

## **Part I : Short introduction to the European Coordination of social security schemes**

**This short text aims to provide its readers with a simplified introduction into the theory of social security coordination and the coordination instruments of the European Union. It describes the basic philosophies on which social security coordination is based, especially the aims of social security coordination, the rationale and how it is achieved. This description also provides an overview of the principles of coordination and basic coordination. The text of the coordination regulations and links to relevant European Court of Justice (ECJ)-rulings can be found under the “European resources” section. Selected national case law and national bibliographies relating to social security coordination are stored in the “National resources” section.**

**For questions and answers concerning social security coordination, the reader is referred to the 2nd part of this e-learning module (“Keywords”).**

### **Why is coordination needed ? The territoriality of social security and migrants**

Social security is essentially a creation of national law. The amounts of benefit, conditions of entitlement and duration of payment within social security schemes are determined by national law. These schemes are administered by national bodies governed by national rules and regulations. The scope of social security schemes is therefore traditionally confined to the nationals or the territory of that particular State.

The territorial nature and diversity of social security can cause problems when people migrate from one State to another.

### **The goals of the European Union**

From the start of the European Economic Community (EEC) in 1957, the free movement of persons is considered to be one of the basic principles of the Treaty of Rome. Together with the free movement of capital, goods and services, it still constitutes the cornerstone of the European Union.

Free movement of persons implies that within an internal European market each citizen has the right to travel to another Member State of the EU to work, to look for work, to study or to go on holiday. However, the free movement of persons faces some restrictions. Apart from some “natural” limitations, such as cultural problems, linguistic barriers or differences in standard of living, people can also be confronted with obstacles which are the result of differences in national legislations, in particular in the field of social security.

The drafters of the Treaty of Rome were well aware not only that social security systems in the Member States of the EU differed to a large extent but also that the rules governing social security were applicable only on the territory of each Member State and that this situation was liable to create impediments for the free movement of persons.

Mobility of persons would remain an illusion when workers leaving their country to work in another EU country would lose – completely or partly – their social security rights of the

State they are leaving or when they would not be able to obtain benefits in the State where they go to.

In addition, one has also to take into account the recent developments regarding EU citizenship, according to which every EU citizen has the right to move and reside freely, subject to certain conditions and limitations, on the territory of the Member States of the European Union.

### **The legal instruments available: the European coordination of social security rules**

For the reasons set out above, the European Treaty provides since its origin in 1958 that the Council of Ministers, the legislative body of the Community (later joined by the European Parliament), with unanimity of votes, must take those measures that are necessary in the field of social security for improvements of the free movement of persons. The Council of Ministers did so as one of the first measures ever taken by the European Economic Community; already on 1 January 1959, Regulations Nrs. 3 and 4 on social security for migrant workers entered into force.

On 1 October 1972 these regulations were completely revised and replaced by Regulation Nrs. 1408/71 and its implementing Regulation 574/72. Since 1971 these Regulations were the subject of several amendments in order to accommodate trends in national legislation and progress resulting from the rulings of the Court of Justice.

On 1 May 2010, a new set of regulations, Regulation 883/2004 and its implementing Regulation 987/2009 became applicable. Without changing it dramatically, the new regulations modernise and in some cases also simplify the EU framework for social security coordination.

The overall objective of these Regulations is to install a coordination of the various social security systems in the European Union. Rather than to harmonise the different national regulations - which would mean creating a common European system of social security – these Regulations build bridges between the national social security schemes; the national schemes are linked together, so as to prevent people moving within Europe from losing out on social security rights on account of their moving.

These Regulations therefore leave intact the competences of the national Member States to determine the principles and rules of their own national social security systems. This means that the different national legislators remain competent to determine who is insured, which benefits are provided and under which conditions, how benefits are calculated and how long they are provided, as long as there is no discrimination between citizens of the European Union. This means that national rules will, in principle, not be substituted by the European rules in these domains. For example, the level of pensions, pensionable age and the determination of invalidity remain within the competence of the national legislator.

These coordinating instruments only apply in situations where there is some cross-border element. Coordination is aimed at guaranteeing that someone who wants to go to work in another Member State does not lose his/her social security rights due to provisions applying

in other social security systems. In addition, its goal is to prevent migrant workers from being treated unfairly in the field of social security in comparison with persons who have worked all their lives in one and the same Member State. Conversely, coordination, and European internal market law in general, does not apply in situations which are wholly confined within a single Member State.

### **The four basic principles of social security coordination**

Four basic coordination principles are used in order to protect the social security rights of migrant persons and to remedy the problems created by the territoriality and diversity of national social security systems.

These four basic principles are:

- **Determination of the applicable legislation and a single legislation applicable**

In cross-border situations it could happen that a migrant person is either simultaneously subject to two legislations, or that s/he is not subject to any legislation at all. This is a consequence of the fact that the national legislators remain competent to determine the conditions under which someone is insured or not. In some countries one has e.g. to reside in order to be subject to the social security legislation. In other countries one has to work. Without coordination the application of these different criteria would lead to legal conflicts. Imagine the case of somebody who lives in Belgium, where working is a criterion for being insured, but who works in the Netherlands, where residing is the criterion. This person would be subject to no social security legislation at all and would therefore have no entitlement to benefits. In Belgium, s/he is not insured, because s/he is not working there and in the Netherlands s/he is not insured, because s/he is not living there. This is referred to as a negative legal conflict. Conversely, if that person works in Belgium and resides in the Netherlands, s/he would fulfil the conditions of both legislations and s/he would be simultaneously insured in both countries, which implies having to pay contributions twice. This is referred to as a positive legal conflict. These legal conflicts are impeding the free movement of persons and can be avoided by stating that the law of only one State should apply at the same time and by establishing a rule or set of rules to decide which law it should be. That is the reason why the Regulation contains conflict rules, determining the applicable legislation. A migrant person will therefore only be insured under the legislation of one Member State, to the exclusion of other national legislations. In general, an employed or self-employed person is subject to the country of employment, even if s/he lives in another country. It is in this country that s/he has to pay contributions, and it will be this country's institutions that in principle will pay the benefits. As to any rule, some exceptions are provided for.

- **Equal treatment or non-discrimination**

A second important principle of European social security law is the prohibition of every discrimination between persons on the basis of nationality of an EU or EFTA (Switzerland/Liechtenstein/Norway/Iceland) Member State. Migrant persons might in the new country of employment or residence be confronted with legislations that contain discriminatory provisions on the basis of nationality. National legislation

might provide for stricter conditions of application for foreigners. The principle of equal treatment prevents States from treating foreign nationals less favourably than their own nationals. The Regulation provides that all persons to whom it applies enjoy the same rights and have the same obligations under the social security legislation of any Member State as the nationals thereof.

- **Aggregation of periods**

A third principle is the right to preserve social security rights in the course of acquisition. In many legislations, the right to obtain a benefit is dependent on the condition of having fulfilled a certain period of insurance, (self-)employment or residence under the legislation concerned. If someone wants to obtain a benefit, s/he should have paid contributions during a certain period in that country or have been working or residing for a certain period. Such qualifying periods can be very detrimental for migrant workers. The danger is that when persons move from one State to another they will lose the credit they have gained for periods completed in their former State. This could be very harsh indeed for those who wish to move to another country after they have already been employed in their home State for a long time. Without the principle of aggregation, it could happen that someone who has worked in several Member States during his/her career would not fulfil the qualifying period in any of these States, and as such would be left without entitlement. The insurance period, which s/he has fulfilled in one of these countries, would only give right to benefits if s/he would have been insured there for the whole of the qualifying period. This is especially the case for the acquisition of the right to a pension. To counter the negative consequences of such rules, the Regulation provides for the aggregation of periods. For obtaining a right to a benefit, the institution of a Member State has to take into account periods of insurance, work or residence fulfilled in (an)other Member State(s). The periods completed in (an)other Member States are considered by the institution from which a benefit or affiliation is claimed, as if those periods had been completed under its legislation. Through this principle migrant workers can obtain certain benefits (e.g. pensions), regardless of changes or even interruptions in their international career.

- **The exportability of benefits**

A fourth important principle is the right to preserve social security rights that one has acquired within the European Union. Another way to describe this principle is the possibility to export social security benefits. Many national legislations require as a condition for the payment of benefits that the person resides in the territory of the State concerned. Such national provisions can be very detrimental, in particular for migrant workers. Consider the case of a migrant worker, who has worked all of his/her life abroad, who acquired the right to a pension and decides at the end of his/her active life to return to his/her country of origin. In that case s/he might lose his/her acquired rights. This would imply that citizens of the European Union would, as a matter of fact, be compelled to stay all their life in one and the same country if they want to get social security benefits. This is clearly an impediment to the free movement of persons. For this reason, the Regulation provides that “cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or

confiscation on account of the fact that the beneficiary or the members of his/her family reside in a Member State other than that in which the institution responsible for providing benefits is situated". The case law of the Court of Justice has widened the scope of this provision, by determining that the free movement of persons not only requires that benefits can be "exported", but also that one may not be denied the right to a benefit on the grounds that one is living in another State. In that sense, residence conditions are in principle always forbidden, not only when they are a condition for the payment of the benefit, but also when they are a condition for obtaining the right to a benefit. However, EU law contains some exceptions to the principle of exportability of benefits.

### Persons concerned

The large majority of Europeans are covered by the Regulation. Regulation 883/2004 applies to persons who are either nationals of an EU Member State or who are stateless persons and refugees, if they reside in a Member State and if they are or have been subject to the social security legislation of one or more Member States. This means that, if you are a Union citizen who resides in the EU and who is insured in a Member State, the regulation is applicable to you.

The family members and the survivors of the persons in the previous category are also covered, irrespective of their nationality, as well as certain other survivors.

Nationals from Iceland, Liechtenstein and Norway are covered via the European Economic Area (EEA) Agreement. On 1 June 2002, the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons was signed, so that the coordination rules also apply in relation to Switzerland. Since June 2003 third-country nationals as well as the members of their families and their survivors can rely on the EU provisions on coordination of social security, provided they are legally resident in the territory of a Member State and are in a situation which is not confined in all respects within a single Member State.

### Risks covered

Regulation 883/2004 lists the social security benefits covered by the Regulation. These largely correspond to the general traditional risks of social security:

- sickness benefits;
- maternity and equivalent paternity benefits
- invalidity benefits, including those intended for the maintenance or improvement of earning capacity;
- old-age benefits;
- survivors benefits;
- benefits in respect of accidents at work and occupational diseases;
- unemployment benefits;
- family benefits;
- pre-retirement benefits.

Please note that:

- Regulation 883/2004 only covers statutory social security schemes; occupational social security schemes, established by collective agreement, are not covered (apart from some exceptions);
- Regulation 883/2004 applies regardless of whether the benefits are contributory or non-contributory;
- Regulation 883/2004 applies irrespective of whether the benefits are provided generally or only in certain sectors or for certain categories of persons.

In general, social assistance does not fall within the scope of Regulation 883/2004. What should be understood under social assistance is not very clear. One could however conclude that a benefit is social assistance and therefore excluded from the application of the Regulation if:

- it is discretionary; or
- it is a benefit which is general in nature, which implies that it covers the risk of general need and grants a minimum income to all citizens.

### **Specific coordination rules**

Apart from these four big principles Regulation 883/2004 also has a number of provisions that take into account the specific needs of certain categories of persons, such as frontier workers and seafarers. They also contain provisions taking into account the different characteristics and peculiarities of national legislation.

A large part of the Regulations is dedicated to specific provisions dealing with the coordination of the various branches of social security, such as sickness benefits, family benefits, pensions, unemployment benefits etc. A well-known example in the field of sickness is the provision – relied on by millions of people every year – according to which insured persons can obtain medically necessary health care during a stay in another Member State.

The coordination is a difficult and technical matter and it will remain so in the future. The basic reason is in particular the important number of differences between national legislations and the complexity of these national rules to be taken in account each time there is an international situation. However, the Regulations managed to take away the most important impediments for migrant persons in the field of social security and, in so doing, to help guaranteeing the free movement of persons. As such, these Regulations improve those aspects of national legislation that could impede cross-border movement. In this sense they guarantee for migrant workers a continuous social protection coverage while circulating in Europe.