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EXECUTIVE SUMMARY

A. Introduction

The Coordination Regulations 883/2004 and 987/2009 are two of the most important European legal instruments that contribute to the realisation of the fundamental aim of free movement. Over the years, the phenomenon of free movement has developed from a Europe with a clear economic labour market perspective into a closer social union based on an individual citizen's perspective, in which European citizens are looking for optimal social protection. The European Coordination Regulations have contributed to realising these perspectives and still do so. During the more than 50 years of history of social security coordination, these Regulations had to be adapted at several intervals, on the one hand due to developments on a national level, e.g. the introduction of new social security benefits and internal modifications of these national systems, and on the other hand due to several new rounds of enlargement of the European Union and new developments on a broader European level. Especially in this last domain, we see that basic principles of EU primary law, such as the free movement of workers and services as well as European citizenship etc, are increasingly influencing and intruding on the Coordination Regulations.

This growing interference demonstrates that we should see the Coordination Regulations as one of the several instruments dealing with the social protection of migrant workers, and that we should accept that EU citizens are relying and will rely on other EU instruments and principles. In that respect, the Coordination Regulations do work within a wider environment of a globally growing social European Union.

The key objective of the last major modification of the European Coordination Regulations through the adoption of Regulations 883/2004 and 987/2009 was exactly to find solutions to common problems, to modernise new regulations and simplify them, and to adapt these provisions where they were considered less effective.

However, like all legal instruments the Regulations must be constantly adapted to new challenges that might occur in the near future. While some of the challenges encountered today are not new, as we already dealt with them in the past, others might be expected to or take place in the next years.

The trESS national reports are empirical and analytical and focus on the daily problems with implementing the Regulations in the different Member States. The present report sets out these problems encountered by administrations and citizens. It is based on information gathered from literature searches, interviews with the different stakeholders involved in the implementation of the Regulations, some national seminars, as well as case law at the national level.

The objective of this report is to enumerate certain challenges currently faced at a national level, which might give us an indication for the need of – at least reflection on – further possible modifications of the current regulatory framework.

Several of these challenges are not new. They already existed in the past and were as such also described in several of our previous reports. Nevertheless, one should not lose sight of the fact that some of these developments will even require brave decisions about rather fundamental changes to the current rules and general principles behind the Coordination Regulations.

A new element introduced in this report are Member States' reactions to some of the most recent, significant cases of the Court of Justice of the European Union (CJEU). Do Member States take into account these cases which often deal with situations in other Member States, and do they question their possible impact? Several national reports mention that they do not face particular implementation problems, either because the coordination rules are complied with or because the situation dealt with by the CJEU is considered too peculiar, too different from the national social security systems. From time to time, some Member States however underline the impact of a certain CJEU case on their social security system. Nonetheless, one might from time to time get the idea that the impact which CJEU cases might have on national social security systems is not always investigated or studied.

B. General cross-cutting issues

The different problems of implementation will be further discussed in detail in the following chapters. However, at this stage we will try to answer the question to what extent some more general cross-cutting issues could already be identified. The national reports again confirm and emphasise the important role the Coordination Regulations are playing in the protection of migrant workers. They are an effective instrument in achieving the objective of free movement. Of course, this does not exclude possible issues or inconsistencies, as some of the national reports clearly show.

The reasons for these problems are diverse. Some might stem from Member States' non-compliance with the EU Regulations, while others are basically the result of the constraints, be they political or practical, of a system of coordination. As is clear from the name of the Coordination Regulations, they only aim to coordinate systems of social security. This is the strength, but at the same time the weakness of these European instruments. The coordination of national social security systems evolves in a dynamic and constantly changing environment in which European citizens are moving. It is therefore always at risk of being overtaken by reality. In order to reflect this general view on the problems referred to in the national reports, we would like to emphasise the following two general issues: the changing national environment and the changing European environment.

1. The changing national environment

The first regulations were adopted when there were only six Member States and a relatively limited number of social security schemes to be coordinated. Fifty-five years of history of the Coordination Regulations have shown us that these regulations are able to adapt themselves not only to encompass the different particularities of and differences between these systems, but also to integrate new kinds of systems resulting from the different enlargement processes. Several of the challenges encountered are already well known.

One clearly important and perhaps even growing challenge is connected to the description of the Regulations' material field of application. We all know that the Regulations follow a formalist approach to social security by demarcating their scope as objectively as possible, providing a list of nine risks and benefits to which they apply. The development of new benefits always challenges this enumerative list of risks. If new benefits are to fall within the scope of the Coordination Regulations, it is crucial to be able to link these benefits to one of the nine risks and to delineate the borderline

and the distinction between these different kinds of risks and benefits. For every new benefit introduced at national level, its classification poses problems. This challenge is not new, but despite clarifications provided by the CJEU in many cases, defining the scope remains a source of difficulties for several administrations. Activating people is becoming a characteristic of social security with often a double perspective: in the first place it allows social security to play its preventive role, but in the second place it may also be used as a kind of sanction mechanism to exclude people from social security. In several systems various actions can be found that aim to facilitate persons' return to the job market (activation measures), like training, skills evaluations, etc, a trend that is reinforced by the economic crisis. Measures related to activation and rehabilitation will often balance or move between sickness, invalidity and unemployment benefits. An additional issue is the boundaries of the Coordination Regulations increasingly being tested. There is a growing number of non-statutory benefits based on, for example, contractual (collective bargaining) arrangements. This may cause problems, since non-statutory benefits do not fall within the material scope of the Regulation. At the same time, however, an important discussion remains about benefits located in the border area between exportable and non-exportable benefits. This is often related to questions about classifying certain benefits as social advantages that fall outside, at least, the Coordination Regulations. The current fear of social tourism feeds this debate. This borderline issue between hybrid benefits, social security benefits and social assistance benefits falling outside the scope of the Regulations therefore remains a challenge. However, several reports also show the growing problem of keeping social assistance excluded from the Coordination Regulations' material scope of application. What differentiates these social assistance benefits from other social security benefits? A somewhat related issue is the problem of long-term care benefits. This issue is still unsolved under the new Regulation, but it is currently fully recognised on a European level as a sector in need of a better coordination mechanism. There is indeed a growing recognition that an ingenious solution is necessary, as the classification of these benefits as sickness benefits in kind is far from convincing. Several reports state how difficult it is to define which of their national benefits could be considered as long-term care benefits, and even how difficult it might be to describe some of these benefits as social assistance benefits.

The economic crisis presents another challenge, as it might increase the differences in wages and benefit levels between Member States. This in combination with increased ability to move between Member States accentuates benefit tourism and the fear that citizens of 'poorer' Member States will try to move to 'richer' Member States and become entitled to higher benefits there. Consequently, this phenomenon is considered as a real threat, irrespective of the numbers involved, which causes Member States to put more and more emphasis on the fight against fraud and error. In nearly all Member States, budgetary resources to finance the social security schemes are being reduced, leading to a growing interest in control mechanisms that should prevent persons who are not considered to belong to a national solidarity circle from being in a position to claim benefits in the country concerned.

Another challenge is related to groups of persons. One interesting issue are the clear changes that are taking place in the group of migrant workers. Not only have we noticed that in the last decades migrant workers have become highly fragmented and extremely mobile, but more and more people are migrating as well. This is partly because of cheaper travelling possibilities, but also because the group of migrant workers is broadening. Another group of concern are non-active persons. The interpretation concerning active and non-active persons within the meaning of the Regulations and the rights of the latter remains a troublesome issue. Although their status has been considerably

clarified within the Coordination Regulations, in several Member States in particular the relationship between Regulation 883/2004 and Residence Directive 2004/38 is the subject of debate. It is so that the migration of non-active people has led to divergent reactions in the Member States, some of which adopt a rather anti-mobility, whereas others have a more pro-mobility approach. This debate also raises questions about the solidarity circles of national social security systems and about who could still be excluded from the personal field of application of these benefits? Special attention should furthermore be paid to the status of family members and children in the light of new forms of family. An issue related to this is the individualisation of rights, where the traditional concept including the breadwinner and the rest of the family seems to be switching to a greater individualisation of rights or the splitting of benefits in favour of the person concerned. Clearly a sensitive issue for many European countries is furthermore the status of third-country citizens, in particular in relation to situations where third-country nationals have fulfilled insurance periods in several Member States.

An issue resulting from the migration of this broader group of people is the growing pressure to apply EU law to the intra-state context. More and more, the boundaries of the fundamental principle that European Union law does not apply to intra-state arrangements are narrowing. However, lifting this long existing principle would lead to several practical administrative issues, as well as more fundamental questions.

2. The changing European environment

One of the main objectives of the modernisation and modification of the Coordination Regulations by Regulations 883/2004 and 987/2009 was to solve some of the well-established application problems known since many years. To what extent have these modifications contributed to solving the difficulties in implementing the Regulation and has the introduction of some new concepts or rules led to a smoother implementation of these regulations?

We have already mentioned that the European Report slightly reflects the ambiguity of the national reports. Indeed, some problems reported are sometimes related to new concepts or new rules, whereas the national reports also regularly mention problems that were already known before Regulation 883/2004 entered into force and that seem to remain, even if the entry into force of the newly adapted rules has partly modified the nature of the problems encountered.

In this respect, it might not come as a surprise that e.g. the distinction between occasional care and planned care unfortunately keeps causing problems. This is regrettable, as it endangers such an important issue as the right to medical care for people staying abroad. It is remarkable that several reports mention the functioning of the EHIC to remain a subject of debate. The same goes for the relation between the provisions of the Coordination Regulations and Patients Directive 2011/24, which is currently (in the process of being) implemented in the different Member States, which also remains an area of concern. The reports do mention several problems related to the implementation of this Directive. Traditional elements like the distinction between social security, social assistance and special non-contributory benefits and the way the national social security legislations should be classified under the Regulations and their different chapters were and still are a point of discussion and debate. Similarly, recurrent problems of awareness related to the rules on applicable legislation are reported. Several reports mention that employees (and self-employed persons) working on the territories of two or more Member States are often unaware of the applicable legislation and rules.

Furthermore, concepts such as substantial activity, marginal activity, or the difference between activities in two Member States on the one hand and posting on the other hand, are often reported as another problem. As already mentioned, the classification of new benefits within the risks enumerated in the Regulation remains a source of difficulties. The uncertainty about the benefit classification is reported to be at the origin of problems of exportation of benefits. Even though the new regulatory framework has introduced new provisions and concepts in the field of e.g. health care provisions and pensions, priority rules and family benefits, and overlapping of family benefits, national reports still mention administrations having difficulties implementing these provisions. For this reason, a call for a further clarification of concepts and rules under the Regulations is still heard.

Another category of problems often encountered rather seems to be related to the practical application of the provisions by the administrations, not least when calculating the benefits. The calculation of different kinds of benefits is prominent in the national reports. For sickness benefits in cash, difficulties with the calculation are mentioned with regard to very short temporary employments, in particular when the income is to be taken into account. The calculation of old-age benefits is still problematic when an insurance record includes periods in the EU and in third countries. A similar problem with respect to income can occur when calculating unemployment benefits. Yet, apart from these problems with the more technical provisions of the Regulations, also more basic principles raise concerns. This is very clear with respect to the fundamental principles under the Regulation, such as the principle of aggregation of periods and of equal treatment. These principles and their boundaries have already been put in a new light. Several national reports question to what extent the principle of aggregation has to be used and if aggregation can take place without lastly having fulfilled a period of insurance in the competent State. There is indeed a growing debate about a kind of unconditional aggregation principle further limiting the sovereignty of national legislators. The same concern exists in the field of equality of treatment and its related new concept under the Regulation of assimilation of facts and events. Although the principle of non-assimilation of facts is a logical consequence of an evolution of CJEU case law, the principle itself is looked at with a lot of interest, but also with scepticism.

The smooth application and exchange of data and information is of paramount importance to a good coordination of social security benefits. However, several reports still mention administrative problems. These might be related to long delays in other countries' responses, or to unjustified administrative obstacles and excessive delays with regard to claims or problems in obtaining reliable data. It is indicated that this makes the claimant's existence rather uncertain. Slowness or a lack of accuracy, or the federal organisation or the amount of domestic institutions are considered additional challenges. So, not only is there often a slow exchange of information between countries, but slow internal procedures often also make it impossible to issue forms within a short period of time. Special attention could be paid to some information not being exchanged, as some data seem to be personal data and an exchange would lead to a breach of data privacy protection rules. This is a matter of increasing concern.

Nevertheless, the reports do not only mention problems and issues concerning the implementation and application of the Regulations. They also describe some good practices. For example, some national administrations have developed separate application forms for employees and for self-employed persons applying for an assessment of their cross-border situation with respect to the rules of applicable legislation. The data on these forms allow, after verification by the administration, an evaluation of the fulfilment of all provisions as regards the Regulation as well as the decisions of

the Administrative Commission and the CJEU case law. Other countries have for example emphasised that, due to special training given to certain officers, several problems of application have decreased. This was particularly so for a special training related to the application of the transitional provisions as laid down in Regulation 883/2004. To the same extent, the issuing of internal instructions was seen as resulting in good administrative practice.

The set-up of national procedures can also be given as an example of a growing trend. Indeed, in several countries national administrations have developed procedures on a national level, outside and next to the existing procedures on a European level, either to further improve and make the implementation of the Regulation provisions smoother or, to the contrary, in order to better control the abuse of the coordination provisions, without waiting for further initiatives on a European level.

One of the most burning issues often mentioned in the reports is, as already indicated above, that the Regulations are no longer the only instrument dealing with the social security for migrant workers, as also other areas of European law encroach on it. The relation between the Coordination Regulations and other EU secondary instruments that deal with the protection of migrant workers, e.g. Patients Directive 2011/24 and Residence Directive 2004/38, are therefore not surprisingly often mentioned as a source of difficulties. The fact that these different European instruments also use different concepts complicates the application of the Regulations and may lead to more legal uncertainty, which could even endanger the rights and protection of the European citizens. EU primary law very prominently influences the fundamental principle of the applicable legislation. 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 No. 883/2004. This State may, as a consequence of CJEU case law, under certain circumstances now become obliged to grant social security benefits, which as such adds an additional floor of social security protection to migrant citizens. This basically questions some of the long standing principles of EU coordination and might perhaps lead to some far going discussion on possible modifications of the regulatory framework. However, not only the relation between the Coordination Regulations and other EU instruments raise problems. Several reports have highlighted difficulties related to the combination of coordination rules and bilateral agreements. Last but not least, we should mention the relation between the Coordination Regulations and taxation issues, which will become more and more important. Only contributions (levies earmarked for social security purposes) are coordinated under Regulation 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. The question that will have to be answered is to what extent the way countries decide to fund their social security system should interfere with the application of the coordination rules.

SHORT GUIDANCE THROUGH THE REPORT

The Coordination Regulations are playing an important role in the protection of migrant workers and are to a big extent an effective instrument in achieving the objective of free movement. This does not exclude possible issues or inconsistencies;

Some issues are related to a changing national environment while others are related to the changing European environment (new concepts or other EU instruments having an impact on the Coordination Regulations). In general, we can list the following issues:

- The status of children as defined under national law or the status of a couple with respect to family benefits raises problems for the Coordination Regulations' personal field of application.
- The emergence of newly integrated benefits. The classification of hybrid benefits between exportable and non-exportable benefits gives rise to problems, and their existence causes a reluctance of some countries to broaden the scope of their benefits covered to exclude them from the Regulations' material field of application.
- The concrete implementation of the aggregation principle and its conditions and/or limitations.
- The principle of assimilation of facts still needs to be fully incorporated into national legislations.
- The interpretation and application of the posting rules leads to problems and Member States are increasingly concerned with tackling fraud and taking the appropriate measures.
- The principle of a single applicable legislation remains challenging in practice, in particular when activities are performed in two or more Member States. Another issue is the impact of the new 'home base' rule for flight crew or cabin crew members.
- With regard to sickness benefits in kind, the functioning of the EHIC remains the subject of debate and requests are made for a better application and control of the existing mechanisms. The distinction between occasional care and planned care keeps causing problems and the implementation of Patients Directive 2011/24 is problematic.
- The analysis of national benefits with regard to the EU concept of 'long-term care benefits' remains a challenge. Difficult classification raises lots of practical problems for the application of the coordination rules, e.g. determining who the competent State is or dealing with the overlapping of benefits.
- The evaluation of invalidity remains a touchy subject and is regularly brought before national courts.
- The export of old-age pensions is a well-known and respected fundamental principle of the Coordination Regulations. However, some reluctance may be noticed in the Member States to export their pensions and some indirect ways are used not to do so.

- The relation between the Coordination Regulations and facts happening in third countries is of growing concern. So is the combination of third States and bilateral agreements.
- There is a debate about the period of exportation of unemployment benefits and about whether beneficiaries should be entitled to export their unemployment benefits for a longer period or even until the end of the person's entitlement to benefits according to the rules of the competent State.
- With respect to family benefits, in several States problems have been detected in relation to the CJEU Bergström case.
- In general, the relation between the Coordination Regulations and other secondary EU instruments or the impact of EU primary law.

THE OPERATIONAL IMPLEMENTATION OF THE EU COORDINATION REGULATIONS IN THE EU/EEA MEMBER STATES AND SWITZERLAND

A. GENERAL PRINCIPLES

1. Scope

a. Personal scope

i. Active and non-active persons

Now that interest in the distinction between active and non-active persons has waned in the Coordination Regulations, the status of active persons has become less problematic. Nevertheless, in some specific cases some questions are raised (see also p.24 of the report: d. Non-active persons). The status of civil servants had to be adapted in some countries in order to take account of the entry into force of the new regulations. In the Czech republic, questions were posed in particular with regard to the status of employees of the trade and tourism state agencies, which post their workers to other Member States in order to promote the country. Since 2006 they were treated as posted workers. After the new regulations entered into force, those employees were provided with a civil servant status, according to Article 11 (3) (b) of Regulation 883/04, in order to keep them into the Czech social insurance system. As a consequence of this decision the question has recently been raised as to whether this solution could also be applied to employees, i.e. teachers, of an organisation belonging to a ministry who work abroad and have a labour relationship with foreign universities. The relevant institutions agreed that such teachers can hardly be seen as civil servants, as they probably do not perform public administration and their main labour relationship is established abroad with a foreign university. Such persons will fall under Article 11 (3) (a) of Regulation 883/2004 and will therefore be insured in the country where their labour relationship with a foreign university is established. If they wish to be insured in the country they may request an exception. Their eventual status as civil servants will be examined from case to case (**CZ**).

With the new Coordination Regulations, the status of non-active persons has been considerably clarified. Countries have also made efforts to contribute to the clarification process. For instance, it was agreed in the Czech republic that for unemployment benefits, a family member who is not working will be considered as falling within the scope of Article 11 (3) (e), even though he or she might be covered for health care by another State where his or her spouse carries out gainful activity. This will apply also in situations where the non-active person has taken care of their own children; these periods will be counted as insurance periods for the purpose of unemployment benefits (**CZ**).

ii. Family members

Even if the coordination rules provide that the concept of 'family members' is mainly defined at national level, several reports raise some interesting points.

One question concerns polygamy. In Spain, where polygamy is illegal, courts have on several occasions addressed the problem that is the result of the death of a worker leaving behind several widows who each claim a survivor's benefit. Should the pension be divided equally between the survivors, proportionally to the duration of the marriage? Or should only the first spouse be recognised certain rights? (**ES**) Another problem refers to the concept or 'reverse discrimination'. For instance, the Slovenian report explains that Slovenia would be the competent State if an EU national would be employed there even if his or her family members still resided in another Member State. In this case, the scope of family members would be defined according to the legislation of another

Member State and not the Slovenian one. For instance, in other Member States same sex partners may be mandatorily health insured as family members, whereas they have no such right in Slovenia. When the same sex partner stays in Slovenia, Slovenian health insurance would have to cover the health care costs for him or her (according to Article 18 of Regulation 883/2004), although there is no obligation to cover identical costs for same sex partners whose situation is limited only to Slovenia (**SI**).

The status of children is also discussed. Some countries still make a distinction (taking into account financial involvement of the parents towards their children) between legitimate and natural children. This approach may have consequences relating to the application of coordination rules. For example, in Luxembourg the national family benefit institution refused to grant family benefits to a mother of a natural child, born in 2000, both residing in Belgium. The motivation of the refusal was the following: the father does not provide for the child's main lodging, and it was not proven that the child is mainly dependent on the father, the ex-partner of the mother, who is residing in Belgium, but working and insured in Luxembourg. Moreover, the child is entitled to family benefits in Belgium (**LU**).

One report highlights the status of a couple in relation to family benefits. According to the Swedish National Social Insurance Board, both under the new and the old regulation the other parent is regarded as a family member of the worker or Swedish resident parent only if the couple is in fact married or living together. Two parents can be regarded as living together despite the fact that they do not have a common household since one of them is working in another Member State. Earlier, in relation to Regulation 1408/71, also a parent living with the child in another Member State, not married to or living with the other parent, was regarded as a family member. The Swedish reporter states that the new definition is questionable (**SE**).

iii. Third-country citizens

The status of third-country citizens is a sensitive issue for many European countries.

Difficulties appear before domestic courts. For instance, in Austria the Supreme Court had to rule on a case that involved a citizen of Bosnia-Herzegovina who claimed an Austrian old-age pension referring to insurance periods in Austria and France. The Austrian pension insurance carrier denied the entitlement to old-age pension because the claimant could not prove sufficient insurance periods. According to this Austrian pension insurance carrier the periods completed in France could not be considered for the calculation of periods, as the claimant had lost his right to legally reside in Austria and since then lived in Bosnia, and therefore did not fulfil the personal scope of Regulation 1231/2010. The Austrian Supreme Court came to the conclusion that the decision of the Austrian pension insurance carrier was in accordance with EU law. The claimant was residing in Bosnia-Herzegovina when he claimed Austrian old-age pension because he had lost the right to legally reside in Austria in 1999. Thus, he did not fulfil the personal scope of Regulation 1231/2010, which requires that the claimant is legally residing in a Member State of the European Union. Consequently, he could not refer to the obligation of aggregation of periods laid down in Article 6 of Regulation 883/2004. This ruling was the first decision of the Austrian Supreme Court concerning the personal scope of Article 1 of Regulation 1231/2010 (**AT**). The Austrian report furthermore refers to cases dealing with the following question: can Turkish nationals claim the Austrian *Familienbeihilfe* (family allowance), even if they had no legal status of residence at that time? The Austrian Administrative Court came to the conclusion that the Austrian authorities must prove whether the Turkish nationals were working as employees during the periods concerned. In that case, the claimants could refer directly to Decision 3/80 of the Council of Association and do not need to prove a status of legal residence according to Austrian law (**AT**). In France, a local tribunal sent a request for a preliminary ruling to the CJEU on the interpretation of French law with regard to Article 11 of Directive 2003/109 setting the principle of equal treatment in the fields of social security, social assistance and social protection between nationals and long-term residents (pending case C-257/13, *Mlamali*) (**FR**). In

addition, a case of 5 April 2013 of the French *Cour de cassation* made a very important statement: for persons falling within the scope of association agreements concluded with Algeria and Turkey, the delivery of a medical certificate cannot be required, as this requirement is discriminatory (**FR**).

Besides court cases, also administrative difficulties are underlined. For instance, calculations of pensions gives rise to problems if recipients from third countries have insurance records not only in Lithuania, but also in other Member States (LT**).** In the Czech Republic, the requirement of permanent residence (for the purpose of the health insurance and family benefits scheme) is not applied in relation to third-country nationals. However, a continuity of residence in two or more Member States is required in order to apply the Coordination Regulations. If a period is accomplished in a third country in between periods in EU countries, Regulation 883/2004 is not applied. In other words, Czech institutions apply the Coordination Regulations only to persons who participated in the social security system of a Member State and moved directly afterwards to another Member State, for example to the Czech Republic. This leads to the exclusion of persons to whom the legislation of one Member State was applicable already in the past, after which this person moved to another country outside the EU and subsequently asked to be admitted to, for example, the Czech social security system (**CZ**).

It must be recalled that Regulation 1231/2010 is not relevant for EFTA countries. Still, as the social security system in Iceland is mostly residence-based, third-country citizens residing in Iceland are entitled to social security provided that other conditions are met (**IS**).

b. Material scope

i. Classification of schemes and social security benefits

Despite clarifications brought by the CJEU in many cases, the material scope remains a source of difficulties in many countries.

Questions are sometimes related to the emergence of new benefits. The Austrian report, for instance, discusses the classification of the *Rehabilitationsgeld*. Entitlement to an invalidity pension is now only granted to persons who are permanently disabled and unfit to work due to his or her physical and psychological state of health. For persons who are only temporarily – but for a longer period than six months – disabled and unfit to work, either medical rehabilitation or occupational rehabilitation can be claimed instead of a temporarily limited invalidity pension. The main responsibilities are centralised at the pension insurance carriers, who take the major decisions about whether the person concerned is permanently or just temporarily disabled to work, whether medical rehabilitation is appropriate and reasonable or whether occupational rehabilitation has to be conducted. This 'integrative approach' complicates the legal classification with regard to national law as well as with regard to the material scope of Regulation 883/2004. In particular, it is difficult to tell whether they are invalidity or sickness benefits. The classification of *Umschulungsgeld* is not clear either (**AT**). The German report also refers to the difficulty to classify rehabilitation benefits (**DE**).

In France, a professional transition allowance can be granted for a period up to one year to persons in danger of losing their job on the grounds of a collective/economic dismissal. To this end, a contract (*contrat de sécurisation professionnelle* or '*CSP*') is signed by the beneficiary. It provides that, in exchange for keeping 80% of the former salary for a period of one year (granted instead of the standard unemployment benefit), the beneficiary agrees to both a conventional termination of the contract (instead of a dismissal) and to various actions aiming to facilitate his or her return to the job market (activation measures): training, skills evaluations, etc. When the one year period expires, persons who are still unemployed no longer receive the professional transition allowance and are in lieu entitled to the standard unemployment allowance. The period of one year is taken into account for the calculation of the length of entitlement of this allowance. One could wonder whether the professional transition allowance is an unemployment benefit under Article 3 of Regulation 883/2004

(**FR**). In Germany, benefits intended to prevent future unemployment are not covered by the Regulation (**DE**).

Hybrid benefits are also discussed. Some Swedish benefits are located in the border area between exportable and non-exportable social benefits. However, not all have been designated as hybrid benefits. The Swedish authorities have classified them either as social advantages falling outside the scope of the Regulation – but within the scope of Regulation 492/2011 (for instance the municipal attendance allowance), or as sickness benefits in kind, which are not exportable according to the Regulation (for instance the attendance allowance). General Swedish income support (*försörjningsstöd*) is not a social security benefit. It is administered by the municipalities and regarded as social assistance (SE). As far as the exclusion of social assistance is concerned, the German report indicates that under the new regulations, medical assistance which is provided by the social assistance scheme is now included into the scope of the Regulation (DE). In the UK, the correct categorisation of the Universal Credit in EU law turns on whether the new benefit is a new benefit with the characteristics of social assistance that is not linked to one of the contingencies enumerated in Article 3 (1) of Regulation 883/04 – which is the opinion of the Department for Work and Pensions – or whether it is an umbrella benefit, the purpose, role, characteristics and conditions of entitlement to the various components of which are essentially the same as those of the currently existing benefits it will replace.

The question of long-term care benefits in a future coordination perspective is also an important one. The Swedish view is that these do not fall within the scope of social security, but instead are social assistance (**SE**). Slovakia discusses the classification of the 'Christmas benefit' (**SK**). In Slovenia, some new benefits (bonuses) may also be seen as social security benefits (**SI**).

The Dutch report states that the number of non-statutory benefits based on, for example, contractual (collective bargaining) arrangements is increasing. This may cause problems, since non-statutory benefits do not fall within the material scope of the Regulation (**NL**).

In Luxembourg, even after the CJEU *Hliddal* case of 19 September 2013, some benefits closely related to a family environment give rise to questions with regard to their classification. The Luxembourg report indicates that a request for a preliminary ruling has been made to the CJEU on the so-called 'child bonus'. Difficulties come from the fact that the *Caisse Nationale des Prestations Familiales* (*CNPF)* and the French local *Caisse Allocations Familiales* (*CAF)* have organised together a new method of payment for cross-border workers residing in France and working in Luxembourg. They are granted a monthly bonus, not paid by a separate instalment but together with the family benefits or the 'additional amount'. Some families are not entitled to a monthly payment, like lone parents, interim workers, pensioners. These families fall under the second situation. For all the other cross-border workers, entitled to an 'additional amount', bonuses are calculated monthly but paid twice a year, in July for the first semester and in January of the next year for the second semester (**LU**).

One way to avoid application of the Regulation's principles is to ensure that benefits fall outside its scope. Some reports emphasise the reluctance of some countries to broaden the scope of their benefits covered. Regarding advances of maintenance payments, the German report indicates that there are discussions to put an end to the exclusion of these benefits from the scope of the coordination rules (**DE**).

The impact of the CJEU Stewart case (C-503/09) in European countries

Some reports indicate that this case raises problems of implementation in their country. In France, the classification of the third person assistance and equipment benefit for the disabled (*prestation de compensation*) is uncertain. It is, under domestic law, regarded as a sickness benefit in kind. The *Stewart* case could lead to a different conclusion under EU law (**FR**). In Ireland, the exact status of the carer's allowance vis-à-vis the Regulations may ultimately fall to be clarified through jurisprudence (**IE**). In Slovakia, the same

problem of classification arises (**SK**). In Slovenia, some benefits are awarded outside of the social insurance scheme to persons who have been disabled since birth (or became disabled in their youth) and were never covered by the mandatory pension and invalidity insurance. According to the rather old Act on Social Care of Mentally and Physically Handicapped Persons (ZDVDTP) of 1983, such persons may have the right to invalidity benefits as well as assistance and attendance allowances. It might be argued that both benefits should be coordinated, the first as invalidity benefits (and the permanent residence requirement might be questionable) and the second as sickness benefits lato sensu, i.e. as long-term care benefits. The same question arises for similar supplements within the social insurance scheme and mirrored in the social assistance scheme as assistance and attendance allowances (**SI**). The UK indicates that the *Stewart* judgement has impacted on other of their benefits. For example, it has changed the way the UK applies the EU regulations with regard to Winter Fuel Payments. Prior to the *Stewart* judgement, entitlement could not be acquired for the first time by an EEA national who was not ordinarily resident in Great Britain. In response to the Stewart judgement, the government has however announced that a 'temperature test' will be introduced by legislation in 2015, which will mean that the Winter Fuel Payment will be withdrawn from people living in a European country with an average winter temperature higher than the UK from autumn 2015.

The Swiss report makes an interesting analysis of domestic benefits versus benefits targeted by *Stewart*. The benefit at issue in this case is the short-term incapacity benefit in youth. This benefit is hereby considered together with the long-term incapacity benefit, which is the continuation of the short-term incapacity benefit in youth. With regard to its function, the short-term incapacity benefit in youth corresponds in essence to the extraordinary pension provided for under the Federal Law on Invalidity Insurance, which is granted, under certain conditions, to persons who do not meet the minimum contribution period requirement for an ordinary pension. In Swiss case law, which in this respect is in line with the *Stewart* case, the extraordinary invalidity pension was qualified as an (exportable) invalidity benefit within the meaning of Article 4 (1) (b) of Regulation 1408/71. Under Regulation 883/2004 this benefit is now considered to be a special non-contributory cash benefit insofar as it is granted to disabled persons who have not been subject, before their incapacity to work, to Swiss legislation on the basis of an activity as an employed or self-employed person (**CH**). On the contrary, the equivalent benefit provided in Liechtenstein is not listed in Annex X of Regulation 883/2004 and is therefore an invalidity benefit, in line with *Stewart* (**LI**).

The *Stewart* case does not seem to give rise to problems of implementation in most countries (e.g **FI, GR, HR, HU, IT, LT, LV, MT, NL**), either because there is no equivalent benefit or because coordination rules are complied with (e.g. **BG, CY, CZ, EE**).

ii. Special non-contributory cash benefits

Most remarks focus on the impact of the *Bartlett* case on national law. Whereas this case is said to have had no impact in some countries (e.g **ES, FR, GR, LI, LT, LV, MT, SE**) where national legislation is in compliance (**IE**), other reports underline the impact of the *Bartlett* case (and past related CJEU cases) on their social security system.

For instance, in Austria most of the legal systems that concern disabled persons are classified as social assistance executed by local entities and therefore fall outside the material scope of Regulation 883/2004. Some good reasons could be given to challenge this national classification. Other reports explain that *Bartlett* will not impact domestic law (**AT**). In Switzerland, the few cantons which still provide for non-contributory mixed benefits in the event of unemployment are likely to continue not to export these benefits pursuant to Annex X of Regulation 883/2004 as adapted by the Agreement on the Free Movement of Persons (**CH**). Taking account of CJEU cases, Finland has considered all its disability allowances as sickness cash benefits within the meaning of the Regulations, including benefits which were not specifically mentioned for the Finnish part as sickness benefits (**FI**). For Italy, it is useful to remind that the allowance for personal and continuous assistance to the holder of a disability pension, which was part of Annex II-bis of Regulation 1408/71, is no longer included in the corresponding Annex X of Regulation 883/2004, and therefore no longer considered a special non-contributory benefit (**IT**). In the Netherlands, social services, including mobility facilities, can be provided within the framework of the Dutch Social Support Act. They are to be regarded as a form of social assistance and therefore as non-exportable (**NL**).

Some reports underline the ambiguity of the concept of special non-contributory cash benefits and wonder about the classification of some of their domestic benefits (e.g. **CY**).

iii. Miscellaneous

In Croatia, a declaration stipulated by Article 9 of Regulation 883/2004 has been drafted by the Ministry of Labour and Pension Insurance. It is expected to be adopted at the next meeting of the Inter-Ministerial Working Group scheduled for the week of 30 September 2013, after which it will be submitted to the Administrative Commission. The declaration specifies child allowance as the only family benefit (**HR**).

c. Fundamental principles: cross-cutting issues

i. Equality of treatment

The principle of equality of treatment is as a general principle very well accepted and correctly applied by European countries. The entry into force of new regulations has not altered this statement. Still, some problems are reported.

Despite the fact that the principle of equality of treatment is applied in Spain, the social security legislation has not been reformed yet to treat Spanish and EU citizens equally. Therefore there are lot of examples where Spanish nationality is required. This situation obliges national legislation to be interpreted according to EU law (**ES**).

The residence test, which is potentially an indirect discrimination on the grounds of nationality, is mentioned in one report. In Ireland, it may have negative effects towards nationals in countries where there are lots of returning emigrants (**IE**). In the UK, the government announced in its Spending Review 2013 that claimants whose standard of spoken English is a barrier to work will be required to attend English language courses with sanctions, including possible loss of benefits, applied to those who decline to participate (**UK**).

ii. Aggregation

Although the principle of aggregation is clearly understood by all countries, its concrete implementation is not so easy.

In France, according to the national old–age benefits institution, it is not possible to proceed to an overall aggregation of insurance periods between France, EU countries and Switzerland. This interpretation is based on the fact that each instrument should be applied in parallel. Therefore, insurance periods can be aggregated between EU and EEA countries, but the aggregation excludes Swiss periods; insurance periods can be aggregated between EU countries and Switzerland, but the aggregation excludes periods in EEA countries. Is this interpretation compatible with EU law? (**FR**)

The Icelandic report gives an interesting example of application of aggregation in the context of parents' rights to payments from the Maternity/Paternity Leave Fund. In Iceland, when a parent has worked on the domestic labour market for at least the last month of the rights acquisition period, account shall be taken of her or his working periods as an employee or as a self-employed individual in another Member State, providing that the parent's work conferred rights on her or him under the legislation of the State in question regarding maternity/paternity leave. If the parent has worked on the domestic labour market for less than the last month of the rights acquisition period, the Directorate of Labour shall assess whether the parent in question is to be regarded as having worked in the domestic labour market for the purposes of the act with the consequence that account is to be taken, to the extent necessary, of her or his working periods as an employee or as a self-employed

individual in another Member State during the rights acquisition period, providing that the parent's work conferred rights on her or him under the legislation of the State in question regarding maternity/paternity leave. A condition for this is that the parent began work on the domestic labour market within ten working days of stopping work on the labour market of the other Member State (**IS**).

A general trend is highlighted by the Irish report: the introduction of stricter contribution conditions for pensions is likely to lead to more recourse to aggregation; but this is difficult to quantify (**IE**).

iii. Assimilation of facts

The principle of assimilation of facts, the newest among the basic principles of coordination, still needs to be fully incorporated into national legislations.

In France, some unemployment institutions forbear to apply the principle to situations where it should be implemented. Cases concern unemployed persons who are entitled to retain unemployment benefits over the standard maximum period when they have a 'long career'. One of the conditions to be met is to have been insured 'at least one year continued over the last five years'. Some claimants are denied the extension of benefits because they have not been insured in France for at least one year over the last five years, even if they have been insured during this period in another EU country. According to the principle of assimilation, these periods of insurance should be counted in order to assess the insurance requirement over a five-year period (these periods should also be totalised for the purpose of determining the one-year insurance condition) (**FR**). By contrast, a French old-age benefits institution issued an administrative letter in which it explains to what extent periods of sickness, maternity and temporary incapacity related to an accident at work, which are assimilated to periods of insurance under French law (within the limit of four trimesters) for the purpose of the 'anticipated pension for long career', can cover equivalent periods accomplished in another EU country (**FR**).

A fundamental question is considered by the Slovenian report: can the principle of assimilation have a negative effect on a person? In this respect, a case was recently decided by the Slovenian social courts. The First Instance Court held that the assimilation of facts (insurance in Austria) could lead to the denial of a pro rata pension in Slovenia. The higher Labour and Social Court overturned this decision, essentially arguing that the coordination rules should have a positive outcome for a migrant and not vice versa. The Slovenian Supreme Court agreed with the First Instance Social Court and denied a person still insured in Austria the right to a pro rata old-age pension (**SI**).

In Sweden, a special issue with regard to the assimilation of facts seems to arise in relation to the sickness benefit in cash (*sjukpenning*). Generally speaking, this sickness benefit is a work-based benefit within the national system and no qualification period is required. What might cause problems are the following rules. Once a person qualifies for the sickness benefit, protection rules apply meaning that the person will remain covered by the insurance during periods of pregnancy, child-rearing, studies and unemployment. It is still unclear how these rules apply in relation to migrant workers, i.e. if such periods completed in another Member State or in connection to moving/returning to Sweden may be taken into account (**SE**).

On the contrary, a nice illustration of application of the principle of assimilation of facts is provided by the Spanish report. In a judgement of the regional court of Asturias, it was to be determined whether days worked by a Spanish miner below the ground in Czechoslovakia should be 'compensated' as periods worked in Spanish mines in order to get an early Spanish retirement pension. In its judgement, the court ruled that the applicant was indeed entitled to get a Spanish pension calculated *pro rata temporis* taken account of the days worked in Czechoslovakian mines (**ES**).

iv. Export of benefits

Leaving aside the difficulties related to the fact that countries may refuse to export a benefit because it considers the benefit as non-exportable (**CZ**), exportation remains a source of disputes.

The highest national courts may have to issue rulings to ensure the protection of such a fundamental principle. In Poland, the criterion of 'residence' as a condition for entitlement to special benefits provided by the law was the subject of a ruling of 25 June 2013 of the Constitutional Court. This court held that the act on social pensions violates the constitutionally protected rights, including the right to social security and the right to equal treatment, because it imposes the obligation to stay on the territory of Poland as a condition for granting a social pension. The court also pointed out that the act violates fundamental rights of EU citizens, such as the right to move and reside freely within the territory of the EU (**PL**). The Italian Constitutional Court judgement of 9 February 2011 invalidated the regional law of Friuli Venezia Giulia, according to which access to welfare benefits is subject to residency in the region for at least 36 months, for unreasonable discrimination (**IT**).

Practical implementation is also challenged. For instance, certain countries point to fees or administrative obstacles related to cross-border bank transfers (**BE**, **CZ**). In Ireland, the principle of export has been criticised in relation to the payment of child benefits for children resident in other Member States and the parent being subject to Irish legislation. It is now generally accepted that this is required under the Regulations and the Treaties (**IE**).

v. Administrative cooperation (including EESSI implementation) and administrative issues encountered by citizens/companies

Many reports refer to administrative difficulties. A lack of accuracy or slowness (e.g **CY**) and the breach of data privacy protection rules (**AT, NL**) are reported. The federal organisation or the amount of domestic institutions concerned is an additional challenge (**DE, EE, GR**).

Nonetheless, also many good practises are reported. Bulgaria has issued a decree that defines the concepts of 'competent body', 'competent institution', etc and that establishes the main tasks, rights and obligations of national coordination bodies and institutions (**BG**). Other reports describe internal procedures set up to comply with EESSI (**CZ, IT, LV**).Furthermore, authorities proceed to harmonisation and simplification of the information available about European social security on the websites of the involved institutions (**EE**). Many example of bilateral information exchanges are given (e.g **ES**). Another good administrative practice stressed is the issuing of internal instructions. For instance, in Slovenia the Health Insurance Institute of Slovenia (ZZZS) issued such instructions to all its regional units. Also the Pension and Invalidity Insurance Institute of Slovenia (ZPIZ) prepared detailed instructions on the implementation of the Regulations, enabling uniform application in Slovenia. These are constantly updated and specific guidelines are provided by the Ministry of Labour, Family, Social Affairs and Equal Opportunities, if necessary (**SI**). Finally, bilateral agreements aiming to fight fraud are reported (**DE**).

The ratione temporis application of the new Regulations in Switzerland

Some temporal problems regarding the application of Regulations 883/2004 and 987/2009 were highlighted. For Switzerland in particular, those Regulations were integrated into the Agreement between the European Union and its Member States, of the one part, and the Swiss Confederation, of the other, on the Free Movement of Persons by Decision No. 1/2012 of the EU-CH Joint Committee, which came into force on 1 April 2012.

The question is to what extent CJEU rulings given after said date have to be taken into account under Article 16 (2) AFMP / Article 16 (2) of Annex K of the EFTA Convention, the answer to this question depending on how to draw a line between old case law (dating from the period prior to 21 June 1999) and new case law (dating from

the period after this day) within the meaning of Article 16 (2) AFMP / Article 16 (2) of Annex K of the EFTA Convention (**CH**).

2. *Applicable legislation*

a. Activity in one Member State

i. Lex loci laboris

The principle of lex loci laboris causes no real concern even if it sometimes needs to be reminded about by courts (**CH**) or proves to be difficult to implement from an administrative point of view (**GR**). Problems are still mentioned by countries who apply a residence-based insurance (**SE**).

The following administration-related problems are mentioned. In Finland, more and more situations occur where a person should be covered by the lex loci laboris principle, but the employer faces considerable difficulties in insuring the employee in the country of employment (**FI**). In particular, some countries require that the Finnish employer presents a copy of the Company Register. When the employer is e.g. an association, such a copy cannot be provided (**FI**). However, the issue of the persons working in Romania with their employer abroad, with no registered office in Romania, who cannot pay social security contributions in Romania has been solved by the Emergency Ordinance of 23 August 2012 (**RO**).

Some specific problems may arise concerning family benefits when two Member States are (one primarily and the other secondary) determined as competent States (**SI**).

The impact of CJEU Salemink case (C-347/10) in European countries

Most countries indicate that the *Salemink* case has no impact on their national legislation (e.g **CZ, ES, FR, HU, LI, LT, MT, SE**), for instance because the insurance is irrespective of the workplace / place of residence (**BG, CH**) or is not residence-based (**AT**). One report, which especially concerns the *Salemink* case, indicates that domestic law is in line with the CJEU (**CY**). The Nordic convention of 12 June 2012, likely to come into force on 1 March 2014 or 1 May 2014, is also in conformity with the *Salemink* judgement (**FI, NO**).

In Croatia, the CJEU decisions in *Salemink* (and Bakker), along with the provisions of Regulation 883/2004, are expected to have an impact on the case law and jurisprudence concerning the personal scope of national compulsory social insurance for seafarers. Indeed, the application of Regulation 883/2004 has extended a scope of social insurance for seafarers in Croatia or for seafarers working on board vessels at sea flying the Croatian flag, which had previously been linked to residence according to Article 129 of Croatian Maritime Code (**HR**).

In response to the CJEU ruling, the Dutch legislation has been amended. As from 1 January 2012 employees in the situation of Mr Salemink are compulsorily insured pursuant to the Act Social Insurance Continental Shelf (**NL**).

Problems related to double contributions are still mentioned. In France, even after the CJEU '*CSG-CRDS*' cases (General Social Contribution and Social Debt Repayment Contribution), some problems keep occurring. Indeed, for some parts of the *CSG-CRDS*, the law has not been modified. It implies that persons who are subject to the social security law of another Member State and who are fiscally resident in France have to pay the *CSG-CRDS* based on assets. A request for a preliminary ruling was sent to the CJEU on 17 July 2013 (**FR**). In Hungary, due to a delay in information about a person's current situation, contributions may still be collected whereas the person is no longer working in the country (**HU**). In Hungary, due to a delay in information about a person's current situation,

contributions may still be collected whereas the person is no longer working in the country. Additional administrative burden is caused by back payment (**HU**).

ii. Specific rules of conflict: the impact of Bakker in European countries

A vast majority of reports see no problem implementing the *Bakker* case. It is, for instance, stated that the national legislation does not contain provisions that exclude nationals employed by local employers and performing their activities outside the country from social security (**BG**).

The Swiss Federal Supreme Court already considers that coordination rules can also be relevant in cases in which a worker's activities are performed outside the territory of the Member States. Otherwise it would not have held in a recent ruling, taking account of the *Aldewereld* case, that a worker residing in one Member State and working in a non-Member State for an undertaking established in another Member State is subject to the legislation of the second Member State (**CH**).
Some countries' reports, especially dealing with the *Bakker* case, indicate that domestic law is in line with the CJEU (**CY, MT**).

This case is applied even in residence-based countries (**FI**).

The case also helps to establish conditions for fair competition for shipowners (**GR**). Work performed on ships under the Lithuanian flag is deemed to be equal to work in Lithuania (**LT**). In Latvia, if seamen are employed by an employer who is a domestic tax payer, the employer should pay taxes for the seamen employed. Thus, even if seamen are employed on a vessel which operates outside the territory of the European Union and their employer is a Latvian tax payer, these seamen will be affiliated to the social security scheme of Latvia (**LV**).

Still, some potential difficulties are reported. It is likely that a bilateral convention may be incompatible with the solution of the *Bakker* case (**FR**). Other reports mention that the impact of *Bakker* is hard to predict (**IS**).

Directly involved in *Bakker*, the Dutch benefit administration already pursued a policy on the basis of which Title II of Regulation 1408/71 was made applicable to seafarers who are nationals of a Member State of the EU or the EEA and who resided in one of those States and worked on board of a ship which does not fly the flag of a Member State, solely on the basis that the employer was established in the Netherlands. The consequence of that policy was already that the insurance fund for employed workers treated workers such as Mr Bakker as being compulsorily insured, even though, on the basis of the Dutch legislation, they do not belong to such a category of insured persons, either because they do not reside in the Netherlands or because they are not employed there. The Dutch Ministry of Social Affairs indicated that, in the short run, this policy rule will be introduced in the Dutch legislation (notably in the Dutch decree which extends (and also limits) the personal scope of Dutch social insurance benefits which are based on citizenship, such as pensions, survivors' benefits and family benefits) (**NL**). In Croatia, the *Bakker* case will have a direct impact on the legislation applicable (**HR**).

b. Posting

One concern shared by many countries is to tackle fraud. There is a special agreement (not published to date) between the Bulgarian and the German authorities for special enhanced checks (**BG**). Austria has set up IT programmes to collect and store all PD A1 documents issued by other Member States, one objective of which is to fight fraud (**AT**). The Cyprus report insists on the necessity to reform the A1 form withdrawal procedure (**CY**). When competent institutions suspect that the location of the company is purely administrative and is likely to be a 'mailbox company' (within the meaning of the CJEU *Plum* case, C-404/98), special attention is paid to the assessment of posting conditions and labour agencies are involved (**CZ**). In this respect, a Lithuanian competent institution

refused to issue an A1 certificate to the workers of a company arguing that this company's activities in Lithuania are not substantial (the income from activities in Lithuania being less than 10 per cent of the company's total income). The company argued that Article 12 (1) of Regulation 883/2004 does not require any 'substantial activity', and that therefore the refusal to issue the certificate was not justified. In a case of April 2013 (*Lido Marine*, case No I-1243-121/2013), the Administrative Court rejected this argument (**LT**). The definition of 'substantial activity' remains one of the most burning issues in the context of applicable legislation.

One type of problems concerning posting that are underlined in the reports are problems of interpretation. The Polish report refers to an amendment introduced in the 'Practical Guide' in 2012 which is said to have tightened the explanation of the notion 'to replace sent person by another sent person', as is formulated in Article 12 of Regulation 883/2004. According to the new interpretation, the prohibition of replacement applies to the continuous, repeated posting of different employees for the same position and for the same purposes, regardless of which posting company or Member State the newly posted worker comes from. Due to such a restrictive interpretation, there are uncertainties regarding the application of Article 12: on the one hand, in case of the interpretation proposed by the Administrative Commission, the Social Insurance Institution in Poland (*ZUS*) may expose itself to allegations of non-compliance with this Article by the person who wishes to benefit from the posting. On the other hand, if Article 12 is applied as before, without considering its interpretation proposed by the AC, the *ZUS* may be exposed to negative consequences from the institution of another Member State (**PL**).

Good practises are also described. The Czech Social Security Administration has developed separate special application forms for employees and for self-employed persons applying for an assessment of their cross-border situation. The data on these forms allow, after verification by the administration, an evaluation of the fulfilment of all provisions as regards the Regulation as well as Decisions A2 and A3 of the Administrative Commission and CJEU case law. In order to allow employees, employers and self-employed persons to correctly apply for an A1 form, there is detailed information on the web pages of the Czech Social Security Administration including the application forms (**CZ**). In Malta, any employer applying for an A1 form for the first time is interviewed and a detailed questionnaire is completed. This is to verify that the conditions set out in the Regulations are satisfied, and that the company making the request is in fact carrying out significant activities in Malta, maintains a direct relationship with the posted employee, and is not a 'letterbox company' (**MT**). In Latvia, in order to prevent possible corruption, it has been decided that officials who take on (receive) the application for an A1 certificate do not make a decision regarding the issue of the certificate. The decision is made by another official of the State Social Insurance Agency (**LV**).

Posting furthermore keeps causing problems when a third-country citizen is involved. For instance, it is hard to determine the legal status of third-country citizens employed by Polish companies in order to be posted to work in another Member State. Do these persons have to be employed and insured for a specific period prior to the posting? (**PL**)

One report emphasises the fact that slow internal procedures make it impossible to issue the form within a short period of time (**HU**). It is also reported that as a consequence of the recession, the volume of requests for postings, especially in the construction sector, has also significantly reduced (**IE**).

c. Activities in two or more Member States

Activities in two or more Member States is probably the most problematic situation in relation to conflict of law rules.

Attention is drawn to a recurrent problem of awareness of the applicable rules. Employees (and self-employed persons) working on two or more Member States' territories do not know that they have

to pay social security contributions only in one Member State. This situation is the source of many administrative and financial problems. When the problem is discovered, contributions unduly paid have to be paid back and the employer has to delete the insurance legal relationship from the registers of all the authorities concerned (**HU**).

Whereas the concept of 'substantial activity' is a source of concern, it is also assessed positively. The amended rules in Article 13 of the Regulation requiring substantial activity in the State of residence for it to become the competent State also when there are two or more employers, has helped to solve the difficult problems experienced in the Öresund region to a considerable extent. Danish employers had a very negative attitude towards Swedish residence workers as long as even a small amount of work in Sweden made Sweden the competent State, Swedish social contributions on behalf of the employer being much higher than the ones paid in Denmark. It was thus common practice for Danish employers to include in an employment agreement that the employee committed him or herself not to take up any employment in Sweden during the time of the employment relationship (**SE**).

Problems may occur in relation to the implementation of the concept of marginal activity. The Polish report introduces the phenomenon of 'escaping' the Polish social security system with the use of coordination rules, especially Article 13 (3) of Regulation 883/2004. Polish institutions face specific problems of persons self-employed in Poland who take up an additional gainful employment in another Member State (part-time job, very low remuneration). The solution could be to use Article 14 (5b) of Regulation 987/2009. Unfortunately, it is very difficult to determine whether or not any of the activities pursued by the person concerned is of a marginal nature. Although the specific criteria for this purpose have been listed in Article 14 (8) of Regulation 987/2009, their usefulness is limited (**PL**).

The principle of one single legislation applicable remains challenging in practice. Some problems reported concern technical ways of collecting contributions from other Member States and individuals (**SI**). A Liechtenstein institution points to an interesting issue: a person who works as a civil servant for two Member States and is subject to the legislation of two Member States, in spite of the principle according to which a person shall be subject to the legislation of one Member State only (**LI**). According to some people (**UK**) the 'new' Article 13 (1) (b) (3) produces an anomaly in that an individual can end up insured in a location which makes no sense from a personal coverage perspective. If we have a French national, a French resident all his life with a French contract and a UK contract for separate employments, but who only spends 20% of his work time in France, he will have a UK liability on his total income under this Article.

The difference between activities in two Member States on the one hand and posting on the other hand is an another problem reported. In this respect, an interesting case is mentioned where workers were frequently posted to perform work abroad, but were not permanently working in two Member States. Pursuant to Lithuanian regulations an E101 LT form is issued when a person has employment contracts in Lithuania and another Member State, resides in Lithuania and works in Lithuania not less than one day in three months (**LT**). Another case mentioned concerns workers of a Lithuanian transportation company who work in Germany. If they are treated as workers of a subsidiary company of that transportation company, German legislation should be applicable. If they are treated as workers of a Lithuanian company, Lithuanian legislation should be applicable. The Lithuanian competent institution issued E101 LT forms, but withdrew this decision after a German institution requested this. The essence of the dispute went beyond competence under the Coordination Regulations – what is and what is not a 'subsidiary company'. In the ruling of April 2013 already cited above, the Administrative Court of Lithuania ruled that the decision of the Foreign Benefit Office to withdraw the forms E101 LT was justified (**LT**). In Portugal, the question is raised whether a contractor of a Member State that executes works in the territory of another Member State can employ a worker residing in this Member State and register that worker within the social

security system of the first Member State, ignoring Article 11 (3) (a), considering that worker as being 'posted'? (**PT**)

The impact of the CJEU Format case (C-115/11) in European countries

Some countries do not see any problem of conformity (e.g **HU, IT, SI**). The authorities do not seem to regard the wording of the employment contract as decisive, but the places where the work is in fact performed (**CH, LI**).

Another report indicates that, on the grounds of domestic rules, a person can be considered as a person working in two or more Member States if the person regularly works in two or more Member States within a specific time frame. The working periods in different countries may rotate in different ways, but there needs to be some form of regularity in the shift of country of employment. There is no set formula that is required to define work in two or more Member States (e.g. no specific amount of days a week/month is required for the working periods in different Member States). The decision is made based on evaluating the situation as a whole (**FI**).

In France, there is an important pending case about an interim company based in Cyprus that sent Polish employees to a nuclear plant situated in France. The ruling of the First Instance Court is scheduled for December 2013 (*Conseil de Prud'hommes Cherbourg*, pending case RG 12/00028). In this case, the Court will have to analyse the mobility pattern and determine whether this is posting, alternating activities in more than one country or activity in one single Member State. Ratione temporis, claims are based both on Regulation 1408/71 and 883/2004 (**FR**).

A person residing in Sweden can be considered as normally working in Sweden as long as he or she maintains a connection to the Swedish labour market while working in another country. The rules concerning post-protection are said to provide guidance in this regard. A person can thus be considered as normally working in Sweden when there is not more than three months in between the periods of work in Sweden. A person who receives a work-based benefit may also be regarded as normally working in Sweden. According to the guidelines it may be difficult to draw the line between posting and work in two Member States when a person is working for one and the same employer in two countries. It is disputable whether three months without work (compare above) is equivalent to 'employed more or less simultaneously or concurrently on the territory of more than one Member State' (compare the judgement) (**SE**).

After the CJEU *Format* case (C-115/11), a ruling by the referring Polish court is expected in January 2014 (**PL**).

How is Regulation 465/12 implemented by European countries? Although some reports indicate that implementation is overall smooth (**MT**), several problems are listed. Owing to the lack of specific rules of conflict for lorry drivers, the residence State is now considered as the competent State more often than under Regulation 1408/71 (**AT**). it is very difficult for the competent authorities to evaluate the dimension of truck driving activities in the respective Member States, as even the employers do not exactly know in advance how the activities will be divided between the Member States (**AT**).

With regard to the new 'home base' rule for flight crew or cabin crew members in Article 11 (5) of Regulation 883/2004, Austrian authorities consider that the fact that the home base is located in a third country cannot cause the inapplicability of Regulation 883/2004. In this case, Article 13 (1) must be applied to determine the competent State. Furthermore it is unclear – according to the competent Austrian authority – whether a transfer of the home base to another Member State must be considered a change of the relevant situation in the sense of Article 87a of Regulation 883/2004 (**AT**). In Malta, where aircrew change activities from home bases in different Member States within twelve calendar months following or preceding the determination of the applicable legislation, the applicable legislation has to be determined by the Member State of the pilot's residence in accordance with Article 13. Either the legislation of the aircrew's Member State of residence, or the

legislation of the Member State where the registered office or place of business or employer is situated is applicable. Lately, the Maltese Department of Social Security observes a trend whereby certain airline companies organise their work practices differently: instead of directly employing aircrew for a longer period of time in a stable home base or from more than one home base, they employ aircrew through employment agencies with frequent changes in home bases, in order to make the legislation of the Member State where the employment agency is established applicable for the following twelve calendar months (**MT**). In Ireland, the full impact of the new rules for flight crew and cabin crew members of airlines has not begun to emerge yet as if there is no change in the workers' situation since the applicable legislation was determined prior to 27 June 2012. That legislation will continue to apply for up to 10 years until 27 June 2022. As Irish legislation applies to a significant number of these workers a major task at present is to deal with the impact of changes in the situations of the workers concerned and monitor the overall position (**IE**).

An additional problem with regard to Regulation 465/2012 concerns the repayment of already paid contributions in case that a person pursues activities in two or more different Member States. These repayment procedures are mostly very difficult and complex (**AT**). Some good practices are also reported. As a reaction to the entry into force of Regulation 465/2012, the Czech Social Security Administration published on its own official website detailed information on simultaneous activities in two or more Member States (**CZ**).

The impact of the CJEU Partena case (C-137/11) in European countries

The *Partena* case does not seem to cause implementation problems (e.g. **CY, FI, IT, LI, LT, LV, NL, SI**) or has been incorporated into the administrative practice (**MT**).

In two rulings of 15 November 2012 and of 27 May 2013 the Swiss Federal Supreme Court, in the context of the determination of the legislation applicable and taking account of CJEU case *de Jaeck* (C-340/94) and CJEU case *Hervein and Hervillier* (C-393/99 and C-394/99), explicitly stated that the concepts of employed and self-employed activity refer to activities which are regarded as such for the purposes of the social security legislation of the Member State in the territory of which those activities are pursued (**CH**).

However, some situations are questionable. For instance, in Austria every self-employed person who is a member of the Austrian Chamber of Commerce (*Wirtschaftskammer*) as well as every agent of a company that is a member of the Austrian Chamber of Commerce is subject to the Austrian social security system for the self-employed. Thus, for the latter category of persons to fall under the social security system for the self-employed, it is sufficient that the company they are working for performs a commercial activity and resides in Austria. Apparently, Austrian authorities nevertheless verify from case to case whether the person concerned also performs a real activity in Austria (**AT**).

The status of partnership – whether it is an actual activity or not – is debated in some countries (**CH**, **FR**). It is also interesting to note that, according to Icelandic law, management from another Member State at a company subject to taxation in Iceland is presumed to have taken place in Iceland (**IS**).

d. Non-active persons

The relationship between Regulation 883/2004 and Residence Directive 2004/38 is a very sensitive issue in some countries. Some of them have introduced specific rules which should prevent EU citizens to move to their territory in order to claim social benefits (**AT**). Other countries seem to adopt a more 'pro-mobility' approach. In particular, as a result of the fact that 'social assistance' within the meaning of the Directive and within the meaning of the Regulations are not necessarily identical, special non-contributory benefits under Regulation 883/2004 could be considered as social assistance within the meaning of the Directive (**FI**). It is interesting to read that the EEA Coordination Unit confirms that supplementary benefits are considered by Liechtenstein – as known from its written statements in the proceedings of case E-4/11, *Arnulf Clauder*, before the EFTA Court and

from the discussions in the Administrative Commission – to qualify as social assistance in the context of the right of residence (**LI**).

Still about the relationship between coordination rules and the Residence Directive, some reports cite problems similar to those raised in the *Brey* case of 19 September 2013. For instance, the Dutch Ministry of Social Affairs reported difficulties with regard to the interpretation of Article 7 and 14 of Directive 2004/38 when non-active persons move their residence in the Netherlands and subsequently apply for a supplementary benefit on the basis of the Dutch *Toeslagenwet,* which provides for a supplement up to the minimum income level to recipients of unemployment or disability benefits. This supplementary benefit is registered as a special non-contributory benefit in Annex X of Regulation 883/2004. According to the Dutch authorities, the supplementary benefit is to be classified as a social assistance benefit that falls within the scope of Article 7 and 14 of Directive 2004/38 (**NL**). In Sweden, the question is posed whether the elderly support benefit has to be taken into account already when deciding if the individual has sufficient means to stay in Sweden. (**SE**)

The interpretation concerning active and non-active persons within the meaning of the Regulations remains troublesome (**FI**). Some countries refer to a state of confusion at administrative level (**GR**). Finally, there is a risk of double insurance, as social security institutions are not always aware of a change of country residence (**LT**).

e. 'Article 16' agreements

Information relating to Article 16 agreements is fragmented. Some countries give examples and statistics of agreements concluded under Article 16 (**EE, ES, FR**). It is confirmed that most problems related to the duration of posting are solved by concluding Article 16 agreements. In general, these agreements extend the posting period to a period of five years (**NL, SE**). The concept of 'interest of certain persons or categories of persons' remains blurry and a source of potential misunderstanding or misuse. One administrative case reported ruled that an 'Article 16 agreement' was denied because it was not in the interest of the worker (**LT**).

Problems mentioned are administrative problems. It is for instance reported that there are long delays in some countries' replies to Article 16 requests (**FI**).

On 24 January 2011, an 'Article 16' agreement was signed involving Belgium, France, Luxembourg, the Netherlands and Germany. The agreement provides that boatmen are subject to one single legislation, i.e. the legislation of the State where the registered office of the company in charge of the boat is located. If the registered office is situated outside the EU territory of one of the countries to the agreement, the legislation of the State where the company has a permanent representation is applicable. Otherwise, the legislation applicable is the legislation of the country where the owner of the boat has its registered office. A specific rule of conflict applies to the boatman who is the owner of the boat. In this case, the law applicable is the law of the country where the company's registered office is and, alternatively, the law of the country where the boat is registered or where the home port is (**FR, NL**).

Croatia has already started concluding agreements with the purpose of exempting from the application of Croatian law (**HR**).

f. Transitory provisions

No specific problems are reported regarding the transitional provisions laid down in Article 87 and Article 87a of Regulation 883/2004. However, these rules are sometimes considered very complicated in practice (**AT**). In a decision of 27 May 2013, the Swiss Federal Supreme Court explicitly mentioned that concerning social security contributions for a period between 2006 and 2008 the

legislation applicable has to be determined not under the new Regulation 883/2004, but under the old Regulation 1408/71 (**CH**).

With regard to Article 87, it is worth describing a good practice. In Luxembourg, since the implementation of the Act of 21 December 2012 creating the National Agency to Promote Employment (*ADEM*), there are three agencies that register frontier workers: Luxembourg, Esch-Belval and Wasserbillig. Three officers have been specially trained to receive frontier workers. In April 2013, only 183 persons were registered at the same time in their State of residence and in Luxembourg, as the State of last employment. It must be noted that they are entitled to active measures in Luxembourg, such as assistance for the workers to go back to work, financial assistance, or an income bonus for employers who want to hire them (**LU**).

g. Miscellaneous

It is reported that new forms of mobility – shorter periods, varying legal statuses, multi-mobility practices, etc – often make the implementation and application of the Regulations problematic (**DE**). Rules of conflicts are not adapted to highly mobile workers (**DE, MT**).

In the context of a difference of views between Member States concerning the determination of applicable legislation, the relation between Articles 6 (1) and 5 of Regulation 987/2009 is reported to be unclear. An example is provided by the Polish report. It states that there is a difference of view between two countries as to the legislation applicable to a civil servant/mariner/posted worker under Article 11 (3) (b) / 11 (4) / 12 of Regulation 883/2004. The institution of the Member State which considered itself to be competent issued a PD A1 form to the person concerned. According to CJEU rulings (for instance, Case C-2/05, *Herbosch-Kiere*) and Article 5 (1) of Regulation 987/2009, a PD A1 form is to be accepted by the institutions of any other Member State, as long as it has not been withdrawn or declared invalid by the Member State in which it was issued. Does that mean that, while the PD A1 form is in force, the contributions are to be collected in the Member State that certified that document? At which stage of a dispute should Article 6 (1) of Regulation 987/2009 be applied? (**PL**)

B. VARIOUS CATEGORIES OF BENEFITS

1. Sickness, maternity and paternity benefits

a. Benefits in kind

i. Equality of treatment, aggregation and assimilation of facts

The principle of assimilation of facts is a source of debate (see above p.17: iii. Assimilation of facts).

For instance, the assimilation of foreign pensions has been discussed by the Czech institutions. This discussion was about persons who receive a pension from another Member State, and who at the same time work in the Czech Republic as self-employed persons. According to the Czech legislation the State pays health care insurance contributions for pensioners. It is questionable whether this advantage should be extended to pensioners from other Member States if they perform a gainful activity in the Czech Republic. This could indeed lead to the situation where such a person, who is active, would be entitled to full health care without having to pay any contributions for the sole reason that he or she is also a pensioner (**CZ**).

ii. Persons residing outside the competent State

Some reports underline several administrative difficulties. In Switzerland, the Common Institution under the Federal Sickness Insurance Act criticises that when using a portable document there is no confirmation of registry from the institution of the place of residence or stay. It also notes that the moment when a reimbursement claim is deemed to have been notified to the other Member State is not clear. Also, it has not yet been clarified what the procedure is with regard to the exchange of information when persons who receive long-term care cash benefits from the competent institution receive benefits in kind in the Member State of residence for the same period (**CH**).

Member States' various understandings of the concept of 'residence' leads to situations where one person, because a form E106 has been denied by the competent State, may have double insurance. Concretely, these insured persons in the competent State should receive only medically necessary services in Hungary (like in all EEA States), and they should not have access to treatment for their chronic diseases (e.g. hypertension, cancer-related treatments and examinations, etc). However, they prefer to pay the monthly insurance sum of HUF 6,660 in Hungary rather than to consult a doctor in the competent State, which could be much more costly for them. Still, when registering for contribution payments at the Hungarian tax authority, these persons have to declare that they do not have 'an insurance legal relationship or a legal relationship giving eligibility for health services in any EEA Member State' (**HU**). One report also describes situations of fraud where persons manage to be insured in a country where contributions are very low and then have their residence in another country where they take advantage of the medical treatments they wish to receive there (**HU**).

Frontier workers cause specific problems. The Netherlands were one of the countries listed in Annex III of the Regulation (EC) No 883/2004. Even if the country will be formally removed from the Annex by 1 May, 2014, difficulties remain worth being introduced. Family members of a frontier worker who works in the Netherlands are only entitled to claim benefits in kind in the Netherlands when immediate health care is required during a temporary stay in the Netherlands. In practice, this does not create problems. On the basis of bilateral agreements with the neighbouring countries, family members of frontier workers are entitled to claim benefits in kind in the Netherlands on the condition that they have an MVG 111 form, which can be obtained from a particular insurance company. In return, they are to pay contributions to the CVZ (*College voor Zorgverzekeringen*) from the moment they turn eighteen. In practice, this may complicate the position of frontier workers since they may have to deal with four institutions, notably the care provider of the worker, *Agis*, the CVZ and the insurance company in the State of residence (**NL**). In Poland, there were discussions about the consequences for frontier workers, mostly students and pensioners, having so-called German 'mini-jobs'. A 'mini-job' is employment with a remuneration not exceeding the amount of € 400 per month, as well as short-term employment. Since such jobs do not give entitlement to health care coverage in Germany and since Polish citizens employed under the 'minijob' contracts often do not have health care insurance in Poland as well, the question raised is who should be responsible for financing the cost of the health care of the persons concerned. In addition, it is necessary to note that the voluntary health insurance in Germany is too expensive for a person employed through a minijob (**PL**). Dutch frontier workers who live in the Netherlands and are employed in Belgium or in Germany are subject to the social insurance legislation of Belgium or Germany. On the basis of the Regulation they are entitled to claim benefits in the Netherlands on the condition that they have joined the Dutch insurance institution. Problems may arise when the frontier worker wishes to take out supplementary insurance, since the Dutch insurance institution is not inclined to offer frontier workers collective reductions for a supplementary insurance package. Consequently, the frontier workers may have to take out supplementary insurance on the basis of conditions which are less favourable than those for residents (**NL**).

iii. Persons staying outside the competent State

- occasional care
- planned care

The functioning of the EHIC remains the subject of debate. Many problems are reported. For instance, the German health care institutions argue strongly for a better application and control of the existing mechanisms. In this respect, German health care insurance institutions (*AOK*) have proposed to display a symbol in entrance areas of service providers showing that the EHIC will be accepted in accordance with the Coordination Regulations (**DE**). Several problems of ill-applications are reported: the EHIC may be wrongly used for planned care (**MT**); similarly, Belgium sometimes rejects invoices (i.e. forms E125) for treatment received by Belgian insured persons in Spain, Poland and Italy, because it suspects the treatment was planned (**BE**); the EHIC holder may not actually be insured at the date of the treatment and therefore the State which issued the card refuses to reimburse the medical costs (**LT**); hospitals may be reluctant to accept the EHIC (**ES**).

Is occasional care abroad refunded accordingly? The Belgian report raises some doubts. In Belgium, indeed a circular of 4 July 2012 (effective as from 1 July 2012) lays down the reimbursement procedure of occasional care provided to Belgian insured persons in an EU/EFTA Member State. The circular notably applies to cases in which non-planned, non-authorised care was received and the costs associated with it were paid in full by the patient. The circular lays down a different procedure depending on whether the medical costs incurred exceed € 200 or not. In the latter case (A), the costs (excluding those corresponding to treatment not covered by the Belgian benefits package) are reimbursed at an average refund rate of 75%. If the costs incurred abroad do exceed € 200 (B), the insurance institution should either i) send a request for refund rates to the country of treatment with a view to reimbursement according to the rates applicable in that country, or ii) grant a reimbursement in accordance with the Belgian tariffs and reimbursement conditions, provided the insured person agrees to this procedure. Only in case B (i) is it important that the care provider operates within the public/social health care system of the country of stay. If, in case B (i), it turns out that the costs are not covered under the legislation of the country of stay, it is not possible for the person concerned to subsequently request application of the 75% rule or reimbursement according to the Belgian rates/conditions, except when the insured person had to be admitted urgently to a private clinic during his or her stay abroad. According to a spokesperson at the *RIZIV-INAMI* (the National Institute for Health and Disability Insurance), the 75% rate broadly reflects the overall public subsidy rate of health care provision in Belgium, and also has a basis in international standard setting instruments. Even though the circular's attempt to systematise reimbursement procedures is understandable, it seems that certain aspects of this circular are not in keeping with the provisions of the Coordination Regulations. This is particularly true where the circular deprives insured persons of the possibility to obtain reimbursement in accordance with the legislation of the country of stay for costs below € 200. It can also be doubted whether it is legitimate to deny the insured person the application of the tariffs and conditions of the State of treatment on account of inertia of that State's institutions. (**BE**).

The distinction between occasional care and planned care keeps causing problems (**LV**). For instance, an Austrian citizen, residing in Austria, wanted to undergo an operation to change sex in Munich, Germany. He asked the Austrian health insurance carrier for the authorisation. The Austrian health insurance carrier, however, did not issue the authorisation, as such an operation could also be performed in Austria under comparable conditions within a reasonable period of time. Nevertheless, the person concerned went to Munich and got operated on there. Due to the gravity of the surgery, the claimant had to stay in the hospital for another week, but after some days post-operative complications occurred because the patient got out of bed too early. Consequently, another surgery was necessary, which prolonged his stay in Munich for another week. When he came back to Austria the patient claimed the costs of this second surgery and the costs of one week of stay in the hospital with the argument that it was a case of emergency and therefore must be considered 'occasional'

care. The Austrian Supreme Court denied such an entitlement for reimbursement of costs based on Regulation 1408/71 (OGH 24.7.2012, 10 ObS 49/12x). What is essential for the distinction between 'planned' and 'occasional' health care is the purpose of the stay abroad which led to health care (**AT**).

One interesting case regarding planned care is worth being reported. A judgement of the Regional Court of Cataluña decided on a claim for reimbursement of the medical assistance received in Belgium by a Spanish child who had been a victim of a misdiagnosis in Spain and as a result had his eye removed. The cost of the cross-border medical treatment was € 4,594. The Court rejected the reimbursement claim because the parents did not seek authorisation from the competent institution and the surgical intervention can be taken in Spain (**ES**). Other cases are described where national courts insist on the requirement of prior authorisation for planned care (**PL**). On 21 September 2012, the Bacau Appeal Court sent a request for a preliminary ruling. The CJEU ruled in an Order that Article 49 EC and Article 22 of Regulation 1408/71 do not prevent a Member State from subjecting the full reimbursement of cross-border hospital care to a prior authorisation. On the contrary, the automatic exclusion of the reimbursement of such care is not compatible with Article 49 EC and Article 22 of Regulation 1408/71. When the refusal of reimbursement is justified, the insured person can claim, under Article 49 EC, the reimbursement of hospital care within the limits of the coverage provided by the country of affiliation (case C-430/12, *Luca*) (**RO**) .

The state of transposition of Directive 2011/24 and related problems

With regard to the state of transposition of Directive 2011/24, laws of transposition are in the process of being voted or published (**AT, BE, CZ, EE, FI, HU, LT, MT, NL, RO**). In some countries, the law has already been passed (**HR**, **SE**).

Some reports highlight the fact that if the Directive is not transposed yet, many cases based on the principle of free movement of services apply identical solutions (**FR**). In Ireland, provision for many of the requirements of the Directive are already in place, for example in the areas of quality and patient safety, data protection and compliant and redress procedures. Furthermore, it is anticipated that arrangements for some others can be readily put in place (**IE**).

Otherwise, several problems related to the transposition of the Directive are mentioned, several of which are not linked to the application of the Regulation:
- How can it be ensured that the patient should be able to conclude which is the more beneficial provision for him or her? (**FI**)
- How are the personal scope of the Directive and the Regulations to be combined? (**FI**)
- In hospitals, should patients be treated according to the Regulation or the Directive (whether a person will be treated under the EHIC or if money will be asked from the patient)? A problematic question may also arise about the content of the specific health service package, when there is a list of complex treatments under one reference. Furthermore, price differences from Member State to Member State give rise to problems (**EE**).
- Should there be a time limit to claim reimbursement (**ES**)?
- Should pharmacists be allowed not to dispense the medicine prescribed in another Member State 'for ethical reasons'? (**ES**)

Some reports express concerns about the flow of patients between countries with 'high fees' and countries with 'low fees' and towards countries providing excellent medical care (**GR, LT**). Difficulties might also arise when patients are denied reimbursement for cross-border care paid upfront (**GR**). The issue of aftercare or follow-up could present problems particularly in those cases where prior authorisation is not required (**MT**). The question of reimbursement of transportation/ accommodation costs is also considered unclear (**HU**).

It remains ambiguous whether certain health care treatments which are recognised by the medical profession abroad but which have never been tested or used in the competent country are to be considered (according to the Directive) as being covered and thus eligible to be refunded when provided abroad (**HU**). Also, the restriction of reimbursement based on 'overriding reasons of general interest' needs to be clarified since the latter concept lacks accuracy (**HU**).

It is considered that the provisions under Article 20 of Regulation 883/2004 will remain the main basis for the provision of necessary treatment abroad for insured persons and their families more generally (**IE**). One report indicates that, according to the new rules, the care insurer will obtain the possibility not to reimburse the cost of health care provided by a care provider in another Member State with whom the insurance company did not conclude a contract establishing the conditions under which care is to be provided. Another possibility is to reimburse the cost at a lower rate than contracted care in the Netherlands. The compatibility of such restrictions with the Directive is debated (**NL**). It is interesting to note that in Sweden a 'dual procedure' is upheld also after the introduction of the 2013 Act transposing the Directive; persons can either apply for reimbursement based directly on Regulation 883/2004, or, according to the Act. The 2013 Act does not apply should the Regulation be the basis of application. The motivation for this rule is that the individual is to be free to make his or her choice depending on the most convenient alternative (**SE**). The distinction between planned care and necessary care remains crucial and uncertain for the purpose of the application of the Directive or the Regulation (**LV**).

Some countries are looking closely at the functions of the National Contact Point (**MT, SI**).

Efforts to make information related to care abroad accessible to everybody are pointed to in some reports (**BG**). One country indicates that it has arranged the obligation of recognition of prescriptions (**EE**).

iv. The status of pensioners

Practice shows that problems may arise when pensioners receive a pension which cannot be qualified as an old-age benefit in the sense of Annex XI (f) of Regulation 883/2004, such as a transitional company pension. In consequence, they do not have access to health care in the State of residence at the expense of the State granting the pension (**NL**).

An issue that received a lot of attention a couple of years ago was the Dutch position according to which the health care costs of Dutch residents who are entitled to a Dutch and a Belgian pension (former frontier workers) but who forego their Dutch pension, are at the expense of Belgium, and this pursuant to the text of Article 23 of Regulation 883/2004 (which refers to the actual receipt of a pension from the State of residence, not the entitlement thereto). The Belgian authorities did not agree with this interpretation and refused to issue an S1 document to pensioners in this situation. In his reply to a parliamentary question on this matter (E-8689/2010) from MEP Brepoels, Commissioner Andor sided with the Netherlands, referring to the textual argument and arguing that whether or not entitlement to a pension can be waived is a matter of national legislation. 'In the interest of the pensioners', the Belgian authorities have resigned themselves to the interpretation of the European Commission, however, not without highlighting the risks associated with it (as already voiced by MEP Brepoels, i.e. undermining the neutrality of the rules determining the legislation applicable) and the fact that for the persons concerned it entails that the exemption of the 3.55% contribution for sickness and invalidity insurance is lifted. The change of policy was effective as from 18 June 2012 onwards: see circular VI/OA 2012/251 of 4 July 2012 (**BE**).

v. Contributions

The Dutch report describes the impact of the *Van Delft* case (C-345/09) on national law. After this CJEU case, the pensioners turned to the European Court of Human Rights, thereby asserting that the annulment of their private insurance and the loss of their entitlements under this insurance constitutes an infringement of their right to 'peaceful enjoyment of their possessions', contrary to Article 1 of Protocol No. 1 to the European Convention of Human Rights (ECHR). The Court disagreed. It observed that the pensioners were, prior to 2006, insured under contracts which, conditional on the payment of contributions, entitled them to certain benefits in the event that the insured situation came about. Yet, according to the Court, they were not faced with a loss of entitlements under the prior insurance arrangements. The Court also considered that 'possessions' in the sense of Article 1 of Protocol No. 1 may comprise a 'legal expectation' of obtaining effective enjoyment of a property right based on a legal provision or a legal act such as a judicial decision. However, in this case, the pensioners' expectations were solely based on the hope to see their private insurance contracts continued, or renewed, on terms no less favourable for them than those which they enjoyed previously. Hence, the Court concluded that there was no infringement of the right to 'peaceful enjoyment of their possession' and thus no breach of Article 1 of Protocol No. 1 ECHR (Decision of 23 October 2012, Ramaer and Van Willigen v the Netherlands, Application No. 34880/12) (**NL**).

vi. Specific issues concerning maternity/paternity benefits

The change in applicable legislation due to the entry into force of the new regulations may cause problems. In the Czech Republic, some people who were previously covered by the Czech health care insurance now fall under the legislation of the Member State where they reside. This concerns Czech citizens (mainly women) who have a permanent residence in the Czech Republic, but whose residence according to the coordination rules is located in another Member State. The applicable legislation is different if they derive their rights from the rights of their spouse, or if they are regarded as a non-active person. Only after the labour office has decided that the person in question is no longer entitled to parental allowance do the health insurance companies get to find out that they are no longer competent, not even regarding the health insurance for such a person. This problem is being tackled by the competent health insurance companies in cooperation with the labour offices (**CZ**).

Cases are known of Slovenian insured persons who gave birth in an Austrian clinic, using their EHIC, although the time and method of birth were arranged beforehand. The health insurance carrier established that it was planned rather than necessary care. This was also confirmed in decision of the Slovenian social courts. For instance, the Slovenian Supreme Court (decision of 19 November 2012) established that the birth in another Member State was not unexpected and not unplanned during the travel or stay for non-medical reasons in another Member State. The plaintiff went to another Member State with the purpose of giving birth there (**SI**).

b. Benefits in cash

i. Equality of treatment, aggregation and assimilation of facts

The problems encountered here are minor. One country underlines the difficulty relating to the recognition of its work forms for temporary incapacity. The problem results from the fact that some information, considered to be personal data, cannot be mentioned on the form (**EE**).

ii. The calculation of benefits

The calculation of benefits may give rise to difficulties for very short temporary employment. In Sweden, any employment must be expected to last for at least six months for it to serve as the basis

for an estimation of future income. However, when for migrant workers under the Regulation future income is calculated as if their very short period of employment were intended to be permanent. This is a very generous principle that favours migrant workers compared to other workers in temporary employment (**SE**).

In Germany, with respect to the calculation of sickness benefits, reference is made to a percentage (70 %) of the regular income from work on which contributions are levied. For frontier workers, who are liable to pay taxes in their Member State of residence (e.g. France), the competent sickness fund must take into consideration that German sickness benefits are not taxable in France (see Saarbrücken Social Court case of 15 February 2013) (**DE**). This illustrates the relation between social security law and tax law, which is of growing importance.

iii. Export of benefits

Problems of exportation of benefits may be related to administrative difficulties (**GR**). These are often related to uncertainty about the benefits' classification. In Austria, the *Rehabilitationsgeld*' is calculated in analogy to the 'classical' sickness benefit in cash (*Krankengeld*) and accounts at least for the same amount as a complementary supplement (*Ausgleichszulage*). However, this is linked based on the requirement of legal residence in Austria. These are good reasons to doubt whether this requirement of residence is in correspondence to EU law (**AT**).

Problems may also simply arise from a misinterpretation of the coordination rules. For instance, on 16 September 2011 the French *Cour de cassation* ruled that a person insured in France and receiving maternity benefits in cash, loses her benefits when she stays in Switzerland (**FR**).

iv. Medical examinations and administrative checks

Experience shows that the approaches of Member States differ. For instance, some Member States send their national medical documentation while others continue to use E 116 forms (**CZ**).

Problems may arise when medical examinations are to be performed on behalf of the competent institution of another Member State. This is illustrated in the following example. A Dutch institution had examined the state of health of a person who lived in the Netherlands and worked in Germany. On the basis of this examination, a German sickness benefit was awarded. However, the Dutch institution omitted to perform a monthly re-examination, which is a precondition for retaining the benefit under the German legislation. Even though this omission was rectified later on, the competent German institution refused to pay the benefit, not only for the period of default, but also thereafter (**NL**).

Polish competent institutions have to wait a very long time to receive a reimbursement of costs of the administrative and medical examination of a person insured in another Member State, which have been made on behalf of the foreign competent institution (**PL**).

v. Specific issues concerning maternity/paternity benefits

In Sweden, it is now recommended that in accordance with Preamble 20 in Regulation 883/04 a parental benefit (at a minimum/guaranteed level) can still be paid out to a family member/the other parent resident in another Member State provided he or she is not him or herself entitled to such a benefit in the country of residence. This requires – as before when the benefit was regarded a family benefit – that the insured parent transfers his or her days receiving a parental benefit to the other non-resident parent. The benefit not being a family benefit, however, the special rules on the overlapping of such benefits are no longer relevant (**SE**).

In Slovenia, there are some problems of classification, especially with child care leave/benefits immediately after exhausting the maternity leave/benefit. The amount of both benefits is equal. As a rule, maternity leave/benefits have to be used by the mother and child care leave/benefit can be used by the mother or the father. If it is not linked to a person, i.e. a mother or a father, but is intended to meet family expenses, it might be classified as a family benefit rather than maternity benefits (**SI**).

The problems with aggregation/assimilation of periods and facts in another Member State experienced in relation to the Swedish parental benefit scheme seem to remain, despite the re-classification of this benefit. This is particularly so as regards entitlement to income-related parental benefits during the first 180 days of parental leave (**SE**).

vi. Miscellaneous

The question which legislation should provide the sickness benefits in cash is raised by two reports. The Czech report refers to an on-going issue concerning the so-called protection period which exists in its system of sickness insurance. The Czech Republic refused to pay sickness benefits in cash to citizens of another Member State who finished their employment relationship in the Czech Republic and returned to their home country. Czech legislation provides that, after the employment relationship has finished, the protection period applies to such a worker according to the sickness insurance legislation, so that if this person gets sick during the protection period, he or she is still entitled to sickness benefits. Czech institutions argue, however, that the principle of one applicable legislation should be applied in such cases. In that case, the applicable legislation the other Member State's legislation, as the person has been registered as unemployed by a foreign institution. Czech institutions were contacted informally in order to see whether new regulations did not change the Czech position. The Czech institutions started to pay sickness benefits within the protection period in 2012. This initiative put an end to the infringement proceedings even before a case was brought to the CJEU (**CZ**). A similar difficulty is described in Slovakia (**SK**).

The coordination of rehabilitation cash benefits from a competent Member State with benefits in kind from the Member State of residence remains very challenging in practice. Nordic countries have tried to solve this issue by concluding bilateral agreements on administrative procedures in cross-border rehabilitation situations. In the proposal for the new Nordic Convention on Social Security, which should enter into force in 2013/2014, it is provided that the relevant institutions in the countries concerned should co-operate on support and activation measures with a view to providing opportunities for entry into or return to work (**FI**).

2. Long-term care benefits

a. The classification as benefits in kind or in cash

The analysis of national benefits with regard to the EU concept of 'long-term care benefits' remains a challenge. Difficult classification raises lots of practical problems for the application of the coordination rules (**SI**).

In Germany, the private long-term care scheme is integrated into the legal framework of the SGB XI (the *Sozialgesetzbuch* or Social Criminal Code) to that extent that private insurance companies must fulfil specific statutorily laid down conditions which prevent them, for instance, from denying certain persons affiliation to the scheme because of age, sex, health condition etc at the moment of the conclusion of the insurance contract. This scheme falls within the ambit of Regulation 883/2004, notwithstanding the fact that rather than being income-related, premiums for private long-term care are risk-related, because, by law, the amount of such premiums cannot exceed the maximum contribution rate for statutory long-term care insurance. The same applies to tenured civil servants covered by special public schemes which give entitlement to part payment (*Beihilfe*) or full payment

(*Heilfürsorge*) of health care, childbirth care, long-term care and funeral costs. Both schemes provide benefits in cash (*Pflegegeld*) as well as benefits in kind (**DE**).

In Poland, the Act on Family Benefits lists the medical care allowance paid directly to persons in need of long-term care services, and the nursing benefit established to support people who do not undertake or resign from employment or other paid work due to the necessity of taking care of a disabled family member. Due to the purpose of these benefits, they can also be considered as long-term care benefits (**PL**).

In Sweden, some benefits closely related to long-term care fall within the scope of sickness benefits or social assistance and not of long-term care (**SE**).

b. Equality of treatment, aggregation and assimilation of facts

The Belgian report notes that, following CJEU case C-212/06, *Government of the French Community and Walloon Government v Flemish Government*, regarding the Flemish care insurance scheme, the relevant decree was last amended by the Decree of 21 June 2013. This decree, among other things, introduced a provision which is interesting from the perspective of the principle of unicity of the applicable legislation and overlapping of benefits, as it provides that 'the Flemish Government determines the transitional measures governing the conditions under which benefits continue to be provided to persons who cannot remain affiliated to the care insurance as a result of the application of the conflict rules contained in Regulation 883/2004'. No such transitional measures were enacted to date (**BE**).

c. Export of benefits

Some on-going problems between countries are reported regarding the question which country is competent for the payment of long-term care benefits (**CZ**), for instance for pensioners who move their residence to another country (**LT**).

d. Overlapping of benefits

Some Member States are reluctant to provide benefits of a similar kind to other Member States and consider this to fall outside the scope of coordination – social assistance residence-based benefits. Consequently, in some situations two benefits might overlap when a person resides in one State and is insured in another one. One would be provided by one country according to the Regulation, and the second would be based on the other Member State's social assistance residence scheme. In such a situation the person receives two benefits. The reverse situation, i.e. one that results in the absence of any benefit, however, is much worse for the person concerned (**CZ**).

The impact of CJEU case C-388/09 Da Silva Martins in European countries

The *Da Silva Martins* case causes no concern for most countries (e.g. **CZ, FI, HU**). A minority of reports see potential problems. For instance, in Switzerland (and in case *Da Silva Martins* would be applicable *ratione temporis*), the helplessness allowance under the Federal Law on Accident Insurance is exportable (Article 7 of Regulation 883/2004). On the assumption that this allowance qualifies as a sickness benefit under Chapter 1 of Title III of Regulation 883/2004 as far as non-occupational accidents are concerned, *Da Silva Martins* might be understood as meaning the following: when a beneficiary of pensions of two or more Member States, one of which is his or her State of residence and another Switzerland, who is insured in the State of residence according to Article 23 in conjunction with Article 29 of Regulation 883/2004, the Swiss accident insurance to which the person concerned was formerly affiliated has to pay the difference between possible long-term care benefits in charge of the State of residence and the amount of the helplessness allowance under the Federal Law on Accident Insurance, if the latter is higher than the former (**CH**).

The following questions are also raised: will this ruling be applied only to contribution-based schemes or also to residence-based schemes? Will additional rules on differential supplements be necessary? (**GR**)

3. Invalidity

a. Equality of treatment, aggregation and assimilation of facts

Few reports refer to difficulties in the field of invalidity benefits. Some specific problems are nevertheless mentioned.

In a case ruled by the Supreme Austrian Court, a Polish citizen who had completed a professional education as an electrician in Poland and who had worked in Austria afterwards claimed an invalidity pension in Austria (targeting 'blue-collar workers') because he was no longer able to work as an electrician. The competent Austrian pension insurance carrier however denied entitlement to an invalidity pension arguing that the claimant is a blue-collar worker without any professional education and is still able to perform a reasonable and accessible job on the national labour market. The professional education in Poland was not considered comparable with an Austrian education and therefore could not be taken into account for the invalidity pension. The Polish citizen claimed a violation of his right to equal treatment. On 10 September 2012, the Austrian Supreme Court came to the conclusion that the Polish citizen is not entitled to an Austrian invalidity pension, because he must not be considered as a blue-collar worker with a professional education. The reason for this is that there is no legal basis for an obligation of equal treatment regarding his Polish education (**AT**).

The Swiss report refers to a case which applies the coordination rules well. According to the Swiss Federal Law on Invalidity Insurance, the acquisition of the right to an ordinary invalidity insurance pension is subject to the completion of a three years' period of contribution. In a Decision of 16 May 2013, the Federal Administrative Court declared that periods of insurance completed under the legislation of other Member States have to be taken into account as if they had been completed under Swiss legislation, with the exception of those situations where the Swiss contribution period amounts to less than one year (**CH**).

From an administrative point of view, long delays are reported in receiving a claimant's records from some Member States (**IE**).

b. The calculation of benefits (A or B systems)

It is mainly administrative problems which are encountered. For instance, there could still be misunderstandings about how to take periods of insurance and residence into account under Article 44 of the Regulation, even if no practical problem has arisen (**EE**). The receipt of reliable data may take a very long time, which makes the claimants' existence rather uncertain (**HU**).

A specific problem is reported concerning countries not listed in Annex VII of the Regulation. The Netherlands are one of these countries and therefore are not bound to accept invalidity assessments of other Member States. This may, for example, result in the following situation: the Dutch benefit administration, due to a change in the health condition, re-establishes a certain degree of incapacity for work which is, however, not accepted by, for instance, the German benefit administration. If this administration finds the person concerned not incapacitated for work, this person will not be entitled to the German part of the invalidity benefit. Hence, a new calculation will be required. The need to re-calculate will pop up each time when the circumstances relevant to the entitlement or the benefit level change (**NL**).

c. Export of benefits

One single problem, resolved in fact, is reported and concerns the Netherlands. In 2009, the Dutch government introduced a financial compensation for chronically ill and disabled persons. It concerns a fixed amount of € 350 per year meant as a compensation for the extra cost related to chronicle illness and disability. As the allowance is paid by the tax administration, the Dutch authorities regard it as a tax regulation. Therefore, the compensation is considered as non-exportable to chronically ill and disabled persons living abroad.

However, in the context of coordination rules, Dutch authorities decided to change their policy: the compensation will be paid to those entitled to it with retroactive effect up to 1 January 2009. To smooth away the additional cost which this decision brings along, the compensation will be cut by 2.5% as from 1 July 2013. In practice this means that the compensation will be reduced to a fixed amount of € 342 per year (**NL**).

d. Evaluation of invalidity

The evaluation of invalidity remains a touchy subject (**SI**) and is regularly brought before national courts.

The Austrian Supreme Court had to answer the question if it is in compliance with EU law that only the competent State is to decide if a person has reached a sufficient status of invalidity to be entitled to an invalidity pension. A claimant who got a negative response from the Austrian pension insurance carrier although he already received a positive evaluation from his State of residence brought forward that this rule is contrary to Article 5 of Regulation 883/2004 as well as Article 15 (2) of the European Fundamental Rights Charter. The Austrian Supreme Court refused both arguments. It is clearly stated in Regulation 883/2004 that only the competent State decides on the status of invalidity (**AT**).

In a number of decisions, the Swiss Federal Administrative Court makes clear that a decision taken by an institution of an EU Member State on a claimant's degree of invalidity is not binding on the Swiss institution concerned. However, the latter has to take into consideration medical documents and reports as well as administrative information collected by the institution of another Member State as if they had been drawn up in Switzerland. Still, the institution may – but must not – have the claimant examined by a medical doctor of its choice (**CH**).

Some reports refer to problems which countries not listed in Annex VII encounter. For instance, the Dutch institution always makes its own assessment of the degree of incapacity or invalidity. If the Dutch institution is not the competent institution, the institution of the competent State can re-examine the beneficiary in order to assess the physical or mental limitations of the person concerned. Yet, it will be difficult for the latter institution to make the required assessment on the income that he or she is able to earn despite the limitations, since this assessment is linked with the employment possibilities on the Dutch labour market. Also for the person concerned this procedure may be quite burdensome. After all, his or her situation is assessed on the basis of Dutch criteria, which may cause problems when he or she wants to contest the results of the assessment. Furthermore, his or her employment possibilities are assessed on the basis of the Dutch labour market which may be less suitable for persons who are more likely to find a job in the State of residence (**NL**).

From a purely administrative point of view, the exchange of information between competent institutions is depicted as 'complicated'. For instance, problems arise when a person applies for an invalidity pension in Lithuania and has some insurance periods in the United Kingdom. Although the Lithuanian competent institution sends the form E123 LT to the UK, the information already included in the E123 LT form is frequently requested once more (**LT**).

e. Miscellaneous

In the UK Ministers have signalled 'a curb' on people living abroad who are able to claim UK state pensions through their British spouses. According to the Pensions Minister there are 220,000 people living outside the UK who receive some form of state pension based solely on their spouse's British work history – at a cost of £ 410m a year. The Pensions Bill proposes to stop new claims of this kind, but existing pensioners would be unaffected. The Pensions Minister stated that 'Most people would think, you pay national insurance, you get a pension. But folk who have never been here – but happen to be married to someone who has – are getting pensions. Women married to British men, we are getting more of them claiming a pension based on his record. In some cases, they have never set foot in Britain at all.' (**UK**).

4. Old age, survivors and death

a. Equality of treatment, aggregation and assimilation of facts

Several administrative problems are brought forward. In Bulgaria, there are difficulties with regard to the aggregation of periods, especially due to the long delay of other countries' response (**BG**). Other problems are related to misunderstandings between countries: Member States communicate the periods of insurance or residence considered for the given time on the E 205 form and not the periods which can be recognised taking account of the retirement age in their country. Consequently, the preliminary aggregation is not correct and information based on this is not accurate either. For instance, before reaching the retirement age, several Member States do not certify the time spent as a full-time student in higher education or in military service (**HU**). In Greece, smooth implementation of the aggregation principle is not guaranteed everywhere (**GR**). This kind of administrative problems could explain why domestic courts have to apply (in 2013 cases) the mechanism of aggregation (e.g. **CY**).

Next to the administrative difficulties, there are also substantial problems. For instance, the Polish report points to the issue that it is not possible to take into account foreign periods shorter than one year for the purpose of calculating the amount of pension from the foreign contribution system (**PL**).

It is interesting to note that some problems have been resolved. In Latvia, the aggregation of periods of employment completed in the former Soviet Union is now clear. Agreements were concluded with Estonia and Lithuania about the inclusion of insurance periods completed in the former USSR. These agreements aim at the elimination of double inclusion of insurance periods extending insurance periods. The agreement between Latvia and Estonia came into force on 1 September 2008. The agreement with Lithuania came into force only on 1 April 2013 (**LV**). In the Czech Republic, subsequent to the CJEU *Landtova* case, an amendment to the Pension Insurance Act is in the process of being adopted. The new legislation should regulate entitlements in such a way that they depend neither on citizenship, nor on the current residence of the claimant. The pension supplement shall be provided to persons who were insured for 25 years during the existence of the former Czechoslovak State and who during the years 1993 to 1995 gained at least one year of insurance in the Czech system of pension insurance. This solution should respect the rights of people who lived in a common State and at the same time respect the argumentation of the Constitutional Court and comply with EU law and the Coordination Regulations (**CZ**).

A last problem is mentioned in the Swedish report and results from the fact that there are no references to nationality in the Swedish system. Problems do occur with the Swedish 'guarantee pension', since this pension is not really guaranteed but calculated pro rata in relation to years of residence in Sweden. The qualifying period for a full pension is 40 years between 16 and 64 years of age. The years between 16 and 24 are taken into account only if the claimant's work created the right to a pension in Sweden. Consequently, foreign students who spend a couple of years in Sweden will not be entitled to a guarantee pension (**SE**).

b. The calculation of benefits

The calculation of benefits is still problematic when a person's record includes periods in the EU and in third countries. In particular, the combination of EU rules and bilateral issues is a source of concrete difficulties (**LT**).

These difficulties sometimes lead to disputes. In this respect, an interesting case of 3 October 2012 is reported by the Latvian report. The claimant, 'V.L.', contested a decision of the State Social Insurance Agency regarding his old-age pension. V.L. had a total length of service of 36 years. He had completed periods of insurance in Latvia, Lithuania and Estonia. The periods of insurance in Lithuania and Estonia were completed before 1990. In accordance with Article 46 (2) (b) of Regulation 1408, the State Social Insurance Agency calculated the actual amount of the pension based on the theoretical amount in proportion to the ratio between the periods of insurance completed under Latvian legislation and under the legislation of Latvia, Lithuania and Estonia. In accordance with the Law on State Pensions, 'for Latvian citizens, the work performed on the territory of Latvia and of the former USSR up to 31 December 1990 and the accompanying periods shall be equivalent to the length of the periods of insurance'. Thus, if only national legislation is applied, Latvia is to pay pensions also for periods of insurance completed in Lithuania and Estonia. Taking into consideration that old-age pensions are listed in part 2 of Annex VIII to Regulation 883/2004, the District Administrative Court interpreted Article 52 (5) of Regulation 883/2004 as giving a person the right to be entitled to the benefit calculated in accordance with the legislation of the Member State concerned. Since the actual amount of a pension calculated in accordance with national law is bigger than the actual amount of a pension calculated in accordance with the provisions of the Regulation, in the Court's view only national legislation shall apply (**LV**).

The calculation of benefits in relation to child-rearing periods can be complex. In Sweden, pension rights for child-rearing are automatically given to the parent with the lowest income the concerned year, irrespective of sex. However, there is a possibility to transfer pension rights for child-rearing years to a spouse, as long as the conditions above are fulfilled. The construction of the child-rearing years can thus be said to lie on the border line between old-age pensions and family benefits and are of a gender-neutral design. This poses special problems in relation the Regulation. May a spouse to a Swedish worker, residing in another Member State, rely on the Regulation to obtain pension rights for child-rearing years as a derived right from her husband? It is difficult to predict the potential legal problems which will arise in relation to the Regulation and the child-rearing years of the new Swedish pension system (**SE**).

The impact of the CJEU Reichel-Albert case (C-522/10) on European countries

Many reports make a positive assessment of the impact of *Reichel-Albert* on their domestic law (e.g. **AT, ES**). It seems to be raising no concern (e.g. **CY, FI**).

In Liechtenstein, for example, all neighbouring States, which almost all of the employees residing abroad come from, know child-raising periods. Therefore, the question of possible consequences of *Reichel-Albert* has for the time being not arisen (**LI**).

The main difficulty envisaged is in having such periods declared: it often happens that claimants do not declare periods of insurance completed in Ireland and that, as a consequence, the claims are not sent to Ireland even though the person's circumstances could indicate that they might have Irish insurance. If the person subsequently becomes aware that there might be an entitlement, and there is, it has to be treated as a late claim with limited retrospection (**IE**). One other report indicates that the same difficulties would arise as in *Reichel-Albert* (**LT**). In Croatia, it is expected that the CJEU decision in the *Rachel-Albert* case will have a significant impact on future jurisprudence and case law (**HR**).

The Spanish report indicates that if the CJEU *Salgado* case should change the administrative national practice, no news instructions have been issued by the Spanish National Institute of Social Security (**ES**).

The impact of the CJEU Tomaszewska case (C-440/09) on European countries

Many reports note no incompatibility (e.g. **CH, CY, ES, LT, RO, SI**). The fact that this case deals with a problem of entitlement and not of calculation does not necessarily make it relevant for other countries (**LI**).

The Finnish report indicates that the case is interesting in relation to the seafarers' pension scheme in Finland. The insurance periods from another Member State in general only have little affect when deciding about a person's right to benefits based on the Finnish employment pension legislation. Sea fearers, however, have a right to retire before the general pension age if he or she has worked at sea for a long period. In 2011, the Appeal Board for Employment Pensions decided and stated that insurance periods fulfilled when working on a boat flying the flag of another Member State have to be taken into account when deciding about a seafarer's right to a pension before the general pension age. The decision of the Appeal Board has not yet taken legal effect as the Pension Fund for Pensioners has appealed against the decision (**FI**).

In Poland, after the *Tomaszewska* judgement, the referring court (*Sąd Najwyższy*) overruled the cassation of the *Zaklad Ubezpieczeń Społecznych* and upheld the decision delivered at second instance (*Sąd Apelacyjny w Krakowie*), according to which: 'the aggregation of the insurance periods completed in and outside Poland enables to take account of the contribution periods completed in Poland and outside Poland in accordance with the principle of equal treatment of migrant workers. The fact of not allowing the non-contribution periods to exceed one third of the contribution periods completed in Poland gives rise to a situation in which non-contribution periods are taken into account in a less favourable manner for migrant workers compared to individuals who can provide proof of relatively lengthy contribution periods in Poland.' (**PL**).

c. Export of benefits

The export of old-age pensions is a well-known and respected fundamental principle of the Coordination Regulations. This does not mean that all problems are solved.

Some countries may be reluctant to export their pensions and may use indirect ways not to do so. The Dutch legislation provides for a 'purchasing power allowance', which is paid by the tax administration to persons aged 65 and over who can prove that at least 90% of their world income is taxable in the Netherlands. In practice, owing to this condition the allowance will not be granted to people living outside the Dutch territory. In reaction to a domestic case law of 2012, the rules are being modified. The allowance will be paid to pensioners living in the EU, EEA and Switzerland with retroactive effect to 1 June 2011, the date when the act entered into force. To smooth away the extra cost involved, it has been decided to at the same time reduce the allowance by € 3 a month (the allowance amounted to a fixed amount of € 28.14 and will now be lowered to € 25.16 a month). Also, a bill is being prepared in which the allowance is to be replaced by a new old-age arrangement which will be included in the Dutch old-age benefit scheme (**NL**).

It is interesting to see that other problems relating to pensions not being exported are in the process of being resolved. In particular, the European Commission asked Belgium to end the complex procedures to pay pensions to beneficiaries residing in another EU country. As a response to this reasoned opinion, the Belgian authorities amended the relevant regulations. According to the Royal Decree of 13 August 2011 (Belgian Official Journal of 24 August 2011), beneficiaries residing in the EEA now get their pension paid directly to their bank accounts via a cross-border transfer. It follows that also this issue is settled (**BE**). The exportation in Greece of Romanian pensions is also being

gradually worked out. Still, a request for a preliminary ruling has been sent by a Romanian court (C-401/13, *Balazs*) (**RO**).

Finally, the Lithuanian report focuses on an interesting problem concerning people who earned their pension rights in Russia, but whose pension is paid by a Lithuanian institution. One person who worked in the Russian Federation and has never worked in Lithuania was indeed entitled to a pension in Lithuania according to the agreement between Lithuania and the Russian Federation (insurance periods earned in another country by the residents are considered in each country as own periods). The agreement between Lithuania and the Russian Federation provides that Lithuania is to assimilate insurance periods completed in the Soviet Union before 31 May 1991 to own insurance periods. Lithuania considers periods accomplished after this date as own periods under the Lithuanian legislation (by agreement – after the end of 1991) only if a benefit recipient resides in Lithuania. A person concerned was granted a pension taking into account the period from 1960 to 1994. In 2013, this person moved to Germany. Consequently, his pension was reduced – the period between 1 June 1991 and 1994 is now no longer taken into account (**LT**).

d. Rules against overlapping

The French report discusses an interesting case of 20 September 2012 applying the rules against overlapping. In November 2003, a widow claimed a survivor's pension after the death of her spouse two years before. He was already receiving benefits in Spain. The request was turned down by the French social security institution because his resources were too high. The resources calculation incorporated the Spanish benefits. The widow argued that Article 46 (c) (overlapping of one or more benefits referred to in Article 46 (a) with one or more benefits of a different kind or with other income) was applicable. This is not the point of view of the French *Cour de cassation*, which held that Article 46 only aimed at reducing the impact on the survivor's resources that the anti-aggregation rules may have in two or more Member States. Since the benefits he was receiving in Spain were not subject to a national anti-aggregation rule and since only French anti-aggregation rules were applicable, Article 46 could not be invoked (**FR**).

Another report highlights some difficulties related to the combination of coordination rules and bilateral agreements. Certain overlapping of insurance periods remains when agreements with Belarus and Ukraine are applied to persons who have completed insurance periods in Lithuania, other Member States and the former Soviet Union before 1992. This can be illustrated in the following example concerning a person who has ten years of insurance in Lithuania before 1992, five years in Lithuania after 1992, six years in Ukraine and three years in Member State B. If this person resides in Ukraine, according to the bilateral agreement with Ukraine, ten years of insurance in Lithuania before 1992 are considered by Ukraine as a common 'Soviet' period. Ukraine is then responsible for ten plus six years and Lithuania for only five years. On the other hand, for State B Lithuania has to apply the Coordination Regulations and calculate the theoretical amount taking into account ten plus five plus three years and pay a 15/18 part of this amount. If this amount is higher than the Lithuanian part calculated in accordance with the bilateral agreement with Ukraine (only five years), the higher one is paid from the Lithuanian side. From Ukraine, the person receives a pension calculated according to sixteen years of insurance. As a result, ten 'Soviet' years overlap. However, the Coordination Regulations forbid the overlapping of periods of insurance only between Member States (**LT**).

Finally, the competent Austrian pension insurance carriers detected a possible legal gap regarding the possibility to request the deduction of benefits unduly received according to Article 72 of Regulation 987/2009. This rule is considered incomplete, as it firstly does not determine which institution is responsible for the deduction if more than one State is providing benefits, and secondly does not guarantee a minimum income for the person concerned. The latter problem can be explained by the following example. A person receives an undue amount of pension benefits from Austria as well as from Hungary. That could lead to an inappropriate situation if the person

concerned lived in Hungary and the Hungarian authorities asked the Austrian authorities for a deduction of the undue amount. The Austrian authorities would be obliged to deduct this full amount from the on-going Austrian pension payments even if the person concerned therefore falls under the Austrian minimum existence level. The latter is only guaranteed by Austrian law if the person concerned resides in Austria. As a result, the person concerned could in fact receive a very limited amount of pension benefits for a significant period of time. This is considered to be an inappropriate outcome (**AT**).

e. Miscellaneous

There are some administrative problems. Some Member States do not accept applications for pensions issued over a certain period (e.g. a month) before the expected start of the pension. This means that the person in question must in practice make a new pension application. This puts a lot of responsibility on the institution in the country of residence to inform the applicant (**FI**). Several other administrative cooperation problems highlighted are the definition of the pension starting date, the rigid application of systems of documents certification etc. (**FI**).

The Belgian report indicates that a problem has been solved with regard to contributions levied on pensions. The Belgian competent institutions used to levy the solidarity contribution on Belgian pensions regardless of whether the beneficiary resided in Belgium or in another State. The Act of 13 March 2013 on the reform of the 3.55% contribution for sickness and invalidity insurance and the solidarity contribution on pensions (Belgian Official Journal of 21 March 2013) amended the relevant legislation, which now provides for an exemption of the solidarity contribution for recipients of a Belgian pension who reside in the EU/EFTA (**BE**).

5. Accidents at work and occupational diseases

Little information is given about this topic. In a Decision of 15 May 2013 the Swiss Federal Administrative Court declared that the payment of an old-age pension to be settled in another Member State (the Member State of residence of the person concerned) may be made in the currency of this Member State (**CH**).

6. Unemployment benefits

a. Equality of treatment, aggregation and assimilation of facts

Questions are raised about how the aggregation principle should be applied. In the Czech Republic, the question has been raised as to whether periods of care of a person's own children should be taken account if they were acquired in another Member State. Czech institutions are of the opinion that child-raising can be taken into account only on condition that the Czech legislation applied to the person concerned during the given period. If the person concerned was subject to the legislation of a different Member State, it is for that State to take account of the child-raising period and – if it is under its legislation recognised as insurance or an equivalent period – to certify it in the PD U1 or SED/E form for aggregation purposes (**CZ**). The principle of aggregation is also problematic in Sweden with the membership requirement for the income-based benefit (**SE**).

Another question is when aggregation should start? In Greece, the principle of aggregation is criticised for its financial consequences when one person has worked only one day in the country and therefore can claim the local unemployment benefits based on the previous periods of employment in another Member State where contributions have been paid (**GR**). It is interesting to make a comparison with Ireland, where in order to be eligible for aggregation a claimant has to complete one week of insurable employment and have one contribution recorded (**IE**).

With regard to activation measures, the issue of assimilation of facts is raised. The German report asks the question whether the measures can be accomplished abroad. Beneficiaries must reside in Germany and, as a rule, activation must take place in Germany. However, this does not mean that the training measure cannot be implemented abroad, which implies that it can also be provided by a foreign institution. If a person does participate in an activation measure abroad the question is, however, whether investigations by the institutions of the competent country can be carried out across the borders (**DE**).

Other implementing difficulties are connected to the principle of assimilation. In France, there is a case concerning migrant workers who worked some years in France, who still reside in France, but who work in another country. When they lose their job, can they receive unemployment benefits? The answer provided by local unemployment institutions is sometimes negative, based on the interpretation of Article 61 of Regulation 883/2004. Indeed, in order to receive the benefit, the claimant must have been insured in France for twelve years, including one year over the last five years. Some local *Pôle Emploi* consider that the principle of assimilation is not applicable for the condition of 'one year of insurance in France over the last five years' (**FR**).

b. Calculation of benefits

In its Decision of 22 October 2012, the Social Security Court of the Canton of Zurich pointed out that, in contrast to Article 68 (1) of Regulation 1408/71, Article 62 (1) of Regulation 883/2004 no longer makes an exception for the exclusive taking into account of the salary a person received from his or her last employment under the legislation of the competent Member State for persons who have been in their last employment in this State for less than four weeks (**CH**).

The question was raised how to calculate the unemployment benefit of a person who performed a self-employed activity in another Member State before he or she became unemployed. According to the Czech legislation, for the purpose of calculating the benefits of such a person, the base of assets from the self-employment is used, not the income from the self-employed activity, as is envisaged by Article 62 (3) of Regulation 883/2004. If the foreign institutions use the net income in the relevant formula, this will be used in the Czech Republic as well; if the gross income is used, the same amounts will be subtracted from this income, as if it had been a Czech income from the self-employment activity (**CZ**).

c. Unemployed persons going to another Member State

There is a debate in some countries about the period of exportation of unemployment benefits: should beneficiaries be entitled to export their unemployment benefits for a longer period or even until the end of the person's entitlement to benefits according to the rules of the competent State? It is furthermore questionable if an unemployed person who is actively looking for a new job should be obliged to be physically present in the country where he or she is looking for a job (**DE**). The Spanish Supreme Court has used Article 64 of Regulation 883/2004 as an 'interpretative tool' in several cases in order to resolve the legal consequences for unemployment beneficiaries of travelling abroad for less than 90 days. The Court established that in such situations, the absence from the national territory does not imply that the right to unemployment benefits expires; it is only suspended (**ES**). An interesting practice is furthermore worth describing: in Slovenia, on request of the unemployment benefit recipient, the *ZRSZ* (the Slovenian Employment Service) first grants the export for three months. Then a request for the prolongation of this period (for up to six months) might be submitted. The responsible employee of the *ZRSZ* verifies with the insurance carrier in the Member State where the recipient is registered as a jobseeker whether he or she is still registered as a jobseeker and requests information about his or her activities for finding employment (**SI**).

The Dutch report mentions difficulties with regard to the interpretation of the *Huijbrechts* case. According to Article 65 of Regulation 883/2004, unemployed persons who lived in another Member

State than the competent State during his or her last activity as an employed person are to receive benefits in the State of residence as long as the conditions attached to Article 65 are fulfilled. The competent State is to pay the benefit in these cases as if it were the State of last employment. As long as this legal fiction applies, the obligations of the State of last employment with regard to providing unemployment benefits are suspended. However, they will 'relive' once the legal fiction ceases to apply. In the *Huijbrechts* case, the CJEU ruled that this will be so when a wholly unemployed worker who receives benefits from the State of residence transfers his or her place of residence to the State of last employment. According to the CJEU, the State of last employment is then to (re-)assume its obligations, meaning that this country will become the competent State and thus will be responsible for the payment of the benefit. Is this ruling still relevant in view of Article 11 (3) (c) and Article 65 (5) of the Regulation? (**NL**)

The Latvian report refers to an interesting case of 28 December 2012 that deals with the definition of place of residence. In accordance with the E301 certificate provided by the Italian competent authorities, an applicant was registered and insured (for unemployment) in Italy. However, the applicant did not register in Italy as being unemployed and did not apply for an unemployment benefit there. The claimant decided to come back to her home State – Latvia. Since she did not find a job in Latvia, she decided to apply for an unemployment benefit in Latvia, expecting that her working periods in Italy would be taken into account. The applicant tried to interpret Article 65 (5) *in favorem*. However, the court confirmed the position of the State Social Insurance Agency that within the meaning of Article 65 (5), Latvia cannot be considered as a Member State of residence during her employment in Italy (**LV**).

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

Several administrative difficulties are pointed out. In Slovenia, it sometimes seems difficult in practice to receive good quality information about whether an employment contract in another Member State has been terminated due to the fault or will of the insured person. Another problem might be the unresponsiveness of certain bodies in some Member States. The procedures to grant the benefit might be unreasonably lengthy, which might influence the legal position of the insured person. Some problems were reported to arise when implementing the reimbursement of paid unemployment benefits according to Article 65 (6) to (8) of Regulation 883/2004 (**SI**).

One difficulty relates to airline crew and arises when Ireland is the competent State by virtue of the airline's registered office and place of business being in Ireland. During the winter months, airline staff may, while retaining their employment contract with the airline, be unemployed for certain periods and entitled to benefits during these periods. Although Ireland may be the competent State, the staff may be resident in another country, which can lead to administrative difficulties in processing claims and arranging the payment of benefits. The new rules under Regulation 465/2012 under which competency will be related to the airline employees' 'home base' should in time reduce these difficulties (**IE**).

Luxembourg – transitory provisions

With regard to the transitory provision set out in Article 86, it is reported that as of 1 September 2013, Luxembourg has not concluded any bilateral agreement or any convention regarding Article 65 (7).
Therefore, this country pays back three months of unemployment benefits to its neighbouring countries for the frontier workers who lost their job in Luxembourg. In 2012, there were 2,820 claims from French institutions; in 2013, there already have been (up until 1 July) 2,849 French claims. Two thirds of these claims have been accepted (amounting to 9 million euros), which means that one third (nearly 1,000) have been rejected. The other way around, Luxembourg made 39 claims for reimbursement of 200,000 euros at French institutions (**LU**).

Concerning activation measures and following the *Caves Krier* case, it is reported that the Luxembourg government did not have to act, because there was no legislation that prescribed that registration as a jobseeker is subject to a condition of residence in the national territory. Residence as a condition for registration as a jobseeker was only a common practice of ADEM (National Agency to Promote Employment). Fundamental changes in ADEM's practice are underway (**LU**).

The concept of residence remains crucial for the application of Article 65 (5) (a). For the purpose of demonstrating that persons' residence remains in the Slovak Republic, a questionnaire has been drafted. Citizens must attach various documents which demonstrate that they keep their residence in the Slovak Republic. The most important criteria are the period of stay in another Member State and the stability of employment. These are two essential matters which may be obvious directly from the questionnaire. The relevance of such a questionnaire for the definition of the person's actual residence is contested (**SK**).

Following a conclusion by the EFTA Court that national law could not require that the insured person is actually staying in Norway as a condition for the right to unemployment benefits, the requirement of residence in Norway has been withdrawn from the domestic regulation on 15 July 2013 (**NO**).

e. Unemployment benefits for self-employed persons

Most countries do not specify any problems regarding Article 65a introduced by Regulation 465/2012. This could be due to the small number of self-employed persons who applied for unemployment insurance (**AT**) or because there is no scheme for self-employed persons (e.g. **CY, EE, FR, LT**).

However, the implementation of Article 65a may also be seen as problematic. Some questions are raised: how to know if the person is question is unemployed? What if the person in question is outside of the labour market for a valid or invalid reason and registers him or herself as a jobseeker after this? Can a person with his or her own actions determine the legislation applicable? (**FI**) One report gives a positive feedback: in Luxembourg, the representative of ADEM explained that Luxembourg pays unemployment benefits to self-employed French frontier workers, because France does not have an unemployment scheme that covers this category of workers. In July 2013, the Luxembourg legislation applied to three French self-employed frontier workers (**LU**). It is also reported that Belgium does need to take into account insurance periods completed in other countries as a self-employed person when this person is not (or no longer) a self-employed frontier worker, i.e. when he or she subsequently works as an employed person, when he or she completed a Belgian insurance period since or when he or she moved to Belgium after ceasing his or her activity in the other country (the former country of residence) and he or she completed a Belgian insurance period (**BE**).

f. Miscellaneous

Some countries consider the CJEU *Jeltes* case as having simplified the status of frontier workers, at least from an administrative point of view (**CH, NL**).

In the Czech Republic, a question recently arose regarding a person who is entitled to transfer unemployment benefits from another Member State to the Czech Republic in accordance with Article 64 of Regulation 883/2004. There is some doubt as to whether in such a case it is possible to separate the costs for a re-qualification course from re-qualification support (an unemployment benefit). If such a person fell under Article 65, he or she should be entitled to a re-qualification course. The costs for a re-qualification course are, however, not an unemployment benefit and do not fall within the regulations. Only re-qualification support is an unemployment benefit, which should be coordinated. The labour office should therefore, already at the beginning of such a person's registration, settle whether this person resides in the Czech Republic, and whether he or

she plans to remain in the Czech Republic also after the benefits are no longer exported from the other Member State, and therefore whether he or she might opt for a re-qualification course in the Czech Republic (**CZ**).

There is also another question regarding payments into the health insurance system for persons whose unemployment benefits are no longer paid (the period for which these were provided already expired) and who are still registered as unemployed. If a Czech citizen is in such a situation, the State pays the contributions for him or her. If this situation concerns a migrant worker, the Czech State should pay contributions for him or her only if the Czech Republic is competent for his or her health insurance (**CZ**).

Under German law the job centres which provide unemployment benefits are obliged to enable beneficiaries to stay into contact with their children, which may include the costs of travels abroad (**DE**).

7. Family benefits

a. Equality of treatment, aggregation and assimilation of facts

In Spain, workers and civil servants have the right to 'a period of leave no greater than three years to care for each child'. Beneficiaries are not entitled to benefits in cash but to non-economic benefits for child care. However, Spanish legislation does not contain any rules to resolve whether foreign workers could claim these non-economic benefits for child care when they have enjoyed a period of leave in order to take care of their children under another EU social legislation (**ES**).

In Italy, the *INPS* (the Italian National Social Security Institute) recently provided further clarification in order to ensure that national provisions and the rules laid down by the European Regulations are tuned to each other better. First, it stated that for natural parents, in order to assign the right to receive family benefits for children, there is a condition of cohabitation with the offspring, and that under Article 1 (3) of Regulation 883/2004 this condition is fulfilled if the person is 'substantially dependent' on the insured person. Therefore, when residence is not established, the same has to be considered satisfied if the person concerned is mainly dependent on the insured person, regardless of the residence in Italy or in one of the EU countries of the family members involved, in accordance with Article 1 (i) (3) of the Regulation. Secondly, the *INPS* recalled that if a parent with custody or a natural parent living with his or her offspring works or is unemployed or retired, he or she cannot enforce his or her right to family allowances in connection with the 'protected relationship' (so-called criterion, as stated in Circular No. 85 of 12 February 1977) of the spouse, even if such a choice may help them receive better benefits (**IT**).

The impact of the CJEU Bergström case (C-257/10) on European countries

Most countries envisage no problem with the implementation of *Bergström* ***(e.g** HU, LI, RO**). Still, some problems were detected.***
The Finnish insurance court has in two cases referred to the *Bergström* case. The first one of 12 June 2012 dealt with a person who had no income in Finland, but who had worked in the United Kingdom. The Finnish Social Insurance Institution granted a minimum level parental benefit since the person did not have any taxable income in Finland. The Insurance Court considered that it could refer to the *Bergström* case in this situation. It ruled that the Social Insurance Institution should not have granted the parental benefit at a minimum level to the person concerned but instead should, in compliance with the requirement of equality of treatment according to Article 3 (1) of Regulation 1408/71, have calculated the benefit according to the *Bergström* ruling by taking into account the income of the person who has comparable experience and qualifications and who is similarly employed in the Member State in which that benefit is sought. The second ruling of the Insurance Court of 8 July 2013 concerned sickness allowance. The person in this case had worked on a boat flying the Swedish flag from 1 January 2005 to 1 October 2008 and resided in Finland the whole time. As of 2 October

2008 he was covered by the Finnish legislation. He was granted a study grant from 1 January 2009. He was granted sickness allowance from 3 March to 21 March 2009. The level of the sickness allowance was based on the study grant, as the amount of this was higher that the taxable income in Finland for 2007. The income earned in Sweden was not taken into account when calculating the sickness allowance. The Insurance Court ruled that the Social Insurance Institution should grant the allowance, as in its previous ruling, by taking into account the income of the person who has comparable experience and qualifications and who is similarly employed in the Member State in which that benefit is sought (**FI**).

In Iceland, when calculating maternity/paternity leave payments, only average total wages for those months during the reference period in which the parent was on the domestic labour market must be taken into account. The question is raised whether this rule is in conformity with the *Bergstöm* case (**IS**).

In Croatia, institutions recognise the right to child allowance, but request data on the qualifying income for the year prior to the request, in order to assess if the applicant fulfils the applicable income criteria. Possible calculation of income based on an income of a person with comparable experience and qualifications is not envisaged by Croatian law (**HR**).

In its judgement of 3 July 2012, the Swedish Administrative Supreme Court granted the plaintiff an income-based parental benefit on the basis of her work – in its entirety – carried out in Switzerland. The Court did, however, leave it to the National Social Insurance Board to calculate the benefit 'as prescribed in the CJEU's judgement'. Today, the opinion of the Swedish *Försäkringskassa* is that the 240 days of insurance may well be completed in another Member State in its entirety (**SE**).

Still in relation to the *Bergström* case, problems about equality of treatment are identified. In Austria, the income-based family benefits called *Kinderbetreuungsgeld* (child care benefit in cash) apply especially to frontier workers. The Austrian report gives a concrete example. A mother resides with her husband and her child in Germany and had been employed in Austria before her child was born. She applies for a German income-based family benefit called *Elterngeld* (parental benefit in cash). Due to this application the German authorities granted German *Elterngeld*. Also the husband applied for German income-based *Elterngeld* because of his employment in Germany. According to German law both parents can apply for *Elterngeld* at the same time. If the mother would have applied for the comparable Austrian income-based family benefit called *Kinderbetreuungsgeld* she would have received a higher amount of money. Thus, she applied for supplement payments based on Regulation 883/2004. Because the mother had been employed in Austria before her child was born, supplement payments were granted by the Austrian authorities. However, the Austrian authorities calculated the amount of the supplement payments not only on the basis of the German family benefits received by the mother, but also included the payments which were drawn by the husband (**AT**).

Disputes may furthermore be brought before national courts. In Luxembourg, a judgement of 26 December 2012 annulled a decision of the *CNPF* (*Caisse Nationale des Prestations Familiales*), which refused to grant family benefits to the son of a frontier worker who was completing an apprenticeship in France. The frontier worker's son was an apprentice in France and was as such affiliated to the French social insurance scheme. As a consequence, the *CNPF* decided that he was no longer entitled to family benefits in Luxembourg. The Court based its arguments on the CJEU case of 17 March 2005 (C-109/04, *Kranemann v Land Rhein Westfalen*) and stated that the affiliation in France is not exclusive of an entitlement to family benefits in Luxembourg. It took the wages granted during the apprenticeship in France into account, which was 55% of the national minimum wage. As a consequence, he still had to be considered as financially dependent on his parents. Moreover, the Court stated that he could be deprived of the family benefits in Luxembourg only if his professional activity would have the same consequences, if it were exercised in Luxembourg. In Luxembourg, an apprentice is entitled to 100% of the national minimum wage. Therefore, his actual situation – apprenticeship in France – would be less favourable (**LU**).

Again in Luxembourg, the *CNPF* refused to pay the 'additional amount' (*bonus*) for two children of a German couple working in Luxembourg and residing in Germany. It argued that the amount of the German family benefits was higher than the amount of the Luxembourg family benefits for the same period, because it included the German *Elterngeld* into the calculation. The *Conseil Arbrital des Assurances sociales* overruled this decision arguing that the *Elterngeld* had to be excluded from the calculation, because it was granted to the mother who was responsible for the upbringing of the children and not to the children as such. Only benefits granted to the children have to be taken into account, even if they are paid to the parents. The Supreme Court asked whether only family benefits of the same nature have to be taken into account or if all the benefits received by the family – due to their family-oriented nature – must be included in the calculation of the 'additional amount'. In the judgement of 12 July 2013, the *Cour de Cassation* of Luxembourg decided to request a preliminary ruling (**LU**)

The determination of the place of residence remains a very complicated and central problem: important information is in many cases missing and the establishment of a person's 'centre of interests' is difficult (**LT**).

b. Export of benefits (family members residing in another Member State)

The conflict between Slovakia and Austria about Slovak citizens (especially women resident in the Slovak Republic working in Austria only as a self-employed person or as employees) who were claiming the entitlement to family benefits in Austria has been resolved by a bilateral agreement. The Slovak Republic has recognised its primary competence in the event that a parent who has the custody of a child is employed in Austria, the other parent is employed in the Slovak Republic, and the child has its residence in the Slovak Republic (**SK**).

c. Overlapping of family benefits

The CJEU *Hudzinski* case is usually not a source of difficulties (e.g **CH, CY, LI, NL**). For instance, the Italian legislation does not appear to exclude the right to family allowances when a comparable benefit must be provided in another Member State; from this point of view this legislation is not contrary to the European legislation on the free movement of workers (**IT**). Some reports are less affirmative and state that *Hudzinski* could be referred to by claimants to receive residence-based benefits. For instance, it may be discussed if a worker who is posted to France from another EU country and who sets his or her residence in France could claim French family benefits (**HR**). In Croatia, child allowance is subject to residence in Croatia (or permanent presence of a foreigner) which has to have a continuity of three years. This disqualifies seasonal workers from being eligible to claim child allowance. Due to the residence condition which excludes migrant workers from being eligible to claim this benefit, it is estimated that the *Hudzinski* case will have a significant impact on forthcoming national jurisprudence (**HR**).

An interesting case dealing with overlapping of family benefits comes from Germany. The case dealt with a Polish citizen working in Germany, whereas his three Polish children were residing with their mother in their home country. For the Munich Court, the right to a German child benefit for a worker whose child resides with her or his mother in another country is only reduced if the child's mother is legally entitled to an equivalent benefit in her country of domicile. This is for instance not the case if the mother does not get such a benefit because she is neither employed nor self-employed or because her income does exceed an income level for the entitlement to a benefit. The court based its reasoning on the assumption that family benefits constitute a special type of benefits insofar as it is not only the situation of the employed or self-employed person itself which is relevant, but also the situation of the children for whom the benefit is paid, which must be taken into account in deciding where the family benefit is to be paid. (Munich Financial Court (*Finanzgericht*), judgement of 27 October 2011, Az. 5 K 2614/10) (**DE**).

d. Miscellaneous

Unjustified administrative obstacles and excessive delays with regard to family benefit claims are pointed to (**SI, SK**).

The repayment of unjustly paid family benefits is also a source of administrative difficulties, in particular related to the distinctive interpretation of the Coordination Regulations and their implementation. Especially now, in times of crisis, some countries tend to avoid repayment and use various (also unjustified) arguments why the repayment is not possible. There are many links, for instance with Austria (**SI**).

8. Pre-retirement benefits

The Hungarian report describes a new benefit which looks like a pre-retirement benefit. Its objective is to let workers in the public sector ease into retirement by allowing them to continue to work part-time. Public sector employees who are within five years of retirement and who have completed at least 25 years of service can reduce their working hours while receiving 70% of their former salary until they reach retirement age; this period counts towards social insurance rights. According to the reporter, this is not a social security pension benefit (**HU**).

On the contrary, the Lithuanian report excludes the classification of a domestic early retirement pension as a 'pre-retirement benefit'. The reason is that Article 1 (x) of Regulation 883/2004 defines 'pre-retirement benefit' as a benefit paid *before* the early retirement pension, which is not the case for said pension (**LT**).

C. The Coordination Regulations and International Agreements

One report specifies that the solutions of the *Gottardo* judgement (C-55/00) were included into a bilateral agreement with a third country in the part regarding personal scope (**CZ**). Bilateral agreements may be expressly applicable to nationalities (**BE**). In this respect, newer bilateral agreements are not restricted only to the relevant periods completed in both contracting States, but may extend to periods from third States as well. A condition may be that both contracting States have concluded separate bilateral agreements with the third country. If only one has done so, this kind of third-country clause might be applicable only to persons (nationals or all persons) covered by the agreement with the third country (**SI**).