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Assessment of the impact of amendments to the EU social security coordination rules on aggregation of periods or salaries for unemployment benefits

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Executive summary

On the agenda of this report are reform proposals in the area of Chapter 6 of Regulation (EC) No 883/2004, which coordinates unemployment benefits. The focus is on the principle of aggregation and the calculation of unemployment benefits as they are laid down in Article 61 and Article 62 of Regulation (EC) No 883/2004. Should these provisions be preserved in their present state (Option 1)? Or are changes desired or necessary as envisaged in the presentations of Option 2 and Option 3? To be able to assess these Options, an analysis must be carried out.

Together with the principle of export of benefits, the principle of aggregation forms the backbone of the system of coordination of social security, which was enacted in 1958 in Article 51 of the EEC Treaty and which is now to be found in Article 48 TFEU. The principle of aggregation was conceived as a remedy to what is usually called the principle of territoriality, which is a characteristic of nearly all social security systems of the Member States. These systems show a clear tendency toward making entitlement to benefits dependent on territorial requirements. As a result, a benefit is very often granted on condition that the claimant has completed periods of insurance or employment in the territory of the granting Member State, periods completed elsewhere not being taken into account. The principle of aggregation helps to overcome this restriction and renders periods completed in another Member State equivalent. They are not equal, but of equal value in terms of relevance for entitlement to benefits.

Through this mechanism the principle of aggregation makes an important contribution to the freedom of movement of persons. With a view to Article 48 TFEU (and its precursor provisions) the Court of Justice of the European Union (CJEU) considers the purpose of the aggregation principle to ensure that exercising the right to freedom of movement, conferred by the Treaty, does not deprive a worker of social security advantages to which he or she would have been entitled if he or she had spent his or her working life in only one Member State. Otherwise, this might discourage EU workers from exercising the right to freedom of movement and would therefore constitute an obstacle to that freedom.

From the beginning, Regulation (EEC) No 3/58, and later on, Regulation (EEC) No 1408/71 implemented the principle of aggregation through numerous provisions in different chapters. Regulation (EC) No 883/2004 did away with this approach and formed the principle and its essence in the general rule in Article 6 of Regulation (EC) No 883/2004. With Decision H6 of the Administrative Commission the principle of aggregation additionally gained in substance and precision giving good guidance to its application. Article 6 of Regulation (EC) No 883/2004, however, leaves room for derogating provisions ("unless otherwise provided for"). Article 61(1) of Regulation 883/2004 is in line with the exceptional clause in its Article 6. It does not abrogate the principle, but modifies it. It restricts unconditional application of the principle to periods of insurance, whereas periods of (self-)employment are not taken into account unless they would have been considered periods of insurance, had they been completed in accordance with the applicable legislation. A further restriction is laid down in Article 61(2) of Regulation (EC) No 883/2004. The relevant periods must have been completed most recently in accordance with the legislation on which the claimant bases his or her claim. This exception does not apply to persons in terms of Article 65(5)(a) of Regulation (EC) No 883/2004.

The reason for the divergent application of the aggregation principle required by Article 61(1) of Regulation (EC) No 883/2004 (and which was also required by Regulation (EEC) No 3/58 and Regulation 1408/71) is usually seen in the diversity of the unemployment benefit schemes available in the Member States. Some of them are

based on periods of insurance for entitlement, others prefer periods of employment to become entitled to unemployment benefits.

Whereas Article 61 of Regulation (EC) No 883/2004 gives guidance on the application of the aggregation principle when the competent institution has to ascertain whether there is a right to an unemployment benefit, Article 62 deals with the quantitative dimension of the benefit, the level of the benefit. Unemployment cash benefits are overwhelmingly income-related in the Member States' legislations. They are intended to replace income lost through unemployment. As a result the level of the benefit is a statutorily fixed portion of the preceding income. This line of thought is in tune with the view held consistently by the CJEU, who associates a benefit with the risk of unemployment if it is to replace a salary lost as a result of unemployment and is therefore intended for the upkeep of the unemployed worker.

Most Member States calculate the benefit on the basis of income earned during shorter or longer periods of reference preceding the unemployment. Coordination law has to give an answer to this question in cases in which income preceding the occurrence of unemployment was earned in different Member States. The answer given in Article 62(1) of Regulation (EC) No 883/2004 opts for the exclusive account of salary or professional income received by the person concerned in respect of his or her last activity as an employed or self-employed person under this legislation. The CJEU interpreted Article 62(1) of Regulation (EC) No 883/2004, and the preceding provision in Article 68(1) of Regulation (EC) No 1408/71, to the effect that the previous wage or salary which normally constitutes the basis of calculation is the wage or salary received in the last employment of the worker. In this way mobility of workers is not impeded.

Article 62(2) of Regulation (EC) No 883/2004 takes account of the reference periods widely provided for in national legislation. In this event, too, the basic calculation principle of this Article applies. In contrast to Article 62(1) and (2) of Regulation (EC) No 883/2004, Article 62(3) provides a different mode of calculation for frontier and similar workers (Article 65(5)(a) of Regulation (EC) No 883/2004). Following the *Fellinger* case, Regulation (EC) No 883/2004 requires the competent institution of the Member State of residence to take into account the salary or professional income received by the person concerned in the Member State to whose legislation he or she was subject during the last period of (self-)employment.

Option 1 is intended to keep to the *status quo*, as described above.

In the outline of the mandate reference is made to the one-day rule according to which aggregation is possible if there is any insurance in the new Member State, irrespective of the length of the insurance. Whether this interpretation is the right one is a moot point.

With regard to Article 61(1) of Regulation (EC) No 883/2004 (and to every other provision of EU law) a uniform interpretation has to be achieved. Perhaps there is a uniform interpretation of Article 61 of Regulation (EC) No 883/2004 by Member States in theory, but there is no uniform application of the one-day rule in its practical implementation. Some Member States require longer periods to be completed under their legislation before the aggregation mechanism is activated. And this is certainly a drawback of the present state of law. Perhaps the different application of Article 61 of Regulation (EC) No 883/2004 does not result from the wording, but from the outcome of the application of the one-day rule which may be seen as undesired. For example, one Member State's reply to the FreSsco questionnaire stated that a one-day insurance/employment period completed is often treated by the competent institutions of this State as a deceitful/abusive action. Generally speaking and judging by the replies to the questionnaire, the picture of application of the aggregation principle is not uniform. A Member State reported the adoption of a one-week rule due to the fact

that in this Member State relevant periods are not expressed in days but in weeks. The rejection of the one-day clause is also motivated by the lack of guarantee that the person concerned is integrated into the labour market of this State. This thus pleads in defence of a solution similar to what Option 2 has in mind. In addition, it is reported that local institutions follow different approaches in their decision-making. As a result, uniform application of the law is not secured, which could be a reason to consider a revision of the wording to respond to the Member States' interests or to address their concerns.

An important topic in the examination of Article 61 of Regulation (EC) No 883/2004 and its one-day interpretation is integration into the national labour market and financial implications. Nobody would say that a one-day employment is sufficient integration. However, one could argue that other short-term benefits (e.g. sickness benefits) are treated likewise offering protection on a one-day basis.

It cannot be ruled out that Article 61 of Regulation 883/2004, in its interpretation of applying the aggregation mechanism even after one day, may tempt people to benefit from it in a fraudulent way. A typical example could be when a person induces or connives with an employer to establish an employment relation which in reality is disguised employment. Other examples could be added, in particular against the background of Article 64 of Regulation (EC) No 883/2004.

Despite these critical arguments against and the evident drawbacks of Article 61 of Regulation (EC) No 883/2004, the defenders of the present state of law may put forward good reasons. The question may be raised as to whether a change of this Article would also entail a divergence from the application of aggregation rules for other benefits. In addition, the fact that everything lies in the hands of the competent State of the last employment is an advantage since it offers legal certainty. Administrative procedures need not be altered and no transitional provision is needed. Against the integration argument it may be said that the goal of unemployment benefits is not only income replacement but also support for job searching. As a result, if the final decision were the choice of Option 1, to enhance a uniform application of the aggregation principle, a decision by the Administrative Commission could be made which renders the one-day rule obligatory.

The amendments under **Option 2** keep the principle of aggregation intact, but they aim at a postponed application of the aggregation. One month or three months of insurance or (self-)employment would have to be completed before aggregation can be applied.

Since these proposals interfere with the principle of aggregation, the examination of their compatibility with primary law, in particular with Article 48 and Article 45 TFEU, is of the utmost importance. As was already underscored above, the principle of aggregation is one of the central pillars of social security coordination. This was the reason why it was enshrined in the EEC Treaty in 1958.

Article 48 TFEU is placed within the legal framework of the free movement of workers provisions. Free movement of workers is a fundamental right. It protects every European citizen willing to go to and stay in another Member State for work and he or she must not be discriminated against. Compliance with the provisions on free movement of workers is binding not only on Member States but also on all EU institutions. In particular, secondary legislation has to be in accordance with the wording and purpose of Article 45 et seq TFEU.

Against this background the amendments envisaged have to be examined since they would constitute a change of the reach of the principle of aggregation in Article 61 of Regulation (EC) No 883/2004. Following the scheme which the CJEU has developed in its case law concerning the testing of compatibility of secondary law with primary law,

the first step is to define the scope of the Treaty provision and then to see whether the derived law interferes with it. If there is interference, a second step has to be taken and possible justification sought.

The principle of aggregation as it is laid down in Article 48(a) TFEU is designed to abolish as far as possible the territorial limitations of the domestic social security schemes. Without guaranteeing aggregation the access to and the amount of benefits the person has worked for could be lost.

As far as the equality of treatment principle pursuant to Article 45 TFEU is concerned, the CJEU emphasised its importance in the arena of social security coordination very early in its case law. With reference to the *Pinna* case, the CJEU ruled that the adoption of rules which provide for unequal treatment among citizens is not permitted. Equality of treatment prohibits all covert forms of discrimination which, by applying other distinguishing criteria, in fact achieve the same result.

If Option 2 is implemented, migrant workers who become unemployed will have to accept a qualifying period the completion of which is necessary to acquire the protection through the application of aggregation of periods. As a result the amendments envisaged represent a restriction to the free movement of workers.

This brings the analysis and the compatibility examination to its second step, i.e. the search for the existence of justifying reasons. It has to be considered that the law-giving bodies of the EU may choose the most appropriate measures for attaining the objective of Article 48 TFEU and therefore dispose of a wide discretion. This includes the possibility to depart from coordination mechanisms designed by this provision.

Since there are no written reasons to justify restrictions with regard to Article 48 TFEU, only overriding reasons or mandatory requirements may justify restrictions. Case law specific to this problem in the area of social security is rare. Most of the judgments delivered by the CJEU concern discrimination resulting from national law. But it is possible to indirectly draw lessons from such cases. Below, the criteria mentioned in the mandate will be picked up and subjected to scrutiny from the viewpoint of justification.

The aspect of fighting fraud and abuse is certainly of great weight. Nevertheless, it has to be said that a good reason alone is not sufficient for justification. The CJEU sets great store on the proportionality principle. Is it really justified to partially dispense with aggregation (which is the case with stating a qualifying period) and punish unemployed people for the unwanted behaviour of a probably small group of claimants? Doubts may be cast on this. The same is true of the argument of lacking integration into the competent Member State's labour market. Even if integration is still weak due to the short length of gainful activity, does this really justify the suspension of the principle of aggregation?

A serious argument refers to the protection of the stability of national social security systems. That one Member State even after one day of employment has to bear the whole burden of unemployment benefits can be considered as inappropriate. However, under the proportionality test we might ask whether the solution to this problem should lie on the shoulders of the unemployed, or is there a way out through the introduction of a reimbursement scheme (see below).

Aspects of simplification and clarification alone are certainly no justifying reason. On the contrary, the realisation of the amendments would require additional rules concerning which State should be competent during the course of the qualifying period.

Weighing the arguments above it seems doubtful whether the CJEU would consider the new law to be in conformity with Article 48 and 45 TFEU. As a consequence additional measures have to be taken into consideration.

The envisaged amendments under Option 2 require an answer to the question which Member State should substitute the State of last employment if the minimum threshold is not met. Without a workable solution to this problem a violation of Article 48 TFEU would occur. Several alternatives can be taken into consideration, all of which have significant drawbacks.

Clarity alone could not justify substantial amendments which significantly change the legal position of large groups of migrant workers to their detriment. If the one-day rule should no longer be accepted, the present law could be modified in the sense of the amendment. But perhaps an interpretation in a decision by the Administrative Commission expressing the will behind the amendments could be sufficient. From the point of view of simplification the new law would certainly not be recommendable, since extensive amendments to other provisions, e.g. Article 64, 65 and 65a of Regulation (EC) No 883/2004 could be required.

The most serious doubts have to be put forward as far as protection of rights is concerned. As was mentioned above, the referral of the unemployed person to a Member State other than that of the last professional activity due to the introduction of a threshold may be a significant disadvantage for this person. In many cases it could be incompatible with the current life situation and the personal goals of the person concerned. To remedy these disadvantages an altered scheme of this presently laid down in Article 64 Regulation (EC) No 883/2004 would be needed.

The enormous amount of problems as to the competence of Member States in the wake of the new law weigh heavily also under the aspect of administrative burden and implementation arrangements. A new procedure would have to be established, including the use of new forms and SEDs.

The threshold of one month or three months could reduce cases of fraud and abuse, a period of three months even more than a period of one month. Still, one cannot rule out that bogus employment would also occur, lasting either one month or three months.

From the angle of financial implications, it has already been said that the new law, with its shift of costs from the Member State of the last professional activity to another Member State, might only partially lead to a cost-effective solution. In addition, costs may be incurred by the unemployed persons due to their change of residence which would possibly be necessary.

Against this background of significant problems resulting from the enactment of the amendments under Option 2, the preservation of the present scheme in Article 61 of Regulation (EC) No 883/2004 could be preferable to the amendments envisaged. Alternatively, a new reimbursement scheme could be installed. To implement such a new reimbursement scheme the existing scheme in Article 65(6) to (8) of Regulation (EC) No 883/2004 could serve as a template.

Option 3 aims at a change of Article 62 of Regulation (EC) No 883/2004 by introducing a new model for the calculation of unemployment benefits. This calculation will also be based on the salaries earned in the previous Member State(s). Here again the assessment must be undertaken using the criteria and the objectives contained in the mandate. In particular, concerning Option 3 the mandate requires scrutiny of whether the calculation of the amount of the unemployment benefit on very short periods of employment may lead to arbitrary results.

The function of unemployment cash benefits under national law is replacement of the income lost through unemployment. This is why unemployment benefits are income-related and why income preceding the unemployment is the calculation basis. The same is true of unemployment cash benefits on the coordination level. This is confirmed by the consistent case law of the CJEU. As far as the income is concerned upon which the calculation is based, Member States usually lay down reference periods (following the information in the mandate, on average 12 months). Article 62(2) of Regulation (EC) No 883/2004 indirectly confirms the relevance of reference periods. At any rate, Article 62(1) and (2) state that income earned exclusively in the territory of the person's last (self-)employment has to be taken into account. A derogation from these rules applies for persons in terms of Article 65(5)(a) of Regulation (EC) No 883/2004 (Article 62(3) of Regulation (EC) No 883/2004). Both amendments under Option 3 favour a change of the basic rule in Article 62(1) and (2) in cases in which the period of (self-)employment of the claimant was very short (less than one month/three months). In this event the income basis is extended to (self-)employment in the previous Member State(s).

The new law would not pose problems from the viewpoint of clarification and simplification. A different judgment has to be made when the problem of the administrative burden and implementation arrangements has to be assessed. Taking into account income received in the previous Member State presupposes reliable information from the competent institutions in this State. As a consequence, an exchange of relevant data has to take place. Compared to the present law a further administrative step is necessary. This additional administrative burden could be relieved if use were made of the information channel which is currently used in cases concerning frontier and similar workers according to Article 62(3) of Regulation (EC) No 883/2004. The implementing rule in Article 54(2) of Regulation (EC) No 987/2009 could be extended to cases under the new law. Otherwise the competent institution would apply its law and the income communicated would be fitted into its calculation scheme.

An argument against the introduction of the new mode of calculation could be that it delays the award of the unemployment benefit. However, if this problem arises the benefit could be granted on a provisional basis according to Article 7 of Regulation (EC) No 987/2009. As far as the implementation of the new scheme is concerned the wording of Article 62(1) and (2) of Regulation (EC) No 883/2004 has to be altered correspondingly and jointly with the mentioned extension of Article 54(2) of Regulation (EC) No 987/2009.

Perhaps the most central aspect of the change of law is the protection of rights, since this is what coordination of social security aims at. Is the application of the present scheme with its exclusive reference to the income earned in the last professional activity to the advantage or to the detriment of the unemployed person? It depends on the level of income at the time of the occurrence of unemployment compared to that of the previous State. That the person concerned is better off when his or her recent income is higher is certainly acceptable if he or she was insured under the applicable scheme for a reasonable time. But how to judge if this was not so?

In legal doctrine, the fact that the present scheme is built on chance is seen by authors as a wrong legal policy. Many an author goes a step further and asserts that indirect discrimination and as a result a violation of Article 45/48 TFEU takes place in cases in which the migrant worker takes up a lower paid employment and becomes unemployed after a very short time. The former income will not be taken into account, which may lead to the person concerned being treated worse than a person who has completed his or her periods of insurance in one and the same country.

Another weighty problem might be seen in terms of justice and fairness. As was said and shown above, Member States' legislations overwhelmingly adopt calculation schemes which form the benefit level according to a longer insurance record. In this way one could say that this method does justice both to the unemployed person and to the granting institution which administers the financial resources and has to use them economically in the interest of all the contributing workers affiliated to the scheme. We are confronted here with the problem related to one of the objectives stated in the mandate, i.e. the objective as to ensure that the financial burden for paying unemployment benefits does not arise in situations where mobile EU workers have not yet made a significant contribution to the scheme of the new Member State. However, this objective is not achieved under the current law in cases where migrant workers with a low level of income in the previous Member State benefit from the high level in the new Member State, even after very short periods of (self-)employment (in the extreme case one day).

The aspect of fraud and abuse has already been touched upon above and the mode of calculation may have a rather modest impact upon fraudulent behaviour. Yet one aspect seems to be important at this point. The problem of moral hazard has long since been discussed in theory and policy of unemployment insurance. It is requested that unemployment insurance has to be shaped in such a way that it does not allow people to stay unemployed instead of taking up employment even if the income is lower. The present law of Article 62 of Regulation (EC) No 883/2004 could favour such undesired behaviour.

Many an argument discussed above with regard to the protection of rights may again be put forward here. The nucleus of the problem refers to the question whether enjoying the full benefit level, despite only a short time of employment and as a consequence few contributions to a scheme plus weak integration into the scheme, is in harmony with the sound financing of unemployment insurance. It is hard to find an answer in the affirmative.

Introduction

1 The principle of aggregation of periods (Article 61 of Regulation (EC) No 883/2004)

1.1 The principle under primary law

The principle of aggregation of periods is one of the leading pillars of coordination and therefore was already enshrined in (now) Article 48 TFEU. The principle has to be seen against the background of the division of competence between EU law and national law. It is consistent case law of the Court of Justice of the European Union (CJEU) that EU law does not detract from the powers of Member States to organize their social security systems.[1] This is the consequence of Article 48 TFEU providing for the coordination, not the harmonisation of the Member States' legislations.[2] This means that periods qualifying for the acquisition, retention, duration or recovery of a right to benefits are defined by the law of the Member States. From the beginning the CJEU has underscored this empowerment of Member States and it is now consistent CJEU case law that it is up to the Member States to provide for relevant periods and its premises. It has stated that Regulation (EEC) No 1408/71 (and the same is true of Regulation (EC) No 883/2004) does not determine the conditions governing the constitution of periods of employment or insurance. Those conditions, as is apparent from Article 1(r) of that Regulation (now Article 1(t) of Regulation (EC) No 883/2004), are defined by the Member State's legislation under which the periods in question are completed.[3]

Domestic law traditionally follows the principle of territoriality.[4] And at this point the coordination principles come into operation. In essence, the principle of aggregation aims at overcoming the principle of territoriality as far as periods under domestic law are concerned. From a legal point of view this extension of territoriality takes place through a specific legal technique: equivalence. The aggregation of periods renders periods completed under different systems of social security equivalent. They are not equal, but of equal value in terms of relevance for entitlement to benefits. Therefore, it has quite rightly been said that the aggregation of periods completed under different types of social security is not a sinecure.[5] In other words, a process of assimilation is often needed to offer the possibility of aggregation.

The aggregation of periods is, if its conditions are met, a way for a migrant worker to retain the rights acquired under a legislation which is different from the one presently applicable. This happens because the aggregation mechanism leads to a unification of migrant workers' professional career.[6] It is based on the irrefutable presumption that the claimant of benefits has to be treated as if he or she had always and continuously

[1] This basic statement was for the first time pronounced in the judgment in *Duphar*, C-238/82, EU:C:1984:45, paragraph 16. See for a recent case the judgment in *Salgado Gonzalez*, C-282/11, EU:C:2013:86, paragraph 35.
[2] This is one of the statements which emerge in many judgments by the CJEU, see for example recently the judgment in *Jeltes*, C-443/13, EU:C:2013:224, paragraph 43.
[3] Judgment in *Schmitt*, C-29/88, EU:C:1989:61, paragraph 15; judgment in *Alonso*, C-306/03, EU:C:2005:44, paragraph 30. Emphasis is laid on this legal position also in doctrine: see for example N. Guastavino (ed.), F. Basurko & M. Boto, *Lecciones de derecho social de la Unión Europea*, Tirant lo Blanch, Valencia, 2012, p. 208; S. van Raepenbusch, *La sécurité sociale des personnes qui circulent à l'intérieur de la Communauté Économique Européenne*, Story Scientia, Brussels, 1991, p. 198.
[4] See for this F. Pennings, *European social security law*, Intersentia, Antwerp, 2010 (5th edition), p. 9 et seq.
[5] F. Pennings, *European social security law*, *ibid*, p. 10.
[6] Cf P. Mavridis, *La sécurité sociale à l'épreuve de l'intégration européenne*, Bruylant, Brussels, 2003, p. 501.

performed his or her work under the social security system of that Member State from which he or she claims benefits.[7]

Against this background we can formulate the rationale of the aggregation principle and we can rely for this on the case law of the CJEU. With a view to Article 48 TFEU (and the precursor provision) the case law conceives the purpose of the aggregation principle to ensure that exercising the right to freedom of movement, conferred by the Treaty, does not deprive a worker of social security advantages to which he or she would have been entitled if he or she had spent his or her working life in only one Member State. Such a consequence might discourage community workers from exercising the right to freedom of movement and would therefore constitute an obstacle to that freedom.[8] With this statement the CJEU confers in respect of the aggregation principle what has to be observed as a general rule: all the provisions of the regulations must be interpreted in the light of Article 48 TFEU. The aim must be to remove all barriers in the sphere of social security which impede a generally free movement of workers.[9]

1.2 The codification of the aggregation principle in Article 6 of Regulation (EC) No 883/2004

Regulation (EEC) No 1408/71 renounced a general rule on aggregation of periods. It preferred to lay down specific rules in different sections of the Regulation. By contrast, Regulation (EC) No 883/2004 opted for a general rule in Article 6. It was intended in this provision to do away with the numerous aggregation rules contained in various sections of the Regulation and to create a unitary and comprehensive regulation for all cases in which aggregation is needed.[10] From Recital 12 and 13 of the Preamble we can gather that the principle of aggregation serves the aim to retain the rights and the advantages acquired and in the course of being acquired by persons moving within the Community and their dependants. The mechanism of aggregation secures the acquisition and retention of the right to benefits and makes the *calculation of the amount of benefits* possible.[11]

The principle of aggregation has been concretised by the Administrative Commission in Decision H6. This Decision partly relies on the case law of the CJEU, but goes a step further. Firstly it requires to take into account all periods for the relevant contingency completed under the legislation of another Member State by applying the principle of aggregation. Obviously, relevant periods are very often not identical with regard to their elements. Nevertheless, point 2 of the Decision requires that periods communicated by other Member States must be aggregated without questioning their quality. However, point 3 acknowledges the Member States' jurisdiction to determine their other conditions for granting social security benefits taking into account Article 5 of Regulation (EC) No 883/2004. This is a clear reference to the case law of the CJEU.[12]

[7] M. Fuchs, Introduction, in M. Fuchs (ed.), *Europäisches Sozialrecht*, Nomos, Baden-Baden, 2013 (6th edition).
[8] Judgment in *Alonso* EU:C:2005:44, paragraph 29 with reference to the former judgment in *Moscato*, C-481/93, EU:C:1995:44, paragraph 28.
[9] R. Cornelissen, '50 years of European social security coordination', in (2009) *European Journal of Social Security*, 9 (15).
[10] B. Spiegel, in B. Spiegel (ed.), *Zwischenstaatliches Sozialversicherungsrecht*, Manz-Verlag, Vienna, 2012, Article 6(2) of Regulation (EC) No 883/2004.
[11] Emphasis by M. Fuchs. I emphasise this aspect because it could have a direct impact on our discussion of the calculation of benefits under Article 62 of Regulation (EC) No 883/2004.
[12] Reported above.

Article 6 of Regulation (EC) No 883/2004 shows that this principle is not of an exclusive nature. It opens up for other provisions which deviate from what is stated in Article 6 ("*unless otherwise provided for by this Regulation*"). Article 61 is one of the rare specific rules of Regulation (EC) No 883/2004 which derogate from what is required under Article 6 of Regulation (EC) No 883/2004.[13]

1.3 Aggregation of periods under Article 61 – the exception to the rule

1.3.1 The main contents of Article 61 of Regulation (EC) No 883/2004

Article 61(1) of Regulation (EC) No 883/2004 does not do away with the principle of aggregation of periods. However, compared to Article 6 of Regulation (EC) No 883/2004 it restricts the reach of the principle. This restriction is of a two-fold nature: firstly, periods taken into consideration are only periods of insurance or (self-)employment. Secondly, periods of (self-)employment have a lesser value than periods of insurance (61(1), second paragraph).

Why is it that Article 61 of Regulation (EC) No 883/2004 partly derogates from an unfettered application of the aggregation principle in the sense of Article 6 of Regulation (EC) No 883/2004? The distinction between insurance periods and periods of employment was already made in Article 33(1) and (2) of Regulation (EEC) No 3/58. Regulation (EEC) No 1408/71 has continued this distinction between insurance periods and periods of employment.[14] Article 61 of Regulation (EC) No 883/2004 is likewise based upon this distinction. For an explanation of the necessity of the distinction, reference is usually made to the diversity of existing unemployment benefit schemes, which are based either on periods of insurance or periods of employment.[15]

1.4 The functioning of the aggregation of periods under Article 61(1) of Regulation (EC) No 883/2004

Due to the wording of Article 61(1) of Regulation (EC) No 883/2004 three variants can be discerned and have to be treated accordingly in what follows.

1.4.1 The competent State and the other Member State follow the insurance approach.

If the law on unemployment benefits in both Member States in question pursues the insurance model, i.e. benefits are dependent on the completion of insurance periods, the aggregation of periods completed in both Member States is obvious. Periods of insurance have to be taken into account also if the law of the competent Member State is based on periods of employment.[16] The competent Member State has no power or discretion to qualify a period of insurance completed and communicated by the authorities of the other Member State.

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[13] With regard to pre-retirement benefits, Article 6 will not apply (Article 66 of Regulation (EC) No 883/2004).
[14] Article 67 of Regulation (EC) No 1408/71.
[15] P. Watson, *Social Security Law of the European Communities*, Mansell Publ., London, 1980, 229 et seq; E. Eichenhofer, *Sozialrecht der Europäischen Union*, Beck, Munich, 2013 (5th edition), p. 248; M. Fuchs in M. Fuchs (ed.), *Europäisches Sozialrecht*, Nomos, Baden-Baden, 2013 (6th edition), Article 61(1) of Regulation (EC) No 883/2004. For more detailed information about the different approaches see U. Rönsberg, *Die gemeinschaftsrechtliche Koordinierung von Leistungen bei Arbeitslosigkeit*, Centaurus, Herbolzheim, 2006, p. 22 et seq.
[16] Judgment in *Frangiamore*, C-126/77, EU:C:1978:64. See for a detailed analysis S. van Raepenbusch, *La sécurité sociale des personnes qui circulent à l'intérieur de la Communauté Économique Européenne*, Story-Scientia, Brussels, 1991, p. 458 et seq.

1.4.2 *The competent Member State follows the insurance approach. The other Member State builds upon periods of employment.*

In this case Article 61(1), second paragraph is applicable. If the aggregation of periods principle is to apply, the periods of employment in the other Member State have to be periods of insurance under the legislation of the competent Member State. This provision has been criticised because it could deprive the migrant worker of her or his protection against the risk of unemployment, a protection which she or he has possibly earned due to contributions to the unemployment system in her or his country on the basis of an employment relationship which is not acknowledged in the competent Member State.[17]

In the *Warmerdam-Steggerda* case[18] the question was raised whether the aggregation of periods of employment completed in another Member State presupposes that such periods should be regarded as periods of insurance for the same branch of social security by the legislation under which they were completed. The CJEU denies the existence of such a condition. It suffices that the period of employment is considered as a period of insurance according to the applicable law.

1.4.3 *The competent Member State and the other Member State take into account periods of employment.*

This case has not been subject of controversy so far. And it seems to be obvious that aggregation has to take place. The reason for it can be taken from Article 6 of Regulation (EC) No 883/2004 or Article 61(1) of Regulation (EC) No 883/2004. Article 6 clearly states the necessity of aggregation, because Article 61(1) does not "*provide otherwise*".

1.5 Requirement for the application of the aggregation principle (Article 61(2) of Regulation (EC) No 883/2004)

Article 61(2) of Regulation (EC) No 883/2004 is sometimes wrongly understood as a conflict-of-law rule. However, the applicability of the legislation for the award of unemployment benefits has to be determined by Article 11 to 16 of Regulation (EC) No 883/2004. This was clearly stated by the judgment in *Adanez-Vega.*[19] With the exception of frontier workers Article 61(2) of Regulation (EC) No 883/2004 requires the aggregation of periods on condition that the person concerned has "*the most recently completed*" periods in accordance with the legislation under which the benefits are claimed. The objective of this provision is – following the reasoning by the CJEU – to encourage the search for work in the Member State in which the person concerned last paid contributions to the unemployment scheme and to make that State bear the burden of providing the unemployment benefit.[20] This requirement is met if, regardless of the lapse of time between the completion of the last period of insurance and the application for the benefit, no other period of insurance was completed in another Member State in the interim.[21]

The requirement under Article 61(2) of Regulation (EC) No 883/2004 is cogent and, as a consequence, does not preclude a Member State from refusing to grant a worker unemployment benefits if the worker has not most recently completed periods of

[17] S. Van Raepenbusch, *La sécurité sociale des personnes qui circulent à l'intérieur de la Communauté Économique Européenne*, Story-Scientia, Brussels, 1991.
[18] Judgment in *Warmerdam-Steggerda*, C-388/87, EU:C:1989:196.
[19] Judgment in *Adanez-Vega*, C-372/02, EU:C:2004:705. In this judgment the CJEU presented a clear-cut scheme how to operate this determination; see paragraph 17 et seq of the judgment.
[20] See the judgment in *Gray* v *Adjudication Officer*, C-62/91, EU:C:1992:177, paragraph 12.
[21] Judgment in *Adanez-Vega* EU:C:2004:705, paragraph 52.

insurance or employment in that Member State.[22] Article 61(2) of Regulation (EC) No 883/2004 is in tune with Article 48 TFEU.[23]

2 Calculation of benefits (Article 62 of Regulation (EC) No 883/2004)

2.1 The basic principle (62(1))

Unemployment benefits in cash are typical income replacement benefits. This is why Member States usually shape these benefits with reference to income lost through unemployment. If income was earned in different Member States during periods preceding the unemployment, an answer has to be given by coordination law which income should be the relevant income for the calculation of an unemployment benefit. In principle this answer is offered by Article 62(1) of Regulation (EC) No 883/2004, where the competent institution is required to take into account exclusively the salary or professional income received by the person concerned in respect of her or his last activity as an employed or self-employed person under this legislation.

The CJEU has remarked on this provision referring to the Preamble that in order to secure the mobility of labour under improved conditions, the Regulation seeks to ensure the worker without employment the unemployment benefit provided for by the legislation of the Member State to which he or she was last subject. And it goes on interpreting Article 68(1) of Regulation (EC) No 1408/71 (now Article 62(1) of Regulation (EC) No 883/2004) in such a way that the previous wage or salary which normally constitutes the basis of calculation of unemployment benefits is the wage or salary received from the last employment of the worker. In such a manner the unemployment benefit is regarded as not to impede the mobility of workers and to that end seek to ensure that the persons concerned receive benefits which take account as far as possible of the conditions of employment, and in particular of the remuneration, which they enjoyed under the legislation of the Member State of last employment.[24]

Regulation (EC) No 883/2004 has not taken up the provision in Article 68(1), second sentence of Regulation (EC) No 1408/71, pursuant to which a four-week clause has to be observed. If the worker had his or her last employment in the territory of the competent institution for less than four weeks, the benefit has to be calculated on the basis of the normal wage or salary in the place where the unemployed person was residing or staying corresponding to an employment equivalent or similar to his or her last employment in the territory of another Member State.

2.2 Reference periods

Member States' unemployment benefit schemes very often refer to specific reference periods when the income for the calculation of benefits is to be established. Article 62(2) states that in this event, too, the basic principle laid down in 62(1) has to be applied.

[22] Judgment in *Van Noorden*, C-272/90, EU:C:1991:219. However, it is not compatible with Article 45(2) TFEU and Article 4 of Regulation (EC) No 883/2004 if a Member State of residence denies unemployment benefits to a national of another Member State on the ground that, on the date when the benefit claim was submitted, the person concerned had not completed a specified period of employment in that Member State of residence, whereas there is no such requirement for nationals of that Member State. See the judgment in *Chateignier*, C-346/05, EU:C:2006:711.
[23] See the judgment in *Commission* v *Belgium*, C-62/92, EU:C:1992:177, paragraph 12.
[24] Judgment in *Fellinger*, C-67/79, EU:C:1980:59, paragraph 7.

2.3 The special case of frontier workers (62(3))

Regulation (EC) No 1408/71 did not contain a provision on the calculation of benefits concerning frontier workers. In a preliminary ruling the CJEU decided that the competent institution of the Member State of residence must take into account the wage or salary received by the worker in the last employment held by him or her in the Member State in which he or she was engaged immediately prior to his or her becoming unemployed. This CJEU case law was adopted in Article 62(3) of Regulation (EC) No 883/2004.[25] For unemployed persons to whom Article 65(5)(a) is applicable, the institution of the place of residence must, pursuant to Regulation (EC) No 987/2009, take into account the salary or professional income received by the person concerned in the Member State to whose legislation he or she was subject during the last period of (self-)employment.

The Member States' legislations very often provide for a ceiling within the framework of calculating both contributions and benefits, whereby contributions are levied from the income that is taken into consideration up to the assessment ceiling for contributions. This is also decisive for the income used to assess the benefit. In the *Grisvard* and *Kreitz*[26] case the CJEU referred to Article 71(1)(a(ii) and (b(ii) of Regulation (EC) No 1408/71 and held that frontier workers who are wholly unemployed must receive benefits in accordance with the legislation of the Member State in the territory of which they reside as though they had been subject to that legislation while last employed. The legislation of the Member State of residence alone has to be applied and not, therefore, the legislation of the State of employment, including any rules it lays down on ceilings.[27] As the contents of Article 65(5) correspond with the former provisions of Article 71, existing case law can also claim validity under the new legislation.[28]

[25] See also in this respect R. Cornelissen, 'The new EU Coordination System for Workers who Become Unemployed', (2007) *European Journal of Social Security*, 187, 198 et seq.
[26] Judgment in *Grisvard and Kreitz*, C-201/91, EU:C:1992:368.
[27] Judgment in *Grisvard and Kreitz* EU:C:1992:368, paragraph 16.
[28] Likewise R. Cornelissen, 'The new EU Coordination System for Workers who Become Unemployed', ibid, p. 199 et seq.

Option 1

Option 1 – *status quo*: "one-day rule": aggregation is possible, if there is any insurance in the new Member State, irrespective of the length of the insurance. The unemployment benefit is only calculated on the basis of the salary earned in the State of last activity.

1 The structure and the contents of Article 61 of Regulation (EC) No 883/2004

1.1 General consideration

Taking into account that the general content of Article 61 was placed under close scrutiny in the preceding paragraphs, here Option 1 will be examined, pointing out pros and contras. This Option entails the maintenance of this provision with the current wording, without the introduction of any change. Moreover, it is necessary to check out some aspects of this provision that could be considered as controversial. Finally, a possible solution will be provided for the best and a uniform application of this Article.

On the other hand, it has to be stressed that Option 1 not only deals with Article 61, but also with Article 62, the calculation of benefits. In that regard, in this part all the references will be made to Article 61, leaving the analysis of Article 62 for Option 3.

Article 61 of Regulation (EC) No 883/2004 establishes a special rule for the aggregation of periods of insurance or (self-)employment, which derogates from the general rule of Article 6. However, it can be considered that the basic principles of Article 6 are maintained in Article 61 with some particularities. In fact, what Article 6 and Article 61 demand as a prerequisite for the activation of the aggregation principle, is that the person concerned who claims benefits has a link with the competent State – usually through the completion of – at least – one day of insurance or (self-)employment in the said Member State.

1.2 Drawbacks of the current provisions

1.2.1 In the search for the uniform interpretation of Article 61

The need for a uniform interpretation of all EU law and, in this case, of Article 61 of Regulation (EC) No 883/2004 is a "must" as the Court of Justice of the European Union (CJEU) often reminds. Indeed, one of the principles of the EU and a prerequisite or condition for its survival and for its development is the uniform application of its law by all Member States.

The CJEU, referring to the said uniform application, determined in *Rheinmühlen-Düsseldorf*[29] in a very clear way that this *"is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community"* and that it *"aims to avoid divergences in the interpretation of Community law. […] Consequently any gap in the system so organized could undermine the effectiveness of the provisions of the Treaty and of the secondary Community."*

[29] Judgment in *Rheinmühlen-Düsseldorf*, C-166-73, EU:C:1974:3.

In theory, there is probably a unanimous interpretation of Article 61. Unfortunately, this unanimity is not reflected in its practical application. Indeed, the "one-day rule" is not followed by all Member States that require, for some cases, longer periods completed under their legislation to activate the aggregation mechanism. As a consequence, the mandatory uniform application of the law is not achieved.

Maybe the problem of the different application of Article 61 does not emanate from the wording of the provision, but from the undesirable and unwanted results of the one-day clause. Some Member States do not consider it appropriate that with a single day of insurance or (self-)employment a Member State has to aggregate periods of other Member States and bear the costs of the whole unemployment benefits. In this regard the answer of one Member State to the questionnaire of FreSsco is very enlightening *("However, a one-day insurance/employment period completed in our Member State is often treated by the X institution as a deceitful/abusive action, targeting at the granting of the unemployment benefit. Thus, a period longer than one day, completed to our Member State, is mostly required")*.

On the other hand it has to be pointed out that it is possible, for some Member States, to start the aggregation mechanism with some (few) hours of work and not with a complete working day. This fraction of a day could be rounded up and be considered as one day. More problematic is the practice followed by other Member States which do not apply the one-day rule, but the one-week rule, because their periods of insurance or (self-)employment are expressed not in days but in weeks ("*the Member State X would not therefore aggregate insurance from another Member State until the minimum period of insurance of one week had been completed i.e. 'registered' on the system*").

In an indirect way, this position of rejection responds to the idea that the one-day clause does not guarantee the integration of the person concerned in the labour market of the competent State and defends – with its practical and not harmonised application of Article 61 – the "more-days clause" or, in other words, Option 2 of this report.

Indeed, from one reply received to the questionnaire, it can be concluded that the requirement of more than one day to start with the aggregation mechanism is not only a rare, atypical practice or an exception, but a frequent and common exercise *("However, since no domestic rule expressly consolidates the 'one-day rule', local unemployment institutions may alternately decide that one day is not sufficient for the purpose of aggregation. A uniform application in X of 'the one-day rule' is therefore not guaranteed.").*

Conversely, in theory, the zero-day rule to activate the aggregation mechanism could be envisaged for those Member States which do not require that the claimant of benefits, under their legislations, had completed a specified period of employment in that Member State. In that regard it seems that neither Regulation (EC) No 883/2004[30] nor the CJEU[31] have validated this thesis. In consequence, this possibility will not be dealt with here.

1.2.2 Simplification and clarity

This report does not pretend to go into the considerations and the reasons why some Member States do not apply the one-day clause and require more days of insurance or (self-)employment to start the aggregation mechanism. In fact, one of the advantages of Article 61 in comparison with Article 6 is precisely that *"theoretically"* it offers a

[30] See Recitals 10, 11 and 12 of Regulation (EC) No 883/2004.
[31] Judgment in *Chateignier* EU:C:2006:711.

clear rule for the activation of the aggregation mechanism, which makes a uniform application of the provision possible. Indeed, Member States where the person concerned claims benefits have to look if, under their legislation, periods of insurance or (self-)employment were most recently completed and if the nature of these periods fills the requirements of their applicable legislation. If the answer is yes, they start the aggregation mechanism.

It has to be said that the practical implementation of this mechanism can be complicated taking into account in particular some rulings[32] of the CJEU. However, this problem does not concern the purpose of this report.

In principle, no major difficulties appear for the designation of the competent State, according to Article 61 of Regulation (EC) No 883/2004. The real problem comes later when the competent State applies Article 61. At that point, the "one-day rule" or the "more-days rule" play a role, depending on the different interpretation or practical application of Article 61(2). Unfortunately, maybe the wording of this provision opens up possibilities of different interpretations or, some Member States intentionally do not apply the content of this provision because they do not agree with it. This means that one of the pros of the current provision, its clarity, is lost and the uniform application of the law, as required by the CJEU, not achieved. Perhaps a revision is needed to match Member States' interests or address their concerns.

1.2.3 Integration in the national labour market and financial implications

On the other side, and going deeply into the content, sense and logic of the current Article 61, it has to be questioned whether with only one day of insurance or (self-)employment the person concerned is integrated in the labour market of the Member State where benefits are claimed or, in other words, if this rule contributes to the labour integration or if the opposite is true. Indeed it can be argued that with respect to other short-term benefits (e.g. sickness benefits) also the one-day rule is applied. However, unemployment benefits are much linked and dependent on the labour market and the integration in this market plays a very important role taking into account the nature and goal of these benefits and the different active and passive measures.

Moreover, and stressing the importance of the integration factor, it does not seem appropriate that one Member State is obliged to bear all the costs of the unemployment benefits when the person concerned only completed very short periods (one day is enough) of insurance or (self-)employment under the legislation of this Member State, due to the fact that all periods completed in other Member States have to be taken into account as a result of the aggregation mechanism.

Precisely to avoid or reduce these drawbacks, a kind of sharing of cost was established in Article 65 (unemployed persons who resided in a Member State other than the competent State). Accordingly, reimbursements between Member States were introduced.

The aim of these reimbursements was to compensate the Member State of residence which has to provide benefits in accordance with its legislation "*as if the person concerned had been subject to that legislation during his last activity as an employed or self-employed person*".

The logic of Article 65 was clear. The Member State of residence where possibly no periods of insurance or (self-)employment were completed cannot be the only State responsible to bear all the costs.

[32] Judgment in *Warmerdam-Steggerda* EU:C:1989:196.

The reimbursements, between Member States, usually follow a very complicated procedure and for this reason legislatures have always been very reluctant to introduce such instruments, although, at least from the perspective of proportionality, it does not look inappropriate.

Some defenders of the current provision could argue that the situation of Article 65 cannot be compared with the situation of Article 61. In fact, it can be imagined that a frontier worker, for instance, has completed no period (zero-day rule) of insurance or (self-)employment in the Member State of residence, and that this Member State will be considered as the competent Member State and has to provide benefits for a long period. It is reasonable, accordingly, that this Member State receives, as compensation, reimbursement up to five months of the cost of the benefits paid. In the same way, it can also be envisaged that under Article 61 a Member State may be competent as a result of a single day of insurance or (self-)employment. In this regard the difference of the zero-day and one-day rule is very small. Then again, the difference of cost (five months reimbursement/nothing) can be enormous.

It can be agreed that the situations of Article 61 and 65 are totally dissimilar. However, the rationale underlying Article 65 is to avoid that a Member State has to bear a disproportional cost related to the periods completed under its legislation. Unfortunately, this proportionality principle does not appear in the current wording of Article 61, taking into account that it is possible that with one single day of insurance or (self-)employment a Member State is obliged, based on the aggregation mechanism, to provide benefits 6, 12, 18, or 24 months or longer. For this reason the critics of the wording of the current Article 61 are, in some cases, easy to understand. And the voices that call for some restrictions and limits on the aggregation (periods of one or three months completed in the Member State where the benefits are claimed) may to some extent be considered justified and reasonable.

1.2.4 Fraud and abuse

It has to be analysed whether the current Article 61 might foster fraud and abuse. In fact, beside health tourism, social tourism, and poverty tourism also unemployment tourism may be anticipated and, if possible, prevented. Indeed, under the current provision, a single day of employment suffices to be subject to the social security system of the Member State of employment. This could increase the temptation/attraction for nationals of another Member State to seek employment for a few days with a fraudulent intention. For example, the person concerned may induce or agree with an employer to establish an employment relation in a way that in reality is a form of disguised employment. After a dismissal, Article 61 will be applicable and the aggregation mechanism activated, with the possible consequence of many months of unemployment benefits. Moreover, the joint application of Article 61 and Article 62 (calculation of benefits) may as a result entail a pull factor for what is called "unemployment tourism" in particular in the direction of Member States with a high level of wages and protection, undermining the sense of the unemployment benefits coordination provisions.

From a quite different perspective, the current wording of Article 61 may also increase the risk of fraud distorting the correct meaning of the restrictions on the export of benefits of Article 64 of the Regulation. An example could be the best way to describe this problem which may affect in particular but not only the Member States of origin of the unemployment claimants. A national of State A who has been working X years in State B becomes unemployed and decides to return to his or her State of origin. The person concerned knows that the export of benefits is limited to three months (six months exceptionally in some Member States) and that he or she has to be registered as a person seeking work with the employment services of the competent Member State for at least four weeks. To overcome these restrictions, he or she immediately

returns to the country of origin. There, this person may, as explained in the precedent paragraph, establish an artificial work relationship and provoke a simulated dismissal. As a consequence, Article 61 will be applicable and the aggregation mechanism activated with possibly many months of unemployment benefits provided by State A.

This problem is well-known by some Member States, as reflected in a reply to the FreSsco questionnaire *("A representative from the X Unemployment Service reports that they tend to review all possible simulation of professional relationships (fraud) including also those related with the application of the aggregation after a very short period of insurance in X. Simulation, however, is almost impossible to prove in most cases, especially when the person is hired via a temporary employment agency […]." "According to [the] Department of Coordination of Social Security Systems in the Ministry of Labour and Social Policy of X Member State, it is estimated that over 90% from 1517 cases in 2013 were from its own citizens." "Therefore I believe that a significant percentage of them are expected to be Nationals from X Member State that want to come back to this Member State after a period abroad.")*.

1.3 Advantages of the current provision

It can be considered, after reading the precedent paragraphs, that this report makes a plea in favour of the modification of Article 61. In part this is true and in part it is not. Or, as Voltaire said, "the better is the enemy of the good".

It is true that the current wording of Article 61 has declared enemies but also good friends, the latter being those who consider that any changes introduced in this provision will imply more drawbacks than advantages. In fact, the defenders of the *status quo* estimate that the one-day rule is the common principle and practice, applicable for other benefits (except pensions). They believe that any restriction to the aggregation mechanism for unemployment benefits could entail a kind of time bomb that could undermine the root and pillar of the coordination system.

The arguments put forward by the defenders of maintaining Article 61 as it is now, without any change, are solid. In fact for migrant workers it is a very appropriate solution, taking into account that the Member State where the last employment was carried out will always be the competent State. Actually, this solution offers a legal certainty that perhaps will not be offered by other alternatives.

Also for the competent institutions an unchanged Article 61 implies advantages. For instance, the administrative procedures as they are now may continue. Moreover, no transitional provision will be needed.

Concerning fraud and abuse we do not seem to be confronted with a problem of great magnitude. In fact, Member States have their own legislative instruments to fight disguised employment and simulated lay-offs. Moreover, as the European Commission (EC) admits, "*EU citizens do not use welfare benefits more intensively than the host country's nationals*".

A similar opinion is shared by the experts[33] of the *University College London* (*UCL*). They declared that "*[t]here are claims that immigrants from Europe take advantage of the social security system. But, despite the controversy surrounding this issue, evidence for how much immigrants take out of and contribute to the public purse is surprisingly sparse. Our new research published by the Royal Economic Society in the Economic Journal aims to fill this void. Our findings show that European immigrants*

[33] C. Dustman & T. Frattini, 'Yes, EU immigrants do have a positive impact on public finances', *The New Statesman*, 5 November 2014.

have paid more in taxes than they received in benefits, helping to relieve the fiscal burden and contributing to the financing of public services".

Consequently it appears that fraud and abuse have more a political dimension than a real dimension.

On the other hand, the argument of the need of integration in the labour market of the competent State is not quite consistent. Indeed, the goal of unemployment benefits is not only to replace income but also to facilitate the search for a new job. For this reason, benefits and job search are linked and any separation or distribution of competences between Member States can have, in principle, negative consequences for the employment of this person. In fact, the current provision follows the idea that the unemployed person has to make him or herself available in the Member State that offers the most favourable conditions to find new employment.

1.4 An alternative proposal for amendment

In case the final decision about Article 61 would be the election of Option 1, i.e. the maintenance of the current text, it could be appropriate to look for a uniform application of this provision, avoiding misunderstandings or different interpretations. For this purpose, the best solution would be the adoption of a Decision by the Administrative Commission establishing with clarity the "one-day rule" for the activation of the aggregation mechanism and eliminating other alternatives, in particular the "more-than-one-day rule".

Option 2

Option 2: a threshold is applied for the aggregation of periods of insurance or (self-)employment fulfilled in another Member State.

Sub-option 2a: One month of insurance or (self-)employment needs to be completed before aggregation can be applied.

Sub-option 2b: three months of insurance or (self-)employment needs to be completed before aggregation can be applied.

The principle of aggregation has a specific aim. It protects migrants from disadvantages that could be provoked by movements from one Member State to another. This aim is expressively assigned in Article 48 TFEU (see above Introduction, 1). Option 2 derogates from this principle. The idea produced by the European Commission (EC) is to introduce a "threshold" (one could also call it a "qualifying" or "waiting" period). During a certain period of time (one or three months), the aggregation principle would not apply and, as a consequence, the person concerned would not be able to bring into account periods accomplished under the legislation of the previous Member State. Given the fundamental character of the aggregation principle on the one hand and the sharpness of the proposal on the other hand, we can note that Option 2, as such (without any protecting rules), is not compatible with superior EU law, especially with the Treaties. There is some relevant case law of the Court of Justice of the European Union (CJEU)[34] as well as doctrine[35] about the question (see Introduction, 1). In order to avoid a violation of primary law, additional rules should be adopted concerning the situation during the proposed qualifying (or waiting) period and connected questions (return of contributions if the waiting period is not fulfilled and if no benefits have been paid, access to other benefits and employment services etc). The report therefore includes considerations how to organise a lawful treatment of the person concerned and formulates some draft rules (see Option 2, 2).

1 The compatibility of Option 2 with higher ranked EU Law

The first part of the present report (see Introduction) explains the functioning of the aggregation principle. Option 2, however, calls for some additional remarks, because it is focused on persons who are pursuing a professional activity. It sets up a rule which covers workers. It is therefore more difficult to justify a restriction, especially by referring to the integration argument, because working and contributing to the social security system does represent a good way to integrate into the local job market.

The following shortly recalls the legal effect of the rights granted by the Treaty (1.1), summarises the obligations of the EU legislature in terms of coordination (1.2), explains why the draft rule deviates from essential coordination rules required by the Treaty (1.3) and finally looks at the justifying reasons mentioned in the mandate (1.4).

[34] Judgment in *Vougioukas*, C-443/93, EU:C:1995:394, paragraph 30. Also see Opinion of the Court 1/91, EU:C:1991:490: "*EEC Treaty, albeit concluded in the form of an international agreement, nonetheless constitutes the constitutional charter of a Community based on the rule of law*.").
[35] U. Becker, in J. Schwarze (ed.), *EU-Kommentar*, Nomos, Baden-Baden, 2012 (3rd edition), Article 48 AEUV/3.

1.1 Free movement of workers and entitlements associated to the right of free movement

Free movement of workers is a fundamental principle of European law[36] and has the function of a fundamental right.[37] It provides a legally protected position to every European citizen willing to work and stay in a Member State.[38] The relevant rules (especially Article 45 TFEU) are directly applicable,[39] prevail over contrary national law[40] and can establish a claim of compensation if violated.[41] In respect of Option 2, it should be recalled that the right of free movement is binding not only for the Member States but also for all EU institutions.[42]

1.2 Obligations of the EU legislature in terms of social protection

The EU legislature is required to set up a system to enable workers to overcome obstacles with which they might be confronted in national social security rules.[43] It is also obliged to omit measures which introduce additional obstacles to the free movement of workers, such as rules which allow the Member States to discriminate against EU citizens.[44] This follows from Article 45 TFEU combined with Article 48 TFEU.[45] It hence could be held that the legislature does not fully discharge its obligations under Article 45 and Article 48 TFEU if Option 2, without alternatives, were adopted.

1.2.1 Aggregation of periods

The aggregation principle is expressively mentioned in Article 48 TFEU. It therefore appears to be part of the coordination principles the Treaty assumes to be important. The other coordination rules, like the designation of the law applicable, rules opening the access to cross-border health care, the cooperation between national social security institutions, are not. Article 48 TFEU focuses on two instruments: the aggregation of periods and the exportation of benefits. Those principles are "*intended to ensure that workers do not lose, as a result of their exercising the right to freedom of movement, social security advantages granted to them by the legislation of a Member State*".[46] They are designed to abolish "*as far as possible the territorial limitations*" of the domestic social security schemes.[47] The principle is fundamental because without aggregation the access to and the amount of benefits the person has already worked for could be lost.[48] It is necessary in order to undertake a useful implementation of Article 48 TFEU. Hence aggregation of periods belongs to the measures the legislature is required to set up.[49] Consequently, the CJEU has held that

[36] Judgment in *Watson and Belmann*, C-118/75, EU:C:1976:106, paragraph 16.
[37] Judgment in *Heylens*, C-222/86, EU:C:1987:442.
[38] Judgment in *Ugliola*, C-15/69, EU:C:1969:46.
[39] Judgment in *Van Duyn*, C-41/74, EU:C:1974:133.
[40] Judgment in *Watson and Belmann* EU:C:1976:106.
[41] Judgment in *Larsy*, C-118/00, EU:C:2001:368.
[42] Also see Article 15(2) of the EU Charter of Fundamental Rights, which guarantees that "*every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State*", and which is binding for the EU.
[43] Judgment in *Vougioukas* EU:C:1995:394, paragraph 30.
[44] Judgment in *Pinna v Caisse d'allocations familiales de la Savoie*, C-41/84, EU:C:1986:1, paragraph 24.
[45] U. Becker, in J. Schwarze (ed.), *EU-Kommentar*, Nomos, Baden-Baden, 2012 (3rd edition), Article 48 AEUV/3.
[46] Judgment in *Drake*, C-12/93, EU:C:1994:336, paragraph 22.
[47] Judgment in *Singer*, C-44/65, EU:C:1965:122, p. 971.
[48] U. Becker, in J. Schwarze (ed.), *EU-Kommentar*, Nomos, Baden-Baden, 2012 (3rd edition), Article 48 AEUV/1.
[49] Judgment in *Vougioukas* EU:C:1995:394, paragraph 30.

Article 48 TFEU does not only provide the competence to adopt legal acts. Article 48 TFEU also contains a mandate the legislature has to observe.[50] This follows from Article 45 TFEU, which is the '*raison d'être*' of Article 48 TFEU: as the CJEU has pointed out several times "*the establishment of as complete freedom of movement for workers as possible, which forms part of the foundations of the Community, constitutes the ultimate objective of Article 51 of the EEC Treaty and thereby conditions the exercise of the power which it confers upon the Council*."[51]

1.2.2 Equality of treatment

Equality of treatment is anchored in Article 20 of the EU Charter of Fundamental Rights and all measures taken by the EU have to conform to this right.[52] This is also true for Article 45(2) TFEU, which prohibits "*any discrimination based on nationality*". Article 4 of Regulation (EC) No 883/2004 applies the principle to social security. The formulation used by this Article ("*unless otherwise provided for by this Regulation*") suggests that waivers could be allowed by the legislature. According to the CJEU, however, coordination must secure the equal treatment laid down by Article 45 TFEU[53] and must not add to the disparities caused by national legislation.[54] As stated by the CJEU in the *Pinna I* case concerning a French family allowance, EU institutions are not permitted to adopt rules which provide unequal treatment among citizens; such rules are void as contrary to the Treaties, especially in respect to Article 45 TFEU mentioned above. Equality of treatment also "*prohibits (…) all covert forms of discrimination which, by applying other distinguishing criteria, in fact achieve the same result*".[55] This was the case in the *Pinna* judgment mentioned above.

1.3 Derogation from the above-noted principles

According to Option 2, people who move their work from one Member State to another have to wait one or three months before the aggregation principle applies. Therefore, the proposal restricts free movement of workers. The aggregation principle (1.3.1) is affected, since the draft says to not apply it. The principle of equality of treatment is also concerned because it potentially allows Member States to treat foreign workers differently (1.3.2).

1.3.1 Aggregation of periods

Option 2 deviates from a rule prescribed by the Treaty. Article 48 TFEU clearly shows that the aggregation rule is one of the principles that allows workers to move freely within the European Union. The solution suggested under Option 2, however, does exactly the opposite. Whereas the Treaty says "do aggregate", Option 2 says "do not aggregate". Therefore, the result of Option 2 does not correspond with the aims pursued by the Treaty. The proposed change would create obstacles to the free movement of workers, because for the moment, the national legislation is not harmonised. Member States are fully allowed to define all kinds of qualifying periods. Without aggregation of periods, migrant workers would not get the protection necessary to encourage free movement.

[50] Judgment in *Pinna v Caisse d'allocations familiales de la Savoie* EU:C:1986:1, paragraph 24.
[51] Judgment in *Khalil*, C-95/99, EU:C:2001:532, see also the judgment in *Singer* EU:C:1965:122.
[52] Judgment in *Razzouk* v *Commission*, C-117/82, EU:C:1984:116; judgment in *P - Lindorfer* v *Council*, C-227/04, EU:C:2007:490; judgment in *Koninklijke Scholten-Honig NV and Others* v *Hoofdproduktschaap voor Akkerbouwprodukten*, C-125/77, EU:C:1978:187.
[53] Judgment in *Pinna v Caisse d'allocations familiales de la Savoie* EU:C:1986:1, paragraph 24.
[54] Judgment in *Pinna v Caisse d'allocations familiales de la Savoie* EU:C:1986:1, paragraph 22.
[55] Judgment in *Pinna v Caisse d'allocations familiales de la Savoie* EU:C:1986:1, paragraph 23.

1.3.2 Equality of treatment

The draft rule of Option 2 does not expressly refer to the nationality of workers. Therefore, it does not constitute an overt discrimination. But it allows Member States to not take into account periods accomplished under the legislation of another Member State.[56] This type of disguised or hidden discrimination can be avoided by aggregation of periods. Option 2, instead, opens the door to such treatments. There is some case law concerning similar rules which might be interesting to mention.

In the *Roviello* case, the CJEU declared void a rule adopted by the Council in 1983. The rule in question did not itself lay down any formal difference in treatment between nationals and European citizens, but it allowed a Member State to do so[57]; it was "*not of such a nature as to guarantee the equal treatment […] and therefore [had] no place in the coordination of national law*".[58] According to the CJEU, such provisions are liable to have an effect on foreigners more often than on nationals and include the risk of placing them at a particular disadvantage. The same is true for Option 2 as well, because the waiting period will typically apply to migrants; it is evident, moreover, that it reduces the rights of those migrants because unemployment benefits might be refused to them. It is therefore plausible to affirm that Option 2 is not compatible with the principle of equal treatment.

Option 2 is also problematic in terms of mutuality, because the migrant worker is not protected by the system of the receiving Member State although it is likely that the worker will have to pay social security contributions there. In several judgments the CJEU has held that an unlawful disadvantage occurs if EU citizens, other than nationals, must pay higher contributions than usual without being entitled to additional benefits[59] or if they are subject to social contributions "*on which there is no return*".[60]

1.4 Justifying reasons

1.4.1 "threshold"

The EU legislature may choose the most appropriate measures to attain the objective of Article 48 TFEU and therefore disposes of a "*wide discretion*".[61] This includes the right to formulate formal conditions, like the obligation to register as a jobseeker at the employment services of the competent Member State (Article 64(1) of Regulation (EC) No 883/2004).[62] Furthermore, material conditions may be set, for instance the necessity of having the most recently completed period in the competent Member State (Article 61(2) of Regulation (EC) No 883/2004).[63] And finally, it also includes the possibility to depart from the coordination mechanisms designed by this provision.[64] As a consequence, exceptions or restrictions provided by EU coordination law may be

[56] R. Langer, in M. Fuchs (ed.), *Europäisches Sozialrecht*, Nomos, Baden-Baden, 2013 (6th edition), Article 48 AEUV/18.
[57] According to this rule only the occupation periods insured in Germany were taken into account in determining entitlement to an occupational invalidity pension.
[58] Judgment in *Roviello*, C-20/85, EU:C:1988:283.
[59] Judgment in *Terhoeve*, C-18/95, EU:C:1999:22, paragraph 18.
[60] See, to that effect, the judgment in *Hervein and Others*, C-393/99 and C-394/99, EU:C:2002:182, paragraph 51; judgment in *Piatkowski*, C-493/04, EU:C:2006:167, paragraph 34; judgment in *van Delft and Others*, C-345/09, EU:C:2011:57, paragraph 100 and 101; and the judgment in *da Silva Martins*, C-388/09, EU:C:2011:439, paragraph 72 and 73.
[61] Judgment in *Vougioukas* EU:C:1995:394, paragraph 35.
[62] Judgment in *Gray* v *Adjudication Officer* EU:C:1992:177, paragraph 11 and 12.
[63] Judgment in *Testa*, C-41/79, 121/79 and 796/79, EU:C:1980:163, paragraph 14; judgment in *Gray* v *Adjudication Officer* EU:C:1992:177.
[64] Judgment in *Vougioukas* EU:C:1995:394, paragraph 35.

regarded as valid even if they do not furnish the whole protection assigned by Article 48 TFEU.[65]

This leads to the questions whether deviations from fundamental principles must be justified by overriding reasons and how those reasons are to be examined. They are not completely solved yet. The case law concerning restrictions and exemptions decided by the EU legislature is relatively rare. Some decisions do not discuss justifying reasons as such. In the *Pinna* case, the CJEU does not examine the existence of justifying reasons at all.[66] The *Testa* judgment concerning the three-month limitation to exportation of unemployment benefits does not mention justifying reasons either; it only explains that the rule is reasonable, because it confers the possibility to seek employment outside the competent Member State.[67] In the *Gray* case, the CJEU notes that the "*Council considered it necessary*" to attach conditions to the entitlement to unemployment benefits (the obligation to register and the necessity to have the most recent period in the competent Member State); the CJEU also explains that people should be encouraged to seek work in the Member State in which they were last employed and that the latter should have the financial burden of providing the unemployment benefits.[68] Technical difficulties due to profound differences between Member State law were discussed but denied in the *Vougioukas* case.[69] In the *Snares* case the CJEU accepted the argument that special non-contributory benefits are closely linked with the social environment and therefore justify the condition of residence introduced by the EU legislature in 1992.[70] This case law at least answers the first question. It shows that deviations need to be justified by some reasons and, evidently, that a reason must outweigh the rights conferred by Article 45 TFEU. This approach is consistent with the rule of law laid down in Article 2 TEU.

The second question could be answered in the light of the *Gray* judgment mentioned above, in which the CJEU held that the Treaty does not prohibit the Community legislature from attaching conditions to the rights granted by Article 45. In the *Gray* case the CJEU identified and approved the intention of the legislature to encourage persons to seek work in the Member State they were last employed. Therefore, the restriction is considered as valid. As Advocate General Tesauro pointed out in this case, the idea of Article 61(2) Regulation (EC) No 883/2004 is to "*avoid the exportation of unemployment*".[71] This aim does not exactly correspond to the problem focused on by Option 2. Option 2 wants to avoid abuse and excessive financial burden for the Member States, especially the Member State where the worker has lost his or her last job. This motivation is different from the one protected by the CJEU in the *Gray* case, even if the rule proposed might have a similar impact on the European job market. For this reason we do not think that the argumentation used in the *Gray* case may be transposed on Option 2.

Furthermore, the case law related to deviations set up by the EU legislature does mention justifying reasons such as technical difficulties of coordination or the financial burden due to the exportation of benefits. However, they do not go much further, for instance explaining that the reasons put forward must be rational and that every restrictive measure has to respect the principle of proportionality; those arguments are proper to the case law related to measures taken by the Member States.[72]

[65] Judgment in *Vougioukas* EU:C:1995:394, paragraph 35.
[66] Judgment in *Pinna v Caisse d'allocations familiales de la Savoie*, EU:C:1986:1.
[67] Judgment in *Testa* EU:C:1980:163, paragraph 14.
[68] judgment in *Gray* v *Adjudication Officer* EU:C:1992:177.
[69] Judgment in *Vougioukas* EU:C:1995:394, paragraph 32.
[70] Judgment in *Snares*, C-20/96, EU:C:1997:518, paragraph 42.
[71] Opinion of the Advocate General in *Gray*, C-62/91, EU:C:1992:18, paragraph 5.
[72] Judgment in *Stewart*, C-503/09, EU:C:2011:500, paragraph 107.

However, they should also govern the use of competence by the Union, as Article 5(1) TEU stipulates. The necessity to have the most recent period in the competent Member State, as examined in the *Gray* case, has an effect on the aggregation principle because the jobseeker cannot ask for aggregation before having worked at least one day in the receiving Member State. But this rule is less severe than Option 2, which applies to people who have already worked in this State. Option 2 goes a step further than the existent law. It refuses aggregation to workers who already have found a job in another Member State and thus have established a link to the legal system of this Member State; those workers may not apply for benefits in the former Member State any longer. The existent law might be considered sufficient to protect the Member States' financial interests.

As far as we know, the arguments mentioned by the EC (mandate, p. 2, p. 3: clarification, simplification, risk of fraud and abuse, uneven financial burden for Member States) have not yet been subject to CJEU decisions concerning the validity of EU coordination law. In any case, arguments which allow to justify a restriction of the fundamental right of free movement of workers have to be solid. They are typically related to important interests such as inner security, public health and hospital planning.[73] This follows from the case law related to the internal market in general because the necessity of rational and proportionate justifying reasons are relevant for all the freedoms granted by the Treaty, especially for free movement of goods, free movement of persons (movement of workers and right of establishment) and freedom of services.[74] In the field of unemployment benefits or benefits which are similar to the latter, the CJEU has held that conditions such as a residence requirement have to be proportionate.[75] It should also be noted that most of the case law about the question how to justify discriminating rules concern national law. Restrictions can be justified, under EU law, "*if [they are] based on objective considerations independent of the nationality of the persons concerned and (are) proportionate to the legitimate objective of the national provisions.*"[76] The rule must be "*appropriate for securing the attainment of the objective pursued*" and it must not "*go beyond what is necessary in order to attain it*."[77] Usually, the CJEU takes into account the particular national rules and circumstances. In the *Stewart* case, for instance, the CJEU had to consider the situation of a British subject to whom a disability allowance was refused, for the sole reason that she was not present in Great Britain on the date on which she claimed the allowance.[78] The CJEU held that this restriction could not be described as appropriate; it neither ensured a genuine link between the claimant and Great Britain nor was it necessary to preserve the financial balance of the British social security system.[79] In other words, the amendment proposal would have to explain why, in certain Member States, the waiting period is necessary. It would also be necessary to define under which conditions or in which kind of situation a waiting period would not apply (e.g. to persons who had already worked in the receiving Member State in former times and have contributed to the social security system of the State).

[73] Judgment in *Watts*, C-372/04, EU:C:2006:325; this example falls within the scope of the freedom of services, but similar justifying reasons related to health care also appear in the field of social coordination under Regulation (EC) No 883/2004; see e.g. the judgment in *Elchinov*, C-173/09, EU:C:2010:581, paragraph 44 and 51.
[74] R. Bieber & F. Maiani, *Précis de droit européen*, Bern, 2011 (2nd edition), p. 191.
[75] Judgment in *Petersen*, C-228/07, EU:C:2008:494, paragraph 61.
[76] Judgment in *De Cuyper*, C-406/04, EU:C:2006:491, paragraph 40. See also the judgment in *Sotgiu*, C-152/73, EU:C:1974:13, paragraph 4.
[77] Judgment in *De Cuyper* EU:C:2006:491, paragraph 42.
[78] Judgment in *Stewart*, C-503/09, EU:C:2011:500.
[79] Judgment in *Stewart* EU:C:2011:500, paragraph 108. See also the judgment in *Petersen*, C-228/07, EU:C:2008:494.

1.4.2 Justifying reasons such as mentioned in the mandate

The mandate also explains that the current rules bear the risk of fraud or abuse because people can claim benefits just after arriving in another Member State (p. 2 of the mandate). According to the EC, Option 2 would limit this risk, since the person would have to wait a certain period of time before he or she could ask for aggregation. In the field of social security, the CJEU has not yet discussed the risk of fraud and abuse as a justifying reason. This might be due to the fact that parts of the case law mentioned above go back to the 1970s and 1980s. Today, the Treaties include a chapter about Area of Freedom, Security and Justice, wherein the Union is to prevent and combat crime (Article 67(3) TFEU); the European Anti-Fraud Office investigates fraud against the EU budget. Therefore, it seems plausible that the EU is also concerned about fraud and abuse directed against its members. As recently pointed out by the EC, EU law contains "*a range of robust safeguards to help Member States to fight abuse and fraud*"[80]. In the field of social security coordination, the Treaty does not expressly mention rules fighting fraud and abuse, but neither does it prohibit such rules (Article 48 TFEU). Hence, the risk of fraud and abuse may be taken into account by the EU legislature while adopting coordination rules. It could even constitute a justifying reason for exemptions and deviations from the principles mentioned in Article 48 TFEU. The question, however, if Option 2 is justified by this argument needs some additional clarifications. It should first be verified if the fear about possible abuse is based on objective facts. The statistics seem to indicate the opposite: "*EU citizens do not use welfare benefits more intensively than the host country's nationals*".[81] Furthermore, it should be asked if the simple risk of abuse is sufficient. Would it not be more appropriate and proportional to figure out a rule which sanctions abuse committed by persons instead of choosing a measure of general prevention? Such measures are not allowed when adopted by the Member States and, consequently, should not be used by the EU legislature either.[82]

Moreover, the waiting period could help to make sure that the migrant worker is fully integrated in the job market before getting unemployment benefits. But the integration argument (p. 1 of the mandate) is problematic if we consider the relevant Treaty provisions and the settled case law of the CJEU. The Member States may indeed adopt rules which require the migrant to show a certain degree of integration; the CJEU uses the expression "*degree of connection to society*" and admits that "*the aim of solidarity may constitute an objective consideration of public interest.*"[83] Conditions of territory, however, usually fail to comply with the principle of proportionality; they are not an appropriate means by which to obtain the objective of solidarity if the person who has his or her residence in another Member State is in fact as well integrated as a resident.[84] Several CJEU decisions did not even evoke the possibility that the refusal to take into account external events might be justified; the CJEU found a violation of EU law without discussing any overriding consideration.[85] In the *Mulders* case, the CJEU held that a Member State cannot preclude, as a period of insurance, an entire period during which contributions were paid for the sole reason that the person concerned did not reside in that Member State during this period.[86] It should also be noted that the recent case law concerning persons who move into

[80] COM(2013) 837 final, Free Movement of EU citizens and their families: Five actions to make a difference, p. 7.
[81] COM(2013) 837 final, Free Movement of EU citizens and their families: Five actions to make a difference, p. 4, referring to data collected by the Commission.
[82] COM(2013) 837 final, Free Movement of EU citizens and their families: Five actions to make a difference, p. 8, concerning Member State actions.
[83] Judgment in *Tas-Hagen*, C-192/05, EU:C:2006:676, paragraph 35 and 36.
[84] Judgment in *Tas-Hagen* EU:C:2006:676, paragraph 37 and 38.
[85] Judgment in *Elsen*, C-135/99, EU:C:2000:647; judgment in *Klöppel*, C-507/06, EU:C:2008:110.
[86] Judgment in *Mulders*, C-548/11, EU:C:2013:249, paragraph 47.

another Member State without the intention to work, cannot be applied to the present situation.[87] The draft amendment concerns migrant workers, which means persons who intend to accomplish a gainful activity and therefore contribute to the national economy of the receiving Member State. This is an important factor proving integration. In the case mentioned above it was completely absent; the applicants did not have any economic activity, nor did they look for such an activity.[88]

The waiting period might be desired by some Member States, especially by Member States with a high level of EU immigration. The mandate (p. 2) mentions the financial burden put on the shoulders of those Member States and hence refers to another important principle of the EU. The Treaties indeed contain several provisions which refer to economic difficulties the Member States have to face. Beside rules concerning the economic and social cohesion (Article 162 and 174 TFEU), competition rules[89] and the chapter concerning the Monetary Union (Article 140 TFEU) take into account the financial and economic power of the Member States. All Member States of the Eurozone have to guarantee financial stability and must not overload their budget. Therefore, it is plausible to defend that solidarity and the limits inherent to the latter require a measure such as Option 2. But the proposal then raises the question how to cover the person during the qualifying period and which Member State should reasonably have the financial burden (see 2 below).

This also answers the question if Option 2 could be justified by the simplification argument (p. 2 of the mandate). We do not think so. If the aim is to adopt simple coordination rules, the legislature should choose a system in which the worker is clearly subject to the law of one Member State. Option 2, however, requires the adoption of additional rules about access to benefits during the waiting period (see 2 hereafter: a paragraph added to Article 61 of Regulation (EC) No 883/2004 provides exportation of unemployment benefits from the previous Member State). The system does not become easier this way. Moreover, by abandoning the one-day rule, the draft introduces the necessity to calculate terms and periods. Such calculations do not promise any simplification.

A last reason mentioned is to ensure uniform application of the rules on aggregation of periods by all Member States (p. 2 of the mandate). This aim, however, can already be attained by a correct application of the existing law. The mapping, which is attached to this report shows that most of the questioned Member States apply the one-day rule (e.g. Germany, the Netherlands). If other Member States might not do so, they would deviate from a uniform rule and therefore violate EU law.

1.5 Intermediate result

Option 2 is not, as such, compatible with Articles 45 and 48 TFEU. By deviating from the aggregation principle it does the opposite of what is prescribed in Article 48 TFEU. It allows Member States to refuse unemployment benefits if the person concerned has less than three months (or one month) of a working period under domestic law. The motivating reasons are not solid enough to justify the restriction entailed. Even if the rule were qualified valid, a person could claim aggregation directly on the ground of Article 45 TFEU.[90] The provisions would also have to be interpreted restrictively[91] and

[87] Judgment in *Dano*, C-333/13, EU:C:2014:2358.
[88] Judgment in *Dano* EU:C:2014:2358, paragraph 39.
[89] Judgment in *Kingdom of the Netherlands* v *Commission*, C-28/66, EU:C:1968:5.
[90] Judgment in *Vougioukas* EU:C:1995:394, paragraph 36 and 44.
[91] Judgment in *Jauch*, C-215/99, EU:C:2001:139.

in the light of this Article.[92] The additional rules proposed hereafter (see 2) take into account this aspect.

An amendment of Regulation (EC) No 883/2004 which introduces a waiting period must guarantee that the free movement of workers would not be restricted. Therefore, the following part outlines additional provisions in order to enhance Option 2 (see 2). The proposal contains rules about the protection the migrant worker gets during his or her waiting period. Those rules indicate the Member State competent to pay benefits. The new system should also be proportionate (Article 5(4) TFEU). Introducing a waiting period might be considered as such since it does not totally exclude aggregation but provides a temporary limitation; a waiting period of one month rather than three months might suffice (for more details see the draft provision in the following part of this report, 2).

2 Evaluation of Option 2

2.1 Which Member State could be competent to aggregate if the minimum period in the last Member State of employment is not fulfilled?

There can be no doubt that currently the focus of the rules to coordinate unemployment benefits lies predominantly on the migrant workers' interests, providing the most favourite conditions for finding new employment. The financial concerns of the institutions are being taken into account to a much lesser extent. At least this is the case while the unemployed person is available to the employment services of the State that pays the benefits. The proposals by the EC in Option 2 would shift the focus significantly to the institutions' interests by ensuring that the financial burden for paying unemployment benefits does not arise in situations where mobile EU workers have not yet made a significant contribution to the scheme of the new Member State. However, this would only be the case with regard to certain groups of migrant workers, while the coordination provisions for migrant workers falling under Article 65 would remain unchanged, unless wider amendments to Regulation (EC) No 883/2004 are implemented.

Option 2 would mean that migrant workers would not be entitled to benefits in the last Member State of employment if aggregation with periods concluded in other Member States would be necessary in order to fulfil the waiting period of this Member State. As shown in the mapping at the end of this report, this would concern 7,188 persons in only six selected Member States in a period of one year (2013, respectively 2014). If the Regulation were not to provide for another Member State to apply aggregation in such cases, this would lead to the situation that the migrant workers concerned would be entitled to benefits in no Member State at all, unless entitlement would be opened purely under the national legislation of a Member State. This would undoubtedly form an obstacle to the free movement of workers and – as shown above – would most probably be incompatible with the Treaty.

We therefore hold the view that a different Member State would have to substitute the last State of employment and apply the aggregation rule under Article 61 if the minimum threshold is not fulfilled. It would be most likely a violation of primary law to stipulate that periods completed by the person concerned would be aggregated in no Member State at all. Which institution could be obliged to apply the aggregation provision and pay the unemployment benefit instead of the last Member State of

[92] Judgment in *Elsen* EU:C:2000:647.

employment if the minimum period of insurance or (self-)employment was not completed in the competent Member State?

2.1.1 *The second to last Member State of employment without requiring any minimum period of insurance or (self-)employment in this State*

Example: A worker resides and works in Member State A for five years. Afterwards he or she works in Member State B for three weeks. Then he or she moves his or her residence to Member State C and takes up employment there, but is dismissed after only two weeks.

Referring to the second to last Member State of employment without any condition for the person concerned of having completed there the same minimum period of one or three months would be unreasonable. If the institutions' interests are relevant, why should the second to last Member State be less protected against claims of persons with only short careers than the last Member State?

2.1.2 *The Member State of employment where the minimum period of one or three months of insurance or (self-)employment was lastly fulfilled*

Example: A worker resides and works in Member State A for five years. Afterwards he or she works in Member State B for three weeks. Then he or she moves his or her residence to Member State C and takes up employment there but is dismissed after only two weeks. The unemployed person must make him or herself available to the employment services of Member State A, the institution of which provides the benefits.

This option would pursue the objective to make a Member State pay the benefits where the unemployed had completed periods for a relevant time span. However, this could lead to situations where it would be quite difficult for the unemployed person to register as a person seeking work with the employment services of that Member State; to be subject to the control procedure organised there; and to adhere to the conditions laid down under the legislation of that Member State. As the CJEU pointed out, "*the circumstances which must exist for the condition as to availability to be satisfied cannot have the direct or indirect effect of requiring the person concerned to change his [or her] residence.*"[93] Particularly in cases where the person concerned has moved his or her place of residence to the last Member State of employment, further amendments to the Regulation would be required to avoid impairments of the unemployed person's situation that would raise huge legal concerns with regard to violation of the Treaty.

What further amendments could be necessary will be analysed under 2.2.3 (see 2.2.3).

2.1.3 *The Member State of residence*

This option can only apply to persons falling under Article 65 of Regulation (EC) No 883/2004 who in principle have the right to make themselves available in the Member State of last employment. It would be the most reasonable solution for this group of persons, as the Regulation is built on the assumption that the Member State of residence provides the most favourable conditions for finding new employment and because this is the alternative offered to them already under the current legal framework.

[93] Judgment in *Naruschawicus*, C-308/94, EU:C:1996:28, paragraph 26.

2.1.4 *The previous State of residence*

This option could apply to workers who worked and resided in the same Member State when they became unemployed, but have fallen under Article 65 of Regulation (EC) No 883/2004 before.

Example: A worker resides in Member A and works as a frontier worker in Member State B for five years. He or she terminates his or her employment in Member State B and moves his or her residence to Member State C. He or she is employed there for only three weeks and is then dismissed by his or her employer.

As the minimum insurance period in Member State C is not fulfilled, this Member State is not competent to apply the aggregation provision and provide benefits. At first sight it would appear reasonable to impose this obligation on Member State B instead, because this is the second to last Member State of employment and the worker has paid contributions for five years to the scheme of that State. However, at that time he or she was a frontier worker. If he or she would have become unemployed while residing in Member State A, his or her Member State of residence would have provided the benefits and Member State B would have provided reimbursement under Article 65(6) only. It seems doubtful whether the obligation to provide benefits can be imposed on Member State B now. It would seem more in line with the current structure of the Regulation that the previous Member State of residence A had to substitute the last Member State of employment C. If so, then the second to last Member State of employment B would have to provide reimbursement to Member State C under Article 65(6).

2.2 Identification and assessment of how the proposed options and sub-options presented by the EC would respond to certain criteria (social, economic and political pros and cons)

2.2.1 *Clarification*

As pointed out in the mandate only "*most Member States apply the 'aggregation rule' after one day of insurance*". It follows that some Member States interpret Article 61(2) in a way that also longer periods can be required in order to trigger aggregation if this finds a reasoning in the national legislation applied.

The provision in its current version speaks about "periods" of insurance and (self-)employment, terms that can be considered not fully clear and subject to different interpretations if in national legislation a "period" is a longer period than one day (e.g. one week). Against this backdrop the legal situation could be clarified by explicitly stipulating in Article 61(2) that one or three months of insurance or (self-)employment are required in the last Member State of employment in order to impose on this State the obligation to apply the aggregation provision.

However, the same clarity could be achieved by amending Article 61(2) without changing its substance. What should be relevant is the political intention of the legislature to apply a minimum threshold of one day, of 30 days or of 90 days. If the intention is clear it is up to the legal technique of the legislature to reflect this in a proper wording. Also the Administrative Commission could make this clarification in a decision, as proposed for Option 1, notwithstanding the non-binding effect of such decisions. The aim of clarity alone cannot justify substantial amendments that significantly change the legal position of large groups of migrant workers to their detriment.

2.2.2 *Simplification*

Providing for a minimum threshold of one or three months instead of one day in order to apply aggregation under Article 61 of the Regulation would be neutral under the aspect of simplification when focusing on Article 61 only.

However, we have shown that inserting a minimum threshold into the aggregation provision would most likely require extensive amendments of other provisions as well, particularly of Article 64, 65 and 65a. Also the procedures would be more complicated by involving at least one more Member States that would have to substitute the obligations of the last Member State of employment.

We come to the conclusion that neither the Regulation nor the procedures would be simpler if Sub-options 2a or 2b were implemented.

2.2.3 *Protection of rights*

Within the current legal framework the one-day rule in the aggregation provision under Article 61(2) applies to unemployed persons who make themselves available in the Member State of last employment, i.e. to persons who during their last employment resided in the competent Member State and to persons other than frontier workers who fall under Article 65 and make themselves available in the competent Member State. By introducing a minimum threshold of one or three months for applying aggregation under Article 61, a significant number of persons would not be entitled to benefits in the last Member State of employment and thus lose a right which is currently awarded to them.

This loss of right in the last Member State of employment could be mitigated by awarding a new right in another Member State. As regards persons other than frontier workers who fall under Article 65 it was proposed that they should be referred to their Member State of residence when not fulfilling the minimum period of insurance or (self-)employment. Compared to the *status quo* this would be a clear loss of rights as these persons would lose their right of option. Nevertheless, this loss of right would seem to be acceptable as the right of option is a privilege within Regulation (EC) No 883/2004 and imposing on them the obligation to make themselves available in their Member State of residence complies with the general rule for frontier workers.

For unemployed persons other than frontier workers several alternative models were discussed under point 2.1. Requiring a minimum period of insurance or (self-)employment in their Member State of last employment which is also their Member State of residence would deprive these persons of their right to make themselves primarily available to the employment services in this State (which is both their Member State of last employment and their Member State of residence). This would be a clear change of concept of Chapter 6 because currently another Member State only comes into play when the export rule under Article 64 applies.

The obligation to make oneself available in a third Member State, be it a previous Member State of employment or the (previous) Member State of residence, can be to the detriment of the unemployed person, as in many circumstances this obligation cannot be fulfilled without transferring the place of residence or habitual stay to this Member State.

Example: A mother resides and works in Member State A for two years. She moves her residence with her family to Member State B, her State of origin, and takes up employment there but is dismissed by her employer after only three weeks. If Member State A, as second to last State of employment, is competent for the person she can either make use of an amended export provision (see below) and receive benefits for up to three (six) months, or she would have to go back to Member State A and reside or habitually stay there again by perhaps leaving her family behind.

Implementing Sub-options 2a and 2b would raise significant concerns with regard to the protection of rights of the unemployed and to their legal certainty, if no additional amendments to the Regulation would be implemented.

Adopting provisions that the last Member State of employment is not competent and substituted by another Member State, if a minimum period of insurance or (self-)employment was not completed, could put unemployed persons in a difficult or maybe even desperate position if no accompanying amendments to the Regulation were implemented. In many cases going back to a previous State of employment or residence will be incompatible with the current life situation and the personal goals of the person concerned. As pointed out, the CJEU has held that the circumstances which must exist for the condition as to availability to be satisfied cannot have the direct or indirect effect of requiring the person concerned to change his or her residence.[94] It follows that certain accompanying amendments would be absolutely necessary to avoid violations of the freedom of movement of workers.

The situation could be mitigated if the person concerned was enabled to seek work in his or her Member State of residence while receiving benefits in cash from the competent Member State under Article 64 of the Regulation. However Article 64 stipulates quite harsh conditions and limits to allow an unemployed person to seek work in a Member State that is not competent while retaining entitlement to unemployment benefits. Particularly it requires that before his or her departure, the unemployed person must have registered as a person seeking work with the employment services of the competent Member State and have remained available there for at least four weeks after becoming unemployed.

First of all the unemployed person should not be forced to go back to the competent Member State to register with the employment services in that State. He or she should have the possibility to register with the employment services of the Member State of residence and submit a claim to benefits there, being subject to the control procedure organised there, and adhere to the conditions laid down under the legislation of that Member State. The institution must forward the registration and claim to the institution of the competent Member State. The date of registration with the employment services in the Member State of residence must apply in the institution of the competent Member State.

Secondly, the unemployed person must not be committed to being available to the employment services of the competent Member State for at least four weeks after becoming unemployed. This deviation from the general rule is already laid down in Article 65a(3) for former self-employed frontier workers who make themselves available in their Member State of residence only.[95] The situation of these persons is to a certain extent comparable with the situations discussed in this report.

A minimum threshold to apply aggregation by the last Member State of employment and to determine a previous Member State as competent can create situations where the unemployed person cannot go to the competent Member State in order to seek work without completely changing his or her current life situation. We therefore suggest that the competent institution may extend the export period up to the end of the period of entitlement to benefits as already provided for under Article 65a(3), last sentence, or up to six months without discretion. It should even be discussed that the unemployed person is granted a right to that extension of the export period.

[94] Judgment in *Naruschawicus* EU:C:1996:28, paragraph 26.
[95] And where the Member State of last employment is competent under Article 65a(1).

2.2.4 Administrative burden and implementation arrangements

Only implementing a minimum threshold of one or three months for applying aggregation would not create any additional burden or require new implementing arrangements. One could even say that the administrative burden for the institution in the last Member Sate of employment would be reduced, because a significant number of applications for benefits could be rejected.

However, as was shown, applying a threshold in the aggregation provision would not make the legal situation simpler if another Member State would have to take over the obligations of the last Member State of employment. This would necessitate the development of a new procedure which could cause administrative costs for the institutions involved to be higher than under the current legal framework. The Administrative Commission would have to develop new forms and SEDs. It goes without saying that identifying the competent Member States and handling all necessary formalities would require a quick procedure, as the unemployed person must know within hours or days the competent Member State.

Example: After an amendment, Regulation (EC) No 883/2004 stipulates that a threshold of three months applies in Article 61(2) and imposes on the Member State where the minimum threshold of three months of insurance or (self-)employment was lastly completed to take over the obligations of the last Member State of employment. A person works and resides in Member State A for three years. He or she moves his or her residence to Member State B and works there for two months. Then he or she moves his or her residence to Member State C and is dismissed after only two months of employment.

Member State C knows that it is not obliged to apply aggregation and provide unemployment benefits. However, it cannot simply reject an application by the person concerned but must support him or her to find the competent Member State. In our example information exchanges between the unemployed person and Member State C and between Member States A, B and C seem to be necessary before the unemployed person can be definitely referred to the employment services of Member State A.

2.2.5 No risk of fraud and abuse

Reducing the risk of fraud and abuse is one of the central tasks of applying a threshold for aggregating periods of insurance or (self-)employment. The terms "fraud and abuse" must be restricted to cases of bogus employment only.

Example 1: A worker resides and works in Member State A for two years. He or she is dismissed by this employer and moves his or her residence back to Member State B. The unemployment benefit paid by Member State A would be exported for three months only. In order to circumvent this limited period of entitlement, the unemployed person agrees with a friendly entrepreneur in Member State B to take up bogus employment and be dismissed after one week.

Example 2: As above, but the worker takes up employment in Member State B without fraudulent agreement with the employer, but with the intention to terminate the employment by his or her own choice after only one week in order to receive unemployment benefits from Member State B.

Within the current legal framework Member State B would have to pay unemployment benefits by aggregating periods completed in other Member States and as long as provided for by national legislation. If a minimum threshold would apply in Article 61(2) of the Regulation, Member State B would not apply aggregation and the unemployed person would probably fall under the competence of Member State A again if the legislature amended the Regulation accordingly.

Cases of short-term employment without a bogus nature cannot be described as fraud and abuse. If in the example above the worker takes up normal employment and is dismissed after one week for whatever reason this would oblige the institution in the last Member State of employment to pay benefits to a person who had contributed to the scheme for a very short time only, but this is not a fraudulent or abusive situation.

Undoubtedly a threshold of one month or three months could reduce cases of fraud and abuse, as it would make it more difficult to create fraudulent and abusive situations for a longer period; a period of three months more than a period of one month.

It is doubtful whether the changes would be significant. Why should the unemployed person and the employer in Example 1 not agree on bogus employment of one month or three months? Why should the unemployed person in Example 2 not terminate the employment by his or her own decision after one month or three months?

It seems that the consequences of a threshold would be much bigger with regard to normal cases of short-term employment. This will be discussed under the next point.

2.2.6 Potential financial implications

Applying a threshold of one or three months in Article 61(2) would release the competent Member State from the obligation of providing benefits to unemployed persons after very short periods of employment. This would correspond to the financial interests of paying benefits only to persons who have contributed for a relevant period to the scheme concerned. It would have a positive impact on the finances of the last Member State of employment. It goes without saying that the positive financial impacts for the last Member State of employment would be much more significant when applying a three-month threshold. On the other hand, it should not be forgotten that – when not abolishing the one-day-rule under the current legal framework – in the longer term the competent Member State of last employment (usually the place of current residence) is likely to benefit from the jobseeker's future employment through future insurance contributions and associated contributions to the competent Member State's economy. Particularly in times of demographic changes any loss of human resources may be regrettable.

Furthermore, we have explained that the obligation to provide benefits of the last Member State of employment should be substituted by a different Member State. Therefore, the savings for the last Member State of employment by not paying benefits for persons who did not complete the minimum period of insurance or (self-)employment under its legislation could – at least partly – be compensated in other cases where it must take over payment obligations for persons where it was not the last Member State of employment but for example the second to last Member State of employment.

Another financial concern could be that imposing on an unemployed person the obligation to make him or herself available to the employment services of a Member State other than the last Member State of employment could mean that this person must move his or her place of residence or habitual stay to another Member State in order to fulfil the requirements of the national legislation of that State. Of course a move of residence or stay gives rise to costs and it could be argued that the Member State where the unemployed person must make him or herself available would have to reimburse these costs, at least to a certain extent.

However, if a one-month threshold is applied, it is questionable if this quite severe measure would be appropriate, given the many concerns and detriments for the unemployed persons, because the difference in periods of contributing to the

unemployment scheme of the last Member State of employment would in most cases amount to only a few days or weeks.

2.3 Alternative proposal

In order to reduce the financial burden for the Member State of last employment where not at least one month or three months of insurance or (self-)employment were completed, a new reimbursement mechanism could be installed. Analogous to Article 65(6) to (8) of Regulation (EC) No 883/2004, the benefits provided by the institution of the place of last employment should continue to be at its own expense. However, the competent institution of the Member State where the person concerned lastly completed at least one month or three months of insurance or (self-)employment should reimburse to the institution of the place of last employment the full amount of the benefits provided by the latter institution during the first three months. The amount of the reimbursement during this period may not be higher than the amount payable, in the case of unemployment, under the legislation of the debtor Member State.

As elaborated above, introducing a minimum period of insurance or (self-)employment for aggregation under Article 61 of the Regulation could impair the position of unemployed migrant workers to find new employment. To avoid this and at the same time take into account the just financial interests of the institutions, a new reimbursement mechanism could shift the financial burden at least partly to a Member State where relevant contributions have been paid, while safeguarding the right of unemployed persons as they are currently provided. This proposal follows the model of Article 65(6) to (8) of the Regulation, which is the method currently applied in Chapter 6 of the Regulation to reconcile the interests of both the unemployed persons and of the institutions. The obligation of the Member State of residence to provide benefits to frontier workers, although the Member State of last employment received the contributions, seems to be comparable with the obligation of the Member State of last employment to pay benefits to migrant workers after a very short period of employment. Why should the solution not be the same one? Problems of interpretation that were posed by Article 65 should be avoided. In particular it should be clarified, that reimbursement is only due if the person concerned was entitled to benefits in the debtor State.[96] In principle a new reimbursement mechanism should follow the same criteria as applied in Article 65(6) to (8) in order to facilitate administration by the institutions.

2.4 Concerns about unequal treatment of workers within Chapter 6 of Regulation (EC) No 883/2004

Regulation (EC) No 883/2004 currently builds on the assumption that the Member State of residence provides for the most favourite conditions to find new employment. Although this is explicitly laid down only for persons falling under Article 65(2), first sentence, it must be noted that other migrant workers not falling under Article 65, who must make themselves available in the competent Member State, by definition usually also reside in this State. The analysis of these basic principles of the Regulation reveals that the implementation of a minimum threshold to apply the aggregation rule under Article 61 of the Regulation could give rise to concerns as regards equal treatment of different groups of workers. As the one-day rule in Article

[96] We refer to the discussion about Decision U4 and the position of one Member State not to apply this decision.

61(2) applies "*except in the cases referred to in Article 65(5)(a)*", this minimum threshold would not apply to workers falling under Article 65(2) of the Regulation.

Example: Mr X and Mr Y both move their residence from Member State A to Member State B. Mr X works for an employer in Member State B. Mr Y works for an employer in Member State C and goes back to his home in Member State B every day. After two and a half months both workers are dismissed by their employers. Under the current legal framework both workers would be entitled to benefits in Member State B, because the competent institution in this Member State would take into account their periods of insurance or (self-)employment completed in other Member States. If Option 2b were adopted, Mr X would not be entitled to benefits in Member State B because – as he did not complete the minimum period of three months under the national legislation of this Member State – the institution would not aggregate. Mr Y, however, would still be entitled to benefits in Member State B, because Mr Y falls under Article 65 of the Regulation and the institution in Member State B would take into account his periods completed in other Member States. Mr X would be denied aggregation although he has completed two and a half months of insurance under the legislation of Member State B. Mr Y could rely on aggregation although he has completed no period in Member State B at all.

Furthermore it must be noted that under Article 65(6) of Regulation (EC) No 833/2004 the competent institution of the Member State to whose legislation the person concerned was last subject must reimburse to the institution of the place of residence the full amount of the benefits provided by the latter institution during the first three months after only one day of insurance in that State.

The 2012 trESS Think Tank Report on the coordination of unemployment benefits[97] proposed that the competence to provide unemployment benefits should be exclusively with the institutions of the State of last (self-)employment. By introducing a minimum threshold to apply the aggregation principle under Article 61 of the Regulation this proposal could find new support, because equal treatment of frontier workers and non-frontier workers within the legal framework of the Regulation could be achieved.

	Clarifi-cation	Simplifi-cation	Rights	Administr. burden	Fraud and abuse	Financial implications
Option 2a/b	+	≈	-	-	+	?

[97] C. G. de Cortázar (ed.), E. Rentola (ed.), M. Fuchs & S. Klosse, trESS Think Tank Report 2012 'Coordination of unemployment benefits'.

Option 3

Option 3: instead of introducing a minimum period for aggregation, only the **calculation** of unemployment benefits changes: i.e. in case of short employment in the new Member State, the calculation will also be **based on the salaries earned** in the previous Member State(s).

Sub-option 3a: the salary earned in the previous Member State is also taken into account for the calculation of the unemployment benefit by the competent Member State, if less than **one month of insurance or (self-)employment** is completed.

Sub-option 3b: the salary earned in the previous Member State is also taken into account for the calculation of the unemployment benefit by the competent Member State, if less than **three months of insurance or (self-)employment** are completed.

1 Unemployment benefits – legislation in the Member States

If we are to give answers to the questions under Option 3, we have to begin with a short analysis of how unemployment benefits are shaped and conceived in the Member States as far as calculation of benefits is concerned. From the legislation studied it clearly appears that unemployment benefits are conceived mainly as income replacement benefits. The unemployed person has lost his or her income which regularly is the basis for his or her living expenses. The unemployment benefit compensates the loss of this financial basis. To serve this purpose the unemployment benefit has to be shaped correspondingly. As a consequence, the manner in which the calculation of benefits is carried out is of the utmost importance.

Apart from a system in which only a flat rate is paid, two conceptions are available. The first one takes into account the income earned at the moment when the employment relationship ended. In other words, the income received most recently is the most important factor of calculation which mainly determines the level of the unemployment benefit.[98]

The second approach relies for the calculation of the benefit on income earned during a longer period which precedes the occurrence of unemployment (income earned during a reference period).

The first approach is very rarely taken.[99] Most other countries prefer reference periods, ranging from three months to twelve months, and in very few cases up to 24 months.[100]

The first approach is to the advantage of the unemployed person if he or she had a higher income when he or she became unemployed compared to his or her income in the past. But, of course, if the reverse true, the method is to his or her disadvantage. To put it simple, the method builds on chance.

The second approach, however, extends the account of earnings to a longer period and, as a consequence, the determination of the relevant income is done on a basis

[98] Other factors like the length of the employment relationship or the members of the family may play a role.
[99] The Netherlands take the last daily wage into account. Belgium refers to the average salary earned in the last position. See European Commission, Paper on Automatic Stabilisers, Brussels, 04 October 2013, p. 36.
[100] See European Commission, Paper on Automatic Stabilisers, Brussels, 04 October 2013, p. 36.

less dependent on chance. It strikes a balance between periods of low and high levels of income and creates an average income.

Experience from some Member States shows that the second approach is mainly chosen. According to the mandate the amount of the unemployment benefit depends on average earnings gained during a certain preceding period (normally 12 months).

2 Calculation of unemployment benefits under coordination law

In principle, coordination of unemployment benefits has to serve the same purpose as does national legislation. But in contrast to what is needed in the national arena, coordination has to deal with the transnational dimension. Coordination has to offer solutions for the situation in which the unemployed person has earned income in different Member States.

However, the main purpose of unemployment benefits, i.e. to secure the financial basis of the person concerned, is no different from what is required by national unemployment benefit schemes. To facilitate income replacement is therefore the main aim which Article 62 is indebted to.[101]

Article 62 of Regulation (EC) No 883/2004 requires the calculation of benefits on the basis of the amount of the salary in the State of last employment (Article 62(1)). Article 62(2) requires the same mode of calculation if the legislation of a Member State provides for a reference period. A different rule applies for persons covered by Article 65(5)(a) of the Regulation. The institution of the place of residence takes into account the income received in the Member State of last activity.

3 The perspective of Option 3

3.1 Sub-options 3a and 3b

Both sub-options derogate from what is now established in Article 62(1) and (2) of Regulation (EC) No 883/2004, insofar as they require taking into account also salary earned in a previous Member State. This renders them similar to what applies for workers in the terms of Article 65(5)(a). In principle, Sub-options 3a and 3b are identical, but they differ in respect of the time span which renders the extension to salaries received in a previous Member State necessary.

3.2 Assessment of Sub-options 3a and 3b

According to point 5) of the mandate, the analytical report is required to identify how the proposed options and sub-options would respond to the criteria specifically listed. In addition, under its heading "Considered amendments" the mandate makes it very clear that basing the calculation of the amount of the unemployment benefit on very short periods of employment may lead to arbitrary results. Against this background the assessment of Sub-option 3a and 3b will be made.

3.2.1 Clarification/Simplification

From the clarification and simplification point of view the envisaged amendment is not much different from the existing calculation rule. The new rule would not create many

[101] This is also the conception of unemployment cash benefits by the consistent case law of the CJEU; see for example the judgment in *Knoch*, C-102/91, EU:C:1992:303, paragraph 44; the judgment in *Meints*, C-57/96, EU:C:1997:564, paragraph 27.

difficulties of interpretation. Besides the income earned in the competent State income received in the previous State has to be taken into account pursuant to the rules of the competent institution. This is an operation which for other cases is provided for in Article 5(a) of Regulation (EC) No 883/2004. For this reason, the amendment envisaged is clear and simple.

3.2.2 Administrative burden and implementation arrangements

Exchange of information

The present mode of calculation in Article 62(1) of Regulation (EC) No 883/2004 is simple and easy to apply from the administrative viewpoint. The competent institution can exclusively rely on the income earned in its country and the data are available. In contrast to this, calculation under the envisaged amendment has to be extended. Earnings received in the previous Member State have to be put into the calculation. To get the income data needed for calculation the competent institution has to address the institution of the previous Member State and information has to be forwarded from the latter to the former.

As a consequence and compared to the administrative burden under the current law, a second administrative step has to be taken, which thus increases the burden of the handling of cases. This additional activity is certainly a disadvantage of the amendment. However, the additional burden could be facilitated if use were made of the information channel which serves for cases for which Article 62(3) of the Regulation applies. To get the data about the income earned in the previous State, the implementing rule in Article 54(2) of Regulation (EC) No 987/2009 could be extended to the situation under the amendment. Another or additional way could be the use of current forms for aggregation of periods including the data on income.

Apart from taking into account income earned in the previous Member State the competent institution applies its legislation. Particular rules existing in the previous Member State must not be applied. In particular ceilings provided for in the legislation of the previous Member State may not be taken into account by the competent institution.[102]

Effects on the length of the awarding process

A critical point of the amendment envisaged could be that it increases the length of the awarding of the benefit. Whether this would really be the case, is an open question, since the institutions are familiar with this situation, as it is identical or similar to what the calculation of the unemployment benefit requires from them in application of Article 62(3) of Regulation (EC) No 883/2004. But even if a certain delay occurred, the unemployment benefit could in favour of the claimant be awarded on a provisional basis according to what is laid down in Article 7 of Regulation (EC) No 987/2009.

Implementing arrangements

The realisation of the amendments under Options 3a and 3b would need a change of the wording in Article 61(1) of Regulation (EC) No 883/2004 in order to take into account income received in the previous Member State. The following sentence could be added to Article 61(1): "If insurance or (self-)employment completed in the competent Member State was less than one month/three months, salary earned in the previous Member State is also taken into account as if it had been earned in the competent Member State.

[102] See the judgment in *Grisvard and Kreitz* EU:C:1992:368.

It has already been said (see above 'Exchange of information') that an extension of the duty resulting from Article 54(2) of Regulation (EC) No 987/2009 would be reasonable to conform with the requirements under the new mode of calculation.

3.2.3 Protection of rights

As every provision of Regulation (EC) No 883/2004, the provisions in Chapter 6, too, have to be guided by the wording, spirit and purpose of Article 48 TFEU. In the *Fellinger* case, in which it had to be decided which income is relevant for frontier workers, the CJEU also made an important statement about the general rule in Article 68(1) of Regulation (EC) No 1408/71 (now Article 62(1) of Regulation (EC) No 883/2004)[103] and held that the previous wage or salary which normally constitutes the basis of calculation of unemployment benefits is the wage or salary received from the last employment of the worker. In such a manner unemployment benefits are regarded as not to impede the mobility of workers and to that end seek to ensure that the persons concerned receive benefits which take account as far as possible of the conditions of employment, and in particular of remuneration, which they enjoyed under the legislation of the Member State of last employment.[104]

Nevertheless, we should keep in mind that the CJEU made a short hint at exceptional cases where the general rule alone was not fully appropriate. Obviously the CJEU referred to the then existing provision in Article 68(1), second sentence, of Regulation (EC) No 1408/71, which required that if the person concerned had been in his or her last employment in that territory for less than four weeks, the benefits had to be calculated on the basis of the normal wage or salary corresponding in the place where the unemployed person is residing or staying to an equivalent or similar employment to his or her last employment in the territory of another Member State. This provision was not taken up by Regulation (EC) No 883/2004, and we think with good reason, because its application was burdensome and lacked certainty of law. Nevertheless, this abrogated provision contains a grain of salt of sound reason which may be useful to take into consideration with regard to the amendment discussed here. It is a strong argument to say that the exclusive calculation on the basis of the income from the last (self-)employment is not quite adequate if the time of employment completed in the competent Member State is very short. Sub-option 3a expresses this line of thought.

Advantages and disadvantages of the current calculation scheme

The current scheme puts exclusive emphasis on the income earned in the Member State of (self-)employment. Income received elsewhere is irrelevant. This provision favours unemployed persons who earn a higher income in this Member State compared to that acquired in the previous State. And it disadvantages persons in an inverse income situation. As said above, Article 62 of Regulation (EC) No 883/2004 makes the benefit level dependent on chance.

This seems to be acceptable if the person concerned has completed a significant time in the Member State of (self-)employment. But is this solution acceptable if the period completed is very short, in the extreme case one day? The envisaged amendment seems to state it is not. To give an answer to this problem one has to check relevant criteria, whereby the yardstick is the protection of rights.

Equality of treatment/indirect discrimination

In legal doctrine doubts have been cast upon the compatibility of Article 62(1) of Regulation (EC) No 883/2004 with provisions on the free movement of workers in view

[103] Judgment in *Fellinger* EU:C:1980:59, paragraph 7.
[104] Judgment in *Fellinger* EU:C:1980:59, paragraph 7.

of the disadvantage for a worker who moves from a high-income country to a low-income country and becomes unemployed. Calculation of his or her unemployment benefit is done on her or his low wages in her or his country of employment. There are authors who criticise Article 62(1) of Regulation (EC) No 883/2004, saying that it is a wrong legal policy provision, but leaving it open to question whether the provision is a violation of Article 45 or 48 TFEU.[105] Yet many an author goes a step further. With reference to the aforementioned situation (movement from a high-wage country to a low-wage country) the argument of indirect discrimination is formulated. An author in the leading Austrian commentary on social security coordination discusses just this situation characterised by low wages for a very short period in his or her Member State of last employment in contrast to a higher income in the previous State and concludes the following[106]: *"In this way the person concerned can be treated worse than a person who has completed his or her periods of insurance and as a consequence his or her income basis in one and the same country. Article 62 may consequently lead to an indirect discrimination of migrant workers."*[107]

Justice and fairness

Against the current provision in Article 62 of Regulation (EC) No 883/2004 we may also formulate doubts under the aspects of fairness and justice. It seems to be not quite fair or just if, in some cases, a person without having paid a reasonable amount of contributions and consequently being only weakly integrated[108] into the unemployment scheme is treated on an equal footing with other insured persons who have been living and working in this Member State for a longer time.

As was shown above (see above, 1) national unemployment benefit systems usually provide for statutory reference periods. From this we may derive that it is widely held that a sound system of defining the level of unemployment benefits should take into account a longer stretch of time to guarantee a level of benefits which corresponds to and is in line with contributions to an unemployment benefit scheme. In this way the level of benefits is defined not dependent on a very short income situation which by chance may favour or disadvantage the unemployed person, but based on the preceding income situation which compensates for possible lows and highs of earnings. The current law is not in line with the ideas behind statutory reference periods in national legislation, since even with the existence of such reference periods there is a gap in logic between national legislation and the mode of calculation in Article 62 of Regulation (EC) No 883/2004, since Article 62(2) requires the application of the calculation scheme of 62(1). If the period of income earned in the Member State of last (self-)employment is very short, the aim which national statutory reference periods wish to achieve is impeded.

Example: A worker W has worked in Member State B for five months, earning a monthly salary of € 2,000. After that she takes up employment in Member State A where he or she draws a monthly salary of € 3,000. After two weeks he or she becomes unemployed. The reference period in this Member State's legislation is six months.

[105] See for this opinion R. Waltermann, 'Arbeitslosigkeit', in (2006) *Europäisches Arbeits- und Sozialrecht* 2, 9140, paragraph 25.
[106] E. Felten, in B. Spiegel (ed.), *Zwischenstaatliches Sozialversicherungsrecht*, Manz, Wien, 2012, Article 62(1).
[107] Translation by Maximilian Fuchs.
[108] It has to be reminded that the CJEU in its consistent case law has held that with regard to unemployment benefits a real link of the person claiming the unemployment benefit and the labour market is an important element. See the judgments in *D'Hoop*, C-224/98, EU:C:2002:432; *Ioannidis*, C-258/04, EU:C:2005:559; *Vatsouras and Koupatantze*, C-22/08, EU:C:2009:344.

On the basis of the present rule in Article 62(1) and (2) of Regulation (EC) No 883/2004 the reference period has to be respected, but the income to be used as calculation basis is exclusively that of the Member State A. In other words the reference period under national law loses its inherent logic, the logic requiring that income earned over a time span of six months has to be taken into account in order to establish a balanced and rational calculation basis. On the other hand, under the present law the momentary income at the time of becoming unemployed exclusively prevails. With good reason one can call this result, relying on the wording of the mandate, arbitrary. The dissatisfaction with this discrepancy between coordination law and domestic law could possibly be the reason why some Member States' institutions do not comply with Article 62 of Regulation (EC) No 883/2004. The competent institution in the case reported by the German expert (see below, 'Mapping') applied national rules for short-term (self-)employment against the clear wording of Article 62 of the Regulation. In addition, Article 62(1) could be a barrier to access to unemployment benefits. The calculation model reported for the Contribution-based Jobseekers' Allowance in the UK (see below, 'Mapping') provides for a 26-week minimum limit for national insurance contributions which the claimant must have paid during a fixed period before the occurrence of unemployment in order to become entitled to the allowance. For the worker in the example above, leaving out income in Member State B seems to deprive him or her of the allowance. Against this background sub-option 3a and to a higher degree Sub-option 3b further the protection of rights in a more balanced way than the present provision of Article 62 of Regulation (EC) No 883/2004.

It cannot be denied that the new law could be to the detriment of those migrant workers who in their new employment receive a higher income compared to the income earned in the previous Member State. As a consequence the level of the unemployment benefit could be significantly lower. However, this is in line with the logic of the new mode of calculation: balancing the income fluctuations. Moreover, it is not against what is required by Article 45 and Article 48 TFEU. It is consistent case law of the CJEU that "*Treaty rules on freedom of movement cannot guarantee to an insured person that a move to another Member State will be neutral as regards social security. In view of the disparities existing between the schemes and legislation of the Member States in this field, such a move may, depending on the case, be more or less financially advantageous or disadvantageous for the person concerned.*"[109] To argue that a migrant worker having worked for a very short period in a Member State should be treated in the same way, if it is about calculation of benefits, as persons who have worked in this Member State for a longer period and have paid contributions to the unemployment benefit scheme correspondingly, is difficult to justify.

3.2.4 No risk of fraud and abuse

We have already discussed this topic above under Option 1 and 2. A few observations may be added. In some countries there is an ongoing discussion about fraud and abuse of social rights with regard to immigrants, in particular those from low-income countries. A less critical argument is called social or benefit tourism. On second thoughts the arguments do not hold water.[110] Free movement of workers is an essential principle of market economies. The right to free movement realises what economists call efficient allocation of resources. This economic thinking was already present in the Spaak Report.[111] The Spaak Report envisaged, by means of eliminating obstacles to the free movement of factors of production, that labour movements were

[109] See for this the recent judgment in *Jeltes* EU:C:2013:224, paragraph 44.
[110] Cf M. Fuchs, 'Freizügiger Sozialtourismus?', (2014) *ZESAR*, 103 et seq.
[111] 'Rapport des Chefs de Délégation au Ministre des Affaires Étrangères', 1956.

stimulated from Member States of low productivity to industrial regions and sectors where productivity and demand for labour were highest.[112] Consequently, the EEC Treaty enshrined the freedom of movement of workers as a fundamental right. This fundamental right is secured by guaranteeing free access to employment and a ban on discrimination. This right is furthermore flanked by social security coordination, which extends freedom of movement and equal treatment to the arena of social security.

Therefore, the exercise of these rights can never represent abuse or fraud. To speak about fraud and abuse is justified only for a quite different behaviour that takes place. For example, it is well known that a – fortunately only very small – portion of immigrants falsifies documents or violates their duties of information in order to become entitled to social security benefits from the host State. To prevent this or fight against this is an affair of criminal law and of the law enforcement authorities. It cannot be entrusted to coordination law.

We think that from the angle of abuse and fraud the mode of calculation of benefits used under the regime of coordination presumably plays a minor part. But it should be remembered that in the economic theory on unemployment insurance the problem of moral hazard plays a role.[113] Reference is made to the behaviour of unemployed persons who might be tempted to stay unemployed and receive the unemployment benefit instead of taking up a job even if the income is lower. As a consequence, it is requested that unemployment insurance is shaped in a way that avoids incentives which could contribute to such behaviour.

Example: A person, after working in a low-wage country, has got a well-paid job in another Member State and becomes unemployed after less than a month. Although he or she could get a job in the former Member State, he or she is not inclined to take up employment there due to the high level of the unemployment benefit (compared to the salary to be expected) acquired after a very short time of employment and based on the exclusive relevance of income earned in this country of employment.

The current law may favour to behave in this way.[114] The envisaged amendment of the calculation model could possibly be a disincentive to prefer unemployment to entrance into the labour market in a low-wage country, since the unemployment benefit would be significantly lower due to the taking into account of the former income in this country.

3.2.5 Potential financial implications

As far as financial implications are concerned the current law shows a clear tendency to put a financial burden on the Member State of (self-)employment. This risk allocation is totally justified as long as the competent institution has received a sufficient amount of contributions by the now unemployed person. But here again justification is doubtful if only a short time of employment has created the right to an unemployment benefit.

If we assume migration from low to high-wage countries as the typical case, the latter are disadvantaged since they have to shoulder the expenses for unemployment benefits on the basis of their wage levels without getting corresponding contributions

[112] Cf S. O'Leary, 'Free movement of persons and services', in P. Craig & G. De Búrca (ed.), *The Evolution of EU Law*, Oxford University Press, Oxford, 2011 (2nd edition), 499 (503).
[113] R. Chetty, 'Moral hazard vs. liquidity and optimal unemployment insurance', in (2008) *Journal of Political Economy*, 116 (2), p. 173-234.
[114] See for this argument also E. Felten, in B. Spiegel (ed.), *Zwischenstaatliches Sozialversicherungsrecht*, Manz, Wien, 2012, Article 62(1), who writes that Article 62(1) has effects restricting freedom of movement, "*when persons, who despite menacing unemployment rather accept the loss of employment instead of taking up lower-paid employment in another EU country, in order to avoid a lower benefit level in the case of later unemployment*" (translation by M. Fuchs).

if the period of (self-)employment is short. Compared to this situation a one or three-month clause decreases this disparity, since wages earned prior to the employment in the competent Member State have to be taken into account. Certainly in cases of migration from a high-wage country to a low-wage country the inverse is the case. Apart from the fact that this is the statistically rarer situation in labour migration, we would value the protection of rights higher than the financial interests of the institutions affected. The reason is that the unemployed persons deserve the protection, since they have earned this protection through their contributions. We should not forget that critics of the amendments might use the financial argument with reference to the numerous immigrants who after a certain amount of time return to their country of origin. In this respect it has to be considered that the Member State of origin does not apply aggregation if claims are made, since Article 61(2) of Regulation (EC) No 883/2004 precludes it. And, obviously the institution of the Member State of origin benefits from the one-month/three-month rule.

The mandate requires answers to how the envisaged amendments under Option 3 respond to the specified criteria. Therefore, the foregoing analysis laid emphasis on elaborating the cons and pros which can be identified vis-à-vis the current law and its prospective changes, and its effects on the parties involved: the unemployed persons and the institutions which administer the award of unemployment benefits. However, persons not unemployed but in work and financing the benefits must not be forgotten. National unemployment schemes need to be shaped in a way that they obey sound economic requirements. A balance has to be found between the interests which result from the need of protection, the economic use of financial resources and a smooth administrative operation. Since secondary law has to be in accordance with primary law, questions of compatibility with Article 48 TFEU had to be raised.

Is a change of the current law recommendable? It depends. It depends on the preferences of the reader, observer and, needless to say, of the decision-making bodies. It is quite possible that who studies the presentation of the cons and pros is in favour of the *status quo* as laid down in Article 62 of Regulation (EC) No 883/2004. Its simplicity and its easy administration may convince him or her, putting less weight on aspects of fairness and justice or compatibility problems. Then again other experts may consider administrative problems to be rather easily solved, thinking that the increase in administrative burden is slight and the experience with the same administrative practice which applies for frontier workers will help to manage the handling of cases. They might see clear advantages with regard to the protection of the unemployed and a better realisation of the aims, which are inherent to national unemployment benefit schemes, on the coordination level. It has to be reminded that the mandate formulates as one of the objectives to ensure that the financial burden for paying unemployment benefits does not arise in situations where mobile EU workers have not yet made a significant contribution to the scheme of the new Member State. As was shown above, the present law does not live up to this aim in cases of migration from low to high income countries if the person concerned becomes unemployed after a very short time of (self-)employment. Moreover, Article 62(1) of Regulation (EC) No 883/2004 requires to exclusively base the calculation on the income of the Member State of last employment, even when the income period is very short, in the extreme event only one day. It follows that the risk of what the mandate describes as arbitrary results when the calculation of the amount of the benefit is based on very short periods of employment, can materialise. Further weighing strategies could be continued.

	Clarifi-cation	Simplifi-cation	Rights	Administr. burden	Fraud and abuse	Financial implications
Option 3a/b	≈	≈	+	≈	+	+

Conclusion

In our report we have outlined the pros and cons with regard to Options 1, 2 and 3 as they were formulated and explained in the mandate. The Executive Summary contains an abridgment of the arguments we considered decisive for the assessment of the different options.

In a nutshell, the report can be summarised as follows:

To decide in favour of Option 1 would mean the preservation of the legal *status quo* as it is laid down in Article 61(1) of Regulation (EC) No 883/2004. For a number of reasons, the mandatory uniform application of Article 61 of Regulation (EC) No 883/2004 in the Member States is not achieved. Several disadvantages may be stated of the present legal situation (weak integration of the unemployed person into the labour market of the new Member State, the financial burden for this State for lack of significant contributions to its unemployment benefit scheme) due to the fact that even a one-day employment is sufficient to enjoy the benefits with application of the aggregation principle. On the other hand, Article 61 of Regulation (EC) No 883/2004 is easy to apply and offers legal certainty and in particular substantially protects the rights of unemployed persons. And, for the increased financial burden of the State of last employment a remedy could be the introduction of a reimbursement scheme whereby the one contained in Article 65 of Regulation (EC) No 883/2004 could serve as a template.

Option 2 contains the introduction of a qualifying period (one month/three months) the completion of which is necessary for the application of the principle of aggregation. With a view to Article 48 and Article 45 TFEU and the corresponding case law of the CJEU, serious doubts may be cast on the solutions proposed under Option 2. As a consequence, to avoid the risk of violation of primary law, protection of the unemployed persons has to be secured through the substitution of the State of last employment by a different Member State. Our analysis shows that all solutions for the definition of the "right" State have significant drawbacks. The assessment of Option 2 puts emphasis on the disadvantages with regard to nearly all the criteria which the mandate considers as relevant. The release of the financial burden of the Member State of last employment, the most important advantage resulting from Option 2, could be realised on another route which would at the same time avoid the disadvantages mentioned before. A reimbursement scheme as proposed above could offer the necessary compensation.

In cases of short employment in the new Member State, instead of a minimum period for aggregation, Option 3 wishes calculation to also be based on the salaries earned in the previous Member State(s). Its simple application and administration speaks in favour of the present calculation model in Article 62 of Regulation (EC) No 883/2004, since there is no need to seek information about the income in the previous State. The main dilemma of the present calculation scheme is the fact that it is based on chance. It is in favour of migrant workers coming from low-wage to high-wage employment and is to the detriment in the inverse case. The financial burden of the Member States concerned increases or decreases correspondingly. The balancing effect which is achieved in most Member States which provide for reference periods is not achieved at the coordination level. Therefore, in legal doctrine many an author considers Article 62 of Regulation (EC) No 883/2004 as wrong legal policy and it is argued that indirect discrimination in terms of free movement of workers may take place. The mandate, especially the objective described under (2), intends that the financial burden to pay unemployment benefits does not arise in situations where mobile EU workers have not yet made a significant contribution to the unemployment scheme of the new Member State. Under the present law, this aim is hard to achieve in many cases.

Mapping

According to point 6 of the mandate a mapping has to be included of the specific impact of the proposed amendments in eight to ten Member States with the highest number/share of EU emigrants and immigrants. Information was gathered from **France**, **Germany**, **Italy**, **the Netherlands**, **Poland**, **Romania**, **Spain** and the **United Kingdom**.

In principle most of these Member States apply the one-day rule. However, in **France** there is no specific national law or administrative circular which takes a precise position on the "one-day rule". Circular Unédic 2010-23 of 17 December 2010 only provides that "*the latest period of employed activity must have been completed in France*". In practice, central social security authorities as well as the French central unemployment institution (*Unédic*) consider that a literal interpretation of Article 61 should prevail. This means that aggregation may start after one day of work in France or even less (in some cases, aggregation has seemingly been implemented for migrants who had worked a few hours under a so-called '*chèque emploi service*', a simplified system of salary payment). However, the French national expert pointed out that since no domestic rule expressly consolidates the one-day rule, local unemployment institutions may alternately decide that one day is not sufficient for the purpose of aggregation. A uniform application in France of the one-day rule is therefore not guaranteed.

If the State of last employment is **Greece**, the competent institution, where the application is submitted, is obliged to take into consideration the periods of insurance and employment completed in another Member State. However, according to the Greek national expert, a one-day insurance/employment period completed in Greece is often treated by the Greek institution as a deceitful/abusive action, targeting at the granting of the unemployment benefit. Thus, a period longer than one day, completed in Greece, is mostly required. However, while periods of very short work in a Member State can give rise to further examination by the institutions, we believe that the automatic assumption that most cases concerned are about deceitful or abusive action seems to be problematic and a thorough examination on a case-by-case basis is required.

The **United Kingdom** works in qualifying weeks. So for example to meet the first contribution condition for Contribution-based Jobseeker's Allowance (JSA(C)) a claimant must have paid, or have been treated as having paid, national insurance contributions for at least 26 (weeks) times the Lower Earnings Limit (LEL) for that tax year. The United Kingdom does not aggregate insurance from another Member State until the minimum period of insurance of one week in the United Kingdom has been completed, i.e. 'registered' on the system.

Although we cannot provide data for **Finland** and **Denmark**, it should be noted that these two Member States have introduced a specific waiting period for the purpose of aggregating periods of unemployment insurance in their respective national legislations.

Section 9 of Chapter 5 of the **Finnish Unemployment Security Act 1290/2002** reads as follows (translation):

"Insurance and employment periods completed in another State

If periods of insurance or employment completed in another State must be included in the previous employment requirement under a social security agreement concluded by Finland or the provisions of the Social Security Regulation or the Basic Regulation, these periods shall only be taken into account if the person concerned has pursued an

activity as an employed person in Finland for at least four weeks or as a self-employed person for at least four months immediately before becoming unemployed."

§2 of the **Danish Ordinance No 490 of 30 May 2012** on the Danish unemployment insurance provides that if a person who has not been a member of a Danish unemployment insurance fund within the last five years, but has been insured in another Member State, this person's periods of insurance completed in another Member State will be taken into account only under the following conditions:

Firstly, the person must apply in writing for membership of a Danish unemployment insurance fund within eight weeks after he or she ceased to be covered by the other Member State's unemployment insurance scheme.

Secondly, within this eight-week period the person must have taken up employment or self-employment in Denmark.

Thirdly, prior to unemployment the person must have worked continuously on a full-time basis, i.e. for at least 296 working hours in the past 12 weeks or three months, or, for partially employed persons, 148 working hours in the past 12 weeks or three months. In the case of self-employment, the equivalent condition is eight full weeks within a period of 12 weeks or three months prior to the unemployment.

It is a huge concern how migrant workers could cope with a situation where they are denied aggregation and benefits in the last Member State of employment if a threshold of one or three months was implemented. In Finland and Denmark this situation can already occur because of their national legislations. If relevant data were available, one could analyse how the persons concerned in these two Member States cope with the situation.

As for the numbers of cases concerned **France** provided data for the year 2014, the other Member States for 2013. **Germany** and **Italy** did not provide data. The Italian national expert explained that INPS is not able to detect in detail the required information, nor to give an estimate of such data, since there is currently no EU-wide system and information exchanges are still paper-based, not having implemented the Electronic Exchange of Social Security Information (EESSI) procedure. The difference in numbers between **France** and other Member States, particularly the **United Kingdom**, is remarkable.

Periods in last State of employment	FR	NL	PL	ES	RO	UK
1 day	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
1 day to 1 month	3,784	26	115	1,195	2	17
1 month to 3 months	1,220	27	265	534	2	1
3 months or more	2,571	107	682	742	8	12
Total	7,575	160	1,062	2,471	12	30

Poland was also able to provide data of rejected claims in 2013: 1,062 benefits faced 454 negative decisions. On the basis of up to one month insurance in Poland, 49 claims were rejected (115 benefits awarded); on the basis of more than one and less than three months of insurance in Poland, 113 claims were rejected (265 benefits awarded). The data do not show the reasons for the rejections.

The Department for Work and Pensions of the **United Kingdom** stated in a note accompanying the provided figures that these cases represent a small subset of job-seeking EEA migrants in the United Kingdom. In the same period around 90,000 JSA income-based (listed as a special non-contributory benefit in Regulation (EC) No 883/2004) claims were made by EEA migrants. In addition, 3,594 migrants used the Regulation to import their unemployment benefit into the United Kingdom. In isolation therefore the data provided does not serve to fully illustrate the United Kingdom's concerns with the social security coordination Regulations in this area or more widely.

A particular interest was in the share of nationals of the Member State concerned who claimed unemployment benefits after very short periods of work in the last Member State of employment. There is the assumption that nationals of the receiving State could use the one-day rule when going back to their Member State of origin in order to circumvent the limited export period under Article 64 of the Regulation. Only one Member State could give precise data on the share of nationals in the figures above. In **Romania** factually all of the migrant workers concerned were Romanian citizens. In **Poland** the share is estimated to amount to 90%. As for **Spain** it was not possible to obtain a breakdown by nationality of the persons concerned and there is no information in order to make a reliable estimation of the percentage of Spanish nationals among them. However, the national expert pointed out that it is logical to think that the persons concerned probably have a strong link with Spain as far as they want to receive an unemployment benefit in Spain. It can be assumed that they have information regarding the amount of these benefits and their length. Therefore, the expert believes that a significant percentage of them are expected to be Spanish nationals that want to come back to Spain after a period abroad.

The **German** national experts reported a case which shows that the competent institution did not take into account income pursuant to Article 62 of Regulation (EC) No 883/2004, since the income received by the Belgian frontier worker in Germany was earned within less than 150 days. According to German law, in these cases a fictitious income forms the basis for calculation. The *Landessozialgericht* of the Land Nordrhein-Westfalen held that the arguments against the current law in Article 62 of Regulation (EC) No 883/2004 cannot justify the non-application of Article 62 in view of the clear wording. The *Bundessozialgericht* confirmed the judgment (its reasons are not yet published).

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