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Key challenges for the social security coordination Regulations in the perspective of 2020

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INTRODUCTION

Mandate

The mandate for this year's trESS Think Tank report is worded in the following way:

'The coordination of diverse social security systems of the Member States is bound to face various and continuous challenges The conclusions of the Prague Conference celebrating the 50th anniversary of the European Coordination of Social Security in 2009 provided for the constant need for discussion on the on-going issues and adaptation of the rules to the changing legal and societal framework. While the modernised rules (Regulation (EC) No 883/2004 and implementing Regulation (EC) No 987/2009) were not yet into force at that time, a number of main challenges to come for these rules were already identified.

In the reflection on the current and coming challenges for the EU coordination in the ten years perspective from now, a variety of elements should not be forgotten. On the one hand, the possible changes to the national legislation and structure of the national social security systems will regularly imply consequences for the EU-wide coordination rules. On the other hand, the societal developments and newly coming trends in mobility of EU citizens, including those resulting from the economic context and from the situation of the market, will undoubtedly result in further evolution of the EU coordination.

Objective

Based on the challenges identified in conclusions of the Prague Conference of 2009, the report will identify the key challenges for coordination Regulations in the perspective of 2020 and how these challenges impact on the coordination principles and propose broad solutions on how the existing coordination rules could be best adapted to these challenges in order to respond to the objectives of the Treaty.

It is expected that the analysis comprises different aspects of developments, trends and changes which may generate those challenges – on the one hand, in the national law and structure of the national social security systems, and on the other hand, in the society (such as creation of new benefits or umbrella benefits, increased mobility for various reasons e.g. employment or family reasons, available tools facilitating mobility, flexicurity and flex jobs, ageing society, economic context, development of internal market and others).'

An explanation of our working method … from the mandate to the report

The topic of this year's trESS Think Tank report is indeed a challenge in itself. How should we anticipate what the situation in 2020 will look like? It is nearly impossible to gain certainty on how society, politics and social security in the Member States (how many?) will look like in seven years. Naturally, there are some macro-economic and demographic assumptions which are very important and reliable. For the rest of our fields of interest, for which no really usable prognoses are available, **we had to make our own assumptions.** This did not exclude that we looked for some external input on general, societal challenges that are expected to take place in the next years. Therefore, we held discussions with sociological experts.

We took it for granted that the situation encountered today will prevail during the next years as well. Therefore, the challenges already dealt with in the recent past (e.g. documented in the report on the Prague Conference) served as guiding elements. We thus made future projections of the past

developments. Nevertheless, we should never forget that new elements (e.g. immense oil discoveries in Member States which today have economic problems, new health treatments which dramatically reduce the costs of public health systems) could overthrow all our expectations and change the assumptions profoundly. We also took various other sources into consideration, e.g. proposals published on the homepage of the European Commission during the Single Market Month from 23 September to 23 October 2013.

It was not feasible to cover all challenges and elements possible from a theoretical point of view. We picked those which we thought to be the **most interesting and important**. Therefore, this report is not exhaustive and does not cover all aspects. We also did not want to make a very detailed analysis of all the challenges chosen, as this would have meant writing a book. Our intention was to give the interested reader not a complex and very academic report this time, but a not too technical text that should be easy to read.

As this report is not the first trESS text and as the third trESS phase will come to an end at the end of this year, we also wanted to refer to **existing** trESS **texts,** on the one hand to avoid too many duplication of ideas already produced, and on the other hand to guide the interested reader through the already impressive amount of texts developed by the network (more than 1,750 pages). A list of all the trESS texts published up until now can be found in the Annex.

This report is divided in **two major parts**. In the first one we have described the challenges and the impact of these challenges on today's coordination.

The challenges are always described in two ways. We first give a general overview of the broader context in which these challenges are taking place. Secondly, we consider these challenges' concrete impact on the Regulations.

In the second part we have developed a package of proposals for changes and amendments of the Regulations, some of them revolutionary and very broad, others quite technical and detailed. Unfortunately, it is not possible to link each challenge to one solution as some of the broader solutions can be a remedy to many challenges, while others are only tailored to one challenge. To help the reader in finding the solution for a specific challenge we have inserted light grey tags as guides between the two parts. It is not the objective of this report to provide concrete solutions to all these general problems and challenges. We however found it appropriate to open the debate by putting forward some general ideas that might be useful to be investigated and which also fit in with some general lines of thought that might shed some new light on the new Regulation.

Finally, we would like to mention that this report is the product of **four different authors** who differ in style and also in their approaches towards the different challenges. These authors all share a common view on the challenges identified.

Naturally, the report builds the necessary bridges between these different parts. For the sake of originality and also to show the different approaches which are possible, the different parts have not been streamlined excessively. As a result, some aspects are dealt with under several chapters but always from a different angle, which in our opinion gives the whole picture and helps to understand the many different elements which can be considered when dealing with this topic.

EXECUTIVE SUMMARY

Fifty-five years ago, one of the most important European legal instruments saw the light of day: Regulation No. 3 on the coordination of social security schemes, later replaced by Regulations (EEC) No. 1408/71 and 574/72 and, finally, replaced and modernised by Regulations (EC) No. 883/2004 and 987/2009, which are currently in force (hereafter called 'the Coordination Regulations' or simply 'the Regulations'). These aimed to contribute to the realisation of one of the fundamental principles within the European Union: the free movement of persons.

Taking into account the wide variety of social security systems, a coordination of all these systems was not an easy task. In the history of social security coordination, the Coordination Regulations had to be adapted at several intervals. This was not only to integrate new systems in the different enlargement phases of the European Union, but more essentially due to developments in the social security systems of the Member States themselves.

Indeed, the changing societal environments in which social security systems were developing forced the Regulation to modify its rules from time to time to be able to respond better to the need to protect migrant persons. One of the basic problems of law is that it is most of the time developed as a reaction to societal developments. Law follows reality or should follow it and is therefore often forced to catch up with it.

It would be interesting to have a crystal ball and be able to predict further modifications, allowing the law to better adapt itself to expected changes in reality. To some extent, this is also the task of the 2013 trESS Think Tank: looking for key challenges of the social security Coordination Regulations in the perspective of 2020.

It is a fact that the coordination of the Member States' diverse social security systems is, just as it has been the last 55 years, bound to face various and continuous challenges in the near future. In this report, the Think Tank aimed at identifying some of these challenges that will force EU legislators to adapt, modify and further modernise the Coordination Regulations. Looking at future developments, certain assumptions are made. These assumptions were, however, not developed out of the blue, but were based on lessons learnt in the past and on trends which we currently might already detect on a national, but equally important, on an European level as well. Some of these challenges will not come as a surprise. Others, we believe, need to be reflected upon. We should certainly not close our eyes and just try to ignore them.

Adapting and modernising regulations is a cumbersome task. It will be more than a challenge for all stakeholders involved. We believe that societal developments and the new environments in which the European Union is developing today will require some brave decisions, as it cannot be excluded that the challenges faced will perhaps even question some of the fundamental principles behind the current system of the Coordination Regulations. It might be a good idea to already start this reflection process.

It is true that the Coordination Regulations will in the first place be confronted with endogenous developments, i.e. developments at Member State level. The Member States' welfare systems face challenges such as new approaches towards the inclusion of people in the solidarity circle (residence is a growing connecting factor), an often growing gap of benefit levels between Member States, new ways to look at the prevention and compensation of social security risks (inclusion of activation measures, benefits such as LTC benefits, new forms of statutory pension insurance.), and the individualisation of social security. These are all elements which the provisions of the Coordination Regulations have been confronted with and will in the future continue to be confronted with. Such

developments not only ask for modifications in the personal and material field of the application of the Coordination Regulations, but also affect some of the basic concepts like own and derived rights. Not only developments directly related to social security, but also more general societal changes will have an impact on the Coordination Regulations. The switch in ways that people live together and new forms of partnerships, leaving behind the traditional family with a husband, a wife and two children; and other demographic changes due to an ageing population further question the need for a revision of the Coordination Regulations.

A significant issue in this respect is the currently growing interest on a national level in the fight against abuse, fraud and error in the social security field. Although technical developments on a national level, but also introduced on a European level, might contribute to making administrations more efficient, so that the demand of putting more emphasis on the fight against fraud and error can be better responded to, the Regulations do not contain a general prohibition on fraud or the abuse of rights. Nationally, Member States are often balancing on a thin European line, asking for increased European intervention. The further realisation of a full free movement will strengthen these needs.

Apart from these endogenous developments at Member State level, we can also find some exogenous developments at EU level. Through various legal acts, the European Union has been actively intervening in the different issues related to cross-border social security. The coordination of these various instruments, often with different concepts of social security, as well as solutions to cross-border issues make it absolutely necessary to look at the coordination of the different social security coordination instruments themselves from a more European perspective. The Coordination Regulations are no longer the only instrument that deals with the social protection of migrant workers. Indeed, the Coordination Regulations do work within a wider environment of the European Union, with a growing realisation of an internal market. This leads to globalisation and increased migration, characterised by new patterns, including more temporary migrant workers and migration by persons other than the traditional economically active migrant persons.

The dynamism of European integration has contributed to a Europe where the labour market perspective has developed into an individual citizens-based perspective, with a growing union of citizens looking for and claiming optimal social protection. The Coordination Regulations are therefore confronted with a growing intrusion of fundamental principles of EU law such as the free movement of workers, services and goods, European citizenship, and the protection of the fundamental rights of human beings.

As a result of these challenges, it might have to be accepted that the Coordination Regulations, although they still have a very important role to play in the social protection of migrant persons, are no longer the only instruments. Different parallel coordination instruments are emerging from the application of EU primary law.

All these challenges, which not only result from developments at national level but clearly also at European level, not least because of a dynamic interpretation of EU law by the Court of Justice of the European Union (CJEU), not only require a cosmetic adaptation of the current provisions of the Regulations (by technical amendments such as extending the material field of application or strengthening the individual rights). They also call for the start of a process of reflection on some of the fundamental parameters behind 55 years of coordination. Developments at European level necessitate looking ahead and starting a process of reflection that might lead to a reformulation and even the replacement of some of the current parameters of coordination. This might put pressure on some of these general principles like equal treatment, the export of benefits and determining the applicable legislation. However, it better fits in with the new idea of European solidarity that emerged some years ago and will be further elaborated, not least owing to the CJEU's dynamic interpretation. The most important challenge and need will indeed be to find a global, coherent

approach, on the basis of the different European legal instruments aiming at protecting the migrant worker, as well as the European citizen and deciding which countries will need to take prior responsibility. This report wants to shed some light on the challenges and propose some solutions to start this reflection process.

SHORT GUIDANCE THROUGH THE REPORT

As this report deals with many different aspects and is, consequently, longer than political papers usually are, we have decided to include the following short 'stand-alone' guidance chapter to present to the reader the main aspects of the report at a glance.

From the very beginning, the Coordination Regulations faced several challenges, and they will continue to be challenged. This report wants to look for the key challenges of the social security Coordination Regulations in the perspective of 2020. While some of these developments might lead to technical, cosmetic modifications of the Regulations, others will require brave decisions, as it cannot be excluded that the challenges faced will perhaps even question some of the fundamental principles behind the current system of the Coordination Regulations.

Challenges may appear at several levels. At one level, the Coordination Regulations will be confronted with **endogenous developments, i.e. developments at Member State level**. These include:

- The inclusion of Member States' often very different social security schemes, with their own particularities (Bismarckian versus residence-based schemes; differences in benefit level and financing methods), which are today confronted with a growing gap of benefit levels. These differences may lead to tensions between the Member States.
- New ways to look at the prevention and compensation of social security risks in the Member States (inclusion of activation measures, benefits such as long-term care (LTC) benefits, new forms of statutory pension insurance, individualisation of social security *etc*).
- The lack of synchronisation between social security, taxation, labour law and schemes of international organisations. The fact that only contributions and not taxation are coordinated can lead to enormous differences in cross-border situations. Other EU instruments adopted to tackle some of these problems do, however, not take away all these disadvantages.
- The changes in the way of living, family situation, aging population, dependency on LTC and demographic evolutions.
- Technical developments, digitalisation, data exchange, new technological developments and the dematerialisation of work.

Apart from these endogenous developments at Member State level, we can also find some **exogenous developments at EU level**. These include:

- The different pieces of EU secondary legislation which, to a different extent, deal with the cross-border application of the EU Member States' social security systems, sometimes leading to a lack of coherence and to legal uncertainty.
- The different territorial application of all these instruments.
- The burdensome and complicated process to modify the Coordination Regulations, not allowing for quick reactions to societal developments.

Lastly, we are also confronted with some **exogenous elements at global level** which happen outside the sphere of influence of a Member State, but which nevertheless have an influence on coordination. Here we can refer to:

- The globalisation of the markets and interdependent economies leading to new human resources strategies by multinational companies and networks. In addition, new patterns of migration appear, including more temporary migrant workers and migration by persons other than the traditional economically active migrant persons.

- The dynamism of European integration contributing to a Europe where the labour market perspective has developed into an individual citizens-based perspective, with a growing union of citizens looking for and claiming optimal social protection.

After having described the general societal challenges and their impact on the Coordination Regulations, this Think Tank report describes **some possible remedies**, taking into account certain developments deduced from judgements of the CJEU. These solutions differ greatly, stretching from more technical amendments of the existing parameters to more fundamental reforms of the mechanism of coordination, including redefining some fundamental parameters. We can mention the following remedies which should be seen as a starting point for a wider debate:

- Changing the personal scope of application of the Coordination Regulations by a revision of the principle of priority between derived and own rights and strengthening individual rights.
- Adapting the Coordination Regulations' material scope of application to get rid of the systematic differences between Member States. This could include defining LTC benefits and drawing the boundary between these benefits and other benefits of social security; lifting the restriction to statutory schemes; including social assistance schemes and introducing specific rules for activation measures throughout all risks.
- A stronger and more harmonised coordination of social security schemes worldwide through 'exporting' the coordination mechanism of the Coordination Regulations worldwide.
- Redefining the basic principle of equal treatment, on a cross-border level (a real and sufficient link with a Member State as a condition for equal treatment to apply) as well as on a national level (lifting the requirement of a cross-border element solving this issue of reverse discrimination).
- Introducing a European solidarity mechanism into the Coordination Regulations to achieve more transparency and a rethinking of the distribution of reimbursement rates as well as aiming for a more realistic and fairer burden sharing resulting from coordination.
- Changing the system of determining the applicable legislation to make sure that the applicable legislation is that of the State of the activity's centre of interest (the activity's closest link) and to avoid that the applicable legislation changes too much over a short period of time.
- Introducing the principle of the closest link as developed by the CJEU throughout all aspects of the Coordinating Regulations, allowing a better combination of the rules on the free movement of workers with the internal market principles and European citizenship, and in order to better balance out the interests of the different stakeholders of the Coordination Regulations.
- Making the Coordinating Regulations a more guiding and strict instrument, among others by changing the institutional decision-making process to speed up the revision process and to strengthen the role of the Administrative Commission.
- Bringing all EU instruments that deal with the coordination of social security under one roof.

PART I
CHANGES CREATING CHALLENGES FOR THE EXISTING WAY OF COORDINATION

A. Endogenous developments at Member State level

This chapter will deal with those developments which have their source at Member State level. The challenges identified range from those that stem from the differences between the national systems to those that stem from changes in society and technical developments. These all have an impact not only on the situation in the Member States concerned but also on coordination.

1. A challenge that already existed in the past (differences in persons covered and benefit levels)

a. Description

The long history of the Regulations is characterised by a long process of adapting to or accommodating the social security systems of all current Member States with their particularities, taking into account the big differences between them.

A lot has already been written on the development of social security schemes in Europe. For the sake of completeness, we only want to mention the main issues of this subject in brief. Without any doubt, the systems in today's 28 Member States differ considerably concerning the philosophy behind them (especially with regard to the questions which persons are covered by the scheme, how the schemes are financed, or under what conditions benefits can be claimed). From a historical perspective these differences started gradually. The first six founding members of the EU had quite homogenous schemes (as a rule based on the principle that only the active population could gain individual rights (and had to contribute for that by means of contributions from the gainful income) while the 'rest' of the population had to rely on derived rights ('**Bismarckian' schemes)**). However, we must not forget that already during this founding period, there was not only one way to social security across these six Member States. As an example we would like to refer to family benefits, which in one Member State covered only the active population based on the Bismarckian philosophy, while in the other Member States coverage was meant for all residents (a differentiation which could long afterwards still be seen in Article 76 (1) of Regulation (EEC) No. 1408/71 and Article 10 of Regulation (EEC) No. 574/72).

This changed dramatically with the entry of Denmark, Ireland and the UK, as these new Member States' social security schemes are much more focused on **residence-based coverage**. Especially the accession of the other two Scandinavian countries, i.e. Finland and Sweden, add clear examples of schemes based on that philosophy. Furthermore, with the entry of the Middle and South Eastern European states into the EU a new group of social security schemes ('formerly described as having a communist approach to social security') joined. In these schemes, fundamental reform was still being implemented, coming from an approach towards social security which was dominant in these countries after World War II until the change to modern democratic states (based on the philosophy that it is the task of the state to provide for a universal coverage against the basic risks for all citizens) and changing sometimes towards purely market-orientated approaches (e.g. changing from pay-as-you-go to fully funded pension schemes).

Whereas differences are already striking enough on the benefit side, on the financing side they are even much more noticeable. Tax-financed schemes are clearly distinguishable from contribution-based schemes. While in the latter scheme the relationship between the way of financing and the

benefits accrued are clear and very often transparent, there is usually no such relationship in the former scheme.

These differences are deepened by the **impact of the economic situation**. Especially since the last rounds of accession there are remarkable **gaps between the living standards** of some Member States. This is due to different wage levels, which also result in different benefit levels. The Austrian minimum pension could serve as an example here. In Austria, the minimum pension amounts to more than € 800 a month for a single person, whereas in one of Austria's neighbours the average pension does not reach half of that amount. These differences are aggravated by the economic crisis, which forced some Member States to restructure their social security schemes in such a way that sometimes benefit levels had to be reduced. This leads – in the worst case – to a situation where the population no longer has confidence in the ability of national schemes to cope with all the contingencies of daily live. An example of this is the new CJEU case *Petru* (C-268/13) (as the patient who had to undergo a complex operation saw his live endangered when this operation was carried out in his home State due to a lack of the necessary medicine and medical equipment – although the knowledge and experience of the medical personnel corresponds to European standards). This aspect is also dealt with from different angles in Chapter C.

b. Impact on the Regulations

A comparison of the development of the Regulations with the changes in the national schemes covered clearly shows that the Regulations have not taken these differences between Member States and developments into account. From Regulations Nos 3 and 4 to Regulations (EEC) Nos 1408/71 and 574/72, to Regulation (EC) Nos 883/2004 and 987/2009, the fundamental principles have not changed – they **still largely rely on the Bismarckian concept**. As an example, reference could be made to the chapter on sickness benefits, which still makes the distinction between insured persons' own rights and family members' derived rights. In the event of conflicting rights, those based on residence (individual rights) are considered weaker than derived rights (Article 32 (1) and (2) of Regulation (EC) No. 883/2004). This is totally contrary to the philosophy and understanding in residence-based schemes (which already represent a major part of all the health care schemes of the 28 Member States).

Let us give an example of this conflict.

Consider, for instance, a resident who is the non-active partner of a person employed in another Member State. If the **whole resident population is covered against the risk of sickness,** it is – from the individual's but also from the institution's point of view – very difficult to understand why this resident has to ask for the authorisation for planned treatment in another Member State from the foreign institution of the State where the partner is insured due to Article 20 (3) of Regulation (EC) No. 883/2004, while all other residents can ask their locally competent institutions for that authorisation. The Regulations thus lead to misunderstandings and are not well received by the population and institutions of Member States with residence-based schemes. The same for example applies in relation to **child care benefits**. Although in nearly all Member States these benefits are granted on an individual basis (to the person taking care of the child), they have to be coordinated as traditional family benefits (due to the CJEU in e.g. *Hoever and Zachow* (C-245/94 and C-312/94) concerning Regulation (EEC) No. 1408/71, which was not changed in Regulation (EC) No. 883/2004). This means that another person can give rise to entitlement for the person taking care of the child and that entitlement under the legislation the person taking care of the child is subject to could be determined as applicable in only a subsidiary way (under Article 68 of Regulation (EC) No. 883/2004). This creates tension between reality and the coordination rules.

This tension is not only limited to the persons and institutions concerned. Also the CJEU has to tackle situations where national rights are declared void or at least applicable only in a subsidiary way because of another Member State's competence to grant such benefits. The famous *Bosmann* case (C-352/06) is a result of this (which accepted the existence of rights in the Member State of residence even in situations in which under the Coordination Regulations this Member State is not the competent one). This idea was confirmed and further developed in e.g. the ***Hudzinski*** case (C-611/10 and C-612/10), in which it became obvious that a new parallel system of coordination is emerging. It is applicable throughout all social security risks.

Consequently, it could be said that today coverage and rights based on residence are not sufficiently dealt with in the Regulations. Coordination via priority and subsidiary rights is very complex and if the Member State of residence does not at all have to grant its benefits, the danger is that the CJEU would add rights directly based on the TFEU as it has done in *Bosmann*. Although this case referred to family benefits, but the same could e.g. also happen with LTC benefits in cash which are provided under the legislation of the Member State of residence (see also Chapter 7 of the 2011 trESS Think Tank report 'Coordination of Long-term Care Benefits – current situation and future prospects').

Solutions for the problems of residence-based schemes can be found in Chapters D-1, D-4 and D-9

However, also the still existing **differences in wage and benefit levels** could create tensions. New ways of gathering information, but also facilitations of 'real' movement between Member States (no more border controls within the Schengen area, cheap flights, new generations who are used to travelling *etc*) lead to a better knowledge of the social security schemes in other Member States. Consequently, European citizens can easily compare benefit levels. Citizens of Member States with a lower level of benefits might envy citizens of Member States with much higher benefit levels and try to become entitled to these higher benefits there just by travelling to these countries.

In the political debate this phenomenon is described as **benefit tourism**. On the one hand, the Regulations provide entitlements to these higher benefits sometimes at the expense of the Member States with lower benefit levels (e.g. with regard to sickness benefits, because the competent Member State has to grant authorisation for treatment abroad due to shortcomings of the local system – S2 procedure under Article 20 of Regulation (EC) No. 883/2004, or because the persons concerned simply move to a new Member State of residence and are entitled there to all the benefits provided – e.g. under Article 24 of Regulation (EC) No. 883/2004). In these cases which involve reimbursement, additional pressure is placed on the systems of the Member States which might already have internal problems to finance their social security schemes, as they are confronted with reimbursement claims from the other Member States that are much higher than the tariffs they would have to pay for domestic treatment. Further aspects of these impacts, which could also be aggravated by the economic crisis, can be found in Chapter C-1.

Solutions for the problems of financial burden stemming from reimbursement obligations can be found in Chapter D-6

On the other hand, in some cases the Member States which attract European citizens due to the interesting level of benefits have to subsidise this benefit tourism. For example, tax-financed benefits may have to be granted also to persons moving from another Member State who have never paid taxes or paid only an insufficient amount of taxes in the Member State which now has to grant the benefits. This could be the case for e.g. family benefits which have to be granted for children resident in another Member State, when the gainful activity of one parent in a Member State providing higher benefits is carried out only to a very small extent (the CJEU ruling in *Geven* (C-213/05), which seemed to allow restrictions in such cases, has not been transferred into Regulation (EC) No. 883/2004). Another example of benefits being granted without a prior integration into a new Member State of residence is the CJEU ruling in the *Brey* case (C-140/12). The CJEU seems to draw a line which allows Member States to restrict minimum benefits for citizens of other EU Member States to those which

do not become an unreasonable burden to the social assistance scheme of the Member State of residence. Nevertheless, there will always be cases where in similar situations Member States with higher benefit levels will have to grant benefits to persons without prior and sufficiently close links to that Member State. This could easily create tension on the side of the Member States concerned.

If public awareness about this increases, this could easily add to the acceptance problems encountered today in some of the Member States in connection with the measures to be taken in the framework of the euro safety net (both on the side of the 'receivers' and on the side of the 'givers').

From our point of view this is **a very sensitive issue** which should be observed and evaluated with great caution. It might be that today's legal framework is sufficiently clear and that there are some tools to prevent benefit tourism (e.g. the concept of 'residence' in the sense of Article 1 (j) of Regulation (EC) No. 883/2004, which could influence entitlements to benefits considerably). It is also important to note that there are no reliable figures on social tourism today, so perhaps there are not that many cases in reality (which is also the outcome of the ICF/GHK/Milieu study 'A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence'). Yet, as the political debate is evolving in the different Member States, this is not a real remedy, since public opinion considers social tourism as a real threat (irrespective of the numbers involved). It may, however, not be forgotten that this fear of social tourism should also be looked at against the background of the fundamental right to free movement.

Therefore, it would be advisable to reflect on introducing a requirement of a closer link of the persons concerned to a Member State before a State has to grant benefits, especially tax-financed benefits, which are not linked to income from previous gainful work. If Europe does not manage to fulfil this highly political task, the very fabric of Europe, which could be described as the gathering of different traditions, histories, and philosophies under one European idea, is endangered. If no action is taken, also Regulation (EC) No. 883/2004 could stoke xenophobia and EU criticism, and in the end even lead to rejections of the European idea.

Solutions for the problems of benefit tourism
can be found in Chapters D-4 and D-9

2. Changes in welfare systems

a. Description

In principle, it could be said that although Member States remain competent to shape and run their social security schemes, the challenges these schemes are confronted with are quite comparable, and so are the solutions found. We would like to mention some of the most interesting developments which also have an impact on coordination:

These developments can most easily be detected when they are the response to the appearance of new risks. Especially because of demographic changes, in the past decades Member States introduced **benefits for persons in need of care (LTC schemes)**. The aim of all these benefits is very comparable but the systematic approach differs widely. As this new branch of social security is a very good example we want to elaborate a little bit more on it. There are insurance-based schemes and residence-based schemes, schemes that grant benefits in kind and those that grant only benefits in cash or a combination of both; there are benefits aimed at the person in need of care or at the carer (including insurance coverage for the carer – see *Gaumain-Cerri* (C-501/01)), benefits which as a lump sum cover all possible aspects of the person's need, or a broad bouquet of different benefits covering only specific aspects (e.g. the mobility aspect); benefits are regarded as social security or as

social assistance; *etc*. (For the different national approaches to LTC we would like to refer to the 2012 trESS Analytical Study 'Legal impact assessment for the revision of Regulation 883/2004 with regard to the coordination of long-term care benefits').

Another horizontal development could be observed in the introduction and strengthening of **activation measures** in many fields of social policy. The most interesting are new links between benefits, e.g. invalidity benefits, which should only be granted to persons who are willing to undergo rehabilitation measures which aim at a re-integration into the labour market.

Furthermore, there is a trend to **opt out of the statutory schemes**. On the one hand, this is favoured by the legal framework (e.g. excluding persons from the coverage of the statutory schemes in case sufficient coverage by a private scheme is documented). On the other hand, more wealthy citizens want to have additional and better coverage as a plus to the statutory schemes (e.g. additional health care coverage or private pension insurance – third pillar). Thus, the persons affected by such recourse to private insurance products share in the advantages and disadvantages of the market. The same applies to statutory pension schemes, which in some Member States changed from the traditional pay-as-you-go models to defined contributions and fully funded schemes.

As a counterweight, Member States also introduce **minimum subsistence levels** into their social protection schemes. These might be universal schemes that cover anybody (irrespective of age, or occupational or health status) or specific schemes that only target special groups of the population (e.g. non-active persons who also do not receive any pension).

Individualisation of rights also has to be added to that context. In the past the traditional concept of the breadwinner and 'the rest of the family' has been predominant in many social security schemes (at least in those based on the Bismarckian principles – see also Chapter A-1. concerning different approaches to the persons covered under residence-based schemes). Modern social and family policy tends to achieve a greater individualisation of rights. This begins with special benefits for the parent taking care of a child and ends with pension splitting in favour of the partner taking care of a child even in traditional Bismarckian pension schemes.

b. Impact on the Regulations

This is an issue which has already been dealt with at length, e.g. during the Prague Conference in 2009. Nearly all the topics discussed there are still valid and waiting for solutions. We have therefore only concentrated on some of the points linked to this challenge.

One of the remaining and sometimes even aggravating challenges of coordination lies in the **different national approaches towards social security** if looked at from national systematic perspectives. Some of these challenges present a serious threat to coordination. We should remember that one of the main goals of the mechanism under Regulation (EC) No. 883/2004 is that the material scope covers the entire list of risks (Article 3 (1)), which is so abstract that it should enclose every national scheme irrespective of the national systematic point of view. It is also the opinion of the CJEU that the same type of benefits should always be coordinated in the same way to avoid disadvantages for mobile citizens due to systematic differences between the schemes.

The rulings concerning **LTC benefits** are a very good example of this, especially the ruling in *Commission against Parliament and Council* (C-299/05), which states that benefits of various Member States of a totally different nature are to be regarded as LTC benefits for the purpose of coordination (see also Chapter A-5). Many of the issues related to different national systematic approaches concerning the classification of LTC benefits and the problems arising under today's coordination have already been dealt with in the 2012 trESS Analytic Study 'Legal impact assessment

for the revision of Regulation 883/2004 with regard to the coordination of long-term care benefits' (Chapter B, Options B, C and D).

Solutions for the problems of the coordination of LTC benefits can be found in Chapters D-2, D-4 and D-9

Concerning the newly emerging **activation measures**, reference can be made to the 2012 trESS Thematic Report on activation measures. Although from today's perspective it seems that Member States do not encounter many problems with coordination, from our point of view it is only a question of time until we are confronted with new CJEU cases on that issue. The *Caves Krier* case (C-379/11) is the only recent case on this topic from the perspective of free movement of persons. It is very likely that there are other issues which could arise. Think of a Member State the legislation of which links entitlement to invalidity benefits with additional rehabilitation measures. If the person concerned was subject to the legislation of this Member State and now resides far away in another Member State which does not know a comparable concept of rehabilitation measures, rehabilitation measures cannot be applied there. Can the benefit be denied or does it have to be granted also without rehabilitation measures (which would put persons abroad in a much better situation than the resident population – reverse discrimination – see also Chapter A-V. concerning the effects of different notions of family members)? The main problem with such activation measures is that they usually have to be regarded as benefits in kind and that the Regulation only provides for the coordination of sickness or accident at work benefits in kind. So, again, this is a question of classification (which branch of social security is concerned? – problems might arise especially for invalidity benefits) and then a question of equivalence of the measure. As long as the Regulation does not contain specific rules on such activation measures there will always be uncertainty and gaps which could be filled by new CJEU rulings.

To give a good example of new activation measures reference could also be made to Slovenia, where some new benefits (bonuses) were introduced with the new pension and invalidity insurance act (ZPIZ-2), applicable from the beginning of 2013. Questions may be raised regarding their proper classification for coordination purposes. One of these benefits is a **bonus which should stimulate insured persons to continue working after reaching the retirement age**. An insured person who meets the conditions for acquiring the right to an old-age pension and remains insured to the same extent can request a monthly payment of 20 % of the old-age pension to which he or she would be entitled. It is provided additional to the salary until the insurance is terminated or a partial pension is claimed, or until the age of 65 (it is not provided beyond this age).

The question might be whether such incentive to continue working is in line with the basic philosophy of the social security system as such. The purpose of social security is to provide income replacement in case of its loss or reduction. In this case there is (and should not be) any reduction of income and hence no need for its replacement in order to guarantee social inclusion. The CJEU emphasises that when benefits are classified the social risk for which they are intended should be taken into account. This might cause problems. The bonus described is not an old-age pension and the social risk of old age has not materialised (no reduction or loss of income). Hence, according to its legal nature it might actually be better to classify this bonus as an activation (active employment) measure, rather than as a pension.

Solutions for the problems of activation measures can be found in Chapter D-2 and, concerning reverse discrimination, in Chapter D-5

The Regulation covers only statutory schemes (the possibility to include also occupational schemes under Article 1 (l) of Regulation (EC) No. 883/2004 is – with two exceptions – not used by Member States). Thus, coverage by **private insurances** usually falls outside the scope of the Regulation (leaving aside the obligations stemming from the CJEU ruling in *Gaumain-Cerri* (C-502/01), which would advocate also the coordination of private opting-out schemes under the Regulation). This is sometimes a disadvantage for the persons concerned. For example, persons might be able to claim

treatment in another Member State only as private patients which, on the one hand, sometimes gives them a better treatment, but, on the other hand, sometimes obliges them to pay much higher tariffs for the treatment than under the Regulation. At the same time it may endanger the balance between Member States. Article 32 of Regulation (EC) No. 987/2009 contains an attempt to avoid such shifting of burdens from Member States that have such opting-out models towards other Member States. Nevertheless, an overarching examination of all aspects of persons covered not by statutory schemes but by other schemes (occupational, private schemes) is missing (this examination could cover all aspects such as applicable legislation, aggregation of periods and also entitlement to benefits).

Solutions for the problems of private insurances
can be found in Chapter D-2

Concerning the new forms of statutory pension insurance (**defined contribution and funded schemes**), at some places the Regulation has already reacted to these new developments (no pro rata calculation if entitlement exists without aggregation – Article 52 (4) and Annex VIII/1 of Regulation (EC) No. 883/2004; granting always the national amount in case no timely elements are included in the calculation – Article 52 (5) and Annex VIII/2 of Regulation (EC) No. 883/2004; and special provisions for such schemes in the pro rata calculation – Article 56 (1) (d) of Regulation (EC) No. 883/2004). It seems that these special provisions are sufficient for the time being, as Member States have not reported serious problems (e.g. in past years' trESS national reports). Nevertheless, this is a field which should be observed further to react if new problems occur.

For the new forms of pension schemes no immediate new solutions seem to be necessary.

Benefits trying to safeguard a **minimum subsistence level** could escape coordination if they are not linked to one of the risks enumerated under Article 3 of Regulation (EC) No. 883/2004 (CJEU, *Hoeckx* (C-249/83)). This could also apply to situations where other Member States coordinate such benefits under the Regulation, if these benefits are meant only for a specific group of the population, e.g. the unemployed or persons receiving a pension. Thus, the systematic choice of the national legislators influences coordination. Situations which – from an abstract point of view – are very similar could lead to different results (e.g. if a Member State which has introduced specific benefits did not succeed in listing these benefits as non-exportable benefits in Annex X of Regulation (EC) No. 883/2004, and another Member State still regards the benefit as social assistance because it covers only the risk 'poorness' not covered by the Regulation). These tendencies should also take into account the CJEU's particularly narrow view of the concept of social assistance, opening the debate to what extent it is still possible to exclude certain benefits from the material field of application of the Coordination Regulations.

Solutions for the problems of different notions of social assistance
can be found in Chapter D-2.

Concerning the **individualisation of rights**, the Regulation is very often still based on the principle of the (male?) breadwinner and the 'rest of the family' deriving rights from him. As already elaborated on under Chapter A-1. the Regulation is sometimes no longer up to date in this respect. A revision of the Regulations should focus on these issues and try to achieve more modern solutions.

Solutions for the problems stemming from an individualisation of rights
can be found in Chapter D-1

3. Old problems which could become more and more pressing (no synchronisation between social security, taxation, labour law and schemes of international organisations)

a. Description

Under this category of challenges for the existing system of coordination we would like to mention some well-known issues that have existed for years, but for which no remedy has yet been found. It can be assumed that they will remain and could even become worse in the future. Not having found any solution up until now should not discourage us and we should think again about possible ways out.

A first problem is that of **different financing methods**. Member States are free to decide how to finance their social security scheme(s). There is no comparable approach. Some Member States finance their systems in a traditional way, mostly via taxes, while others focus more on contributions. Yet, there are no absolute models; no Member State relies exclusively on taxation or on contributions. Usually there is no problem as long as taxation and contributions are levied by one and the same Member State. The question how much a single person has to pay in total (contributions and tax) is a carefully balanced and sensitive issue in all the Member States. The moment the competence to levy taxes and contributions is split between two or more Member States this goal cannot be achieved anymore.

The same problem occurs in the relations between social security and **labour law.** For enterprises engaged in cross-border activities it could be important not only to apply social security and tax laws of the same Member State, but also this Member State's labour law. Although there are EU legal instruments for labour law aspects (e.g. Regulation (EC) No. 593/2008 (Rome I) on the applicable labour law or Directive 96/71/EEC on posting), these instruments are not synchronised with the competences under Regulation (EC) No. 883/2004. Several of these instruments furthermore considerably differ from some of the basic principles under the Coordination Regulations (e.g. the principle of free choice in labour law in connection with the principle of protection and the principle of favouritism towards the employee).

In relation to the general aspect of labour law, the divergence between statutory and **non-statutory social security** (especially pension) schemes might also be mentioned. Besides the legal construct (e.g. based on law or on collective bargaining) there is no difference between the two concepts. Under both concepts occupational social security schemes can be construed (sometimes called second pillar schemes). A possible example of this are the Swiss second pillar schemes, which, as they are based on legislation, fall under Regulation (EC) No. 883/2004. By contrast, the second pillar schemes of the Netherlands, for example, which are based on collective bargaining, do not fall under this Regulation but under Directive 98/49/EC on supplementary pension rights for migrant workers. Again, this leads to different solutions depending on the structural differences of the schemes involved (see also Chapter B-1).

Another issue that is becoming more and more important are persons not moving from an employment in one Member State to an employment with a 'normal' employer in another Member State, but **with international organisations or EU institutions**. Usually the situation of such 'international' employees is covered by 'site agreements' between the international organisation and the Member State where the organisation is situated, or even by EU rules. The social security schemes of the international organisation or of the EU do not fall under the coordination regime of Regulation (EC) No. 883/2004. Usually, instruments that cover the schemes of international organisations work with transfer of capital – comparable to the transfer from one funded occupational pension scheme to another. However, there are gaps in the protection in the event of

movement from a Member State other than the 'site state' to these international organisations, or if this usually voluntary transfer of capital was not made.

Finally, the **fight against fraud and error** is of increasing political importance, which can also be deduced from the many publications and international conferences dedicated to that specific topic (for the literature on the topics dealt with in this report we want to refer to the bibliography listed on the trESS homepage). In nearly all Member States budgetary resources for the financing of social security schemes are being reduced, combined with the strengthening of control mechanisms to avoid spending social security money on purposes not covered by the Member States' social policy aims. Thus, more and more energy is spent on the fight against undeclared and illegal work and on avoiding that benefits are claimed and obtained by persons who are not entitled to these benefits or who try to escape the Member States' control mechanisms. This has an internal as well as an ever growing external dimension. This threat could even endanger the whole European idea, as there is considerable risk that the public opinion regards these aspects of social tourism as a negative connotation of free movement, a fundamental pillar of the European structure. However, in this context also the danger of 'over-reaction' by Member States has to be mentioned. A public opinion according to which every foreign claimant of benefits is immediately regarded as someone misusing the social security scheme and as a person potentially committing fraud has to be avoided, as this kind of attitude also threatens the fundamental principles of the EU. Thus, the fight against fraud and error has to be balanced against the legitimate purpose of avoiding the granting of benefits to persons who are not entitled to them under the national legislation (which, of course, has to be in compliance with the principles of EU Law) and against the creation of a climate of mistrust and even xenophobia.

b. Impact on the Regulations

As we have already mentioned in Chapter A-1. only **contributions** (levies earmarked for social security purposes) are coordinated under Regulation (EC) No. 883/2004, while **general taxation** is not (usually double taxation agreements provide for some measures of coordination). Depending on the way a Member State has chosen to finance its social security, this could have totally different results. We would like to demonstrate this using an extreme example based on two Member State's fictitious schemes. Member State A has a Bismarckian system with overall social security contributions that amount to 35 % of the income; taxation amounts to 30 % of the income. Member State B in principle has a residence-based scheme, where contributions are only to be paid for some benefits that have an income replacement function (unemployment and occupational pensions). These contributions amount to 15 % of the income. Taxation covers the majority of the social security benefits and amounts to a total of 50 %. Thus, in both Member States deduction from income amounts to 65 %.

The moment a cross border situation is concerned, there could be some **shocking results**. Let us consider that the two Member States are bound by a double taxation agreement based on the OECD model, under which in case of posting the posting Member State remains competent to tax the income of the person posted only if the posting period does not exceed 183 days. Thus, if a person is posted from Member State A to Member State B for 20 months, Member State A applies its social security legislation while Member State B is already competent to tax the income. This leads to 35 % of contributions plus 50 % of taxes, which makes a total of 85 % of levies, while in the opposite situation 15 % of contributions are combined with 30 % of taxes, a total of 45 %. It is clear that this creates losers and winners compared to a situation in which both aspects would be covered only by the competence rules of Regulation (EC) No. 883/2004 (as this could be regarded as a stronger instrument compared to bilateral double taxation agreements outside EU competences).

The CJEU has not yet dealt with such clear cases and it seems that it is reluctant to really break up the two systems of coordination (see e.g. *Deroin* (C-103/06)). At first glance the results shown in the example above seem to be a clear hindrance to free movement (the migrant is treated worse compared to the resident citizen) and it could be interesting to see how the CJEU would decide such a clear-cut case. Nevertheless, as both fields, social security and taxation, have a long tradition it would not be realistic to assume that a harmonisation of the two ways of coordination would be an easy task. It is also interesting that in the Communication of the European Commission of 2011 'Double Taxation in the Single Market' (COM (2011) 712 final) this issue is not mentioned at all. Therefore, without clear CJEU rulings nothing will change in the near future.

The simultaneous application of the legislation of different Member States, under Regulation (EC) No. 883/2003 for social security and e.g. under Directive 96/71/EEC for **labour law aspects** like minimum wages, does not make the life of persons involved in cross-border situations easier. When employees are posted some aspects fall under the legislation of the Member State of activity (e.g. the level of the wages), while social security coverage remains with the posting Member State. This gives rise to many questions (e.g. how to treat increments which have to be granted on top of the salary to reach the minimum wage level in the Member State of activity under the social security legislation of the posting Member State?). Also this is an aspect for which it would be unrealistic to expect changes to the relevant EU legislation in the next future. Nevertheless, it should be mentioned for the sake of completeness.

Long-term solutions for the problems stemming from the lacking synchronisation of social security, taxation and labour law aspects can be found in Chapter F-2-.

For occupational pension schemes, the difference between statutory and non-statutory (which is not visible when comparing the benefits, as this only depends on the legal base of the scheme) could lead to unsatisfactory situations. The situation is especially complex if the competence for the statutory (e.g. basic pension) and the non-statutory occupational pension falls apart. It is true that Article 6 of Directive 98/49/EC safeguards that such a discrepancy does not occur in posting situations; but, it is not excluded in all other cross-border activities such as simultaneous employment in more than one Member State or exceptions due to agreements under Article 16 of Regulation (EC) No. 883/2004. Fields other than applicable legislation involve other disadvantages, e.g. no obligation to aggregate periods, no health care coverage and also no family benefits when a person receives only this type of non-statutory occupational pension (if e.g. such an occupational pension can already be claimed before the retirement age of the first pillar statutory pension). If the occupational pension itself is statutory these disadvantages are avoided due to various principles laid down under Regulation (EC) No. 883/2004.

It is true that at the moment a **new portability Directive** is being worked on (the Council has already agreed on the text during the first reading), but also this instrument will not take away all of the disadvantages cited above. The only remedy solving all problems would be if under Regulation (EC) No. 883/2004 the differentiation between statutory and non-statutory schemes of social security is abandoned in such a way that the Regulation covers all schemes irrespective of their legal base, excluding, if necessary, the purely private schemes (e.g. third pillar pension schemes).

It should in this respect not be forgotten that even under the Coordination Regulations, the concept or the notion of social security was as such not defined. The Regulation adopts a formalist approach by demarcating its scope, linking it to enumerating branches of social security and to the legal (statutory) base for the relevant schemes. The common concept of what should be understood as social security cannot be found throughout all different EU instruments, which leads to possible conflicts, overlaps or even possible gaps.

Solutions for the problems stemming from the lacking inclusion of occupational schemes into the coordination can be found in Chapter D-2

As the **schemes of international organisations or the EU social security scheme** fall outside the scope of Regulation (EC) No. 883/2004, the growing number of international employees does not have a direct impact on the Regulation. However, persons moving from one Member State to an EU institution or an international organisation in another Member State have to be regarded as migrant workers who have the right to benefits under the fundamental principle of free movement with regard to the social security schemes of the Member States they left or join afterwards (e.g. CJEU in *My* (C-293/03), *Rockler* (C-137/04) and *Öberg* (C-185/04), and most recently *Gardella* (C-233/12)). As this right to free movement finds its expression in e.g. the aggregation principle under Article 48 TFEU, Member States are obliged to aggregate also these periods with international organisations if they have not concluded an agreement with the international organisation (*Gardella*). But, it seems that this only has an impact on Member States and not on the international organisations, which are not bound by EU law. The same might also apply with regard to the EU institutions when the persons concerned do not use their right to transfer the capital accrued. Therefore, Member States' social security schemes are under pressure to provide solutions for these situations if they do not want to conclude agreements with all the international organisations that have a seat in another Member State.

Solutions for the problems of lacking coordination with schemes of international organisations can be found in Chapter D-2

With regard to the **fight against fraud and error**, the Regulations already contain various provisions which can be used in this new political field of action, notwithstanding that the concept of fraud and abuse cannot be found in the Regulation (with one minor exception in Recital 19 of Regulation 987/2009, according to which procedures between institutions for mutual assistance and recovery of social security claims should be strengthened).

Administrative cooperation (e.g. under Article 76 of Regulation (EC) No. 883/2004) is one tool which is more and more used by Member States besides the possibility to conclude specific bilateral arrangements under Article 8 (2) of Regulation (EC) No. 987/2009. The special platform in the framework of the H5NCP project, co-financed under the call for proposals of the European Commission, can also be cited in that context. Still, there are many questions unsolved and it might become evident that all these tools are not sufficient. However, the Regulation is as such not an instrument principally aimed at combatting fraud and error. First, data protection issues are getting more and more into the centre of interest of law. Is the existing framework of the Regulations sufficient to allow e.g. that the data of recipients of unemployment benefits of one Member State are compared with the data of gainfully active persons in another Member State? Second, the fight against fraud and error is the task of various institutions which are competent for fields other than social security as well (e.g. tax, migration, and police authorities, and special taskforces). Can social security data be used for other purposes? Take, for example, the use of the A1 certificate to fight undeclared work (which is not really a social security issue); or take the wish to control the level of remuneration paid to posted workers (under Article 3 (1) (c) of the Posting Directive 96/71/EC). Is it possible to get these data from the competent insurance institutions which have issued an A1 for the posted worker? The enforcement of the Posting Directive is now being negotiated in a specific Directive (proposal of the Commission, COM (2012) 131 final), which shows that the work is going on, but, again, the context of the possibilities under the Regulations or even an extension of these possibilities to other fields are not dealt with. The need for further cooperation concerning undeclared work is also evident from the recent consultation paper issued by the European Commission (COM (2013) 4145 final).

In the absence of further European initiatives, Member States have recently started to implement mechanisms in the fight against fraud and error which, however, often balance on a very thin European line.

Solutions for the lacking cross-cutting approach concerning the fight against fraud and error can be found in Chapter F-2

4. Historical developments

a. Description

Although the history and tradition of the Member States' social security systems are usually different, there are some common effects binding two or more Member States which are still visible today. **Some States had a common past** which also meant only one scheme in the field of social security. Usually the most urgent question is what to do with pension entitlements accrued under the previous common pension system after separation. It has to be avoided that both successor states take these periods into account or that none of them take responsibility for such periods. To overcome these problems usually special national legislation or special bilateral agreements are needed. It is true that very often these common schemes have been a thing of the past for so long that there are not that many cases which could still be relevant today (e.g. the colonial past of some Member States, but also the common social security scheme of Germany and Austria during the *Third Reich*). Nevertheless, there are also more recent examples such as the disintegration of Czechoslovakia, of Yugoslavia, but also of the Soviet Union; many of the newly established states have become or will in the future become Member States.

One could assume that these situations are specific and should not be a problem for the EU. However, to be able to share the burden with regard to the common past, some connecting elements with the new established states are needed (very often the nationality or residence in a specific territory at a specific date is taken as a condition), which could automatically lead to problems with EU principles (as – from an abstract point of view – these elements have to be regarded as discriminatory).

b. Impact on the Regulations

At the moment these effects of a common past are to some extend – in an abstract way – also reflected in **Article 8 (1) of Regulation (EC) No. 883/2004,** as bilateral agreements which deal with special historic circumstances can be upheld by mentioning them in Annex II of the Regulation. Nevertheless, the CJEU seems to dislike such bilateral provisions which exonerate one Member State from the obligation to grant benefits because the other State should pay for these periods (*Wachter,* (C-450/05), concerning the old Austrian-German agreement, which is difficult to understand as it concerns a very specific provision of that agreement). Easier to understand is the ruling in *Landtová* (C-399/09) (concerning the Czech-Slovak agreement) where the division of insurance burdens per se was not questioned (therefore it could be argued that the CJEU in principle accepts such provisions which are upheld also under Regulation (EC) No. 883/2004). However, the CJEU also considered it contrary to the principles of non-discrimination that one Member State afterwards topped up the pension of the other Member State only for its own nationals.

These rulings do not give a clear answer as to whether or not it is possible to maintain such bilateral provisions under the rigid interpretation of the non-discrimination principle of EU law. If two Member States are involved the CJEU could, maybe, be convinced that under these rules no insurance periods are lost but that these provisions only rule which of the two Member States involved has to take them into account (so one could argue that such bilateral provisions are a kind

of an anti-cumulation provision in the broader sense and are thus justified, although some elements of discrimination are always involved).

The situation gets more complex the moment such rules also **relate to a third country**, e.g. an agreement between a Baltic state and Ukraine. If an agreement between this Baltic state and Ukraine opens the possibility only for the citizens of that Baltic state to earn pension rights also for periods spent in Ukraine during the Soviet period would we not immediately get problems under the principles developed by the CJEU in *Gottardo* (C-55/00), with regard to the citizens of any other Member State (e.g. those of another Baltic state)? The Member States concerned should carefully examine all questions linked to these bilateral agreements. Anyhow, as problems may not only arise under EU law, but also with regard to human rights (*cf* the European Court on Human Rights, *Andrejeva versus Latvia,* case 55707/00) the room for manoeuvre for such special bilateral provisions seems to be quite narrow. Without any doubt, this is an issue which should be further analysed if Member States concerned wish to do so. From our point of view it is premature to already today think about amendments to the Regulation for these problems before such analysis is carried out. Taking into account that many such cases could occur, the significance of this question should not be underestimated.

For the time being, there seems to be no immediate necessity to amend the rules related to taking into account insurance burdens.

5. The family situation and demography

a. Description

The **way of living has undergone substantial changes** also in the EU. Non-marital relationships and lone parenting have become more widely accepted. According to the Demography report 2010 ('Older, more numerous and diverse Europeans', March 2011), single-parent households are relatively common in e.g. Estonia and the UK (in both cases above 20 %). Childless (married or non-married) couples and same-sex partnerships are no longer novelties. Although in some countries the participation of women in the labour market was already quite high, this is being promoted and growing in many countries (also according to the 2011 'Second Biennial Report on Social Services of General Interest').

In addition, **mobility** within the EU (see also Chapter C-2) is promoted by applying various mechanisms, from Erasmus mobility programs, to researchers' mobility, and providing the best possible social security coverage to migrants. The latter could be deduced also from some CJEU judgements, e.g. the decisions in *Petroni* (C-24/75), *Bosmann* (C-352/06), or in the joined cases *Hudziński* (C- 611/10) and *Wawrzyniak* (C-612/10). Also great focus is placed on labour mobility, which should contribute to the functioning (and positive effects) of the internal market. Activation of social security benefit recipients in the so called work first welfare state is emphasised. An (unemployed, disabled or widowed) beneficiary should do everything to find (suitable) employment in or outside its own place of residence (and country).

Due to all these **changes in family structures**, large families, which would be able to provide security to their family members, no longer exist (or are at least becoming rare). Social intervention is required to provide social security when social risks occur (like sickness, invalidity, old-age, disease, reliance on LTC).

Not only modifications in family structures, but also **demographic changes** influence how national social security systems are shaped and coordinated (internally and supranationally). The population of the EU is becoming older. According to the EU's Demography report 2010, the Member States' population aged 65 years or over accounted for 17.4 %, with its peak in Germany with 20.7 %,

followed by Italy with 20.2 %, of the entire population, and is expected to rise. One of the reasons for this is an increasing life expectancy, which was 76.4 years (men) and 82.4 years (women) at birth in the EU in 2009. According to the 'EU Employment and Social Situation Quarterly Review March 2013 – Special Supplement on Demographic Trends', life expectancy shows an increasing trend. It was estimated at 80.4 years in 2011 (83.2 years for women and 77.4 years for men). In a relatively short period of ten years since the start of this millennium, life expectancy thus increased by 2.3 years for women and 2.9 years for men.

Another element in the aging of the population is a **low level of fertility**. Fertility rates are increasing, although they are still rather low. The fertility rate in the EU was 1.6 in 2009 (the lowest in Latvia with 1.31, followed by Hungary and Portugal with 1.32, and Germany with 1.36). In many countries this is far from the required 2.1 or 2.2 births per woman (within a certain age bracket) to enable a normal renewal of the population (not taking into account various migration flows). In addition, women are postponing births for various reasons (including education, career and/or housing concerns).

The aging population, which is a long-term trend, is expected to continue. The share of persons aged 65 or more is projected to increase from 17.4 to 30 % in 2060 in the EU (at the same time noting that the reliability of such long-term projections might be questioned). In the absence of any unpredictable events, aging is a fact that has to be taken into account when reforming social security systems and their coordination.

An increased life expectancy means that we live longer. This is not necessarily something negative. We should be happy to know that (on average) Europeans live longer and that life expectancy in the EU is generally higher than in most other regions of the world. It is a reflection of welfare and quality of life, which should be maintained at a highest attainable level also in old age, when the primary social risk of (reduction of work capacity and income due to) old-age is accompanied especially by risks of sickness (higher costs of health care) as well as reliance on LTC and other social services (of general interest).

Dependency and reliance on LTC is not exclusively but nevertheless predominately a phenomenon related to the reduction of personal autonomy due to old age. For instance, according to the German 'Pflegestatistik 2011' (statistics on LTC published biennially) at the end of 2011 there were 2.5 million persons in need of LTC benefits in Germany (2.34 at the end of 2009). As much as 83 per cent of them were aged 65 years or more (36 % were over 85). The risk of dependency increases with age. For instance, in Germany in the population aged between 70 and 75 only every 20th person (five %) required LTC, whereas in the age group above 90, 58 % were in need of LTC.

As much as 70 % of persons reliant on LTC in Germany (1.76 million) were in home care, the majority of which were taken care of by their family members (1.18 million). In addition, on average women live longer than men, hence the majority of persons requiring LTC benefits are women. For instance, 65 % of LTC recipients in Germany were women (in 2011). One of the reasons for this might also be that men usually do not claim LTC benefits, since they might be living with their wife (or extramarital female partner) who provides the necessary care. Similar situations seem to exist in Austria and some other countries.

The problem might be linked to a lack of family and household members at the time the elderly or disabled members of the family have an increased need for LTC.

b. Impact on the Regulations

Social relations are constantly evolving. Also due to increased life expectancy and changed family structures, Member States are modifying their social security systems, which will affect the social security coordination mechanism of the Union. The rule of law principle, a cornerstone of every modern society, **demands from the legislators** (at national and EU level) to **align its normative action with ever changing social relations**. This goes especially for social security law, one of the most rapidly changing fields of law.

The trend is that a growing number of persons require specific benefits in old age, including LTC services. The problem might arise if there are no family or household members available to deliver such care. The traditional family structure of two or even three generations living together is not common anymore. As the population ages, more people live in smaller households. **Single-person households are increasing**, as it has become less likely for older people to live with their children or grandchildren. These trends lead to fundamental modifications in the social security systems, not least the emergence of new social security benefits like LTC benefits.

In many Member States, the question might arise, **who should be responsible to provide LTC**? Should this be the responsibility of legal subjects governed by private law, like the dependent person him or herself (with his or her savings or possible private insurance), his or her family, or should it be the responsibility of legal persons governed by public law, i.e. the State, regional or local communities and other public law governed bodies. The latter are taking over the responsibility which families are no longer able to provide. It could be argued that broader social solidarity is (to a certain extent) replacing (or complementing) family solidarity. For instance, special (new) schemes were formed in Spain, Germany, Austria, Belgium (the Flemish part), the Netherlands and (are being considered) in other countries, like in Slovenia, where LTC benefits are currently provided in various parts of the social security system. The situation was already extensively dealt with in several trESS reports (*cf* the 2010 and 2011 trESS Think Tank reports, and the 2012 trESS Analytical Study).

One of the problems of social security coordination might be that there is no common understanding (definition) about **which benefits should be treated as LTC benefits** and coordinated as such, and not as sickness benefits (*stricto sensu*), or pensions (or pension supplements) or family benefits (for children reliant on LTC).

Solutions for the problems connected with LTC benefits can be found in Chapter D-2

In addition, reliance on LTC might presents itself as a double social risk, i.e. for the person reliant on LTC and for the carer (usually a female family member, e.g. the wife or a daughter), who mostly not only receive, **but also perform LTC activities**. In many Member States **special benefits are provided for carers**, possibly also outside of social security systems (e.g. in labour law as time credit or in tax law). These might also be in need of coordination. However, it should be noted that LTC activities should not be perceived as the duty or 'natural obligation' of certain family members (especially women), who have their own lives to live.

Solutions for the special situation of the carer can be found in Chapter D-1

In addition, new benefits might arise, e.g. **new kinds of family benefits** reflecting the new forms of family structure. Problems with new partnership forms might already be covered in the present coordination rules. For instance, if the applicable legislation of a Member State does not make a distinction between members of the family and other persons to whom it is applicable, (only) the spouse, minor children, and dependent children who have reached the age of majority must be considered members of the family (Article 1 (i) 2 of Regulation (EC) No. 883/2004). The question

might arise whether such definition covers all family members in new family structures, or whether should it be modified and broadened.

New forms of partnerships might also cause problems for social security coordination. For instance, for sickness benefits in kind a '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 of the Member State in which he or she resides (Article 1 (i) 1 (ii) of Regulation (EC) No. 883/2004). This means that the definition of a family member who might be entitled to sickness benefits in kind (medical benefits or broader health care) will be governed by the law of the State of his or her residence, and not by the legislation of the State paying for the benefits (the State where the person is insured), nor by the legislation under which the benefits are provided.

Some Member States not only regard spouses as family members, but also **cohabiting partners or even same-sex partners,** whereas some do not. For instance, if a Member State of residence covers same-sex partners, they will be entitled to sickness benefits in kind as family members on the account of the competent Member State. The latter will have to provide sickness benefits in kind to same-sex partners in other Member States, even if it does not cover them in its own public health care system (statutory health insurance or national health service). This might also be a case of so-called **reverse discrimination**, where the legal position of a moving person (and his or her family members) is more beneficial than the legal position of persons whose legal situation is confined to one Member State only.

Solutions for the problems stemming from new family structures can be found in Chapter D-1, concerning individualisation see Chapter D-1, concerning reverse discrimination see Chapter D-5

6. Technical developments

a. Description

The historically fast digitalisation, dematerialisation and electronic transfer of texts, sound and images has led to a revolution in the performance of professional and non-professional activities and in the relationship between persons and/or enterprises and between users and administrations.

In particular professional activity as a whole, whatever the sector, has changed profoundly with the increase in the number of manufacturing robots, the widespread use of IT support in various creative, design and management tasks, the complete computerisation of enterprises' accounting, administrative and financial management, and the use of websites for communication, orders and contact.

As a result of the **widespread use of computers and of communication and data-sharing networks**, for a growing number of workers, a professional activity does no longer assume that the worker is permanently present at the workplace. Furthermore, the result of this intellectual, manual or mixed activity is presented in a dematerialised form.

As the place of work may be located outside the enterprise or may be itinerant, working time and personal time relate to each other differently for a person who works with information technology and mobile communication tools; the **dematerialised work** may be delivered at all times and from anywhere.

We may give three examples which this evolution has already provided: the boom in teleworking from home; the delocalisation of call centres of large enterprises; and the delocalisation, e.g. typically to India, of IT helpdesk and development services (see also Chapter C-2).

This same development has obviously also affected administrations, in the same way as it did enterprises, and has profoundly changed the relationship with the users as a result of introducing **remote services.** These services will, in the end, replace a large part of the actual work in public offices (communication and data exchange websites, online services, downloadable portable documents, the use of personal computers, smart cards, mobile phones, smartphones or tablets *etc*).

b. Impact on the Regulations

Like globalisation, the digital revolution has an impact on coordination via the **changes introduced in working conditions**. Like teleworkers, workers who work in production processes remotely and at an ad hoc basis have a hard time finding rules and criteria in Title II of the Coordination Regulations that are well-adapted to the elements typical of the performance of their activities. Will surgeons, who will soon perform or assist operations remotely, be considered as working at the place where they are during these operations or at the place where the tools are working which they are remotely operating?

Solutions for the new working environment due to digitalisation can be found in Chapters D-4, D-8 and D-9

Another aspect is that, for efficiency purposes, it is necessary to take into account that administrations which are currently coordinated (administrative cooperation in applying the Regulations) increasingly use new technologies in their activities and also in their relationships with third-party users (insured parties and beneficiaries, employers, medical personnel and medical institutions, social and personal services). This coordination must use these same tools and offer users services the quality of which is at least equivalent to the quality observed in each of the internal national systems. As a result of this awareness, the principle that states that data exchange related to coordination must be electronic was laid down in Regulation (EC) No. 987/2009, and the **EESSI network** was developed and implemented.

It is always difficult to anticipate technologic development. However, it is allowed to **question the value of the technical choices which this network is based** on today, whether they are suitable enough for the existing technical possibilities or those to come. In particular the priority given to the electronic exchange of forms over the establishment of online or mobile services, and the possibility to consult databases in real time should be the subject of a critical review during the current extended transitional period and during the reorganisation of the network which is taking place now.
In any case, it seems necessary to enter a new phase with regard to the Coordination Regulations, evaluating whether all of the mechanisms planned up until now fit the possibilities created by this digital revolution and may be used with new technologies to come or could turn out very soon as outdated and therefore have to be replaced by totally new ways of exchanging information between administrations and citizens. One may in that respect not forget that these new technological developments on an international level also imply possible modifications of and a better internal coordination within the countries.

Solutions for problems stemming from the digital revolution can be found in Chapters E-1 and E-2

B. Endogenous developments at EU level – institutional challenges

Having dealt with developments predominantly happening at Member State level, we now want to look closer at the developments and problems encountered at European level.

1. The parallelism of various legal acts all dealing with cross-border aspects of social security

a. Description

Many pieces of legislation (EU Regulations and EU Directives, but also legal instruments concerning the relation with third countries) deal, to a different extent, with the cross-border application of the EU Member States' social security systems.

This is especially so for different types of **agreements concluded with third countries**. Firstly, there is the **EEA Agreement** (Norway, Iceland and Liechtenstein) and the agreement with **Switzerland**, which fully cover the coordination of these States' and the EU States' social security systems. However, incorporating Regulations (EC) Nos 883/2004 and 987/2009, they actually extended the geographical scope of application of these Regulations, which were adapted to this end by means of some annexes that were added relating to these non-Member States. Therefore, there is no coherence problem, as in principle the same texts (Regulations) apply both within and outside the Union (concerning the time gaps in between entry into force inside the EU and in the EEA or in relation to Switzerland see Chapter B-2). Secondly, there are numerous **cooperation and association agreements** with third countries (Turkey, Israel, Algeria, Morocco, Tunisia, FYROM, Montenegro, Albania, San Marino). These agreements include provisions that partially coordinate the national social security schemes; however, their stipulations concerning the nationals of these third countries who work and reside within the EU are superseded by those included in Regulation (EU) No. 1231/2010 extending Regulation (EC) No. 883/2004 and Regulation (EC) No. 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality. Consequently, there is no coherence problem at all, since here as well the texts that apply to the EU nationals and to the third-country nationals are the same.

Other acts aim to give a status or elements of a status to **third-country nationals staying or residing in the EU** and belonging to the categories determined (Directive 2004/114/EC for students, Directive 2005/71/EC for researchers, Directive 2009/50/EC for highly qualified workers *etc*). Yet, these acts are confined, with regard to social protection, to the recognition of the equal treatment with EU nationals who fall under the same categories, and even to a simple requirement that there is health care coverage. There is no interference with the internal coordination rules, because these rules apply to these categories of persons via the above-mentioned Regulation 1231/2010 for third-country nationals.

Nevertheless, in certain cases certain other acts have or may have a direct effect on the coordination of social security systems, or deal with certain aspects of coordination directly. This could be the case for the **Directive on the portability of supplementary pension rights**, which is still in a draft form. This Directive will first have to make sure that the material scope of application is coherent, thereby defining it clearly, and, like Directive 98/49/EC on safeguarding the supplementary pension rights of employed and self-employed persons moving within the EU, could avoid any direct interference by explicitly excluding from its scope of application the supplementary schemes that are covered by the social security Coordination Regulations (see also Chapter A-3).

Directive 2004/38/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** has a direct impact on coordination in that it uses three elements of significance (in italics below), without really defining them, each furthermore used in its own context: for inactive people to be allowed to stay more than three months on another Member State's territory, the conditions are that they have *sufficient resources* (which may wholly or partially be composed of benefits) and *comprehensive health insurance*; also, these persons

may *not become a burden on the social assistance system* of the host Member State thanks to sufficient resources.

Finally, Directive 2011/24/EU on the application of **patients' rights in cross-border healthcare** is the prototype of this parallel action of secondary legislation insofar as it operates, with respect to cross-border health care, within the scope of the Coordination Regulations itself and insofar as it almost only deals with the responsibility for and the reimbursement of costs that resulted from the care which the beneficiaries of the national social security schemes received. In very concrete terms, European legislation on the national schemes' responsibility for this care currently consists of the overlapping of the sickness chapters of Regulations (EC) Nos 883/2004 and 987/2009 and the stipulations of Directive 2011/24/EU.

This makes it difficult for someone to understand his or her rights, as well as for administrations to apply the most appropriate instrument within a particular situation

b. Impact on the Regulations

The situation described above creates a lack of coherence of the applicable rules. The way in which the same situations are treated may differ from one piece of secondary legislation to another. Thus, there appear to be **links between residence and the access to insurance or to health protection**. The Coordination Regulations provide inactive nationals of Member States habitually residing on another State's territory with access to the insurance or health protection of the latter State, under the same conditions as those applicable to its nationals. However, the Directive on the right to reside grants beneficiaries a right to reside for only a maximum of three months in this State if they have no comprehensive health insurance and resources that are considered sufficient. How should these two rules work? Does the Regulation take precedence, allowing the conditions for the right to reside to be met (access to local health insurance + sufficient resources consisting of local social security benefits)? On the other hand, does the Directive, for inactive persons, make the qualification of a right to reside subject to the right to access the scheme and the social security benefits of the host State? These questions were dealt with in the 2008 trESS Think Tank report 'The relationship and interaction between the coordination Regulations and Directive 2004/38/EC'.

The European Commission has provided information about how these two rules must be jointly applied, but many Member States still have reservations and questions about this matter. Evidence of this are, apart from the discussions within the Administrative Commission, the pre-litigation procedures introduced by the Commission against certain Member States and the requests for a preliminary ruling to the CJEU (with regard to the latter, see the ruling of 19 September 2013 in *Brey* (C-140/12), the decision of which was not in favour of the Regulation).

This lack of coherence also manifests itself in **legal uncertainty**. The legal situations, and rights and obligations under different circumstances are not always very clear to the citizens and the administrations. This is so for cross-border health care with regard to the above-mentioned overlapping of the Coordination Regulations and Directive 2011/24/EU. If the two rules jointly apply, that is to say when the care concerned falls within both scopes of application, which one is given priority? Does the insured patient really have a choice? Is there a possibility for one rule to complement the other? Does the Directive also cover care during a stay (unplanned care received during a temporary stay in another Member State), which seems to have been the intention of the legislators?

With regard to the significance for the citizens, the European Commission (DG Sanco and DG Empl) has started to provide a common reading of the interaction between these two rules. However, in

order to remove every uncertainty, a complete and detailed *modus operandi* should be provided for the administrations who apply them and for the users whom they are applied to.

In addition, acts of secondary legislation on different legal bases sometimes result in **different territorial applications.** This is the case for acts which were based not on Article 48, but on Article 79 (2) (c) TFEU (Title V, Chapter 2: policies on border checks, asylum and immigration), such as the Regulations concerning the extension of coordination to third-country nationals, or the acts concerning the negotiation or adoption of cooperation and association agreements with third countries, due to the Protocols annexed to the Treaty. These Protocols concern the position of the United Kingdom and Ireland on the one hand, and of Denmark on the other hand in respect of the area of freedom, security and justice (Title V TFEU). They offer these three States an exceptional scheme (opt-out or opt-in for the two former and non-participation for the third) for each act taken on the basis of one of the stipulations under this Title.

Consequently, the territorial continuity of the application of EU law may be broken for certain acts, which may lead to legal and administrative difficulties for the application. Take, for example, **Regulation (EU) No. 1231/2010** extending Regulation (EC) No. 883/2004 and Regulation (EC) No. 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality. This text does not apply to Denmark, nor does it apply to the United Kingdom, who has exercised its right to opt out. However, it does apply to Ireland, who exercised its right to opt in. Yet, as the United Kingdom exercised its right to opt in to preceding Regulation (EU) No. 859/2003 extending Regulation (EEC) No. 1408/71 and Regulation (EEC) No. 574/72 to nationals of third countries, there are three groups of Member States to be taken into consideration: Denmark, who does not apply anything; the United Kingdom, who applies the old Regulations; and the other States, including Ireland, who apply the new Regulations to the beneficiaries. This may create situations that are very confusing and difficult legally speaking.

The search for a common view, allowing the Union to present itself as united and indivisible when negotiating (the legal basis of Article 48 TFEU) amendments to at least the EEA agreement (and most likely also to the EU/Switzerland agreement), has resulted in a divergence of views brought before the CJEU by the United Kingdom, supported by Ireland, and the ruling of 26 September 2013 (*United Kingdom v Council* (C-431/11)) confirming, for this act, the legal basis of Article 48 TFEU.

Solutions for the inconvenient co-existence of various EU legal acts can be found in Chapter F-2

2. The decision-making process

a. Description

If amendments to Regulation (EC) No. 883/2004 are necessary, experience shows that **the process is becoming more and more burdensome**. First, the co-decision with the European Parliament slows down the process; second, inside the European Commission it also takes more time to prepare new Regulations than in the past due to the now necessary impact assessment. For entries into some Annexes there is a quicker procedure which allows Regulations by the European Commission (Article 92 of Regulation (EC) No. 987/2009). If interpretative questions have to be solved quickly, Decisions by the Administrative Commission are a good alternative to amendments to the Regulation for clarification purposes. On the one hand, also here a qualified majority could more easily result in agreement compared to the previous voting by unanimity. On the other hand, it seems that the willingness of all Member States to stick to these Decisions seems to have diminished taking into account that some Member States could also be outvoted.

Furthermore, there are other aspects to today's decision-making process. We refer here to the extension of Regulations (EC) No. 883/2004 and 987/2009 to the three **EEA States and Switzerland** via the relevant agreements (see also Chapter B-1). In principle this cooperation works well and without major problems. These four countries participate in the meetings of the Administrative Commission and the other groups joined to it. The main problem from a practical point of view is that the time within which the Member States and these four countries adopt legislative changes differs (e.g. new Regulations or decisions of the Administrative Commission). Especially with regard to major reforms (e.g. the new coordination under Regulations (EC) No. 883/2004 and 987/2009, or the amendments to the rules on applicable legislation with Regulation (EU) No. 465/2012) a simultaneous entry into force would be much better than the phased entry into force we experienced. In reality, amendments made to the Regulations inside the EU have to be adopted afterwards by decisions of the relevant bodies (the EEA Joint Committee and the EU/Switzerland Mixed Committee). This takes some time (also depending on the implementation processes in the third countries concerned) and leads to gaps between the dates of entry into force for the different States.

b. Impact on the Regulations

A good example for the time-consuming step-by-step approach to achieve important amendments to the Regulation is **the coordination of LTC benefits**. The process started with the CJEU rulings in *Molenaar* (C-160/96) in 1998 or at the latest with the *Jauch* case (C-215/99) (in which it became clear that a new type of benefits really was to be dealt with which for all Member States should be coordinated as sickness benefits). In 2001 the process stretched into the decision on Regulation (EC) No. 883/2004 in which – due to the reluctant attitude of some Member States – only minor adaptations were accomplished (Article 34). Later, it stretched into the impact assessment of the European Commission, which will finally lead to a proposal for a new coordination regime for LTC benefits. It could be assumed that the Council starts to work on this proposal in 2014. Nobody knows how long the co-decision on that dossier will take. Therefore, it could be said that it takes nearly twenty years from the first appearance of a problem until a solution is found when following the ordinary way of amending the Regulations. The implementation of such amendments into the EEA or EU/Switzerland agreements will take even longer.

This makes it evident that an amendment to the Regulation under this procedure is no tool for quick reactions. Therefore, also in the future it is more likely that new developments (e.g. concerning the growing role of activation measures) are dealt with by the CJEU and not by the European legislators. This lengthy procedure also has disadvantages of a more technical nature. It could be assumed that all **questions concerning procedural matters** (contacts between institutions) will be under constant review taking into account the developments of EESSI. It could be a big disadvantage if also these amendments to the Regulations have to follow the same procedure (maybe also an impact assessment by the European Commission). Consequently, no quick reactions are possible. Also, it has to be assumed that due the increasing importance of data protection, more and more every exchange of information will need a sound legal base. Thus, it could happen that the necessary exchange of data for the settlement of rights and obligations of European citizens cannot take place because the relevant amendments to the Regulations take too long.

Solutions for the slow decision-making process can be found in Chapter F-1;
concerning the delayed implementation of new EU legislation
into the EEA and the EU/Switzerland agreement see Chapter D-3

C. Exogenous developments at global level

Lastly, we also decided to mention some elements which happen outside the sphere of influence of a Member State, e.g. due to macroeconomic developments, which nevertheless have an influence on coordination.

Although one might indeed hope that the economic crisis will take an end here at a certain point, it might give us some indicators of certain trends and developments in social security systems and reactions of Member States that could strengthen certain trends in challenges and needs for adapting the coordination framework.

1. The macro-economic context – the effects of the crisis

a. Description

Before dealing with globalisation of the markets and migration in the following two chapters, we would like to begin with a short introduction and overview of **today's economic situation in the EU,** which is dominated by the economic crisis and high rates of unemployment in some Member States. For many aspects of coordination it will be important how these parameters change within the next years. It will be very important how and how successful European politics will deal with these challenges. The following paragraphs are meant to be a short help providing orientation and might lead to a broader understanding of the concrete challenges identified.

The European Union's motto adopted in 2000 declared the EU '**United in Diversity**.' The divisions between countries in today's EU revolve around three main axes: economic and social institutions (north v south), political and civic institutions (east v west) and governmental and financial institutions (those countries with small v those with big governments). The major factor of both international and intra-national integration is based on the different statuses of countries and the role of institutions. The heterogeneity of national institutions plays a crucial role in the European integration process and the ability of Member States to respond to the challenges they face. Moreover, differences between countries are the effect of the correlation between different environments, their institutions and the interaction between environment and institutions.

The effects of so-called **global shocks during the past 40 years** and the impact on common regulations of the EU have had different consequences across the countries both in economic and political performance.

While heterogeneity across the EU has always been present, it is more marked today, to the point where talking about '**European unemployment**' is indeed misleading. In many countries unemployment is low. Eurostat figures of September 2012 showed unemployment standing at 4.4 % in Austria, 5.2 % in Luxembourg and 5.4 % in Germany and the Netherlands. Such figures stand in stark contrast to other countries where the rates are much higher, such as in Spain (25.8 %) and Greece (25.1 %). Compared with the previous year, the September 2012 figures showed that the unemployment rate increased in twenty Member States and fell in seven. The largest decreases were observed in Lithuania, Estonia and Latvia, whereas the highest increases were seen in Greece, Cyprus and Portugal.

Adverse shocks can explain the general increase in unemployment. Differences in institutions, however, can explain differences in outcomes across countries. These differences have become stark and become exposed due to the debt and financial crises of recent times. Two points are illustrative here. Firstly, the shocks of the 1970s and 1980s led to **high unemployment**, triggering changes in institutions. However, these changes were only partial and poorly done in some European countries.

Secondly, a **long duration of unemployment** leads to loss of skills and morale, and thus renders many of the long-term unemployed in effect unemployable.

We can identify **four general trends in unemployment** across Europe. Firstly, the initial increase in unemployment in Europe is primarily due to adverse and largely common shocks. Secondly, different institutions led to different initial outcomes. Collective bargaining and/or inflation could be used to reduce real wage growth and determine the size of the increase in unemployment. Thirdly, the increase in unemployment, in most countries, led to changes in institutions as most governments tried to limit increases in unemployment through employment protection and to reduce the pain of unemployment through more generous unemployment insurance. Fourthly, most governments in Europe have partly reversed the initial change in institutions due to financial pressure and intellectual arguments. However, this reversal was partial and sometimes perverse. The different paths chosen may well explain the differences in unemployment rates across European countries today.

There are several relevant explanations here for these trends. The role of shocks and the interaction with collective bargaining emphasised by initial theories, the role of capital accumulation and insider effects emphasised by the theories that focus on persistence, and the role of specific institutions clarified by flow-bargaining models, all explain important aspects of the evolution of European unemployment. We could predict that a more favourable macroeconomic environment and an improvement in institutions should lead to a substantial decline in unemployment.

High productivity growth need not imply favourable employment performance, or *vice versa*. There is a strong tendency on the part of policy-makers to presume that economic problems must be one-dimensional – that growth and job creation are both aspects of some underlying quality, typically labelled with words such as '**competitiveness**'. The available evidence suggests, however, that the unemployment problem has a life of its own, and is not simply part of a generalised deterioration in economic performance. Significant differences in the overall economic and social environments created the gap – and resultant tensions – between two clusters of European countries: north and south.

The **consequences of the current crisis have been drastic**. There are **several possible answers**. One view is that investment in human capital – both in basic education and in the retraining of older workers – can reverse the trend towards greater inequality. A second view suggests improvements in the welfare system, especially decreasing expenditure, which would reduce social contributions and hence lower the cost of labour. A third view, in the past dubbed the Swedish model, advocates an 'active manpower policy' with subsidised employment for those who would otherwise be unemployed, which is seen as the way to cut through the otherwise agonising trade-off between mass unemployment and mass poverty.

Economic stagnation and high unemployment in several countries will have an impact on remittances with potential repercussions for countries highly dependent on the external demand and financial flows. The Eurozone's real problems concern fiscal policy and bank/financial market regulation.

The current crisis has been created by two factors: the sharp rise in European unemployment rates, and the emergence of large budget deficits in countries with extensive welfare states and lower productivity. **The 2009 crisis**, therefore, is the **product of the interaction among several underlying forces**: mispriced risk, macroeconomic policy misbehaviour over many years, weak prudential policies and frameworks, and a lack of structural reforms.

Leaving aside the hopeful effects of education and training, there are two main alternatives: Europe can **become more like the US**, or it can **try to become more like Sweden used to be**. That is, the

welfare state can be scaled back, increasing the incentives for firms to offer and for workers to accept low-wage employment, or governments can try to subsidise employment at acceptable wage levels. The political problems with either alternative are obvious. Attempts to scale back the protections that have discouraged employment in Europe will lead – indeed, already have led – to massive protests. On the other hand, if employment is to be subsidised, the money must be found somewhere, a difficult task when the budgets of many high-unemployment nations already seem to be dangerously out of control.

There is one more important difference among EU countries: those (communist) **countries** which had to go through a subsequent process of transition after the fall of the iron curtain, versus those (mostly old Member States) which did not experience communism. Even though in people's minds the 1989-1991 revolutions in Europe, which brought the fall of Communism, has become one of the most positive events in modern history, we still cannot say that the majority of the states that overthrew communism have enthusiastically embraced the new way of life, which was formed during a complicated social and economic transformation. The democratisation of totalitarian regimes itself was not linear, simple or without serious perils. The problems with the consolidation of democracy and the establishment of democratic institutions tied to the tendencies towards authoritarianism and the undermining of democratic institutions accompanied the transition towards a new regime. This period of transition also directly concerned the attitude of the population towards social security. If one of the risks were covered by social security the state would undoubtedly take care of its citizens and thus the individual did not have to care about his or her protection. By contrast, under the new – very often market-based – philosophy of the transformed social security schemes everybody has to look him or herself for the best protection and benefits depending on the efforts made during the active life. Especially those persons already receiving pensions have problems with these new circumstances, taking into account the sinking value of their pension and the lacking possibilities to cope with rising living costs.

In the short-term, the majority of the population will probably evaluate the direction of their respective countries and the achievements of their political representatives above all through the prism of their own wallets. To successfully respond to the modernisation challenges, however, it will be crucial to what extent the decisions of the political representation focus on **long-term investments into education and the environment**, as well as on the support of a real equality of opportunities, respect for human rights and non-discrimination.

b. Impact on the Regulations

Now it is time to build the bridge to coordination: It must not be forgotten that e.g. high unemployment can add to flows of migration in addition to the one planned and also to the brain drain (see also Chapter C-3). This will lead to further imbalances between Member States and also **feed euroscepticism** as already dealt with under Chapter A-1. Especially it has to be mentioned that it will become very difficult for those Member States with high unemployment rates to understand why they have to finance the export of the unemployment benefits of many unemployed workers under Article 64 of Regulation (EC) No. 883/2004, knowing that this is the only way to get these workers back to work; work which is, however, to the profit of the other Member States (not so much affected by the crisis) and not to theirs.

At the moment, **solidarity between Member States in the field of social security** is not a big issue under the Regulations. The whole concept is built on the principle that all benefits have to be paid by the Member State which is under an obligation to grant them (in principle the competent Member State). Thus, e.g. Articles 62 to 65 of Regulation (EC) No. 987/2009 aim at the reimbursement of all the costs incurred in the Member State of stay or residence for persons covered by the legislation of another Member State. As a consequence, treatments in Member States with expensive and highly

developed benefit schemes usually have higher reimbursement rates than comparable treatments would have cost in the other Member States. Especially if these other Member States try to reform their national health care schemes because of budgetary reasons and thus reduce also the benefit levels, this could lead to an increase in situations where an authorisation under Article 20 of Regulation (EC) No. 883/2004 has to be granted with higher reimbursement rates than theoretical costs for treatment in the State concerned, which could have very negative results for the overall cost minimising efforts of these Member States.

In addition, another effect has to be considered. Some Member States in economic trouble receive **direct or indirect subsidies or loans (indirectly) from other Member States** (e.g. via the various mechanisms of the European Monetary Union) to overcome economic difficulties. When persons insured in these countries are given treatment in other Member States (not only in the cases mentioned above but generally speaking in all cases under the Regulations) the money given also has to be used to fulfil these countries' obligations under the Regulations in relation to the Member States which finance these subsidies or loans. Thus, it could be said that these subsidies or loans also help to cover claims of the Member States giving these subsidies and loans ('giving Member States') and that they lead to a reduction of the money available in the receiving countries to strengthen their economy.

Therefore, it can be said that the existing **reimbursement mechanism under the Regulations** could add problems for Member States which already have financial problems due to the crisis. Thus, also the Coordination Regulations will be affected by the extent and persistence of the effects of the crisis. The quicker the EU and the Member States concerned succeed in getting rid of the crisis the better also for the coordination of social security schemes.

Solutions for the problems linked to the crisis
can be found in Chapters D-6 and D-7

2. Globalisation of the markets and economic environment

a. Description

For several decades there has been a profound development towards the globalisation of increasingly open markets and increasingly interdependent economies. **Multinationals** have a structural role in this and increased competition is becoming widespread, both between territories and between products and services. This development was furthered by the end of the Cold War and world polarisation, the rise of large virtual or physical transport networks, the opening up of new markets, supported by technological development, but also by a general deregulation, international agreements supporting economic liberalisation, the opening up of borders and competition (GATS, WTO *etc*), national public policies to increase territories' attractiveness towards foreign investors, and sometimes more or less openly accepted social dumping. The continuous developments in technology nurture this **competition** (the constant arrival of new products – see also Chapter A-6), which in turn fuels and furthers research and development. Similarly, the opening up of markets and competition promotes the convergence of consumption patterns, which in turn facilitates competition and the creation of new products.

Enterprises search for production locations that offer the best economic conditions:
Production processes are segmented and divided into continental and global geographical areas. The new constraints resulting from **globalisation** make the multinationals focus on their know-how or on their core business again and make them turn to expert suppliers, subcontractors or partners for various components, services and complementary functions. Their purely commercial strategies penetrating markets outside their country of establishment have gradually evolved into strategies that are equally productive: they search for production bases that allow them to supply the markets

that have become global. Production is set up at locations where it is more efficient and less costly to sell the product where the purchasing power allows so. At the same time, increasingly fierce competition gives rise to the search for cost reduction to again find the competitive margins and leads to constant innovation (research into new products, technical developments, following trends *etc*).

More and more, **production processes take the form of international networks of specialised units.** These networks, composed or directed by the multinationals, arise and are operational within the evolving globalisation framework and take shape according to control strategies, based on their assets, or by means of integration in or in partnership with separate financial funds and structures.

Outsourcing has become an almost complete constraint for enterprises, resulting in either integrated networks of multinationals, or permanent and contractual associations of legally independent specialised suppliers. These are characterised by shared constraints in the search for minimum costs, by better know-how, by access to strategic resources, by flexibility and by risk sharing, and are subject to the conditions of fierce competition between as well as within these networks.

The rise of these international production and distribution networks is particularly shown by the **competition that takes place between territories**, which is facilitated by national public policies. Each activity may thus be considered as potentially being moved to another location, if a certain territory offers the necessary infrastructure and qualified and competitive workforce.

The search for the best revenue-to-costs ratio and the need to constantly adapt to technological development, to competition and to the availability of production factors leads these enterprise networks to adopt a strategy to manage their human resources on two levels:

- the **localisation of human production resources** depending on their availability at the location and on their wage, social and tax cost, next to the availability and cost of other production factors (capital, raw materials, energy, transport, joint venture offers *etc*);
- but also the internationalisation of part of the human resources for production needs and their mobility, depending on the qualifications of the workforce concerned and their relative cost.

This second level is shown in several developments. Firstly, it can be seen in the **development of intra-group mobility for managerial staff** and highly qualified personnel. Secondly, it is shown in an increased number of members of personnel being posted – stimulated or required by the considerable increase in the international provision of services, which in turn is a result of globalisation. Lastly, it is shown in the search for the most flexible and least costly social and tax link combined with social protection by enterprises or groups (pension funds, insurance groups *etc*), which allows the enterprise networks to level out the differences in national protection and to offer their mobile workers protection that is on the whole considered as attractive and as fostering loyalty.

Workers are becoming increasingly mobile:
The increased mobility of workers is in the first place a professional mobility: the idea of a worker who is fully trained during adolescence and subsequently during his or her career performs the same job for the same or a few enterprise(s) – standard procedure in the great manufacturing industry – has changed. Whereas training and education have not yet become 'lifelong learning', it is frequently seen that a **first education and training is necessarily rounded out during professional life by means of supplementary training**: specialisation, bringing one's knowledge up to date, and even retraining with a view to a change of profession. Enterprise mobility is forced on workers as a result of frequent restructuring and relocations of enterprises, which entails a change of employer more frequently, often within the same group or network of enterprises.

Globalisation furthermore **increases the geographical mobility of workers** who have to change employers more often, which may entail a change of residence within a region, state, or even from one state to another, sometimes far away, or the establishment of a place of stay different from the place of usual residence.

In their strategies of participation or resistance towards globalisation, enterprises are looking for more flexibility within their workforce management by increasingly using **fixed-term contracts**, temporary work contracts, and service contracts with other enterprises who post their workers to perform services provided (outsourcing of tasks). Consequently, this increased **lack of job security** for part of the workers forces a greater mobility upon them.

This labour mobility is also increased because of the development of new itinerant activities, which are a consequence of both globalisation and dematerialisation of certain tasks and work, which will be dealt with in Chapter A-6, such as consultancy and expertise.

In addition, apart from networks of enterprises being created, globalisation causes **networking or intra-groups** to flourish. This leads to triangular labour relationships, meaning that authority is divided between the 'nominal' enterprise, which the employee is linked to, based on an employment contract, and the principal enterprise, which often holds part of the economic decision-making power. The role of the employer is broken up; the workforce is fragmented. This system has two levels. The first level is a level of authority over the activity and the worker, for example divided between the employer-principal contractor and the employer-subcontractor who executes the task requested. The second level is the triangular level including the employee, the enterprise who is the employer 'nominally', and the enterprise who gives the assignment or the enterprise the employee is connected to.

Consequently, the existence of networks of enterprises creates network or intra-group mobility. Moreover, it creates **triangular relationships** which are often characterised by the **simultaneous existence of two employment contracts**. One of these contracts is dormant, i.e. the one with the principal enterprise or the enterprise the employee is connected to. The other contract is active, i.e. the one with the enterprise that executes the tasks requested and performs the works. Within the networks, at a certain point in time and in the course of their careers, employees seem to have multiple links with different enterprises; their career pattern forces them to go from one member of the network to another.

This concept of networking could also cover posting. **Posting** is defined as most often a three-player game (including the worker; the employer-service provider; and the enterprise of temporary activity, the buyer of the services), but is presented as a static and unique situation in the Coordination Regulations. Reality shows that many enterprises who have posted workers do not do so only once, and neither for one worker only. Furthermore, a posted worker may be posted at least once in his or her professional career, but may very often also be posted repeatedly depending on his or her profession, the type of enterprise he or she is working for and the opening up of different markets, accompanied by the lifting of limitations to the free movement of services. So, there are continuous and unique network activities within the community of enterprises who are clients of the enterprise-employer, and intra-group activities if all or part of these enterprises-clients and the enterprise-employer belong to the same network.

We will return to increased mobility in Chapter C-3. in the broader context of migration. For all the matters discussed above, we also refer to the trESS Think Tank reports of 2008, 'Towards a new framework for applicable legislation: new forms of mobility, coordination principles and rules of conflict', and 2009, 'Intra-group Mobility'.

b. Impact on the Regulations

Basically, globalisation affects the rules to **determine the applicable legislation**. These rules are becoming all the more significant and restrictive for enterprises and groups that are constantly restructuring and frequently relocating, and for the workers who are more mobile and who rather often find themselves in complex situations where two or more enterprises are involved.

These rules are based today on the following principles: a single legislation is to apply, the subjection to which is obligatory; the criterion of the professional activity performed takes precedence; the search for the **place of work** implicitly considered stable and unique. These principles are becoming difficult to apply to these new situations and seem to go beyond what characterises them.

The same goes for the place of work, meaning the **habitual place of work** that has been subject to an initial flexibility that is increasingly applied via situations in which employees are posted or in which self-employed workers post themselves, and which make it possible to combine – under certain conditions and for a limited period – one single employer or activity and two places where the activity is performed: the habitual place of work and the temporary place of work. This exceptional framework has recently been completed (Regulation (EU) No. 465/2012 of 22 May 2012 amending Regulation (EC) No. 883/2004 and 987/2009) by a new exceptional framework concerning flight and cabin crew, whose place where they perform their activity is referred to as their 'home base'. This improves the way in which the reality of such an activity can be taken into account and allows to **increase correspondence with European labour law** (see also Chapter A-3), which, in comparable situations where itinerant work is being performed starting from a fixed point, refers to 'the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract' (Regulation (EC) No. 593/2008 of 17 June 2008 (Rome I), Article 8), and this with regard to individual employment contracts, to determine the legislation applicable to contractual obligations if the parties have not chosen the applicable legislation.

However, other situations which go beyond the context of a single Member State and which cannot fall under the strictly described exceptions are treated as situations in which **activities are performed in two or more Member States.** Here, the applicable articles – which are already complex and difficult to apply – may lead to the proposition of solutions that are rather unsuitable or even unacceptable, as their results are contrary to the purposes of coordination. These situations include intra-group mobility and what is referred to as hypermobility in different sectors of activity.

Solutions for the problems linked to the globalisation of markets
can be found in Chapters D-4, D-8 and D-9

It should also be noted that, owing to globalisation, the number of enterprises or workers who are in a cross-border situation that exceeds the EU-EEA-Switzerland geographical framework is considerably growing. It is paradoxical to furthermore note that the more the geographical space of European coordination expands via accessions and external agreements, the higher the number of situations which Regulations (EC) No. 883/2004 and 987/2009 do not or only partially cover, because the employer or one of the employers are established outside that space or because a person's professional activity is wholly or partially performed outside the space, which leaves the door wide open to possible social dumping or fraud. In this respect, it is worth emphasising that Article 14 (11) of Regulation (EC) No. 987/2009 is the only article that partially covers **certain situations that exceed the EU-EEA-Switzerland geographical framework**.

The consequences of globalisation thus call to reconsider the rules to determine the applicable legislation, in order to **reform and update the principles and adapt the criteria applied**.

Apart from these rules, globalisation also makes it more difficult to take into account the elements as a whole that are typical of an enterprise or person (resources, assets, activities, other links *etc*) and that are necessary to examine a right or obligation, since all or part of these elements are located outside the EU-EEA-Switzerland geographical framework. All of this is therefore also connected to the problems related to the external dimension of the coordination.

In this context it has to be recalled that in a globalised world all Member States conclude **bilateral agreements with third States** to solve the problems stemming from movement in between the States concerned. The processes for negotiating these agreements are slow and take a lot of energy. Letting aside some aspects concerning equal treatment (e.g. the *Gottardo* case (C-55/00)) the Regulations and the bilateral agreements exist in separate worlds although dealing with the same issues. It could be interesting to combine these two worlds in the future to, for example, look for synergies.

Solutions for the problems linked to relations with third countries can be found in Chapter D-3

3. Migration

a. Description

The **free movement of persons** is one of the fundamental rights and central pillars of the European structure. It is also considered one of the most positive achievements of the EU. However, the principle of free movement of workers underwent a process of deepening and widening, continuously expanding its scope. Whereas already from the beginning the concept of workers was broadly interpreted by the CJEU, which led to offering protection also to non-workers such as future or former workers, migration patterns have changed. The migrant worker of 50 years ago is no longer the migrant worker of today. The nature of migration and the new patterns of work within an increasing flexible labour market have led to **new forms of mobility** that will undoubtedly also challenge the principles of the current coordination framework.

The Regulation was set up at a time when workers had a full-time permanent employment relationship. The migrant worker was someone – usually a male – who moved to his or her country of work (with or without his or her family) and returned to his country of origin at the end of his or her career. Often, people coming from low-wage countries migrated for better working opportunities and conditions, including higher wages. Such type of migrant workers in particular focused on **fully integrating in the social security systems of the State of the new workplace**. When migrating at a later age, the biggest problems these persons were confronted with were related to the possible export of retirement benefits. However, today there is greater diversity with a range of different types of migrant workers within a pan-European labour market. Cross-border frontier workers, temporary migrant workers and pan-European management personnel all contribute to these developments. Also the globalisation and the creation of a European internal market will further strengthen these trends, including the growing number of employees that are sent out by their employer to perform temporary activities in another Member State (see also Chapter C-2).

Some of these migration patterns are confirmed and strengthened by developments that are expected to characterise migration in the future. Migrant worker policies are apparently more and more focused on **attracting highly-skilled or educated migrants**. Other migration patterns seem to confirm these objectives. Although **student migration** has been part of the European policy for many years and may be seen as essentially temporary in nature, there is a growing trend in countries to set up specific programmes, allowing student migrants who have successfully completed their education to remain in the country to work. Such programmes in the destination countries are attractive, as they offer the possibility of adding qualified young workers with a good level of linguistic and cultural

integration to the national labour force. In the next years, the migration pattern will further develop from a situation where the permanent move is the most important trend towards an intra and inter-organisational move, where people plan their career through consecutive international assignments. Such qualified workers' interest in social security protection differs considerably and is moving away from the idea of a full integration in their country of new (temporary) employment. Next to these highly skilled workers, there is the growing recruitment by countries of migrant labour on a temporary basis (such as agricultural workers, care providers, *etc*). Many workers will continue finding jobs in other Member States without the intention to move there forever. The result is temporary and circular migration.

In the coming decades, Europe with its **ageing and shrinking population** will be more in need of migrant labour and skills. Apart from attracting highly skilled migrants, also circular migration is seen as an answer to an existing need to fill seasonal or other temporary jobs. But, it is also seen as a possible way to **replace the brain drain with brain circulation**, where typically previous migrant diasporas will often return to their former country of origin for limited periods and will be further engaged in its economic and social life. Increasing temporary geographical mobility by temporary limited migration patterns will characterise European migration.

The freedom of workers has also become a basic principle. Initially designed to address shortages of labour, the freedom of workers not only contributed to the emergence of a new wide labour market, but has also become a **fundamental individual right**. An individual, rights-based perspective replaced the initial labour market perspective. Europe has become an area where every citizen, regardless of his or her professional status, may use his or her right to move freely, and this also regardless of the objective, whether it is for better working conditions, for the climate or for one's self-satisfaction. Growing possibilities offered by EU law to patients to look for a better medical treatment, but also mobility resulting from tourism and cheaper travel options will contribute to a further modification of the traditional labour-related migration. The **migration of economically non-active persons** cannot exclude that situations might arise where free movement will be chiefly inspired by the wish to improve one's social security position by acquiring benefits. Differences between social security systems, certainly in times of economic crises, might be seen as an incentive for people to (ab)use their right to free movement to profit from and to claim better welfare benefits.

Nevertheless, the pressing demographic challenges and the shrinking European workforce will also require national and European policy-makers to look for options to ensure the well-being of their citizens. **Migration may therefore become a crucial pillar in sustaining Europe's economic and social models**, certainly in a time when the population is ageing, creating a possible need to attract temporary and circular migrants from outside the EU. The pressure on the EU's external borders will continue to rise. Perhaps contrary to the actual migration patterns within the EU, these third-country migrant workers will in the first place mainly occupy low and medium-skilled jobs.

b. Impact on the Regulations

The approach towards free movement has moved from a labour market perspective to an individual rights-based perspective. Free movement as an instrument of economic concern has changed and now relates to a **growing union of citizens**. The creation of European citizenship with its corollary of freedom of movement for citizens across the territory of the Member States represents a considerable qualitative step forward into separating this freedom from its functional or instrumental elements (the link with an economic activity or attainment of the internal market) and raises it to the level of a genuinely independent right inherent in the fundamental status of the citizens of the European Union. A new notion of **European solidarity** has been created, now also embedding the free movement of workers into a wider EU social policy and into the framework of

the Charter of Fundamental Rights of the European Union, which all leads to a new dimension in the case law of the CJEU.

The case law clearly further develops into the direction where the Treaty not only condemns discrimination, but also **non-discriminatory restrictions to the free movement of workers**. The CJEU has emphasised that the Coordination Regulations are no longer the only means for people to obtain social security benefits and rights. The direct reliance of people on the general principles of EU primary law in order to combat the possible limitations to their fundamental rights, limitations that are not only the result of national rules, but sometimes also follow from the application of the EU Coordination Regulations, lead to a growing new floor of social security rights.

All these rules will have to be tested against the background of EU primary law.

The **new conformity test** will imply that every rule is judged against the general test of free movement. This means that it is checked whether the application of the rule concerned constitutes an impediment whereas no objective justification can be found, and to what extent the principle of proportionality is respected. Even when finding an objective justification might still be easy, much more complicated will it become to pass the proportionality test. Member States will be confronted with a new, often political, task, i.e. to find the concrete justification in the case concerned assessed in the light of the proportionality test. European citizens will increasingly question national legislators as well as the European Coordination Regulations and confront these with the fundamental principles of EU law and its proportionality test. Migrant persons are witnessing an opening up and extension of their welfare rights as the Coordination Regulations are constituting the floor of their European rights, and as direct reliance on EU primary law offers a new ceiling.

This new approach will challenge the Coordination Regulations and may have an impact that goes much further than a merely cosmetic adaptation. This new opening up of social security rights has led to new boundaries of European solidarity, based on the certainty that **the claimant has a sufficient link to the Member State's labour market, social security system or society as a whole**. The CJEU makes clear that the possible indicators are almost open-ended and that the threshold may not be that high. The real link is a theory of exclusion on the one hand, excluding those people whose links with the Member State concerned are too loose. On the other hand, it also is an instrument of inclusion. Member States will be forced to welcome those persons who have a sufficient link. It is certainly not to be excluded that this theory of a real link will further percolate into the system of the Regulation and will question the current, long-existing basic parameters of the existing Coordination Regulations.

The emphasis on this fundamentalisation of EU primary law has also led to a new important role to be played by the Member State which is not the competent State under Regulation (EC) No. 883/2004 (cases *Bosmann* (C-352/06), and *Hudzinski and Wawrzyniak* (C-611/10 and C-612/10)). This State may now under certain circumstances become obliged to grant social security benefits which adds as such an additional floor of social security protection for migrant citizens. Not only will the competent Member State according to the Coordination Regulations be obliged to grant social protection, but also migrant citizens can **rely on the non-competent State to gain access to its social security system** and this on the basis of a judge-made system of social protection, applying the proportionality test of EU primary law.

All these trends of a further individualised approach to welfare rights are to the benefit of the EU citizens, but do question the balance of power between the different stakeholders of the Regulation. The Coordination Regulations are an instrument to the benefit of European citizens (from workers to self-employed persons to economically non-active persons), employers and social security institutions. All these trends require the assessment of the balance of the interests of the employee,

the employers as well as the institutions in the structure and the rules of coordination. Exactly as the Coordination Regulations are from all sides attacked by EC Treaty principles, like European citizenship, freedom of movement, free movement of services and goods, *etc*, the Coordination Regulations might risk looking too technical, outdated and therefore subject to being overruled by more fundamental principles. Whenever proposals for amendments to coordination rules are made, which seems to be required taking into account the shift in objectives of European social integration, it will be necessary to carry out an impact assessment in order to know which parties (employees, employers, insurance institutions) are favoured and which are disadvantaged. This might help to find a rational solution.

Solutions for the problems linked to the effects of free movement on social security schemes can be found in Chapters D-4, D-8 and D-9

PART II
BROAD SOLUTIONS

A. A redefinition of the fundamental parameters

After having described the general societal challenges in the previous part and their impact on the Coordination Regulations, this part describes some possible remedies, taking into account certain developments deduced from judgements of the CJEU. These remedies might therefore also be in line with possible trends to be expected in the European legal order.

Under this Chapter we will present some solutions for the challenges and problems elaborated on under the previous Part based on amendments to the existing coordination mechanism itself. As we have realised, these solutions differ greatly. They stretch from more technical amendments to the existing parameters, e.g. concerning the scope of Regulation (EC) No. 883/2004 (Chapters D-1, D-2 and D-3), to more fundamental reforms of the mechanism of coordination, e.g. redefining equal treatment or introducing a new principle to determine the competent Member State by using the closest link principle (Chapters D-4 to D-9).

1. Examination of the personal scope

In line with the general understanding of the traditional concept of social security, which has considerably developed the past years, the philosophy of the personal scope of Article 2 of Regulation (EC) No. 883/2004 is still based on a very traditional concept based mainly on the breadwinner and the 'rest' of the family who derive rights from that person. It could be an interesting task to rethink this concept and thus modernise the Regulations considerably.

The following could be a solution for the problems stemming from individualisation of rights (Chapters A-1, A-2 and A-5)

The focus could mainly be placed on a **revision of the principle of priority between derived and own rights** (which is of particular importance in the field of sickness). It could be considered that own rights (including those based on residence) should have priority over rights derived from another person. This could do away with some of the most challenging problems encountered today (e.g. excluding family members who are co-insured with a migrant worker who is subject to the legislation of another Member State than their Member State of residence from LTC benefits in cash of their Member State of residence). As shown, this could give entitlement to additional rights, but usually (especially concerning the benefits in kind) would only shift the financial burden from another Member State to the Member State of residence. To avoid any disadvantages for the persons concerned it could be stipulated that any other Member State has to top up the benefits if these are, under its legislation, higher than those of the Member State of residence.

However, it also has to be accepted that this revision could be regarded as **not balanced**, as Member States with residence-based systems would be much more burdened than the other Member States (as the former would have to bear the costs of all residents and in addition also of all family members of persons subject to their legislation who reside in Member States with schemes with derived rights). Therefore, a very careful evaluation of the financial impact and possible ways of re-distributing the costs could be necessary. Anyhow, from the point of view of the persons concerned this seems to be a much more logical solution than today's coordination.

Also the following could be a solution for the problems stemming from the individualisation of rights (Chapters A-1, A-2 and A-5)

Another issue in that context could be to further **strengthen individual rights**. It could be considered to separate, for example, the rights which are clearly attributed only to the person taking care of a child from the coordination of family benefits as we know it today (where always the situation of the whole family is relevant). This would mean that if a family is resident in Member State A and the mother is working as a frontier worker in Member State B, this Member State B would be responsible to grant its **child care benefits** which are meant only for the person taking care of the child, while all other family benefits would have to be granted with priority by Member State A (if the father works there). This would be especially important for all child care benefits with an income-replacement function, but could also apply to lump-sum benefits meant for the whole resident population. This proposal could be regarded as contradictory to the previous one, stating that individual rights in the Member State of residence should have priority. Nevertheless, it should not be forgotten that in this case Member State B is competent for the mother (also during the period of suspended employment there) and not the Member State of residence A. Thus, especially problems concerning the calculation of benefits with an income-replacement function are avoided. Today, great uncertainty exists as to how, in our example, Member State A, which is competent by priority, should calculate the child care benefit with an income-replacement function for the mother (taking into account the income which is subject to the legislation of another Member State, or only e.g. a lump-sum amount which is granted to all non-active citizens – see also the 2011 trESS European Report, Chapter 8).

The following could be a solution for the problems stemming from the special situation of the carer (Chapter A-5)

This principle could also be further developed and it could be determined that other individual aspects which today have to be coordinated as rights derived from another person are only to be coordinated as own rights. This concerns especially the **rights of a person taking care of another person in need of care**. Based on the CJEU ruling in *Gaumain-Cerri* (C-502/01) and in *Commission against European Parliament and Council* (C-299/05), such benefits should be coordinated today in the same way as the 'other' LTC benefits granted to the person in need of care. This interpretation leads to situations in which the Member State responsible for the applicable legislation for the carer and the one responsible for granting such benefits are not necessarily the same – such situations could easily lead to over or undercompensation (see also the 2012 trESS Analytic Study – Chapter B.7). It should be examined what the consequences would be if the Member State competent under the applicable legislation for the carer is appointed as the one which should also grant such benefits (which could mean 'payment' for the person providing the care – e.g. carers' allowances – or other 'benefits', e.g. a pension or health care insurance that is free of charge for the carer).

2. Examination of the material scope

A fundamental reform of the material scope of Article 3 of Regulation (EC) No. 883/2004 (and/or amendments also to the definition of 'legislation' in Article 1 (l) of that Regulation) could be a step towards a modern coordination that gets rid of systematic differences between Member States.

The following could be a solution for the problems of LTC benefits (Chapters A-2 and A-5)

This could be very helpful for the coordination of **LTC benefits**. A clear definition and drawing the boundary between these benefits and other benefits of socials security could be the first step towards a better coordination (see also the 2012 trESS Analytic Study).

The following could be a solution for the missing fully-fledged coordination of all social security schemes (statutory and non-statutory (Chapter A-3)

First, the **restriction to statutory schemes** in Article 1 (l) of Regulation (EC) No. 883/2004 could be changed. One new element could be that the Regulation should apply to statutory and other collective schemes (e.g. occupational pension schemes based on contractual relations or collective bargaining). Thus, the existing boundary concerning the inclusion of occupational pension schemes would be abandoned. Naturally, such an extension has to be further analysed and special rules e.g.

concerning aggregation of periods for some of the schemes could be necessary. It seems that the calculation formulas that exist already today under the Regulation in the pension field could be sufficiently flexible to also cover any occupational pension scheme. This would make the work on the portability Directive superfluous and from our point of view would lead to much better results, as also other aspects of social security, e.g. entitlement to health care and family benefits, would be covered. Should this approach be too ambitious and should the portability Directive be considered the only possible way to coordinate occupational pension schemes, at least an inclusion of these benefits for the other rules of the Regulation (e.g. health care coverage) should be examined.

The following could be a solution for private insurances (Chapter A-2)

Second, to improve fair burden sharing, **opt-out solutions** (private insurance coverage instead of statutory insurances) should be treated in a comprehensive and coherent way. It has to be safeguarded that such decisions taken by a single person or the national legislators for a whole group of persons (e.g. some members of liberal professions) do not burden another Member State (e.g. the Member State of residence which has a residence-based scheme, if these persons are subject to the legislation of another Member State due to the exercise of a gainful activity there but have family members living in the first Member State; naturally, switching to a more individualised concept of persons covered – see Chapter D-1 – would also change this point as individual rights would prevail).

The following could be a solution for the problems of persons migrating to international organisations (Chapter A-3)

In this context also the problems of persons **migrating to international organisations or EU institutions** could be tackled. A first step could be to change the special coordination for persons working in EU institutions. As the general principles and safeguards of free movement also apply to persons moving from another Member State to the EU and the standard instrument to avoid any disadvantages for 'normal' migrant workers is without any doubt Regulation (EC) No. 883/2004 – why not also apply these in relation to the social security schemes of the EU? Without any doubt this would be a solution that could not be contested by the CJEU. It also would make coordination much easier for all Member States and would not necessitate today's special agreements or national legislation to comply with the obligations under Annex VIII of the EU civil servants' statute. As a second step also a horizontal rule for international organisations could be introduced into Regulation (EC) No. 883/2004, which would at least make the aggregation possible of the periods completed in such international organisations in the absence of a special agreement that covers the case concerned (to take account of the *Gardella* ruling (C-233/12)).

The following could be a solution for the various benefits safeguarding a minimum subsistence level (Chapter A-2)

Another solution could be to re-examine the exclusion of **social assistance benefits** (Article 3 (5) of Regulation (EC) No. 883/2004). Honestly, we really should answer the question how many real and traditional social assistance benefits still exist today in the Member States. Developments show that many Member States have also linked entitlement to benefits which under national system are regarded as social assistance to legal entitlements (at least Member States have opted for solutions which give the persons concerned a legally described situation which could also be invoked before national courts). Thus, one element of a social assistance benefit (see e.g. CJEU in *Hoeckx* (C-249/83)) is already gone. If the benefit is furthermore clearly dedicated to a specific group (e.g. unemployed persons or persons in need of care) also the second element of social assistance (no link to one of the risks enumerated in the material scope of Regulation (EC) No. 883/2004) no longer applies. Also benefits in kind do not exclude the application of the Regulations.

So, maybe it could be more prudent to adopt a more proactive way of thinking? What would happen if the **Regulations also apply to social assistance in general,** while there is room for special rules (e.g. non-export as already provided under Article 70 of Regulation (EC) No. 883/2004 for special non-contributory cash benefits)? Thus, also differences in today's coordination, under which some

schemes specifically targeted to persons connected with one of the risks, are coordinated, whereas the comparable benefits of other Member States which know only general schemes for all persons in need are still outside coordination. Including all social assistance benefits would not mean an extension to grant these benefits in all cases. There would also be situations in which Member States would have to grant benefits (which they have to do already today – e.g. on the basis of one of the Residence Directives), but under the Regulation they would be entitled to claim reimbursement from another Member State. Thus, existing differences in coordination depending on the national system could be avoided to a large extent. One remaining challenge could be to distribute general social assistance schemes (without any earmarks for a specific risk) among the different chapters of coordination under Regulation (EC) No. 883/2004, unless specific rules like Article 70 of Regulation (EC) No. 883/2004 are agreed upon.

The following could be a solution for the problems of activation measures (Chapter A-2)

One of the greater gaps of today's coordination is the lack of provisions and certainty concerning **activation measures**. Many of them have to be regarded as benefits in kind. If they are not regarded as falling under the sickness or the accident at work and occupational diseases chapter, the Regulation does not explicitly provide for the granting of such benefits for persons residing outside the competent Member State. This creates many problems which should be analysed in more detail. Special provisions should be integrated which safeguard that e.g. a person receiving an invalidity benefit linked to the granting of activation measures has access to such measures also in other Member States wherever comparable activation measures exist. That means that new provisions on granting such measures and including the question of reimbursement also have to be created in other chapters of Regulation (EC) No. 883/2004. The Regulation should also deal with situations in which the Member State of residence does not know comparable activation measures (should there e.g. be no entitlement to benefits at all; should benefits be granted also without activation measures; should activation measures which are not comparable be accepted; is there an obligation to come back to the competent Member State; *etc* ?).

Taking this even further and including also aspects of **taxation** (synchronising this issue with the applicable legislation for social security schemes) or e.g. also **labour law** could be regarded as premature or even impossible. From our point of view, further and more explicit CJEU rulings could be awaited. Nevertheless, it can be assumed that the pressure for a harmonised approach will grow, especially if the financing principles differ more and more and if migrant workers and their employers are confronted with increasing problems and inequalities concerning the financial burden they have to bear depending on the Member States involved.

3. The territorial element

Up until now the territorial element of the geographical field of application of Regulation (EC) No. 883/2004 has not raised many questions, as the Regulation applies in all Member States (letting aside exotic areas like Greenland, which is explicitly referred to under Article 90 (1) (b) of Regulation (EC) No. 883/2004). The moment we go further down to locally separate regions (e.g. regions, provinces or communities) the situation becomes more complex, especially if these local entities have specific social security schemes which are distinguishable from schemes which are the same for the whole territory of a Member State. We must not forget that **cross-border situations** do not exist solely between Member States, but that they can also occur **between regions**. These elements will be further elaborated on in Chapter D-5.

The following could be a solution for the problems
in relation to the EEA and the EU/Switzerland agreement (Chapter B-2)

It is true that the *status quo* (postponement of amendments already done inside the EU due to the decision mechanism in the **EEA Joint Committee or the Mixed EU/Switzerland Committee**) is a consequence of the existing agreements. Nevertheless, this should not prevent experts on

international treaties to look at it and look for contractual solutions that would allow a simultaneous entry into force. This could be inserted in the EEA or EU/Switzerland agreement in order to prevent such delayed entry into force in the future. For instance, it could be analysed if retroactive effects of the relevant extensions of the EU legislation in relation to the EEA States and Switzerland would be a way out (which in the past has already been accepted e.g. with regard to Regulations (EC) No. 3095/95 and 3096/95 – Article 3 of the Decision No. 63/96 of the Joint EEA Committee).

The following could be a solution in relation to other third countries (Chapters B-2 and C-2)

The extension of some aspects of the Regulations may also concern other countries, i.e. the **associated countries.** In this respect, also social security is covered by the Association agreements (at the moment involving Albania, Algeria, Israel, FYROM, Montenegro, Morocco, San Marino, Tunisia and Turkey). It is true that this extension of the coordination is very limited and consists mainly in an export and equal treatment obligation towards these associated countries. It could be said that including more principles of coordination, such as aggregation of periods and pension calculation but also provisions on applicable legislation, could be a further step in expanding coordination with these countries, but also with other countries with which Member States increasingly have economic and labour migration relations.

Should the EU go so far to broaden such **extended instruments of cooperation and coordination –** e.g. under the EEA or EU/Switzerland agreement – also to other countries or groups of countries? This is without any doubt a very political question. Nevertheless, such a discussion should not be avoided. The Commission's Communication 'The External Dimension of EU Social Security Coordination' (COM (2012) 153 final) is a good starting point for this discussion. We think that a stronger and more harmonised coordination of social security schemes worldwide will be something that will become more and more important. Therefore, it is only logical that the work starts as early as possible. It would be wise before starting the real negotiating process to provide some clarifications concerning e.g. the necessity of a legal basis, the question whether such coordination with third countries should be obligatory for all Member States or only for those which are willing to join *etc*. It can be expected that in the beginning some Member States will be very reluctant towards such an approach. However, in the longer perspective at least some Member States might be convinced of the advantages of such a synchronised approach, e.g. in relation to strong negotiating partners like China or Japan. This would also be a way to 'export' the coordination mechanism of the Regulations worldwide. Nevertheless, it can be assumed that this development would not be a one-way process, as the traditions of social security coordination in other parts of the world could also influence the modelling or interpretation within the EU – so, in the long run, it could end up in a globalised approach of coordination – which seems to be one of the nice aspects of all the challenges to social security coordination in the years to come.

4. A redefinition of equal treatment

This could be a solution for the -problems of residence-based schemes (Chapter A-1), benefit tourism (Chapter A-1), LTC benefits (Chapter A-2), new situations in employment due to technical developments (Chapter A-6), effects of the globalisation of the markets (Chapter C-2) and migration (C-3)

Equal treatment is a **basic principle of European law** – for some even the fundamental cornerstone of European law – laid down in its primary law and repeated in the Coordination Regulations. It is as applicable against direct discrimination based on nationality as it is against indirect discrimination. It applies fully, always to the same extent, and generally without exception.

Although not questioning the existence of this basic principle, we may nevertheless reconsider the practical significance it should be given in order to try to partly respond to certain challenges mentioned in Part I. Which should be the reference group to assess the equal treatment: **only the workers of a Member State or more generally the citizens of a Member State**? Taking into account

the extension of the Coordination Regulations to inactive people, therefore all citizens, the second option should be chosen.

Furthermore, **which Member State should serve as a reference point**: the Member State of activity or the Member State of residence? Obviously, this choice only applies to workers, to retired workers and to their family members, as equal treatment may only work for inactive people by reference to the State of residence. For the former, the fact that they are citizens of the Union and their fundamental status according to the CJEU are connected to the State of residence. However, their status as a worker or their link to a worker is connected to the State of activity or former professional activity. The Coordination Regulations, consistent with their rules to determine the obligatory and unique applicable legislation, actually use this last reference, but without prejudice to a connection with the State of residence when its legislation is applied instead of the State of activity's (benefits in kind) or when the right to certain benefits of the State of residence are only given on the condition of residence (family benefits). However, one could consider more clearly that equal treatment may be applied, if applicable, both with regard to the State of activity and with regard to the State of residence according to the way of reasoning in *Bosmann* (C-352/06), in line with a similar development in the determination of the legislation applied (even the applicable legislation) and in the adapted priority/cumulation rules.

Should the **notion of a real and sufficient link** with a Member State or with its social security scheme be introduced in the Coordination Regulations as a condition for equal treatment to apply (see also below in Chapter D-9 – the 'closest link' principle, where these ideas are extended beyond the principle of equal treatment to all different aspects of coordination)? And if so, should it be so for inactive people only or for all people covered? Before the Regulations were extended to inactive people, case law had introduced this notion to make equal treatment conditional for the latter merely on the basis of citizenship (*Collins* (C-138/02)), thus justifying the existence of prior conditions of residence. In *Lucy Stewart* (C-503/09) the CJEU clarified that prior residence may not exclude the search for a link, which can be established from other representative elements, when e.g. looking for existing connections between the person concerned and the social security scheme of the State concerned, or from the context of the family relationships of the person concerned.

The **introduction of the elements of this case law into the Regulations** could make the application of these Regulations and primary law more coherent and could provide a solution to the problems raised by certain States with regard to the joint application of the Regulations and Directive 2004/38/EC and with regard to the burdens caused by so-called social tourism that are considered too heavy. This introduction will be accompanied by two ideas: on the one hand, keeping the *status quo* towards active people who should not be submitted to a test whether there is a real and sufficient link, as the fact that they are workers or retired workers is *a priori* considered as establishing a real and sufficient link (like elsewhere in the above-mentioned Directive, which grants a right to reside for more than three months to workers under no additional condition); on the other hand, and in consideration of the very objective of coordination, the introduction of safeguarding provisions (maintaining temporary rights and limiting waiting times with regard to legislation) to prevent that inactive persons covered within the State that they left find themselves in a situation in which they are not covered in the host State, because the real and sufficient link was not established with the latter State.

In addition, the **links to be established between equal treatment and assimilation of facts** could benefit from a clarification, thereby aiming to find a reasonable limit, and in line with the objectives of coordination, the latter principle should not, in a context of coordination and not of harmonisation or unification, manifest itself in the negation of all the determining factors of a scheme (for example the complete assimilation of a stay in a State and a stay in another State, irrespective of the

circumstances, would completely make the conditions of stay or residence void, and would even call the national schemes' scope of action into question).

5. Extending the principles also to cases without cross-border elements

The following could be a solution for the problems stemming from reverse discrimination (Chapters A-2 and A-5)

Persons who find themselves in a cross-border situation may invoke EU law. So-called **reverse discrimination** might occur when a Union citizen finds him or herself in a 'purely internal situation' of a certain Member State and as a result cannot rely on EU law to obtain a certain benefit. Only the national law of the Member State concerned is applicable. Traditionally, situations that remained purely internal ('wholly domestic situations') were entirely governed by national law (*Saunders* (C-175/78)). The same circumstances might turn out to be less favourable in the latter situation than EU law.

An example of sickness benefits in kind (medical treatment) of family members residing outside the competent Member State has already been mentioned (Chapter A-5).

Another example might be the **(long-term) care insurance introduced in the Flemish Community** in Belgium. According to the EU social security Coordination Regulations it has to cover not only residents of Flanders, but also employed and self-employed persons who have made use of their right to free movement of persons in the Union, even if they reside in another Member State. The question sent to the CJEU was whether migrant employed and self-employed persons who have made use of the EU law on the free movement of workers (and moved to Belgium) and who work in Flanders but reside in the other part (the Walloon Community) of the same country (Belgium) should also have access to the Flemish care insurance (*Government of the French Community and the Walloon Government v The Flemish* Government, C-212/06). The CJEU held the view that this was indeed the case. With this decision, the CJEU seems to have opened the door for a change. As a rule, until this decision it abstained from the system outcome comparison, i.e. which social security system is good and which is better for the migrant worker. It is clear that national (or even regional) social security systems are distinct, i.e. more and less developed. It might be argued that a Pandora's box might be opened by the CJEU if in each case, regardless of the agreed legal norms, the best solution for the migrant has to be found. This position even legitimises situations in which migrant workers are in a better legal position than workers who have never moved.

Reverse discrimination might also occur when **seeking medical benefits in another Member State as a consumer of services and not as an insured person**. An insured person might want to choose the path of the Directive 2011/24/EU on the application of patients' rights in cross-border healthcare (and be reimbursed later in a limited scope) over the Coordination Regulations. For instance, this might also be the case for treatment by private (non-contracted) health care providers (not related to a public health care system). Cross-border patients relying on the Directive will have the option to choose a public or purely private health care provider in the Member State of treatment. Limitations in the health care provision, such as waiting lists, might apply to public providers but not to private ones. Such patients could be treated by private physicians, who would be directly paid by the patient. Yet, the latter will be reimbursed by the public health care system in the competent Member State (Member State of affiliation). The patient, whose legal and factual situation is limited to one Member State only, might have no access to purely private health care providers.

It is true that Directive 2011/24/EU expressly stipulates (Article 1 (4)) that it does not oblige a Member State to reimburse costs of health care provided by health care providers established on its own territory, if those providers are not part of the social security system or public health system of that Member State. However, such reverse discrimination has negative implications for the legal

position of persons whose case is limited to purely internal situations, and may lead to unjust outcomes.

The question is what the solution could be. **Could it really be argued that reverse discrimination is in complete accordance with the law, i.e. EU law and the national law of the Member States**?

This could be doubted, since the CJEU has already recognised the rights based on EU citizenship without any movement within the Union. One example might be a case like *Rottmann* (C-135/08), a landmark judgement which opens a new phase in the law on EU citizenship, since the CJEU focused on the status of citizen of the Union rather than on the existence of elements demonstrating a cross-border situation. Another case is *Zambrano* (C-34/09) (as further developed in *McCarthy* (C-434/09), *Dereci and others* (C-256/11), and *Ymeraga and others* (C-87/12)). It seems that at this stage the CJEU limits the use of citizenship argument to cases with a so-called 'deprivation effect', where citizens are forced to 'leave the territory of the EU as a whole'. The next stage might be to broaden this concept also to above described situations.

It could be stated that the argument of **Union citizenship could be applied also to combat undesired results of reverse discrimination** and reinforce the principle of equal treatment of Union nationals. However, reverse discrimination could also run up against the national constitutional law prohibiting discrimination. The question emerges whether the law of the Member State tolerates a less favourable legal status for individuals compared with the one they would enjoy under EU law.

Does this mean, for instance, that some national public health care systems would have to change from providing benefits in kind to the reimbursement of costs, enabling medical treatment by non-contracted (private) health care providers also in purely internal situations? For instance, Germany has modified its legislation to accommodate certain interpretations of the CJEU and in Austria a person could visit non-contracted providers and be (only) partially reimbursed. However, **reverse discrimination could run also against the national, especially constitutional law** prohibiting discrimination on the grounds of various personal circumstances. From this angle, less favourable treatment of purely internal cases in relation to the intra-Union cases might be perceived as unconstitutional.

Could the solution be to modify EU law (including social security coordination) instead? For instance, a new definition of family members could be agreed upon and patient mobility rules should be included in the Coordination Regulations (truly contributing to more transparency and legal certainty, mentioned also under Chapter F-2). The question might be **whether the Union really has the power to change the substance of national social security systems** (more specifically in this case public health care and LTC systems) and harmonise and not just coordinate them. It seems that this topic is gaining attention and will also have to be dealt with in the future.

The day the CJEU also follows the resistance against the principle that European law only applies in a cross-border context, the concept of European solidarity and the place of migrant workers in the social security systems of the Member States would be reconsidered.

6. Introducing a European solidarity mechanism into coordination

The following could be a solution for the problems stemming from the different economic situations in some Member States (Chapter A-1) and from the economic crisis (Chapter C-1)

It could be advisable to rethink the whole issue of reimbursement under the Regulations especially in the context of the effects of the economic crisis, and to seek possibilities to get achieve transparency. One way to do this would be that the **creditor Member States** (under the reimbursement mechanism of the Regulations) **directly finance the claims of their institutions with regard to the Member**

States receiving loans or subsidies from the EU and its Member States to overcome the problems of the economic crisis. Thus, the money given to help the economy of the receiving Member States would show the net amount which is really at the disposal of these Member States. If these Member States are given loans, the giving Member States could also try to recover the amounts pre-financed in relation to the institutions of the giving Member States from the debtor institutions of the receiving Member States under the same terms as the overall loan. Thus, if loans are given, it could be easier for the receiving Member States to pay back these amounts, as they would not be bound by the strict rules (including interest) under Articles 66 to 68 of Regulation (EC) No. 987/2009. Instead, the same procedures as for the repayment of the general loans would apply. In case of subsidies without the obligation of repayment also the claims for reimbursement would remain the financial burden of the giving Member States. This could be a first step under which also claims in the field of social security are clearly and transparently linked with general economic aid programmes. Naturally, there are also other ways to tackle this complicated situation. Claims against the institutions of the receiving Member States could also be officially included and declared as such in the overall subsidies or loans given to the receiving countries. Consequently, at least transparency is achieved concerning the net amounts at the disposal of the receiving Member States.

Yet, we could even take this further. A real act of solidarity would be to rethink reimbursement rates. Especially in that respect, differences between Member States with expensive and usually highly developed social security schemes and the other Member States (with lower-cost schemes) are usually evident. One way to enact measures of solidarity would be to **limit reimbursement to the rates which apply in the debtor Member State.** The difference with the higher tariffs in the Member States of treatment would thus be the solidarity element which has to be borne by these Member States. In principle this would make the reimbursement more complex, as both Member States would have to evaluate the comparability of the benefits and as it could lead to a greater number of disputes. However, from a theoretical point of view such a measure should be possible as every Member State has to have a transparent set of tariffs which also have to be used for the purposes of Directive 2011/24/EU on patient mobility. It is clear that, at the level of those responsible for social security and the costs of the relevant social security scheme, it would be very difficult to agree upon such a switch of fundamental principles of reimbursement. It could only be part of a general decision on a very high politic level (e.g. in connection with new parameters for subsidies given from the EU structural funds).

Another way which could have very similar results but would not lead to such an administratively complex situation is to create a new **European solidarity fund for the reimbursement of health care costs**. This fund would reimburse the institutions of all Member States under the procedures laid down in Articles 66 to 68 of Regulation (EC) No. 987/2009 and would have to be financed by all Member States taking into account various parameters (e.g. the number of the insured persons, but also the overall economic situation of a certain Member State). Elements of solidarity could be easily introduced in reimbursement procedures.

Finally, a type of solidarity could also be discussed in relation to non-active persons moving from one Member State to the other. Under today's coordination mechanism in many cases such persons are entitled from the moment they reside (legally – as elaborated and further clarified by the CJEU in *Brey* (C-140/12)) in another Member State. One act of solidarity could be that the **previously competent Member State continues granting some of its residence-based benefits** during an interim period. We do not need to go further into detail for this proposal, as the 2011 trESS Analytic Study 'Social security coverage of non-active persons moving to another Member State' already contains additional elements for that proposal (Chapter 3.3. of that study). This is also related to the general question who can still be excluded from a national circle of social security beneficiaries. Anyhow, such an approach could also correspond to the 'closest link' principle as proposed under Chapter D-9.

7. Looking for a fairer burden sharing between Member States

The following could be a solution for today's imbalanced situation between some Member States (Chapter C)1)

Whatever type of benefits is concerned, the Coordination Regulations do not properly deal with burden sharing between the Member States concerned in a given situation. For each situation, the coordination rules to determine the applicable legislation and the legislation applied appoint the Member State which directly or indirectly (after reimbursement of the benefits in kind) bears the costs for the benefits given or which, conversely, collects the social security contributions provided for by its legislation.

Certain economic challenges mentioned in Chapter C-1 or connected to the new mobility of pensioners or of other inactive persons (see also Chapter C-3) lead us to look for a **more realistic and fair sharing of burden resulting from coordination**. There are alternative ways that could be explored, without prejudice to the new provisions already discussed above (Chapter D-4) concerning equal treatment (particularly the introduction of provisions on the performance of this right by unretired inactive persons) and applicable legislation.

Could it be considered, in general, that **two Member States are jointly competent** for one given situation? This could be the case for the allocation of benefits other than pension, in line with the *Bosmann* case law (C-352/06), according to which one State is the prior State (competent State) and the other the complementary State (State of residence), in order to avoid every unjustified cumulation. Although inevitable because of case law and already being applied in the event of cumulation of family benefits of the same level for one or more children, extending this solution to family benefits and health care benefits is not necessarily fairer. The burden sharing depends on the relative values of the benefits provided and on the respective conditions for the entitlement to benefits. This also assumes an adaptation of the rules determining that there is one single applicable legislation competent to collect contributions, if the State of residence pays contributory benefits, the granting of which depends on conditions of residence. Above all, such a burden sharing method can only work if there is a legislation in the State of residence that grants benefits without conditions of insurance or activity.

This could also mean **resorting to a financial sharing of the costs that result from the benefits provided,** without changing the rules to grant benefits. For example, for sickness and maternity benefits granted to a pensioner and to his or her family members, the burden should not be borne by a single State, i.e. the State of residence if a pension is provided or another State if it is the debtor of a pension. This burden should be divided between the two States, just as was provided for in the initial proposal for a Regulation which was presented by the Commission and which led to Regulation (EC) No. 883/2004. Laying down percentages of burden sharing and the procedure to determine the amount to be reimbursed and the way in which it is to be reimbursed will mean making delicate decisions (this idea will also be further developed under Chapter D-9).

Nevertheless, bearing in mind the experience with the reimbursement of benefits in kind provided by a State on behalf of another State, it should be taken into account that **any procedure of reimbursement or financial participation has its price** and that it should be guaranteed that, if such a solution would be chosen, the administration costs do not call the value of such burden sharing into question, especially as a certain burden sharing has already been introduced by the new Regulation based on another way to determine the State, thereby considering the cost of the benefits received in a third Member State during a stay or due to a temporary return to the State that owes the pension.

However, other options that are administratively much more easy to manage could be considered to deal with a situation that proves to be too disadvantageous for one of the States concerned: instead of determining every reimbursement individually, the amount that is to be reimbursed could be determined **based on average costs and general statistics** on persons concerned.

The question about a fair or fairer burden sharing will become even more acute when **specific provisions concerning LTC benefits**, primarily for pensioners, are included in the Regulations. Is it, consequently, advisable that one Member State bears the total costs that result from the health care benefits and LTC benefits granted to pensioners of its legislation who reside in another Member State or to pensioners of other Member States who reside on its territory and also receive a pension from this State? (See the 2012 trESS Analytical Study). For example, can there be two competent Member States at the same time (at least to bear the costs of benefits)?

8. Applicable legislation

The following could be a solution for today's problems with applicable legislation (Chapters A-6, C-2 and C-3)

Currently, the applicable legislation is unique and its determination based on the place where the professional activity is performed has priority, notwithstanding the specific rules and the cases in which activities are performed in two or more Member States. As a response to the existing challenges this system of determining the applicable legislation could be subject to a number of changes:

- to reconsider the notion, included in Regulation (EC) No. 593/2008 of 17 June 2008 (Rome I), according to which the place where the activity is performed is the **place from which the employee habitually carries out his or her work** in performance of the contract; for the self-employed worker this may be the place from which the activity is carried out, or the centre of interest of his or her activity in the sense of Article 13 (2)(b) of Regulation (EC) No. 883/2004;
- the general introduction of the **notion of the activity's centre of interest**, with criteria to be defined, in order to take certain specific activities into account as well (artists, sales representatives, sportsmen *etc*) or the performance of activities in different Member States, this centre of interest thereby corresponding to the habitual place of principal activity wherever possible;
- to refer to the **notion of the closest link** of the activity to a Member State (see also Chapter D-9) in order to determine the applicable legislation in a number of specific situations, in the first place those in which employees are posted or self-employed workers post themselves, but also other forms of temporary mobility, such as intra-group mobility or teleworking or the simple fact that an employment contract in a State is suspended for a short period to perform another activity in another State under a temporary contract.

The returning element in the search for solutions for the challenges is to better take into account, in the long term, the real conditions of the activities, to make sure that the applicable legislation is that of the State of the activity's centre of interest, that of the place where the principal activity is habitually performed, or that of the activity's closest link, all of which may overlap, or even be related to each other, and to avoid that the applicable legislation changes too much over a short period of time.

With regard to the latter point, situations should indeed not only be considered at one particular moment, but above all throughout their duration, thereby taking into account their characteristics and giving a more systematic character to what is provided for by Article 14 (10) of Regulation 987/2009, which is too simplistic and not realistic enough.

Furthermore, also to fight against certain forms of social dumping, the Coordination Regulations should no longer, in their geographical scope of application, be limited to dealing with situations in which all persons concerned are present or perform their activity within this scope. Instead, primarily with regard to the applicable legislation and in the way that Article 14 (11) of the implementing Regulation already rudimentarily does, they should introduce provisions that cover situations in which all or a part of the persons concerned do not reside or are not established within their geographical scope of application, from the moment a professional activity is performed completely, partially or temporarily within this scope. Obviously, the resulting obligations would be enacted subject to international treaties which the European Union is part of in the framework of its external competences, thereby improving the coherence at the internal and external levels of coordination (see also Chapter D-3).

In addition, in order to provide elements of response towards certain challenges mentioned in points 2 and 3, it should also be considered that the Coordination Regulations no longer approach rights and obligations from a family perspective, but from an individual's perspective. In other words, they should no longer refer to the concept of family member, but only to the concept of a person with personal rights and obligations, without prejudice to the fact that these rights, under certain national legislations, are derived from the status as family member of another person. This transformation can be applied to the determination of the applicable legislation, as well as to the right to different benefits. Such an individualisation not at all undermines the rights of family members, but values them. Furthermore, it makes certain coordination mechanisms more simple and transparent (expenses), in particular with respect to health care benefits and family benefits.

Finally, the possibility should be considered to extend the dichotomy between the applicable legislation and the legislation applied to other benefits, such as health care benefits in kind provided in the State of stay or residence. For example, this could be the case for family benefits, almost all national legislations being legislations concerning residence. For general purposes, the priority rules would be inversed (activity in one State and the children reside in another), which would mean simpler situations for families and a different distribution.

9. Replacing the existing rules to define the competent Member State with the 'closest link' principle

This could be a solution for the problems of residence-based schemes (Chapter A-1), benefit tourism (Chapter A-1), LTC benefits (Chapter A-2), new situations in employment due to technical developments (Chapter A-6), effects of the globalisation of the markets (Chapter C-2) and migration (C-3)

As it is necessary to combine the rules on the free movement of workers with the internal market principles and European citizenship in order to better balance the interests of the different stakeholders of the Coordination Regulations – employees, employers and national social security institutions – future amendments of the coordination rules and the rules of conflict of law should be looked at taking into account their conformity with these general principles of EU law. This approach might lead to a new understanding of the current fundamental principles behind the conflict rules (such as their compulsory and neutral character, as well as the principle of exclusivity and their strong character) and as such requires more than a mere cosmetic adaptation of these rules.

This solution of the closest link extends the solution already presented under Chapter D-4 beyond the principle of equal treatment to all the aspects of coordination. It has to be recalled that under the most recent rulings of the CJEU granting various benefits (social security or others) depends on the question whether or not a person **has a sufficiently close link to the Member State** concerned (e.g. cases *Collins* (C-138/02), *Geven* (C-213/05), *Nerkowska* (C-499/06), or *Lucy Stewart* (C-503/09)). In principle, based on these rulings a benefit can only be denied (e.g. by applying elements which constitute indirect discrimination) if a person has not yet achieved the necessary close link. An idea

for a new way of coordination would be to take the element of the necessary close link (or in other words the necessary degree of integration into the society of a Member State) as the general principle for all questions of coordination, as this close link or integration could also have a negative aspect. If there is integration into the society of one Member State it could be assumed that there cannot be the same level of integration into the society of another Member State for the same period. Thus, the identification of the Member State with which at a given moment the closest link exists, and making this Member State the competent State under the Regulation excludes that any other Member State is also competent for the same period. This search for the Member State with the closest link would therefore have the same importance as the search for the Member State in which a person has his or her residence under today's Regulations (to recall: there can be residence only in one Member State at a given moment; residence in one Member State excludes simultaneous residence in another Member State.

In theory, switching to the new guiding principle that only the Member State to which the closest link exists could **drastically reduce the number and complexity of provisions of the Regulations**. We would need only one central Article which states this principle, and some additional Articles to guide the decision-makers how to identify this Member State (there could be a list of indicators comparable to Article 11 of Regulation (EC) No. 987/2009 concerning residence – only for cases of dispute or also for all cases). Only some additional procedural provisions (e.g. concerning benefits in kind outside this Member State or concerning administrative assistance *etc*) would be needed. However, we have to assume that such a drastic innovation is far from finding the necessary political consent. It also has to be acknowledged that such a very abstract competence provision would take away legal certainty and could give rise to much more dispute than today's clearer distribution of competences. Therefore, it would be necessary to stick to the existing system of clear rules which define competence. In the following paragraphs we try to identify some elements which could be considered in that context. As this would be – at least in some aspects – a totally new way of coordination, we cannot elaborate on all the different possibilities. Therefore, we give only some examples.

The 'closest link' principle could – without any doubt – be applied in the field of applicable legislation as well as in the field of provision of benefits (although these two fields are very much interrelated). Concerning **applicable legislation** it seems that today the solutions provided under Regulation (EC) No. 883/2004 in the vast majority of cases already correspond to the closest link principle. Usually the Member State where a gainful activity is exercised is the one to which a person has the closest link. Nevertheless, a careful examination of all cases seems to be advisable. It is, for example, evident that Article 13 (3) of Regulation (EC) No. 883/2004 does not respect this principle when self-employment is the main activity and the simultaneous employed activity is only very small and occasional one. Nevertheless, under today's coordination the Member State in which the employed activity (a little bit above the limit of being marginal) is exercised is determined as the competent State, while the closest link would make the Member State in which the self-employed activity is exercised the competent State. The same applies to cases in which activities are usually exercised in one Member State, but occasionally other activities are also exercised abroad (under the assumption that today Article 13 of Regulation (EC) No. 883/2004 is not applied, but that the Member States concerned regard this situation as consecutive cases of Article 11 (3)(a) of Regulation (EC) No. 883/2004). Such situations could concern e.g. artists with consecutive contracts, but also inter-corporate transferees who cannot benefit from the posting rule under Article 12 of Regulation (EC) No. 883/2004. Under the closest link principle, these situations would remain under the competence of the Member State where usually the activities are or have been carried out. Further details and problems with applicable legislation can also be found in the 2009 trESS Think Tank report 'Intra-group Mobility'.

Yet, immediately also the **problems of the closest link principle** become visible. Is it the intention of the person concerned which is decisive or the decision of a neutral observer based on objective criteria? Consider that a person starts his/her career in the home country and after ten years of activity there takes up a new job in another Member State for twelve months. One could say that the closest link still exists with the home country, as after these twelve months this person intends to come back and end his or her career there, while another person is convinced that the Member State of new activity is the one to which the closest link exists, because he or she intends to continue working there for the rest of his or her active life. Another issue which should be considered is whether only the situation of the employed person has to be taken into account or if also the situation of the employer is relevant. For example, an enterprise which develops computer software could say that the closest link of all employment relationships of the programmers employed by that enterprise logically is to the place where this enterprise has its registered office, while under today's coordination the place where the programmers actually perform their work (usually from their home-offices) is decisive.

For **non-active persons** the Member State of residence is very often the only centre of interest and is thus also the Member State to which the closest link exists. Still, it could be argued that in the event of transfer of 'residence' this transfer does not lead to an immediate change of the Member State of the closest link, but that such a switch takes place only after some time (when the bonds to the previous Member State of residence have to be regarded as really and definitely replaced by much stronger bonds to the new Member State of residence. It is true that already today the definition of the transfer of residence (especially the exchange of information under Article 20 of Regulation (EC) No. 987/2009) would make it possible that the residence itself is not transferred immediately the moment a person physically moves from one Member State to another (for further details we would like to refer to the work carried out by the Ad Hoc Group of the Administrative Commission on the 'habitual residence test'). However, there might be cases where the residence has already been transferred without any doubt but, still, the closest link is given to the previous Member State of residence. For these cases the switch to the closest link principle would change the existing competences under Title II of Regulation (EC) No. 883/2004.

In the context of the re-examination of the whole concept of the Regulations with a view to the closest link principle also the cases in the **grey area between activity and non-activity** have to be analysed. Persons who exercise only a very small and marginal activity in one Member State (some hours a week or even a month) while residing in another Member State for the time being have to be regarded as active persons and thus subject to the legislation of the Member State of activity and not of the Member State of residence. Applying the closest link principle could have the opposite result. In this context the questions pending before the CJEU in *Franzen and other* (C -382/13) are of relevance and it might be that the CJEU already under today's coordination gives us some answers which could be relevant for the future.

This brings us to the other part of coordination, the designation of the **Member State competent to grant benefits**. Very often this is the most important competence. This Member State could differ from the Member State competent under the provisions of applicable legislation already under today's Regulations. For instance, for pensioners the Member State competent under Title II (Member State of residence – Article 11 (3) (e) of Regulation (EC) No. 883/2004) has nearly no function if another Member State grants a pension, as this also leads to the competence of this other Member State to provide any other benefits which could be important (LTC benefits) and to bear the costs of sickness benefits in kind granted by the Member State of residence.

Also for the determination of the Member State competent to grant benefits the closest link principle could be applied. If we succeed in always giving the Member State to which the closest link exists the obligation to grant benefits would this make coordination immune against criticism by the

CJEU? Again we have to be very careful! It could happen that **for the various benefits different Member States could be regarded as the one with the closest link**. This could also lead to different solutions for the same risk between Member States depending on the way the benefits are organised. We could assume that with regard to work-related benefits, e.g. with an income replacement function, the Member State competent for that gainful activity is the one to which the closest link exists (especially if the benefit is contribution-based). On the other hand, for benefits which are granted to all residents it could be said that the Member State of residence is the one with the closest link. This immediately leads to different Member States being competent to grant e.g. child-raising benefits if one Member State grants it to the person taking care of the child and the benefit has an income-replacement function (percentage of previous earnings), while another Member State grants a lump sum to every resident taking care of a child irrespective of whether that person has been previously gainfully active or not. Under the uncontrolled application of the closest link principle in case of residence in the second Member State and gainful activity in the first, both Member States could be regarded as the one with the closest link with regard to the specific benefit, while in the opposite case neither would be competent. Therefore, it would be advisable to examine all benefits from that angle and decide for all benefits covering the same risk which Member State is the one with the closest link (covering the majority of the benefits at stake?). Unfortunately this could lead to situations where a Member State would have to grant a benefit which is not the one with the closest link in the individual case (a situation we know already today).

Anyhow, the closest link principle could be a remedy for those cases where benefits are more or less of the same type, e.g. **unemployment benefits** (maybe without any amendments to the *status quo* if we decide that e.g. for frontier workers the Member State of residence is the one with the closest link; in case we decide that the last Member State of employment is the one to which the closest link exists the whole coordination scheme would change fundamentally). Further proposals for new ways of coordinating unemployment benefits can be found in the 2012 trESS Think Tank Report 'Coordination of unemployment benefits' (we therefore have not elaborated more on unemployment benefits in this report, leaving aside the problems mentioned with regard to activation measures especially under Chapter D-2).

With regard to **special non-contributory cash benefits** (Annex X of Regulation (EC) No. 883/2004) the examination of the closest link could lead to some deviation from today's coordination. As already mentioned above in relation to applicable legislation, we could decide that for inactive persons the closest link switches only after some time from one Member State to the other. This would result in an obligation of the previous Member State of residence to continue granting its benefits before the new Member State of residence takes over. An idea which has already been developed in the 2011 trESS Analytic Study 'social security coverage of non-active persons moving to another Member State'. As this is a very sensitive issue it has to be examined from all different points of view. Especially also the **interaction** of this continued competence of the previous Member State of residence with the **Residence Directives** has to be further examined. A person moving from a Member State with relatively high Annex X benefits would easily fulfil the residence criteria in the new Member State of residence (condition of sufficient resources not to become a burden on the social assistance scheme of that new Member State of residence – e.g. Article 7 (1) (b) of Directive 2004/38/EC), while a person moving from a Member State with relatively low Annex X benefits would not be entitled to reside in the new Member State without any additional resources.

However, this principle could also be extended to other fields of benefits, e.g. **pensions**. If a person has worked in Member State A for 30 years, in Member State B for two years, and in Member State C for two years, does it really correspond to the closest link principle if pensions are paid from all three Member States as under today's coordination? We must not forget that this coordination sometimes leads to hardship in case of a divergent pensionable age or invalidity criteria. We could assume that the persons concerned would in such cases prefer that only the Member State in which the longest

career has taken place grants a pension for all the periods. This could be easily achieved with an extension of the twelve months rule under Article 57 of Regulation (EC) No. 883/2004. Nevertheless, this would immediately raise the question concerning the new duration we want to insert instead of the twelve months period. The most dramatic reform would be to always make the Member State with the longest career the competent State – but, this could be regarded as leaving the closest link principle already and would thus not be recommendable.

We must not forget that the closest link principle could also stretch to **reimbursement questions.** We think it would be in line with that principle that for pensioners the Member State in which the person concerned has fulfilled the longest period of pension insurance should be the one which has to bear all health care costs of this person (even if this person resides in a Member State from which he or she also receives a pension). These questions have already been elaborated in the 2009 trESS Think Tank Report 'Healthcare for Pensioners'.

Furthermore, the application of the principle of the closest link might also lead to new ideas about the status of third-country nationals in the national social security systems, as these persons might fulfil the same requirements.

To sum up, a switch to a closest link principle would mean a **parametric reform of coordination**. It would need further clarification how to decide on this closest link in all the different situations. Unfortunately, it cannot solve all the various problems cited above. It cannot be excluded that in some cases where a close link exists to more than one Member State, a simultaneous competence is applicable with a Member State competent by priority and another one competent to top up the benefits of the first Member State (e.g. for LTC benefits or child-raising benefits if entitlements based on a gainful activity meet benefits based on residence). Therefore, it could be considered doubtful whether coordination based purely on the closest link principle would meet the unconditional approval of the CJEU, which could take away a lot of the charm of this totally new way of coordination.

B. Living in an area of technical developments

This could be a solution for the problems stemming from the digital revolution (Chapter A-6)

If an evolution and diversification of the **rules to determine the applicable legislation** appears suitable to take into account the effects which the digital revolution has on the conditions for the performance of professional activities (see Chapter D-8), what should the response be towards the direct challenges posed by the continuous evolution of techniques concerning electronic data storing and exchange which are mentioned in Chapter A-6 above? Although the response(s) may not simply come down to regulatory changes, certain responses nevertheless seem suitable to facilitate taking the technical evolutions into account more quickly.

First, we should go back to the drawing up of the new Coordination Regulations, which was done in two long and separate periods, and remember that Regulation (EC) No. 883/2004 does not provide for electronic data processing, but limits itself to a sentence in Article 78 (1) to in some way postpone the question to a later point in time and make it a matter for the Member States and not for the Union and the Member States.

1. Making the Regulations a more guiding and strict instrument

Biting the bullet, implementing Regulation (EC) No. 987/2009 indicates to the contrary that **electronic data processing** is a current matter and a matter of the Union as regards coordination (*cf* Article 4 (2)). However, for electronic data transmission no further elements are laid down (neither

objectives, nor characteristics), as this task is passed on to the Administrative Commission lock, stock, and barrel (*cf* Article 4 (1)). Furthermore, a transitional period prior to the setting up of exclusively electronic data exchange is provided for (*cf* Article 95), which again postpones the matter to a later time (if the basic Regulation had straightaway started the necessary work to set up a network for the exchange of data, the required transitional period could have lied completely before 1 May 2010 and the change to the Regulations could have been already combined with a change of the means of transmission).

Of course, the past is not to be reconsidered, but it is useful for the future that the two Regulations be amended in such a way that the **basic Regulation already clearly determines that exchanges of data must be done electronically**. The Regulations should also lay down the objectives, nature and main characteristics of the network(s) to be set up and used (details and management are left up to the implementing bodies), thereby completely encompassing online data exchange and direct consultations of databases of partners and, for the users, allowing room for the **most modern data carriers and communication tools** (smart cards, but also mobile phones, smartphones and soon online wristwatches *etc* – it is an open list). To be laid down clearly as well are the Member States' obligations, not only during the setting up and organisation of the network(s), but also with regard to the adaptation of their internal information systems and with regard to making necessary data available.

Electronic data exchange must keep the application of the Regulations up to date. This goes far beyond today's way of thinking which still persist in the building of EESSI and which concerns – unfortunately – a paper exchange of information. It is strongly recommended to abandon this concept and think also about the **needs of citizens and today's administrations**, which are based also on the necessity to provide online information (which has not been yet elaborated under EESSI). We think that e.g. immediate control (also by inspection services) if a person found working in another Member State is actually insured in the 'posting' Member State (via an online control of the insurance status) or a corresponding check of EHIC holders should become a priority issue of EESSI.

2. Making the governance structure of EESSI more effective

Another aspect would be to **clarify and facilitate the decision-making** and to reduce delays in this decision-making within the appointed managing bodies, which for years have been the Administrative Commission, the Technical Committee and the Steering Committee. The Technical Committee, whose role – defined by the basic Regulation – is rather vague, has not yet shown its effectiveness. This level, at which at best the Steering Committee's work has been duplicated, should be re-evaluated by the Administrative Commission. The new governance structure which follows from the installation of the new Executive Board is from our point of view a good step forward. It will be of utmost importance that all the bodies involved know exactly which one has to take the necessary steps and is also liable for these decisions. Also the role of the major national institutions competent in their Member States for the establishment and implementation of the European data exchange system has to be respected during this critical phase of the project.

C. Institutional and legislative developments

Finally, we want to propose some technical amendments which do not concern the content of the rules for coordination, but the way they are made and how they can be made more transparent and visible.

1. Changing the decision-making process to speed up legal changes

The following could be a solution for the problems stemming from the slow decision-making process (Chapter B-2)

It is clear that questions concerning fundamental changes (e.g. a new coordination for LTC benefits) cannot avoid the existing lengthy procedure (impact assessment by the European Commission and co-decision with European Parliament). All stakeholders involved have to be aware that quick reactions to newly evolved situations are not realistic. Therefore, it could be wise to **strengthen the position of the Administrative Commission** to solve as many interpretative issues as possible via Decisions with a new commitment of all Member States to act in accordance with these Decisions.

This cannot solve all problems, as in **procedural questions** (especially data exchange between institutions) there will be cases in which quick reactions of the legislators are needed and decisions of the Administrative Commission might not be sufficient. For these issues, lessons could be learnt from the changes of some Annexes for which Article 92 of Regulation (EC) No. 987/2009 is the legal base for corresponding Commission Regulations. Experiences show that this tool allows quick reactions without unnecessary red tape. It could be assumed that also all questions related to procedural questions – as these questions are not highly political – would allow the creation of a legal basis for a Commission Regulation to change and adapt the relevant provisions of the Regulations. Ideal for that purpose would be a new splitting of the two Regulations (EC) No. 883/2004 and 987/2009 into two instruments, one containing the legal provisions and one containing the merely procedural and technical provisions. This would also necessitate that some of the provisions today contained in Regulation (EC) No. 987/2009 (e.g. the definitions under Article 14 for applicable legislation or the provisions on child-raising periods in Article 44) have to be transferred into the 'legal' instrument. As this does not seem to be realistic, another solution would be to create a new provision (corresponding to Article 92 of Regulation (EC) No. 987/2009) which enumerates the provisions which can be amended by a Regulation of the European Commission.

Another, more daring solution would be to drastically change the existing legal technique of coordination (which consists in many detailed and directly applicable provisions) into a more flexible text. It does not seem to be excluded that coordination is performed via a **European Directive** instead of a European Regulation. Directive 98/49/EC on occupational pension rights for migrant workers (based also on Article 48 TFEU) or Directive 2011/24/EU on patient mobility (based on Articles 114 and 168 TFEU, but dealing with issues very comparable to the ones covered by Regulations (EC) No. 883/2004 and 987/2009) could serve as an example. In such a case the European legislators would only have to focus on the general leading principles (which could be more sustainable) and the national legislation would then have to implement these principles into national legislation and also react to changes of the situation. However, before taking such drastic steps, it would be recommended to carefully examine all possible effects which such a switch to Directives might have. One big disadvantage could be that the homogeneous application in all Member States is thus lost and that the situation of migrating citizens would depend much more on the Member States involved than today.

2. Summarising all the different legal acts in only one legal instrument

The following could be a solution for the problems stemming from the coexistence of different EU legal acts (Chapter B-1)

Our analyses have shown that more and more different legal instruments deal with aspects that are directly linked to the coordination of social security. We suggest to bring all these instruments together under one roof to safeguard transparent legislation that is also easy to find and to understand for the citizens.

To start with, the most ambitious *desideratum* would be to make such a comprehensive instrument that also no longer would there be room for the **direct application of the TFEU** itself. From a legal clarity point of view this direct application of the TFEU principles next to the clear rules of the Regulations (e.g. *Petersen* (C-228/07), concerning export of unemployment benefits, or *Hudzinski and Wawrzyniak* (C-611/10 and C-612/10), concerning applicable legislation) is not the best solution. However, we have to be realistic and admit that we will never achieve such a perfect wording of the Regulations. Therefore, the CJEU will always examine any provision of secondary legislation in the light of the TFEU and there is always the danger that some provisions are declared invalid or that the CJEU directly applies the TFEU apart from the Regulations.

An important step towards more clarity would be to bring the reimbursement and treatment aspects of **Directive 2011/24/EU on the application of patients' rights in cross-border healthcare** under the roof of Regulation (EC) No. 883/2004. Thus, the interaction between these obligations and the possibilities to receive health care in another Member State under Regulation (EC) No. 883/2004 could become more transparent. Also some of the problematic aspects caused by the parallelism of the two instruments could be ironed out. Naturally, the first evaluation phase under Article 20 of the Directive has to be awaited; but, should this evaluation result in amendments to the legal framework, this should be regarded as an option.

Another issue that is governed by more and more legal instruments is the **equal treatment of third-country nationals** falling outside the personal scope of Regulation (EC) No. 883/2004. If they can show cross-border elements within the EU, Regulation (EU) No. 1231/2010 directly applies to them. If this cross-border situation is lacking, various Directives apply and provide for equal treatment obligations. As an example the following provisions can be cited: Article 11 of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, Article 12 of Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research, Article 14 of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, Article 12 of Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State. The new Directives on inter-corporate transferees, on seasonal workers and on third-country nationals migrating for the purpose of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing add to this list. All these different Directives do not safeguard a harmonised picture. Differences exist e.g. concerning the material scope of the equal treatment obligation. For the sake of legal clarity and transparency it would be good if all these aspects could be brought under the roof of Regulation (EU) No. 1231/2010. This could be achieved if – for equal treatment purposes – the condition of cross-border elements within the EU is waived and – if necessary – the concrete conditions and limits for equal treatment for third-country nationals legally working in a Member State are provided in a harmonised way. Naturally, the legal base for such an approach has to be examined.

The following could be a solution for the missing bridge between instruments to fight fraud and error (Chapter A-3)

Finally, a concentration of **all social security related fraud and error issues** in one legal act or at least in one platform with the additional legal framework is desirable. I would especially be necessary to deal with the question which national authorities are allowed to use cross-border social security information under what circumstances. For example, the purposes for which the A1 form can be used should be fixed at European level to avoid excessive use in fields other than social security (e.g. under migration law or national law to combat undeclared work, where in some cases a posted worker who does not have an A1 with him or her when entering a building site abroad could be punished and national authorities could prohibit him or her from entering this building site, although for social security purposes such harsh measures are not allowed – see e.g. Article 5 of Regulation

(EC) No. 987/2009). In this context also the electronic access to information should be further examined (see also Chapter E-1). Up until now EESSI is only meant for social security institutions, so it is not possible for authorities outside the framework of these institutions to access it. Nevertheless, such data exchange beyond social security could be a very useful tool for the overarching combat against fraud and error. It could be recommended to further examine the legal framework for such trans-social security issues.

ANNEX

OVERVIEW OF trESS REPORTS PUBLISHED UP UNTIL NOW:

2005: trESS European Report
2006: trESS European Report
2007: trESS European Report
2008: trESS European Report
2008: trESS Think Tank Report 'The relationship and interaction between the coordination Regulations and Directive 2004/38/EC'
2008: trESS Think Tank Report 'Towards a new framework for applicable legislation'
2009: trESS European Report
2009: trESS Think Tank Report 'Intra-group Mobility'
2009: trESS Think Tank Report 'Healthcare for Pensioners'
2010: trESS Special European Report 'Preparations for the application of Regulations 883/2004 and 987/2009'
2010: trESS Think Tank Report 'Analysis of selected concepts of the regulatory framework and practical consequences on the social security coordination'

- Assimilation of Facts
- Long-term Care
- Members of Family
- Residence
- Child-raising Periods

2010: trESS Think Tank Report 'Healthcare provided during a temporary stay in another Member State to persons who do not fulfil conditions for statutory health insurance coverage'
2011: trESS European Report
2011: trESS Think Tank Report 'Coordination of Long-term Care Benefits – current situation and future prospects'
2011: trESS Analytic Study 'Social security coverage of non-active persons moving to another Member State'
2011: trESS Report 'Statistics for the evaluation of the Coordination Regulation'
2011: trESS EHIC Report
2012: trESS Special European Report 'The Coordination of Benefits with Activation Measures'
2012: trESS Think Tank Report 'Coordination of Unemployment Benefits'
2012: trESS Analytic Study 'Legal impact assessment for the revision of Regulation 883/2004 with regard to the coordination of long-term care benefits'
2012: trESS EHIC Report
2013: trESS EHIC Report