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Assessment of the impact of amendments to the EU social security coordination rules on export of family benefits

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1 Executive summary

The coordination of family benefits has become an issue of political interest in some Member States. It is argued that an unlimited export of these benefits granted to migrant workers whose children reside outside the Member State which has to grant benefits may not meet the policy aims behind these benefits. Therefore, the FreSsco team has been mandated to look into different options which could be a remedy for these political concerns.

The options we have chosen (based on the mandate and some also added by us) to evaluate their impact (always compared to the status quo) are the following ones:

- **Option 1**: Keeping the status quo.
- **Option 2**: Introducing an adjustment mechanism (which deviates from today's unlimited amounts of family benefits for children living outside the Member State concerned and adjusts the amount due to the different cost of living in the Member State of residence compared to the Member State which has to grant the benefit). As 'adjustment' is not a clear notion and as we had an extended exchange of ideas concerning the questions how such adjustments could work, what will be the outcome, and what legal obstacles could exist which hinder such adjustments, we have also elaborated on these questions in more detail. We have analysed the following three different sub-options:
  - **Sub-option 2a**: full upwards and downwards adjustment of the amounts.
  - **Sub-option 2b**: full upwards and downwards adjustment of the amounts but reimbursement of the amount of any upwards adjustments by the Member State of residence.
  - **Sub-option 2c**: only downwards adjustment.
- **Option 3**: reversing the order of priority, and always making the Member State of residence of the children the State competent by priority.
  - **Sub-option 3a**: reversing only the order of priority without additional measures.
  - **Sub-option 3b**: reversing the order of priority, and reimbursement by the Member State with primary competence under today's coordination of the amount it would have to grant today.
  - **Sub-option 3c**: reversing the order of priority, and adjusting the amount of the Member State which has secondary competence to an amount according to the level of costs of living in the Member State of residence (when calculating a differential supplement).

For our evaluation of these six new options the following factors were considered:

- **Clarification**: where clarity and transparency are an issue.
- **Simplification**: is the solution simple or rather complex?
- **Protection of rights**: for this evaluation benchmark it is important whether the persons concerned are well protected, whether they lose rights but also how safe and quick the procedures are which have to be followed to get a benefit.
- **Administrative burden and implementation arrangements**: here the burden for administrations is scrutinised.

- **No risk of fraud and error**: options should also not be construed in such a way that the persons concerned try to achieve better results (e.g. higher benefits) by simulating facts which do not correspond to reality.
- **Potential financial implications**: behind this point the main question is hidden, as it seems that divergent points of view of Member States have been the incentive for this report; therefore, we refrained from really giving marks on this factor, but we only show the possible impact the option will have and leave it to the decision-makers to draw the conclusions from this;

The discussion within our small group of experts already showed how difficult it would be to achieve a solution to which everyone can agree (we quickly saw that on some points we did not agree and, thus, this also had to be reflected in this report).

To help the reader more easily identify our conclusions concerning the different factors in relation to each option we used a system of marks where (+) means better than, (-) worse than and (≈) means nearly the same as the status quo, while (?) indicates that we give the results of our analysis whereas it will be a decision for the political decision–maker to make, as we cannot.

The following table presents the results of our evaluation.

	Clarifi-cation	Simplifi-cation	Rights	Admin. burden	Fraud	Financial implica-tions
Option 2a	-	-	?	-	≈	?
Option 2b	-	-	?	-	≈	?
Option 2c	-	-	-	-	≈	?
Option 3a	+	?	+	+	+	?
Option 3b	+	-	+	-	+	≈
Option 3c	-	-	?	-	+	?

The analysis also showed that export is not the only problem. Thus, if a revision of the family benefits chapter is envisaged also all other problems and shortcomings existing today should be examined. If possible also additional options could be achieved at the same time with the provision of the export principle. From our point of view the problems which arise due to some of the horizontal problems are much more important and, maybe, should be solved with more energy of the legislature and urgency than the export question. We identified several issues, especially the following ones: the need for better definitions, a special coordination for child-raising benefits for persons in gainful employment (exclusive granting by the Member State which is competent for the person concerned) but also a clear rule on the question how many 'baskets of benefits' have to be made for the calculation of the differential supplement. Some of these horizontal issues are so interlinked with our main topic of export of family benefits that we had to recommend to take them also on board for the planned revision. As an example we want to mention that we have all been convinced that, even if an adjustment of family benefits is decided to be an interesting option, this cannot apply to contributory benefits (when only the payment of contributions opens

entitlement to benefits) or to those with an income replacement function (e.g. some child-raising benefits).

Thus, our conclusion is that the examination of possibilities for a revision of the family benefits coordination rules is a valuable exercise which could improve the status quo. It should not be restricted only to the export question, but should also contain additional elements. Looking at the marks we have given to the different options it is clearly Sub-option 3a which seems to be the most suitable one for further analysis. Of course, also this option would be optimised by adding a special coordination e.g. for child-raising benefits. But it should never be forgotten that also this option would have negative aspects like e.g. a shift of the burden between the Member States, which has to be reflected upon when the political decision is taken.

2 General remarks

2.1 Notions used throughout the text

To ease the reading of the text some notions used throughout the text have to be defined:

'**Regulation (EEC) No 1408/71**' means Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, as amended;

'**Regulation (EEC) No 574/72**' means Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedures for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, as amended;

'**Regulation (EC) No 883/2004**' means Regulation (EC) No 883/2004 of the European Parliament and the Council of 24 April 2004 on the coordination of social security systems, as amended;

'**Regulation (EC) No 987/2009**' means Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, as amended;

'**Regulation (EU) No 492/2011**' means Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on the freedom of movement for workers within the Union;

'**CJEU**' means the Court of Justice of the European Union; rulings which dealt with Regulation (EEC) No 1408/71 are also mentioned in relation to Regulation (EC) No 883/2004 if from our point of view these rulings are still valid under the new Regulation (the relevant material content did not change);

'**family benefit**' means benefits in kind and in cash intended to meet family expenses (definition of Article 1(u)(i) of Regulation (EEC) No 1408/71 and Article 1(z) of Regulation (EC) No 883/2004);

'**family allowance**' means periodical cash benefits granted exclusively by reference to the number and, where appropriate, the age of the members of the family (definition of Article 1(u)(ii) of Regulation (EEC) No 1408/71);[1]

'**member of the family**' means – in accordance with Article 1(i) of Regulation (EC) No 883/2004 – any person defined or recognised as a member of the family or as a member of the household by the legislation under which benefits are provided; thus, it is a question of definition under the legislation which applies in the concrete case; if this legislation makes it necessary that the person concerned lives in the same household as the insured person or the pensioner, this condition has to be regarded as satisfied if the person in question is mainly dependent on the insured person or pensioner;

'**export**' is from a legal point of view misleading; in principle Regulation (EC) No 883/2004 obliges to grant the family benefits also for the children residing in another Member State; therefore, it depends mainly on the legislation of the Member State which has to grant the benefits to whom the benefits have to be granted; if they have to be granted directly to the children this indeed usually means export; if they have to be granted to one of the parents this is not export, but it is assumed that the person receiving the money spends it in favour of the children concerned; if this is not the

[1] In MISSOC tables family allowances can usually be found under the heading 'Classic child benefits'.

case, Article 68a of Regulation (EC) No 883/2004 safeguards that the benefit is transferred to the person who really maintains the children; this is only a clarification for the reader; we do not intend to change anything in this respect under our options and decided to use the word 'export' in a broader sense for all situations in which the children reside outside the Member State concerned;

'**Member State with primary competence**' means the Member State which has to grant its family benefits by priority (this Member State has to grant the full amount of the benefit under the legislation it applies). We will use this term throughout this report, also if we propose changing the rules of priority (for further details under today's coordination please read chapter 3.1.2).

'**Member State with secondary competence**' means the Member State which only has to top up the family benefit of the Member State with primary competence in the event that the family benefits of this Member State with secondary competence are higher (differential supplement – see below).

'**differential supplement**' means the topping up of the family benefit of the Member State which has been declared primarily competent by the Member State which is secondarily competent to reach the amount of benefits in the latter Member State (which is only necessary if the latter amount is higher than the first one – today provided under Article 68(2) of Regulation (EC) No 883/2004);

The **different States** to which Regulation (EC) No 883/2004 applies have at certain points been abbreviated in the following way: Austria (**AT**); Belgium (**BE**); Bulgaria (**BG**); Switzerland (**CH**); Cyprus (**CY**); the Czech Republic (**CZ**); Germany (**DE**); Denmark (**DK**); Estonia (**EE**); Greece (**EL**); Spain (**ES**); Finland (**FI**); Liechtenstein (**FL**); France (**FR**); Hungary (**HU**); Croatia (**HR**); Ireland (**IE**); Iceland (**IS**); Italy (**IT**); Lithuania (**LT**); Latvia (**LV**); Luxemburg (**LU**); Malta (**MT**); the Netherlands (**NL**); Norway (**NO**); Poland (**PL**); Portugal (**PT**), Romania (**RO**); Slovenia (**SI**); Sweden (**SE**); Slovakia (**SK**) and the United Kingdom (**UK**).

A **bibliography**, including selected literature on the coordination of family benefits for further reading, is attached as **Annex 3**.

2.2 Mapping

We also want to already refer to the **mapping** which had to be done especially to reflect the specific impact of the proposed amendments (options) in the different Member States, but, also to map the current situation and the problems encountered. For this purpose questionnaires were sent to **FreSsco national experts**. The countries were chosen according to substantive and geographic criteria. Care was taken to select countries that provide family benefits as income replacement benefits and those with no link to employment and paying of social security contributions, those with very diverse family benefits and those with more simple ones, countries from continental Europe, Eastern Europe and a Scandinavian country. Hence, the questionnaire was sent to (and the replies were received from) **Austria**, **Belgium**, **Bulgaria**, **the Czech Republic**, **Croatia**, **Luxembourg**, **Poland**, **Slovenia** and **Sweden**. It has to be mentioned also that the selected Member States have very different levels of cost of living standards. Starting with the Member State with the highest level,[2] **Sweden** is No 2, **Luxembourg** No 4, **Belgium** No 8, **Austria** No 10, **Slovenia** No 16, **the Czech Republic** No 22, **Croatia** No 23, **Poland** No 26 and **Bulgaria** No 28. Due to the very restricted time schedule for all three think tank reports (next to the present one also on special non-contributory cash benefits and unemployment benefits), all three questionnaires could not be sent to the same

[2] See chapter 5.

national experts (candidate countries for the analysis of family benefits could also be **DE**, **UK** or **FR**), since this would clearly be overburdening for them. The results of the replies received have been incorporated into the report wherever best fitted. These parts are clearly distinguished in separate chapters.

Whenever we refer in this report to the special situation in one Member State, this is as a rule the outcome of the replies to the questionnaire (thus, the opinion of the FreSsco experts) and not of other (e.g. official) sources.

3 Current situation and problems

3.1 Legal background – coordination of family benefits under today's coordination rules

3.1.1 The coordination embedded in the general principles of the TFEU

The substantive rules currently in force to coordinate family benefits in the EU are stipulated by Regulation (EC) No 883/2004, more precisely in its **Title III, Chapter 8**. Understandably the preamble of the said Regulation as well as Title I, which sets out general provisions, and Title II, which fixes the main principles for the determination of the applicable legislation, are extremely important, as well as implementation Regulation (EC) No 987/2009.

To better understand the idea of the coordination rules, it is useful to note that Regulation (EC) No 883/2004 was enacted under **the legal base of Articles 48 and 352 TFEU**. The former one obliges the EU institutions to adopt measures to secure the rights of migrant workers and their dependants in the field of social security, which are necessary to provide freedom of movement to workers. In other words one of the aims of the Regulation is "*to contribute to the establishment of the greatest possible freedom of movement for migrant workers*", which is one of four fundamental freedoms of the EU, along with free movement of capital, goods and services.

It has to be mentioned that compared to the previous coordination Regulations, the current one is broader as it applies to all nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors (Recital No 7; Article 2). Thus, it does not only cover economically active persons and their families, but everyone who has had some contact with the social security of several Member States. For persons who cannot be regarded as being active, the Regulation was adopted following the procedure in Article 352 TFEU. The broader personal scope is logical, taking into account the general trend to expand also the rights of non-active EU citizens (especially under the fundamental right to free movement for all Union citizens under Article 18 TFEU).

The Court of Justice of the European Union (CJEU) has consistently held that Article 48 TFEU provides for the coordination, not for the harmonisation, of the legislation of the Member States. The aim of coordination is to adjust social security schemes in relation to each other in order to regulate transnational questions, with the objective of protecting the social security position of migrants (or any other eligible persons according to the Regulation), by guaranteeing that persons do not lose their social security rights due to migration. At the same time the coordination rules have a neutral character, which means that in principle situations have to be accepted where, due to the change of applicable social security legislation, the migrant person may find him or herself in a less favourable situation deriving from the substantive law of the Member State where the person migrated to (as, for example, the substantive law, applicable according to coordination rules, provides for lower amounts of benefits). However, the situation could also be in favour of the migrant.

Before going more into detail of Regulation (EC) No 883/2004 it is also important to mention **Article 18 TFEU**, according to which, within the scope of application of the Treaties, any discrimination on grounds of nationality must be prohibited and Article 45 TFEU, which, in the context of free movement of workers prohibits any discrimination on grounds of the migrant worker's nationality.

The aim of all coordination rules, is, as previously said, to guarantee that a person, due to free movement, is not losing his or her social security rights. Looking at the preamble of the Regulation, especially recitals No 1, 7, 8, 13, and 17, and taking into account the legal base from the TFEU, it could be said that the Regulation concentrates on securing the social security rights of all EU citizens who have used their right to free movement and their family members, and not especially of economically active persons. But, arguments could also be found which support the idea that the Regulation still gives priority to economically active persons and their families, especially concerning family benefits, (see also recitals No 8 and 17 of the preamble) as the previous Regulations did. This question of the personal scope is important in defining whether the aim is to particularly guarantee the equal treatment of migrant workers and their rights in the Member State of activity or whether the aim is more general – to secure the social security rights of all persons who have used their right to move freely on whatever ground or have been in contact with that right through family members.

3.1.2 Specific rules on coordination of family benefits

This part gives a short description of the main principles of coordination of family benefits. To guarantee persons' rights (also to family benefits), in **Title I** the Regulation provides for generally applicable principles, e.g. specific rules for aggregation of insurance etc, periods in different Member States, the assimilation of facts, the waiving of residence rules. The Regulation also enacts a general rule which should prevent overlapping of benefits (Article 10 and specific rules in Title III). All these general principles are well-known to the reader and seem unnecessary to be repeated at this occasion.

Title II of the Regulation determines which legislation is applicable to a person. As a general rule, the person covered by the Regulation should be subjected to the legislation of a single Member State (Article 11(1)). Article 11(3) defines the general rules of applicable legislation: as in previous Regulations, the Member State in which the person concerned pursues his or her activity as an employed or self-employed person should be the (one and only) competent Member State in social security matters (see recital No 17 and Article 11(3)(a)) and that State should also apply the general principles mentioned above; in particular it should treat the person equally with its nationals (Articles 4 and 5). At the same time there are more and more rules in the Regulation which derogate from this general principle of competence of the Member State of gainful activity and which complement these rules, and also which regulate competence situations where a person is not economically active, but is still covered by the Regulation. This determination of the applicable legislation is of utmost importance for the coordination of family benefits as – on the one hand – only a Member State which is competent for one of the members of the family (including the one competent for a child) has the obligation to grant benefits under Regulation (EC) No 883/2004[3] and – on the other hand – every competent Member State is obliged to open entitlement to its family benefits for all family members, irrespective of whether they reside in the same or in another Member State (Article 67 of Regulation (EC) No 883/2004).

Without any additional rules this could lead to overcompensation if all Member States competent have to grant the full amount of their family benefits. Therefore, **Title III**, **Chapter 8** of Regulation (EC) No 883/2004 provides for priority rules which set up a

[3] To keep this part simple we do not want to refer to the specific solutions developed by the CJEU under the general principles of the TFEU in relation to Member States not competent for any member of the family which provide for entitlements under national legislation alone – e.g. the judgment in *Hudzinski and Wawrzyniak*, C-611/10 and C-612/10, EU:C:2012:339.

hierarchy of competent Member States (especially Article 68). Only the Member State which has primary competence has to grant the full amount of its family benefits and any other competent Member States only have to grant a top-up in the event that the family benefits under the legislation of these Member States are higher than those of the Member State with primary competence. In a nutshell, this hierarchy could be described as follows: competence of a Member State due to work has priority over the competence of a Member State granting a pension,[4] which has priority over competence due to mere residence. The Regulation also contains special provisions for those cases in which more than one Member State at the same step of hierarchy is involved (e.g. two different Member States in which the parents exercise a gainful activity and thus are subject to the legislation of both Member States due to Article 11(3)(a) of Regulation (EC) No 883/2004). In these cases the residence of the child gives priority. Should no result be obtained thanks to this rule either (e.g. the child resides outside the two Member States in which the parents exercise a gainful activity) there are additional rules which determine the Member State which has to grant its family benefits by priority. As these are very rare cases we do not want to go into the details of these rules.

3.2 Legal problems

The rules on family benefits under Regulation (EC) No 883/2004 are one of today's most complex and disputed fields of coordination. Among the problems of a legal nature especially the following have to be mentioned:

- **Various and diverging types of family benefits in cash**: Taking into account the rulings of the CJEU, not only the traditional family allowances have to be regarded as family benefits. This includes also a bouquet of other benefits which do not have a lot of common elements, but, which have a general aim, which is (at least in part) the intention to meet family expenses: child-raising benefits which are usually meant to help the concrete person taking care of the child and which, therefore, replace income which cannot be received during the child-raising period;[5] tax benefits which are granted as a tax bonus;[6] an aid for child care at home if the public kindergartens are not used;[7] but also advances of maintenance payments[8] and childbirth and adoption allowances[9] (this last group had to be explicitly excluded from the definition of family benefit to safeguard that Regulation (EC) No 883/2004 does not apply to them – Article 1 (z)). This variety of benefits makes it difficult to know exactly which benefits have to be coordinated and which fall outside the material scope of the Regulation.

[4] The case of pensioners is special as it is not the Member State competent for the pensioner under Title II of Regulation (EC) No 883/2004 (which would be, based on Article 11(3)(e), the Member State of residence) but the Member State which grants the pension; thus, the Regulation adds Member States which have to grant family benefits to those which are competent under its Title II.

[5] E.g. the judgment in *Hoever and Zachow*, C-245/94 and C-312/94, EU:C:1996:379; the judgment in *Kuusijärvi*, C-275/96, EU:C:1998:279; the judgment in *Weide*, C-153/03, EU:C:2005:428; the judgment in *Dodl and Oberhollenzer*, C-543/03, EU:C:2005:364; and most recently the judgment in *Wiering*, C-347/12, EU:C:2014:300.

[6] Judgment in *Lachheb*, C-177/12, EU:C:2013:689, concerning the aspects of tax benefits which are at the same time social security benefits; see B. Spiegel (ed.), K. Daxkobler, G. Strban & A.P. van der Mei, 'Analytical report 2014: The relationship between social security coordination and taxation law', FreSsco, European Commission, January 2015.

[7] Judgment in *Maaheimo*, C-333/00, EU:C:2002:641.

[8] Judgment in *Offermanns*, C-85/99, EU:C:2001:166, judgment in *Humer*, C-255/99, EU:C:2002:73, and judgment in *Effing*, C-302/02, EU:C:2005:36.

[9] If Luxemburg had not excluded this benefit explicitly it would have been covered by Regulation (EEC) No 1408/71; judgment in *Leclere and Deaconescu*, C-43/99, EU:C:2001:303.

- **A transition from work-related concepts towards the inclusion of anybody covered by a social security scheme:** While Regulation (EC) No 883/2004 switched from covering (in principle) only gainfully active persons and their dependents (as has been the case with Regulation (EEC) No 1408/71) towards covering all persons subject to any social security scheme (Article 2), the coordination rules for family benefits still follow the old logic by giving priority to the situation of the gainfully active persons. This could cause some tension with the rights which every EU citizen derives from European citizenship (which rights have priority: those as a European citizen as an own right or those derived from another gainfully active person?). Without going further into that issue we recommend that this is an aspect which could also be further taken into account when thinking about concrete reforms of the coordination of these benefits.
- **The calculation of the differential supplement**: When the Member State which is not competent by priority has to top up the benefits of the Member State competent by priority many questions arise. The question if this top up has to be made for the total of all family benefits together or only per benefit category has been decided under Regulation (EEC) No 1408/71 by the CJEU in favour of the second option.[10] Although some doubt may arise whether this also applies for the application of Regulation (EC) No 883/2004, there are convincing arguments in that direction.[11] Another issue which is still not decided is whether this calculation has to be made per family or per child (which could also lead to totally different results, the latter one giving entitlement to higher benefits than the first one).
- **An unclear situation concerning benefits in kind**: The notion of family benefits also covers all benefits in kind. Despite that, Regulation (EC) No 883/2004 does not provide for clear rules (as are e.g. provided in the field of sickness benefits in kind[12]) on which Member State has to grant these benefits. Although concrete rulings of the CJEU are still missing,[13] it cannot be excluded that these benefits have to follow the general rules of coordination of family benefits including the obligation to grant them also for children residing outside the Member State concerned. Of course it is very difficult to imagine the export of e.g. free school books, free school milk or free travel from home to school to other Member States, but, would it not be possible that the CJEU, once asked, deducts from these rules an obligation to reimburse the expenses incurred outside the competent Member State?[14]
- **Which persons have to be regarded as members of the family**: Under the traditional family concept the question which persons can open entitlement to family benefits was not so difficult to answer (the parents and the children). Modern family situations have altered this dramatically. Today it is in some

[10] Judgment in *Wiering* EU:C:2014:300.
[11] See also Y. Jorens & J. De Coninck, 'Reply to an ad hoc request for comparative analysis of national legislations. Family Benefits – Consequences of the Wiering judgment in C-347/12', FreSsco, European Commission, December 2014, 132 p.
[12] There is a whole Chapter 1 under Title III of Regulation (EC) No 883/2004 which deals with the various aspects of the granting of sickness benefits in kind. Most important is that there is no export of these benefits but an obligation of the Member State where the concrete treatment is effected to grant these benefits at the expense of the competent Member State.
[13] In the judgment in *Commission* v *Austria*, C-75/11, EU:C:2012:605, the CJEU did not have to answer the question whether the Austrian reduced costs for public transport have to be regarded as family benefits in kind under Regulation (EEC) No 1408/71.
[14] Following e.g. the reimbursement obligation developed by the CJEU in the cases on 'patient-mobility'; but of course, the cases we are confronted with are usually not cases on the freedom to provide services under Article 56 et seq TFEU. As this is not the main subject of this report we do not examine this question more in depth; for our purpose it is most important to mention it as a problem.

situations very complicated to decide which persons might be involved. The CJEU had to respect these new situations and declared also persons outside the actual family as persons who might open entitlement to family benefits, e.g. a divorced parent.[15] As a result, much more individuals could be concerned when calculating the amounts of family benefits. The definition of family member under Article 1(i) of Regulation (EC) No 883/2004 should be analysed if it really gives enough clarity concerning all persons who could fall under the notion of 'family member'. Another issue is also if today's definition covers in a sufficiently broad way all new forms of family which are recognised only under the legislation of some Member States (e.g. homosexual marriages).[16]

3.3 Administrative problems

3.3.1 Results from the mapping exercise

The **FreSsco national experts'** replies to the questionnaire showed some details concerning administrative difficulties. Certain administrative problems were reported by the majority of FreSsco national experts, arguing that the coordination regime for family benefits does not function perfectly in practice. Causes might lie for instance in the difficulty of comparing distinctive family benefits, not only due to diversity in the nature of these benefits, but also due to diversity of eligibility conditions for claiming them (e.g. in **LU**).

It seems that in **Austria** the principle that **the whole family must be considered** for the entitlement to family benefits leads to major administrative efforts for the competent institutions. They are obliged to identify all relevant facts regarding the mother, the father and the child. Also **Poland** reported problems regarding the classification of benefits and of a family (e.g. the legal situation of a step-parent). Similarly in **Bulgaria**, the reference to persons who have to be specified in part A of the E400 family benefit confirmation form creates certain difficulties. The form requires referral to a (former) spouse or other person/persons whose entitlement to family benefits in the country of residence of those family members should be verified. This allows referral of economically inactive persons (pensioners and even deceased relatives) and in that manner, to designate the other Member State as primarily competent (based on occupation). Moreover, in Bulgaria a large number of portable documents and certificates providing data only for family allowances for children in Bulgaria is being issued to individuals (by the Social Assistance Directorate at the Ministry of Labour and Social Policy). These do not provide information for occupation and activity in Bulgaria, and thus they cannot serve to determine the competent institution under the social security coordination rules.

All that may result in **rather long procedures**. Lengthy procedures were reported not only by **Austria**, but also by **Croatia** and **Slovenia**. In the latter it appears that the reason lies especially in complicated matters of coordination of family benefits and the important increase of coordination issues since Croatia's accession to the Union. In addition, only few experts are dealing with the coordination of family benefits, which may result in administrative decisions being issued only after a year from claiming the benefits (with an even longer tendency in the future). Moreover, certain procedures, like the one for the recovery of benefits, are as a rule not even instigated. Interestingly, in order to prevent fraud and abuse of family benefits, it is reported that

[15] Judgment in *Slanina*, C-363/08, EU:C:2009:732; this ruling is understood in Austria as extending the notion of member of the family beyond the definition of Article 1(i) as also children who have not been dependent on the insured person came within the notion of member of the family .
[16] See also Y. Jorens, B. Spiegel, J.-C. Fillon & G. Strban Think Tank report 2013, 'Key challenges for the social security coordination Regulations in the perspective of 2010', Chapter 5.

the Czech Republic is currently starting negotiations with Slovakian partners on a possible future anti-fraud bilateral agreement. However, this procedure is only in a very beginning stage and no details on the future content of such an agreement are known yet.

So far, problems encountered and reported by the **Croatian** authorities relate also to **cooperation with the competent institutions of other Member States**. It seems that the main problem consists in obtaining the answer from another Member State, particularly where there is primary competence in another Member State on the basis of receipt of pension. The procedure is often long, without a reply from the Member State with primary competence. This results in the temporary granting of benefits by the Member State with secondary competence (i.e. **HR**), which could potentially lead to lengthy and complicated reimbursement procedures. Another problem in communication arises with the forwarding of applications for family benefits, which are deemed submitted in all Member States if they are submitted in one Member State (which is then liable to forward it, if the facts of the case so require). Practice shows that applications are either not forwarded at all, or are forwarded without response from the other Member State.

Administrative problems in the cross-border exchange of data were also reported by **Belgium** and **Bulgaria**. In **Bulgaria** it seems that the series **E400 forms** and the SEDs of the F-series are exchanged on paper by regular post. As a result, the information flow lingers and a risk of losing documents always exists. Introduction of upcoming electronic exchange should accelerate and facilitate the process of data exchange.

Reportedly, in **Sweden** there are problems concerning the **coordination of income-replacing parental benefits** (see 4.1.4 below).

Another problem was reported by **Austria** in relation to family benefits. Entitlement to family benefits often **effects inclusion into social insurance**, like health or pension insurance. This can cause problems if the person concerned is already insured because of the prolongation of employment, e.g. during maternity leave. In this case the question arises which Member State is competent to provide social insurance coverage? This is also due to the fact that the material scope of Decision F1 of the Administrative Commission for the Coordination of Social Security Systems[17] is not clear enough regarding the applicable legislation.

Despite all the problems mentioned above, not many **national court cases** dealing with social security coordination of family benefits were reported. None or very few (non-recent) cases were reported by **Belgium**, **Bulgaria**, **the Czech Republic**, **Hungary**, **Luxembourg** (apart from two famous cases, i.e. *Lachheb*[18] and *Wiering*[19] – introducing insecurity for the **Luxembourg** institution CNPF[20]) and **Slovenia**.

It is in **Austria** that several court cases were reported. In 2014 and 2015 (until end March) Austrian higher courts had to decide 23 cases regarding the coordination of family allowance (*Familienbeihilfe*) and two cases regarding the coordination of childcare cash benefits (*Kinderbetreuungsgeld*) under Regulation (EC) No 883/2004 (or Regulation (EEC) No 1408/71, respectively).

[17] Administrative Commission for the Coordination of Social Security Systems, Decision F1 of 12 June 2009 concerning the interpretation of Article 68 of Regulation (EC) No 883/2004 of the European Parliament and of the Council relating to priority rules in the event of overlapping of family benefits, OJ C 106, 24.04.2010, p. 11-12.
[18] Judgment in *Lachheb* EU:C:2013:689.
[19] Judgment in *Wiering* EU:C:2014:300.
[20] Caisse nationale des prestations familiales.

In **Sweden** (apart from the *Kuusijärvi*[21] case, also mentioned below) courts had to deal with the question of the duration of export of residence-based family benefits, such as child allowance.[22] Sweden also reported a specific problem with regard to the case law on the deduction of days to be made when parental benefits have been paid out in other Member States.[23] The negative consequences for families with one frontier worker were also acknowledged in the Swedish media.

Several (administrative) court cases were also reported by **Poland** concerning overlapping of family benefits and the determination of the applicable legislation. Polish courts are of the opinion that the subject of comparison should be only the total amount of the benefit(s) granted, rather than the particular amounts of each type of benefits granted,[24] which seems to be in opposition to the CJEU judgment in *Wiering*.[25]

3.3.2 Short conclusions on the administrative problems

As shown by the mapping exercise, many technical and administrative problems occur in today's application of Title III, Chapter 8 of Regulation (EC) No 883/2004 (beside the legal problems). It is not the subject of this report to deal with all the different problems; only those relevant to export will be analysed if needed. Nevertheless, from our point of view especially the following problems can be summed up (some of them stemming from the FreSsco national experts, some added from our experiences and knowledge):

- problems identifying the Member State competent by priority;
- problems calculating the differential amount by the other Member States;
- very lengthy procedures which lead to situations in which the families concerned have to wait long before any benefit is paid;
- problems calculating provisional benefits;
- problems recovering overpayments.

[21] Judgment in *Kuusijärvi* EU:C:1998:279.
[22] Reportedly, one case concerned a woman who had left Sweden for France. As long as she was a student there with Swedish study allowance, she was entitled to continued payments of child allowance. However, when her studies came to an end, the Social Insurance Agency claimed that she was no longer covered by Swedish legislation. The Administrative Court of Appeal found that the woman, due to a leave of absence from her Swedish employer, could not be regarded as having ceased all occupational activity in Sweden (compare with the *Kuusijärvi* case). The Social Insurance Agency appealed and claimed that the woman was no longer covered by any risk according to Swedish social security legislation, since a person during leave of absence is not covered by the Swedish work-based social security legislation (compare with the *Dodl/Oberhollenzer* cases). The case was not granted leave to appeal in the Supreme Administrative Court.
[23] According to national legislation, Sweden is entitled to deduct days from the total of 480 Swedish days of benefits. However, to establish how many days have been taken out in another Member State may be problematic. The full Swedish parental benefit equals seven days of benefits a week. The Swedish Social Insurance Agency has taken the stance that, when transforming weeks taken out into days, a foreign week equals seven days, regardless of how many actual days the person has been granted in the other Member State during that week. In a situation where the mother worked in Denmark, for example, and had started the parental leave, the Swedish deduction led to situations where there were no days left for the father, working in Sweden, when he wanted to draw his parental benefit.
[24] Cf Naczelny Sąd Administracyjny, akt I OSK 295/11, I OSK 713/11.
[25] Judgment in *Wiering* EU:C:2014:300.

3.4 Political problems

3.4.1 General remarks

On top of the legal and administrative problems, in recent years the coordination of family benefits also became the focus of political attention. Anecdotally, some stakeholders' main concern and point of criticism is that the family benefits which have to be granted for children residing outside the competent Member State have to be exported without any limitation, irrespective of the (economic) situation in these children's Member State of residence. Member States with relatively high amounts of family benefits could argue that this unlimited export is not fair, as it provides (in relation to the economic situation) much more money than the local families (without cross-border movement) get. Main purpose of the mandate for this report (which clearly mentions these concerns) is to look into various options for the export of family benefits which could solve the political problems. But, already at that occasion it has to be stressed that our group did not see today's situation of unrestricted export of family benefits in such a dramatic way; in public discussion only very few Member States raised this issue.

As any option which is different from the status quo will not be measured in relation to its impact on these political problems alone, but, also in relation to the legal and administrative problems described, we will also refer to them and have a look if these problems could also be solved or at least diminished. The option which could best solve all three categories of problems would be the preferred one.

3.4.2 Results from the mapping exercise

Despite all the problems mentioned and also the rationale behind our mandate, hardly any **political debate** on coordination of family benefits was reported by the **FreSsco national experts**. It is considered that the coordination Regulations are a technical matter, giving rise to debates only between experts (e.g. CNPF in **LU**). For example, the *Wiering* case law[26] is of great importance for **Luxembourg**, but it seems too hard to explain it in detail to the public. Some public debate on family benefits was reported by **Slovenia** (following the adoption of the new family benefits act) and **Bulgaria** (on very low family benefits and their entitlement for the Roma population), but none on the coordination of family benefits. No public debate on coordination was also reported by **Belgium**, **Bulgaria**, **the Czech Republic** and **Slovenia**.

Conversely, there was some public debate in **Poland** on transfer of family benefits from other Member States, especially from the United Kingdom to Poland. This started when David Cameron, British Prime Minister, stated that he would try to renegotiate the UK's membership of the European Union to allow it to withhold child benefits for children living in other EU countries.[27] This became an international affair, and Polish foreign minister Radek Sikorski, talking about reciprocity, wrote on his official site: "*If Britain gets our taxpayers, shouldn't it also pay their benefits? Why should Polish taxpayers subsidise British taxpayers' children?*"[28] It has to be noted that in the United

[26] Judgment in *Wiering* EU:C:2014:300.
[27] David Cameron said: "*It's a situation that I inherited … I think it will take time because we either have to change it by getting agreement from other European countries – and there are other European countries who, like me, think it's wrong that someone from PL who comes here, who works hard, and I am absolutely all in favour of that, but I don't think we should be paying child benefit to their family back at home in Poland.*" R. Mason, 'Cameron to push for cap on European migrants in UK negotiations with EU', *The Guardian*, 5 January 2014, available at http://www.theguardian.com/uk-news/2014/jan/05/cameron-cap-european-migrants-uk-negotiations-eu (last accessed 17 March 2015).
[28] B. Waterfield, 'Poland attacks David Cameron plan to ban Polish and EU migrants from claiming child benefit', *The Telegraph*, 6 January 2014, available at

Kingdom child benefit claims under Regulation (EC) No 883/2004 in respect of children living in Poland are constantly decreasing.[29]

http://www.telegraph.co.uk/news/worldnews/europe/poland/10553020/Poland-attacks-David-Cameron-plan-to-ban-Polish-and-EU-migrants-from-claiming-child-benefit.html (last accessed 17 March 2015). He argued that Polish people contributed about double the amount to the British economy than they withdrew in benefits. According to statistics, migrants from the Central and Eastern European Member States are much less likely to claim benefits than British nationals. The majority claim child benefits. In the long run the United Kingdom is receiving the fiscal contribution of migrants' work, without paying for the education and training that enables them to work.

[29] According to statistics, in 2009 there were 22,885 claims for 37,941 children in Poland. In 2013 there were 13,174 claims for 22,093 children of migrants from Poland. R. McInnes, 'Statistics on migrants and benefits', available at http://www.parliament.uk/briefing-papers/SN06955/statistics-on-migrants-and-benefits (last accessed 31 March 2015).

4 Horizontal options which are relevant for all options examined with regard to export

Before going into the concrete options concerning the export of benefits, we want to mention some horizontal issues which emerge when problems in relation to the coordination are mentioned and, therefore, also have relevance for these options. We recommend also including these aspects in any attempt to change the existing system, as they could have significance for the impact assessment of the different options. After our examination of the different options we are convinced that these horizontal questions cannot be left aside by the policy-makers who have to take a decision on which option on export of benefits to follow.

Nevertheless, these additional options are not a must for the new coordination concerning export. They could help to avoid some additional problems, but, any export option would also perfectly work without them (maybe, with different pros and cons as a result of the impact assessment – which can be of great importance for the decision-makers). As this was not explicitly requested we have also abstained from making a detailed impact assessment of these additional options. Whenever important we will refer to them during the impact assessment of the export options. Taking into account the very restricted time available for any reform of the export provisions it would not be realistic to expect that all these additional options will be taken on board at this next occasion. Maybe, these ideas could be further discussed for a more profound revision of the coordination of family benefits in future.

4.1 The same coordination for all family benefits?

4.1.1 General remarks concerning the variety of benefits

Of course export today concerns all family benefits in the same way (letting aside the advances of maintenance payments and special childbirth and adoption allowances which are included in Annex I of Regulation (EC) No 883/2004). Nevertheless, it should be examined if the same coordination for all family benefits is really the perfect solution.

From a historical point of view (when Regulation (EEC) No 1408/71 was drafted) **family allowances** have been the main benefits provided for by the legislation of the Member States. Later on, the bouquet of family benefits as described above expanded and covered more and more different types of benefits. If export is considered the problem which stimulated this search for new options, we have to examine first if all the different groups of family benefits cause the same problems.

4.1.2 Results from the mapping exercise

The diversity of political aims behind the different family benefits of the Member States also became very clear from the replies of the **FreSsco national experts**:

In general, the aim of social security systems is to provide income security in cases of lost (or reduced) income and in cases of additional costs (through a process of broader or narrower social solidarity). More precisely, the **primary goal** of family benefits may be deducted from the *actes préparatoires* (legislative material for the adoption of a new act). As a rule, it is to cover (part of) additional costs a family has due to maintenance and education of a child or more children.

For instance, in **Austria** in the *preparatory documents*[30] for the adoption of the Families' Burden Compensation Act (*Familienlastenausgleichsgesetz*/FLAG)[31] regulating family allowance (*Familienbeihilfe*), it is mentioned that the social policy aim of the Families' Burden Compensation Act is to support families with children when the costs of maintenance and education of children impair the standard of living, especially if a family has more than one child. It has been ascertained that compensating the additional financial burden of families for housing, clothing and nutrition is crucial for the existence of the whole **Austrian** society. This compensation is to be conducted between those who carry that burden – also for the good of the whole society – and those who do not carry such burden and therefore benefit from the fact that others do.

In **Slovenia** the social policy aim of the parental care and family benefits scheme is expressed in the preparatory materials for the new ZSDP-1 (*Zakon o starševskemvarstvu in družinskihprejemkih*, Parental Care and Family Benefits Act).[32] It is emphasised that family benefits are a link of the entire uniform family policy, which is exercised also via other policy areas. The ZSDP-1 is based on the social nature of the Slovenian state and the fact that the state cannot ignore the basic societal cell – the family.

The primary goal of family allowances to offset the costs of a family for raising children is reported also by every other Member State (covered by our questionnaire), i.e. **Belgium**, **the Czech Republic**, **Poland**, **Luxembourg** (where family allowances are a personal right of the child),[33] **Sweden** (where family allowances should somewhat even out the differences between families with children and those without) and **Bulgaria** (benefits should support parents to raise a child in the family environment).

However, there are also **ancillary (secondary) aims**, like guaranteeing equal treatment of children (**BE**), or maximising the best interests of the child, increasing birth rates and nativity (**HR**), providing more gender equality, enabling workers with family responsibilities to balance between professional and family life (**SI**), or combating the decline in birth rates (**AT**). It is also important to note that family benefits should prevent or even alleviate poverty of children and their families (**BE**, **BG**). In **Bulgaria** it is discussed that instead of targeting poor people (especially Roma), family benefits should follow children in educational establishments, being dedicated to education and better health care to increase children's potential for future employment and social inclusion. Some initial conceptualisations have, however, become obsolete (e.g. family benefits as a wage supplement for workers with families in **BE**).

Taking all these primary and secondary aims into account, family benefits are **shaped quite distinctively** across Member States. Some amounts may depend on the number of children (e.g. in **SE**) and their age (e.g. in **AT**, **CZ**, **SI** for child benefits). Some may be income-related and some provided as a lump sum (e.g. in **LU**). Some may be income-tested or means-tested (**HR**, child allowance in **CZ**, guaranteed child benefit in **BE**, child benefit in **SI**, family allowances and supplements in **PL**). For some (permanent) residence may be required (e.g. in **AT**, **SI**). There may be special benefits (e.g. partial payment for lost income and childcare supplement in **SI**) or

[30] RV 549 BlgNR 21.GP, 11.
[31] Federal Gazette Number 376/1967, latest version Number 53/2014
[32] Government of the RS, legislative proposal for the ZSDP-1, EVA 2013-2611-0042, 10.10.2013
[33] Reportedly, since the beginning of the 21st Century, LU has adopted a new approach regarding welfare of children, based on the United Nations Convention on the rights of the child. Through reforms in fiscal matters – the abolition of income tax classes taking into account the presence of children in a household and the creation of a "child bonus" (2007) – and family benefits – the creation of a childcare voucher (2009), the abolition of family allowances for young people over 18 and the creation of a financial aid for young people in higher education (2010), the government recognised the child as an individual.

certain supplements for children with disabilities (e.g. in **BE**, **BG**, **PL**). Supplements may include additional amounts of certain family benefits for single parents (e.g. in **BE** where it is income-tested, **SI**) or for long-term unemployed, sick or incapacitated parents or those receiving an old-age or survivor's pension (e.g. the **BE** professional scheme), supplements for heating or electricity support (in **BG**), or within the housing benefit (in **SE**).

It should be emphasised that presenting all different features of all family benefits in all Member States is not the central focus of the present report. For this we refer to the annexes (country sheets) of the FreSsco report on the *Wiering* judgment[34] and the MISSOC comparative tables on family benefits.

However, it might be pertinent also for the present analysis whether the **amounts of family benefits (and their adjustment)** are linked to the (minimum or average) wage or social assistance or living costs in the Member State they are being provided. Linking family benefits to different factors might influence the possibility (or criteria) for their adjustment when exporting them to another Member State.

The amounts of some family benefits are not directly linked to any of the abovementioned factors. For instance, in **Austria**, there is no defined percentage of living costs or average income which should be covered by the benefit. The amount is not directly related to minimum income or the social assistance amount. However, family allowance is not deducted when calculating social assistance (*Bedarfsorientierte Mindestsicherung*) in comparison to e.g. cash childcare benefits. This is due to the fact that the latter are qualified as 'income', which reduces the amount of social assistance accordingly. In contrast, the amount of social assistance even increases (plus 18%) if the claimant has to care for a child receiving family allowance.

In **Belgium**, in neither scheme (i.e. the professional and residual one) is there a defined percentage of the average income or living costs that should be covered by the benefit. In principle, the amount is not tied to the minimum income or to amounts of social assistance. However, the guaranteed child benefit is granted only to persons who receive social assistance or have a low income (hence, an indirect link to social assistance does exist), and certain supplements are income-tested.

In **Bulgaria**, the amounts of family benefits are fixed annually by the State Budget Act for the respective year, which means they may differ from one year to another. Each family benefit or allowance type is a fixed sum and is not rate-related with living costs or average monthly or annual income. However, this does not apply to income-related family allowances.

In **the Czech Republic**, the amount of family allowances is not related to minimum income (reportedly, it used to be, but is not anymore), or to social assistance amounts. Interestingly, for Czech parental allowance, it is up to the parent who claims this benefit to choose how long he or she wants to stay at home with the child. The shorter the period, the higher the amount per month (within certain limits).

In **Croatia** benefits depend on monthly income per member of the household as put in relation to the State Budget Base of HRK 3,326 (€436) (the same base applied since 2002). Three income groups are eligible to receive the allowance: households who earn below 50% of the State Budget Base, those who earn below 33.66% of that base and those who earn below 16.33%. Those whose income exceeds 50% of this amount are not entitled. There are also additional supplements. The amount of the child allowance therefore depends directly on the amount of the State Budget Base, which

[34] Y. Jorens & J. De Coninck, 'Reply to an ad hoc request for comparative analysis of national legislations. Family Benefits – Consequences of the Wiering judgment in C-347/12', FreSsco, European Commission, December 2014, 132 p.

is determined and laid down each year, by the Act on the Implementation of the State Budget for the current year.

Also in **Luxembourg**, the effective costs of the presence of a child in a household have never been calculated. A universalist vision prevails, which means that all children have equal rights, that they have a right to family allowances of the same (lump sum) amount. It is not related to living costs, average income, minimum income or social assistant amounts.

This is similar to **Sweden**, where child allowances and special supplements within housing benefits are not related to the minimum income/social assistance. Still, there appear to be discussions in Sweden from time to time on whether child allowance should instead depend on the income level of the family. It is argued that in this case the costs for administrating the benefit would increase.

Also in **Poland** family benefits are not defined as a percentage of living costs, average remuneration or social assistance.

However, in **Slovenia** there seems to be a certain link to the minimum wage, e.g. parental allowance used to be determined as 55% of the minimum wage (and according to the new ZSDP-1 it is just set as a corresponding amount, no longer mentioning minimum wage as such). Also partial payments for lost income used to be equalled with (a proportional part or the entire) minimum wage (now the nominal amount is set, which corresponds to the minimum wage as it was set in the first half of 2010). Some benefits are targeted to those below 64 % of the average wage per family member (child benefit and large family supplement)

The most evident link to (former) income (wage) exists in income replacement child-raising schemes, e.g. the **Austrian** income replacement scheme of the cash childcare benefits (*Kinderbetreuungsgeld*), or parental benefits in **Sweden**.

Some family benefits do have a link with the cost of living in the country, which is evident from the **adjustment** (indexation) rules. Some family benefits are adjusted by the rate of inflation (e.g. in **AT**),[35] some by the evolution in living costs (e.g. in **BE** or **SI**). It may also be that family benefit amounts are fixed amounts, which are, e.g. in **Luxembourg**, no longer adjusted to the evolution of living costs.

4.1.3 Benefits with the predominant aim to meet family expenses; questions of definition

If the political decision behind a family benefit is (besides other policy aims like e.g. the promotion of families or the encouragement to have (more) children) to cover the additional expenses which are caused by the obligation to maintain children (e.g. additional or special nutrition, nappies, prams, school books etc.) it is arguable that this decision is usually only based on the situation in the Member State concerned. The costs of these goods there are the decisive factor. In an ideal transparent world national politics set a percentage of these additional costs which has to be covered by the family benefit. If this decision says e.g. that 20% of these additional costs has to be the amount of the family benefit, this decision is outbalanced if the children need these goods in another Member State where they live and this amount covers e.g. 100% or only 5% of these goods there. In these cases a political problem might arise. On the contrary, our mapping exercise (see 4.1.2 above) showed that national legislatures usually did not refer to a specific percentage of the living costs when a new family benefit was introduced, even if it is also provided for that these benefits have to be adjusted in correspondence to the development of the costs of living in the

[35] In Austria, for the years 2016-2017 the amount of the family allowance will be increased by 1.9 %. The same applies for the year 2018. That approximately corresponds to the calculated rate of inflation.

Member State concerned. Important is also that it seems that no Member State has adjusted its family benefits to different costs of living inside the relevant territory.

For these benefits which include at least the classic family allowances, options could be considered which strive for a better way of achieving the political aims behind the benefit. These benefits will be the main focus of detailed options concerning the export of family benefits. Of course these options could also cover all other family benefits if no decision is taken to split the coordination for the different types of family benefits, but, we should never forget that especially these general benefits gave rise to the main problems with today's export obligations.

Past FreSsco work unveiled the complexity of the notion of family benefits especially if benefits are concerned which are at the same time social tax benefits (benefits granted under tax law which have the clear purpose to cover at least a part of the additional costs due to having children to maintain).[36] The perception from a national point of view of what constitutes a family benefit covered by Regulation (EC) No 883/2004 and which benefits fall outside its scope are very often more influenced by national systematics than European approaches (which should only look into the policy aim of a measure to establish the material scope of the Regulation). This situation has been aggravated by new types of benefits added by the CJEU which are not so evidently covered by the existing definition of family benefits as they cover also other purposes (e.g. helping the person taking care of a child to reconcile work and family life as is very often the case with child-raising benefits).

Therefore, it could be good to start any work on new ways of coordination with a new definition of a family benefit. This would be recommendable even if no specific coordination is provided for specific benefits which are income-related (see 4.1.4 below). Such a new definition should draw a clear borderline in relation to social tax benefits which still remain outside the scope of coordination under the Regulation (if there are any) and should also cover all the other benefits (if no specific new coordination is provided for them).

Proposal for an additional horizontal Option No 1

The definition of family benefits should be adapted to avoid today's questions of interpretation and to draw a clear borderline in relation to benefits which should remain outside the coordination.

4.1.4 Benefits which are employment-related

4.1.4.1 Which benefits are special because they are employment-related?

Opposed to the classic family benefits there are benefits with quite different political aims. They want to replace income of the person who actually takes care of a child and for that reason interrupts or at least reduces a gainful activity. This is most evident if the amount of the benefit has a clear income replacement function, which means it is calculated as a percentage of the former earnings. But also benefits which have a lump sum nature could be added under this category as long as they are granted to persons exercising a gainful activity. It could be assumed that under today's coordination these benefits give rise to some problems and it is not

[36] B. Spiegel, K. Daxkobler, G. Strban & A.P. van der Mei, 'Analytical report 2014: The relationship between social security coordination and taxation law', FreSsco, European Commission, January 2015.

safeguarded that all Member States apply Regulation (EC) No 883/2004 in the same way.

4.1.4.2 Results from the mapping exercise

The above has also been confirmed by the replies from the **FreSsco national experts**. They especially report the following points:

Problems were reported with the coordination of family benefits in relation to **Sweden**, in particular as regards the **parental benefit**. When Sweden joined the EU it was considered that the parental benefit – which is related to the income of the individual parent – was to be regarded as a maternity benefit. However, the CJEU classified the parental benefit as a family benefit in the *Kuusijärvi* case.[37] Reportedly, there have been many cases in national courts regarding parents moving during parental leave and the issue of their right to continued payments of benefits. The issue of non-actives moving to Sweden and claiming parental benefits has also come up in the courts. The Supreme Administrative Court referred such a case to the CJEU (*Bergström*).[38] In general, it is argued that the coordination of family benefits has been one of the main problematic issues when it comes to applying Regulation (EEC) No 1408/71 and (EC) No 883/2004 in Sweden.

There have also been some cases concerning the overlapping of benefits in Sweden. As mentioned, parental benefits compensate income loss, whereas 'normal' family benefits are related to costs in general for having a family. Since some other Member States do not classify their parental benefits as family benefits, Sweden has often been obliged to pay supplements for families residing in another State, while one of the parents is working in Sweden. The Swedish Social Insurance Agency issued two reports on this issue, one in 2004 and one in 2006, to look into the cost for Sweden.

Also, the individual worker could be negatively affected by the fact that flat-rate benefits were put in the same benefit basket as the income-related parental benefit. The following example came up in the case law: a worker in Sweden whose family and working husband were in Denmark was taking out a few days of parental benefit a month (reportedly, in Sweden this is a common way of reducing working hours when having small children, since parental benefits may be spread out over several years; also when the child is sick parental benefits can be taken out). Denmark is then primarily responsible for family benefits. The Danish child allowance is higher than the Swedish one. When calculating the supplement for Sweden to pay out in this situation, the Swedish parental benefit was regarded as a family benefit, meaning that the few days of parental benefit 'disappeared' in relation to the higher Danish amount, despite covering income loss for the worker and not general costs for the family.

The problems related to overlapping of benefits have led to a special solution in the 2012 Nordic Convention (a multilateral convention based on Regulation (EC) No 883/2004 between **SE**, **DK**, **NO**, **FI** and **IS**), meaning that when calculating differential supplements for family benefits in accordance with Article 68(2) of the Regulation, benefits intended to compensate income loss for parents are not to be included.

As of September 2011, **Sweden** reportedly has taken the view that the parental benefit is to be regarded as a maternity/paternity benefit. This means that the Social Insurance Agency from this date on no longer includes parental benefits when calculating differential supplements (i.e. the same solution as in the Nordic Convention). The re-classification of parental benefits is, however, questionable. From our point of view it is difficult to justify such a fundamental change in interpretation

[37] Judgment in *Kuusijärvi* EU:C:1998:279.
[38] Judgment in *Bergström*, C-257/10, EU:C:2011:839.

taking into account that the general principles of coordination and the definition of family benefits did not change when Regulation (EC) No 883/2004 was adopted.

The fact that the parental benefit could be exported to family members in other Member States with no individual income in Sweden – which was one of the consequences of the classification in *Kuusijärvi*[39] – has been considered quite odd. One problem that could occur was on which level the benefits had to be granted – the income level of the spouse working in Sweden or the basic level granted in Sweden to non-actives.

The above example shows the diversity of family benefits in general and specific features of employment-related benefits in particular.

4.1.4.3 Proposal for a new way of coordination

From our point of view the negative consequences of coordinating a family benefit with an income replacement function can be best shown by way of an example:

> ***Example**:*
>
> *Member States A and B know a child-raising benefit for the person who interrupts the gainful activity and takes care of the child for one year after birth. The amount of the child-raising benefit is in Member State A 60% of the previous earnings; in Member State B it is 80%. In addition, Member State A knows a lump-sum benefit (fixed amount) for persons who were not gainfully active before they started taking care of a child.*
>
> *In a family which resides in Member State A the father works in Member State A while the mother works as a frontier worker in Member State B. The mother draws child-raising leave after maternity leave and stays with the child at home.*
>
> *Under today's coordination[40] Member State A has primary competence. Will it grant the child-raising benefit under its legislation by compensating 60% of the income of the mother (who has been subject to the legislation of Member State B and not of Member State A)?[41] In this case Member State B (secondarily competent) will have to grant a differential amount of 20% to reach the 80% provided under its legislation. Or will it, maybe, only grant the lump-sum amount for non-active persons in that Member State and will Member State B grant a differential supplement to reach the 80% provided under its legislation?*

From the point of view of the persons concerned this solution is not understood. In principle they would expect that the legislation of the Member State where they exercise their work has to grant these benefits. This is especially the case if there is no clear-cut borderline between the duration of the maternity (paternity) benefit which has to be coordinated under Title III, Chapter 1 of Regulation (EC) No 883/2004 and, thus, be granted from Member State B in our example, and the following child-raising benefit (sometimes the benefits even have the same amount).

To avoid problems of coordination of these types of family benefits it should be considered to draft a specific coordination which is not connected to the coordination of the remaining family benefits. One way could be to state explicitly that for these benefits the same coordination as for maternity or equivalent paternity benefits (Title III, Chapter 1 of the Regulation) should apply, as seems to be the practice already in some Member States. Thus, only the situation of the person concerned would be

[39] Judgment in *Kuusijärvi* EU:C:1998:279.
[40] Let us assume we apply the *Wiering* judgment and coordinate all child-raising benefits in one basket.
[41] From the judgment in *Bergström* EU:C:2011:839, it could be assumed that under Regulation (EC) No 883/2004 such an obligation exists.

relevant and not the one of other members of the family. It has to be admitted that such a radical change of today's coordination which is also a consequence of the clear rulings by the CJEU was not shared by all members of our group. Another way, more in line with the existing coordination, could be to provide under Title III, Chapter 8 of the Regulation specific rules for this kind of family benefits which strengthen the *lex loci laboris* principle of the person who wants to claim the benefit. To avoid overcompensation, only one parent should be entitled to claim such benefits for the family wherever the children reside. Should this recommendation (which is not the focus of this report and, therefore, will also not be elaborated in full detail) be chosen, all options which we will examine in relation to the export of benefits have to be read in such a sense that they do not cover these special child-raising benefits.

For this option we recommend that also the following elements should be further examined:

- **Definition**: It could be said that 'child-raising benefits linked to a gainful activity' are those which are provided under national legislation for persons who are in a gainful activity and who interrupt or reduce this activity with the (sole) purpose to raise a child.
- **Problems with benefits which have both functions, i.e. benefits for all residents + benefits for the gainfully active**: As an example the **Austrian** child-raising benefit could be mentioned, which consists in various lump sum options for all residents and an income replacement option for gainfully active persons. It has to be decided if only the income replacement option has to be coordinated under the new way of coordination or any of these options if the person is in a gainful employment (we favour the second alternative because this would give any person in gainful employment the option he or she also has under national legislation).
- But, it also has to be taken into account that this approach could **take away rights which exist under today's coordination**. If we imagine in our example that Member State B does not have any such child-raising benefits, whereas Member State A does, there would be no entitlement. We think this is a consequence which has to be accepted, as it goes without saying that in this situation also e.g. cash sickness benefits would not have to be granted by Member State A if there is no entitlement to such benefits under the legislation of Member State B. Thus, this solution would correspond to coordination usually provided under the individualised approach towards benefits.
- Another issue which should be clarified in that context: for the coordination it should not matter if a family benefit is **financed by tax or contributions or if it is provided for all residents or only the gainfully active population**. Always the same coordination rules should apply with – in principle – the same results. Of course, entitlement in contribution-based systems could be seen as problematic when no contribution has been paid into the scheme of that Member State. This is an issue which is further discussed under 5.2 below.
- In this context we have noticed that under today's coordination the **text of Article 68 of Regulation (EC) No 883/2004** is not as clear as it should be. The words "*rights available on the basis of an activity as an employed or self-employed person*" seem to mean that the person concerned is subject to the legislation of the Member State in question due to the exercise of an activity as an employed or self-employed person under Title II of the Regulation.[42] Yet, it could also mean that the scheme concerned is based on an activity as an employed or self-employed person (excluding residence-based schemes). If a

[42] Recital 35 of Regulation (EC) No 883/2004 is a strong indicator for that interpretation.

reform of these provisions of the Regulation is undertaken, also this possibility of misunderstandings (which leads to totally different results of coordination) should be removed. Our discussion showed that also the last sentence of Article 68(2) is not clear and could be made more explicit.

Proposal for an additional horizontal Option No 2

We recommend to further analyse the coordination of child-raising benefits for gainfully active persons and to look for ways of coordination which could take better care of the peculiarities of these benefits compared to classic family benefits like e.g. family allowances.

Proposal for an additional horizontal Option No 3

We recommend some clarification in Article 68 on the meaning of "*rights available on the basis of an activity as an employed or self-employed person*".

4.1.5 Benefits which have the function of special non-contributory cash benefits

Up until now Annex X of Regulation (EC) No 883/2004 does not contain any benefits which are related to family benefits. If export is a problem for some Member States because the benefit is strictly limited to the special needs of the local population, it could be examined whether an entry of these rare groups of benefits (if they exist at all) into that annex is possible already under today's criteria for special non-contributory cash benefits.[43] Or, it could be examined whether a revision of the criteria contained in Article 70(2) of the Regulation is advisable to cover also these family benefits. Thus, all the options discussed in relation to the export of benefits would not apply to these benefits, which could also ease the discussion. But, as this is a very radical and far-reaching approach which could have effect for other benefits, this recommendation is not supported by all members of our group.

Proposal for an additional horizontal Option No 4

We recommend an examination of the list of Annex X of Regulation (EC) No 883/2004 especially to cover also some family benefits which show the relevant elements.

4.1.6 Advances of maintenance payments and childbirth and adoption allowances

This is only to mention the problems with the existing exclusion of these benefits from the coordination under Regulation (EC) No 883/2004 the moment they are listed in Annex I. As we know, excluding benefits for which the CJEU decided that they are family benefits of the Regulation does not exclude that the TFEU or even Regulation

[43] This is a decision the EU legislature will have to take when such requests for inclusion of new benefits into Annex X of the Regulation are forwarded by a Member State; the moment a benefit is not special but a general social security benefit it can never be listed in that Annex (see also the judgment in *Hosse*, C-286/03, EU:C:2006:125).

(EU) No 492/2011 applies to these benefits.[44] When new ways of coordination of family benefits are considered also the special situation of these benefits should not be forgotten.

4.1.7 Special new rules for benefits in kind

As already said, the exact coordination of family benefits in kind is not clear under the existing coordination. A reform of this part of Regulation (EC) No 883/2004 should also be used to insert the necessary clarifications. From our point of view various options are at our disposal:

- The definition for family benefits could be changed and the application of the Regulation restricted to benefits in cash. This would not mean that benefits in kind would no longer fall under EU law, but all the other relevant instruments, like e.g. Article 45 TFEU or Regulation (EU) No 492/2011 would apply.[45]
- If also family benefits in kind should remain covered by some provisions of Regulation (EC) No 883/2004 it has to be noted that under today's definition of benefits in kind (Article 1(va)) no reference is made to family benefits, which could be regarded as disturbing and should be clarified.
- It could be provided that family benefits in kind always have to be provided only by the children's Member State of residence (no export, but, of course aggregation of periods if needed and equal treatment); this is what seems to be today's practice by many Member States but without a clear legal basis.
- This last option could be complemented by a reimbursement provision (as today provided under the Regulation for sickness benefits in kind), thus making the provision quite complex, not changing anything for the beneficiaries concerned and – as not all Member States share the same concept of family benefits in kind – burdening some Member States with costs of family benefits much higher that under today's coordination.

Proposal for an additional horizontal Option No 5

A clearer rule concerning family benefits in kind should be introduced.

4.1.8 Clustering of benefits for the purpose of calculating the differential supplement

Of course, the consequences of the *Wiering* judgment are far from clear[46] and Member States are not sure about the importance of this judgment in all the different situations. Therefore, it is strongly recommended that the legislature intervenes and clearly defines the different baskets within which the comparison of benefits has to be made to calculate the differential supplements or if all the benefits should be taken together. This would be especially important if no special coordination for child-raising benefits is provided for (see 4.1.4). Our analysis of the different options will not deal with this issue; the reader has to imagine how complex the situation would become if

[44] Judgment in *Hartmann*, C-212/05, EU:C:2007:437.
[45] Judgment in *Commission* v *Austria* EU:C:2012:605.
[46] See also the FreSsco report by Y. Jorens & J. De Coninck, 'Reply to an ad hoc request for comparative analysis of national legislations. Family Benefits – Consequences of the Wiering judgment in C-347/12', FreSsco, European Commission, December 2014, 132 p.

the method of coordination were to be applied to different baskets by some Member States but only to one basket by others if a common approach could not be achieved.

This clarification would not only concern the calculation of the differential supplement but also other aspects like e.g. the obligation to reimburse half of the amount of the benefit(s) of the basket(s) concerned, granted under **Article 58 of Regulation (EC) No 987/2009**. In this context we have to mention that *per se* Article 58 of this Regulation is a provision which could also create a lot of problems. It is not always easy to identify the Member State with the "*highest level of benefits*". How do you compare a lump sum benefit with a benefit paid every month during years? What is more important, that the benefit lasts longer or the amount granted? What happens when the family benefits are very different? We think that the problems identified up until now with the calculation of the differential amount apply also to the reimbursement under Article 58.

Proposal for an additional horizontal Option No 6

A clear decision should be made if and, as the case may be, how many baskets of different types of family benefits have to be made for the calculation of the differential supplement and the reimbursement.

4.2 Who is a member of the family at the side of the 'grown-ups'?

As already shown many problems arise with regard to the question who is a member of the family, especially concerning the persons who could open entitlements. To avoid these problems and safeguard a more synchronised application of the family benefit coordination between different Member States, we recommend a more detailed definition than today's. However, the legislature could even go further and decide – under a common European definition – e.g. whether the biological parent always has the stronger ties to a child and is thus entitled to open family benefits, even if the child already lives in a new family and e.g. the mother's new partner maintains the child. Or, should it be *vice versa*: always the partners in whose household the children (irrespective of the biological father or mother) really live and are maintained. Maybe there are also other possibilities to clarify the situation. This would deviate from today's principle under which it is always the task of national legislation to define which person has to be regarded as family member (letting aside the condition of the shared household[47]). This far-reaching approach was not supported by all of us.

Proposal for an additional horizontal Option No 7

It could be useful to specify or at least clarify who is a member of the family for the purpose of the coordination of family benefits.

[47] Supplemented by the position of the CJEU e.g. in the judgment in *Slanina* EU:C:2009:732; which at least from the Austrian point of view added European elements to that national definition.

4.3 Also the child could open an entitlement under Regulation (EC) No 883/2004

If we combine the new elements of Regulation (EC) No 883/2004 (the personal scope is no longer restricted to active persons and their members of the family but covers all persons who are or have been subject to the legislation of a Member State – Article 2) with the clarifications made by the CJEU under Regulation (EEC) No 1408/71 (it does not matter which family member opens entitlements under national legislation; in a cross-border situation all members of the family have to be treated as if they resided in the Member State concerned[48]) it could be discussed if children should always be (also) entitled or open entitlements (also) to family benefits under the legislation of their Member State of residence.[49] Thus, in a situation where a family resides in Member State A and the father works in Member State B while the mother works in Member State C this family opens entitlement to family benefits under the legislation of all three Member States. Therefore, already in a *Bosmann* scenario[50] (no entitlement to benefits in the Netherlands where the mother works and entitlement under national German legislation where the family, and thus also the child, lives) would Regulation (EC) No 883/2004 open entitlement to German family benefits.[51] As discussions within our team showed that this question is not that clear and that the effects of *Bosmann* under the Regulation seem to need further examination as well, the child's situation with regard to entitlement to family benefits in the Member State of residence if the parents exercise their gainful activities in another Member State could be fixed in a clearer way than today.

Proposal for an additional horizontal Option No 8

It should be clarified that also every child is covered by Regulation (EC) No 883/2004 as a non-active person and, thus, can open entitlement to family benefits in its own situation in the Member State of residence.

4.4 Problems with the place of residence of a child

Problems can also arise with the determination of the Member State of residence for the purpose of applying the adjustment (if we opt for this solution).[52]

It is not always easy to determine where a child resides in accordance with the Regulations. Verifying this can be more difficult, for example, if he or she does not attend school or, on the contrary, attends a boarding school. As is well known, the

[48] E.g. the judgment in *Dodl and Oberhollenzer* EU:C:2005:364.
[49] As they are subject to that legislation as inactive persons under Article 11(3)(e) of Regulation (EC) No 883/2004.
[50] Judgment in *Bosmann*, C-352/06, EU:C:2008:290.
[51] But, of course, this would neither solve situations as examined by the CJEU in *Hudzinski and Wawrzyniak* EU:C:2012:339, as in this case Germany was not competent under Regulation (EC) No 883/2004 for any member of the family (also the children resided outside Germany).
[52] See for instance the judgment in *Maaheimo* EU:C:2002:641. Ms Maaheimo was a Finnish national, as were her husband and her children. Having obtained parental leave, she cared for her children at home. From 8 January 1998 she received the home child care allowance. During the period from 1 May 1998 to 30 April 1999, her husband worked in Germany as a posted employee. From 10 July 1998 to 31 March 1999 Ms Maaheimo and her children stayed with her husband in Germany. She claimed that her permanent domicile remained in Helsinki. During that period the whole family was subject to Finnish social security legislation. Finnish administration stopped paying this family benefit from 10 August 1998 on the ground that the children were not actually resident in Finland.

Member State of residence is where a person habitually resides[53] or where the centre of his or her interests is located, and there is only one for the sake of coordination.[54] Following the precedent case law,[55] Article 11 of Regulation (EC) No 987/2009 provides for a non-exhaustive list of criteria based on relevant facts that should be used, with no clear order of precedence, in order to identify the residence (the centre of interests) in the event of disagreements between national institutions. As established by the CJEU, said criteria can also be considered relevant in case of disputes between an institution and the competent Member State.[56]

The criteria do not suit children much. On the one hand, the Article mentions the **duration and continuity of the presence**, this presence being independent from the administrative residence terms established in Directive 2004/38/EC.[57] Regarding this criterion it is reasonable to wonder whether social security systems can easily gather the relevant information involved and check the duration and frequency of stays, especially inside the Schengen Area.

Article 11 of Regulation (EC) No 987/2009 also refers to different factors regarding the **person's situation**. The first factor is linked with the *working status* that in the case of minors would often be out of the question. Secondly it refers to the *family status and family ties*. Thirdly, with regard to *students* the Regulation specifically establishes that "*the source of their income*" has to be taken into account (in our scenario this income would normally be the salary of the parent working in a Member State which under today's coordination is one of the Member States competent to grant family benefits). The last factors are *housing situation* and *tax residence*. This last criterion does not apply to non-active descendants either.

If the criteria mentioned are not definitive, the **person's intention**, specifically the reason to move in the first place, should be considered. It does not seem that the minor's intention could be relevant to determine their residence.

In sum, if the adjustment mechanisms were implemented, ad-hoc criteria should be provided to determine the children's Member State of residence.

Proposal for an additional horizontal Option No 9

It could be useful to also envisage a revision of Article 11 of Regulation (EC) No 987/2009 concerning the determination of the place where a child resides.

[53] Article 1(j) of Regulation (EC) No 883/2004. Article 1(k), in turn, defines "*stay*" as temporary residence which does not necessarily mean of short duration (See the judgment in *I*, C-255/13, EU:C:2014:1291)
[54] Judgment in *Wencel*, C-589/10, EU:C:2013:303, paragraph 49.
[55] Mainly the judgment in *Swaddling*, C-90/97, EU:C:1999:96.
[56] See the judgment in *I* EU:C:2014:1291, paragraph 54.
[57] Reiterated by the CJEU in the judgment in *I* EU:C:2014:1291.

5 Horizontal principles which are relevant for the options concerning export of family benefits

5.1 What does 'adjustment' mean for the options concerning the export of family benefits?

As some options focus on the adjustment of family benefits to the living standards in the children's Member State of residence we have decided to dedicate a special horizontal chapter to this issue and to not include it in the description of these options only.

5.1.1 Why adjust family benefits?

Already the definition of family benefits states that the main purpose of the benefit is to meet family expenses. As shown in chapter 4.1.3 these expenses can differ from one Member State to another. Thus, it could be argued that the social policy aim behind these benefits is no longer achieved. Adjusting the benefits to the level of the child's Member State of residence seems to avoid an imbalance and to safeguard that the social policy aim of the benefit is still achieved. This method would affect only the Member States which are competent to grant family benefits where the child does not reside.

5.1.2 Which elements could be the base to determine the factor of adjustment?

First of all we want to mention that the legal analysis of whether such adjustments are **possible from a legal point of view** is a tricky issue which merits a study on its own. Nevertheless, we have also spent some time on this question. Interesting details which could help the decision-maker in this respect can be found in **Annex 2**.

The following elements could be used to set such adjustment. There are various figures which demonstrate economic differences between Member States, e.g. gross domestic product per capita, average income or the price of living costs. Therefore, if the adjustment of social security benefits is discussed it is relevant which social policy aim is pursued with the benefit. If its purpose is to cover the costs of persons rendering services (e.g. in case of some long-term care benefits) it would be advisable to link it to the relations of average income between two Member States. If the purchase of goods and services is more the centre of the social policy decision, then e.g. the comparative price levels calculated by Eurostat[58] could be a valid tool, as the different price levels in the Member States for specific goods are the base for the calculation of these factors. Of course it could be argued that the basket of goods taken for these general statistics is not specifically the one which children need, and it should be a more focussed basket of goods to calculate these factors (e.g. child nutrition, additional living expenses for households with more than two household members, nappies, prams, furniture for children and juveniles, school costs and school equipment etc). However, it would be quite complicated to get reliable data for such specific baskets and it could be assumed[59] that such data are not regularly updated. Therefore, we recommend relying on general data which are published and reliable, unless more specific data with the same quality exist.

[58] http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tec00120&plugin=1 (last accessed 25 March 2015).

[59] As it was not our task to examine the available data sets, we restricted our work to those elements which were really necessary to better understand and evaluate the export options.

The following table contains figures taken from Eurostat to demonstrate the functioning of these data. In the following paragraphs we will give some examples and explanations to better understand how these figures could be used.

Country	Factor	Country	Factor	Country	Factor
EU-28	100.00	**ES**	93.50	**NL**	111.10
BE	110.80	**FR**	109.80	**AT**	107.20
BG	49.00	**HR**	67.50	**PL**	55.80
CZ	68.70	**IT**	103.20	**PT**	81.30
DK	139.40	**CY**	91.40	**RO**	54.00
DE	102.30	**LV**	71.20	**SI**	83.10
EE	78.10	**LT**	63.50	**SK**	69.40
IE	120.00	**LU**	121.40	**FI**	123.10
EL	89.20	**HU**	59.70	**SE**	131.60
ES	93.50	**MT**	82.50	**UK**	114.60

These figures have to be understood in such a way that they always refer to the average of the EU-28 (therefore, the factor for this average is 100.00). Thus, to adjust an amount from one Member State to the level of another Member State the factors for both countries are relevant. If we assume that e.g. Denmark has a family benefit of €100[60] and the child resides in Bulgaria, then the calculation would be: €100 : 139.40 x 49.00 = €35.15. This has as a consequence that the same amount of family benefits of different Member States in the end differs if the children reside in the same Member State. So, if also the Czech Republic has a family benefit of €100 and the child resides in Bulgaria, this would lead to: €100 : 68.70 x 49.00 = €71.32. This is also logical as the difference in living costs between Denmark and Bulgaria is higher than the one between the Czech Republic and Bulgaria. The €100 family benefit in the Czech Republic has a much higher value of purchasing power in that country than in Denmark. Therefore, also when exported for a child in Bulgaria it must have a higher value than the benefit of Denmark.

Of course this calculation method also works in the opposite sense. If we assume that Bulgaria has family benefits of €20 and the child resides in Denmark this would lead to: €20 : 49.00 x 139.40 = €56.90 and if the child resides in the Czech Republic: €20 : 49.00 x 68.70 = €28.00. This adjustment would not only oblige Member States with comparatively low costs of living (e.g. those with an index below 100.00, thus below the average) to adjust their benefits by raising the national amounts, but in principle all Member States with the exception of the only one Member State with the highest index (DK); also the second one (SE) would have to raise its family benefit of an assumed €100 for a child resident in Denmark in the following way: €100 : 131.60 x 139.40 = €105.90.

An important final issue to mention: these adjustments do not really reflect on the level of family benefits under the legislation of the child's Member State of residence. Depending on the social policy decisions of this Member State they could be higher or lower than the adjusted benefits of the exporting Member State. Thus, also an option which includes adjustments could, on the one side, safeguard much higher amounts

[60] We have deliberately not taken the actual figures of family benefits of the Member States chosen, but only fictitious amounts to better demonstrate the effects of adjustment. The reader can easily adapt these calculations to real live figures.

than the local level and could, on the other side, be supplemented also by the obligation to grant differential supplements.

5.1.3 Would adjustment be possible from an administrative and technical point of view?

Of course, such an adjustment cannot react to all developments of living costs in the Member States concerned. Some clear rules within which periodicity such adjustments have to be revised are necessary. It would be strongly recommended, if such an option is chosen, to refer to already existing, well-known and without any doubt usable tables. The ones for the application of the EU Staff Regulations (which contain rules for adjustment of wages and also some social benefits for EU civil servants residing outside Belgium and Luxemburg – see also Annex 2 – Elements for analysing the legal possibilities to adjust the amount of family benefits to the living costs) could e.g. be a good starting point,[61] as these are also published in the OJ, as there is always a clear indication for which period they have to be used etc.

5.2 How to treat persons in a contributory scheme or in an employment-related scheme who are not in such a situation in the relevant Member State

Another important question is how the Member State of residence has to provide benefits when no gainful activity is exercised there. No problems should exist in relation to residence-based benefits which are granted on a lump sum base to all residents. But, how is the situation in relation to other types of benefits which are more or less employment-related?

5.2.1 Benefits which are contribution-based but open entitlement to all residents

These benefits should also create no problems. If such benefits are financed from contributions e.g. from the employer, but any resident (including families without any gainful activities) is entitled to benefits (as e.g. in AT) already under national law entitlements are given. Thus, the Member State of residence will grant entitlement also if the only gainfully active parent works in another Member State.

5.2.2 Benefits which are provided only for insured persons

5.2.2.1 General remarks

More problematic are benefits which are contribution-related or employment-related and for which entitlement is granted only to those persons who are insured or in the relevant employment. Does Regulation (EC) No 883/2004 open entitlement to such benefits if a gainful activity is only exercised in another Member State?

If the Regulation provides for competence of the Member State of residence, the existing rulings of the CJEU seem to speak in favour of this solution. From the

[61] Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (OJ 45, 14.6.1962, p. 1385, as amended); the last publication can be found for the period beginning with 1.7.2014 in OJ C 444, 12.12.2014, p. 10 . For more details see Annex 2. Something which would have to be further analysed is e.g. the question whether or not the special indexes for special cities which are provided under the Staff Regulations (Bonn, Karlsruhe, Munich, Varese and Cultham) should be maintained for family benefits also under Regulation (EC) No 883/2004.

Bergström judgment[62] it could be deduced that the ban on discrimination and, of course, also the assimilation of facts under Article 5 of the Regulation obliges the Member State of residence to take into account also employment (and the income received from such employment) in another Member State as such employment in the child's Member State of residence.[63] As the situation of the whole family always has to be treated as if it were in the Member State of residence of the child,[64] it should also not matter that the person exercising such an employment is subject to the legislation of another Member State. Nevertheless, it has to be assumed that this is not always applied in a consistent way in all Member States. To avoid problems it could be interesting to exclude benefits which are employment-related like child-raising benefits from the general coordination and provide for the competence of only the Member State which is competent for the person taking care of the child (see 4.1.4).

Finally, it has to be mentioned that also if there is a condition of a special duration of periods of insurance to be entitled to a benefit, the Regulation could help, as the aggregation principle is applicable to family benefits (Article 6 of the Regulation).

5.2.2.2 Results from the mapping exercise

Also the replies from **FreSsco national experts** show that benefits with an income replacement function are not always coordinated in a way as it might be necessary from e.g. the *Bergström* ruling.

For instance, in **Austria** entitlement to the income replacement scheme requires (among others) that the person concerned has been employed for a minimum period of six months before childbirth. Section 24(2) of the Child Care Cash Benefit Code (*Kinderbetreuungsgeldgesetz*) clarifies that 'employment' means "employment that is subject to Austrian social security insurance". Thus, a person who resides in Austria but is working in another Member State and is therefore subject to the social security scheme of that Member State, is not entitled to income replacing cash childcare benefits in Austria, although Austria is competent to grant family benefits e.g. because the other parent works there. Austria would not take the income replacement scheme as the basis for the calculation of the differential amount, but exclusively the lump sum scheme (of the cash childcare benefits).[65] Similarly in **Belgium**, in order to qualify under the 'professional' scheme, work has to be carried out in Belgium.

Reportedly in **Sweden** the parental benefit was the only family benefit with an income replacement function. The Social Insurance Agency no longer considers it a family benefit (but a maternity benefit) and therefore it is not included when calculating the differential amount for family benefits.

In many Member States family benefits do not have an income replacement function. For those who have such function it could be assumed that they are sometimes coordinated under the maternity/paternity chapter of Regulation (EC) No 883/2004. An example could be the maternity benefit in **the Czech Republic**, or the maternity, paternity and parental benefits in **Slovenia**. **Bulgaria** stressed that family allowances differ from benefits under the Social Security Code and do not depend on personal

[62] Judgment in *Bergström* EU:C:2011:278.
[63] For family benefits there is no specific rule concerning the calculation of benefits which would allow a deviation from these principles as can be found e.g. in Article 21 of the Regulation for sickness or maternity benefits, which allows to take into account only income received in the relevant Member State and, thus, excludes the obligation to grant benefits with an income replacement function in cases in which no such income was received in that State.
[64] To be deduced from the judgment in *Dodl and Oberhollenzer* EU:C:2005:364.
[65] Almost all Austrian family benefits are based on residence and not on employment. That applies especially to family allowance (*Familienbeihilfe*) as well as to cash childcare benefits (*Kinderbetreuungsgeld*). As regards the latter, however, the Austrian Child Care Cash Benefit Code (*Kinderbetreuungsgeldgesetz*) provides for two different schemes: a lump sum scheme and an income replacement scheme. Therefore, at least for the income replacement scheme employment is of relevance.

contributions. Also in **Luxembourg** family benefits are only residence-based (and, therefore, no problems in that respect were reported).

6 Which options could be envisaged concerning the export of family benefits?

Before starting the analysis of the different concrete options dealing with the export of family benefits we have to make some general remarks:

For all options we have used **one standard example** to safeguard a better comparison of the effects of the different options. This standard example will be supplemented, if needed, by other examples to better demonstrate all different aspects of the option.

Standard example:

We assume the following situation:

Member State A: amount of family benefits: €100; in case of adjustments due to different costs of living in Member State B: €80

Member State B: amount of family benefits: €50; in case of adjustment due to different costs of living in Member State A: €63 (exactly €62.5, which has been rounded up for easier reading)

This standard example is used in two different scenarios:

Scenario 1: cases where work is exercised only in Member State A while the residence of the family is in Member State B

Scenario 2: cases where work is exercised only in Member State B while the residence of the family is in Member State A

The numerical results of the different options, when applied to this standard example, have been made visible in graphs which form **Annex 1** of this report.

The options will be examined by ways of an **impact assessment**, which was made by using the following parameters.[66]

The different aspects analysed for each of these options were the following:

- **Clarification**: Here we looked into the question whether the option is clear, easy to understand and transparent. From our point of view, the most important question with regard to clarification is whether persons concerned know in advance and without problems what their rights (and obligations) are. Naturally the option should be clear for institutions as well. However, as institutions would be involved in any case, also in complex legal situations, this does not have that great a weight.
- **Simplification**: For this second aspect, we examined whether the solution is simple or complex. It was sometimes difficult to distinguish between this aspect and the first one, but also between this one and the administrative burden. Therefore, these three aspects have to be seen as related to each other. It also has to be mentioned that any new way of coordination – as

[66] We want to refer also to Y. Jorens, B. Spiegel, J.-C. Fillon & G. Strban, trESS Analytic Study 2012, 'Legal impact assessment for the revision of Regulation 883/2004 with regard to the coordination of long-term care benefits', which contains the same criteria for the impact assessment. We have, therefore, included the same description for the criteria into this report whenever possible and added a new one concerning the impact on migration.

simple as it might seem if used for the first time – would also cause problems during a period of transition from the existing coordination towards the new coordination. We have, however, no longer mentioned this in our analysis of the different options. So even if the transition might be complex, non-transparent and arduous for the institutions we have not changed our evaluation if the option itself – looked at in an abstract way – has to be regarded as positive compared to the status quo.

- **Protection of rights**: A very important issue is whether the rights of the person concerned are well protected. This means we had to check if really all benefits which can be claimed can be granted, or if the family loses entitlements. In addition, the question how easily and how quickly the persons can get the benefits which are necessary to cover the costs related to having a family also plays a role. This evaluation was not clear in cases where political decisions need to be taken. Therefore, we abstained from evaluating, e.g. in case of adjustments, if this is better or worse concerning the protection of rights. Of course in case of downwards adjustments a person might lose benefits which he or she is entitled to today. The political question which we did not answer under this point is whether it is necessary to always maintain the status quo (only higher benefits can be considered a plus with regard to protection of rights) or if also a solution is good with regard to the protection of rights if less benefits are awarded which, however, better meet the social policy decisions of the Member State granting the benefit.

  An issue which could also be discussed when talking about protection of rights is what the impact could be on the national system of a Member State as a whole (also in situations without cross-border elements). It could be argued that if a group of Member States has to grant, under one of our options, more or higher family benefits than under the status quo this could lead to the decision of the national legislature to reduce all family benefits to achieve the same result with regard to the costs of the system as before. If this were true, on the other hand, the group of Member States which have to grant in less cases or lower benefits could spend the money saved on increasing all family benefits und thus all persons receiving family benefits from these Member States could profit. As we have estimated that no option would result in such a significant impact on the budget of the national family benefits financing mechanisms, we will not mention this aspect in the context of the different options. Still, this could be an element which should not be forgotten when the political decision is taken.

- **Administrative burden and implementation arrangements**: Here we deal with the institutions. Is it easy to administer the option without large additional processes or do we have to set up new processes? Does it need additional flows of information and does information have to be exchanged regularly? Will institutions have to set up new implementing arrangements to put the coordination into practice? The mere fact that e.g. under EESSI new SEDs or flows will become necessary does in itself not mean that an option adds to the administrative burden, because this will be a standard situation in the future if we change the existing ways of coordination.

- **No risk of fraud or abuse**: It also has to be examined if the option favours situations where the persons concerned could easily influence and manipulate their situation in such a way that they receive more benefits than they would otherwise be entitled to. We will also examine if the necessary checks are easy or not.

- **Potential financial implications:** This point as well is not easy to answer and evaluate. First, it was not the task of this report to go into data and analyse what exactly the additional amounts would be which Member States would have to pay or what the amounts would be which Member States would save under the various options compared to the status quo. Therefore, we will only outline whether groups of Member States would have to pay more or less from a general point of view. But, this does in itself not give a clue for the evaluation of the different options. Is a solution which is more costly (for some Member States) better or worse than the status quo? Taking this question into account, we have decided to extend the examination of the financial impact also to the question whether an option leads to a fairer distribution of costs compared to the status quo.

  However, also the burden-sharing between the Member States involved is an issue which is very difficult to evaluate. The 'fair burden-sharing' between Member States largely depends on the system the Member States apply. As the political concerns of some Member States that they have to pay too high amounts of family benefits for children residing outside their countries were the main reason for the whole exercise, a shifting of burdens seems to be a solution for that problem. Therefore, it will remain a political decision which transfer of burdens makes the system more balanced and from a political point of view more acceptable for the large majority of the Member States. We will present the pros and cons for the different groups of Member States concerned, but abstain from giving recommendations, as this will be something for which a political decision is necessary.

The results of our examination of the various aspects of the impact assessment have to be seen as the comparison with the status quo (therefore, the status quo, which remains an option, is neutral in that respect):

(+) means better than the status quo;

(-) means worse than the status quo;

(≈) means (nearly) the same as the status quo;

(?) means the decision has to be taken by the policy-makers.

6.1 Option 1 – Status quo

6.1.1 Legal background and general remarks about Regulation (EC) No 883/2004

To better understand any new option it is always necessary, first, to recall the existing rules applicable to family benefits. With regard to the existing coordination rules for family benefits we want to refer to 3 above. In this context we only want to recall some elements which are necessary for our evaluation of this option.

6.1.2 Rules in the event of no overlap of entitlements

The specific rules for family benefits do not change the general rules to determine the applicable legislation. This is still to be decided in accordance with Title II of Regulation (EC) No 883/2004, which means that the Member State of employment or any other competent State according to Title II (the only exception are pensioners, as for these it might be another Member State than the one competent under Title II, if this other Member State grants a pension) should pay family benefits, which is also

the case in situations where the family members of eligible persons reside in another country (see Title II and Article 67). In the following examples we will focus on active persons, their partners and their children and not deal with the specific situation of pensioners, as in practice they are not so significant.

Family benefits are intended to meet family expenses. In this respect the sole situation of the employed person is not the only relevant one (which is the case mostly with e.g. unemployment benefits). The situation of the family, especially of dependent children, is also relevant (see also 4.3 above). Despite the latter fact, the Member State of employment or any other Member State competent according to Title II is responsible to pay the family benefits at its rate even when the children are residing in another Member State (in case of overlap of benefits, see below). This means that the situation of the family of migrant workers (or other eligible persons) could be more advantageous compared to other families in the children's State of residence. If we consider that the aim of the Regulation is first and foremost to guarantee the equal treatment of migrant and domestic workers working in one country, and not so much to achieve the material equality of families, the provisions are rational. A strong argument to defend the status quo, especially in cases where the competent Member State is the State of employment, is that the person has also paid taxes and contributions there. Of course, paying e.g. tax is not such a strong argument if we think about situations in which tax has to be paid in a Member State other than the one which is competent under Title II of the Regulation.[67] Or would this mean that the Member State collecting the taxes and not the one competent under Title II has to grant tax-financed benefits? This would be a totally new way of coordination which should be carefully examined.

6.1.3 Rules in the event of overlap

As family benefits are granted mainly on behalf of dependent children, there are a great deal of cases in which family benefits overlap, for example as often both parents are eligible for benefits for the same child, but also the child itself could open entitlement to benefits in its Member State of residence. Article 68 of Regulation (EC) No 883/2004 tries to solve these questions.

The priority rules applicable depend on whether benefits are paid on a different basis – employment or residence – or on the same basis (see also 3.1.2 above; concerning possible problems of interpretation of that principle see also 4.1.4.3 above). In the first case Article 68(1)(a) of the Regulation is the applicable rule; in the latter case Article 68(1)(b). In both cases also Article 68(2) is relevant, as the Member State which does not have primary competence according to Article 68(1) may have to pay a differential supplement.

Standard example:

Scenario 1: Member State A (primary competence) grants €100, Member State B (secondary competence) does not grant a differential supplement

Scenario 2: Member State B (primary competence) grants €50, Member State A (secondary competence) grants as a differential supplement €50

[67] See for such cases B. Spiegel, K. Daxkobler, G. Strban & A.P. van der Mei, 'Analytical report 2014: The relationship between social security coordination and taxation law', FreSsco, European Commission, January 2015.

Additional example to highlight the effects of the status quo:

The family (mother, father, child) resides in Member State A, the father works in Member State A, the mother works as a frontier worker in Member State B; the amount of family benefits for a child is €120 in Member State A and €200 in Member State B.

Member State A (primary competence) has to grant €120; Member State B (secondary competence) grants a differential supplement of €80.

6.1.4 Advantages and constraints of the status quo

For legal, administrative and political problems related to today's Regulation (EC) No 883/2004 with regard to export of family benefits and more general problems of coordination of family benefits see chapter 3 above.

Below, the pros and cons of the current system of coordination of family benefits are shortly presented. Reference is also made to chapters 3 and 4. In this chapter we will not give +/-/≈/? marks, as the status quo is the situation against which the other solutions are evaluated, and it is hard and subjective to construct any ideal solution against which the status quo could itself be evaluated.

- **Clarification**: The current Regulation is more or less clear for the migrant workers. They usually get the family benefits in their Member State of employment at the rate of that State, despite their family residing in another Member State (this is a clear case when the other parent is non-active; less clear when both parents work, are posted etc – e.g. in cases where the priority of the States should be determined). The current option poses problems, but some of them are more general in nature. They arise more from the diverging nature of potential family benefits (what benefits exactly are family benefits that should be exported according to Articles 67 to 68) and from the question whether or not the benefits should be divided into baskets, for example to decide whether there is overlap to calculate the differential supplement– see also 4.1 above. Therefore, taking all these elements together, it could be said that today's coordination is not as clear as it could be.
- **Simplification**: If there is overlap of benefits, the current Regulation is not very simple. See also chapter 3 for existing problems and chapter 4 on our proposals for horizontal solutions.
- **Protection of rights**: Currently the Regulation is built around the migrant worker/ person, not around the children. This is logical, as the background of the Regulation is the necessity and aim to protect migrant workers (see also 3.1.1 above under which TFEU Articles the Regulation is adopted). In principle the Regulation aims to guarantee that the migrant worker (as, still, often the State of employment is competent) is treated the same way as all other workers in that country – he or she receives the same benefits also for his or her children, despite the economic situation in the Member State where they reside. There is also an economic logic behind it, as the worker usually pays taxes and contributions in the State of employment. The question whether the current Regulation sufficiently protects the rights of children is not easy to answer. It depends among other things on whether the children are living in a country with higher living costs or not; whether they have the rights to some residence-based family benefits in the country of residence; and how family benefits in kind are treated in the Member States concerned. A negative aspect for children in the current system is that it may take quite a long time before the institutions involved may take the necessary decisions and they receive the

full amount of benefits, especially in cases where the priority rules are not easy to decide.

In chapter 3.4 the question was analysed whether the current system is unfair to children, in the context that children whose parents are migrant workers may, in the context of unlimited export, get higher benefits than other children in the Member State where they reside. This could be a question of reverse discrimination of the children. At the same time, the discrimination could be justified with objective reasons (no comparable situations etc).

Another point where we have doubts if today's coordination sufficiently protects the rights of the persons concerned are child-raising benefits for employed persons (e.g. also with an income replacement function). This is an issue we have already dealt with under chapter 4.1.4.

- **Administrative burden and implementation arrangements**: As analysed in chapters 3.1 and 3.3, the current system entails administrative difficulties. At the same time, the system has been in operation for years and the routines are usually in place in the Member States. The difficulties in implementation do not lie in the fact that the benefits are not adjusted to the living standard of other Member States. They are caused by the existing general rules of the Regulation (e.g. Articles 10 and 68) and the interpretation given to them by the CJEU – which benefits should be considered as family benefits, how to calculate the differential supplement etc. See also chapter 4 for horizontal solutions.
- **No risk of fraud and abuse**: Every regulation runs the risk of being outsmarted. In the context of export of benefits it could happen in relation to children's eligibility to benefits, as the competent State cannot always easily and quickly verify the eligibility of children in another country. When the benefits are high in the children's country of residence, the family may first try to quickly get the benefits there, by denying the working activity of one parent in another Member State. In contrary cases it might be desirable to 'create' a gainful activity (e.g. a 'mini-job' or an activity which exists only on paper) in a Member State with high family benefits to receive these benefits for children living in another Member State (with not so high amounts of benefits). Also the concrete residence of children could be an issue when attempts are made to manipulate the entitlement to higher benefits. Therefore, it could be said that today's coordination is not very fraud-proof.
- **Potential financial implications**: Today's financial implications should be known to Member States. Is today's system fair with regard to the sharing of the burden between Member States? This is the main political question to be answered. It could be said that only if the Member State receiving contributions (and taxes) grants its full range of benefits this solution is fair. Others argue that when paying benefits which have the clear aim of covering additional costs of children and these costs differ between Member States, only e.g. an adjustment of amounts can lead to fair results. Therefore, we abstain from answering the question whether today's coordination of family benefits is fair.

6.2 Option 2 – Adjustment of the amount of family benefits to the living standards in the Member State of residence of the child(ren)

A general description of all sub-options summarised in this Option 2: Option 2 consists in maintaining the current principles, i.e. the so-called 'status quo' described in chapter 6.1, but adding a new rule affecting the calculation of the amount of the

family benefits. This new rule would consist of the adjustment of the amount of the family benefit granted by each Member State to the living standards in the Member State where the child or children reside.[68] The adjustment procedures and its logic were described above in chapter 5.1.

It should be outlined that this adjustment would be linked to the different economic situation (cost of living) in the Member State involved and would not be affected by the level of protection in the said Member State, i.e. the amount of the family benefits. The living standard is expected to go hand in hand with the level of social protection, but this is not necessarily always the case.

The **top-up obligation** (differential supplement) envisaged in Article 68(2) of Regulation (EC) No 883/2004 would still exist under this option. The difference would be that the Member State of residence of the children (if it is the Member State with secondary competence) may have to pay a differential supplement if the amount of the family benefit in said Member State exceeds the **adjusted family benefit** paid by the Member State that is primarily competent. That supplement would logically be limited to the sum exceeded. Taking into account the different levels of family benefits it could be assumed that such a top-up obligation would not occur very often.

As in the 'status quo', the Member State of employment would still be the one with primary competence.[69] Being the Member State of employment, i.e. the State receiving the contributions and the majority of the taxes paid by the migrant workers, it could be said that a certain economic logic is maintained. The adjustment procedure, however, may disrupt this logic as the analysis of the burden-sharing will show.

Once dealing with the idea of adjusting the amount of the family benefits to the living standards of the children's Member State of residence, several possibilities arise and will therefore be analysed. The first possibility would be the **upwards and downwards adjustment** (**Sub-option 2a**). Simply put, under this sub-option, if the children reside in a less expensive Member State, the benefit would be adjusted downwards, while if they reside in a more expensive Member State, the benefit would be adjusted upwards. Logically the Member State having to pay such adjusted benefits may not have a problem paying a smaller benefit, but may oppose the idea of paying a higher benefit than the one received by the children residing in its territory.

The second **Sub-option 2b**, a possible solution to this latter situation, would be the **reimbursement of the upwards adjustment by the children's Member State of residence** (this sub-option was not included in our mandate but added by us to show also some alternatives). Under this sub-option the family benefits would be adjusted upwards and downwards as described in the previous paragraph. However, the competent Member State of employment (outside the Member State of residence of the children) would be reimbursed by the children's Member State of residence, which would cover the difference between the original benefit and the one that was adjusted (upwards). The problem could be that said reimbursement may be linked to a benefit that is not envisaged by the social security legislation of the Member State where the children reside. Said Member State may again oppose the idea of paying part of a benefit that is not covered by its social security system.

[68] Hereinafter the chapter will refer to children in general, although the same would apply if there was a single child.

[69] Regarding the determination of the legislation applicable to the entitlement of family benefits, the general rules established in Title II of Regulation (EC) No 883/2004 would be applicable. Regarding active persons, *lex loci laboris* is the competence rule except e.g. in the case of posted workers (among others). In Title III, Chapter 8 there are no specific conflict rules; there are only priority rules in the event of overlapping. In Option 2 the status quo is kept unchanged.

Finally, the third sub-option would be **adjusting only downwards** (**Sub-option 2c**). Under this sub-option, if the children reside in a comparatively less expensive Member State, the benefit paid by another Member State would be adjusted downwards, but if they reside in a more expensive Member State, they would receive the same family benefits as those residing in the Member State which has to grant these benefits.

Finally, an issue which will be very important for any new option is whether the **legal base of the TFEU** will allow this solution (**legal compatibility**) or whether it is endangered if it is contrary to one of the principles enshrined in the TFEU. Analysing this question for the adjustment of benefits would merit a study on its own and was also not covered by the mandate of our report. Nevertheless, we have made some preliminary remarks also on that aspect in Annex 2 – Elements for analysing the legal possibilities to adjust the amount of family benefits to the living costs of this report.

Something has to be recalled in this context: we think that any rule on adjustments cannot be applied also to benefits with an income replacement function. Therefore, all three sub-options would necessitate special rules (specific coordination – see 4.1.4 above – or at least exemption from the adjustment) for this category of benefits and, thus, should apply only to **traditional family benefits like family allowances**. When the adjustment mechanism is also applied to family benefits with an income replacement function (when the benefit is e.g. calculated as a specific percentage of previous earnings) we tend to give a (-) to all three sub-options with regard to "protection of rights", as rights acquired due to a gainful activity would be endangered. This would without any doubt also be contrary to the fundamental principles of the TFEU.

6.2.1 Sub-option 2a – adjustment of the amount (no limits)

A short description of this sub-option: This option would consist in maintaining the current rules of Regulation (EC) No 883/2004, but **adjusting upwards and downwards** the amount of the family benefit granted by any Member State for children residing in another Member State to the living standards in that Member State of residence of the children.

To put it simply, under this option, if the children reside in a comparatively less expensive Member State, the benefit would be adjusted downwards, while if they reside in a more expensive Member State, the benefit would be adjusted upwards.

Standard example:

Scenario 1: Member State A (primary competence) grants €80: Member State B (secondary competence) does not grant any differential supplement

Scenario 2: Member State B (primary competence) grants €63: Member State A (secondary competence) grants a differential supplement of €37

The upwards adjustment could have no effect for the children concerned in practice if the benefit has to be topped up by a differential supplement of the Member State of residence of the children and if said supplement exceeded the amount of the adjustment already under the status quo. In such a case this option would result in a mere modification of the sharing of the burden between Member States in favour of the Member State of residence.

However, if the children's Member State of residence did not top up the benefit, the upwards adjustment would always result in an effective increment of the amount received by children residing in a Member State with a higher factor of adjustment.

Additional examples to highlight the effects of this option:

Example 1

The father works in Member State C, the mother and 2 children reside in Member State D, and the mother does not work. The amount of a certain family benefit for 2 children is €200 in Member State C. There is no top-up (as the benefit in Member State D would amount to only €180). The factor of adjustment is 100 in Member State C to 120 in Member State D.

Member State C (primary competence) grants €240: Member State D (secondary competence) does not grant any differential supplement.

[Status quo: Member State C (primary competence) grants €200: Member State D (secondary competence) does not grant any differential supplement.]

Example 2

However, any adjustment of course also works in case of employment in two different Member States of the parents.

The father works in Member State C, the mother and 2 children reside in Member State D, and the mother works there. The amount of a certain family benefit for 2 children is €200 in Member State C. The amount of the family benefits in Member State D is €180). The factor of adjustment is 100 in Member State C to 120 in Member State D.

Member State D (primary competence) grants €180: Member State C (secondary competence) grants a differential supplement of €60 (the adjusted family benefits amount to €240).

[Status quo: Member State D (primary competence) grants €180: Member State C (secondary competence) grants a differential supplement of €20.]

Evaluation of the option

(-) Clarification

This option is less clear or easy to understand than the status quo as far as it does not simplify the current procedures and involves an additional adjustment procedure. Thus, it requires an additional factor of adjustment that is not self-explanatory and therefore requires additional clarification. Furthermore, migrant workers would be less aware of their rights, as the amount of the family benefit received would suffer variations depending on various factors, such as macro-economic criteria or the country of residence of the children and it would be different from the one received by the sedentary workers around him or her.

(-) Simplification

This option is more complex to apply as far as it imposes additional obligations for migrant workers, such as the obligation to state and eventually prove the Member State of residence of the children. Possible changes in the Member State of residence of the children would result in additional administrative obligations for the migrant worker and in changes in the amount of the benefit granted by one and the same Member State.

(?) Protection of rights

The evaluation of how the protection of rights varies under this option is not easy and depends on the point of view envisaged. First of all the 'value' of this option largely depends on political points of view. If it is decided that an unrestricted export cannot be justified (and is not necessary from a legal point of view) than this option is best adapted to protect the rights, as children always receive the benefit which corresponds to their economic circumstances. If the decision is taken that the national amount of the competent Member State is a right which has been acquired by the migrant worker, then this option cannot protect these rights.

The **beneficiaries** whose children are residing in a Member State with a **higher factor of adjustment** would see how their rights are better protected as they may receive a higher benefit to cover their family expenses. On the other hand, the beneficiaries whose children are residing in a Member State with a **lower factor of adjustment** would see how the amount of their benefits is reduced. The processing times between the claim being filed and the benefit being received could be increased due to the verification of the residence, which might be more important, as it is decisive for the amount to be paid, in which Member State the children reside (which is not that important under the status quo from the point of view of the Member State of primary competence, as always the same amount is at stake, irrespective of whether the children reside e.g. in this or in any other Member State – of course, only if the first Member State stays the one with primary competence also after any transfer of residence of the children).

From the perspective of the States, the **Member State with primary competence** could have the perception that they are protecting the rights of their beneficiaries as a whole in a more balanced way, as each of them would receive an amount that covers a similar percentage of the related costs. A problem could arise, however, when States receive active migrants from Member States with a higher factor of adjustment, as they would have to allocate a higher share of their social budget to cover the benefits of children residing abroad, which could result in a diminished overall protection. Nevertheless, it is true that this is not expected to be a very common situation.

From the point of view of the **Member State of residence** of the children, the perception would vary depending on whether it is a State with a high or a low factor of adjustment. In the first case, children would receive higher benefits from the Member State with primary competence, so they would be better protected. In the second case, children would receive lower benefits from the Member State with primary competence, they will be less protected and the State of residence may have to allocate additional funds to protect these children, for example topping up the benefits with a differential supplement to guarantee the level of protection which this Member State wants to grant to all children residing on its territory.

Therefore, it is difficult to determine whether this option provides a better or worse protection of the rights of beneficiaries as a whole. It is for the policy-maker to determine this in the light of the level of protection which each of the groups mentioned currently has.

(-) Administrative burden and implementation arrangements

This option would result in a certain increase of the administrative burden. It is true that the implementation of the option would require some preliminary work, especially to establish the factors of adjustment, determining how the residence of the children needs to be proven and to include the additional adjustments in the national procedures, taking into account there will be 32 adjustment indexes. The running cases would also need further administrative processes as e.g. the updating of the

adjustment factors has to be made on a regular basis (even if national amounts do not change).

As to the prevention of fraud, linked with the determination of the children's Member State of residence, a certain increment of the administrative burden may also be supposed, but, this is expected to be minor.

(≈) No risk of fraud or abuse

Under this option, families could be tempted to declare that their children live in a Member State with a higher factor of adjustment (or even in the Member State with primary competence), as far as the amount of the benefits would depend on the children's place of residence. For the Member State with primary competence, the children's place of residence is usually more difficult to determine than e.g. the place of work, as has been stated above (see 4.4), so the risk of abuse could increase. Nevertheless, a change of residence from a Member State with low factors of adjustment to States with high factors may not be very usual in practice; changes in a child's residence without any previous link to that Member State are not easy to explain and, therefore, administrations should have some remedies to prove the contrary (e.g. if a family resides in **PL** and the father works in **DE**, it would not be very plausible if the children claim that they have moved to **DK**). However, it could encourage looking for constructions under which the child would be deemed residing in the Member State with primary competence and thus entitled to the full amount of the family benefit. Under today's coordination this is not an issue as the amount is always the same, irrespective of whether the children reside in the Member State with primary competence or anywhere else.

On the other hand, this option does not prevent or diminish the current risk of abuse, as it does not provide any additional instruments preventing the fraudulent overlapping accumulation of benefits.

(?) potential financial implications

This option shifts the burden from the Member States with a higher factor of adjustment, i.e. those where income and costs are higher, to Member States with lower factors of adjustment. This is made worse due to the effect of the differential supplement.

If the Member State of residence (in case it is the Member State with secondary competence) has a lower factor of adjustment, the benefit paid by the Member State of primary competence would be adjusted downwards. Consequently, the top-up obligation for the Member State of residence could emerge, if its benefits are higher than the downwards adjusted benefits from the Member State with primary competence (which is not very likely to occur). On the other hand, if the Member State of residence has a higher factor of adjustment, probably a less common situation, the benefit paid by the Member State with primary competence would be adjusted upwards. Thus, if the Member State of residence tops up the benefit, the amount of the supplement would be reduced in a proportional way.

Taking into account that migration usually heads from Member States with lower living standards to those with higher standards, this option would probably shift the burden from the latter to the former. This could result in a certain disruption of the economic logic that assigns the obligation to pay the family benefits to the Member State receiving the contributions and taxes.

In sum, it is difficult to determine whether this modification of the burden-sharing is fairer or not and what the exact financial impact for every Member State would be. This should thus be decided by the policy-makers in the light of a broader analysis of the economic relationships between Member States.

6.2.2 Sub-option 2b – adjustment of the amount (no limits) and reimbursement

A short description of this sub-option: This option would consist in maintaining the current rules of Regulation (EC) No 883/2004 and adjusting upwards and downwards the amount of the family benefit granted by any other Member State to the living standards in the Member State of residence of the children, as in Sub-option 2a. Additionally, under this option the Member State of residence would **reimburse the upwards adjustment** to the other Member State(s), which might be (a) Member State(s) with primary or secondary competence.

In plain words, under this option, if the children reside in a less expensive Member State, the benefit would be adjusted downwards. If the children reside in a more expensive Member State, the benefit would be adjusted upwards. The difference between the national amount of the family benefit and the adjusted amount will be paid by the other Member State, but will be reimbursed to this State by the Member State of residence of the children.

Standard example:

Scenario 1: Member State A (primary competence) grants €80: Member State B (secondary competence) does not grant any differential supplement

Scenario 2: Member State B (primary competence) grants €63; Member State A (secondary competence) grants a differential supplement of €37 and reimburses €13 to Member State B

The reimbursement of the adjustment could seem to have a certain parallelism with the payment of a differential supplement (top-up) by the Member State of residence of the children (if it is the one with secondary competence – envisaged in Article 68(2) of the Regulation) although they work differently. The adjustment and reimbursement results from the existence of a different economic situation (cost of living) in each Member State. The differential supplement, in turn, derives from a difference in the level of protection in each Member State, i.e. the Member State of residence of the children may have to top up the family benefit if the amount of the family benefit in said Member State is higher than the amount of the benefit in any Member State with primary competence, irrespective of the cost of living in each Member State.

Additional example to highlight the effects of this option:

Example 1

The father works in Member State C, the mother and 2 children reside in Member State D, and the mother does not work. The amount of a certain family benefit for 2 children is €200 in Member State C. There is no top-up (as the benefit in Member State D would amount only to €180). The factor of adjustment is 100 in Member State C to 120 in Member State D.

Member State C (primary competence) grants €240: Member State D (secondary competence) does not grant any differential supplement but reimburses €40 to Member State C.

[Status quo: Member State C (primary competence) grants €200: Member State D (secondary competence) does not grant any differential supplement.]

Example 2

The father works in Member State C, the mother and 2 children reside in Member State D, and the mother works there. The amount of a certain family benefit for 2 children is €200 in Member State C. The amount of the family benefits in Member State D is €180). The factor of adjustment is 100 in Member State C to 120 in Member State D.

Member State D (primary competence) grants €180: Member State C (secondary competence) grants a differential supplement of €60 (adjusted amount of the benefit: €240); Member State D reimburses €40 to Member State C.

Status quo: Member State D (primary competence) grants €180: Member State C (secondary competence) grants a differential supplement of €20.

Evaluation of the option

(-) Clarification

As with Sub-option 2a, and for the same reasons, this option is less clear or easy to understand than the status quo as far as it does not simplify the current procedures and involves an additional adjustment procedure.

(-) Simplification

As with Sub-option 2a, and for the same reasons, this option is more complex to apply. As for the reimbursement, it does not affect the beneficiaries, but only the institutions of the Member States involved.

(?) Protection of rights

As with Sub-option 2a, the evaluation of how the protection of rights varies under this option is not simple and depends on the point of view envisaged. For the **beneficiaries**, the situation is identical to the one described under Sub-option 2a. Those with children residing in a Member State with a higher factor of adjustment could see their benefit increased, while those with children residing in a Member State with a lower factor of adjustment could see their benefit reduced.

So again it is difficult to determine whether this option offers a better or worse protection of the rights of beneficiaries as a whole. This is for the policy-makers to determine in the light of the level of protection which each of the groups mentioned currently has.

(-) Administrative burden and implementation arrangements

This option would result in a significant increment of the administrative burden, as far as it involves reimbursement of the upwards adjustment of the family benefits and adjustments. As reimbursement of healthcare costs has shown, said procedures require a significant exchange of information, involve constant delays,[70] and result in an additional administrative burden. It is true that the existing reimbursement procedures for healthcare benefits in kind could be applied, but that may not be the case depending on the internal organisation of the national administrations. Of course, also for family benefits reimbursement is not totally new (cf Article 58 of Regulation (EC) No 987/2009), but, the existing reimbursement provision concerns only few cases, while this reimbursement would cover much more cases. Consequently, this option is even more complex than Sub-option 2a from an administrative point of view.

[70] See e.g. Decision S9 of 20 June 2013 concerning refund procedures for the implementation of Articles 35 and 41 of Regulation 883/2004, OJ C 279, 27.09.2013, p. 8.

(≈) No risk of fraud or abuse

As with Sub-option 2a, and for similar reasons, under this option the risk of abuse would increase although to a lesser extent. It is true that when the benefit is adjusted upwards, the Member State of residences would have to reimburse the difference and would therefore have an active role verifying the place of residence of the children. However, such verification would probably be less exhaustive when the benefit is adjusted downwards (the same as under Sub-option 2a).

As for the current risk of abuse, when the benefit is adjusted upwards the Member State of residence is expected to receive updated information regarding the benefits received by children residing in their territory (requests for reimbursement). As a result, the risk of fraudulent accumulation of benefits would decrease. However, when the benefits are adjusted downwards such prevention mechanism would not exist (therefore, also in this respect, in cases of downwards adjustments, the same as under Sub-option 2a).

(?) potential financial implications

This option shifts the burden between Member States due to the effect of the differential supplement, but it does it in a less predictable way. As with Sub-option 2a, if the Member State of residence has a lower factor of adjustment, the benefit paid by any Member State competent which is not the Member State of residence of the children would be adjusted downwards; thus the top-up obligation for the Member State of residence might emerge.

If the Member State of residence **tops up the benefit** (as a Member State with secondary competence), it will pay a lower supplement as in the status quo, as the supplement would be reduced by the same amount, as the reimbursement will have to be paid in addition. So, in principle, the Member State of residence would end up paying the same amount as under the status quo (part of it as reimbursement, part of it as top-up). But, if the Member State of residence **does not top up the benefit**, it will result in a higher burden for the said Member State (as it has to grant reimbursement irrespective of any differential supplements). Furthermore, the Member State of residence will be in a situation where it is obliged to pay part of a benefit that is not envisaged by its social security system. That would be, on the one hand, an imposition of the Regulations difficult to justify in the light of the mere coordination of social security systems. However, this could, on the other hand, also be found under today's coordination of e.g. sickness benefits, where the competent Member State also has to reimburse benefits in kind which are granted in another Member State and which are not provided under its legislation.

In any case, like Sub-option 2a, this option would bring a financial relief for the Member State with a higher factor of adjustment (as they could downgrade their family benefits for children living in Member States with lower factors of adjustment, while Member States with lower factors of adjustment would not see any change in their situation in cases where they have to grant benefits for children residing in Member States with higher factors of adjustment. However, they could be affected by the obligation to grant higher differential amounts (which is not very likely). This could result in a certain disruption of the economic logic that assigns the obligation to pay the family benefits to the Member State receiving the contributions and taxes.

In sum, it is difficult to determine whether this modification of the burden-sharing is fairer or not. Thus, this should be decided by the policy-makers in the light of a broader analysis of existing figures and economic relationships between Member States.

6.2.3 Sub-option 2c – adjustment of the amount (limit national amount)

A short description of this sub-option: This option would consist in maintaining the current rules of Regulation (EC) No 883/2004 and in **adjusting** the amount of the family benefit granted by any Member State other than the Member State of residence of the children to the living standards in the Member State of residence of the children, but **limited to the amount** provided by the social security system of the Member State having to grant the benefits. So, in practice, adjustment would only work **downwards** but not upwards.

Simply put, under this option, if the children reside in a less expensive Member State, the benefit would be adjusted downwards, while if the children reside in a more expensive Member State, the benefit would not be adjusted.

Standard example:

Scenario 1: Member State A (primary competence) grants €80: Member State B (secondary competence) does not grant any differential supplement

Scenario 2: Member State B (primary competence) grants €50: Member State A (secondary competence) grants a differential supplement of €50

If the benefit is topped up by the Member State of residence of the children, the supplement could neutralise the negative impact of the adjustment. However, if the Member State of residence of the children does not top up the benefit, this option would generate unbalanced results: it only reduces the amount received by children living in Member States with lower factors of adjustment without increasing the amount received by children living in Member States with a higher factor of adjustment.

Additional examples to highlight the effects of this option:

Example 1:

The father works in Member State C, the mother and 2 children reside in Member State D, and the mother does not work. The amount of a certain family benefit for 2 children is €200 in Member State C; and €200 in Member State D. The factor of adjustment is 100 in Member State C to 120 in Member State D.

Member State C (primary competence) grants €200 (no upwards adjustment): Member State D (secondary competence) does not grant any differential supplement.

[Status quo: Member State C grants €200: Member State D does not grant any differential supplement.]

Example 2:

The father works in Member State E, the mother and a child reside in Member State F, and the mother does not work. The amount of a certain family benefit for one child is €100 in Member State E and €85 in Member State F. The factor of adjustment is 100 in Member State E to 80 in Member State F.

Member State E (primary competence) grants €80: Member State F (secondary competence) grants a differential supplement of €5.

[Status quo: Member State E grants €100: Member State F does not grant any differential supplement.]

Evaluation of the option

(-) Clarification

As with Sub-option 2a, and for the same reasons, this option is less clear or easy to understand than the status quo as far as it does not simplify the current procedures and involves an additional adjustment procedure. In addition, it distinguishes between two groups of Member States – those with comparatively higher factors of adjustment (they can decrease their family benefits) and those with lower factors of adjustment (they can grant their national amounts). As this is not fixed and depends on every bilateral relation (for every Member State there is a different borderline in relation to which Member States the national amount has to be granted and where the downwards adjustment has to start; this borderline could also change with the time) it is even more unclear than Sub-option 2a.

(-) Simplification

As with Sub-option 2a, and for the same reasons, this option is more complex to apply as far as it imposes additional obligations for migrant workers such as the obligation to state and eventually prove the Member State of residence of the children.

(-) Protection of rights

This option provides a worse protection of the rights of a certain group of beneficiaries, i.e. those residing in Member States with a lower factor of adjustment, while it does not improve the protection of the rights of beneficiaries residing in Member States with a higher factor of adjustment.

In sum, this is an asymmetrical solution that lacks consistency. The amount of the family benefits should be adjusted to the living standard always or never.

(-) Administrative burden and implementation arrangements

As with Sub-option 2a, and for the same reasons, this option would result in a certain increment of the administrative burden, due to the inclusion of the adjustment step in the national procedures and the need for additional prevention of fraud.

(≈) No risk of fraud or abuse

Comparable to Sub-option 2a, and for the same reasons, under this option the risk of abuse would increase. Of course, this option would no longer be an incentive to move the children to a Member State with a higher factor of adjustment, but it could still be an incentive to move from Member States with lower factors of adjustment to the Member State which is competent to grant the benefits. Therefore, this option does not prevent or diminish the current risk of abuse, as it does not provide any additional instruments preventing the fraudulent accumulation of benefits.

(?) Potential financial implications

This option could shift (again) the burden from Member States with a higher factor of adjustment to Member States with a lower factor of adjustment, in a similar way as with Sub-option 2a. Of course, this option differs from Sub-option 2a, as it takes away the obligation of Member States with lower factors of adjustment to make an upwards adjustment if the children reside in a Member State with higher adjustment factors.

If the Member State of residence has a lower factor of adjustment, the benefit paid by any other Member State would be adjusted downwards. The top-up obligation for the

Member State of residence (if this is the Member State with secondary competence) is thus more likely to emerge. Consequently, today's situation would be distorted as it shifts some obligations from Member States with higher levels of costs of living towards Member States with lower levels.

6.3 Option 3 – reversed competence of the Member State of residence before the Member State of employment

General description of all sub-options summarised in this Option 3: The child's Member State of residence always has competence by priority. Any other Member State involved could only be competent at a secondary level. Thus, these other Member States would only have to grant differential supplements (as Member States with secondary competence) if their family benefits are higher than those of the Member State of residence of the child.

Again various sub-options are possible. First **Sub-option 3a**: the differential supplements would have to be granted based on the unreduced national amount in the same way as differential supplements are calculated today. This is the main difference with **Sub-option 3c** (which was not contained in the mandate, but added by us for the sake of completeness), where only adjusted amounts will be taken as the base for the calculation of the differential supplement. In between sits again **Sub-option 3b** (which has also been added by us), according to which no adjustment takes place, but, the benefits provided by the Member State of residence have to be reimbursed by any Member State with primary competence under today's coordination to safeguard the same burden-sharing between Member States as today. Of course there is also room for a **fourth sub-option** (adjustment + reimbursement). However, we have refrained from a detailed description of this sub-option as it seems to be too complex. Nevertheless, the other pros and cons for this additional fourth sub-option are comparable to the ones described in Sub-options 3a to 3c.

These options would mean a total change of today's cascade of competences of Article 68(1)(a) of Regulation (EC) No 883/2004 to determine the Member State with primary and secondary competence, as no longer 'gainful activity' but 'residence of the child' would be on top, followed by 'gainful activity' and 'receipt of a pension'. 'Residence' of any other person than the child as a last resort is not necessary from our point of view as it should not be the intention of this option to change today's Article 68(2), last sentence of the Regulation, under which a member of the family other than a child (e.g. a father) only residing in another Member State without being gainfully active there or receiving a pension cannot open entitlement to a differential supplement.[71]

To avoid any misunderstandings: this option only works properly if it is clear that the Member State(s) where the parents exercise a gainful activity pay their supplements (which could reach 100% of their national amounts in cases in which the Member State of residence of the child cannot grant any benefit under its legislation) also if the national legislation of these Member States of activity are residence-based schemes. Additional provisions to safeguard such a common understanding would be advisable to avoid disadvantages for the persons concerned.

One issue which is very important with this option is whether or not **some of the horizontal options** are also taken on board. This concerns especially the question whether benefits which are employment-related are also covered by this option (also for these benefits it is always the child's Member State of residence which has to grant benefits with primary competence), or whether a special coordination is provided which would make this option easier to accept (our recommended option for these benefits can be found in 4.1.4 above). Also the additional clarifications we have made

[71] Concerning the necessity to clarify this sentence see also 4.1.4.3.

under chapter 5.2 above, e.g. concerning contribution-based benefits, are especially relevant for that option. Therefore, the impact assessment could show a different outcome depending on these horizontal decisions.

For these Options a special and separated coordination of family benefits with income replacement function (see under 4.1.4 above) could be advisable. This could safeguard that those family benefits which are clearly linked to a gainful activity of one parent exercised outside the Member State of residence of the children would still have to be granted by that Member State and not by the Member State of residence.

Concerning the legal framework (especially the **legal compatibility with the TFEU**) it has to be said that this solution should safeguard exactly the same amount for the beneficiaries. As today's solution never has been challenged by the CJEU it could be assumed that also this option would not raise any problems from the perspective of the total amount of the benefits granted. Of course it would shift the competences, thus it might happen that a person would lose immediate entitlement to high benefits by today's Member State with primary competence e.g. where one parent works and have to start with comparatively low benefits from the Member State of residence of the children. But, we do not think that this could endanger the compliance with the TFEU as the same is valid also today if the Member State of residence of the children is the one with primary competence because one parent works there and a differential supplement has to be paid by another Member (e.g. where the other parent works). There are already measures provided to grant the differential supplement as quickly as possible. In case these measures are not yet sufficient it would be up to the Community legislator to look for further improvements.

6.3.1 Sub-option 3a – reversed competence of the Member State of residence before the Member State(s) of employment, no adjustment, no reimbursement

A short description of this sub-option: This sub-option declares the children's Member State of residence as the one with primary competence and any other Member States (e.g. those where the parents work) only competent to grant differential supplements as Member States with secondary competence, if the family benefits under that legislation are higher. The amounts of the family benefits taken into consideration are not adjusted.

Standard example:

Scenario 1: Member State B (primary competent) grants €50; Member State A (secondary competent) grants a differential supplement of €50

Scenario 2: Member State A (primary competent) grants €100, no differential supplement by Member State B (secondary competent)

Additional examples to highlight the effects of this option:

Example 1:

The family (mother, father, 2 children) resides in Member State A, the mother does not work, and the father works as a frontier worker in Member State B; the amount of family benefits for 2 children is €150 in Member State A and €300 in Member State B.

Member State A (primary competence) has to grant its €150 immediately; Member State B (secondary competence) grants a differential supplement of €150.

[Status quo: Member State B (primary competence) has to grant its €300 immediately; no differential supplement by Member State A (secondary competence).]

Example 2:

The family (mother, father, 2 children) resides in Member State A, the mother works in Member State A, and the father works as a frontier worker in Member State B; the amount of family benefits for 2 children is €150 in Member State A and €300 in Member State B.

Member State A (primary competence) has to grant its €150 immediately; Member State B (secondary competence) grants a differential supplement of €150.

[Status quo: The same – Member State A (primary competence) has to grant its €150 immediately; Member State B (secondary competence) grants a differential supplement of €150.]

Example 3:

[This might be considered a not very realistic example; nevertheless, we want to mention it.] The family (mother, father, 2 children) resides in Member State C, the mother works as a frontier worker in Member State D, the father works as a seasonal worker in Member State E; the amount of family benefits for 2 children is €150 in Member State C, €300 in Member State D and €200 in Member State E.

Member State C (primary competence) has to grant its €150 immediately; Member State D (secondary competence) grants a differential supplement of €150, €75 being reimbursed to Member State D by Member State E (tertiary[72] competence).[73]

[Status quo: Member State D (primary competence) has to grant its €300 immediately, €150 being reimbursed by Member State E (secondary competence); no differential supplement by Member State C (tertiary competence).]

Evaluation of the option:

(+) Clarification

As the Member State which is competent by priority is always the Member State of residence of the children, it is clear which Member State has to start granting its benefits. In case of residence-based family benefits this is the clearest situation possible, as all children entitled to benefits under national legislation will get these benefits under Regulation (EC) No 883/2004 as well. Many disputes which today's coordination could cause (if Member States do not agree on which Member State is the primarily competent one) could be avoided. Nevertheless, this option is not the optimum with regard to clarity as we still have more than one Member State which could be competent to grant benefits (which includes differential supplements). From

[72] As also today there is a hierarchy between Member States which are competent due to the same element (more activities, more pensions), we think there are already today more than two competent Member States at stake; therefore, in this example we call Member State E the Member State with tertiary competence.
[73] If we keep Article 58 of Regulation (EC) No 987/2009 and extend it also to these cases.

this perspective, the competence of only one Member State to grant its family benefits could be regarded as the clearest option.

Anyhow, the advantages concerning clarity are very important. The Member State of residence of the children becomes the anchor for family benefits. Irrespective of where the parents work and how often they switch their workplace, the Member State of residence of the children always stays the one with primary competence and the children will continuously receive the same benefits. Only the differential supplement can change whenever a new activity is started by one parent in a new Member State.

(?) Simplification

On the one hand this option could be regarded as simpler, as always the same Member State is the competent one, irrespective of the fact whether the parents work and in which Member State they work (it is always the same Member State which is the one with primary competence). This could lead to a (+). On the other hand, this option is as complex as the status quo, as differential supplements are still provided. The reverse order of priority does not change the overall systematic. So, from an abstract point of view this option could be regarded as neutral compared to the status quo. But, in practice this option could lead to much more cases with differential supplements than today (if we assume that in general the family benefits in Member States to which workers migrate are higher than in the Member State of residence of the children). From this perspective we would have to evaluate it with a (-). Thus, a (?) seems to be a fair value for this option.

(+) Protection of rights

This option is much better than the status quo, as it will safeguard that all children immediately receive the benefits which are provided for children under the legislation of the Member State where they reside. It could be assumed that, consequently, families do not have to wait any longer for the final settlements of conflicts or rely on payment of provisional amounts of benefits.[74] Thus, the policy aims of the Member State of residence on how much money a family should receive which resides in its territory is fully achieved. In addition, higher amounts of benefits in other Member States (especially those where one or both parents work) are also not lost, as there would be a differential supplement from these Member States. The best results concerning the protection of rights would be achieved if employment-related benefits (e.g. child-raising benefits with an income replacement function) remain within the competence of the Member State which is competent for the person taking care of the child. If this was not the case and all family benefits were covered in the same way by this new coordination, we think that many positive elements which this option really has, would be taken away again.

Another important issue is that, when the Member State of residence always has to grant its benefits with primary competence, this takes away today's obligation of this Member State to grant provisional benefits in the event of dispute of competences (Article 60(4) of Regulation (EC) No 987/2009). Thus, as benefits are granted immediately, this definitively adds to legal certainty and the protection of the persons concerned. It also safeguards that not so many cases of recovery of overpayments will occur (which is often the case today when the final competence differs from the provisional competence and thus overpayments have to be recovered (Article 6(5) and Title IV, Chapter III of Regulation (EC) No 987/2009).

Finally, in this context it has to be mentioned that, as family benefits in the Member State of residence could usually be assumed as being lower than those in a parent's Member State of work, this option could result in much more differential supplements

[74] Article 60(4) of Regulation (EC) No 987/2009.

than today. For these cases the procedures will take longer until they get the final amount of family benefits they are entitled to. This diminishes the (+).

(+) Administrative burden and implementation arrangements

No new administrative procedures have to be created, as the existing ones will work in the same way as today (sometimes only by exchanging the Member States' roles). However, the length of procedures will be considerably shortened and provisional competences and all the administrative problems related to this (including the recovery of overpayments) could be largely avoided. Institutions of the child's place of residence can treat all applications in the same way irrespective of the parents' place of work. Again, the fewer cases of overpayment and recovery of overpayments (see under protection of rights) have to be mentioned. The possible increase of cases in which differential supplements have to be paid is something which could add negative aspects to this option.

(+) No risk of fraud or abuse

The Member State of residence will check the family in the same way as any other family resident there. Usually checking and evaluating the situation is easier in the same Member State than abroad and also if all residents are subject to the same checking procedures. Problems of the status quo, where sometimes a work of a parent in another Member State has been dissimulated to immediately get the benefits from the Member State of residence would no longer be an issue, as the Member State of residence is the competent one in all cases.

(?) Potential financial implications

This option shifts the burden in cases of only one working parent abroad (in principle only in these cases) from the Member State of work to the Member State of residence. It is difficult to decide whether this is fairer or not – this remains a political decision balancing the pros and cons mentioned below (this might also depend on the schemes involved). In case of a residence-based scheme in the Member State of residence this could be regarded as fairer, as already without the Regulation all residents would be entitled to the benefits. This would change if the Member State of residence has a contributory scheme and, thus, has to grant also benefits for persons not contributing to the scheme (if we assume that this is the consequence of this option, which has to be clarified anyhow – see also 4.1.4 and 5.25.2 above[75]). Member States of residence could see too much burden on their shoulders (they will have to grant more family benefits than today) taking into account that a parent works and pays tax and/or contributions in another Member State, while this other Member State only has to grant a differential supplement. Therefore, we have to stress that, compared to the status quo, this solution will lead to savings of the Member State of gainful activity at the cost of the children's Member States of residence. From the point of view of the Member States of employment this could be seen the other way around (the higher family benefits are only planned for the children resident on their territory and, therefore, it is only fair that they do not have to export the whole amount but only have to grant a differential supplement).

[75] This shows, again, how many questions have to be solved before a reform of the family benefit coordination chapter can be regarded as finished in a satisfactory way. We want to recall the following issue: if the Member State of residence has a contributory family benefits scheme (only active persons who contribute are entitled to benefits), does the competence of this Member State mean that also a person gainfully active in another Member State and, thus, not contributing to that scheme can open entitlement to such benefits if the children reside there or is this not the case? In the latter case this would not change today's situation in which the Member State outside the Member State of residence of the children where the parent works has to grant its family benefits. And, it could be said that also this new coordination does not safeguard that the Member State of residence of the children grants all the benefits which it would have to in purely internal situations. Member States with only residence-based schemes could say that such an outcome has to be regarded as not balanced.

It could be assumed that this option is more valued by the Member States of work of migrant workers than those where the family resides (Member States from which the migrant worker came). Maybe the remaining unrestricted export obligation (which can result in sometimes considerable differential supplements by these Member States of work) could be an argument which convinces also these Member States of residence?

6.3.2 Sub-option 3b – reversed competence of the Member State of residence before the Member State of employment + reimbursement

A short description of this sub-option: This sub-option is very similar to Sub-option 3a (therefore, unless otherwise stated the remarks under Sub-option 3a apply to this sub-option as well). It declares again the children's Member State of residence as the one with primary competence and any other Member State (e.g. those where the parents work) only competent to grant differential supplements (secondary competence), if the family benefits under that legislation are higher. The amounts of the family benefits taken into consideration are not adjusted. The only difference is that the Member State which would have primary competence under today's coordination would have to reimburse the Member State of residence with an amount which corresponds to its obligation today. Thus, this option would combine the advantages for the persons concerned (immediate entitlement to the benefits provided under the legislation of the Member State of residence) with the well-known burden-sharing of today's coordination.

Standard example:

Scenario 1: Member State B (primary competence) grants €50; Member State A (secondary competence) grants a differential supplement of €50 and reimburses the €50 granted by Member State B

Scenario 2: Member State A (primary competence) grants €100, no differential supplement by Member State B (secondary competence), but, reimbursement to Member State A of €50

Additional examples to highlight the effects of this option:

Example 1:

The family (mother, father, 2 children) resides in Member State A, the mother does not work, and the father works as a frontier worker in Member State B; the amount of family benefits for 2 children is €150 in Member State A and €300 in Member State B.

Member State A (primary competence) has to grant its €150 immediately; Member State B (secondary competence) grants a differential supplement of €150 and reimburses €150 to Member State A.

[Status quo: Member State B (primary competence) has to grant its €300 immediately; no differential supplement by Member State A (secondary competence)].

Example 2:

The family (mother, father, 2 children) resides in Member State A, the mother works in Member State A, and the father works as a frontier worker in Member

State B; the amount of family benefits for 2 children is €150 in Member State A and €300 in Member State B.

Member State A (primary competence) has to grant its €150 immediately; Member State B (secondary competence) grants a differential supplement of €150.

[Status quo: The same – Member State A (primary competence) has to grant its €150 immediately; Member State B (secondary competence) grants a differential supplement of €150.]

Example 3:

[This might be seen as a not very realistic example; nevertheless, we want to mention it.] The family (mother, father, 2 children) resides in Member State C, the mother works as a frontier worker in Member State D, and the father works as a seasonal worker in Member State E; the amount of family benefits for 2 children is €150 in Member State C, €300 in Member State D and €200 in Member State E.

Member State C (primary competence) has to grant its €150 immediately; Member State D (secondary competence) grants a differential supplement of €150 and reimburses the €150 to Member State C, €150 being reimbursed to Member State D by Member State E (tertiary competence).[76]

[Status quo: Member State D (primary competence) has to grant its €300 immediately, €150 being reimbursed by Member State E (secondary competence); no differential supplement by Member State C (tertiary competence)].

Evaluation of the option:

(+) Clarification

For the persons concerned the same advantages as under Sub-option 3a apply. Nevertheless, for the institutions it is less clear, as additional reimbursement is included. This is an issue which we have not dealt with under clarification, but under administrative burden.

(-) Simplification

This option is more complex as the reimbursement is added to the obligation to grant differential supplements.

(+) Protection of rights

For the persons concerned this option is as positive as Sub-option 3a.

(-) Administrative burden and implementation arrangements

As an obligation of reimbursement is added, this sub-option is more complex than the status quo. The points mentioned in relation to Sub-option 2b apply to this sub-option as well.

(+) No risk of fraud or abuse

The same arguments as under Sub-option 3a apply, but, it might be assumed that this sub-option is even more fraud-proof than Sub-option 3a, as also the Member State of employment which has to reimburse will check the case (even if no differential supplement has to be paid).

(≈) potential financial implications

[76] If we keep Article 58 of (EC) No Regulation 987/2009 and extend it to these cases.

For this option we can clearly indicate the effects on fair burden-sharing, as it will lead to exactly the same results as the status quo.

6.3.3 Sub-option 3c – reversed competence of the Member State of residence before the Member State of employment + adjustment

A short description of this sub-option: This sub-option is, again, very similar to Sub-option 3a (therefore, unless otherwise stated the remarks under Sub-option 3a apply also to this sub-option). It declares again the children's Member State of residence as the one with primary competence and any other Member State (e.g. those where the parents work) only competent to grant differential supplements, if the family benefits under that legislation are higher. Different from Sub-option 3a the amounts of the family benefits taken into consideration have to be adjusted. Reimbursement, as contained in Sub-option 3b, is not part of this sub-option, as it would make it even more complex.

Standard example:

Scenario 1: Member State B (primary competence) grants €50; Member State A (secondary competence) grants a differential supplement of €30

Scenario 2: Member State A (primary competence) grants €100, no differential supplement by Member State B (secondary competence)

Additional examples to highlight the effects of this option:

Example 1:

The family (mother, father, 2 children) resides in Member State A, the mother does not work, and the father works as a frontier worker in Member State B; the amount of family benefits for 2 children is €150 in Member State A and €300 in Member State B; due to adjustment this amount would be reduced to €200 (the factor of adjustment is 100 in Member State A to 150 in Member State B).

Member State A (primary competence) has to grant its €150 immediately; Member State B (secondary competence) grants a differential supplement of €50.

[Status quo: Member State B (primary competence) has to grant its €300 immediately; no differential supplement by Member State A (secondary competence)].

Example 2:

The family (mother, father, 2 children) resides in Member State A, the mother works in Member State A, and the father works as a frontier worker in Member State B; the amount of family benefits for 2 children is €150 in Member State A and €300 in Member State B; due to adjustment this amount would be reduced to €200 (the factor of adjustment is 100 in Member State A to 150 in Member State B).

Member State A (primary competence) has to grant its €150 immediately; Member State B (secondary competence) grants a differential supplement of €50.

[Status quo: Member State A (primary competence) has to grant its €150 immediately; Member State B (secondary competence) grants a differential supplement of €150.]

Example 3:

[This might be considered a not very realistic example; nevertheless, we want to mention it.] The family (mother, father, 2 children) resides in Member State C, the mother works as a frontier worker in Member State D, and the father works as a seasonal worker in Member State E; the amount of family benefits for 2 children is €150 in Member State C, €300 in Member State D; due to adjustment this amount would be reduced to €200; and €200 in Member State E; due to adjustment this amount would be reduced to €120 (the factor of adjustment is 100 in Member State C to 150 in Member State D and 166 in Member State E).

Member State C (primary competence) has to grant its €150 immediately; Member State D (secondary competence) grants a differential supplement of €50, €25 being reimbursed to Member State D by Member State E (tertiary competence).[77]

[Status quo: Member State D (primary competence) has to grant immediately its €300, €150 being reimbursed by Member State E (secondary competence); no differential supplement by Member State C (tertiary competence)].

Evaluation of the option:

(-) Clarification

It would be easier for the persons concerned, as they would in all cases be entitled to the family benefits of the Member State of residence. Compared to Sub-options 3a and 3b, this sub-option would not be so clear, as adjustments have to be made. This sub-option is close to Sub-option 2a. As the disadvantages seem to be stronger than the advantages it could be said that this option is worse than the status quo.

(-) Simplification

Adding adjustments to the coordination always makes it more complex.

(?) Protection of rights

Again, as an adjustment is involved, this is a question of political decision. The arguments mentioned e.g. under Sub-option 2a also apply to this sub-option.

(-) Administrative burden and implementation arrangements

As an obligation of adjustment is added, this sub-option is more complex than the status quo. The points mentioned in relation to Sub-option 2a apply to this sub-option as well.

(+) No risk of fraud or abuse

The same arguments as under Sub-option 3a apply.

(?) Potential financial implications

Here, again, we are confronted with a necessary political decision. This sub-option could be seen by some Member States as one of the best, as the Member State of residence has to grant all its benefits by priority, and if another Member State has to grant differential supplements these supplements can be adjusted to the costs of living in the Member State of residence. But, Member States which are in favour of an unrestricted export of all family benefits as it happens today will oppose this sub-

[77] If we keep Article 58 of (EC) No Regulation 987/2009 and extend it also to these cases.

option, maybe even violently, as it does not only give the Member State of residence primary competence, but might also reduce benefits exported into these Member States. From this perspective, this option appears much worse than Sub-option 3a.

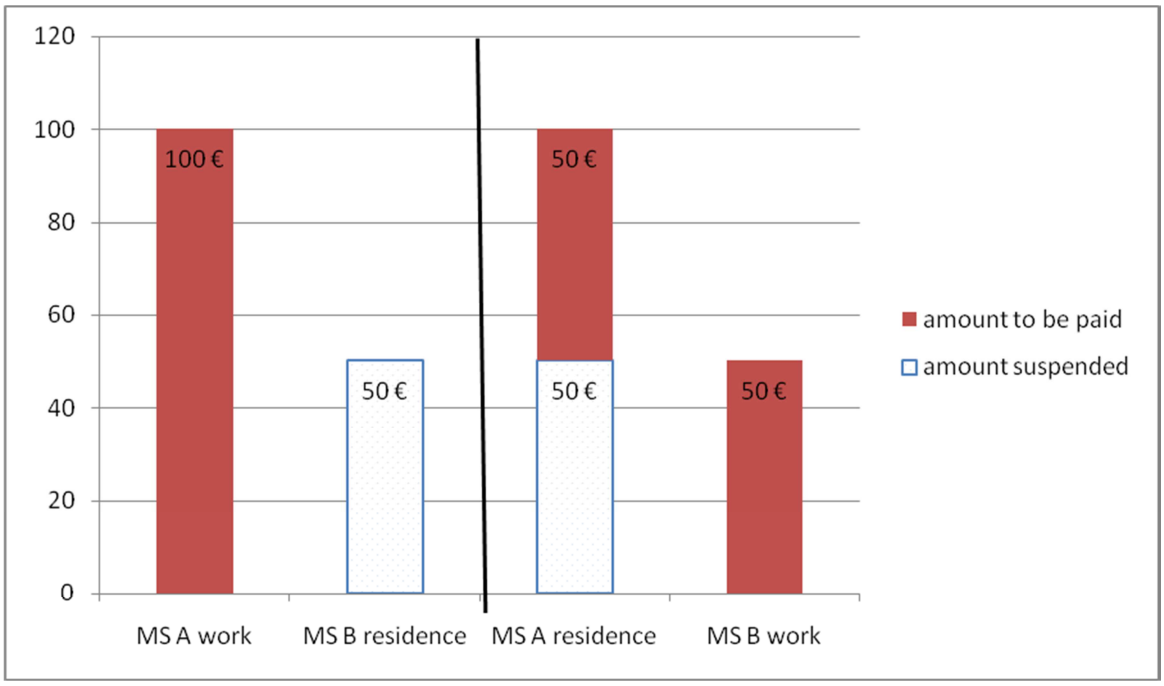
7 Conclusions

Having analysed the existing coordination of family benefits and possible options to modify the current system we came to the following conclusions.

1. The existing coordination of family benefits is complex, covers a great variety of different types of benefits and has become the subject of political debate in recent times.
2. If the existing coordination is perceived as not being fair, this is a political statement. Therefore, also the search for a 'fairer' distribution of the burden depends on a political decision we cannot make. Nevertheless, from our experts' point of view some recommendations can be made irrespective of the political decision to be taken.
3. A re-examination of the existing coordination rules is advisable.
4. Export (understood as a Member State's obligation to grant family benefits also to the children residing in another Member State) is the main focus of the debate. Nevertheless, also other elements should not be forgotten. Some of these horizontal questions and problems could be regarded as more important and more burning issues than export.
5. Therefore, when discussing a reform of the coordination of family benefits we propose also clarifications ancillary to the export issue, like e.g. new or improved definitions, but also a special coordination for benefits which show a strong link to gainful activities, e.g. child-raising benefits for persons in employment. Only if these issues are solved in a satisfactory way, the options proposed for export could be a realistic alternative to the status quo.
6. Mapping has shown – at the level of FreSsco national experts – some support and advancement of legal arguments in favour of adjusting family benefits to the living costs of the country where the children reside, especially from some higher income Member States. Conversely, some lower income Member States were advancing arguments against such adjustment. It could be assumed that this will also be the official position of the Member States concerned. Whichever solution will be further discussed, its pros and cons should be well evaluated and an EU-wide socially just solution should be adopted.
7. If there is really a political will to change the existing mechanism of export of family benefits, we think that the option which only reverses the competences from the Member State of employment towards the child's Member State of residence is a solution much easier to achieve and would also not take away any benefits granted today. Under this option, families would immediately receive the family benefits of the Member State of residence of the child (thus it can be assumed that from the perspective of the persons concerned it can be an improvement compared to the status quo). But, we have to note that this option cannot be presented as the only positive one. As it shifts the burden of the benefits from the Member State receiving the contributions and normally the taxes to the Member State of residence of the children, the fairness of this option can be disputed. It would most probably also result in more differential supplements than today and thus add administrative burden for the institutions. Anyhow, if an option is further examined to modify the existing coordination, we recommend analysing this option, as it contains the most positive elements of the options examined compared to the status quo.

Annex 1 – Overview of the effects of the different options

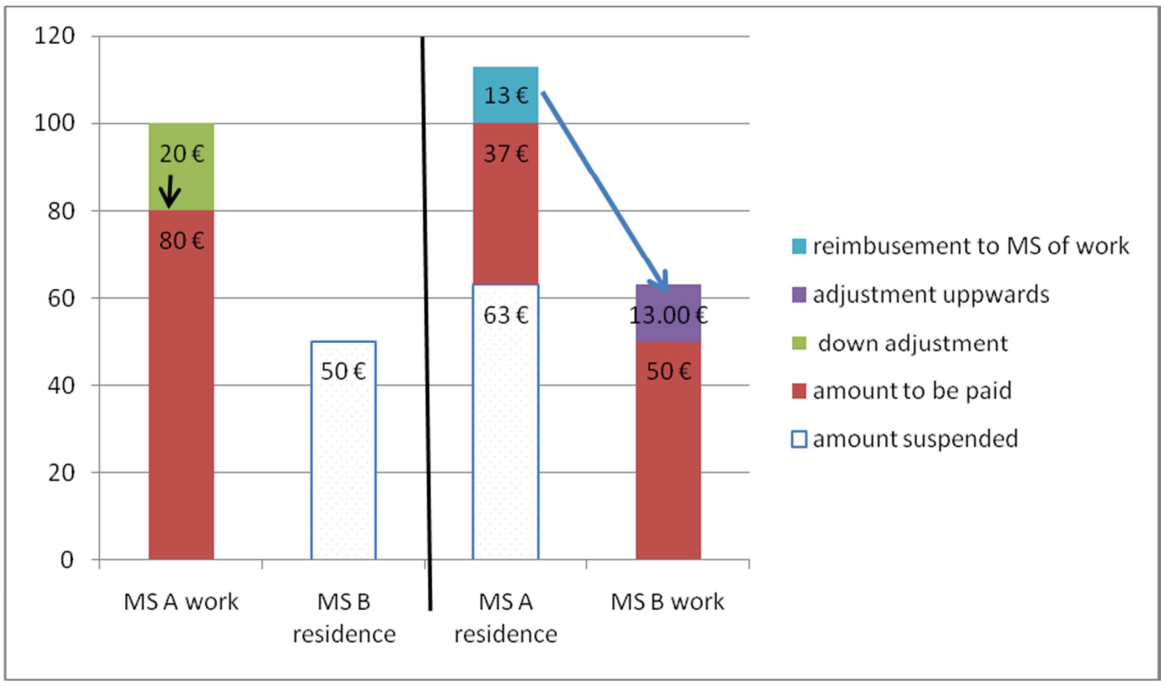
Option 1 (status quo)



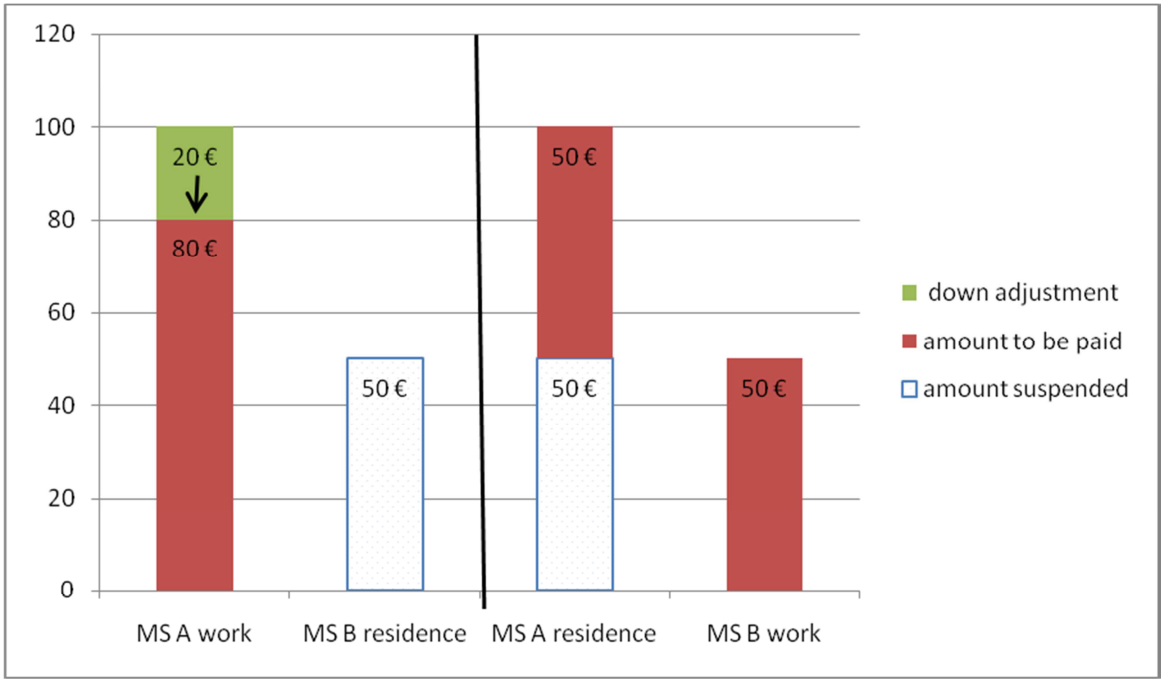
Option 2a (adjustment of the amounts, no limits)

Option 2b (adjustment and reimbursement of difference)

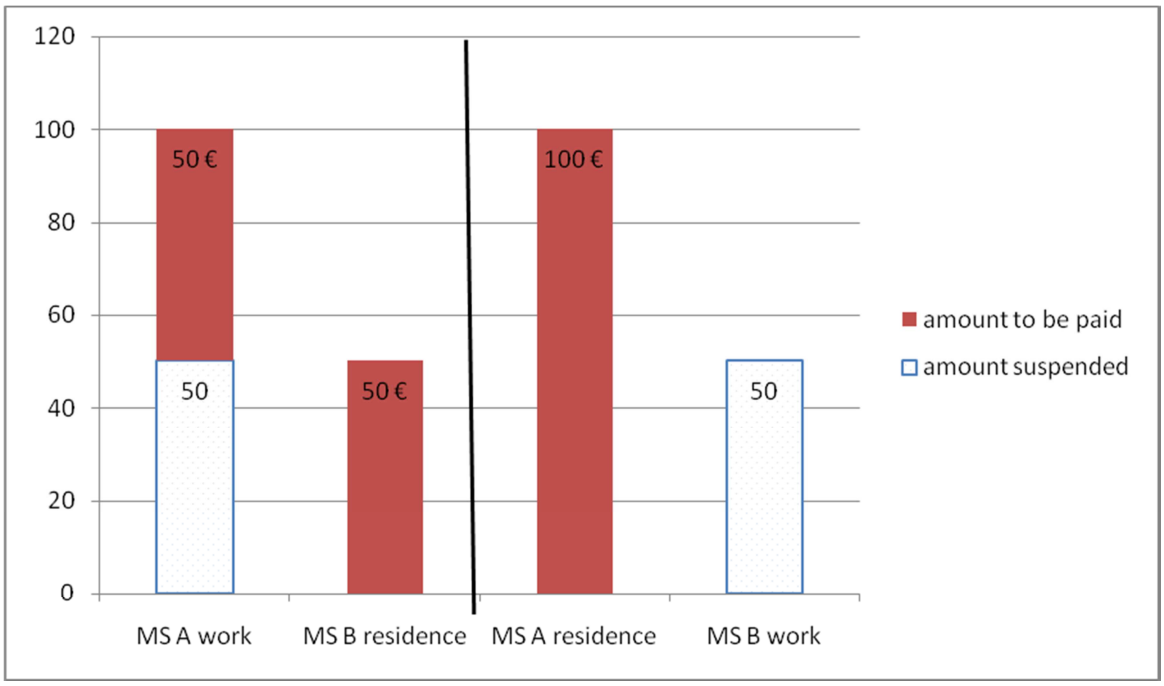
[As the decision towards the person concerned must show the whole suspended amount, the amount of the reimbursement has to be added to the total amount to show the real effects for the Member State of residence.]



Option 2c (adjustment + limit national amount)

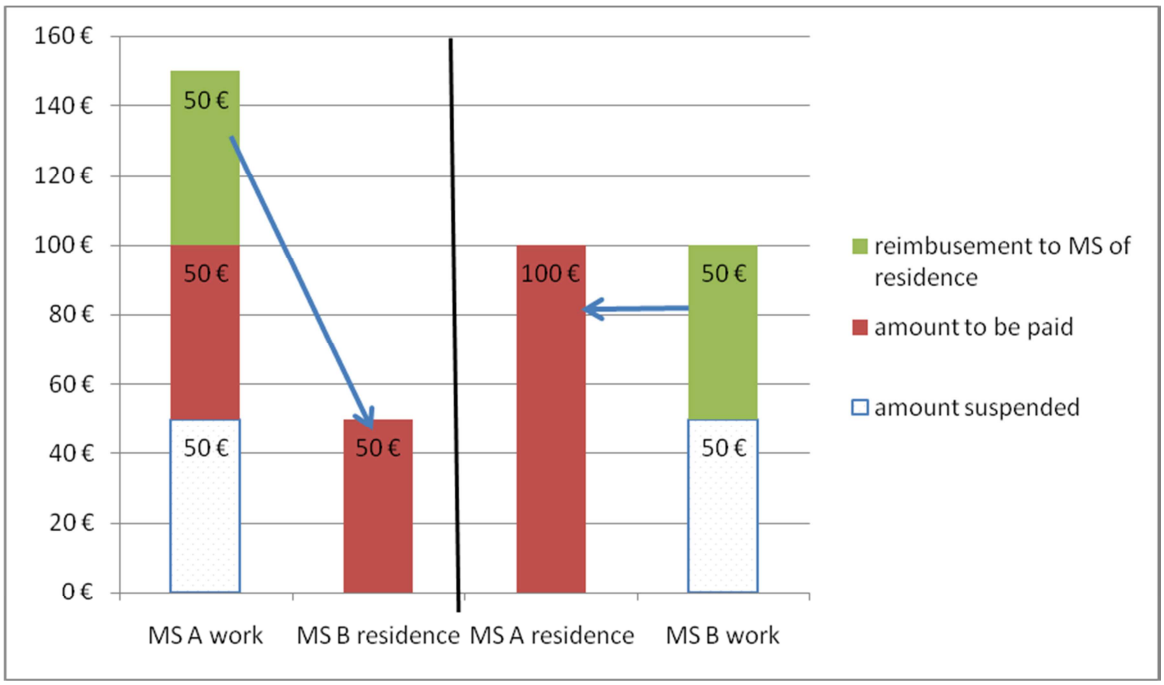


Option 3a (reverse competence, no adjustment, no reimbursement)

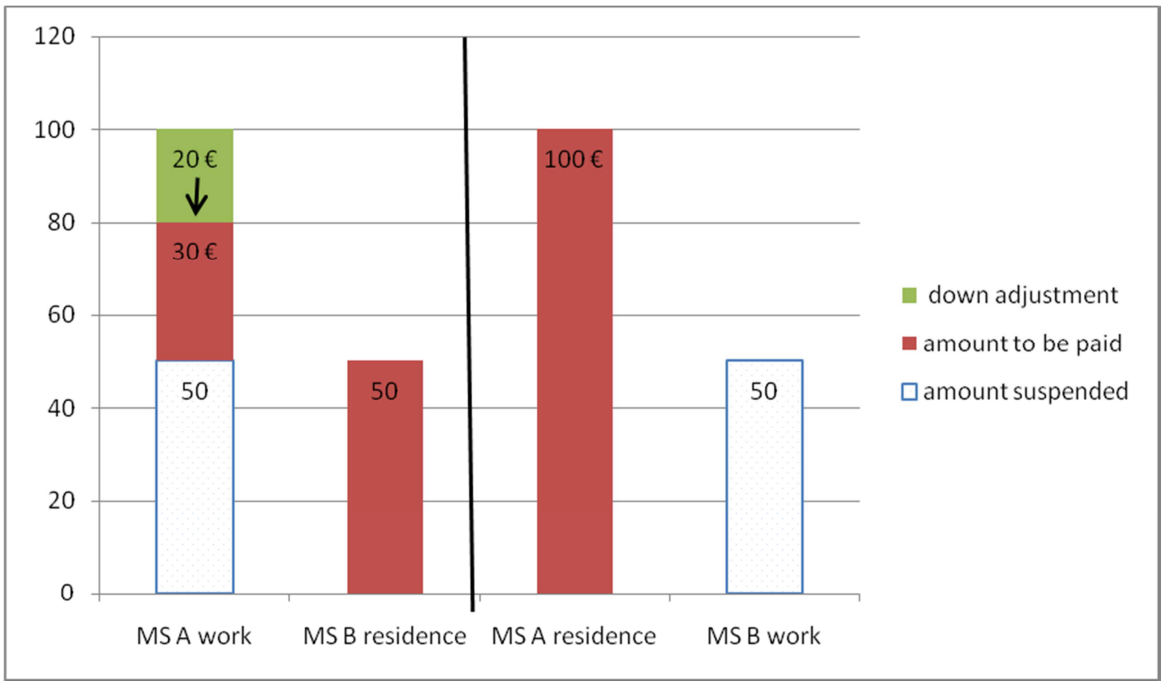


Option 3b (reverse competence + reimbursement)

[As the decision towards the person concerned must show the whole suspended amount, the amount of the reimbursement has to be added to the total amount to show the real effects for the Member State of work.]



Option 3c (reverse competence + adjustment)



Annex 2 – Elements for analysing the legal possibilities to adjust the amount of family benefits to the living costs

Although the examination of a legal base for any adjustment (see 5.1 and Option 2) was not an explicit part of the mandate for this report, we have, nevertheless, collected some ideas, elements and background information to feed this examination.

Results from the mapping exercise

First, it was interesting to explore how such adjustments would have to be regarded from a national perspective.

From the replies of the **FreSsco national experts** it seems that the introduction of a new coordination rule, stating that family benefits have to be adjusted according to the living costs of the Member State where the children reside, is not completely unambiguous from the viewpoint of **national law**. The main concern is the principle of equality, but it also depends on what is being compared (who is taken as a reference group, and who as comparative group).

Such new coordination rule might be in line with the **constitutional values** of some Member States. Reportedly, Article 7 of the **Austrian** Federal Constitution (*Bundesverfassungsgesetz,* B-VG) imposes equal treatment on the legislature. This means that not only persons in the same situation must be treated equally, but also that distinctive situations must be treated differently. Such a different situation may also be effectuated by different living costs in respect to family benefits which are aimed at compensating the financial burden of childcare. Thus, such a new principle would be in line with Article 7 B-VG, provided that the different living costs can be determined effectively.

A similar estimate is made for e.g. **Polish**, **Swedish**, **Luxembourg** and **Belgian** constitutions. It seems that the **Polish** constitution entails only general principles. Also in **Sweden**, there are no constitutional principles to prevent the adjustment of family benefits. For **Luxembourg** it is argued that, a priori, there would be no conflict with constitutional or general principles of Luxembourg law, since family benefits are already considered as personal rights of the children. Moreover, the adjustment of family benefits to the living standard in another Member State is also unlikely to raise constitutional issues in **Belgium**. Certain traces of a benefit adjustment approach can already be found in bilateral agreements of Belgium with Turkey, Morocco and Tunisia, in which specific, lower amounts are exported instead of the normal sums that would be due in Belgium. However, one may wonder whether it would exceed the tasks of coordination, especially where it results in the amount of the Belgian benefit being raised above the level that would be due in Belgium.

The argument of equal treatment may also go in another direction, arguing that adjusting family benefits might be against the equality principle. For instance, if **the Czech Republic** would have to pay a higher or lower amount of family benefits to children abroad only on the ground e.g. that the parents moved with the child to another Member State, this might breach the equality of children living in the Czech Republic and abroad, if the Czech Republic would remain the competent State. Obstacles for adjusting family benefits and possible breach of the equality principle were also advanced by e.g. the **Bulgarian** expert, arguing that adjustment might be against the Bulgarian Constitution and also Article 4 of Regulation (EC) No 883/2004 itself. In the **Slovenian** constitution unequal treatment based on any personal circumstance (which might include the place of residence of children) is as a rule

prohibited, unless it could be proven that formally unequal treatment and positive measures are required to guarantee substantive (material) equality (although reducing family benefits might be difficult to perceive as a positive measure).

For the **legislative acts**, it is argued that national law would either have to be modified (since no adjustment is provided for, e.g. in **AT**; there is also no parallel to it in **BE**, **HR** or **SI** law), or the (accordingly modified) coordination Regulation would have to be directly applicable. However, in some Member States there seem to be specific conditions. For instance in **Luxembourg**, the *Caisse nationale des prestations familiales* (CNPF) would be in favour of such reform under one precise condition: the coordination Regulation has to be changed in accordance with the coordination provisions regarding unemployment benefits. For example, a Polish institution would pay family benefits according to the living costs in Poland to the children of a parent working in Luxembourg and the CNPF would have to pay the differential amount. In this case, the CNPF might agree with this change, if the costs could be reimbursed by the CNPF to the Polish institution in other words, if it would not have to pay the differential amount directly to the parent/child residing in Poland. The financial channels would have to be changed from the parent/child to the institution (these suggestions are very similar to the ones we have further elaborated under Options 2 and 3).

What appears equally important as pure national law is the **purpose** (the philosophy) of family benefits in the Member States (which are 'behind' legal rules). It is argued that the adjustment of family benefits according to the living costs of the individual family is quite odd from a **Swedish** point of view, since family benefits according to national legislation are flat-rate and only vary with the number of children. A similar argument was advanced e.g. by **Slovenia**, where certain family benefits are (indirectly) linked to the minimum or average wage in the country. Adjusting them according to the living costs in another Member State might distort this balance. Also in **Poland** there is no criterion of the cost of living to determine family benefits.

The **Croatian** Act on Child Allowance would have to be amended accordingly, but such an amendment could be contrary to the national situation. The calculation of the State Budget Base (see 4.1.2) would also have to follow the costs of living and be adjusted accordingly. Although the living costs have increased in Croatia in the last decade, the State Budget Base, which is the base for calculation of many other benefits (not only within the family benefits system) has not been changed since 2002. The latest available Household Income Survey of 2011, published by the Croatian Bureau of Statistics, for example shows a dramatic increase in the percentage of households which have a lower income than the living costs (70% of households, in comparison with 40% of households in the previous year). However, there are no plans to recalculate and adjust the amount of the State Budget Base. An obligation to perform adjustments at European level could result in pressure also for the purely national cases.

This is even more the case with income-related family benefits. It is argued that adjustment of family benefits, whether an increase or a decrease, would sit uneasily with the contributory nature of the 'professional' benefit in **Belgium**, since it would loosen the nexus between the amount of the benefit received and the amount of the contributions paid (for this reasoning we also refer to 5.2.).

From this point of view the current coordination regime is perceived as socially just, since it is in the first place established to enable economic mobility within the EU. In a Member State with primary competence, (unadjusted) contributions and taxes are paid, from which also family benefits are being financed. In addition, it is argued that living costs may also be distinct within one Member State (e.g. in the capital city,

compared to other towns and rural areas), but this has no influence on the level of family benefits. The same principle might be applied also Union-wide.

This leads us to another interesting aspect. Imagine a Member State has already today in its **national legislation a rule which stipulates such adjustments** (e.g. higher family benefits in the big cities or in regions with higher living costs than in the rest of the country). Would this Member State be entitled to apply this national rule already today (under the current wording of Regulation (EC) No 883/2004) and reduce or increase its family benefits for children residing in another Member State, or would it be obliged to grant the amount of the region where the migrant worker actually works on its territory also for children resident in another Member State? The existing court rulings are not at all clear. While the EFTA Court seems to favour the first approach,[78] the Court of Justice of the European Union (CJEU) seems to support the latter one.[79] This is also an aspect which would merit further examination.

Would such adjustments be possible from our point of view?

Introductory remarks

First of all, we have to mention that we all considered it very important that this analysis was done and that all the pros and cons were very carefully examined. We have to admit that we do not see this question completely in the same way. While some of us were convinced that an adjustment of family benefits would be in contradiction to the fundamental principles of the TFEU, others thought that it could be justified and thus not be that problematic. The following part has to be read bearing these divergent opinions of the authors in mind.

Would it be legally possible to adjust family benefits to the costs of living?

It should be examined if such adjustments (which lead to reduced or increased amounts of benefits depending on the Member States involved) are in conformity with the general principles of the TFEU (e.g. equal treatment of migrant workers under Article 45, the export obligation under Article 48, but also the core principles of coordination enshrined in Regulation (EC) No 883/2004 itself, e.g. neutrality, assimilation of facts, equal treatment and exportability). Of course, this is a question which has to be examined very carefully and does not lie within our mandate. Nevertheless, if the TFEU does not allow such measures under any circumstances this would – without any doubt – also influence the impact assessment.

Any modification of the Regulations which goes for an adjustment of family benefits requires a careful review. The following considerations could be taken into account when analysing them as far as the adjustment procedures could affect the coordination especially concerning the **neutrality principle**, the general **assimilation of facts** principle, the **equality of treatment** principle and the principle **of exportability** of the acquired rights.

Neutrality principle

As is well-known, the TFEU provides for the coordination, not the harmonisation, of the legislation of the Member States, with regard to differences between the Member

[78] Case E-3/05, *EFTA Surveillance Authority* v *The Kingdom of Norway* (concerning the Finnmark supplement).
[79] Judgment in *Gouvernement de la Communauté française and Gouvernement Wallon*, C-212/06, EU:C:2008:178 (concerning the Flemish care insurance).

States' social security systems and, consequently, between the rights of persons working in the different Member States. It follows that those substantive and procedural differences between the Member States' social security systems, and hence between the rights of the persons working in the Member States, are unaffected by the Treaty.[80]

The coordination Regulation, with regard to family benefits, has so far identified the applicable social security legislation and granted migrants the right to obtain a certain benefit as established in said national social security legislation. Under the scenarios envisaged here, the Regulation would go a step further by introducing an adjustment of the amount of the benefit established by the national legislation. Even if the substance of the national legislation remains unchanged, its result would be distorted.

As the CJEU has said, the objective of the free movement of workers within the EU is facilitated if conditions of employment (including social security rules), are as similar as possible in the various Member States. However, this objective is imperilled and made more difficult to realise if unnecessary differences in the social security rules are introduced by the Regulations. According to the Treaty, the EU legislature must refrain from adding to the disparities which already stem from the absence of harmonisation of national legislations (due to the famous *Pinna* case).[81] It would be important to determine whether or not the adjustment procedures constitute such an unnecessary disparity. However, of course *Pinna* concerned a situation in which all Member States applied one coordination, while France was allowed, pursuant to the Regulation, to apply a different coordination. Therefore, it has to be examined if the *Pinna* obstacle would also apply to a rule under which all Member States have to adjust their benefits in the same way.

The Regulation's **conflict rules** have an indirect effect, as they only determine the national legislation applicable.[82] Under this law, the protection of the migrant (*lex loci laboris* in our case) can be more or less advantageous to the interests of the migrant.

Under the applicable law, the Regulations guarantee, on the one hand, that the migrant is **treated equally** with the nationals assured under this legislation (we will return to this point later on), and on the other hand, that he or she does **not lose any of the nationals' benefits** that he or she has been entitled to if the Regulations had not been applied. This is the so-called *Petroni* principle, establishing that the Regulations cannot freely limit benefits received in the light of the national legislation alone.[83] In fact, according to Articles 45 and 48 TFEU, which constitute the basis of the coordination, "*limitation may be imposed on migrant workers to balance the social security advantages which they derive from the Community regulations and which they could not obtain without them*", but the Regulations may not withdraw or reduce the social security advantages that derive from the legislation of a single Member State.[84]

Therefore, it could be said that the adjustment procedure could only be applied if the right to the family benefit was opened by the Regulations only (no entitlement under national law alone), i.e. by applying the aggregation of periods or the assimilation of

[80] Judgment in *Lenoir*, C-313/86, EU:C:1988:452, paragraph 13 and judgment in *Hervein and Lorthiois*, C-393/99 and C-394/99, EU:C:2002:182, paragraph 51.
[81] Judgment in *Pinna v Caisse d'allocations familiales de la Savoie,* C-41/84, EU:C:1986:1, paragraph 21.
[82] Judgment in *Hervein and Lorthiois* EU:C:2002:182, paragraph 53.
[83] Judgment in *Petroni*, C-24/75, EU:C:1975:129. On the application of this principle on the differential supplement of family benefits, see the judgment in *Dammer,* C-168/88, not available, paragraph 21. The same principle is also followed in the judgment in *Bosmann* EU:C:2008:290, paragraph 30, for letting a Member State which lacks competence retain (under some conditions) the possibility of granting family benefits (voluntarily?) if there are specific and particularly close connecting factors between the territory of that State and the situation at issue. This possibility disappears when there are not enough connecting factors (see the judgment in *B.*, C-394/13, EU:C:2014:2199).
[84] Judgment in *Jerzak*, C-279/82, EU:C:1983:228, paragraphs 11 and 12.

facts mechanisms (e.g. concerning the residence of the child) envisaged by the Regulations. If the right was recognised by mere application of the national social security legislation, the entitlement would be considered autonomous from and intangible for the Regulations. This important limitation for the EU legislature, defending the intangibility of autonomous 'national benefits', is a hermeneutical principle applied repeatedly by the CJEU since 1975 in the *Petroni* case.

General assimilation of facts principle

This principle envisaged under Article 5(b) of Regulation (EC) No 883/2004 should also be considered. Children living in a different Member State have to be treated as if they were residing in the competent Member State with regard to the acquisition of the right to a benefit and the calculation of the amount of the benefit. There is even a specific and a partly reiterative ad-hoc rule regarding family benefits under Article 67 of the Regulation.[85]

Establishing an adjustment procedure for the calculation of the amount of the benefit of the children living abroad could be in contradiction with the assimilation principle. In fact, the adjustment would result in an unequal treatment of a certain group of migrants, i.e. those leaving their children in their home Member State. But, of course, the whole Article 5 of the Regulation is under the condition "*unless otherwise provided in the Regulation*", and thus, the EU legislature could in theory deviate from these principles. This unequal treatment of children depending on their place of residence could be considered an indirect discrimination unless there would be a reasonable and objective justification for this measure and a reasonable proportionality between the means employed and that legitimate aim which is sought to be realised.

Equality of treatment principle

Finally, the principle of **equal treatment** could be affected especially when considering downwards adjustment. Under such circumstances, the migrant worker would not enjoy the same benefits as the sedentary workers, something that may contravene Article 4 of Regulation (EC) No 883/2004. Furthermore, the level of protection will depend on the living standards of the Member State where his or her children live. With regard to family benefits, there would be no equality of treatment between migrant workers and domestic workers. From this point of view, it can be argued that the employed person concerned would be impeded in his or her right to free movement.

From another perspective it could be argued that, if the purpose of the family benefit is to meet family expenses, children are protected to the level established by the competent Member State's social security system as far as a similar rate of their family expenses is being covered. Following this argument, the principle of equal treatment would be broken in our Sub-option 2c only when the upwards adjustment is not applied. But even if we admit that under the current Regulation there is a certain overprotection of children living abroad compared to children living in the competent Member State, this would not be breaking the equality principle, as the Regulations

[85] The aim of this rule, envisaged in the precedent Regulation, was to prevent Member States from making entitlement to, and the amount of, family benefits dependent on residence of the worker's family members in the Member State providing the benefits, so that EU workers are not deterred from exercising their right to freedom of movement (see, in particular, the judgment in *Merino García v Bundesanstalt für Arbeit*, C-266/95, EU:C:1997:292, paragraph 28).

may provide a more favourable treatment of migrant workers compared to sedentary workers, as stated by the CJEU.[86]

The adjustment procedure under this option could remind one of the *Pinna I* case. Although the situation was slightly similar (a worker insured in France whose children were residing in another Member State received a different benefit from the workers whose children were residing in France), the provision included in the Regulation was fairly different. It established that, as the competent Member State, France could pay the family benefits granted by the Member State of residences of the children instead of the family benefits they granted to children residing in France. The CJEU considered this provision illegal because it gave rise to an indirect discrimination on grounds of nationality, as the unjustified provision denied the right to obtain French family benefits to a group of workers that consisted mainly of migrants. The CJEU stated that the right to freedom of movement was at stake if the migrant worker received less than the national workers just because his or her spouse and children remained in the Member State of origin.

Unlike *Pinna I*, our Option 2 proposes the adjustment of the family benefits provided by the competent Member State to the living standards of the Member State of residence of the children, not the substitution of those benefits for the ones provided by the Member State of residence of the children. It could be argued that all children entitled to benefits in a certain Member State will receive a benefit covering the same rate of their protected needs, irrespective of their place of residence, at least under the first Sub-options 2a and 2b analysed. For Sub-option 2c this argument could not be used.

Finally, the references to the first recital of Regulation (EC) No 883/2004[87] by the CJEU[88] should be taken into account. The CJEU stated that migrant workers leave their countries to **improve their living standard**; not to maintain it.

Exportability of the acquired rights principle

As is well-known, Article 48 TFEU on the minimum content of the coordination Regulations mentions only two principles: aggregation and exportability of the acquired rights. Article 7 of Regulation (EC) No 883/2004 developing the exportability principle establishes that "*Unless otherwise provided for by this Regulation, **cash benefits** payable under the legislation of one or more Member States or under this Regulation **shall not be subject to any reduction, amendment**, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his/her family reside in a Member State other than that in which the institution responsible for providing benefits is situated.*"

Even if family benefits are, in this case, not subjected to a real exportation, and exceptions to this exportation principle have been accepted in relation to other types of benefits, this provision should also be considered when determining the viability of adjusting the family benefits on the basis of the fact that the members of the family reside in another Member State.

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[86] Judgment in *Movrin*, C-73/99, EU:C:2000:369, paragraph 51: "*That consequence would result not from the interpretation of Community law but from the system at present in force, which, in the absence of a common social security scheme, is based on a simple coordination of national legislative systems which have not been harmonised (see, in particular, Case 27/71 Keller v Caisse Régionale d'Assurance Vieillesse des Travailleurs Salariés de Strasbourg [1971] ECR 885, paragraph 13, and Case 22/77 Fonds National de Retraite des Ouvriers Mineurs v Mura [1977] ECR1699, paragraph 10)*".

[87] "*The rules for coordination of national social security systems fall within the framework of free movement of persons and should contribute towards **improving their standard of living and conditions of employment***".

[88] See e.g. the judgment in *Hudzinski and Wawrzyniak* EU:C:2012:339, paragraph 47; and the judgment in *Bosmann* EU:C:2008:290, paragraph 30.

From our point of view it goes without saying that any benefits which are based on contributions where the amount of the benefit also reflects the duration of the payment and the amount of these contributions (classic example: pensions) have to be exported without any restriction. If benefits are lump sums or specific amounts to cover special needs inside the Member State concerned, the CJEU has already accepted export restrictions for special non-contributory cash benefits (no export at all).[89] Would it be the same if we introduced an export restriction for family benefits (by adjusting them to the local living costs)? Of course, these benefits cannot be considered as being 'special'. Consequently, the arguments which speak in favour of non-export of special non-contributory cash benefits as a rule cannot be used in relation to non-contributory family benefits. So, other arguments must be used to justify such a deviation from today's principles. Anyhow, such a solution would only be justifiable in relation to benefits which are not income-related like e.g. the child-raising benefits with an income replacement function (see 4.1.4). **Therefore, from our point of view any adjustment option would need a special coordination for these benefits to stay in conformity with the TFEU.**

Finally, the **case law of the Strasbourg ECHR** on benefits considered as *private property* could merit mentioning (e.g. case 9134/06, *Efe against Austria*, which seems to indicate that the ECHR allows different treatment concerning the amount of family benefits for children inside and outside a State, but, of course, taking into account the much more developed principles in the EU we are convinced that this cannot be transposed 1:1 also in the EU; thus, also this judgment cannot be used as an argument to justify the adjustment approach under the Regulation).

Some final additional remarks

We have also found some additional hints which we would like to mention:

- In one case, Advocate General Kokott already pleaded for an adjustment of a benefit by taking into account the different living costs to avoid results which are embarrassing from the exporting Member State's point of view.[90]
- Just for consideration of the decision-makers we also would like to mention the way the remuneration of EU civil servants is adjusted in case of service outside Belgium and Luxemburg. Due to the EU Staff Regulations[91] also in these cases an adjustment to the different living costs has to be made (Article 64 of the Staff Regulations – of course, this concerns only the salary[92]). The same adjustment seems to be applicable also to the family allowances paid under the Staff Regulations (Article 67(4)[93]). The relevant tables are published on a yearly basis in the Official Journal.[94] These indexes slightly differ from the Eurostat indexes mentioned in chapter 5.1 as not the EU-28 are the factor 100 from which all calculations have to start, but the situation in Belgium and Luxemburg. Therefore, the figures indicated for the different Member States cannot be the same as the ones from Eurostat. As such an adjustment has

[89] Judgment in *Snares*, C-20/96, EU:C:1997:518.
[90] Opinion of the Advocate General in *Hosse,* C-286/03, EU:C:2005:621, paragraph 109.
[91] Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (OJ 45, 14.6.1962, p. 1385, as amended).
[92] It seems to be a common feature of many remuneration systems that they adjust at least some parts of the salary to local costs; this could be found e.g. also for diplomats or other civil servants, but also for employees of private employers who post them abroad. It seems that the general non-discrimination principle which, of course, covers also the remuneration does not create any problems in this respect.
[93] But we have to be careful! Interestingly this adjustment only applies if the allowance is directly paid to a person other than the official to whom the custody of the child is entrusted.
[94] For the period beginning with 1.7.2014: OJ C 444, 12.12.2014, p. 10.

already been done for decades for EU civil servants,[95] this seems to be, from our point of view, an interesting model which could also be used if the decision is taken to make an adjustment also of family benefits granted under Regulation (EC) No 883/2004. Of course, it should be further examined if these rules for EU civil servants can give any answer concerning a valid legal base to introduce such measures for migrant workers between Member States.

Taking into account all these different aspects we think that, after this short examination which really did not go into depth, it seems that such an adjustment should be further analysed.

[95] Taking into account the mandate of this report we have not further examined whether this scheme for EU civil servants has already been disputed or even analysed by the CJEU.

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