article 11, §3e Reg. 883/2004). Or let us just take the above-mentioned example of periods of military service where it is required that the person concerned should have fulfilled periods of employment before the period of military service in the country. A literally reading of article 6, might not exclude a priori that in such situations the principle of aggregation of periods might apply instead of the principle of assimilation of facts. If this reasoning is not followed and it is required that a period must first be fulfilled in the competent State, one should rather rely on the assimilation of facts. But perhaps this discussion is more theoretical as the end result will be similar.

On the other hand, under the principle of aggregation of periods, the competent State must take all periods into account that are recognised as periods of insurance under the State where they have been fulfilled and this is, in accordance with Art. 1 (t) of Regulation 883/2204, regardless of whether these periods under the other State would be recognised as a period of insurance according to the competent State. These periods have to be taken into account without there being a need to control if such periods are also considered as periods of insurance under the legislation of the competent State. If, for example, periods of unemployment are considered to be equivalent to periods of insurance under Member State B, according to the principle of aggregation of periods, Member State A is obliged to take them into account for calculating the 24 months condition, even if these periods would not be assimilated to periods of insurance under this State.

As Member States remain competent to structure their social security regimes, they may also make special benefits conditional on the fulfilment of special insurance periods outside the general insurance periods. For example, they might explicitly determine that for an anticipated old-age pension 24 months of insurance periods have to be the consequence of activities as an employed person, and that only periods when a person received an unemployment benefit or when a person was raising children can be assimilated to these periods. If someone has worked abroad as self-employed or for example, has assimilated periods of insurance for incapacity of work, they cannot be taken into account as the additional "qualitative condition" asked from these insurance periods for these special conditions is not fulfilled. It is in such circumstances that the principle of assimilation might eventually play a role. Imagine for example, that the condition for taking into account child-raising periods is that children should be educated on the national territory or placed in a local kindergarten recognised by the competent State. That children are educated on the territory of another State or placed in a kindergarten abroad should be assimilated. Or, for example, the condition that these assimilated periods (e.g. unemployment and child raising periods) may only be recognised if they are followed by effective insurance periods. Under assimilation, periods may be assimilated regardless of whether the ensuing periods of effective employment were completed in the competent State or in another Member State. As such, the principle of assimilation adds a more qualitative element.

### *3.2.3 Assimilation leading to unjustified results*

Finally, the principle of proportionality implies that assimilation may not lead to inappropriate results, which could be the case if this principle were to be used without restrictions to purely national conditions that are specific to the legislation of the competent State. This principle cannot necessarily require an automatic transfer of facts. For example, the legislation of a Member State provides for special conditions for obtaining a benefit for disabled people in case they have a recognised disability of a certain percentage. Assimilation may only apply in case the person has an equivalent degree of invalidity. As every Member State remains competent in deciding the degree of invalidity, it will be very difficult to assimilate these periods due to the difficulty of comparing the degrees of invalidity (exception is made in case Member States have recognised the definition of invalidity as identical in accordance with Annex VII of Regulation 883/2004). This is even more complicated when Member States use different scales of disability. Or according to the legislation of a Member State, certain income achieved in a specific profession, for example, income received through a particular integration contract, is exempted for determining if a person has right to a benefit or not. Only income received abroad in a very similar situation will be able to be exempted. Or the legislation of Member State A foresees that someone will receive a full pension in accordance with the professional system s/he was last affiliated to. For someone who has last been working as an employee in Member State A and then as self-employed in Member State B, assimilation may not lead to the receipt of a pension for self-employed people in A.

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# LONG-TERM CARE

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## 1. ORIGIN AND LOCATION OF THE CONCEPT:

### 1.1 History under Regulation (EEC) No. 1408/71:

Under Regulation (EEC) No. 1408/71 long-term care (LTC) is not mentioned explicitly. This is especially due to the fact that in the 1970s when this Regulation entered into force no Member State had a system of this name. The need for care was included in classical social security systems (like e.g. increments to pensions for pensioners in need of care, the various aspects of invalidity schemes but also specific benefits like e.g. increased family allowances for disabled children), in special schemes for disabled persons (like e.g. special benefits for disabled adults or blind persons) and was also covered by social assistance schemes.

During the final years of the twentieth century century many Member States developed special schemes for persons in need of care. As a distinctive feature compared to traditional social security schemes these new schemes tried to fill the gaps where health care or invalidity benefits could not help. The main purpose was to help the aging population for which traditional help of other family members was increasingly difficult to get. The benefits are aimed at compensating for the additional costs which arise due to the need for care (for example, additional costs related to daily life such as shopping, cleaning the home, personal hygiene, preparing meals, taking part in social life etc.). So these schemes clearly had different targets than health care schemes (which were traditionally intended an improvement of the status of health) or invalidity schemes (which were traditionally intended to compensate for the loss of income due to invalidity). Although the social policy aim behind these new schemes is more or less comparable, the schemes themselves differ widely amongst the Member States. Some schemes provide only for benefits in cash (leaving the decision to the persons in need of care as to how to spend the money to strengthen their autonomy), while others finance only care-related services and therefore grant benefits in kind. Under the latter schemes such benefits in kind could be granted directly by the scheme without the person in need of care having to pre-finance the service (for example, a stay in a home for a disabled person is directly financed from the scheme) or the person concerned has to pay up front for the service and after presenting the bill (for example, for help from a professional carer) the scheme refunds the total amount or at least a part of these expenses. Some Member States also provide for a combination of benefits in cash and in kind, where the “value” of the benefits in kind is usually higher than that of the benefits in cash. Some Member States do not focus on benefits directly for the person in need of care but safeguard an income for the person providing the care (carer’s benefits).

As LTC benefits were not mentioned in Regulation (EEC) No. 1408/71 very soon the question arose, how such schemes should be coordinated. The Member States concerned had different opinions. Problems with European law arose around the export of such benefits to another Member State. In this respect it should be mentioned that the benefits in cash are not intended to replace income but to bear or at least share the costs of the additional expenses of a person in need of care. So when the national policy decides on the amount of such benefits the local costs of care services but also of daily life and also other benefits at the disposal of disabled persons (such as, for example, free transport on public transport services) are all relevant. Therefore, the export of such benefits to another Member State could lead to over or under compensation of the persons in need of care.

To avoid export some Member States argued that although the benefits are paid out in cash they are in principle benefits in kind and therefore non-exportable (due to the general principles under Regulation (EEC) No. 1408/71 benefits in kind are only granted by the State of residence or stay). Other Member States insisted on the non-contributory nature of their benefits and listed LTC benefits as "special non-contributory benefits" in Annex IIa of Regulation (EEC) No. 1408/71 (such benefits are also non exportable due to their specific nature). Finally some Member States relied on the close traditional link of their LTC schemes with social assistance and therefore argued that these schemes are outside the scope of Regulation (EEC) No. 1408/71 as are all other social assistance schemes.

## 1.2 Clarification by the ECJ

In a number of rulings (see references) the ECJ made the following clarifications under Regulation (EEC) No. 1408/71:

- As there is no mention of LTC benefits in the list of the risks covered by Regulation (EEC) No. 1408/71 but these benefits are without any doubt social security benefits covered by this Regulation they have to be coordinated under the rules concerning one of the risks mentioned in this list. As the closest relationship exists to sickness these rules have to be applied.
- LTC benefits which are granted to all persons resident in the Member State concerned or to all persons insured against that risk under the legislation of a Member State cannot be regarded as special as it is a general risk which has been included into the social security schemes of many Member States. Therefore an inclusion in the list of special non-contributory benefits of Annex IIa of Regulation (EEC) No. 1408/71 is not correct. Due to these rulings Annex IIa had to be re-examined and LTC benefits had to be deleted from that list.
- Coordination has to be made under the general rules applicable to benefits provided for the risk of sickness. Therefore the Member State competent for the provision of health care benefits under Regulation (EEC) No. 1408/71 has also to grant LTC benefits. So there may be a different competence for benefits in cash and in kind. Benefits in cash have always to be granted by the competent Member State (which includes export of these benefits). The Member State for example, where the father works has to grant LTC benefits in cash also for disabled children resident in another Member State (if the first Member State is also competent to reimburse the health care benefits in kind in the Member State of residence (case *Hosse*). But also a pensioner receiving only a pension from one Member State and residing in another Member State is entitled to receive the LTC cash benefits from the pension-granting Member State (as this State is also competent to reimburse the health care benefits in the Member State of residence – case *Jauch*). Benefits in kind are only granted in the Member State of residence or stay in accordance with the legislation applicable there (no export), nevertheless the competent Member State (which would also have to grant the LTC benefits in cash) has to reimburse the tariffs of these benefits. In case the legislation of the Member State of residence does not provide for benefits in kind the person concerned

cannot receive such benefits even if the legislation of the Member State competent for health care benefits has such benefits (case *Chamier-Glisczinski).*

### 1.3 Problem of definition

Under Regulation (EC) No. 883/2004 LTC benefits are mentioned at several occasions; nevertheless there is no clear definition (leaving aside the clarification in Art. 1 (va) that also LTC benefits in kind have to be regarded as benefits in kind for the application of the health care chapter. Therefore, recourse has to be made to definitions already given by the ECJ.

"Secondly, the Court has earlier held that benefits intended to improve the state of health and quality of life of persons reliant on care […] have as their essential purpose the supplementing of sickness insurance benefits and must accordingly be regarded as 'sickness benefits' for the purpose of Article 4(1)(a) of Regulation No 1408/71" (Case *Gouvernement de la Communauté francaise et Gouvernement wallon,* Para. 20). For the political work of the Social Protection Committee the following definition is accepted: "A cross-cutting policy issue that brings together a range of services for persons who are dependent on help with basic activities of daily living over an extended period of time".

### 1.4 Difference between Regulation (EEC) No. 1408/71 and Regulation (EC) No. 883/2004

Regulation (EC) No. 883/2004 does not provide a special chapter for the coordination of LTC benefits. So also under the new Regulation LTC benefits have to be coordinated under the health care Chapter. Only one detailed issue has been regulated. Under Art. 34 a new rule has been introduced to avoid an accumulation of LTC benefits in cash and in kind. Without such a rule simultaneous entitlement could occur if, for example, the competent Member State has to export its LTC benefit in cash while at the same time the Member State of residence could also grant the LTC benefits in kind provided under its legislation. This could be, for example, the case if a person receiving an Austrian pension resides in Germany. Austria has to export the Austrian LTC cash benefit (case *Jauch*). Nevertheless this person could also claim the German LTC benefits in kind (such as a home-help) and the competent Austrian institution has to reimburse the costs of this home help. Thus the Austrian institutions have to pay twice while the person in need of care is overcompensated. It may be that with the home-help the needs are already satisfied and so the LTC benefit in cash is only additional income. Art. 34 aims to avoid such situations. The elements which are relevant for the application of this Article are outlined below.

## 2. ISSUES OF INTERPRETATION OF ART. 34 OF REGULATION (EC) NO. 883/2004

### 2.1 Text of Art. 34 (1)

(1) If a recipient of LTC benefits in cash, which have to be treated as sickness benefits and are therefore provided by the Member State competent for cash benefits under Articles 21 or 29, is, at the same time and under this Chapter, entitled to claim benefits in kind intended for the same purpose from the institution of the place of residence or stay in another Member State, and an institution in the first Member State is also required to reimburse the cost of these benefits in kind under Article 35, the general provision on prevention of overlapping of benefits laid down in Article 10 shall be applicable, with the following restriction only: if the person concerned claims and receives the benefit in kind, the amount of the benefit in cash shall be reduced by the amount of the benefit

in kind which is or could be claimed from the institution of the first Member State required to reimburse the cost.

## 2.2 General principle

The Member State granting the LTC benefit in cash is entitled to reduce from the benefit paid out the amount which it has to reimburse to the institution of the place of residence or stay for LTC benefits in kind intended for the same purpose granted by the latter institution.

## 2.3 Which benefits are covered by that provision?

For the application of this provision it is very important to know exactly which Member States have LTC benefits in cash or in kind as it is the task of the institutions to guide the citizens concerned. Art. 34 (2) mandates the Administrative Commission to draw up such a list. Unfortunately it has not been possible yet to decide on an exhaustive list. Up until now there is only a "yes/no" list which indicates if a particular Member State has LTC benefits in cash/kind or not. This list is accessible on the homepage of the European Commission under the following address: ( ://ec.europa.eu/social/main.jsp?langId=en&catId=).

## 2.4 Meaning of "at the same time"?

The reduction is only possible if during the same period of time LTC benefits in cash and in kind are granted. So this rule cannot be applied if, for example, during the month of February the Member State of residence provides a LTC benefit in kind (such as a home aid) and reimbursement is requested from the competent Member State in August; while this Member State started to grant a LTC benefit in cash only from the beginning of April of that year. Therefore, only the date of granting the benefit in kind and not the date of the request for reimbursement are relevant.

## 2.5 What is a "benefit intended for the same purpose"?

This has to be decided on a case by case base. The intention of this provision is to avoid reductions in cases in which both benefits (in kind and in cash) are aimed for different purposes and therefore no unjustified double benefits for the same risk are possible. So in case Member State A (competent Member State) exports a benefit specifically aimed to promote mobility for blind persons to guarantee their participation in social life while Member State B (Member State of residence) grants a home aid (benefit in kind) to help at home, these are not benefits for the same purpose. So these benefits in kind and in cash have to be granted in parallel without reducing the benefit in cash. Therefore, such a reduction is in general possible in cases of overall benefits in cash which aim at covering all aspects of additional costs due to the need for care.

## 2.6 Why is it necessary that an institution in the competent Member State is required to reimburse the benefits in kind?

First it has to be noted that it is not necessarily the same institution of the competent Member State which has to grant the benefits in cash and to reimburse the benefits in kind. It is sufficient if the competent Member State has to bear the costs of both benefits. So this rule is also applicable if, for example, a pension institution pays out the cash benefit while all health care benefits in kind including LTC benefits granted abroad have to be reimbursed by the health care institution of the competent Member State.

It is also clear that a reduction of the benefit in cash is only possible if the competent Member State is actually burdened twice. So if the Member State of residence or stay grants LTC benefits to the

person concerned under its social assistance scheme and therefore no reimbursement can be claimed for the granting of these benefits the competent Member State is not entitled to reduce its benefits in cash.

## 2.7 Why has the person to "claim and receive" the benefit in kind?

It is not sufficient that the Member State of residence provides benefits in kind. For the application of this provision the person concerned must have applied and also received the benefit in kind. This element – which might seem to be self-evident tries to clarify without any doubt that only benefits in kind actually granted can be deducted. So the competent Member State is not entitled to decide if the person might have been entitled under the legislation of the State of residence or stay. There is no way to force a person to claim benefits in kind in his/her state of residence or stay.

## 2.8 What is the "amount of the benefit in kind which is or could be claimed from the institution of the competent Member State required to reimburse the cost"?

As already said this rule concerns only cases where the competent Member State has to reimburse the costs of the benefit in kind granted by the Member State of residence or stay. Nevertheless, also cases where both Member States concerned have agreed on a waiver agreement under Art. 35 (3) of Regulation (EC) No. 883/2004 should be treated in the same way. So it is not necessary that an actual reimbursement has to be made in the concrete case (because this case is covered by a waiver agreement) but it is relevant that under the general rules – setting aside the waiver agreement – reimbursement could be claimed. This precision has been necessary to cover also those cases where the competent Member State bears the costs of all benefits granted in the other Member State in another way (because it does not receive reimbursement in the case of treatment of persons insured in this other Member State while treated on its territory).

Regarding the amount to be deducted, Art. 31 (1) of Regulation (EC) No. 987/2009 contains an additional and very important clarification. It has to be safeguarded that the person receives in total not less than the amount of benefits which could be granted in the competent Member State. Therefore, also a legislation which provides for a combination of benefits in cash and in kind must be taken into account. It is important that the total amount of all possible benefits is regarded as the limit.

Let us assume the legislation of the competent Member State grants benefits in cash of, for example, 100 € per month and at the same time benefits in kind to a limit of 200 € per month (amount reimbursed to the person concerned who presents a bill on LTC services purchased) could be covered by the scheme. If this person receives in the Member State of residence benefits in kind for which the competent Member State has to reimburse 250 € then the benefit in cash paid out by the competent Member State can only be reduced by 50 € (which exceed the amount of benefits in kind reimbursable under the legislation of the competent Member State).

Only the amount which is to be reimbursed is relevant. So in a case where the person has paid 300 € for a LTC service but the institution in the Member State of residence refunds to that person under its legislation only 200 € (the remaining 100 € is regarded as cost sharing of the person concerned) only these 200 € will have to be reimbursed by the competent Member State and thus could be deducted from the benefit in cash granted by that Member State.

## 2.9 Procedures applied to long-term care benefits

It is important that for the granting of LTC benefits in kind outside the competent Member State all provisions concerning health care benefits granted in such situations apply (especially Art. 24 and

Art. 25 of Regulation (EC) No. 987/2009). A specific provision exists only concerning the determination of the degree of need of care (Art. 28 of Regulation (EC) No. 987/72009.

# 3. RELATIONSHIP BETWEEN CONCEPTS AND OTHER PROVISIONS OF THE REGULATIONS

## 3.1 Relationship between concepts

Since LTC benefits are granted in the Member State of residence (or stay) in accordance with its legislation, the question might be when exactly is residence established in this Member State? In addition, some Member States grant LTC benefits to all residents. Therefore, clarifying the concept of residence might contribute to the correct application of the rules governing coordination of LTC benefits.

LTC benefits might also be provided to members of the family of an insured person. The question could be who is covered as a family member and according to which legislation is family membership determined? Hence, there is a close connection between the LTC benefits and the concept of family member.

## 3.2 Relationship with other provisions of the Regulation

Obviously, the coordination of LTC benefits is tightly linked with the coordination of sickness benefits (in kind, i.e. medical benefits, and sickness cash benefits), as already elaborated. The ECJ has developed a kind of parallel coordination mechanism for medical benefits by relying on the provisions of the Treaty (now Treaty on the Functioning of the EU-TFEU). Decisions of the ECJ should be codified in the proposed Directive on the application of patients' rights in cross-border healthcare (Brussels, 2.7.2008, COM (2008) 414 final). If adopted, the question will be whether the Directive could also apply to LTC benefits. In the Commission's proposal they are mentioned only in point 9 of the recital, which states that "the Directive does not apply to assistance and support for families or individuals who are, over an extended period of time, in a particular state of need. It does not apply, for example, to residential homes or housing, or assistance provided to elderly people or children by social workers or volunteer carers or professionals other than health professionals." In the text accepted by Council during the Spanish Presidency LTC benefits are explicitly excluded. At present the text must be agreed between the Council and European Parliament.

Notwithstanding this, the ECJ might always directly apply the principles of the TFEU, especially due to the lack of other rules for coordinating LTC benefits. Diversity of such rules could be reduced with future clear (special) coordination rules for LTC benefits. As already outlined, in the Chamier-Glisczinski-ruling the ECJ did not directly apply provisions of the TFEU and refused entitlements on the basis of the EU coordinating instruments. So it is difficult to imagine cases where LTC could be touched directly by the principles of the TFEU in cross-border situations as we have learned that the transfer of the residence from one home for disabled persons to such a home in another MS is not covered by freedom to provide services. So could there still be cases? One could imagine that there might be cases of active free movement of services – a free-lance home aid is not established in the Member State of residence of the person in need of care but in the neighbouring Member State. Also after a possible exclusion from the patient mobility Directive, reimbursement for such home aid could be claimed from the competent Member State. But there could also be cases of passive free movement of services. We cannot exclude that a person in need of care – for example, a disabled person - goes for special treatment (an active labour market programme for disabled persons) to another Member State. Also in such a case it would be difficult to deny reimbursement under the

national tariff of the Member State of insurance taking into account the rulings of the ECJ on free movement of services.

LTC benefits might also be linked to other benefits, subject to social security coordination rules. In some countries LTC benefits are provided as an addition to the (old-age or invalidity) pension, or as an increased or special family benefit (in case of disabled children). The question might then be, whether the rules on the coordination of pensions, or family benefits could be applied to LTC benefits?

Long term-care benefits might also be granted when the dependency, i.e. (partial or complete loss of autonomy) occurred due to an accident at work or occupational disease. In some countries such benefits are governed by specific provisions (special schemes for accidents at work and occupational diseases), and hence might be regarded as governed by specific coordination rules. It has to be noted that this has never been discussed – but it could also be argued that such national peculiarities do not matter and such LTC schemes should also be coordinated under the Sickness Chapter. If this is really considered to be a problem by some Member States legal clarity should be sought in Regulation (EC) No. 883/2004.

A relationship to special non-contributory benefits in cash might also be established, since these are benefits providing supplementary, substitute or ancillary cover against the risks covered (e.g. old-age or invalidity), or benefits providing solely specific protection for disabled people, closely linked to the person's social environment in the Member State concerned (Art. 70 Regulation 883/2004). The question remains whether LTC benefits could still be classified as providing supplementary cover or solely specific protection for disabled people. Although the ECJ up until now has not decided on such a direction it cannot be excluded that there is still room for such a classification (e.g. if there are normal LTC benefits for all residents – which without any doubt have to be coordinated as sickness benefits – and besides them there are increments to these LTC benefits for people which meet special and additional conditions concerning poverty; the latter might be classified as special non-contributory cash benefits and be listed in Annex X of Regulation (EC) No. 883/2004.

Art. 34 of Regulation (EC) No. 883/2004 emphasises benefits "which have to be treated as sickness benefits". Also this suggests that other benefits might not be treated as sickness benefits, but might be treated for instance as special non-contributory benefits or (non-coordinated) social assistance. In the latter case other interesting questions might emerge. For instance, should equality of treatment provisions based on the TFEU (Art. 20 ff. – citizenship of the EU) and Directive 38/2004/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States and, where applicable, also Regulation (EEC) No. 1612/68 on the free movement of workers be applied when LTC benefits are not coordinated?

Also due to their diversity and the distinct legal nature of LTC benefits, it seems that composing a new chapter for coordination of LTC benefits would be the best solution to properly address the newly emerged social risk of dependency on the care of another person. This way the ad hoc development of coordination rules by the ECJ (taking into account the concrete situation of a specific case) could be avoided and more legal certainty provided.

# 4. PROBLEMS

## 4.1 No entitlement although there are long-term care schemes

As there is no specific coordination for LTC benefits all problems which already existed under Regulation (EEC) No. 1408/71 continue to exist under Regulation (EC) No. 883/2004 - setting aside

the special provision under Art. 34. Therefore, unresolved is the situation where the competent Member State has only LTC benefits in kind (which cannot be exported) while the Member State of residence has only LTC benefits in cash (which cannot be granted to persons not insured in that Member State) – in which case the person concerned still does not get any benefits although both legislations involved have LTC schemes.

In addition LTC benefits under many legislations are based on an individualisation of entitlements, as entitlement is given, for example, to all residents. Applying the health care Chapter changes this approach dramatically as the benefits are given to insured persons and their family members. This could give rise to strange solutions which cannot be explained easily. If in a Member State all residents are entitled to LTC benefits in cash – as already explained – it is not easy to understand that a worker or a pensioner who is covered by the health care scheme of another Member State is not entitled to these benefits in cash in his/her Member State of residence. However, it is even more surprising when this also applies to the family members such as, for example, a disabled child of the worker or the pensioner. Also these family members are excluded from their personal entitlements in their Member State of residence.

In this context one question remains unresolved under Regulation (EC) No. 883/2004 as it stands now. How would the ECJ judge a situation in which all residents of a Member State are entitled (due only to their residence there) to LTC benefits in cash while Regulation (EC) No. 883/2004 excludes those residents who are covered by the health care scheme of another Member State (such as for example, persons receiving only a pension from this other Member State)? What would happen in a case where the competent Member State exports an LTC benefit in cash but under the legislation of the Member State of residence all residents are entitled to much higher LTC benefits in cash? Would the ECJ further develop the idea already elaborated in case C-352/06, *Bosmann*, and state – directly based on the TFEU - that the Member State of residence cannot be hindered in (or even has to) granting in such a case its residence-based LTC benefits in cash or at least a corresponding supplement?

### 4.2 No entitlement to the full package of combined benefits

The same applies if an LTC scheme always grants a package of benefits in cash and kind to guarantee the benefits best suited for the individual situation. Also in cases of such combined benefits the whole package can never be given to the person in need of care (unless the legislations of the two Member States involved have exactly the same national legislation – which is almost never the case).

### 4.3 Export could lead to over or under compensation

Another problem is connected with the export of benefits in cash. Usually the amount of these benefits are – as already said - the result of a political decision where the local costs of care services, the cost of living in the relevant Member State but also other social services granted in that Member State play a decisive role. In the case of export, these overarching political parameters which are only valid in the territory of the competent Member State lose their significance. Nevertheless, it has to be mentioned that this aspect does not only concern LTC benefits but also many other benefits which have to be exported under Regulation (EC) No. 883/2004 such as, for example, family benefits.

### 4.4 Problem to receive benefits in kind during a temporary stay

Finally also LTC benefits are confronted with the same problems which are related to health care benefits. In case of benefits in kind required outside the territory of the competent Member State the question whether this is only a “stay” or already a “residence” outside the competent Member State is relevant, as only in the latter case all LTC benefits in kind can be granted. In the case of only a

stay outside the competent Member State entitlement is given only for benefits which become medically necessary (Art. 19 of Regulation (EC) No. 883/2004), which is not the case in relation to LTC benefits where medical reasons usually are not decisive (so in case of stay outside the competent Member State LTC benefits in kind as a rule can only be obtained under Art. 20 of Regulation (EC) No. 883/2004 – authorisation by the competent institution). Therefore the decision on residence is very important – which could be contradictory and cumbersome although Art. 11 of Regulation (EC) No. 987/2009 could be guidance for that decision.

## 5. POSSIBLE NEXT STEPS

To overcome the problems mentioned, amendments of Regulation (EC) No. 883/2004 are necessary. They cannot be solved only by way of interpretative instruments. Nevertheless, interpretative instruments could also be necessary in addition (e.g. an exhaustive list of all LTC benefits in cash and in kind).

It could be useful to think about a specific coordination of LTC benefits separate from the Sickness Chapter. During the elaboration of such a specific coordination the following questions could be discussed:

- First it has to be analysed to which Member State most connecting factors exist – it is clear that for this a political decision is necessary – is it the Member State competent for paying benefits (like the pension paying Member State) or the Member State of residence, or any other Member State?
- How could it be achieved that the persons concerned receive the whole package of benefits? In the case of combined benefits, could benefits in kind and in cash be coordinated as benefits in kind (e.g. by the Member State of residence with reimbursement)?
- Would it be useful to also include benefits which for the time being are outside the scope of Regulation (EC) No. 883/2004 because they are regarded as social assistance benefits?
- Is there another way, other than export, to coordinate LTC benefits in cash? Could the special coordination for special non-contributory cash benefits under Annex X of Regulation (EC) No. 883/2004 be regarded as a model for such a special approach to coordination? What obligations might already exist in light of the ruling of the ECJ in the *Bosmann*-case?
- Is it necessary that the Member State competent for health care benefits always has to safeguard, at least via a differential amount, the highest benefit which might be claimed?
- Should there be specific rules for the granting of LTC benefits during (only) a stay outside the competent Member State or are the existing rules sufficient?
- Should these benefits still be coordinated as benefits for the insured persons and their family members or should there be a change towards an individualized approach?

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# MEMBERS OF FAMILY

## 1. ORIGIN AND LOCATION OF THE CONCEPT

### 1.1 References in the Regulations

#### *1.1.1 Regulation 883/2004*

a) Definitions: Member of the family, Article 1 letter i; family benefits, article 1 letter z.
b) Personal scope: Article 2.
c) Sickness, maternity and paternity benefits (key provisions): Articles 17, 18, 19, 20, 23, 25, 26, 27, 28, 31, 32.
d) Family benefits (key provisions): Articles 67, 68 and 69.

#### *1.1.2 Regulation 987/2009*

Key provisions: Articles 11, 24, 25, 26, 27, 28, 29, 32, 54, 58, 59, 60, 61, 63, 64.

### 1.2 Is there any definition (under the Regulation or by the ECJ)?

#### *1.2.1 Regulation 1408/71*

The definition of 'member of the family' in Regulation 1408/71 is provided by Article 1 (f) which states that 'member of the 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 or, in the cases referred to in Article 22 (1) (a) and Article 31, by the legislation of the Member State in whose territory such person resides; where, however, the said legislations regard as a member of the family or a member of the household only a person living under the same roof as the employed or self-employed person or student, this condition shall be considered satisfied if the person in question is mainly dependent on that worker, where the legislation of the Member State on sickness or maternity benefits in kind does not enable members of the family to be distinguished from the other persons to whom it applies, the term "member of the family" shall have the meaning given to it in Annex 1."*

#### *1.2.2 Regulation 883/04*

Article 1 provides the definition of member of the family in Regulation 883/04. Article 1(i) states that 'member of the family' means:

*1. (i) 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;*
*(ii) with regard to benefits in kind pursuant to Title III, Chapter 1 on sickness, maternity and equivalent paternity benefits, any person defined or recognised as a member of the family or designated as a member of the household by the legislation of the Member State in which he/she resides;*

*2. if the legislation of a Member State which is applicable under subparagraph 1 does not make a distinction between the members of the family and other persons to whom it is applicable, the*

*spouse, minor children, and dependent children who have reached the age of majority shall be considered members of the family;*

*3. if, under the legislation which is applicable under subparagraphs 1 and 2, a person is considered a member of the family or member of the household only if he/she lives in the same household as the insured person or pensioner, this condition shall be considered satisfied if the person in question is mainly dependent on the insured person or pensioner.*

## 1.3 Differences with Regulation 1408/71

### *1.3.1 New elements of Regulation 883/04*

The key element in both regulations is that in principle it is up to the Member State to decide who for the purposes of its legislation is a member of the family; thus 'member of the family' is not a Community notion.

However, a new element in Regulation 883/04 compared to 1408/71 is that where a Member State makes no distinction between the members of the family and other persons to whom it is applicable, the spouse, minor children, and dependent children who have reached the age of majority shall be considered to be members of the family. Thus in cases where Member States do not make any distinction between personal and derived rights and grant personal rights rather than as a consequence of the kinship or economic dependence with regards to the rights holder, Regulation 883/04 provides a Community concept of 'members of the family' in the absence of a national definition (i.e. "the spouse, minor children and dependent children" (letter i of article 1), which has permitted some unification of concepts and the deletion of Annex I (II) of the Regulation 1408/71.

Thus, in the field of health care, where a conflict of law between the legislation of the State of residence and the legislation of the competent State may occur when the competent State is not the same as the State of residence, the Regulation establishes a rule in order to avoid either double or no protection. In these cases, the Regulation opts for the legislation of the State of residence. Significantly, however, the legislator did not take the Delavant ruling (Case 451/93)[2] into account when drawing up Regulation 883/04 (This is discussed in Section 2.1.2 below).

The extension of the personal scope of Regulation 883/04 to *"nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors" (*Article 2) implies the formal inclusion of non-active persons within the Regulation. This means that, with reference to the personal rights/derived rights dichotomy, family members may enjoy rights both because of their relationship with the worker or pensioner, and at the same time, since they are considered to be 'non active persons' included in the personal scope of the Regulation, their own rights independently of their relationship to the worker or pensioner, if the State of residence recognizes the rights in question through the sole fact of residing in that State. In such cases Regulation 883/04 gives priority to the rights that are derived from an activity of a person subject to the legislation of another Member State (Art. 32).

A point of reflection is whether under the new Regulation 883/04 non-active persons (and more precisely, with reference to our topic, members of the family) can claim their own rights, for instance under an unemployment scheme. In this respect there are implications for the Kermaschek [3]

[2] Case C-451/93 Delavant [1995] ECR I-1545
[3] Case C-40/76 Kermaschek [1976] ECR 1669

principle (leaving aside that the wife in that case was a third country national) that go beyond the Cabanis-Isarte ruling.[4] (See Section 2.1.1, below).

### *1.3.2 National definitions of 'member of the family'*

The general principle provided by Article 1 of Regulation 883/04, that members of the family are those recognized as such by national legislation, can be problematic. National definitions provided by the Civil Code of who is a member of the family vary amongst the Member States and within Member States themselves.

***Inconsistent definitions of the family within a Member State***

If the legislation of the competent Member State distinguishes with reference to the concept of 'members of the family' between the different branches of social security this has consequences for coordination. For example, if a Member State for the purposes of family benefits recognises children only up to the age of 18 as family members but for sickness insurance regards children who are at university as being co-insured until the age of 25 this must be respected by Regulation 883/2004. A consequence would be that different persons are regarded as being family members under the different chapters of the Regulation. This implies that the concept of member of the family is not unitary but multiple and may change between one benefit and another and one Member State and another.

A second example results from the principle that for healthcare coverage it is always the legislation of the place of residence and not the one of the competent Member State that is decisive (Art. 1 (i)(1)(ii) of Reg. 883/2004). Therefore, under legislation such as, for example, that of Austria where disabled children are regarded as being members of the family irrespective of their age, cross border situations could give rise to problems. For example, the father works in Austria while his family resides in another Member State, in which disabled children are not regarded as co-insured members of the family. It is clear that family benefits have to be granted as priority by the Austrian legislation (the mother does not work) under which disabled children always open entitlement to Austrian family benefits (Art. 68 of Reg. 883/2004). However, for healthcare coverage this question depends on the legislation of the other Member State although under the legislation of Austria such children would always open co-insurance (under Austrian legislation there is an intended parallelism between the family benefits and the healthcare coverage). As the system of the other Member State does not grant these children co-insurance they could lose any insurance coverage arising via Regulation 883/2004. In such cases, the Delavant principle may be important to avoid disadvantages for mobile persons (The Delevant principle is discussed in Section 2.1.2 below).

***Different and same sex partnerships***

The recognition of new forms of relationships including unmarried different sex partners and same sex partnerships is a particularly problematic area in the approach taken across Member States to the definition of member of the family. There is a range of different situations and civil statuses for different and same sex partners in the EU. Some Member States recognise registered life-partnerships and some same sex marriage, while others do not.

Concerning same sex partners, some member countries allow same sex partners to marry; others have same sex civil union/partnership laws; while others do not allow registration of same sex

[4] Case C-308/93 Cabanis-Issarte [1996] ECR I-2097

relationships but provide some rights for same sex partners. Some EU member countries do not recognise same sex relationships.[5]

Belgium, the Netherlands, Spain, Sweden and Portugal provide the status of marriage to same sex partnerships.

Austria, Denmark, Finland, Germany, Hungary, the United Kingdom offer most of the rights of marriage to same sex partners (Civil Partnerships, Registered Partnerships, Civil Unions etc.)

The Czech Republic, France, Luxembourg, Portugal and Slovenia offer some rights to same sex partners that are similar to marriage.[6]

The remaining Member States: Bulgaria, Cyprus, Estonia, Greece, Ireland, Italy, Latvia, Lithuania, Malta, Poland, Romania, Slovakia do not recognise same sex partnerships. For example, Article 18 of the Polish Constitution defines marriage as a relationship between a man and woman. No other relationship in Poland is legal.

Adoption of children by married same sex couples also differs between Member States. Even across Member States where same sex marriage is recognised, rights of adoption may vary, for example, adoption is permitted in Spain but not in Portugal.

Sánchez Rodas (2010) suggests that the problem *"resides in the fact that although civil status is a question that remains under the exclusive competence of Member States, for the purposes of EU Law, the existence of a marital relationship can affect the exercise of some of the rights recognized both under Primary Law and Secondary Law"* [7].

McColgan et al. (2006) found that discrimination against same sex partners is prevalent in relation to social security in EU member countries. A number of Member States, which do not recognise same sex marriage, either provide specific benefits for married couples or discriminate in the benefit entitlement conditions between married and unmarried partners or between same sex and different sex partners.[8] For example, the Irish Social Welfare Act was amended in 2004 to explicitly exclude same sex partnerships from recognition in social welfare in response to a successful outcome of a challenge by a same sex couple under the Equal Status Act (2004) regarding entitlement to a free travel pass.[9]

Differences in treatment exist concerning entitlement to social security benefits even in Member States which recognise same sex marriage or civil partnership. Roberts and Sakslin (2009) found that in some EU member countries marriage or civil registration may offer only few or no additional entitlement to social security benefits. In some cases same sex partners who had previously been assessed as separate units for means-tested benefits may lose entitlement when assessed as a cohabiting couple. On the other hand, the structure of some member countries' social security

[5] Ottosson, D. (2006) *LGBT world legal wrap up survey*, Brussels: International Lesbian and Gay Association; Ottosson, D. (2010) *State sponsored homophobia* Brussels: International Lesbian and Gay Association; Roberts, S. and Sakslin, M. (2009) 'Some are more equal than others: The impact of discrimination in social security on the right of same sex partners to free movement in the European Union'. *Journal of Poverty and Social Justice Special Edition Issue 3, October 2009.*

[6] Ottosson, D. (2010) *State sponsored homophobia* Brussels: International Lesbian and Gay Association.

[7] Sáchez Rodas, C., "Migrants and Social Security: The EC Regulation 883/2004 and 987/2009", Ediciones Laborum.

[8] McColgan, A., Niessen, J. and Palmer F. (2006) *Comparative analyses on national measures to combat discrimination outside employment and occupation: mapping study on existing national legislative measures – and their impact in – tackling discrimination outside the field of employment and occupation on the grounds of sex, religion or belief, disability, age and sexual orientation*, Brussels: European Commission, VT/2005/062.

[9] Roberts, S. and Sakslin, M. (2009) 'Some are more equal than others: The impact of discrimination in social security on the right of same sex partners to free movement in the European Union'. *Journal of Poverty and Social Justice Special Edition Issue 3, October 2009.*

schemes may give equal rights on an individual basis to all insured persons independently of their sexual orientation or marital status.[10]

In some countries same sex partners are treated differently for different categories of benefits. Slovenia may serve as an example to illustrate this point. In Slovenia the Same Sex Partnership Registration Act (2005) determines the right to benefits and responsibility for maintenance between same sex partners. While same sex partners' income is taken into account when determining entitlement to social assistance, same sex partners are not treated as a family member or a survivor in social insurance schemes (Strban, 2008).[11] Thus same sex partners enjoy equality in terms of their obligations but not in respect of their rights.[12]

# 2. ISSUES OF INTERPRETATION

## 2.1 Is there any ECJ case-law and how is it interpreted?

### *2.1.1 Kermaschek et seq.*

In Kermaschek (C-40/76)[13] the Court of Justice decided that a family member could only rely on Regulation 1408/71 for benefits that are specifically designated for members of the family such as family and survivor's benefits. In the Cabanis (C-308/93 )[14] judgement the Court partially departed from the Kermaschek judgement to find that the distinction between personal rights and derived rights makes the fundamental concept of equal treatment inapplicable to the surviving spouse of a migrant worker and undermines the fundamental requirement that Community law should be applied uniformly. Therefore the Court concluded that the distinction between rights in person and derived rights could not be fully maintained. Thus the Cabanis judgement limits the Kermaschek finding to those cases which apply exclusively to employed persons such as unemployment benefits.[15] It may be appropriate to consider strengthening the effect of Regulation 883/04 in respect of these rulings (leaving aside the third country aspect for the purposes of this analysis).

### *2.1.2 Delavant (Case 451/93)*

As noted above, the legislator did not take the Delavant ruling (Case 451/93)[16] into account in drawing up Regulation 883/04 that:

*"Article 19(2) of Regulation No 1408/71 is to be understood as meaning that when a worker resides with the members of his family in the territory of a Member State other than the Member State in which he works, under whose legislation he is insured by virtue of the regulation, the conditions for entitlement to sickness benefits in kind for members of that person' s family provided by their State of residence are governed, in the same way as for the worker himself, by the legislation of the State in*

[10] Roberts, S. and Sakslin, M. (2009) 'Some are more equal than others: The impact of discrimination in social security on the right of same sex partners to free movement in the European Union'. *Journal of Poverty and Social Justice Special Edition Issue 3, October 2009.*
[11] Strban, S. (2008) *National report for Slovenia 2008*. Training and Reporting on European Social Security (trESS). Ghent University/European Commission. http://www.tress-network.org/TRESSNEW/
[12] Roberts, S., (2008) *UK national report 2008*, Training and Reporting on European Social Security (trESS) Ghent University/European Commission. http://www.tress-network.org/TRESSNEW/
[13] Case C-40/76 Kermaschek [1976] ECR 1669
[14] Case C-308/93 Cabanis-Issarte [1996] ECR I-2097
[15] Pennings, F. (2010) *European Social Security Law*, Fifth edition, Intersentia, Antwerp.
[16] Case C-451/93 Delavant [1995] ECR I-1545

*which that person works in so far as the members of his family are not entitled to those benefits under the legislation of their State of residence."* Delavant (Case 451/93).[17]

Instead the legislator opted to continue with the legislation of the State of residence with regard to benefits in kind pursuant to Title III, Chapter 1 on sickness, maternity and equivalent paternity benefits. However, according to some opinions, the Delavant ruling can be applied subsidiarily. Nevertheless, to avoid lack of legal certainty, it would be helpful to expressly include this principle in the text of the Regulation. Furthermore, it would also be opportune to reflect whether the Delavant principle could be extended to other cases when the concept of member of the family differs between the competent State and the State of residence.

## 2.2 What is the impact on and the relationship with other provisions of EU law?

According to Article 45 of the Charter of Fundamental Rights every citizen of the Union has the right to move and reside freely within the territory of the Member States. While the Treaty provides that, subject to limitations and conditions laid down in the Treaty and measures adopted to give it effect, every citizen of the Union has the right to move and reside freely within the territory of the member countries. The limitations and conditions are found in Directive 2004/38/EC.

Directive 2004/38/EC is uncertain about the rights of Lesbian, Gay, Bisexual and Transsexual people. The Preamble, which although not itself legally binding is nevertheless likely to influence the Court of Justice[1],[18] states:

*"This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of an ethnic minority, property, birth, disability, age or sexual orientation."*

Same sex partners who are both EU citizens have an independent right of free movement. Article 2 of Directive 2004/38/EC extends EU citizens' family reunification rights for partners who are not Union citizens to the registered partner but only if the host member country recognises registered partnership as equivalent to marriage.

The Preamble to the Directive encourages countries to maintain the family unity of those families that are not included in the Member State's definition of 'the family':

*"In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen."*

Thus, instead of providing legal certainty, Directive 2004/38/EC also – like Regulation 883/04 - permits Member States to decide which non EU citizens can join their partners.[19]

[17] Case C-451/93 Delavant [1995] ECR I-1545

[18] Bell, M. (2005) *EU Directive on free movement and same-sex families: guidelines on the implementation process*, Brussels: International Lesbian and Gay Association -- Europe.

In some cases, Regulation 883/04 and the Directive 2004/38/EC can be confronted. For example, in the case of life-partners, irrespective of whether they are of the same or different sex, or a married couple of the same sex, in which one of the partners is a pensioner of a Member State that recognises such relationships and protects, as a member of the family, the other life-partner or married partner where the couple wishes to reside in a country which does not recognise rights arising from their partnership. According to Directive 2004/38/EC, a family member could be the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State. In case the host Member State does not recognise these life or same-sex partners, he or she could be considered in accordance with Article 3 of the Directive as an "other family members". Nevertheless, this life or married partner would not be entitled to sickness benefits in kind taking into account Article 1 (i) (members of the family) of Regulation 883/04 due to the fact that in the host country the legislation of the State of residence, does not recognise these persons as members of the family. This case could also be enlarged to workers in similar situations. The question this example gives rise to, is whether Article 1(i) of Regulation 883/04 is an obstacle to the free movement of workers and citizens?

Although this example refers specifically to life partners, some of these concerns can be extended to the 'classical' members of the family if some of these relationships are not recognised as such for sickness benefits in kind in the legislation of the host country when in the competent State they are entitled to these benefits. And again the same question arises, is article 1.i) an obstacle to the free movement of citizens?

## 3. PRACTICAL EXAMPLES AND PROBLEMS IN THE IMPLEMENTATION OF THE CONCEPT

The study has identified a plethora of different definitions of the family between the legislation of the Member States which includes differences in the eligible marriage age, maximum age for children in order to continue to enjoy the right to benefits, acknowledgement of the grandchildren or the parents as members of the family, etc. The two groups of people whose relationships are perhaps most consistently excluded from recognition as a family across Member States are unmarried different sex partners and same sex partners.

The impact of the interface of the different partnership statuses and benefit entitlement conditions across the member countries means that both these groups may find their status and entitlements changing as they move between different 'rights regimes' with consequent loss of rights to social security should they exercise their right of free movement.[20]

For example, same sex partners from a country that recognises same sex marriage who exercise their right to free movement to work in another country which attributes the same status or a country

[19] Roberts, S. and Sakslin, M. (2009) 'Some are more equal than others: The impact of discrimination in social security on the right of same sex partners to free movement in the European Union'. *Journal of Poverty and Social Justice Special Edition Issue 3, October 2009.*

[20] Jorens, Y., and Hajdú, J. (2008) *European Report, Training and Reporting on European Social Security (trESS),* European Commission/Ghent University. http://www.tress-network.org/TRESSNEW/; Roberts, S., (2008) *UK national report 2008*, Training and Reporting on European Social Security (trESS) Ghent University/European Commission. http://www.tress-network.org/TRESSNEW/; Roberts, S. and Sakslin, M. (2009) 'Some are more equal than others: The impact of discrimination in social security on the right of same sex partners to free movement in the European Union'. *Journal of Poverty and Social Justice Special Edition Issue 3, October 2009.*

that provides most rights of marriage to same sex partners would enjoy the same rights as different sex partners moving between these countries. However, should same sex partners move from a country where marriage or civil partnership and social security rights are recognised to a country where they are not, they would lose rights. For example, in a case where same sex partners move from Belgium to Poland, where because same sex partners are not treated as family members under Polish civil law or social insurance schemes a same sex partner would only derive pension and survivor's rights in Belgium but not in Poland. The situation would be the same – loss of rights on exercising their right to free movement – for same sex partners moving to any of the countries that do not recognize the status of same sex partnerships in their civil law and social security legislation.

A different outcome would arise in the case of a pensioner who is subject to legislation which does not acknowledge same sex marriage who resides with his/her spouse (of the same sex) in a State which does acknowledge this legal situation. In accordance with the Regulation itself, for sickness or maternity and paternity benefits in kind, it shall be taken into account when defining and including the family members, the legislation of the State of residence, and the competent State shall refund the cost of these benefits although it does not acknowledge this form of marriage in its legislation. The fact that the civil status might be considered as 'public order' would not alter, in principle, this reasoning. The Community rules would prevail over the national ones.

As Sánchez Rodas (2010) points out *"Therefore, today, although a migrant worker has married under legislation which allows homosexual marriage, his or her surviving spouse cannot claim survivors benefits under Regulation 883/2004 in a State whose legislation only permits heterosexual marriage. This obviously, is a flagrant barrier to the exercise of worker's rights to freedom of movement"*[21] Significantly, the Court of Justice in Richards (case C-423/04)[22] stated that *"Moreover, in accordance with settled case-law, the right not to be discriminated against on grounds of sex is one of the fundamental human rights the observance of which the Court has a duty to ensure"*.

The same issues and disentitlements consequent on exercising the right to free movement affect different sex unmarried life partners. Thus a very large number of people across the EU are actually or potentially facing barriers to free movement because of the different definitions of the family amongst Member States.

Article 5 of Regulation 883/04 introduces a new principle of equal treatment of benefits, income, facts or events which provides that where legal effects are attributed to certain facts or events, a Member State must take account of like facts or events occurring in any Member State as though they had taken place in its own territory. It is not yet clear how Article 5 will impact on same sex married or unmarried partners or different sex unmarried life partners.

However, one question that will need to be addressed is whether the legislation of a Member State may deny legal effect to a same sex marriage celebrated and recognized by virtue of the legislation of another State? The answer might seem difficult at first glance. If there is only one competent State, it seems logical to think that it is the legislation of that State which should apply. However, a marriage might also be considered to be a cross-border element. For example, a married same sex couple with Spanish nationality in which one of the spouses has carried out his/her entire working life in a State which does not recognize this form of marriage. When the active spouse dies, the other spouse might have a right to a survivor's pension. However, since the competent State does not recognize the surviving partner as a spouse, there is a doubt about whether or not the Civil Spanish Law (*vis atractiva)* would prevail over the public order of the competent State. The issue could become even more complicated if, in the same case, the active spouse has carried out her/his working life in

[21] Cristina Sáchez Rodas "Migrants and Social Security: The EC Regulation 883/2004 and 987/2009", Ediciones Laborum.
[22] Sarah Margaret Richards v Secretary of State for Work and Pensions (Case C-423/04) ECJ 27-04-06

several Member States. In this situation retirement pensions with supplements, or survivor's pensions, or a type A invalidity pension with different amounts due to family dependents, etc. would all be affected.

A further example would concern a situation where family members live in different Member States, one of which does and the other does not, provide for and recognise the adoption of a child by same sex partners, in which case the recognition of the same sex partners' custody of the child and right to family benefits may arise as well as questions concerning overlapping rights with differential supplements. Thus, all benefits can be directly or indirectly affected by this situation. The Imbernón ruling[23] highlights that there are multiple aspects to the problem.

# 4. POSSIBLE NEXT STEPS

The analysis shows that the different definitions of 'member of the family' that exist in civil and social security law across the Member States give rise to serious obstacles to different sex life partners and same sex partners (including married same sex couples) who wish to exercise their right to free movement.

While Regulation 883/04 represents progress over Regulation 1408/71 by providing a Community concept of 'members of the family' in the absence of a national definition (i.e. "the spouse, minor children and dependent children" (letter i of article 1), which has permitted the unification of concepts and the deletion of Annex I (II) of the Regulation 1408/71, the definition employed is a very conservative one that is not adapted to the current reality and to all new situations that might arise. Indeed no mention is made of life partners when in other instruments a clear reference can be found. For example, *Directive 2010/41 of 7th July 2010 on the application of the principle of equal treatment between men and women engaged in a self-employed activity* includes life partners in its scope in so far as they are recognised by national law. Furthermore, *Directive 2004/38 on the rights of the citizens of the Union and their family members to move and reside freely within the territory of the Member States* when defining 'family member' mentions life partners within a registered partnership.

A recommendation is that consideration should be given to the possibility of including in Regulation 883/04 a core definition of member of the family that is applicable to all Member States to avoid the enormous differences that the analysis has identified between and within countries. We could include for example: *the spouse , minor children , dependent children who have reached the age of majority , life partners in so far as they are recognised by national law and any person defined or recognised as member of the family or designated as a member of the household by the legislation under which benefits are provided.* No doubt, this proposal would be contested by some Member States that would consider it to be a form of harmonisation within a coordination instrument. However, as things currently stand the provision of article 1, letter (i) paragraph 2 could also be considered to be a (limited) harmonisation rule. The idea would be to take this extant definition and enlarge it to include life partners.

A more minor change would be to modify only article 1, letter (i) paragraph 2 in this sense: *spouse, minor children, dependent children…and life partners in so far as recognised by national law.* This change would clarify a smaller problem. For example, a country that recognises life partners and that is included in article 1, letter (i) paragraph 2 (no distinction between members of the family and other persons). Is in this case is a life partner considered (for example, in civil law) to be a member of

[23] Case 321/93**,** Imbernon-Martinez, [1995] ECR 1-2821

the family? A literal interpretation of the wording of article 1, letter (i) paragraph 2 certainly raises some doubts.

Of course, this form of wording is a provisional one. The main idea is that the Delavant provision could be considered to be subsidiary, in which case many of the cases that we have highlighted in this report could be resolved. Furthermore, in fact, the Delavant ruling is already applicable. Why not formally include this provision in the Regulation?

However, we must not forget that the coordination provisions aim at eliminating obstacles in the field of social security for the free movement of ***all*** workers and EU citizens. The right to free movement is not defined with reference marital status or sexual orientation.

As Roberts and Sakslin (2009) point out the Lisbon Treaty raises the Charter of Fundamental Rights to the same level as the provisions of the Treaty and creates a clear link between Community law and Human Rights Law. The European Court of Human Rights has stated the Human Rights Convention is a dynamic instrument which must be interpreted in the light of present-day circumstances (*E.B. v France*, (43546/02).[24] This approach should be adopted by coordination law in order to recognise and respect the rights of all persons independent of their sexual orientation and civil status. Thus the concept of 'member of the family' needs to be a dynamic one that changes to adapt to changing times in Europe.

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[24] Roberts, S. and Sakslin, M. (2009) 'Some are more equal than others: The impact of discrimination in social security on the right of same sex partners to free movement in the European Union'. *Journal of Poverty and Social Justice Special Edition Issue 3, October 2009.*

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# RESIDENCE

## 1. ORIGIN AND LOCATION OF THE CONCEPT

### 1.1. Statement of the Problem

Social security entitlements have traditionally been seen as emanating from within nation states and bounded by national frontiers.[25] Perhaps for this reason, today's welfare states use a mix of immigration rules and benefit entitlement conditions to control access to their benefits.[26] The former may allow entry to the country on condition that (certain) benefits are not claimed, while the latter typically include nationality, contribution and residence criteria.

Different types of benefits are controlled by different types of criteria. Many member countries attach residence conditions to tax-financed benefits. It is possible to identify different types of residence conditions and several concepts of 'residence' may operate.[27] Eligibility for non-contributory benefits may require a past period of residence and/or a social link between the paying state and the recipient.[28] The entitlement and the amount of benefit to which a person is entitled may depend on the number of years he or she has been resident in a country. Having established an entitlement a person may not be able to take a benefit abroad or claim the benefit from abroad. It should be noted that there is overlap between these categories. For instance, a prior period of residence may be a criterion in considering whether someone is socially resident. Residence conditions may also apply to nationals who return home from another country, as well as to non nationals.[29]

### 1.2. Solutions provided by coordination

Coordination adjusts social security schemes in relation to each other to protect the entitlements of migrants while leaving the national schemes in tact in other respects.[30] The Treaty itself provides for two solutions to overcome the obstacles facing migrant workers (and now citizens): aggregation and export.

Article 48 of the Treaty provides that:

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self employed migrant workers and their dependants:

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[25] Roberts, S. and Bolderson, H. (1993) 'How closed are Welfare States? Migration, Social Security and National Frontiers: Social Security Provisions for Non-EU Nationals in Six EU Countries'. Paper presented at the Annual Conference of the International Sociological Association, September, Oxford; Roberts, S., and Bolderson, H.(1999) 'Inside Out: A Cross National Study of Migrants' Disentitlements to Social Security Benefits' in *Comparative Social Policy*, ed. J. Clasen, Blackwell; Roberts, S. (2001) 'Crossing frontiers: migration and social security' in *Ethics, Poverty, Inequality and Reform in Social Security*, Ashgate Publishing.

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[30] Pennings, F. (2010) *European Social Security Law*, Fifth edition, Intersentia, Antwerp.

(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;
(b) payment of benefits to persons resident in the territories of Member States.

Since the first instrument -Regulation 3/58 - coordination has been achieved through: equal treatment; discrimination on grounds of nationality is prohibited to guarantee that a worker working on the territory of a Member State is subject to the same obligations and benefits from the same rights as the workers of that Member State; rules are laid down to determine which member country's legislation the person is subject to; rights in the course of acquisition are protected through aggregation of periods of insurance, residence or employment spent in each of the respective countries to establish a right in another Member State; and rights already acquired are protected by allowing certain benefits to be exported. Today Regulation 883/04 uses these same principles and instruments (applicable legislation, equal treatment, aggregation of periods, export of benefits) to coordinate the social security entitlements of mobile workers and citizens.

The concept of residence may operate, generally speaking, at least in three main aspects of the coordination regulations:

A) Applicable legislation.
B) Entitlement to benefits
C) Export of benefits

### *1.2.1 References in the Regulations*

***Regulation 883/04***

**Definitions**

Article 1: frontier worker, letter f); residence, letter j); stay, letter k; institution of the place of residence and institution of the place of stay, letter r); periods of residence, letter v).

Article 1
(j) 'residence' means the place where a person habitually resides;
(k) 'stay' means temporary residence.

**Export of benefits**
waiving of residence rules. Article 7.

Article 7 states

*"Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his/her family reside in a Member State other than that in which the institution responsible for providing benefits is situated."*

**Periods of residence**
(Key articles), article 1, letter v); article 6; article 44; article 45; article 52; article 53; article 54; article 56; article 57; article 58; article 87.

Article 6 of Regulation 883/04, **Aggregation of periods**, states:

*"Unless otherwise provided for by this Regulation, the competent institution of a Member State whose legislation makes:*

— *the acquisition, retention, duration or recovery of the right to benefits,*

— *the coverage by legislation,*

*or*

— *the access to or the exemption from compulsory, optional continued or voluntary insurance, conditional upon the completion of periods of insurance, employment, self-employment or residence shall, to the extent necessary, take into account periods of insurance, employment, self employment or residence completed under the legislation of any other Member State as though they were periods completed under the legislation which it applies."*

**Applicable legislation. *Lex residentiae***

(Key articles), art. 11 (3)(e); art 13, art. 17, art 22, art 23, art 24, art.26.

*Article 11 (3)(e)* states that:

"*any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him/her benefits under the legislation of one or more other Member States."*

Thus the concept of residence wears a variety of hats in Regulation 883/04. Residence is the conflict rule for applicable legislation in those cases where activities are being carried out in two or more Member States or the worker has several employers. In those cases, the State of residence is considered to be the competent State to apply its legislation as long as the person concerned pursues a substantial part of his or her activity in that State, or is employed by various undertakings or various employers whose registered office or place of business is in different Member States (art 13). Comparable provisions exist for self-employed persons.

Article 11 of Regulation 883/04 establishes, as a residual provision, that under those circumstances in which no competent State exits (i.e. no activity, not a civil servant, not an unemployed person, not in military service), the State of residence is considered to be the competent State.

Residence plays a major role for entitlement concerning the provision of sickness benefits (including long-term care benefits) in kind. For example, when a pensioner resides in a Member State where there is a right to benefits in kind as a pensioner (art.23) due to the fact that the person concerned receives a pension in the State of residence, that State would become the responsible State for benefits in both cash and kind.

Although this list is not exhaustive, other examples where residence is the key element for awarding benefits or acts, sometimes, as a conflict rule in the case of possible overlapping of benefits include:

- *Article 58* - Award of a supplement
- *Article 65* - Unemployed persons who resided in a Member State other than the competent State
- *Article 67* - Members of the family residing in another Member State
- *Article 68* - Priority rules in the event of overlapping
- *Article 70* - Special non –contributory benefits

***Regulation 987/09***

(Key provisions), Article 6; article 11; article 14; article 23; article 24; article 45; article 56; article 63; article 64; article 70.

Article 11 provides elements for determining residence:

"1. *Where there is a difference of views between the institutions of two or more Member States about the determination of the residence of a person to whom the basic Regulation applies, these institutions shall establish by common agreement the centre of interests of the person concerned, based on an overall assessment of all available information relating to relevant facts, which may include, as appropriate:*

*(a) the duration and continuity of presence on the territory of the Member States concerned;*
*(b) the person's situation, including:*

*(i) the nature and the specific characteristics of any activity pursued, in particular the place where such activity is habitually pursued, the stability of the activity, and the duration of any work contract;*

*(ii) his family status and family ties;*

*(iii) the exercise of any non-remunerated activity;*

*(iv) in the case of students, the source of their income;*

*(v) his housing situation, in particular how permanent it is;*

*(vi) the Member State in which the person is deemed to reside for taxation purposes.*

*2. Where the consideration of the various criteria based on relevant facts as set out in paragraph 1 does not lead to agreement between the institutions concerned, the person's intention, as it appears from such facts and circumstances, especially the reasons that led the person to move, shall be considered to be decisive for establishing that person's actual place of residence.*

# 2. ISSUES OF INTERPRETATION

## 2.1 Is there any ECJ case-law and how is it interpreted?

### *2.1.1 The concept of 'habitual residence'*

ECJ case law has established that the concept of 'habitual' residence must be taken to mean the place where the person concerned has established the permanent centre of his or her interests. Where that is must be determined on the basis of the facts, having regard to all the circumstances which point to a person's real choice of a country as his or her State of residence (see, *mutatis mutandis*, concerning Article 71(1)(b)(ii) of Regulation No 1408/71, Case 76/76 *Di Paolo* [1977] ECR 315, paragraphs 17 to 20, and Case C-102/91 *Knoch* [1992] ECR I-4341, paragraphs 21 and 23).

Accordingly, although the length of the person's stay in a country may be used to gauge his or her intention to make that country the principal and permanent centre of his or her interests, it cannot be treated as a constituent element- that is to say, a *conditio sine qua non* - of residence (Swaddling).[31]

[31] Swaddling v. Adjudication Officer [1999] All ER (EC) 21

The Court noted in Swadddling that if there were marked differences in the meaning ascribed by the various national systems to the concept of residence, migrant workers would be in danger of losing insurance cover in respect of non-exportable benefits or – at the other extreme – could have double entitlement.

Taking into account some of these rulings, Article 11 of Regulation 987/09 represents a considerable step forward in clarifying the elements and facts that could be used for determining a person's residence.

### *2.1.2 The concept of residence and exportability*

The principle of residence and exportability has been one of the more contested areas of coordination. Much of the political, legal and administrative dispute on the material scope of the Regulation has concerned defining the boundaries between social security on the one hand and social assistance on the other.[32]

Social assistance is explicitly excluded from the Regulation. The question of what is social assistance and therefore excluded from coordination has been challenged before the courts and the ECJ gave a series of Judgements from *Frilli* (C-1/72)[33] to *Newton* (C-356/89)[34] that brought benefits, whether or not they were categorised as social assistance by the Member State, within the coordinating regulations if they were entitlement based (*Frilli* C-1/72) and related to one of the contingencies enumerated in Article 4(1) of Regulation 1408/71 (*Hoeckx*, C248/83).[35]

However, the reasoning of the Court in this series of Judgements had opened up an unintended development in case law and on 30 April 1992, following Newton, the Council adopted Regulation 1247/92 which created a new category of 'special non-contributory benefits' to coordination, defined as benefits granted to provide substitute, supplementary and ancillary protection against social contingencies covered by the branches referred to in Article 4(1)(a)-(h) of Regulation 1408/71 or intended solely for the specific protection of disabled people.

Special non-contributory benefits are not exportable. The ECJ subsequently confirmed this position in two UK cases *Snares* (C-20/96)[36] and *Partridge* (C-297/97).[37] However, the non-exportability of special non-contributory benefits has subsequently been challenged and the ECJ has further clarified the demarcation lines between social security, social assistance and special non-contributory benefits in a series of cases which has eroded the content of the Annex and expanded the content of the category of 'social security'.[38] (*Jauch* (C-215/99),[39] *Leclere and Deaconescu* (C-43/99);[40] *Hosse* (C-286/03);[41] *Hendrix* (C-287/05).[42] Case C-299/05 Commission v Council and Parliament).[43]

[32] Martinsen, D. (2007) "The Social Policy Clash: EU Cross-Border Welfare, Union Citizenship and National Residence Clauses" presented at the European Union Studies Association (EUSA) Biennial Conference 2007 (10th), May 17-19, 2007, Montreal.
[33] Case 1/72 Frilli (1972) ECR 471
[34] Case 356/89 Newton (1991) ECR 3017
[35] Case 249/83 Hoeckx (1985) ECR 982
[36] Case C-20/96 Snares [1997] ECR 1-6057
[37] Case C-297/96, Partridge v Adjudication Officer. ECR 1998 I-3467
[38] Martinsen, D. (2007) "The Social Policy Clash: EU Cross-Border Welfare, Union Citizenship and National Residence Clauses" in European Union Studies Association (EUSA) Biennial Conference 2007 (10th), May 17-19, 2007, Montreal; Jorens, J. and Hajdú, J., (2008) European Report, Training and Reporting on European Social Security (trESS), European Commission/Ghent University.
[39] Case C-215/99 Jauch, [2001] ECR I-1901
[40] Case C-43/99 Leclere (2001), ECR I-4265
[41] Case C-286/03 Hosse [2006] ECR I-01771
[42] Case C-287/05 Hendrix [2007] ECR I-00000
[43] Case C-299/05 Commission v Council and Parliament

## 2.2 What is the impact on and the relationship with other provisions of EU law?

### *2.2.1 Relationship between Regulation 883/04 and Directive 2004/38*

Directive 2004/38 does not include any definition of residence that could help to clarify the concept. It mentions residence for up to three months, residence for more than three months and permanent residence. In fact, there is inconsistency between the Directive and Regulation 883/04 as in some cases what is 'residence' in the Directive would be considered to be 'stay' under the Regulation. For example: With regards to the title of Article 6 of the Directive "Right of residence for up to three months", the Directive does not expressly distinguish between stay and residence. Neither does Article 7, "right of residence for more than three months". It is only Article 16 of the Directive that mentions that Union citizens and members of their family who have resided legally for a continuous period of five years in the host Member State have the right of permanent residence there (c.f. also *Lassal* C-162/09, 7.10.2010). The same five year condition is stipulated in Directive 2003/109 concerning the status of third-country nationals who are long-term residents. This condition may apply particularly to social assistance and other social advantages not covered by Regulation 883/04 (c.f. also Förster, C-158/07), and provided to EU citizens, who are not considered to be workers (according to Article 7 Regulation 1612/68 workers must enjoy equal social advantages, c.f. also *Hoeckx*, C-249/83).

Furthermore, it is possible that a person is simultaneously resident in a Member State according to Directive 2004/38, and has only a temporary stay there under Regulation 883/04. In this respect, the Commission initiated the first steps for an infringement procedure (2003/4198) against Spain in accordance with Article 226 of the Treaty. The circumstances are as follows: Spain requested Form 121 in order to issue a resident permit to pensioners from other Member States. The Commission considered that the condition of having "comprehensive sickness insurance cover in the host Member State" was fulfilled by the European Health Insurance Card and thus that the 121 form was not necessary. It follows from the Commission's position that a pensioner could be resident in Spain under the Directive, completing periods of residence (for non-contributory benefits, for instance) and resident in another Member State under Regulation 883/04 due to the fact that form 121 has been issued. As Spain revised its legislation to remove the requirement for the 121 form for the granting of a residence permit, the Commission did not continue with the procedure. Nevertheless, this case demonstrates that the concept of residence is not unitary and different outcomes could be reached through taking into account the application of the Directive2004/38 or the Regulation 883/04.

### *2.2.2 Association Agreements*

In accordance with the Decisions taken by the European Union within the Association Council created by the Association Agreements with Croatia, Macedonia, Israel, Morocco, Algeria and Tunisia, adopted on the EPSSCO Council held on October 21st, the waving of residence clauses is established for the export of pensions to these six countries. However, the concept of residence in those six countries may differ from the one within the European Union (for example, with respect to the export of benefits), which may give rise to problems when implementing these decisions as these countries are not bound by the rulings of the ECJ in intra-Community cases.

# 3. PRACTICAL EXAMPLES AND PROBLEMS IN THE IMPLEMENTATION OF THE CONCEPT

The analysis shows that residence is not one single concept throughout the different acts of European legislation but several having a variety of different functions and roles. Perhaps the main

problem for the interpretation of the concept of residence is the ambiguity of the definition of the term in Article 1, letter j) of Regulation 883/04: "*the place where a person habitually resides*". This definition is unchanged from that in Regulation 1408/71. As described above, it is ECJ case law that has defined the concept during which the Court has found that residence is "*the centre of interest of the person*". This may not necessarily be self-evident. However, considerable progress has been made with Article 11 of Regulation 987/09 which includes a set of criteria for determining residence when there are disagreements between institutions of two or more Member States. Logically, when disagreements arise between the interested person and a Member State, the same principles should be applied, even if in this case, the *imperium* of the competent institution, at least at the administrative level, probably prevails. Nevertheless, an interested party could resort to an administrative decision in the judicial bodies, based in Article 11 of 987/09 Regulation.

As a result of the imprecision of the concept of residence in the Regulations, Member States will apply their own national concepts and principles, entailing in some cases a positive or negative conflict (double residence/no residence) between two or more Member States. In these circumstances, Article 11 of Regulation 987/09 can act as a rule of conflict. Furthermore, the concept of residence is not uniform across all the fields of European Law or in cases where there is no European competence, varying from field to field (for instance, there are differences at national level in the concept of residence between social security, tax law and residence law)**.**

In some cases there may not be a single concept of residence in the Regulation across the different benefits when it comes to determining the legislation applicable. It is possible that for some benefits a person may be deemed, during the same period of time, to be resident in one Member State (according to its legislation) and for other benefits to be deemed to be resident in another Member State (according to *its* legislation). For example, a UK pensioner could hold a residence permit in Spain, which according to Directive 2004/38 could therefore be considered to be the competent State for non contributory benefits and, at the same time, be considered to be resident in the UK for the purposes of sickness benefits if that person did not apply for a Form 121. Furthermore, that person could claim, as a resident, long-term care benefits in cash in Spain (residence-based scheme) while the competent State for sickness benefits would remain the UK.

Furthermore, following on from the idea that for a residence permit in the case of a foreign pensioner, for instance in Spain, the Form 121 is not required but only the European health card, it could be envisaged that the person concerned in case of a special treatment not included totally in the criteria established in Articles 19 and 27 of Regulation 883/04, could claim a Spanish national health card on the basis of her or his residence permit or due to the fact that s/he is entitled to this card under national legislation. This problem is not of course directly caused by the Regulation (which in principle establishes the competent State); however, the ambiguity of the concept of residence in the Regulation, the different concepts of residence in the Member States and the schemes based on residence introduce added complications. In this sense the problem is one of national legislation and Treaty versus the Regulation. Although, as described above, Article 11 of Regulation 897/09 provides criteria for determining residence, nevertheless the person concerned is able, outside of the Regulation, to ask for the national legislation to be applied.
The innovation, for determining the applicable legislation is introduced by Article 11 of Regulation 883/04 which considers the State of residence as the competent State when the person in question is not employed or self-employed; not a civil servant or in subsided unemployed and has not been called up for military service or the civil service. Article 11 could be summarised as determining that active persons or assimilated persons are included under the applicable legislation of the State of employment and that the legislation of the State of residence is applied to non-active persons. However, in this latter case, Article 11 admits some exceptions to the *lex residentiae* principle in order to guarantee benefits to the person concerned.

The interpretation made by the Court of Justice concerning the concept of residence being *the centre of interest of the person* is subjective and in the final analysis, it may be the person themselves who will decide in which Member State she or he habitually resides. Thus, for instance, when a pensioner from one member country decides to change her or his residence to another member country, the main element, in fact, iuris tantum not iure ex de iure, is the application or not for an E-121 form/S1 portable document, i.e. the form determines residence. However, at this point we must await developments with respect to the application of Article 11 of Regulation 987/09.

As discussed above, under Regulation 1408/71 the ECJ developed criteria to determine residence (centre of interest). There are no grounds on the basis of these judgements for a different concept of residence, for example, to determine the applicable legislation or to grant benefits. Therefore, it could be assumed that if, for example, a Member State only issued an EHIC for healthcare treatment in another Member State (so for health care residence still remained in that Member State) this Member State is theoretically also the only one competent (compared to the one of stay) for example, for granting family benefits or taking into account periods of residence during this period for future pension entitlement.

Unfortunately Regulation 883/04 has not added clarity to this question. Article 11 of Regulation 987/09 only comes into play in cases of dispute between Member States. So it could be argued that as long as there is no dispute or as long as the situation is confined to one Member State only national residence criteria can be applied. On the other hand it could be argued that if national residence criteria are applied this would usually lead to a dispute between Member States and that therefore only a European approach, as developed by the Court of Justice and also deducible from Article 11 of Regulation 987/09, could have been intended by the European legislator. However, this is not self-evident. For example, under the legislation of Member State A residence for social security purposes is only given if the person concerned has already had his/her centre of interest in that State for at least six months; and residence continues for a further six months following the person's departure from the territory of the Member State. If we assume that another Member State (B) has exactly the same national legislation there will not be any conflict between these two Member States. If a person moves from Member State A to Member State B then Member State B will only become competent after six months and Member State A will lose its competence after the same period. This outcome would be contrary to the European notion of residence developed by the ECJ and also contrary to the Swaddling principle, and thus Article 11 would not provide a solution. In this context it should also be noted that Article 11 only works in cases of a dispute between Member States and not in a case where the person concerned is not content with a decision taken by the institution of a Member State.

A further problem that could arise, if Regulation 883/04 does allow more room for national conceptions of residence to be applied, is that different national concepts for the different branches of social security could become applicable. Would it be in line with Regulation 883/04 if, for example, for health care benefits a person is regarded as having transferred his/her residence but for family benefits purposes or under a residence based pension scheme she or he is still regarded as residing in another Member State? Such a segregated approach cannot work because it would automatically lead to the concurrent application of the legislation of different Member States which would clearly contradict the exclusive application of the legislation of only one Member State (Art. 11 (1) of Regulation 883/04).

The situation is further exacerbated because under different fields of Community legislation different notions of residence may apply to the same person simultaneously, for example social security, residence, double taxation agreements. In this context the relationship between Regulation 883/04 and the Residence Directives would benefit from further clarification. In addition to the issue discussed above concerning the situation of benefits or insurance coverage in the new Member State

of residence to fulfil the conditions for residence under the Residence Directives there are other issues which are also not clear. For example, if residence in the social security sense has not yet been transferred to another Member State but the person concerned is nevertheless already residing there under the Residence Directive this could open rights, for example, under the equal treatment obligation of Art. 24(1) of Directive 2004/38/EC. For example, if the legislation of the Member State of residence under Regulation 883/04 does not provide long-term care benefits in cash (under Regulation 883/04 the State of residence is the only one competent to grant these benefits) while the Member State of residence under Directive 2004/38/EC grants such benefits to all residents the question is raised whether the Directive could oblige the latter to grant benefits although it is not the competent State for social security purposes?

Finally, it should be noted that the problems of inconsistency, identified and discussed above, may be exacerbated by the different linguistic versions of the Regulation. In particular, the French and English versions (*séjour* and *residence*) introduce considerable difficulties in finding a uniform interpretation.

# 4. POSSIBLE NEXT STEPS

The analysis shows that:

- Regulation 883/04 reinforces the "lex residentiae" principle. Nevertheless the concept of residence in the Regulation remains ambiguous.
- The inclusion of non active persons in the personal scope of the Regulation reinforces the need for further clarification of the concept of residence.
- The concept of residence varies both within and across the Member States, and within EU law.
- In addition to positive or negative conflicts of residence, there is the possibility of parallel residences that may in turn allow for benefits "a la carte".
- Between "stay" and "permanent residence", a new situation of "non habitual residence" can be identified.
- Schemes based on residence may be confronted by the reinforcement of the principle of lex residentiae.
- Residence may have different functions and play different roles in the Regulation.

There is a strong argument that as residence is a European concept it cannot differ for different branches of social security per definitionem. As this seems not to be clear for all cases clarification is recommended either in the Regulation itself or in a Decision of the Administrative Commission. In this respect, we advise that the Administrative Commission examines whether there is one single concept of residence in the Regulation and acts accordingly.

It may be interesting to explore the possibility of a tight and rigid concept of residence and its practical consequences.

Our view is that in future the lex residentiae will be reinforced, as it was the case with the introduction of Regulation 883/04, and it will become necessary to further clarify the definition of this concept. The need for this is reinforced by people, especially non actives, increasingly, having not one but several centres of interest and by the rapid development of new forms of communication.

At present the ambiguity of the concept of residence has the potential to create numerous problems for its interpretation and application. To date practical problems have been resolved in most cases with the good will and collaboration of the competent institutions involved.

That some Member States consider that, when it comes to determining the legislation applicable, there is not one single concept of residence in the Regulation across all benefits, makes it important for joint reflection in order to find unifying criteria.

# CHILD-RAISING PERIODS

***References***

- Regulation (EC) No. 883/2004: Art. 5 and Title III Chapter 4 and 5
- Regulation (EC) No. 987/2009: Art. 44
- ECJ-Case Law: Cases C-135/99, 23.11.2000, *Elsen*, C-28/00, 7.2.2002, *Kauer*.

## 1. ORIGIN AND LOCATION OF THE CONCEPT:

### 1.1 History under Regulation (EEC) No. 1408/71:

Under Regulation (EEC) No. 1408/71 child-raising periods are not mentioned explicitly. Therefore the general definition for "period of insurance" under Art. 1 (r) of Regulation (EEC) No. 1408/71 applies. Under this definition it is up to legislation of the Member State where such periods have been completed to determine under which conditions these periods have to be treated as periods of insurance (or equivalent periods).

The legislation of Member States varies widely concerning the technique of taking into account child-raising in the pension schemes. Some schemes grant increments to the pension, additional points or periods which are not at all linked to a specific period while others attribute such periods explicitly to the period of raising a child (e.g. some months after the birth, periods during which child-care leave has been taken etc.)

Some Member States have restricted the granting of such periods to situations which have a close link to the territory of the Member State concerned. So, for example, the relevant German and Austrian legislation has restricted the taking into account of such periods – dedicated explicitly to the period of child-raising – to periods of child-raising in the territory of these Member States. Nevertheless, there has also been an attempt to cover cases in another Member State to ensure that some barriers for free movement are abolished (e.g. Annex VI E Germany No. 19 of Regulation (EEC) No. 1408/71 where periods spent in another Member State are also taken into account if there is a employment relationship under German legislation).

The ECJ has had to deal with two cases of child-raising in another Member State which was not covered by these extensions under national law or the Annex.

### 1.2 Clarification by the ECJ:

In the two rulings on the issue (see the references) the ECJ made the following clarifications under Regulation (EEC) No. 1408/71:

- It is a forbidden discrimination when child-raising periods abroad are not taken into account in the case of a frontier-worker who at the time of birth of the child was still subject to German legislation (case *Elsen*).
- The non-discrimination principle applies also to periods of child-raising before the accession of the relevant State to the EU. Also the condition that a maternity benefit under the legislation of the Member State in question had to be granted to open child-raising periods could be regarded as discriminatory, as such periods are always taken into account when completed in the territory of the relevant Member State (case *Kauer*)

### 1.3 Difference between Regulation (EEC) No. 1408/71 and Regulation (EC) No. 883/2004

Under Regulation (EC) No. 883/2004 there is a new framework for taking into account child-raising periods (Art. 44 of Regulation (EC) No. 987/2009 – the reason for not including this provision in Regulation (EC) No. 883/2004 is that the need evolved only later when the Member States had examined carefully the effects of Art. 5 on the assimilation of facts and some Member States had proposed entries for Annex X of Regulation (EC) No. 883/2004; the provision of Art. 44 safeguards a harmonized application in all Member States).

### 1.4 General principle – assimilation of facts

This new rule under Art. 44 is closely linked to the principle of assimilation of facts under Art. 5 of Regulation (EC) No. 883/2004. Firstly, it is important that it is only the competent Member State which has to apply this principle of assimilation of facts. So assimilation of facts cannot make a Member State competent for the taking into account of child-raising periods other than the one that is competent under the provisions on applicable legislation (Recital 11 of Regulation (EC) No. 883/2004); periods under the competence of another Member State can only be taken into account under the principle of aggregation (Recital 10 of Regulation (EC) No. 883/2004).

Therefore, assimilation of facts clearly applies concerning periods of child-raising on the territory of another Member State (when the relevant national legislation restricts such periods to periods of child-raising on the relevant territory) as long as the Member State is still competent for the person concerned under Title II (Applicable legislation) of Regulation (EC) No. 883/2004.

Example No. 1: So, for example, a person who continues to be a frontier worker working in Member State A (and thus subject to the legislation of that Member State) during the child-raising in Member State B (state of residence) has to be granted child-raising periods under the legislation of Member State A even if that legislation restricts these periods to persons residing on the territory of Member State A (assimilation of facts).

## 2. ISSUES OF INTERPRETATION OF ART. 44 OF REGULATION (EC) NO. 987/2009

### 2.1 Text of Art. 44

#### *2.1.1 Taking into account of child raising-periods*

1. For the purposes of this Article, 'child-raising period' refers to any period which is credited under the pension legislation of a Member State or which provides a supplement to a pension explicitly for the reason that a person has raised a child, irrespective of the method used to calculate those periods and whether they accrue during the time of child-raising or are acknowledged retroactively.

2. Where, under the legislation of the Member State which is competent under Title II of the basic Regulation, no child-raising period is taken into account, the institution of the Member State whose legislation, according to Title II of the basic Regulation, was applicable to the person concerned on the grounds that he or she was pursuing an activity as an employed or self-employed person at the date when, under that legislation, the child-raising period started to be taken into account for the child concerned, shall remain responsible for taking into account that period as a child-raising period under its own legislation, as if such child-raising took place in its own territory.

3. Paragraph 2 shall not apply if the person concerned is, or becomes, subject to the legislation of another Member State due to the pursuit of an employed or self-employed activity.

## 2.2 Problem of definition –meaning of "explicitly for the reason that a person has raised a child"

The rule applies – due to the definition in Art. 44 (1) - to all legislation which grants periods or grants a supplement for such periods because the person concerned is raising the child. The word "explicitly" excludes therefore a national legislation under which, for example, all residents are covered and accrue periods of insurance. On the other hand the provision is not restricted to periods which accrue during the concrete period of child-raising but extends also to periods which are granted, for example, when the pension is awarded as a "bonus-period" for the calculation of a pension not related to a specific period of time, and also to any other supplement, increment or addition to the pension which has no time elements but is triggered by the fact of child-raising.

Another important clarification concerns the question when such periods have to accrue. Art. 44 (1) also explicitly refers to national legislation which grants such periods or supplements only retroactively – for example, when the pension is claimed.

## 2.3 First step: Relationship with the provisions on applicable legislation

Art. 44 (2) starts with the principle that the legislation of the Member State which is competent is the one which determines if periods of child-raising have to be treated as periods of insurance (under Art. 1 (t) of Regulation (EC) No. 883/2004) or not. So this is totally in line with the general principle of assimilation of facts. Nevertheless in this respect a difference between Regulation (EEC) No. 1408/71 and (EC) No. 883/2004 could be important. While under the first Regulation the Member State that is competent (which is not the actual Member State of residence) could decide how long this competence continues (Art. 13 (2) (f) of Regulation (EEC) No. 1408/71), the latter gives residence more importance and thus at the end of a gainful activity (extended by the receipt of specific benefits related to that activity (Art. 11 (2) of Regulation (EC) No. 883/2004) the Member State of residence automatically becomes the competent one (Art. 11 (3) (e) of that Regulation).

## 2.4 Difficulties due to peculiarities of the national legislations

Therefore, in relation to legislation which clearly links the period granted for the pension to the actual time of child-raising, this first principle is quite easy to apply: For active persons it is always the legislation which applies to them due to the exercise of the activity which determines if child-raising periods are also taken into account or not.

Example No. 2: Concerns a case where a person who continues working part time in Member State A during child-raising for 12 months and after the end of that work immediately starts to work part time as a frontier worker in Member State B for the first 12 months child-raising periods could accrue under the legislation of Member State A and after that under the legislation of Member State B. Even if the legislation of Member State A could grant up to 48 months, after the birth of the child, as a child-raising period due to the reference to applicable legislation, no more than 12 months would accrue as after this period the competence of Member State A would end and that of Member State B start.

Example No. 3: A non active person who transfers his/her residence 24 months after confinement from Member State A to Member State B would also be confronted with Member State A taking into account only the first 24 months of child care under its legislation and Member State B only starting

from that date. So if, for example, Member State A does not count any periods for persons raising a child and Member State B takes into account 48 months after the birth of a child only starting 24 months after confinement, Member State B has to take into account the remaining 24 months – even if the first 24 months cannot lead to child-raising periods under the legislation of Member State A.

In cases in which the national legislation does not link the periods or supplements to the time actually spent raising the child it is not possible to make such a clear link to the applicable legislation during child-raising. It could be questioned how in such cases Art. 44 should be applied. It could be argued that in such cases a competence of such a Member State at any time during the career of a person would be sufficient for it to be obliged to take into account these periods or to grant a supplement including the application of the assimilation of facts. Nevertheless these cases could be clarified in future.

Example No. 4: The legislation of Member State A grants 12 months of insurance for every person who has raised a child – this period is added to the insurance career when the pension is determined. Member State B adds 100 € to the pension for persons who have raised a child. So in case a person starts his/her career in Member State C where the person worked and raised a child (confinement at the age of 25 of that person) and at the age of 50 starts to work in Member State A and at 60 in Member State B, both Member State A and Member State B have to take into account the child-raising periods or supplements in this case – although during the actual time of child raising they have not been competent under Title II of Regulation (EC) No. 883/2004.

## 2.5 Second step: extension of the competence of the previously competent Member State

As an exception to the general principles stated above (it is only the Member State competent under Title II of Regulation (EC) No. 883/2004 for the relevant period which has to take into account periods of child-raising including the application of assimilation of facts) Art. 44 also extends a previous competence into the new competence of another Member State under the conditions explained below. This extension of the previous competence is limited to the taking into account of these pension periods and does not interfere with the general principle of application of the legislation of the new competent Member State (so under applicable legislation – Title II of Regulation (EC) No. 883/2004 - only the legislation of the new competent Member State remains applicable). Therefore, even if all conditions for taking into account child-raising periods by the previous competent Member State are met this does not interfere with the application of the legislation of the new competent Member State for all branches. It goes without saying that this new competent Member State is competent, for example, for health care, family benefits etc. But even concerning pensions there might be cases where the new competent Member State already grants periods but nevertheless the previous competent Member State has to continue to grant child-raising periods (see further under point 2.7.).

## 2.6 Gainful activity in the previous competent Member State at the start of the period

The legislation of a Member State was applicable to the person concerned on the grounds that he or she was pursuing an activity as an employed or self-employed person at the date when, under that legislation, the child-raising period started to be taken into account for the child concerned.

This is a very important restriction of the application of this rule as it does not apply to persons who are non active when such a period starts to be granted under the legislation of the Member State concerned.

Example No. 5: A person who stopped a gainful activity 3 years before the birth (or has never been active before) and transfers his/her residence 6 months after confinement to another Member State cannot, therefore, profit from this provision even if the new Member State of residence does not take into account child-raising periods.

What is the meaning of: "*at the date when, under that legislation, the child-raising period started to be taken into account*"?

This is not necessarily the date of birth of the child but could be any other date defined by the relevant national legislation for the start of the period (e.g. from the start of maternity leave before confinement, end of maternity leave after confinement etc.).

Example No. 6: Let us assume that under the legislation of Member State A child-raising periods start to accrue 2 months after the birth of a child. So an extension of the competence of that Member State has does not have to be examined if a person has been subject to the legislation of that Member State at the date of birth of the child but has already taken up part time employment in Member State B 2 months after confinement.

What is the meaning of: Pursuit of "*an activity as an employed or self-employed person*"?

Taking into account Art. 11 (2) of Regulation (EC) No. 883/2004, it has to be assumed that this does not cover only cases of the actual exercise of an activity but also cases of receipt of a benefit due to the exercise of such an activity. But it does not cover cases where the legislation of the relevant Member State is applicable to the person concerned at the time from which under that legislation child-raising periods could be taken into account due to residence alone.

Example No. 7: In the case of the national legislation of Member State A as explained under Example No. 6 where a person has been gainfully active before the obligatory period of maternity leave which starts 2 months before confinement and the maternity allowance under that legislation expires 6 weeks after confinement (which has still to be regarded as the exercise of a gainful activity under Art. 11 (2) of Regulation (EC) No. 883/2004), there is no need to examine any extension of the competence of Member State A if the person resides in Member State B and therefore 6 weeks after confinement the legislation of that Member State became applicable and is already applicable under the legislation of Member State A (2 months after the birth of a child) the moment child-raising periods would start to accrue.

What is the meaning of: "*for the child concerned*"?

This means that the examination has to be made for each individual child – in cases where the legislation of the Member State concerned grants also for the second, third etc. child such periods. Therefore, the competence of the previously competent Member State can only continue for the relevant child – if the conditions are met – and not for children born before or afterwards if the conditions are not met.

Example No. 8: A person who is subject to the legislation of Member State A (as explained under Example No. 6) 2 months after the birth of a child and at that time also still exercised a part time activity subject to the legislation of that Member State, stops this activity when she becomes pregnant for a second time and from that time on (6 months before confinement of the second child) only resides in Member State B, would be entitled to child-raising periods under the legislation of Member State A for the first child. But even if that legislation grants 12 months of child-raising periods for every child no such periods have to be considered under the legislation of Member State

A for the second child because the conditions for the extension of the competence of Member State A are not met for that further child.

## 2.7 No child-raising periods in the new competent Member State

Under the legislation of the new competent Member State under Title II no child-raising period is taken into account

So, even if the conditions outlined under the previous point are fulfilled in the previously competent Member State this extension does not apply if in the new competent Member State child-raising periods (in the sense of the definition under Art. 44 (1)) are taken into account.

Due to the elements of this definition (especially the word "explicitly") national legislation which grants periods of insurance to every resident – so not only for persons raising a child – would not be sufficient to exclude the extension of the competence of the previously competent Member State.

Example No. 9: Member State A has legislation which grants 48 months of child-raising periods after the birth of a child; after 24 months the person concerned transfers his/her residence (without being active) to Member State B where all persons resident are granted insurance periods due to their residence only. Although the person concerned immediately starts to accrue periods of insurance in Member State B from the moment the residence starts there, Member State A has to continue to grant its child-raising periods until the end of the 48 months after confinement as Member State B does not have child-raising periods in the sense of the definition.

It could be examined if such a consequence should be changed as usually simultaneous coverage under the legislation of more than one Member State contradicts the general principles; nevertheless such an amendment would necessitate a change to Regulation (EC) No. 987/2009.

What is the meaning of "*is taken into account*"?

In this respect two contradictory interpretations seem to be possible. It could mean that the legislation of the new competent Member State does not at all take into account child-raising periods or that no child-raising periods accrue in the concrete case. The first method of interpretation is recommended to prevent concrete cases being treated differently only because, for example, the date when the competence switches from one Member State to the other. This can be explained in more detail with the following examples:

Example No. 10: Member State A provides for child-raising periods of 48 months after the birth of a child; Member State B only of 24 months after the birth.

Scenario A: A person moves after 12 months of child-raising in Member State A to Member State B;

Scenario B: A person moves after 26 months of child-raising from Member State A to Member State B.

It is clear that under Scenario A that Member State A – under both ways of interpretation - does not have to continue to grant child-raising periods because without any doubt Member State B will grant such periods (therefore such periods "are taken into account" also in the concrete case). Under Scenario B Member State B cannot grant its child-raising periods because the 24 months after the birth of the child are already over. Nevertheless, under the first way of interpretation Member State A would not be obliged to continue to grant the child-raising periods under its legislation because in principle the legislation of Member State B has child-raising periods. Under the second way of

interpretation Member State A would have to continue to grant its child-raising periods because in the concrete case Member State B does not grant such periods.

So this example makes it clear that under the second way of interpretation it would only depend, for example, on the date when a person switches from the competence of one Member State to that of another for the first Member State to have to continue to grant its periods or not.

In this context another issue has to be clarified: Can the competence of a previously competent Member State be reactivated after the end of the period of benefits of the new competent Member State?

Example No. 11: What happens in Scenario A under Example No. 10 after the 12 months of child-raising periods under the legislation of Member State B? Has Member State A to restart granting child-raising periods until 48 months after the birth of the child are reached or not?

As this provision has the intention to continue the granting of such periods beyond the actual competence of another Member State it seems that this provision should be interpreted in a not too extensive way. If another Member State has already become competent and grants such periods (or takes them into account) under both possible ways of interpretation the person concerned should be subject only to that latter legislation – which like in many other cases could be an advantage or a disadvantage depending on this national legislation.

Another important issue is that it does not matter the amount by which child-raising is taken into account under the pension scheme of the new competent Member State. So a case where 12 months of child-raising would increase the pension of the previously competent Member State by 50 € while under the legislation of the new competent Member State this increase is only 10 € for 12 months the provision, does not oblige the previous competent Member State to grant a "differential amount" of 40 € to its pension. As already said the switching of competences – if not all the conditions under Art. 44 are met – is absolute.

## 2.8 Termination in case of a gainful activity in the new competent Member State

Such continued competence does not apply if the person concerned is, or becomes, subject to the legislation of another Member State due to the pursuit of an employed or self-employed activity.

This exclusion under Art. 44 (3) from the continued competence of the previous competent Member State is absolute and does not depend on the criteria elaborated above. Therefore this termination of the competence of the previous competent Member State also applies if the newly competent Member State does not take into account child-raising periods and even if the person concerned is not covered by a pension scheme of the Member State which is competent due to the exercise of the gainful activity.

This rule either ends the continued competence or the continued competence does not apply at all:

Example No. 12: A person moves their residence as an inactive person from Member State A to Member State B (the conditions under Art. 44 (2) are fulfilled and therefore Member State A continues to grand its child-raising periods. Four months after the transfer of residence a gainful activity is exercised in Member State B. From that moment on Member State A can stop granting its child-raising periods.

Example No. 13: A non-active person moves his/her residence from Member State A to Member State B to start a part-time job there. Although the conditions under Art. 44 (2) would be fulfilled and

Member State B only gives coverage under its accident insurance scheme for that part-time employment, Member State A does not have to continue to grant its child-raising periods.

It has to be assumed that also in this respect the transfer of competence is absolute and therefore also a only very short gainful activity in the new competent Member State (afterwards no activity is exercised) does not lead to a revival of the competence of the previously competent Member State to grant child-raising periods until the end of such periods under its legislation.

## 2.9 No link to family benefits

Another important point is that the provision on child-raising periods is not linked to the granting of family benefits. As it is a new provision covering all relevant conditions this is also the case if under national legislation the taking into account of child raising periods is directly linked to the receipt of a family benefit such as, for example, a child-care allowance. Therefore, Art. 44 could lead to other results than under the family benefits Chapter and it has also to be stressed that due to the ECJ ruling in case C-502/01, 8.7.2004, *Gaumain-Cerri*, in which the ECJ has ruled that a pension insurance for a carer has to be regarded as a long-term care benefit in cash for the person receiving this long-term care benefit due to the link between this benefit and the pension insurance, it does not apply to pension coverage (child-raising periods) which is linked under the relevant national legislation to the receipt of a family allowance.

This separation between the two risks could lead on the one hand to cases where a Member State has to grant a family benefit for the person concerned but no child-raising period accrues but on the other hand also cases could occur where a Member State does not grant the relevant family benefits but nevertheless the child-raising period has to be taken into account. In the latter case the receipt of family benefits under the legislation of another Member State has to be treated as the receipt of the relevant family benefit under the legislation of the Member State which has to grant the child-raising period (assimilation of benefits under Art. 5 (1) of Regulation (EC) No. 883/2004).

Example No. 14: The legislation of Member State A grants every person raising a child and thus receiving a child-care allowance (family benefit), for the time of receipt, child-raising periods for pension insurance. A family resides in Member State B, the mother does not work, and the father works and is subject to the legislation of Member State A. The mother receives the child-care allowance under the legislation of Member State A (for family benefits it does not matter who under the relevant national legislation is entitled to claim the benefit – e.g. case C-543/03, 7.6.2005, *Dodl and Oberhollenzer*). But as the mother is not subject to the legislation of Member State A but to that of Member State B (due to her residence there) she cannot claim child-raising periods under the legislation of Member State A (her case is not mentioned in Art. 44 of Regulation (EC) No. 987/2009 where a Member State other than the actual competent one has to grant such periods).

Example No. 15: Same legislation of Member State A as under Example No. 14. The family again resides in Member State B, where the father works. The mother worked in Member State A at the time when child-raising periods started to accrue under the legislation of that Member State. The legislation of Member State B (competent also for the mother as she stopped her employment contract in Member State A after the period of maternity leave) does not provide for child-raising periods in its pension insurance scheme. Although family benefits have to be granted only under the legislation of Member State B, Member State A has nevertheless to grant child-raising periods under Art. 44 of Regulation (EC) No. 987/2009 and has to assimilate a child-care allowance under the legislation of Member State B to the receipt of such a benefit under the legislation of Member State A. In case Member State B does not provide for specific child-care benefits (only ordinary family benefits) it could be argued that there is no entitlement to child-raising periods in Member State A as

one of the conditions under the national legislation of that Member State is not fulfilled. Nevertheless this special case could be further examined.

# 3. PROBLEMS AND POSSIBLE NEXT STEPS

## 3.1 Problems of interpretation

As already outlined above there are some notions which are not that clear (e.g. what has to be understood by "no child-raising period is taken into account" or how Art. 44 has to be applied in cases of national legislation which do not link the granting of periods or supplements to the time actually spent raising the child). To safeguard a harmonized application and understanding of that provision in all Member States an interpretative tool such as a Decision of the Administrative Commission could be helpful.

## 3.2 Problems of application

A practical problem could also arise from the fact that under the legislation of a Member State pension periods should be certified to the persons covered by that legislation well in advance of the pensionable age (e.g. in case of schemes where every citizen has a right to always consult his/her pension account). Therefore under such schemes it is also important to know well in advance if child-raising periods have accrued. In cases in which Art. 44 of Regulation (EC) No. 987/2009 might apply in principle all Member States have to wait for the pension determination procedure in all Member States until this question can be finally settled (one Member State might grant a supplement explicitly for raising a child only when the pension claim is decided). So it might be advisable for Member States which have to certify periods of insurance in advance of the pension claim to give a specific explanation that in cases in which Art. 44 could oblige them to grant child-raising periods for periods for which already another Member State has become competent, that such a certification is only provisional and might be altered depending on whether the new competent Member State takes into account child raising-periods.

To help in such situations a comprehensive table showing those Member States which take into account child-raising under their pension legislation could be helpful and could be further elaborated by the Administrative Commission.

## 3.3 Transition from Regulation (EEC) No. 1408/71 to Regulation (EC) No. 883/2004

Another problem of applying the new Art. 44 of Regulation (EC) No. 987/2009 could be that the provision differs from the situation under Regulation (EEC) No. 1408/71. For example the *Kauer* case has to be decided differently under Art. 44 as Ms Kauer has not been subject to the Austrian legislation at the time child-raising periods could accrue under Austrian legislation due to the exercise of a gainful activity (she was not any longer active at that time – see also example No. 5). Therefore, under Art. 44 Ms. Kauer would not be entitled to child-raising periods under Austrian legislation. So the question arises how the transition from Regulation (EEC) No. 1408/71 to Regulation (EC) No. 883/2004 has to be made in cases in which the periods of child-raising have started or been completed before the entry into force of Regulation (EC) No. 883/2004 – i.e. before 1.5.2010 – but the pension claim is submitted afterwards. Taking into account the transitional provisions for example, under Art. 87 of Regulation (EC) No. 883/2004 and the principle that the final scope of Art. 44 of Regulation (EC) No. 987/2009 usually can only be determined when the pension is determined it could be argued that Art. 44 also applies to periods already completed before the entry into force of Regulation (EC) No. 883/2004. Nevertheless a clarification of that issue in, for example, a Decision of the Administrative Commission could be helpful.

### 3.4 Is it necessary to amend the Regulations?

In case the concept outlined above is not deemed to be adequate (e.g. if also coverage in a residence based pension scheme should lead to the end of the competence of the previously competent Member State) a revision of Art. 44 is necessary.

Another issue which could be considered - if Art. 44 has to be amended - is the placement of a provision concerning child-raising periods. As it is an important question, that is not only procedural, it might be considered whether to position it directly within Regulation (EC) No. 883/2004 rather than in the Implementing Regulation (EC) No. 987/2009.

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