Analytical Report 2017 on mutual assistance and sincere cooperation

An inquiry into the cooperation to enforce the coordination Regulations and to combat fraud and error

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Directorate-General for Employment, Social Affairs and Inclusion
FreSsco (Contract No VC/2016/0743 'Network of Experts on intra-EU mobility – social security coordination and free movement of workers / Lot 1: Legal expertise in the field of social security coordination and free movement of workers')

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EXECUTIVE SUMMARY

Good administration and cooperation can be regarded as of paramount importance for the smooth functioning of the coordination Regulations and might be considered as the fifth general coordination principle. Good cooperation is a set of indispensable rules for the good functioning of the coordination system. Throughout the different modifications to the coordination Regulations, this principle has been vested with a higher status. During recent years this principle has gained further significance in the context of social fraud. Trying to combat social fraud can be complicated and inefficient because of different practical and legal problems of cooperation between administrations within one Member State (internal, national cooperation) and because of problems of cooperation between administrations of different Member States (external, international cooperation).

Multi-national but also multi-dimensional cooperation is required in order to successfully combat social fraud and abuse. Good exchange of information and cooperation between the competent institutions within the framework of coordination Regulations (EC) No 883/2004 and (EC) No 987/2009 could contribute to this objective. A set of rules has therefore been established under the coordination Regulations. These provisions could be considered an elaboration of the general principle of sincere cooperation within EU law, enacted in Article 4 (3) of the Treaty on European Union (TEU), according to which the Member States have to cooperate in good faith in their dealings with the EU as well as among themselves. The characteristics of this cooperation under the coordination Regulations are manifold: communication of relevant information (which may affect the implementation of the Regulations) between the authorities; good administrative assistance according to which an institution of a Member State may request the relevant authority of another Member State to lend its good support to the first institution in providing information; direct communication between the authorities and with the insured persons (based on the principles of public service, efficiency, active assistance, rapid delivery and accessibility (often through electronic exchange of data); the prohibition of the rejection of claims or documents based on language; the mutual information duty between the insured persons and the competent authorities (*e.g.* of any change in the personal or family situation which affects their right to benefits or the obligation for notification of decisions); the avoidance of interpretation difficulties and differences of views between institutions; and the obligation for the latter to provide certain information "within a reasonable period".

In a strict sense the principle of sincere cooperation also includes recovery of incorrectly paid benefits, recovery of provisional payments and contributions, and offsetting and assistance with recovery. The Regulations contain important improvements and developments in this field of cooperation, which can be found in the taxation field. The application of these principles is complex and many clarifications are missing, raising the risk that they may not always be in the interest of the persons concerned. Recommendations for improvement, some of them based on other European procedural rules, are currently under discussion.

Another key aspect of good administrative cooperation to combat social fraud is the (electronic) exchange of data, and the mutual provision of (digital) information. The use of databases is gaining importance and becoming more widespread throughout the Member States. This exchange of information should be fast, safe and efficient, which is definitively important in a cross-border context. However, the privacy argument is frequently invoked in order to refuse to exchange information requested by a competent body of another Member State. While this argument of privacy may be used by other institutions for not transmitting the requested information, it may also be invoked at a later stage and result in a finding of unlawfully obtained proof in violation of the law and/or individual privacy. For all these reasons the framework within which this exchange takes place is of the utmost importance. The impact of these privacy arguments should not be underestimated, just as the borderlines are not always very clear. It cannot be ignored that the issue of privacy introduces limits to the strategy against social fraud. As

demonstrated by the Court of Justice of the European Union, the question can be asked whether all cases in which data are currently exchanged in the context of (cross-border) social fraud are actually in compliance with all privacy and data protection requirements. Recently a strengthening of European level data protection and associated rights in the framework of the coordination Regulations were proposed, but further investigations in this domain are recommended.

It should be noted that the edifice of administrative cooperation rules in the framework of Regulations (EC) No 883/2004 and (EC) No 987/2009 are not conceived as intentional instruments for countering fraud and abuse. From that perspective it might prove worthwhile to look beyond the legal framework of the coordination Regulations in order to see how other legal fields are dealing with comparable problems. Posting Directive 96/71/EC and Enforcement Directive 2014/67/EU have set up a system of measures that should improve posted workers' rights, eliminate abuse, and attain fairer competition with a better level playing field. Furthermore, inspiration might also be found in domains outside social law. The provisions of the TEU regarding the area of freedom, security and justice include a legal basis for Union acts in the field of judicial cooperation in both civil and criminal matters as well as police cooperation in relation to the prevention, detection and investigation of criminal offences. First, it would be interesting to see to what extent some of these instruments of judicial and police cooperation are already being used for mutual assistance in the field of social security. In this respect, it must be emphasised that misconduct with regard to social security (benefits or contributions) may only come within the scope of cooperation instruments in criminal matters, if the behaviour potentially constitutes a criminal or at least administrative offence. However, deciding if and when certain behaviour with regard to social security may constitute a (criminal) offence falls within the competence of the Member States.

Furthermore, these instruments often focus on areas of serious crime, and do not – although this is not completely excluded – include specific offences with regard to social security. It would also be interesting to find out how those instruments are dealing with certain problems of cross-border mutual assistance, which could complement or serve as an example for social security regulation.

In this report a toolbox of possible instruments has been selected and examined in order to find out if they might be helpful to further develop and improve cooperation under the social security Regulations. These elements include joint teams and participation of officials in other Member States; the setting-up of central European data repositories; exploring the extent to which more of a push function could be installed for the mutual information requirements; the introduction of clearly defined and therefore limited grounds for refusal or non-recognition; the strengthening of institutionalised networks and national contact points so that they have the necessary powers and tools in order to effectively execute their tasks; stricter rules and clarifications with respect to the sending of documents; the introduction of more fixed deadlines and time limits; and finally more specifications on the expenses incurred as a result of the general principle of mutual recognition.

1. INTRODUCTION

1.1. Fraud, abuse and cooperation

Good administration and cooperation can be regarded as of paramount importance for the smooth functioning of the coordination Regulations. Such cooperation and communication is an absolute requirement for the other principles of coordination, the latter being impossible to operate without the former. Without a strong mutual cooperation, the Regulations would simply be a virtual reality, of great theoretical value, but of very limited efficacy. The practical application of principles as equal treatment, the aggregation of periods, the export of benefits or the determination of the applicable legislation, would not be achievable without the intervention of the relevant administrations of the Member States. While already acknowledged under the previous Regulations (EEC) No 1408/71[1] and (EEC) No 574/72,[2] this principle has been vested with a higher status in Regulations (EC) No 883/2004[3] and (EC) No 987/2009.[4] An efficient policy therefore requires a well-elaborated administrative cooperation and collaboration between the Member States.

The principle of sincere cooperation is also a general principle enshrined in Article 4 (3) TEU[5] that requires from all authorities in the Member States, to take all appropriate measures to ensure the fulfilment of the obligations arising out of Union Law.

Such cooperation and collaboration is required for an efficient working and allocation of social security benefits to insured persons in a cross-border situation, minimising the risk of overlapping entitlements and ensuring that national conditions of entitlement are observed. In addition, good administrative cooperation is also considered a key element for combating social fraud. However, the strategy for responding to social fraud has not always been a central focus in mutual cooperation, which in principle was meant to work in the interest of the persons concerned and not to control them.

The interest in combating social fraud has known a certain evolution. The authors of Regulations (EEC) No 1408/71 and (EEC) No 574/72 focused on mutual cooperation in order to guarantee citizens their rights and benefits. In fact, for example the exchange of the different forms can be considered a kind of mutual cooperation. Nevertheless, in principle fraud and abuse and its social or political importance was at that time not so significant as it is now. For this reason, only in some articles of the text can we find special concrete provisions to avoid fraud and abuse. Of particular importance are the articles related to the recovery of undue benefits.[6] However, it has to be stressed that the procedure for or implementation of the recovery of contributions, of cardinal importance, was considered a matter of bilateral agreements.[7] Contrary to social security law, some EU labour law instruments for example did explicitly refer to social fraud. According to Article 4 of Directive 96/71/EC on the posting of workers, the Member States shall make provision for cooperation between the public authorities. Such cooperation shall in particular consist in replying to reasoned requests from those

[1] 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, OJ L 149, 5.7.1971, p. 2-50.

[2] Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 74, 27.3.1972, p. 1-83.

[3] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004, p. 1-123.

[4] 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, OJ L 284, 30.10.2009, p. 1–42

[5] Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, p. 13-390.

[6] Articles 110 to 114 of Regulation (EEC) 574/72.

[7] Article 116 of Regulation (EEC) 574/72.

authorities for information on the transnational hiring of workers, including manifest abuses or possible cases of unlawful transnational activities. Such a reference was missing in the Regulation. A general prohibition on fraud and abuse of rights could also be found in Article 35 of Free Movement Directive 2004/38/EC.[8] This provision allows the Member States to enact or maintain measures that avert abuse of rights and fraud. Article 35 (i) allocates anti-fraud responsibilities and (ii) clarifies what means can be deployed to that end. Article 35 of Directive 2004/38/EC mentions that some forms of fraud like 'marriages of convenience' lead to the inapplicability of the Directive *ratione personae.*

Since the 2004 enlargement there has been an increase in interest in cross-national fraud amongst policy makers and in the media across the EU.[9] This focus has increased further alongside the rise in unemployment, partial employment and insecure jobs, in the wake of the banking crisis of 2007-2008 and the consequent recession in many countries, which has placed greater demands on social security with some countries responding with austerity policies that have focused on cuts to social security budgets combined with increasing conditionality and sanctions attached to working age benefits. Many of the stories in the media have focused on foreign benefit claimants allegedly taking advantage of the "generous" welfare systems of the host countries.[10] In this context stories about "benefit tourism" have appeared in which it is alleged that EU citizens and in particular those from central and Eastern European member countries are abusing free movement rights. These stories proliferated during the run up to the UK Referendum in 2016.[11] However, the evidence suggests that fears of "benefit tourism" are unfounded[12] and some commentators have characterised the increasing focus in some elements of the media on stories about undeserving, feckless and fraudulent benefit claimants as a "Moral Panic"[13] in which the most vulnerable elements of society are demonised and even criminalised. Thus while policy makers at both national and EU level need to ensure that public funds reach those who meet the benefit entitlement conditions, they need to be careful that the response is proportionate, evidence-based and does not contribute to a media and political "Moral Panic".

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[8] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, p. 77-123.

[9] The UK government informed the Social Security Advisory Committee that the underlying purpose of the new Right to Reside Test is to *"safeguard the UK's social security system from exploitation by people who wish to come to the UK not to work but to live off benefits."* (Social Security Advisory Committee (SSAC) (2004), The Social Security (Habitual Residence) Amendment Regulations 2004: 3).

[10] In what might be the first use of the term 'benefit tourism' the UK Secretary of State for Social Security told the 1993 Conservative Party Conference that: *"Community rules have opened up a new abuse: ›benefit tourism‹. People travelling round pretending to look for work. But really looking for the best benefits. Not so much a Cooks' tour as a Crooks tour" (*Conservative Party Press Release, 6/10/93 cited by NACAB (1996) *Failing the test: CAB clients' experience of the habitual residence test in social security*. London, NACAB).

[11] A national opinion poll reported by Ipsos Mori on 9 October 2015 found that 58% of respondents thought there should be further restrictions on free movement of EU citizens and a further 14% said that free movement between EU countries should be stopped altogether. Of those who said they wanted more restriction on free movement, 59% cited "people coming to claim benefits" as their reason; Ipsos Mori 9 October 2015 'EU Referendum: Controls on movement of EU citizens key issue for majority of Britons', https://www.ipsos-mori.com/researchpublications/

researcharchive/3631/EU-Referendum-Controls-on-movement-of-EU-citizens-key-issue-for-majority-of-Britons.aspx.

[12] ICF GHK in association with Milieu Ltd (2013) *A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra- EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence*, European Commission, DG Employment, Social Affairs and Inclusion, 14 October; Dustmann, C. and Frattini, T. (2014) 'The Fiscal Effects of Immigration to the UK' *The Economic Journal*, Royal Economic Society. John Wiley & Sons, Oxford.

[13] Cohen, who coined the term, defined moral panic as "*… [a] condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests*". (Cohen, S. (1972) *Folk Devils and Moral Panics*, London: MacGibbon and Kee: 9).

In this context, many national social security schemes of Europe have increased their focus on social security fraud. Notwithstanding different national legislative initiatives and remedies against fraudulent application of certain rules, national inspection services remain confronted with the fundamental difficulty and challenge to apply these control mechanisms on foreign employers and employees. The effective application of national legislation on cross-border employment leads to a number of practical difficulties. For combating such phenomenon, a policy requires a well-elaborated administrative cooperation and collaboration between the Member States. Therefore, the Institutions of the European Union and the coordination instrument of social security have to be engaged actively and act strongly towards this direction, combating these risks that challenge the essence and roots of the European project und undermine the credibility and suitability of Regulations (EC) No 883/2004 and (EC) No 987/2009, which without any doubt can be considered as one of the pillars of the Europe of the citizens.

The real qualitative change in this field was produced with the adoption of Regulations (EC) No 883/2004 and (EC) No 987/2009, which implied a significant improvement in mutual cooperation as a tool for also combating cross-border fraud and abuse. The Institutions and the Member States were aware that technical developments on a European level might contribute to making administrations more efficient in their combat against cross-border fraud, abuse and error and, for this reason, that increased European intervention was required. In this regard cross-border fraud and abuse damages the full realisation of the free movement of workers and persons and potentially discredits this freedom which can be considered one of biggest achievements of the Europe of the citizens.

On the other hand, in recent years, the possibility of fraud and abuse has discovered an external dimension with some aspects of unfair globalisation which increases the competition between territories, products and services. In fact, the personal, material and territorial scope of fraud and abuse is extended as a result of among others delocalisation, virtual or physical transport networks, technological development, the increase of subcontractors, and e-work. As mentioned above, the previous Regulations (EEC) No 1408/71 and (EEC) No 574/72 did not refer to fraud. This did not exclude that combating fraud might have been at the origin of some legislative changes. According to Advocate General Gand, one of the first amendments of Regulation No 3[14] (entry into force 1964) was aimed to remove abuses of the posting regime.[15] The subjection of persons who are simultaneously employed in the territory of one Member State and self-employed in the territory of another Member State to the legislation of both States was, according to Advocate General Jacobs, motivated by the same fear of abuse and/or unfair competition.[16]

Still, in general any reference to fraud was missing. This changed with the adoption of the new Regulations (EC) No 883/2004 and (EC) No 987/2009. These provisions on cooperation and collaboration were strengthened.

The characteristics of this cooperation under the coordination Regulations include communication of relevant information (which may affect the implementation of the Regulations) between the authorities; good administrative assistance according to which an institution of a Member State requests the relevant authority of another Member State to lend its good support to the first institution in providing information; direct

[14] EAEC Council Regulation No 3 implementing Article 24 of the Treaty establishing the European Atomic Energy Community, OJ 17, 6.10.1958, p. 406-416.

[15] Opinion of AG Gand in *van der Vecht*, C-19/67, EU:C:1967:38, p. 363.

[16] Opinion of AG Jacobs in *Hervein,* C-393/99, EU:C:2001:204, paragraph 97: "It is clear that Article 14c(1)(b) is neither intended nor necessary to grant workers additional social cover. The purpose of that provision was, according to the concurrent explanations of the Commission and the Council, to prevent what certain Member States perceived at the time of adoption of Regulation No 1390/81 as a risk of abuse and/or unfair competition."

communication between the authorities and with the insured persons (based on the principles of public service, efficiency, active assistance, rapid delivery and accessibility (often through electronic exchange of data); the prohibition of the rejection of claims or documents based on the language; the mutual information duty between the insured persons and the competent authorities (*e.g.* of any change in the personal or family situation which affects their right to benefits or the obligation for notification of decisions); the avoidance of interpretation difficulties and differences of views between institutions; and the obligation for the latter to provide certain information "within a reasonable period".

For the first time also a reference to fraud and abuse was to be found in Recital 19 of Regulation (EC) No 987/2009. It is of special significance that Recital 19 of Regulation (EC) No 987/2009 as a statement of faith or principles, establishes that:

> "*Procedures between institutions for mutual assistance in recovery of social security claims should be strengthened in order to ensure more effective recovery and smooth functioning of the coordination rules. Effective recovery is also a means of preventing and tackling abuses and fraud and a way of ensuring the sustainability of social security schemes. This involves the adoption of new procedures, taking as a basis a number of existing provisions in Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures. Such new recovery procedures should be reviewed in the light of the experience after five years of implementation and adjusted if necessary, in particular to ensure they are fully operable"*.

A definition of fraud was proposed in the new proposal of the Commission amending Regulations (EC) No 883/2004 and (EC) No 987/2009[17]: "*any intentional act or omission to act, in order to obtain or receive social security benefits or to avoid to pay social security contributions, contrary to the law of a Member State"*.[18] This definition covers the use or presentation of false, incorrect or incomplete statements or documents or the non-disclosure of information in violation of a specific obligation. Moreover, it includes both benefits and contributions and thus the expenses and revenues of social security.

This proposal also contains a number of provisions that aim to provide, on the one hand, a legal basis for the exchange of personal data in the context of a correct application of these Regulations, and on the other hand measures to ensure that this exchange of data is in compliance with the *acquis communautaire* with respect to data protection.[19]

It is clear that the purpose is to assist Member States in their efforts to counter social fraud and abuse. "*This would enable a Member State to periodically compare data held by its competent institutions against that held by another Member State in order to identify errors or inconsistencies that require further investigation*."[20] The proposal furthermore refers to cross-border cooperation and exchange of data when countering *fraud and error*, as well as the possibility that the validity or correctness of documents could be harmed and the necessity of the exchange of data to make it possible to

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[17] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (COM(2016) 815 final); proposal for a new Article 1 (2) (ea) of Regulation (EC) No 987/2009.

[18] This EU level definition can be traced back to Point A (2) a of the Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 22 April 1999 on a Code of Conduct for improved cooperation between authorities of the Member States concerning the combating of transnational social security benefit and contribution fraud and undeclared work, and concerning the transnational hiring-out of workers, OJ C 125, 6.5.1999, p.1.

[19] COM (2016) 815 final; especially the proposals for a new wording of Article 2 (5) to (7) and Article 3 (3) of Regulation (EC) No 987/2009.

[20] COM (2016) 815 final; Recital 13 of the amending Regulation.

withdraw forms.[21] The recovery of amounts is also mentioned as a means to prevent and counter fraud and abuse

However, as "*the good is the enemy of the better*"[22] we have to concentrate on the present and on our common reality in the European Union, leaving for the future these global challenges. It should not be forgotten that Regulations (EC) No 883/2004 and (EC) No 987/2009 cannot be considered by themselves as a legal instrument addressed especially to combating fraud, abuse and error. In principle they were not conceived for this purpose. Nevertheless, the need to reinforce mutual cooperation is evident and the coordination Regulations cannot avoid and ignore this strong demand.

On the other hand, the response to fraud and abuse needs to use all the possible European legal instruments.

In addition, apart from the Regulations, a number of other instruments are in force that provide Member States with mechanisms to exchange information, to seek the collection of admissible evidence in criminal matters in a cross-border context and to strengthen cooperation between judicial, police and customs authorities including in matters of investigation, detention, extradition, enforcement and recovery, so far as this concerns cross-border social security fraud. Considering these interactions the objective is not only to take into account the goal of combating cross-border fraud and crime but also the need to uphold the rights of the suspect.

In his political guidelines (July 2014), President Jean-Claude Juncker announced that "*We have to fight social dumping and we will do it*". In fact, cross-border social fraud and abuse in social security is, directly or indirectly, a part of social dumping. In this regard, we have to emphasise that not only persons but also enterprises are involved in this issue, because in many cases public opinion blames workers and non-active people. However, the technics and methods used by enterprises and employers to escape and evade their obligations in the field of social security mechanisms are often very complex and intricate and very difficult to control by the competent institutions, especially since in the Regulation we are dealing with the legislations of 28+3 +1 States. Moreover, also mobile private persons, although on a different scale and with much less possibilities, can take advantage of the disparities of the existing national legislations and look to benefit from some grey areas which cannot be misused by sedentary citizens.

Recently, in May 2016 the European Commission set up the European Platform against undeclared work that brings together inspection services, relevant authorities and actors involved in responding to undeclared work to tackle this issue more effectively and efficiently, while fully respecting national competences and procedures. This platform facilitates the exchange of information, expertise and best practices related to countering undeclared work. The platform will also promote training for staff from various countries and identify common principles for inspections.[23]

In this respect, in his State of the Union address of September 2017, Mr Juncker announced plans to set up a European Labour Authority that will strengthen administrative cooperation and mutual trust for a fair mobility in the Single Market, and that would enhance the strategy against abuse of labour and social legislation and organise joint cross-border control activities and tackle undeclared work.

[21] See, among others, COM(2016) 815 final, proposal for a new wording of Article 5 (1) and (2) of Regulation (EC) No 987/2009.

[22] Dixit Voltaire.

[23] See Decision (EU) 2016/344 of 9 March 2016 on establishing a European Platform to enhance cooperation in tackling undeclared work, OJ L 65, 11 March 2016.

The objective of this report is to examine the interaction between different instruments in EU law concerning cross-border exchanges of information, the collection of admissible evidence in criminal matters, and cooperation between judicial, police and national authorities including in matters of detention, extradition, enforcement and recovery. In order to identify the problem and to understand the concrete need for cooperation and collaboration, the report first describes, using several examples, the steps that social security institutions/inspection services follow to tackle possible cases of cross-border fraud and error and to guarantee enforcement.

1.2. Some examples of cross-border fraud

Inspection services of all Member States are regularly confronted with different kinds of social fraud. Social fraud can be either benefit fraud or contribution fraud but is often a combination of both. Social fraud can be a purely national phenomenon or have a cross-border element, involving two or more Member States. It is not possible to list all modalities of fraud and abuse in this report. In order to facilitate a better understanding of the need for and the modalities of cooperation, some typical cases of fraud from all the chapters of the Regulations are described below. It is noted that all cases share the cross-border issue and require mutual cooperation of the different Member States for their solution.

Contribution fraud

- An employer owes to the social security institutions of Member State A contributions corresponding to the work of his or her employees in this State. The employer resides in Member State B where s/he has all his or her patrimony. Member State A wants to recover the unpaid contributions. On the other hand, the employer has retained the part of contributions corresponding to the workers and has not transferred this amount to the social security institutions. This action is considered as a crime according the criminal law of Member State A.

- A self-employed person who normally pursues a substantial part of his or her activity as a self-employed person in Member State A and Member State B, declares that s/he resides in Member State A, where the level of contributions is lower than in Member State B. After some inquires it is proven that the person concerned resides in Member State B.

- An international enterprise with its basis in Member State B employs workers in Member State A. However, these workers are considered posted workers, because the employer has provided deliberately incorrect information (*e.g*. concerning the percentage of the activities in the Member State of establishment or the previous insurance of the posted employees). For this reason, the enterprise pays contributions in Member State B, where the level of contributions is much lower than in State A. The labour inspection of country A states that the workers concerned are not considered as posted workers and, therefore, the corresponding contributions have to be paid in Member State A.

Health care fraud (benefits in kind)

- A person who receives a pension from State A resides in State B, where s/he is not entitled to any pension. As contributions are deducted from the pension in accordance with the legislation of Member State A, the person concerned, to avoid this payment in State A, declares in Member State B that s/he does not receive any pension from any Member State. As health care benefits in Member State B are based on residence, the competent institutions of this State acknowledge the right of the person concerned to the corresponding benefits in kind. After a routine check, the inspection services of Member State B find out that the competent State for the health care benefits is country A, which never issued any form. Taking into account the benefits in kind provided to the person concerned

by State B, its competent institution wishes to recover all the costs either directly from the pensioner who has his or her patrimony in State A or from the competent institution of State A.

- A person insured in State A travels to State B with the purpose of receiving a special treatment. The person concerned does not say that s/he is insured in State A and does not present the European Health Insurance Card. Once the benefits in kind are provided and the invoices of the costs presented to the person, s/he argues that s/he is insured in State A and shows the European Health Insurance Card. The competent institution of State A refuses the corresponding reimbursement because considers that the treatment was not urgent. The competent institution in State B starts the procedure for recovering the costs directly from the person concerned, who resides in State A.

- An enterprise based in State A offers fictitious working contracts to persons with serious heart diseases in State B, where contributions are paid. The persons concerned immediately are included in a list of heart transplantation. Some of them, due to their health condition, receive a treatment and get a transplanted heart. The labour Inspection of State B discovers that no real employment is carried out in State B and that the persons concerned are pensioners in State A. The competent Institution of State A refuses the reimbursement of the cost for the benefits provided. The fictitious workers return to State A.

Pension fraud

- A pensioner from State A works in State B. The legislation of State A establishes the incompatibility of the pension with an employment activity. The person concerned does not inform the competent institution of State A that s/he is pursuing a working activity in State B.

- A person who has worked in State A and B presents two claims for old-age pensions to the competent institutions of States A and B. S/he intentionally informs each institution only about the working periods completed in the State where the claim is presented without informing about the working periods completed in the other State. Both institutions acknowledge a national pension. The legislation of State A and B establish rules to prevent overlapping.

- A person who resides in State A receives a pension from State A and B. S/he also receives a small pension from State C (national pension), but has hidden this information from the competent institution in State A. Taking into account that the pensions of State A and B do not reach the minimum benefit fixed by the legislation of State A, the competent institution of the latter Member State awards a supplement equal to the difference between the total benefits due in State A and B. The amount of the pension of State C is not taken into account.

Long-term care benefit fraud

- A person residing in State A receives long-term benefits in cash from State B. The legislation of State A awards this kind of benefits to all residents without requiring any period of insurance. The person concerned does not inform the competent institution of State A about the benefits paid by State B.

Unemployment benefit fraud

- A wholly unemployed person receives unemployment benefits from State A. However, s/he works in State B without informing the competent institution of State B. The person concerned simultaneously receives salary and benefits.

Special non-contributory benefit (SNCB) fraud

- A person resides in State A, where s/he is entitled to means-tested benefits SNCBs due to the level of his or her resources. However, the person concerned has not declared income from State B. Taking into account these incomes the benefits would not be awarded.

- A pensioner from State A receives SNCBs due to the level of his or her resources. However, in reality s/he resides in State B without declaring this fact to the competent institution of State A. Moreover, as a resident in State B, s/he is also entitled to SNCBs in State B. The legislation of State A acknowledges non-contributory benefits to all residents. In fact, the person concerned has two formal (informal) legal residences.

1.3. Cooperation between the different administrative, judicial and social inspection services

Efforts to combat these types of fraud might often be complicated due to different practical and legal problems of cooperation between administrations of one Member State (internal, national cooperation) as well as due to problems of cooperation between administrations of different Member States (external, international cooperation).

1.3.1. Difficulties of cooperation within a Member State

Different public authorities are responsible for investigating and sanctioning violations of internal legal obligations with regard to paying social security contributions or receiving social security benefits. The prevention and prosecution of social fraud therefore involves various administrative bodies and inspection services as well as judicial and police services of a Member State. The responsibility for the various elements may fall on different institutions, and may be distributed differently in different countries. These bodies are not only housed within different government departments but also fall under different administrative, civil, social, fiscal and criminal law regulations of the Member State.24 For example, in Belgium, in practice the social inspection services are entrusted with the task of ensuring that employers and self-employed persons comply with social security law. Pursuant to the Belgian Social Criminal Code the social inspection services have wider powers than police services in the field of social security law. In Cyprus, the responsibility for investigating and sanctioning violations of internal legal obligations with regard to paying social security contributions or receiving social security benefitslies with inspectors of the social insurance services as well as with inspectors of the joint inspection units of various departments of the Ministry of Labour, Welfare and Social Insurance. In the Czech Republic, the Czech Social Security Administration (CSSA) is responsible for investigating and sanctioning violations of legal obligations with regard to paying social security contributions or receiving social security benefits (pensions and sickness benefits). The Czech Ministry of Labour and Social Affairs is competent for investigating and sanctioning with regard to family benefits, and the Labour Office of the Czech Republic and the labour inspectorates are responsible for employment benefits. In Denmark, the unemployment offices (a-kasser) are responsible for the investigation and sanctioning of unemployment benefits and Udbetaling Danmark for other social benefits. Generally, in Germany, the Public Pension Insurance authorities are in charge of supervising the payment of social security contributions or the receipt of social security benefits. They cooperate with the German customs authorities and other social insurance institutions in investigating and prosecuting illegal employment. In Switzerland, social welfare fraud investigation also involves different actors: the social security institutions because they have to enforce the law and may report irregularities, special control bodies (Article 68 LAVS – loi fédérale sur l'assurance-vieillesse et survivants) and prosecution authorities. In Croatia, the Tax Administration of the Ministry of Finance is responsible for

[24] Or of the different autonomous regions of the Member State.

monitoring and sanctioning violations of legal obligations with regard to paying social security contributions and taxes. In addition, when labour inspectors carrying out inspections within their jurisdiction have doubts about the financial legality of employers, they regularly inform the tax administration. If a competent Finnish institution (e.g. the Social Insurance Institution Kela) suspects fraud (or other kinds of malpractice) it is responsible for making a request for investigation to the police. Prior to that request, the competent institution investigates the suspicion in-house, i.e. whether there are grounds for a police investigation. If so, the police are responsible for the pre-trial investigation. Based on the record of the pre-trial investigation, a prosecutor will decide on a criminal charge. A district court has the duty to pass the judgment on possible sanctions. The decision of the district court can be appealed in a court of appeal. In France, the local URSSAF (Unions de Recouvrement des Cotisations de Sécurité Sociale et d'Allocations Familiales) are responsible for ensuring that social security contributions which are due have been paid. The URSSAF is responsible for detecting undeclared work or situations where contributions should have been paid in France and not in another Member State. The URSSAF are directly in contact with prosecutors who may start a criminal procedure.

These examples illustrate the very large number of competent control and inspection services which may complicate the cooperation between the competent bodies of a national State, demonstrating that there is a need for more procedures controlling cooperation and exchange of information between all these actors within national authorities.

Most countries permit the exchange of information internally between national public institutions (including BE, BG, CY, CZ, DK, DE, EL, FR and CH). For example, the Liechtenstein social security institution (*AHV/IV-Anstalt*) is allowed to deliver any data to other bodies (no matter if public or privately organised) required to enforce the law, while the Belgian Social Criminal Code contains some provisions regarding the exchange of information between social inspection services and between social inspection services and social security as well as other institutions. In Cyprus, the Social Insurance Services can access certain information from other government departments through the Government Data Warehouse. In the Czech Republic, the CSSA exchanges information with other national public institutions through an e-portal. There is also an obligation for private banks to provide information otherwise covered by banking confidentiality to tribunals, social insurance institutions and health insurance institutions. Italy permits the exchange of information only between public institutions. In Germany, there is a duty for authorities to provide relevant information to other authorities. In Switzerland, every administrative body is obliged to deliver any data to social security institutions (public or privately organised) required to pay social benefits, recover undue social benefits, prevent undue payments or collect social contributions. Each federal law in Switzerland concerning social security includes a corresponding or more specific data protection rule that allows transmission of data when justified. Data sharing is possible in Finland when there is a specific legal basis for the exchange or transfer of information, and in France data may circulate between institutions responsible for social security and taxation. In order to counter fraud a national registry (*répertoire national commun de protection sociale – RNCPS*) common to all social security institutions determines which information can be shared and by which institutions (Article L114-12-1 of the *Code de la sécurité sociale*). Croatia has several relevant provisions. A general provision of the Act on General Administrative Procedure prescribes that, where relevant, the exchange of data is mandatory in administrative proceedings. Other pieces of legislation contain more specific provisions. For example, Article 24 of the Act on the Central Register of Insurees provides that the Central Register (*REGOS*) will allow the use of data from the register to public bodies, judicial authorities and other users when they are authorised by regulation or when there is consent of the person to whom the data relate. However, in Iceland there is no legislation on information exchange, but there is good cooperation between national public institutions.

As the exchange of data may imply risks regarding the protection of the data and the privacy as well as the legal value of this information, most countries have a legal framework regulating cooperation between these institutions (including AT, BE, HR, CY, CZ, DK, FR, IS, and IE). For example in Austria, it is the Act on Combating Social Fraud (OJ 2015/113 as amended), while in Cyprus the Personal Data Processing (Protection of the Individual) Law of 2001 (No 138(I)/2001, as amended) is in force, and in Finland a general clause concerning inter-authority cooperation (of all authorities) is contained in the Administrative Procedure Act (434/2003). In Denmark, the main legal acts are the Executive Order on Legal Security and the Law on Personal Data. According to the Icelandic Law on Social Security No 100/2007, the Social Insurance Administration can receive information from pension funds, tax authorities, and employment agencies if the applicant has authorised that in the pension application. In Liechtenstein, different social security laws contain cooperation rules, such as Article 19ter *AHVG* (*Gesetz über die Alters- und Hinterlassenenversicherung*) (data exchange) or Article 69 *ALVG* (*Gesetz über die Arbeitslosenversicherung und die Insolvenzentschädigung*), which lays down a general obligation to cooperate for bodies involved in unemployment insurance. In Italy there are some legislative provisions that permit such information exchange, for example between the *INPS* (*Istituto Nazionale Previdenza Sociale)* and INAIL (*Istituto nazionale Assicurazione Infortuni sul Lavoro*), or between social security institutions and the *INL* (*Ispettorato Nazionale del Lavoro*), or between these bodies and the *Agenzia delle Entrate* (National Revenue Agency). In Greece, there is currently no legal framework, but legislation is pending.

1.3.2. Difficulties in cooperation between different Member States

Problems may significantly increase when the fraud crosses borders. As the jurisdiction of practically all inspection services in Member States is confined to their national (or regional) territory, whenever there is a cross-border element to a case, national inspection services need input from their foreign counterparts or other foreign administrative authorities.

The four examples set out below demonstrate the difficulties inspection services encounter and the measures they have in place to detect and prevent such cases from happening. These examples and some questions were presented to the FreSsco National Experts that should shed some light on how their inspection services would deal with cross-border fraud cases. Their replies demonstrate the various steps that different social security institutions/inspection services in Member States would follow in order to tackle possible cases of cross-border fraud and error and to guarantee enforcement. The first example concerns an issue of applicable legislation. In the second example the issue of applicable legislation is also related to labour issues. The third and fourth examples concern potential benefit fraud.

Scenario 1: An international haulage company

Facts: A haulage company based in Country A, which has comparatively high wages, taxes, contributions and employment standards, transfers the responsibility for the employment of its drivers to an intermediate company in Country B, which has lower taxes and social security contributions, and employment and health and safety standards. The drivers have never worked in or visited Country B, and in practice continue to work as they previously did, for the haulage company in Country A. However, under the new arrangement the intermediate company in Country B becomes the drivers' employer and invoices its client, *i.e*. the haulage company in Country A, for the supply of the drivers' services, thus removing the labour contract relationship between the haulage company in Country A and the drivers, reducing the drivers' rights as well as trade union support.

Q1. What approach would Country A take in this case?

Finland reported that in principle the A1 certificates issued by Country B would be accepted. In other Member States, if there is any doubt, the competent institutions would

themselves determine, based on a thorough examination of the facts with reference to the relevant law and criteria, whether the drivers' place of employment is located in Country A or has been transferred to Country B (*e.g*. AT, BG and FI). In many cases, on examination, the enterprises (employers), in this scenario meet these criteria (BG). If necessary, the situation would be clarified with the authorities of Country B (*e.g*. CY, FI, CH). If the competent authorities were convinced that the real employer is in Country A, they would negotiate with Country B to withdraw the A1 certificate. If Country B would not withdraw it, the competent authorities in Country A would start a dialogue procedure under Article 6 of Regulation (EC) No 987/2009 (*e.g*. FI, LI). Similarly, the social security insurance institution of the Czech Republic would focus on the question whether the company in Country B is merely a letterbox/brassplate company. If it was discovered that the company has been created solely for the purpose of bypassing the law, the competent Czech institutions would ask the competent institution in Country B to withdraw the A1 certificates and would insist that the employees are registered in the Czech system. In Croatia, if the Labour Inspectorate suspects fraudulent behaviour, it would initiate an investigation. Accordingly, during the first six months of 2017, the Croatian Labour Inspectorate has sent nine requests to other EU Member States through the IMI system in order to obtain information on workers posted to Croatia, due to reasonable suspicion that there was a possible fraudulent posting or a possible violation of employment regulations. In the same period, Croatia received 12 requests from other Member States.

Several Member States reported concrete cases. For example, in a Danish Labour Court case, *Kim Johansen Transport OÜ* of 9 April 2014, the Court argued that the Danish Trade Union could not take collective action against the transport firm Kim Johansen because its main transport activity was not in Denmark. The transport firm was established in Denmark, but had transferred employment responsibility to its firm established in Estonia, thus paying the drivers lower wages than according to Danish standards. Drivers primarily came from Eastern Europe and were involved in international transport at different places in Europe and not primarily in Denmark. In a response to a European parliamentary question, former Commissioner Lazlo noted that in such a situation applicable law is decided by the place where the transport is primarily carried out and the place to which the employee returns after completing his or her tasks, but that the habitual residence of the driver is of no relevance as such in determining the applicable law.

Spain reported that from a legal point of view, the haulage company based in Country B does not appear to be executing real work or services for the haulage company based in Country A, as far as it is not providing its personal and material resources and making use of its power of organisation and direction (a relationship of subordination). Such a situation would be considered an unlawful assignment of workers, as the real employer has been replaced by a formal employer in order to degrade the employees' working conditions. In Spain, only the legally authorised temporary employment agencies can temporarily transfer their employees to another company. If the Spanish labour inspectorate verified that there is an unlawful assignment of workers and the actual employer is the Company in Country A, this would be considered a very serious administrative infringement, punishable with a potentially large fine. Spanish labour courts could consider that the company in Country A is responsible for the salary and social security contributions and compensation of these employees in Spain. Under some circumstances, criminal courts could consider this situation as illegal trafficking of workers, which could constitute a crime against the rights of workers under the Penal Code. There is Spanish case law regarding the unlawful assignment of workers within Spain, but there have been no cases involving other EU Member States. The French respondent reports that a case similar to this scenario has been brought before the Administrative Commission with regard to seafarers who are recruited by Spanish

intermediate companies and then permanently "seconded" to French companies.[25] The link with the Spanish company is purely administrative. In this type of case, the French labour inspectorate considers that the employer is, in reality, the entity which actually bears the cost of the wages and not the entity which makes the payment. This example shows that the French labour inspectorate wishes to go beyond appearances and verifies which entity is the actual employer, *i.e*. the entity who has a relationship of subordination with the employee. French criminal courts often have to deal with similar cases where there is an "intermediate employer" located in another Member State where labour law and social security standards are lower than in France. These cases may involve a foreign interim agency. Several criminal infractions may be considered including illicit supply of workers, illegal subcontracting and/or undeclared work

Sweden reported that the Swedish National Tax Authority has deducted social security contributions from the company (in this example the haulage company). In one of these cases, the Administrative Court of Appeal in Gothenburg (case No 4068—4069-12) argued that the intermediate company had paid wages, but that they had not had any other responsibilities for the workers. The remuneration paid from the haulage company to the intermediate company did not cover the administration costs of the intermediate company and the companies were part of the same group. It was therefore, according to the Court, very likely that the haulage company had in fact been responsible for the staff and took the benefits and risks in this regard.

Q2. What would Country B do?

Ireland reported that it is fully recognised that the principle of free movement of workers needs to be balanced against the possible reduction in employment rights and social protection that can arise, as in this example, from companies transferring responsibility for the employment of its workers to other countries with lower social insurance contributions. These situations merit close monitoring, liaison with the other Member States involved, and enforcement of the relevant EU and national legislation. Malta pointed out that, given that this is an international transport company, the employer will be applying for PDs A1 in order for the drivers to be allowed to work in more than one Member State. Such PDs A1 will be issued on the basis of Article 13 of Regulation (EC) No 883/2004 – activities in two or more Member States. Currently there is no requirement that the employer must carry out substantial activities in that Member State to apply for the PDs A1 for his or her employees. So if Malta was Country B, the competent authorities would check whether the requirements in the current Article 14(5a) are fulfilled, namely where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out – and that it is not merely a letterbox company. If these criteria are met, there are no other legal checks which need to be carried out. On the other hand, if Country A has further supporting evidence which suggests a different scenario, a dialogue procedure may be initiated between Member State A and B.

Cyprus reported that with the assistance of the competent institutions in Country A, the competent Cypriot authorities would examine if the company in Cyprus was actually an employer from the standpoint of the employment relationship, the EU coordination Regulations and relevant Directives on free movement of labour and provision of services. If after examining all available data it was concluded that the company in Country B was a letterbox company, the Cypriot services would inform the Member State which issued the decision on the applicable legislation of their findings. Similarly, if the Czech Republic were Country B, the Czech institutions would focus on the question whether the company seated in the Czech Republic is a real company or a brassplate/letterbox company. If it was a brassplate company, the competent Czech institutions would not issue PD A1 forms and would not allow the employees to participate in the Czech social insurance system. They would also check with Country A

[25] AC 17/303, 23 May 2017.

what the position of the haulage company is there as regards the seat of the company. With respect to providing employment services, the Czech Labour Inspectorate would check the situation from the point of view of Czech labour law and Posting Directive 96/71/EC.[26] Similarly, the Swiss institutions would check if the drivers work in Switzerland or in the other Member State (Article 11 (3) (a) of Regulation (EC) No 883/2004). The Swiss administration applies this rule to all workers including persons working in the field of international transport. Therefore, if an institution suspects that the work is not really accomplished in Switzerland, it should refuse to issue the A1 form. However, as seen in the *A-Rosa Flussschiff* case,[27] a social security institution recently issued an A1 form although the workers were working in France.

The scenario described above was identified in Lithuania (as Country B). The circumstances were that a German company bought a Lithuanian haulage company which became an employer of German workers. These German workers (drivers) in practice performed the work in Germany and delivered goods in Europe. The Lithuanian Foreign Benefit Office issued A1 certificates, stating that Lithuanian law was applicable for these workers. Nevertheless, following investigation, the competent German institution challenged that decision. However, the Lithuanian State Social Insurance Board (the supervisor of the Foreign Benefit Office) did not agree to withdraw the A1 certificates. However, the Lithuanian Ministry of Social Security and Labour intervened to support the German position (a position that might have been influenced when Germany indicated that it intended to initiate conciliation procedures concerning the validity of the documents). The outcome was that the A1 certificates were withdrawn. The Lithuanian respondent suggests that in the scenario presented, Lithuania has no experience with being Country A. Rather it is always Country B. From that point of view, the respondent identifies a possible conflict of interest between Member States in that the Lithuanian institutions would have an interest in collecting more contributions and so might not be the first to protest against fraud of this kind.

Ireland suggested that, given, in particular, the lower rates of social insurance contributions in Ireland relative to many other Member States, Ireland is also likely to be in the Country B scenario much more frequently than in the Country A scenario. Given that the transfer of responsibility is from Country A and that the workers affected remain working in that country, it appears that Country A is in the best position initially to detect these practices and then work with Country B to deal with them. The Irish respondent furthermore reports that the Irish authorities are likely to very much welcome this study to get the overall EU-wide picture in this regard. Similarly, the Portuguese respondent reports that this is certainly an area where improvement in mutual cooperation and exchange of information between countries is most needed.

Scenario 2: An international logistics company

Facts: An international logistics company has commissioned a subcontractor in Country A to deliver parcels. The subcontractor does not deliver any of the parcels itself, but instead commissions several workers from another EU Member State living in Country A to make the deliveries. A condition for being given the work is that the delivery drivers establish themselves as self-employed persons. Another condition is that they stay in lodging provided by the contracting company, which is substandard but for which excessive amounts are deducted from their wages. Wage payments are often late and, even after deductions for their accommodation, incomplete. At a point when wages have been unpaid for several weeks the contractor declares itself bankrupt.

[26] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21.1.1997, p. 1-6.

[27] Judgment of 27 April 2017, *A-Rosa Flussschiff*, C-620/15, EU:C:2017:309.

Q1. Which actions would Country A undertake?

In this scenario, the competent institutions (*e.g*. AT, CY, DE, MT and NO) would examine the circumstances to determine whether the drivers are employed or self-employed. If it is determined that the drivers are employed, then the subcontractor is obliged to register them as employed persons and pay back the contributions as the employer (*e.g.* CY, HR, DE, LI, MT and CH), including, in Germany for example, contributions for the previous four years. Sweden reports that it is very easy for persons to establish themselves as self-employed. This has led to some persons being directly or indirectly forced to become self-employed and still continue to work mainly for one employer. The lines between employment and self-employment are not easy to draw in these cases. If a person is dependent on the employer and is part of its operation, this may lead to the conclusion that the person is actually employed. The fact that the drivers in the example are obliged to stay in lodging provided by the company may be one such factor. There have been situations where drivers are stationed in Sweden for long periods of time and sleeping in barracks or in their vehicles. Unions then argued that the company in question did not follow the Posted Workers Directive and that the drivers were entitled to Swedish wages and that the Work Environment Agency should be informed.

If the subcontractor were in Spain and the self-employed person made a complaint, the Spanish Labour Inspectorate and/or labour courts would probably consider the scenario to be a case of bogus self-employment, as the workers are in fact subordinated employees under the direction of the subcontractor. In France, if the work relationship is reclassified as an employment relationship, the employer is likely to be accused of illicit supply of workers, illegal subcontracting and undeclared work. The Croatian labour inspectorate can initiate proceedings against employers for the most serious offences in cases where the employer has failed to deliver a letter of engagement prior to the start of employment, or failed to conclude a written employment contract or to deliver to the worker a copy of the application for mandatory pension and health insurance within the stipulated deadline.

Portugal considers that the workers in this scenario were "forced" to accept two contractual conditions that could be used to circumvent the application of legal rules regarding the definition of the contractual/labour status in the relationship with the subcontractor: i) being forced to accept the status of self-employed worker, when according to the relevant criteria workers should be treated as dependent workers; ii) being forced to accept a mode of payment of their salaries, replacing a (higher) base wage or other fees, by a significant amount of payments in kind, for the use of substandard lodging. This could also be used to (illegally) circumvent rules regarding the collection of social contributions, because benefits in kind may not be included in the contribution base, whereas monetary fringes are.

In Germany excessive amounts charged for accommodation are illegal although individual rights have to be claimed in court by the employee. Similarly, the Swiss Civil Code prohibits the use of parts of the wage for the benefit of the employer; therefore, the clause that allows the company to deduct excessive lodging costs from the wage is probably invalid. In Spain the lodging would be considered salary in kind. Salary in kind is only possible if envisaged by law, by collective agreements or by an express or tacit agreement between the employer and the employee. Salary in kind is limited to 30% of the worker's total wage and cannot result in the reduction of the cash amount envisaged as minimum wage. Furthermore, salary in kind must suit the necessities of the worker and his or her family, must have a reasonable quality, and its economic valuation must be fair and reasonable.

The Irish Department of Social Protection has a dedicated unit, the Scope Insurability Section, to determine insurance liability. While German customs services have rights to examine companies and workplaces to check if the labour conditions are in accordance with the act on minimum wages as well as the employee assignment law and the laws on

illegal employment. They might also examine the labour contracts. The Dutch Labour Inspectorate has policies on pursuing persistent offenders.

Q2. And what would country B do?

The problem which the delivery drivers are confronted with in this scenario is that if they are classified as self-employed they fall outside the Member States' employment legislation. Austria reports that the delivery drivers could claim the outstanding wage payments directly from the international logistics company only if they perform work in a relationship of personal dependency, in the construction business as posted workers. In this case the international logistics company could be held directly liable for the outstanding wage payments. As these criteria are not fulfilled in this scenario, the drivers would have to take action against the subcontractor as the contractual partner or – should the subcontractor declare itself bankrupt – refer to the 'Fund for Ensuring Wage Payments in case of bankruptcy'. In Lithuania the drivers in this scenario would not have the guarantees enjoyed by workers (priority of financial claim, benefits from a special Guarantee Fund). Their financial claims would be satisfied according to general procedure without any priority rule. That is, they would be assigned to the third rank of creditors (after workers and state institutions collecting taxes and contributions). Sweden reports that if the drivers are self-employed, the labour law legislation in principle does not apply. This is problematic in cases where persons have been forced to become self-employed. The only means of redress would be via the bankruptcy process, but very often the assets are not sufficient to cover all claims. Denmark reports that if the subcontractor has established a collective agreement, the trade union could take the case to the Danish labour court. However, as the firm has declared itself bankrupt, it will not be able to pay the wages that the delivery drivers are entitled to.

However, the relationship could be contested and be considered an employment relationship rather than self-employment due to the level of dependency between the contractor and the workers. In this case labour law would apply. In Ireland the workers in this scenario, as with any worker, would be entitled to request a formal 'Scope' decision (see example 2 regarding the action of Country A, above) if they consider that they are being incorrectly classified. In the Netherlands, the drivers can go to court to claim to be in an employment relationship. Although this is possible in theory, the Dutch respondent reports that in practice it does not happen. There are barely any self-employed subcontractors who claim to be employed.

Scenario 3: "exported" special non-contributory benefits (SNCBs)

Facts: After a long and happy marriage Mrs A is widowed. She decides to retire with her friend in another EU Member State. Her friend has a full working biography and contribution record giving entitlement to a full contributory state pension which is exportable under the EU Regulations. However, Mrs A has a fragmented working biography having taken time away from paid employment to raise her three children and more time later on to take care of her husband's aging father and again to nurse her husband when he became sick. As a result, she does not qualify for a full contributory state pension. However, she is entitled to a means-tested pension which is classified under the EU Regulations as an SNCB and not exportable. How can such a situation be avoided?

Response: For some countries this is not relevant because they do not have SNCB pensions (*e.g*. HR and IS). Those countries that do have SNCB pensions take different approaches when a recipient travels to another Member State. For recipients of an Austrian SNCB a stay of less than two months in another Member State does not affect their entitlement. If the person concerned stays abroad for a longer period of time, then it will be considered on a case-to-case basis whether s/he has still has his or her centre of interests in Austria. Should the pension insurance institution come to the conclusion that the recipient is usually residing in another Member State, it would stop the payment,

might withdraw the pension and claim back any overpayment. In general recipients of a SNCB pension must inform the pension insurance institution every three years about all personal circumstances, including their place of residence. In case of doubts regarding the place of residence the interval of notification can be reduced to one year. However, no general rules exist regarding the proof of residence.

The relevant SNCB pension in Finland is the guarantee pension (*takuueläke*), which is paid by the Social Insurance Institution, Kela. According to the law on guarantee pension (703/2010; Section 13) the recipient is obliged to inform Kela when moving abroad. According to Kela's internal guidelines, officials must note a person's file when informed that s/he is moving abroad for less than one year. Kela will then track the information received from the Population Registration Centre to see whether the stay lasts for over a year. If so the pension is terminated. If Kela is informed that the person intends to move abroad permanently, the guarantee pension is discontinued immediately. If an overpayment is discovered the recovery process as described in 2.2.3 above is followed. Switzerland reports that each federal law concerning social security contains rules about infringement and crime. Those rules especially prohibit obtaining benefits through dishonesty. They are *lex specialis* to the general criminal law (ATF 140 IV 206; Article 31). For example, the Swiss federal law concerning old-age, widowhood and disability non-contributory benefits (*loi fédérale sur les prestations complémentaires à l'AVS et à l'AI – LPC*, RS 831.30) prescribes a substantial fine if a person obtains benefits by giving incorrect or incomplete information. In a case like the one described, there would probably be a criminal proceeding because Mrs A did not inform the relevant institution that she did not have her domicile and residence in Switzerland, as domicile and residence are both required by the law for getting old-age, widowhood and disability non-contributory benefits (Article 4 *LPC*). Furthermore, she would have to pay the benefits back (Article 25 of the *loi fédérale sur la partie générale du droit des assurances sociales – LPGA*). The situation is similar in Liechtenstein.

The UK takes a very 'robust' approach to the payment of SNCB pensions abroad. In April 2012 the Department for Work and Pensions issued a press release stating that

> *"In a visit to the DWP's Pensions, Benefits & Healthcare team in Madrid, Iain Duncan Smith (Secretary of State for Work and Pensions) will warn British people living abroad not to break the strict rules on what benefits they can and can't claim. He will also urge law-abiding Brits to use the dedicated Spanish fraud hotline to report benefit thieves. People who are pretending to live in the UK to claim benefits, but are actually living overseas cost the taxpayer an estimated £43 million last year. More allegations of people living in Spain whilst continuing to receive UK benefits are received than for any other foreign country, making Spain the number one country for abroad fraud. Secretary of State for Work and Pensions Iain Duncan Smith said: We are determined to clamp down on benefit fraud abroad, which cost the British taxpayer around £43 million last year. This money should be going to the people who need it most and not lining the pockets of criminals sunning themselves overseas. The vast majority of British people overseas are law abiding, but fraudulently claiming benefits while living abroad is a crime and we are committed to putting a stop to it. Since its launch in 2008, over 750 calls to the Spanish hotline have resulted in criminal investigations by fraud investigators in the UK and over 100 people have been sanctioned or prosecuted. 134 cases are currently being investigated and £3.1 million in benefit over payments have been identified and will be reclaimed. The small Pensions, Benefit & Healthcare team based in Spain provide support to the estimated 1million Britons living there. They work with the Spanish Authorities on behalf of the DWP and Department of Health to prevent and detect benefit fraud, ensure correct access to the Spanish healthcare system, and combat misuse of the European Health Insurance Card (EHIC). They prevent fraud by making sure British people living in Spain understand and follow the country's systems and understand the strict rules on what they are and are not able to claim. The team support the work of fraud investigators in the UK by gathering intelligence on*

suspected benefit thieves and by overseeing the Spanish benefit fraud hotline. Abroad fraud involves a range of scams such as people on means-tested benefits going abroad but failing to declare their absence, undeclared property abroad, and individuals working while claiming sickness benefits. In Spain, claims for Income Support or Pension Credit are the most frequently investigated for fraud. If you suspect someone of benefit fraud in Spain you can call Benefit Fraud Hotline in Spain on: 900 554 440 or you can report a thief online via: http://www.dwp.gov.uk/benefit-thieves/."

Italy on the other hand reports that where a state provides a Special Non-Contributory Benefit, if the recipient does not communicate her or his departure from the national territory to another EU Member State, there is little real chance of identifying that person. While Germany reports that cases where a person retains their official residence in Germany but spends most of the year in another Member State are often not detected. If they are detected, however, it may not be only a matter of refunding payments but also a criminal offence.

Scenario 4: Job and unemployment benefits

Facts: A person receives unemployment benefits from Member State A and then decides to take up a job in Member State B without reporting it to Member State A while continuing to receive benefits. How can this be avoided?

Response: Most countries report that the circumstances in this scenario are difficult to detect, notwithstanding that Member States have relevant legislation in place. For example, the law in Liechtenstein concerning unemployment insurance (*Gesetz über die Arbeitslosenversicherung und die Insolvenzentschädigung – ALVG*, LR-Nr. 837.0) contains a rule that prescribes prison or a substantial fine if a person obtains benefits by giving incorrect or incomplete information as well as a rule concerning the reimbursement (Article 77 *ALVG*). If Austria were Country B no specific measures would be taken as such measures are not provided by Austrian law. If the Czech Republic were country A or B, there is no mechanism to discover that a person receiving unemployment benefits in the Czech Republic has started to work in another Member State, or conversely that a person working in the Czech Republic is receiving unemployment benefits from another Member State unless s/he claims unemployment benefits in the Czech Republic and the Czech Republic requests a form U1 from Member State B. Similarly, Denmark reports that this situation is very difficult to prevent as Denmark does not receive information from employers in other Member States (if country A) or provide information to authorities in other Member States (if country B). A similar situation also pertains if Germany is Country B, as the unemployment insurance authorities will not be notified about any person from another Member State who takes a job in Germany. The authorities will only learn that a person is now covered by German social insurance. They will not know whether they are receiving unemployment benefits from another country.

Hungary reports that, as the beneficiary is responsible to report any change in his or her employment status, the Member State where the person takes up employment would not be aware of the unemployment benefits from another Member State, unless the beneficiary reports it. Croatia also reports that If Croatia is Country A or B, there are no direct measures in place to detect this situation or prevent it from happening. While Ireland has no specific measures in place to detect these situations, it is pointed out that in order to receive an Irish Jobseeker's Payment, the person is required to attend a local office on a periodic basis to 'sign on'. This in effect also acts as a control measure making it more difficult and less worthwhile in certain instances for a person to be claiming Jobseeker's Payments while working in another country. In Finland the right to receive unemployment benefits is also regularly monitored via information from taxation authorities. However, taxes paid abroad cannot be seen from the lists of Finnish authorities and therefore the person would most likely not be identified. Furthermore, although unemployed people are to regularly fill in a form to report their activity in the

labour market, as these forms can be filled out on a website they can be completed from abroad. Thus, unless someone reports someone who is wrongly in receipt of a benefit a recipient is very difficult to detect, although sometimes information reaches the authorities via other authorities such as employment or immigration authorities or the police. Similarly, Iceland reports that it can be difficult to prevent this situation, but when a person needs to make a tax return in the country where s/he receives unemployment benefits, information about foreign income will emerge. In this case s/he will be required to reimburse any overpaid unemployment benefit from the Directorate of Labour. In France, cross-border fraud amounts to 6% of overall fraud observed in the unemployment scheme. One typical way to detect fraud is the information written on the passport, required by *Pôle Emploi* staff, which may indicate trips abroad during periods where allowances were granted. However, this method is not very useful for the EU. *Pôle Emploi* local job centres also have tools to detect situations of fraud, including the case of fake jobseekers who, in reality, have taken up a job in another country. If there is a suspicion of fraud the job centre can have access to the national file of bank accounts that are held on French territory. In addition, according to unemployment scheme regulations, any absence of more than seven days from the French territory must be declared to the local job centre and a jobseeker can only declare 35 days of annual leave per year. In order to detect fraudulent cases, jobcenter staff uses IP addresses to verify where the jobseekers are located. Another anti-fraud measure employed in France to detect jobseekers who have a job abroad, which uses statistical models to identify sensitive cases, is being explored. If France is country B every employer in France who recruits an employee must register the employee (*declaration préalable à l'embauche - DPAE*). These declarations are now accessible by French local job centres and may be communicated to foreign institutions upon request.

1.4. Some final remarks

The abovementioned examples demonstrate that a multi-national but also a multi-dimensional cooperation is required in order to successfully combat social fraud and abuse. A good exchange of information and cooperation between the competent institutions within the framework of coordination Regulations (EC) No 883/2004 and (EC) No 987/2009 could contribute to this struggle. However, the coordination Regulations are not conceived as specialised instruments to counter fraud and abuse. For this reason, this exchange of information is very often activated when the problem appears and is discovered. Unfortunately, many cases of fraud and abuse remain hidden due to a lack of information. In fact the information is mostly delivered at the request of a competent institution. Maybe it is necessary that the competent institutions are more and better connected and that more information is delivered *ex officio.*

In the following chapters we want to explore the characteristics of cooperation not only within the coordination Regulations, but in a broader EU context as well.

2. THE PRINCIPLES OF COOPERATION

It is a general principle under EU law that Member States have to cooperate in good faith in their dealings with the EU as well as between themselves. This principle is an expression of community solidarity[28] and a reflection of the principle of good faith, which is designed to secure mutual respect of the powers of the legislative, executive and judicial bodies of different levels of authority and the readiness to cooperate.[29]

This general principle can be found in the Treaty[30] and is often further specified in secondary EU legislation.

2.1. The principle of sincere cooperation in the Treaty

2.1.1. The provision of the Treaty

The principle of sincere cooperation can be found in Article 4(3) TFEU which states:

> "*Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.*
>
> *The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.*
>
> *The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives*."[31]

The history of the principle can be traced back to the European Coal and Steel Community (ECSC) Treaty and the Treaty of Rome. Article 86 of the ECSC Treaty reads:

> "*The member States bind themselves to take all general and specific measures which will assure the execution of their obligations under the decisions and recommendations of the institutions of the Community, and facilitate the accomplishment of the Community's purposes. The member States bind themselves to refrain from any measures which are incompatible with the existence of the common market referred to in Articles 1 and 4.*" [32]

The principle contained in Article 86 of the ECSC Treaty was incorporated into the Treaty of Rome. Article 5 EEC reads:

> "*Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall*

[28] Judgment of 10 December 1969, *Commission v France*, C-6/69, EU:C:1969:68, paragraph 16

[29] Lenaerts, K. and Van Nuffel, P., Constitutional Law of the European Union, Thomson, Sweet* Maxwell, London, 2005, 115-116.

[30] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 202/1, 07.06.2016.

[31] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 202/1, 07.06.2016.

[32] Treaty establishing the European Coal and Steel Community (Paris, 18 April 1951).

https://www.cvce.eu/en/obj/treaty_establishing_the_european_coal_and_steel_community_paris_18_april_1951-en-11a21305-941e-49d7-a171-ed5be548cd58.html

facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty." [33]

The principle, with the wording almost unchanged, was contained in Article 10 TEC until the Treaty of Lisbon. Thus, since the 1950s, very similar wording has imposed, on the one hand, a positive duty on Member States to act to *ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Community/Union* and to *facilitate the achievement of the Community/Union's tasks/purposes,* and, on the other hand, a negative obligation to *abstain/refrain from any measure which could jeopardise the attainment of the Union's objectives/attainment of the objectives of this Treaty*.

However, three important new aspects were introduced by Article 4(3) of the Lisbon Treaty.[34] Firstly, the opening paragraph *"Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties"* explicitly introduces the notion of 'sincere cooperation' and the duty of mutual assistance between the Member States.[35] Secondly, 'the Union' incorporates the case law of the Court of Justice of the European Union (CJEU) – also contained in Article 13 TEU. It is stated that the obligations do not fall solely on the Member States but are reciprocal and include all elements and institutions of the Union.[36] Thirdly, the removal of the pillar structure by the Lisbon Treaty and the position of Article 4(3) in the Treaty, immediately following the articles setting out the EU's values and aims, establishes 'sincere cooperation' as a fundamental EU constitutional principle.[37]

2.1.2. The principle of sincere cooperation as interpreted by the CJEU

In 1986 Lang[38] argued that the implications of Article 5 TEC extended much further than was generally recognised at the time, and identified a range of important duties imposed by Article 5 on Member States. Lang identified several reasons for the underestimation of the significance of Article 5, including: it is a general principle that is contained in special Articles for specific situations; the CJEU did not always refer explicitly to Article 5; and because it is expressed in general terms, lawyers tended not to rely on Article 5. Additionally, Lang pointed out that the CJEU's finding in an early case that Article 5 *"lays down a general duty for the Member States, the actual tenor of which depends in each individual case on the provisions of the Treaty or on the rules derived from its general*

[33] Treaty of Rome (25 March 1957), https://ec.europa.eu/romania/sites/romania/files/tratatul_de_la_roma.pdf.

[34] Casolari, F. (2012) 'The principle of loyal co-operation: A 'master key' for EU external representation?' in *Principles and practices of EU external representation* Eds. Steven Blockmans and Ramses A. Wessel. CLEER Working Papers 2012/5, Centre for Law of EU External Relations, The Hague, p. 13; Klamert, M. (2014), The Principle of Loyalty in EU law, Oxford University Press, p. 9.

[35] Order of 6 December 1990, *Zwartveld*, C-2/88-IMM, EU:C:1990:440, cited by Klamert, M. (2014), The Principle of Loyalty in EU law, Oxford University Press, p. 12.

[36] Order of 6 December 1990, *Zwartveld*, C-2/88-IMM, EU:C:1990:440, cited by Klamert, M. (2014), The Principle of Loyalty in EU law, Oxford University Press p. 26-27.

[37] Van Elsuwege, P. and Merket, H. (2012), The role of the Court of Justice in ensuring the unity of the EU's external representation in *Principles and practices of EU external representation* Eds. Steven Blockmans and Ramses A. Wessel. CLEER Working Papers 2012/5, Centre for Law of EU External Relations, The Hague, p. 39; Klamert, M. (2014), The Principle of Loyalty in EU law, Oxford University Press.

[38] Temple Lang, J. 'Article 5 of the EEC Treaty: The Emergence of Constitutional Principles in the Case Law of the Court of Justice' *Fordham International Law Journal* Volume 10, Issue 3 1986 Article 5 p. 503-6.

scheme" [39] had been understood by some to imply that Article 5 in itself *"had few practical consequences"*.[40]

However, by 1986 the case law of the CJEU had made it clear that a conclusion that Article 5 *"had few practical consequences"* in itself was incorrect. The CJEU had found that Article 5 *"imposed a 'duty of solidarity' on Member States"*.[41] This implied, among other things, a duty not to act unilaterally. The CJEU had also found a duty of cooperation that applied not only to cooperation with Community institutions but also between the Member States themselves.[42]Lang concluded that "*the case law of the CJEU now provides an impressive number of cases in which concrete obligations have been derived from Article 5*."[43] Van Elsuwege and Merket find that "*recent case law takes away all doubt and unequivocally establishes the Treaty provision on loyal or sincere cooperation (Article 4(3) TEU, ex Article 10 TEC) as legal basis of the duty to cooperate*."[44] While Casolari[45] concludes that the principle of loyal or sincere cooperation between Member States and the EU institutions is, in Halberstam's words, at the core of 'the proper functioning of the system of governance as a whole'.[46]

2.1.3. The concept of sincere cooperation

Despite its significance for EU law, the principle had not, until recently, received attention in proportion to that significance.[47] Notable exceptions include the work of John Lang[48] and German literature which has produced systematic studies on loyalty[49] including

[39] Judgment of 8 June 1971, *Deutsche Grammophon GmbH v Metro SB*, C-78/70, EU:C:1971:59, Comm. Mkt. Rep. (CCH) 8106; judgment of 12 July 1973, *Geddo v Ente Nazionate Risi*, C-2/73, EU:C:1973:89, Comm. Mkt. Rep. (CCH) 8219; judgment of 18 February 1986, *Bulk Oil v Sun International*, C-2/73, EU:C:1986:60, Comm. Mkt. Rep. (CCH) 14,288 (conclusions of the Advocate General, EU:C:1985:491); judgment of 11 December 1985, *Commission v Greece*, C-192/84, EU:C:1985:497, paragraph 19, Comm. Mkt. Rep. (CCH) 14,231. All cited by John Temple Lang 1986, p. 504.

[40] Temple Lang, J. 'Article 5 of the EEC Treaty: The Emergence of Constitutional Principles in the Case Law of the Court of Justice' *Fordham International Law Journal* Volume 10, Issue 3 1986 Article 5 p. 504.

[41] Judgment of 10 December 1969, Commission v France, C-6/69, EU:C:1969:68, paragraph 16-17, Comm. Mkt. Rep. (CCH) cited by Temple Lang, J. 'Article 5 of the EEC Treaty: The Emergence of Constitutional Principles in the Case Law of the Court of Justice' *Fordham International Law Journal* Volume 10, Issue 3 1986 Article 5 p. 529.

[42] Temple Lang, J. 'Article 5 of the EEC Treaty: The Emergence of Constitutional Principles in the Case Law of the Court of Justice' *Fordham International Law Journal* Volume 10, Issue 3 1986 Article 5 p. 529-530. Cases cited by Temple Lang: judgment of 22 March 1983, *Commission v France*, C-42/82, EU:C:1982:75, Comm. Mkt.Rep. (CCH) 14,017; judgment of 17 December 1981, *Frans-Nederlandse Maatschappij voor Biologische Producten*, C-272/80, EU:C:1981:312, paragraph 14, Comm. Mkt. Rep. (CCH) 8783.

[43] Temple Lang, J. 'Article 5 of the EEC Treaty: The Emergence of Constitutional Principles in the Case Law of the Court of Justice' *Fordham International Law Journal* Volume 10, Issue 3 1986 Article 5 p. 537.

[44] Judgment of 2 June 2005, *Commission v Luxemburg*, C-266/03, EU:C:2005:341, paragraph 57; judgment of of 14 July 2005, *Commission v Germany*, C-433/03, EU:C:2005:462, paragraph 63, cited by Van Elsuwege, P. and Merket, H. (2012), The role of the CJEU in ensuring the unity of the EU's external representation in *Principles and practices of EU external representation* Eds. Steven Blockmans and Ramses A. Wessel. CLEER Working Papers 2012/5, Centre for Law of EU External Relations, The Hague, p. 38.

[45] Casolari, F. (2012) 'The principle of loyal co-operation: A 'master key' for EU external representation?' in *Principles and practices of EU external representation* Eds. Steven Blockmans and Ramses A. Wessel. CLEER Working Papers 2012/5, Centre for Law of EU External Relations, The Hague, p. 13.

[46] D. Halberstam, 'The Political Morality of Federal System', Virginia Law Review (2004) 101, at 104 cited by Casolari, F. (2012) 'The principle of loyal co-operation: A 'master key' for EU external representation?' in *Principles and practices of EU external representation* Eds. Steven Blockmans and Ramses A. Wessel. CLEER Working Papers 2012/5, Centre for Law of EU External Relations, The Hague, p. 11.

[47] Klamert, M. (2014), The Principle of Loyalty in EU law, Oxford University Press, p. 64.

[48] John Temple Lang 'Article 5 of the EEC Treaty: The Emergence of Constitutional Principles in the Case Law of the Court of Justice' *Fordham International Law Journal* Volume 10, Issue 3 1986 Article 5; John Temple Lang 'Community Constitutional Law: Article 5 EEC Treaty', *Common Market Law Review* , (1990), 645–681; John Temple Lang, The Development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institutions Under Article 10 EC, 31 FORDHAM INT'L L.J. 1483 (2007).

[49] A. von Bogdandy and S. Schill, 'Art. 4 EUV', in E. Grabitz, M. Hilf and M. Nettesheim (eds), *Das Recht der Europäische Union* (Munich: Beck, 2010) cited by Klamert, M. (2014), The Principle of Loyalty in EU law, Oxford University Pres, p. 64.

several attempts at classifying the concept(s) contained in Article 4 (3) TEU and its predecessors. Some classifications distinguish based on the obligations conferred, including whether an obligation to act or to refrain from action is required. For example, Kahl has divided the obligations contained in Article 4 (3) TEU into (1) those requiring action that is related to the implementation of EU law, (2) those requiring abstention from action which is largely imposed on the Member States, (3) obligations of the EU institutions to the Member States, and (4) mutual obligations of the EU institutions and the Member States.[50]

Recently, the principle of loyalty and sincere cooperation has received an increasing amount of attention in the context of the EU's international relations. Van Elsuwege and Merket [51] point out that the duty of sincere cooperation contained in Article 4(3) TEU has frequently been employed by the CJEU to ensure close cooperation between the EU and the Member States in their international relations and that the duty of cooperation is *"a concept that gradually developed in the context of the Court's case law on mixed agreements".*[52]

Both the CJEU and the literature have referred to the concept contained in Article 5 and 10 TEC and 4(3) TEU by a variety of different names and very often the CJEU has not named the concept at all when referring directly to Article 4 (3) TEU or its predecessors.[53] In some of its judgments, the CJEU has spoken of an obligation or duty of 'loyal cooperation',[54] while in others of a 'duty of loyalty'.[55] On occasions, the CJEU has referred to 'solidarity' or 'good faith'.[56] However, in most cases the CJEU has used the term 'sincere cooperation', which is the term adopted by Article 4 (3) TEU.[57] The question arises whether the CJEU is describing the same or different principles and, if different, what the relationships are between those principles. The literature provides different answers. For example, Casolari argues that the principle of loyal or sincere cooperation is the expression of the international principle of good faith, and the principle of 'fidelity' that characterises federal systems and duties of loyalty that operate in the external actions of the EU and the Member States including *"their contribution to the objective, explicitly identified in the Treaties, to promote EU values and interests in the relations*

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[50] W. Kahl, 'Art. 4 (3) EUV', in C. Calliess and M. Ruff ert, *EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta* , 4th edn. (Munich: Beck, 2011) cited by Klamert, M. (2014), The Principle of Loyalty in EU law, Oxford University Press, p. 4.

[51] Van Elsuwege, P. and Merket, H. (2012) The role of the Court of Justice in ensuring the unity of the EU's external representation in *Principles and practices of EU external representation* Eds. Steven Blockmans and Ramses A. Wessel. CLEER Working Papers 2012/5, Centre for Law of EU External Relations, The Hague, p. 38.

[52] Van Elsuwege, P. and Merket, H. (2012) The role of the Court of Justice in ensuring the unity of the EU's external representation in *Principles and practices of EU external representation* Eds. Steven Blockmans and Ramses A. Wessel. CLEER Working Papers 2012/5, Centre for Law of EU External Relations, The Hague, p. 38.

[53] See, *e.g*. the judgment of 15 December 1971, *International Fruit Company*, C-51/71, EU:C:1971:128, paragraph 3; judgment of 8 June 1971, *Deutsche Grammophon*, C-78/70, EU:C:1971:59, paragraph 5; judgment of 14 July 1976, *Cornelis Kramer*, C-3/76, EU:C:1976:114, paragraph 42 and 43; judgment of 11 July 1985, *Leclerc*, C-229/83, EU:C:1985:294, paragraph 20, cited by Klamert, M. (2014), The Principle of Loyalty in EU law, Oxford University Press, p. 31.

[54] Judgment of 19 February 1991, *Commission v Belgium*, C-374/89, EU:C:1991:60, paragraph 15; judgment of 18 December 2007, *Sweden v Commission*, C-64/05, EU:C:2007:802, paragraph 85, cited by Klamert, M. (2014), The Principle of Loyalty in EU law, Oxford University Press 31.

[55] Judgment of 30 May 2006, *Commission v Ireland*, C-459/03, EU:C:2006:345, paragraph 168, cited by Klamert, M. (2014), The Principle of Loyalty in EU law, Oxford University Press, p. 31.

[56] Klamert, M. (2014), The Principle of Loyalty in EU law, Oxford University Press, p. 31.

[57] Judgment of 28 November 1991, *Luxemburg v Parliament*, C-213/88 and C-39/89, paragraph 29; judgment of 22 October 1998, *Kellinghusen*, C-36/97 and C-37/97, EU:C:1998:499, paragraph 30; judgment of 10 February 2000, FTS, C-202/97, EU:C:2000:75, paragraph 51; judgment of 26 September 2000, *Commission v Austria*, C-205/98, EU:C:2000:493, paragraph 39; judgment of 25 July 2002, *P. Unión de Pequeños Agricultores*, C-50/00, EU:C:2002:462, paragraph 29; judgment of 20 October 2005, *Ten Kate Holding,* C-511/03, EU:C:2005:625, paragraph 28, cited by Klamert, M. (2014), The Principle of Loyalty in EU law, Oxford University Press, p. 31.

with the wider world (Article 3(5) TEU)". [58] While 'loyalty' and 'solidarity' have been perceived by some commentators as synonymous[59] and by others as categorically different,[60] Klamert argues that loyalty has *"more in common with the concept of constitutional fidelity in federal systems"* [61], while "solidarity is "political" and "moral" and not legally binding, referring to the relations between Member States, rather than the relationship between the Member States and the Union, which makes solidarity *"an expression of the fundamental principle of the equality of the Member States in the European Union, exhorting the unity between the Member States by prescribing mutual assistance either in kind or financially."* [62]

The literature often *distinguishes* between loyalty and duties of cooperation.[63] Prior to the Treaty of Lisbon, some commentators regarded the principle of loyalty *"as the foundation of the duty of cooperation."*[64] Klamert conceives the duty of sincere or loyal cooperation as a subcategory of the broader loyalty principle[65] and that *"loyalty […] provides the basis for sincere cooperation between all actors involved in the integration process".* [66] From this perspective loyalty refers to an overarching concept in EU law, with duties of cooperation representing its narrower facets. As well as describing relationships between actors, the term 'cooperation' describes a process. From this perspective, duties of mutual assistance between the Member States can be understood as technical.[67] This, Klamert suggests, leads to the further distinction between duties of coordination, consideration, and abstention. Duties of coordination include duties on Member States to provide information, give notification, and consult.[68]

Specific reference to fraud is contained in the Treaty in Article 325 TFEU, which prescribes that "*the Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union."* Article 325 (3) TFEU requires that Member States *"coordinate their action aimed at protecting the financial interests of the Union against fraud."* And *"[t]o this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities."* In this context, 'close and regular cooperation between the competent authorities' represents the institutional, coordinative side of loyalty by requiring practical cooperation of the parties[69] which implies the need to establish necessary contacts and information exchanges.

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[58] Casolari, F. (2012) 'The principle of loyal co-operation: A 'master key' for EU external representation?' in *Principles and practices of EU external representation* Eds. Steven Blockmans and Ramses A. Wessel. CLEER Working Papers 2012/5, Centre for Law of EU External Relations, The Hague, p. 11.

[59] M. Zuleeg, 'Art. 5 EGV', in H. v d Groeben, J. Th iesing and C.-D. Ehlermann, *EUV/EGV*, 5th edn. (Baden-Baden: Nomos, 1997), paragraph 1; W. Kaufmann-Bühler, 'Art 24 EUV', in E. Grabitz, M. Hilf and M. Nettesheim (eds), *Das Recht der Europäische Union, Kommentar* , Vol. I (Munich: Beck, 2010),

paragraph 38; J. Bitterlich, 'Art. 24 EUV', in C.-O. Lenz and K.-D. Borchardt (eds), *EU-Verträge, Kommentar*

nach dem Vertrag von Lissabon , 5th edn. (Cologne: Bundesanzeiger, Vienna: Linde, 2010), paragraph 6 cited by Klamert, M. (2014), The Principle of Loyalty in EU law, Oxford University Press, p. 31.

[60] Klamert, M. (2014), The Principle of Loyalty in EU law, Oxford University Press, p. 35.

[61] *Ibid*, p. 299.

[62] *Ibid*.

[63] *Ibid*, p. 33.

[64] P. Eeckhout, External Relations of the European Union: Legal and Constitutional Foundations (Oxford: Oxford Univ. Press, 2004), cited by Klamert, M. (2014), The Principle of Loyalty in EU law, Oxford University Press, p. 31.

[65] E. Neframi, 'Th e Duty of Loyalty: Rethinking its Scope Th rough its Application in the Field of EU External Relations', *Common Market Law Review* , 47 (2010), 323–359, 325 cited by Klamert, M. (2014), The Principle of Loyalty in EU law, Oxford University Press, p. 33.

[66] Klamert, M. (2014), The Principle of Loyalty in EU law, Oxford University Press, p. 299.

[67] *Ibid,* p. 33.

[68] *Ibid*.

[69] *Ibid,* p. 17-18.

2.1.4. Some final remarks

Loyalty has assumed greater significance since the Treaty of Lisbon. By explicitly referring to duties of mutual cooperation the new basis and specification of sincere cooperation provided by Article 4 (3) TEU creates obligations between the Member States in policy-specific coordination.[70]

Duties of loyalty and sincere cooperation may be found in secondary law in duties of coordination that require Member States to actively manage their relations with each other through the provision of information, notification, and consultation. The duty of national institutions under ex Article 10 EC to cooperate in matters of social security coordination has been referred to explicitly by the CJEU:[71]

> "*The Commission rightly points out that it is incumbent on every social security institution of a Member State to acknowledge the validity of the certificates issued in the other States, the aim of which is to ensure the uniform and consistent application of Regulation No 1408/71, which coordinates the national social security schemes. That duty to cooperate in good faith is laid down in general terms in Article 10 EC and, in respect of cooperation between social security institutions, in Article 84 of Regulation No 1408/71*."

The following sections examine the application of the principle of sincere cooperation and mutual assistance contained in Article 4(3) TEU to EU social security coordination, its different provisions, the special situation relating to investigation, legal proceedings, enforcement and recovery of unpaid social security contributions and wrongly paid social security benefits as well as the fundamental problem of exchange of information in the light of the protection of privacy and personal data.

2.2. Overview of provisions on cross-border cooperation under Regulations (EC) No 883/2004 and (EC) No 987/2009

2.2.1. General overview

'Mutual cooperation' is understood as the interaction between organisms to achieve results or a common goal that is beneficial for all those organisms or for a third person or organism.

In principle, mutual cooperation in the field of social security and concretely in the field of Regulations (EC) No 883/2004 and (EC) No 987/09 has, as a final purpose, the protection against certain risks to which the population can be exposed. Achieving this goal requires an adequate financing through contributions, taxes or other means. In fact, the main issues of social security are benefits and contributions. Consequently, the central point of Regulation (EC) No 883/2004 and (EC) No 987/2009 is the protection of migrant workers and mobile persons and their family members.

'Mutual cooperation' or 'border cooperation' in the field of the coordination instruments is widespread in the whole text. Of course this concept is perhaps not expressly mentioned in many articles, but it is implicit in them. An example may be useful to understand this assertion. Let us take one of the most important techniques of Regulation (EC) No 883/2004, the aggregation of periods.[72] It is clear that one Member State alone cannot know, recognise and identify the periods covered in another Member State without the

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[70] *Ibid*, p. 18-19.

[71] Judgment of 25 February 2003, *IKA*, C-326/00, EU:C:2003:101, cited by Klamert, M. (2014), The Principle of Loyalty in EU law, Oxford University Press, p. 173.

[72] Article 6 of Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, OJ L 82, 22.3.1997, p. 1–16.

help of the latter Member State. In this regard, it would be very informative to discover, based on an accurate reading of the Regulations, how many of the Regulations' articles require, for their application, directly or indirectly, mutual cooperation between Member States. In fact, the coordination Regulations presuppose mutual cooperation as an essential instrument which makes their application possible.

Nevertheless, we have to distinguish between sincere cooperation, mutual cooperation and mutual assistance. In fact, sincere cooperation is included in Article 4(3) TEU and can be considered a general principle of the Treaty. Actually, the European legislature included this principle, for reinforcing its importance, immediately after the articles on the EU's values and objectives. It is therefore a key constitutional principle of general application in the EU legal order.

Mutual cooperation is a consequence of the practice or exercise of sincere cooperation and derives directly from Article 4(3) TEU. In this sense, Article 76 of Regulation (EC) No 883/2004 establishes a double duty: "*[t]he institutions and persons covered by this Regulation shall have a duty of mutual information and cooperation to ensure the correct implementation of this Regulation."* However, both obligations, *i.e*. mutual information and mutual cooperation, cannot be clearly distinguished and could fall into the concept of mutual cooperation.

Finally, mutual assistance could be considered as an instrument, but not the only one, for the implementation of mutual cooperation. In the framework of the Regulations the term "mutual assistance" is predominantly linked to cross-border cooperation with regard to recovery of benefits provided but not due, the recovery of provisional payments and contributions, and offsetting and assistance with recovery. [73] The same approach can be observed in the field of taxes, where

Recital 7 of Directive 2010/24/EU[74] offers a clear concept of mutual assistance:

> "*Mutual assistance may consist of the following: the requested authority may supply the applicant authority with the information which the latter needs in order to recover claims arising in the applicant Member State and notify to the debtor all documents relating to such claims emanating from the applicant Member State. The requested authority may also recover, at the request of the applicant authority, the claims arising in the applicant Member State, or take precautionary measures to guarantee the recovery of these claims.*"

The characteristics of the mutual cooperation obligation under the coordination Regulations are, as already indicated, manifold and do require several obligations from the Member States. It covers situations of communication and assistance. It implies in the first place mutual communication, *i.e.* informing each other of all measures taken to implement the Regulations.[75] Far more relevant is the obligation to provide administrative assistance according to which the requested institution must act on behalf of the requesting institution as though implementing its own legislation, as the requesting institution is not in a position to act itself in the other Member *State.*[76] For instance, in a situation where Member State A needs assistance to calculate the contributions to be

[73] See Recitals 19, 20 as well as Title IV, Chapter III of Regulation (EC) No 987/2009; however, Articles 64 (4), 65 (4) of Regulation (EC) No 883/2004 as well as Article 1 (b) of Regulation (EC) No 987/2009 (definition of "liaison body") may be interpreted as refering to a broader and rather ambiguous concept of mutual assistance.

[74] Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, OJ L 84, 31.3.2010, p. 1-12.

[75] M. Fuchs and R. Cornelissen, EU social security law, CH. Beck, Hart and Nomos, Baden-Baden, 2015, 451.

[76] In some circumstances the competent institution has the right to act itself, as *e.g*. Article 27 (6) of Regulation (EC) No 987/2009 grants the competent institution the right to have the insured person examined by a doctor of its choice when dealing with benefits for incapacity of work for persons residing in another state than the competent State.

paid for an employee working on its territory for an employer who is based in another Member State B. The institution in State A might request the institution in State B to inform State A about the salary of the employee. Member States' authorities may also communicate directly with each other and are obliged to provide or exchange without any delay all data necessary for establishing and determining the rights and obligations of the persons concerned.[77] As indicated in Article 2 (1) of Regulation (EC) No 987/2009, exchanges between Member States' authorities and institutions and persons covered by Regulation (EC) No 883/2004 shall be based on the principles of public service, efficiency, active assistance, rapid delivery and accessibility, including e-accessibility, in particular for the disabled and the elderly. The institutions also have a duty of mutual information, which requires from the Member States to respond to all questions within a reasonable time. The relevant institutions shall forward the information and issue the documents to the persons concerned without delay and in all cases within any time limits specified under the legislation of the Member State in question. The relevant institution shall in addition notify the claimant residing or staying in another Member State of its decision directly or through the liaison body of the Member State of residence or stay. When refusing the benefits it shall also indicate the reasons for refusal, the remedies and the periods allowed for appeals. A copy of this decision shall be sent to other institutions involved.[78]

The obligation of mutual cooperation includes the implementation of the principle of sincere cooperation enshrined in Article 4 (3) TEU, which obliges the institutions of the Member States to cooperate in good faith with each other. This obligation to facilitate the implementation of EU law requires that Member States respect and recognise the equivalence of each other's product tests, diplomas and evidence of professional qualifications in the context of the free movement of goods, persons and services.[79]

2.2.2. Regulation (EC) No 883/2004

Cooperation, as a general concept, is expressed in Article 84 of Regulation (EEC) No 1408/71. The whole text of this provision is repeated and elaborated further in Article 76 of Regulation (EC) No 883/2004. To a certain extent this Article is a blend of the articles under Regulation (EEC) No 1408/71 from which certain provisions on personal data protection were extracted and placed in a separate article. In this text the following was added:

> "*[t]he institutions and persons covered by this Regulation shall have a duty of mutual information and cooperation to ensure the correct implementation of this Regulation. The institutions, in accordance with the principle of good administration, shall respond to all queries within a reasonable period of time and shall in this connection provide the persons concerned with any information required for exercising the rights conferred on them by this Regulation. In the event of difficulties in the interpretation or application of this Regulation which could jeopardise the rights of a person covered by it, the institution of the competent Member State or of the Member State of residence of the person concerned shall contact the institution(s) of the Member State(s) concerned. If a solution cannot be found within a reasonable period, the authorities concerned may call on the Administrative Commission to intervene."*

Although it looks like Article 76 of Regulation (EC) No 883/2004, as a whole, is very similar to Article 84 of Regulation (EEC) No 1408/71, it has to be admitted that the new provision implies a big step ahead, considering as an obligation "*the mutual information and cooperation to ensure the correct implementation of this Regulation*". Taking into

[77] See Article 2(2) Regulation (EC) No 987/2009.

[78] Article 3 (4) of Regulation (EC) No 987/2009.

[79] See *e.g.* the judgment of 7 May 1991, *Vlassopoulou,* C-340/89, EU:C:1991:193, 1991, 2357, paragraph 14 and the judgment of 15 October 1987, *Heylens*, C-222/86, EU:C:1987:442, paragraph 12 (dealing with free movement of persons).

account that the anti-fraud strategy is an instrument to guarantee the correct application of the Regulations, the current text of the Regulations opens possibilities in this direction, respecting, in any case, the provisions of Article 77 on personal data protection.

In a more concrete approach, Article 84 of Regulation (EC) No 883/2004, compared to Article 92 of Regulation (EEC) No 1408/71, introduces some changes to speed up the recovery of contributions and undue benefits. In this regard Article 84 (2) is remarkable and significant:

> "*[e]nforceable decisions of the judicial and administrative authorities relating to the collection of contributions, interest and any other charges or to the recovery of benefits provided but not due under the legislation of one Member State shall be recognised and enforced at the request of the competent institution in another Member State within the limits and in accordance with the procedures laid down by the legislation and any other procedures applicable to similar decisions of the latter Member State. Such decisions shall be declared enforceable in that Member State in so far as the legislation and any other procedures of that Member State so require…Claims of an institution of one Member State shall in enforcement, bankruptcy or settlement proceedings in another Member State enjoy the same privileges as the legislation of the latter Member State accords to claims of the same kind".*

2.2.3. Regulation (EC) No 987/2009

From the first recitals of Regulation (EC) No 987/2009, the legislature made the intention of a better cooperation among the institutions of Member States clear:

> "*Closer and more effective cooperation between social security institutions is a key factor in allowing the persons covered by Regulation (EC) No 883/2004 to access their rights as quickly as possible and under optimum conditions"*[80] *"Electronic communication is a suitable means of rapid and reliable data exchange between Member States' institutions. Processing data electronically should help speed up the procedures for everyone involved. The persons concerned should also benefit from all the guarantees provided for in the Community provisions on the protection of natural persons with regard to the processing and free movement of personal data"*[81] *"Member States should cooperate in determining the place of residence of persons to whom this Regulation and Regulation (EC) No 883/2004 apply and, in the event of a dispute, should take into consideration all relevant criteria to resolve the matter. These may include criteria referred to in the appropriate Article of this Regulation"*[82] *"Procedures between institutions for mutual assistance in recovery of social security claims should be strengthened in order to ensure more effective recovery and smooth functioning of the coordination rules. Effective recovery is also a means of preventing and tackling abuses and fraud and a way of ensuring the sustainability of social security schemes. This involves the adoption of new procedures, taking as a basis a number of existing provisions in Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures…"*[83]*. " For the purposes of provisions on mutual assistance regarding the recovery of benefits provided but not due, the recovery of provisional payments and contributions and the offsetting and assistance with recovery, the jurisdiction of the requested Member State is limited to actions*

[80] Recital 2.

[81] Recital 3.

[82] Recital 11.

[83] Recital 19.

regarding enforcement measures. Any other action falls under the jurisdiction of the applicant Member State".[84]

It is important to study these recitals in depth, because it shows the clear intention of the legislature towards a better and more frequent mutual cooperation between the different institutions of the Member States. Moreover, many of the articles of Regulation (EC) No 987/2009 share this philosophy and values.

It is significant to mention that mutual cooperation or mutual assistance is widespread in many articles of Regulation (EC) No 987/2009. It develops the principle of closer cooperation between the various stakeholders that is referred to in Regulation (EC) No 883/2004 and was significantly enriched by several innovations drawn from the case law of the CJEU and from other lessons from the past. These articles contain the scope and the rules for exchanges between institutions (relating to data sharing, resubmission to the designated institution and modes of data transfer) on the one hand, and between the beneficiaries and the institutions (information sharing, data access, remedies and procedures *etc*) on the other. These rules were also supplemented by new rules on the provisional application of legislation, the provisional payment of benefits and the obligation to provisionally award benefits.[85]

In Annex I and II to this report we have included two tables: one provides an overview of all the articles mentioning the need for cooperation as an obligation *ex officio* or at request (Annex I); the second table (Annex II) looks at the new proposal from the Commission to modify these Regulations. These tables can help to get a general and concrete picture of mutual cooperation and mutual assistance in the Regulations and in the new Commission Proposal; it would be very tedious to mention all of them in detail.

2.3. Recovery and enforcement: a special case of cooperation

2.3.1. Introduction

It might happen that a person obtains undue social benefits when someone – either by forgetting or deliberately – fails to make a proper declaration or report a change in his or her personal or family circumstances (marital or civil status, declaring an activity, failing to declare the death of a person *etc*). Again, the FreSsco National Experts were presented some cases to national authorities that should advise them on how they would deal with each cross border fraud scenario.

Scenario 5: Overpayment of pension after death

Following the death of her partner, Mrs A, who receives a retirement pension from Country A, retires to a warmer climate in Europe (Country B). After enjoying a new lease of life and several happy years of retirement, she dies. Her son is her executor and with the distress of his bereavement, all the work of having to take care of his mother's affairs in another country, and at the same time his own young family at home, he forgets to notify his mother's pension provider of her death.

Which measures do Member States have in place to check or to avoid this situation?

Several issues have to be solved here.

First, it is to be found out what arrangements Country A has in place to identify that a person who is in receipt of a pension has died if they are living in another EU Member State.

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[84] Recital 20.

[85] See Jorens, Y and Van Overmeiren, F., "Geneal principles of coordination in Regulation 883/2004", EJSS, Vol. 11, 2009, 50-51.

Most countries require a person living abroad who is entitled to a state retirement pension to complete a 'confirmation-of-life certificate' periodically. The period varies. Most countries require confirmation annually (*e.g*. AT, CY, DK, FR, EL, HU, IS and ES). Among all Member States the period ranges from every 3 months (CZ) to every 2 years (UK). Bulgaria has a range of periods – 3, 6 or 12 months – depending on the recipient's preference. In Ireland about one fifth of recipients of State Pension Contributory who are resident abroad are selected each year to complete the form certifying their continuing eligibility for payment. Therefore, over a five-year period, the majority of these pensioners who are resident abroad will have been required to provide the necessary certification. Furthermore in Ireland, recipients of a Contributory Survivors Pension who are resident abroad are required to complete the form certifying their continued eligibility for payment every two years. On the other hand, the law in Liechtenstein does not contain any rule requiring a life certificate. The pertinent ordinance only states that the administration periodically checks if pensioners are still alive (Article 102 *Alters- und Hinterlassenenversicherungverordnung*, LR Nr. 831.101). Some countries have established bilateral arrangements on the notification of the death of pension recipients. For example, Finland exchanges information about the death of beneficiaries with Sweden, Norway and Germany on a monthly basis, while exchange of information with Spain has been discussed between the competent institutions. Denmark has established the exchange of information about deaths with Sweden, Germany, Norway and Iceland, which takes place every two months. Denmark is in dialogue with or has established agreements with the Netherlands, the UK, France, Poland and Spain. However, exchange procedures with these countries have not yet been implemented. Denmark mentions that the systems through which the exchange of information should occur are difficult to establish or not yet operative. Thus, the obstacles are technical rather than the result of a lack of political will. Ireland's Department of Social Protection currently receives information only from the UK on a scheduled basis. Information on pensions being paid by other countries is requested on a case-by-case basis, but the volumes are low compared to the UK. French law provides that French old-age institutions can exchange data with equivalent institutions in an EU Member State for the purpose of preventing or sanctioning the payment of undue benefits (*Code de la sécurité sociale*, Article L114-22). Old-age pension institutions may liaise with the civil registration office of another country and/or with the French consulate in order to receive information about the civil status of a pensioner. The Czech Republic reports that if a Czech pensioner dies in another EU country, the social security institution of that EU country usually notifies the Czech Social Security Administration, as the competent institution, and/or the family members notify the administration as well. Finland reports that the information usually comes from the deceased's family.

Second, the question arises which arrangements this country A has in place to recover an overpaid pension when the deceased has been living in another EU Member State?

Overpayment of pensions should be limited for those countries that periodically issue confirmation-of-life certificates. When pensions are overpaid Member States seek to recover the overpayment. However, the legal basis and procedures differ between countries. For example, in Austria the process of recovery is not stipulated by law. It thus depends on the agreements between the pension insurance institution and the respective banking institution which operates the pension payment. Many countries initially try to recover overpaid pensions via the deceased's bank (*e.g*. AT, HR, CY, DK and FI). In Finland this procedure is now provided for by legislation (*e.g*. by law 1247/2016). However, Finland reports that since there is no legal base to collect overpaid pensions from foreign banks, the companies may ask a written consent from clients when the pension is exported. Similarly, Croatian legislation does not provide for a procedure that can guarantee direct recovery from foreign financial institutions, since the Croatian Pension Insurance Institute (CPII) has not concluded any direct contracts with these institutions. If an overpayment cannot be recovered in this way, Croatia reports that recovery is then attempted by sending instruments permitting the enforcement of the recovery in accordance with Article 79 of Regulation (EC) No 987/2009 to the competent

institution in another Member State. Where recovery through the bank proves to be unsuccessful, the competent institution will contact the deceased's heirs (*e.g*. HR, DK and FI). Some countries seek to recover the amounts directly from the heirs in the first instance (EL). In France the recovery of overpaid pensions from heirs of the deceased pensioner is provided for by the French Social Security Code. The recovery is subject to a five-year time limit commencing from when the competent institution became aware of the death. French law limits the recovery of all overpayments to 20 years (*Cour de cassation*, 20 October 2000, case 98-21450). If the overpaid amount cannot be recovered through the heirs, the administrator of the estate may be contacted (*e.g*. DK).

Lastly, the question arises what arrangements are in place in Country B to identify, when a person dies, whether s/he is in receipt of a pension from another EU Member State, and what action is taken.

Again approaches vary between countries. For example, if a foreign national dies in Croatia, the certificate of death is submitted to the Ministry of Foreign Affairs, and is then forwarded to the competent consular post of the other State. However, in Austria neither special arrangements exist nor are special actions taken. There is no record of persons residing in Cyprus who are in receipt of only a pension from another Member State. Similarly, Greece reports that there is no legislation in Greece which provides for a procedure that can guarantee the recovery of overpaid pensions from foreign banks. According to the Greek report, this is mainly due to the lack of systematic cooperation between the Member States. Germany reports that the recovery procedure applied in Germany does not work in cross-border situations. Foreign banks do not accept the requests by German social pension insurance institutions. To address this problem, the German institution, when commencing payment, asks for a statement by the beneficiary that in case of death the overpaid pensions will be paid back and requests further confirmation from the foreign bank. Italy reports that if Country B receives notification of the death of a person living in its territory, there is no obligation to report this information to State A. If France were Country B, there is no system in place that collects information about whether persons are in receipt of a pension from another EU Member State. Nevertheless, for some pensioners the information might be indirectly available if they receive (an)other social security benefit(s) in country B. However, in the Czech Republic notifications of death are checked, and if there is a file on this person, the Czech Social Security Administration (CSSA) looks to see if the person received a pension from another EU country. If so, it notifies the competent institution in that State about this. Similarly, if the Finnish Centre for Pensions is aware of the fact that a Finnish resident receives pension from an EU/EFTA country, Switzerland or a country with which Finland has a social security agreement, the Centre notifies the death to the institution paying the pension abroad by mail or email. Switzerland points out that according to Article 76 (4) of Regulation (EC) No 883/2004, the individuals (and their heirs) have to inform the country of residence of any change in their situation concerning social security benefits; on behalf of the Free Movement of Persons Agreement (FMPO) this rule is directly applicable in Switzerland. The Swiss (and all other Member States') social security institutions should behave as if they were acting in their own interest and communicate the death of a person to the competent State (Article 76 (2) of Regulation (EC) No 883/2004). Similar obligations derive from bilateral social security agreements that might be more detailed (*e.g*. the Switzerland-Germany agreement, Article 3 of the Administrative Arrangement, RS 0.831.109.136.13). Croatia reports that after receiving a request from the competent institution of another Member State regarding the recovery of unduly paid pension, the Croatian CPII will try to settle the claim through an out-of-court arrangement. If the out-of-court settlement cannot be negotiated, recovery is possible through court proceedings as the Croatian Financial Agency (FINA), which is authorised to carry out enforcement in financial claims, is currently willing to recognise foreign recovery claims as instruments permitting enforcement (pursuant to Article 79 of the Regulation (EC) No 987/2009) but only after they get prior authentication at the Croatian courts or public notary.

2.3.2. The situation under the Regulations: some general remarks

When applying the social security coordination rules, results which do not correspond to the rules of the Regulations have to be avoided. These results could be coverage (including the collection of social security contributions) given by the Member State which is not competent under the Regulations or benefits paid by a Member State which would not have to pay such benefits if the rules of the Regulations were correctly applied. In addition, problems have to be tackled where due to cross-border situations the enforcement of the legislation of a Member State might become difficult. It has to be avoided, for example, that a person refuses without sanctions to pay social security contributions or pay back undue benefits only because this person lives in another Member State or because his or her patrimony is located in another Member State. In this context it should be irrelevant if these "wrong" results are caused by fraudulent behaviour, by error (of the persons or institutions involved) or due to other effects (*e.g*. the benefits of a Member State which could have an impact on the benefits of another Member State start being paid from a later date). The mechanism of recovery and enforcement is the same for all these cases.

Regulations (EC) No 883/2004 and (EC) No 987/2009 contain important improvements and developments in the field of cooperation between Member States compared to Regulations (EEC) No 1408/71 and (EEC) No 574/72. On the one hand, intensified cooperation between institutions including the aim of electronic data exchange (EESSI) tries to avoid wrong situations from the beginning. On the other hand, detailed provisions on recovery and enforcement try to correct or repair situations in which wrong results have occurred. While the provisions on offsetting (Articles 72 to 74 of Regulation (EC) No 987/2009) are based on existing provisions (Article 111 of Regulation (EEC) No 574/72), the whole Section on recovery (Article 84 of Regulation (EC) No 883/2004 and Articles 75 to 85 of Regulation (EC) No 987/2009) is brand-new under the new coordination Regulations.[86] Although they are brand-new for social security coordination, this does not mean that these provisions had to be invented. The origin for these provisions could be found in the taxation field, where such provisions have been applicable for years pursuant to a Directive, which had to be transposed into national law.[87] This means that the provisions only needed to be amended for inclusion in a Regulation and adapted to social security purposes. Article 86(3) of Regulation (EC) No 987/2009 also contains a review clause which obliges the Administrative Commission to present a report on the recovery procedures under Articles 75 to 85 of that Regulation (not the rules on offsetting under Articles 72 to 74 of Regulation (EC) No 987/2009) at the latest on 1 May 2015.

This evaluation, conducted by an ad hoc group of the Administrative Commission, was presented to the Administrative Commission on 25 November 2016 (AC 939/16) and adopted during the 349th meeting of the Administrative Commission. The European Commission proposal presented on 13 December 2016 to amend Regulations (EC) No 883/2004 and (EC) No 987/2009 mirrors certain results of this analysis.[88] This will be dealt with in more detail under 2.3.4.3 below.

[86] Article 92 of Regulation (EEC) No 1408/71 is not comparable to this new Section, as it relies on additional provisions in implementing Regulation (EEC) No 574/72, which have not been included and concern only the recovery of contributions. Therefore, under Regulation (EEC) No 1408/71 Member States had to conclude additional bilateral agreements if they wanted to have a legal base for enforceable recovery provisions (*cf*. *e.g*. Article 10 of the Agreement between the Republic of Austria and the Federal Republic of Germany on social security of 4 October 1995, Austrian Federal Law Gazette III 138/1998).

[87] Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures, OJ L 150, 10 June 2008, p. 28.

[88] COM(2016) 815 final.

2.3.3. Offsetting

2.3.3.1. Status quo

The existing legal framework for offsetting is based on the following principles:

- Offsetting usually is in favour of the citizens concerned as it is not up to them to take care of any outstanding claims of institutions, but the institutions involved have to settle the cases between them as far as possible; therefore, offsetting has priority over any other measure of recovery (Article 71 of Regulation (EC) No 987/2009).

- General rule: Benefits paid unduly may be deducted from arrears or ongoing payment of benefits of other Member States (also across the branches of social security) if the national legislation of both Member States involved allow such offsetting (Article 72(1) of Regulation (EC) No 987/2009).

- Benefits in respect of invalidity, old-age or survivor pensions paid unduly may be offset with arrears of corresponding benefits of another Member State, even if the national legislation of the Member States involved do not allow such offsetting (Article 72(2) of Regulation (EC) No 987/2009).

- Social welfare assistance paid unduly because in another Member State entitlement to social security benefits existed for the same period may be offset with these social security benefits if the legislation of both Member States involved provide for such offsetting (Article 72(3) of Regulation (EC) No 987/2009).[89]

- In case of provisional competences under Article 6 of Regulation (EC) No 987/2009 (*i.e.* only in cases of differences of view between the Member States involved) benefits paid unduly by the provisionally competent Member State shall be deducted from the arrears of the benefits of the finally competent Member State even if the national legislation of the Member States involved does not provide for such an offsetting; any amount of benefits paid unduly which cannot be recovered by this shall be deducted from ongoing payments by the finally competent Member State if such offsetting is provided under the legislation of that Member State (Article 73(1) of Regulation (EC) No 987/2009).

- In case of provisional competences under Article 6 of Regulation (EC) No 987/2004 the Member State which has provisionally collected contributions shall first try to transfer these contributions to the finally competent Member State before reimbursing any remaining amount to the person(s) concerned (Article 73(2) of Regulation (EC) No 987/2009).

This short and very simplified overview shows already how complex and multifaceted these provisions are. With exception of the two cases under Article 73 they are not obligatory but only an option for the Member States involved. Some provisions concern offsetting with any benefit, others are restricted to corresponding benefits, some provisions work even if the national legislation does not provide for such offsetting in purely national cases while others depend on corresponding internal rules, some provisions allow also offsetting with future, ongoing payment of benefits while others are restricted to benefits for the same period of time. Taking into account the complexity of

[89] Although the Regulations do not apply to medical and social assistance due to Article 3(5) of Regulation (EC) No 883/2004 this specific provision extends the material scope to social assistance in that respect.

these rules it seems that they are not applied very often in the institutions' day-to-day practice. This is also evident by the very few rulings of the CJEU on these matters.[90]

2.3.3.2. Analysis of the status quo

First, it has to be mentioned that the European Commission has proposed an amendment to Article 73 of Regulation (EC) No 987/2009.[91] But, this proposal would not change the system of the status quo and would only extend the offsetting under this provision to any retroactive change of the applicable legislation (not only in cases of provisional competences under Article 6 of Regulation (EC) No 987/2009) and add a provision of international procedural law by overruling national prescription provisions and setting a time limit of 5 years of retroactivity in cases of a dialogue procedure under Article 5 of Regulation (EC) No 987/2009.

Therefore, it would be advisable to further analyse the problems and inaccuracies of today's wording of Articles 72 and 73 of Regulation (EC) No 987/2009. Concrete examples would be necessary to better understand the cases in which these provisions are applicable and what solutions could be found to overcome the problems.

As an example we would like to refer to the mechanism of Article 73 (2) of Regulation (EC) No 987/2009 concerning the offsetting of contributions. As already explained this rule provides that contributions received by the Member State provisionally but not finally competent shall not be reimbursed to the person concerned. First there has to be an attempt to offset them with the debt of contributions in the finally competent Member State; only the surplus shall be reimbursed to the person concerned. In principle this provision seems to be easy to understand and logical; nevertheless, when applied in practice nearly insurmountable difficulties might occur. This will be explained by the following example: 10 months of provisional competence in Member State A, final competence for that period by Member State B, and a monthly income of € 1000:

[90] The only case dealing mainly with Article 111 of Regulation (EEC) No 574/72 is the judgment of 14 May 1981, *Fanara,* C-111/80, EU:C:1981:105, where the CJEU held that this provision excludes any national law which provides for withholding also amounts of the benefit which are not to be withheld under this provision. In the judgment of 21 March 1990, *Cabras*, C-199/88, EU:C:1990:127, the CJEU declared that the principles enshrined in this Article 111 are only a possibility for the Member States involved and not an obligation; overpayments can also be recovered by other means, *e.g*. of national law if there are no arrears available under the legislation of the other Member State.

[91] COM(2016) 815 final; Article 2 (28) of the proposed Regulation to amend Regulations (EC) No 883/2004 and 987/2009.

Branch	Member State A		Member State B	
	Contribution rate	**Amount**	**Contribution rate**	**Amount**
Sickness	Employer: 3%	€ 300	Tax-financed	
	Employee: 3%	€ 300	Tax-financed	
	Total: 6%	€ 600		
Pensions	Employer: 15%	€ 1500	Employer: 10%	€ 1000
	Employee: 10%	€ 1000	Employee: 10%	€ 1000
	Total: 25%	€ 2500	Total: 20%	€ 2000
AWOD[92]	Employer: 4%	€ 400	Employer: 2%	€ 200
	Employee: 0%	€ 0	Employee: 2%	€ 200
	Total: 4%	€ 400	Total: 4%	€ 400
Unemployment	Employer: 2%	€ 200	Employer: 2%	€ 200
	Employee: 2%	€ 200	Employee: 4%	€ 400
	Total: 4%	€ 400	Total: 6%	€ 600
Family benefits	Tax-financed		Employer: 1%	€ 100
			Employee: 3%	€ 300
			Total: 4%	€ 400
Total		€ 3900		€ 3400

How should Article 73(2) of Regulation (EC) No 987/2009 be applied in this specific case? Should Member State A collect all the contributions received by one "coordinating body" (which is not foreseen under this provision) and pay € 3400 to an institution (which one) in Member State B and reimburse the remaining € 500 (but to whom – to the employee, to the employer)? Or should this amount be split between employer and employee in relation to the contributions paid and those to be paid? This would result in the following calculation. The employer's contributions in Member State A would be in total € 2400 and in Member State B in total € 1500. Therefore, reimbursement to the employer would amount to € 900. The employee's contributions in Member State A would be in total

[92] Accidents at work and occupational diseases.

€ 1500 and in Member State B € 1900. Therefore, the debt of the employee towards Member State B would amount to € 400. The latter seems to be the fairer solution but would necessitate that in both Member States involved "coordinating bodies" settle the issue. If this is not the case it would be very delicate also *e.g*. for the employee to which institution in Member State B s/he should pay the € 400.

As there is no obligation to create such a coordinating body it is more likely that the institutions involved will try to settle the case by offsetting the contributions branch by branch. As a result, the sickness institution of Member State A would reimburse € 300 to the employer as well as to the employee, the pension institution of Member State A would transfer € 2000 to the pension institution of Member State B and reimburse € 500 to the employer, the AWOD institution of Member State A would transfer € 200 to the AWOD institution of Member State B and reimburse € 200 to the employer, while the AWOD institution of Member State B claims € 200 from the employee, the unemployment institution of Member State A would transfer € 400 to the unemployment institution of Member State B, while the unemployment institution of Member State B claims € 200 from the employee, and the family benefits institution from Member state B would claim € 100 from the employer and € 300 from the employee. Thus, in total the employer receives € 1000 from the institutions of Member State A and has to pay € 100 to the institutions of Member State B, while the employee receives € 300 of contributions reimbursed by Member Stat A and has to pay € 700 to the institutions of Member State B.

Although this is already complicated enough this is only one side of the medal. We should not forget that the employee might also have consumed benefits (sickness treatment or family benefits) during these ten months which would also have to be offset under Article 73 (1) of Regulation (EC) No 987/2009. Let us assume the family benefits paid by Member State A amount to € 500 for these ten months, while family benefits which are payable for this period under the legislation of Member State B amount to € 1000; thus, € 500 have to be transferred by Member State B to Member State A and the remaining € 500 would have to be paid out to the employee. At the same time employees and employers would have to pay in total € 400 of contributions to the family benefit scheme of Member State B. Of course, this is an internal situation which should be solved under the national legislation of Member State B. This could result in only € 100 paid out to the employee. But is that correct? Let us not forget that contributions for family benefits are split between employer and employee in Member State B. Thus, it would be more correct (as family benefits are an advantage only for the employee and not for his or her employer) to ask the employer to pay the € 100 of contributions to the family benefits scheme of Member State B and to pay out the surplus of € 200 of family benefits from Member State B to the employee. But, such a situation could easily also occur in cases in which one Member State would have to ask for additional contributions while the other Member State would have to pay out a difference of the benefits due (then it would be a case to which the Regulations must be applied). Can these two amounts be offset (contributions in one Member State and benefits in the other)? It seems that Articles 73 (1) and 73 (2) of Regulation (EC) No 987/2009 are not coordinated and, therefore, there would not be a legal base for such an offsetting.

2.3.3.3. Recommendations

As has been shown by this short and very simplified example the application of Articles 72 and 73 of Regulation (EC) No 987/2009, it is complex and many clarifications are missing. It cannot be assumed that these provisions are used very often or applied in the interest of the persons concerned. We must not forget that these provisions have to work smoothly and also without too much burden for administrations. Only then can the retroactive application of the legislation of the Member State which is competent under the rules of Regulation (EC) No 883/2004 be achieved, another issue which is very important in the context of countering fraud and error. Without retroactive corrections of

competences incorrect situations would be upheld and there would be no incentive for institutions to cooperate and solve disputes as quickly as possible.

How could these provisions be improved? From our point of view it is not possible to insert concrete provisions into the Regulations which set up concrete procedures, as this would be far too complex and complicated. First, all the possible scenarios and possible solutions should be analysed by experts (*e.g*. in the Administrative Commission). It could be a solution if the Regulations provide only for the general principles and the Administrative Commission is mandated to fine-tune these principles *e.g*. in a decision. The general principle should be that Member States first designate one institution which has the task to represent the claims and entitlements of all the different institutions involved in that Member State. Contact and offsetting should take place only between these designated institutions, which is also the common procedure in many other EU instruments[93] (the possibility that any social security institution involved is entitled to contact directly institutions in other Member States seems to be a peculiarity of social security coordination). These institutions should have the task to work together to find the most suited solution in the situation at hand, the solution which is least burdensome for the persons involved (including their employers). This would also necessitate the combined analysis of the contribution and the benefit side of a case. EESSI could help but cannot solve all the outstanding issues. We are convinced that also in future a lot of manual intervention of the clerks will be necessary to achieve satisfactory solutions.

2.3.4. Recovery

As stipulated in Article 71 of Regulation (EC) No 987/2009 recovery under Articles 75 to 85 of Regulation (EC) No 987/2009 should be the last resort if offsetting under Articles 72 and 73 of that Regulation was not already applied successfully.

2.3.4.1. Status quo

For recovery the following principles are provided:

- Recovery is open to any claims of social security institutions concerning benefits paid unduly or contributions not paid (Article 75 of Regulation (EC) No 987/2009).

- Institutions may request information that could be relevant for a recovery from institutions of other Member States (Article 76 of Regulation (EC) No 987/2009). The requested institution shall use all means required to get that information which are available for corresponding situations in national cases. It could be argued that this specific provision is only one additional facet of the general rule of administrative aid enshrined in Article 76(2) of Regulation (EC) No 883/2004.

- Institutions may notify the addressee who is in the territory of the requested Member State of all instruments and decisions as provided for notifications under the legislation of the requested Member State (Article 77 of Regulation (EC) No 987/2009).

- Institutions may use the specific rules provided under Regulation (EC) No 987/2009 to recover in another Member State any claim they have under the conditions provided for (Article 78 of Regulation (EC) No 987/2009 – *e.g.* that the claim is not contested, recovery is not successful or possible in the requesting Member State, the national periods of limitation have not yet expired and the claim is higher than the threshold of € 350[94]).

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[93] *E.g*. Article 4 (2) of Directive 2010/24/EU of 16 March 2010 concernig mutual assistance for the recovery of claims relating to taxes, duties and other measures, OJ L 84, 31 March 2010, p. 1, which obliges Member States to install central liaison offices for any contact in between them in applying the Directive.

[94] This threshold was set at the 318th meeting of the Administrative Commission.

- First the requesting institution has to send its instrument permitting enforcement of the recovery, which is in principle binding for the receiving State, but could be supplemented or replaced by a national instrument of recovery whenever necessary under the legislation of the requested Member State (Article 79 of Regulation (EC) No 987/2009).

- The requested institution has to apply all rules related to recovery as if it were a claim under the legislation it applies (Article 84(1) of Regulation (EC) No 883/2004 – this splitting of the text into provisions in both Regulations is not very transparent) including *e.g*. precautionary measures (Article 84 of Regulation (EC) No 987/2009). Requests which could cause serious economic and social difficulties or are older than five years may not be accepted by the requested Member State (Article 82 of Regulation (EC) No 987/2004).

- Contestations against the title of enforcement (the claim itself) have to be made in the requesting Member State; contestations against the concrete measures of enforcement in the requested Member State (Article 81 of Regulation (EC) No 987/2009). The same applies to periods of limitation connected to these two different issues (Article 83 of Regulation (EC) No 987/2009).

- Costs connected to the recovery shall never be a burden for the requested Member State but should be either recovered from the person against whom the claim is made or from the requesting Member State (Article 85 of Regulation (EC) No 987/2009).[95]

2.3.4.2. Analysis of the status quo

As the whole basket of provisions on recovery has been totally new under Regulations (EC) No 883/2004 and (EC) No 987/2009 compared to the previously applicable Regulations (EEC) No 1408/71 and (EEC) No 574/72, a review clause was inserted (Article 86 (3) of Regulation (EC) No 987/2009) to detect any deficiencies of these provisions.

A first evaluation was made by HIVA-KU Leuven in October 2015 based on the replies of the Member States to a questionnaire (AC 690/15). It turned out that these recovery provisions were not used very often.[96] Also the results of the efforts to recover amounts are not very positive. Only around 10% of requests for recovery of contributions were successful, around 20% were refused and the rest was still pending; the same picture is valid for the recovery of benefits, where nearly 15% were refused, a maximum of 25%[97] successful and the rest was still pending. The main complaints were the threshold of € 350, which was considered by some respondents as too low and a uniform instrument permitting enforcement was requested as it has been introduced in the meantime in the model for the provisions in the field of social security – the corresponding Directive for taxes.

In addition the issue has also been examined by an Ad hoc group of the Administrative Commission, which presented its report in November 2016 (AC 939/16). Again the main request was an alignment with the developments which had taken place in the meantime in the taxation field (especially the introduction of a uniform instrument permitting

[95] Important clarifications are made by Decision No R1 of 20 June 2013 concerning the interpretation of Article 85 of Regulation (EC) No 987/2009, OJ C 279, 27 September 2013, p. 11.

[96] From the Member States which could provide figures nearly 3000 requests for information were submitted and 2000 received; more than 6000 requests for recovery of outstanding contributions were submitted and 1500 received; more than 2000 requests for the recovery of unduly paid benefits were submitted and more than 1000 received.

[97] Of the requests submitted; of the requests received much less.

enforcement)[98] and the elaboration of more detailed information for the clerks. Another important issue was the wish to clearly identify the responsible requesting and requested institutions in the Institution Repository so that it should be easy to identify the institution to which requests can be sent in another Member State.

From these analyses it can be concluded that improvements are advisable to speed up and smoothen cooperation between the institutions in this important field of administrative aid.

2.3.4.3. Proposal of the European Commission for amendments

In the package of proposals to amend Regulations (EC) No 883/2004 and (EC) No 987/2009 the European Commission also proposes a series of amendments to the provisions on recovery.[99] These proposals follow the development of the corresponding rules in the taxation field,[100] which led to Directive 2010/24/EU, which is applicable at the moment.

Nevertheless, one fundamental difference between the rules in the field of social security and the parallel rules in the field of taxation has been kept. While for social security the rules are contained in an EU Regulation which is directly applicable, for taxation an EU Directive has been chosen which has to be transposed by Member States into national law. So, in the taxation field Member States have the possibility to take into account their particular situation when transposing the Directive and also add rules which might be necessary from a national perspective, while for social security purposes this is not possible as the Regulation, although inspired in this field by the Tax Directive, applies directly without any mandate to Member States to adapt the rules to their needs.

The most important amendments (the more technical adaptations introduced by Directive 2010/24/EU are not mentioned) proposed by the European Commission are the following (not to overburden the text the comparison with the tax Directive is made in the relevant footnotes):

- A legal authorisation is provided to use the information exchanged between the institutions also for other purposes, *i.e*. for the decision on taxes and other levies (proposal for a new Article 75 (4) of Regulation (EC) No 987/2009 – this explicit provision is advisable to create a clear legal base taking into account the new data protection rules[101]).

- When an institution intends to reimburse social security contributions it may inform thereof the institutions of the Member State of stay or residence of the person concerned without a previous request[102] (proposal for a new Article 75 (4) of Regulation (EC) No 987/2009). This is, from our point of view, an interesting provision which could have a much greater impact than only in cases of recovery, as such cases are not limited to recovery of contributions but apply to all cases in which contributions have to be reimbursed (*e.g*. when they have been wrongly calculated). Another important aspect is that this provision contains a push mechanism where information is made available to an institution, and not the

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[98] A comparison with the rules applicable in the tax field will be made in the following Chapter.

[99] COM(2016) 815 final; Article 2 (29) to (39) of the proposed Regulation to amend Regulations (EC) No 883/2004 and (EC) No 987/2009

[100] Repealing Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures, OJ L 150, 10 June 2008, p. 28, by Directive 2010/14/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, OJ L 84, 31 March 2010, p. 1.

[101] Regulation (EU) No 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4 May 2016, p. 1.

[102] This corresponds to Article 6 of Directive 2010/24/EU.

usual pull factor where information is only given at the request of another institution.[103]

- A request for information shall not be rejected because it is held by a "*bank, another financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person*" (proposal for a new Article 76 (3a) of Regulation (EC) No 987/2009).[104]

- A standard form (multilingual) for a request of notification is introduced (proposal for a new Article 77 (2) of Regulation (EC) No 987/2009).[105]

- First all available and realistic possibilities to notify (under national law) shall be attempted before a request under the Regulation is made (proposal for a new Article 77 (4) of Regulation (EC) No 987/2009).[106]

- A uniform instrument permitting enforcement is introduced (proposal for a new version of Article 78 (1) and of Article 79 of Regulation (EC) No 987/2009).[107] This addition could help to considerably speed up today's procedures of enforcement. It is no longer possible that the requested Member State supplements or replaces the request by a national instrument.

- The rules on reimbursement of costs of the requested institutions (proposal for an amended text of Article 85 of Regulation (EC) No 987/2009) are much more detailed and correspond to the principles already applied today.[108]

The proposal of the European Commission contains another totally new element of administrative cooperation: it allows the presence of officials of one Member State in the administrative offices in the other Member State, the participation during administrative enquiries, the assistance in court procedures, the interviewing of individuals and the examination of records (proposal for a new Article 85a of Regulation (EC) No 987/2009).[109] This seems to be a very important step forward as today official acts in another Member State were very often deemed contrary to the territorial limitation of such acts.

2.3.4.4. Recommendations

The Section of Regulation (EC) No 987/2009 on recovery is new and it is under revision due to the proposal of the European Commission for amendments to Regulations (EC) No 883/2004 and (EC) No 987/2009. Therefore, it seems to be premature to recommend concrete measures for that Section. Nevertheless, from these provisions important elements could be deduced which are relevant also for cooperation and administrative aid in other fields of the Regulations.

Most important from our point of view is the explicit possibility that officials of one Member State are allowed (if there is an agreement between the Member States concerned) to act also in the territory of other Member States in the context of recovery

[103] *E.g*. under Article 20 (2) of Regulation (EC) No 987/2009, where the words "making available" mean that the initiative has to come from the requesting institution.

[104] This corresponds to Article 5 (3) of Directive 2010/24/EU.

[105] This addition is important to safeguard that the notification is correctly done as the CJEU has decided that notifications have to be in the official language of the requested Member State (judgment of 14 January 2010, *Kyrian,* C-233/08, EU:C:2010:11). This corresponds to Article 8 (1) of Directive 2010/24/EU.

[106] This corresponds to Article 8 (2) of Directive 2010/24/EU.

[107] This corresponds to Article 12 of Directive 2010/24/EU.

[108] Decision R1 of the Administrative Commission. In this respect Regulation (EC) No 987/2009 goes beyond the rules of Directive 2010/24/EU which contains only a rather basic rule (Article 20).

[109] This corresponds to Article 7 of Directive 2010/24/EU.

procedures (as the proposed Article 85a of Regulation (EC) No 987/2009 is part of the Section on recovery this possibility cannot be used for other purposes). These measures include:

- the presence in the offices of the other Member State;
- the presence during official enquiries carried out in that other Member State;
- the assistance of the officials of the other Member State during court proceedings;
- the interviewing of individuals in the other Member State (even without the presence of officials of the other Member State);
- the examination of records held in the other Member State.

Today, such extension of the room for manoeuvre of the officials of one Member State on the territory of another Member State is provided only in one specific and seldomly applied case,[110] and has already been requested also in other fields of cooperation (*e.g*. for the problems encountered with applicable legislation concerning the right to intervene in national court proceedings;[111] but also concerning the interest of the institution situated in another Member State to participate in the investigation of a case[112]). It is not clear[113] why this extension of powers is limited to recovery and not extended to all issues of cooperation and administrative aid which might occur under the Regulations. The same applies to information which has to be delivered without previous request to any institution which might be interested in it (push function – proposed new Article 75 (4) of Regulation (EC) No 987/2009) which is now restricted to recovery but could be relevant also in main other circumstances under the Regulations.

2.4. Cooperation through the exchange of information

2.4.1. Exchange of information and privacy

2.4.1.1. General overview

One of the key aspects of good administrative cooperation for combating social fraud is the (electronic) exchange of data, the mutual providence of (digital) information and the possibility to pass on questions to other competent institutions. This mutual information duty is of the utmost importance. This is the case on a national as well as – even to a larger extent – on an international level. As the legal competence of inspection services is limited to their national territory, there is a need for cross-border cooperation. Exchange of information and cooperation between social security institutions imply the transfer of data. The electronic exchange of information is nowadays the fastest way of sharing information. It was also seen as the *magnus opus* of administrative simplification[114] according to which electronic exchange of information (EESSI[115]) is essential to speed up administration and avoid practical problems and to facilitate the transfer of the information needed for coordinating and in particular ascertaining and calculating the

[110] Article 34 (3) of Regulation (EC) No 987/2009 concerning investigation which might become necessary on the territory of another Member State if an accident on the way to or from work occurred there.

[111] Recommendation No 5b of the Ad hoc group on posting issues (AC 340/16).

[112] National inspectors should be allowed to carry out inspections in other Member States – Recommendation No 5a3 of the AHG on posting issues (AC 340/16).

[113] Of course, Directive 2010/24/EU, which is the model for Section 3 of Title IV Chapter III of Regulation (EC) No 987/2009 contains a corresponding provision which had to be transferred to the recovery part of that Regulation; but, from a systematic point of view nothing hinders to extend this principle under the Regulations also to other fields.

[114] Article 78 of Regulation (EC) No 883/2004.

[115] Electronic Exchange of Social Security Information. EESSI involves a public database containing electronic details and factual information of the national bodies involved in implementing Regulation (EC) No 883/2004. The database is immediately accessible to citizens and contains an electronic directory of the bodies concerned. The electronic directory is hosted by the EC, whereas the Member States are responsible for collecting and checking the necessary information of bodies and for the timely submission to the EC of any entry or change of the entries falling under their responsibility. (see Article 2, annex 4 of Regulation (EC) No 987/2009 and decision No E2 of the Administrative Decision).

rights of the insured persons.[116] The E-forms for the exchange of information between the competent authorities will have to make room for electronic data processing and electronic exchange will become the standard way of processing information in the field of social security coordination.

Almost all Member States these days use electronic tools to store data that contain vital information on natural and legal persons, social security, labour conditions *etc* when it comes to countering social fraud. Some but not all countries have national databases. For example, In Austria a database has been established, run by the Federal Ministry of Finances. In Belgium the Anti-Fraud Organization for Social Inspection Services (*OASIS*) has a database. In Bulgaria there is a database in the NSSI specifically for social security, containing information about deceased persons, overpaid pensions, a register of debtors *etc*. In Cyprus the Social Insurance Services use a Social Security Information System which contains information about each insured person and about employers, including insurance records, contributions paid, benefits paid *etc*. However, currently the system is not fed by external sources. Denmark has extensive national databases which support the social security administration. In Germany the Public Pension Insurance has, since 1996, been required to construct databases on employers. One of these databases contains basic information concerning the employer of each company. Another contains basic information on the insured (employee). Ireland has a Social Security National Database which receives data from other public authorities, *e.g*. the Revenue Commissioners (Irish Tax Authorities). The *RNCPS* in France covers exclusively French institutions. However, CLEISS, which is the French liaison body for coordination rules, is among the institutions who have access to this database. The *RNCPS* also contains information about pensioners who reside abroad. However, some countries do not have a national database (IT, FI). In Greece separate databases are in the process of being consolidated into a national database. In Croatia every social security administration body has their own registries and databases and exchange data between themselves as well as with tax authorities. In order to improve the exchange of information and prevent errors and fraud, the Croatian government, on 5 November 2015, adopted a Decision on the Adoption of the Strategy for the Suppression of Errors, Fraud and Corruption in the Field of Social Protection for the period 2015-2020.

This exchange of information should be fast, safe and efficient, which is definitively important in a cross-border context. However, the privacy argument is frequently invoked in order to refuse to exchange information requested by a competent body of another Member State. While this argument of privacy may be used by other institutions for not transmitting the requested information, it may also be invoked at a later stage and result in a finding of unlawfully obtained proof in violation of the law and/or individual privacy. For all these reasons the framework within which this exchange takes place is of the utmost importance.

Several countries exchange information at the international level. Information exchange is provided for by bilateral agreements in several cases. For example, Belgium has concluded bilateral treaties with France, the Netherlands and Luxemburg to enhance cooperation in the field of countering fraud and error within the framework of the coordination of social security systems. Finland has some bilateral agreements (with some European countries) and multilateral agreements (with other Nordic countries) on the exchange of information. Depending on the agreement, the cooperation may include data exchange, informal meetings *etc*, while Iceland has a long and effective cooperation regarding the exchange of information between social security institutions with other Nordic countries and takes part in working groups with the other Nordic countries on applicable legislation, pensions, sickness, health and rehabilitation. Switzerland has ratified about 50 bilateral social security agreements that contain cooperation rules.

[116] See Jorens, Y. and Van Overmeiren, F., "General principles of coordination in Regulation 883/2004", EJSS, Vol. 11, 2009, 51.

Ireland has several arrangements in place, which include the UK/NI – Cross Border Operational Forum (CBOF); the EU national Contact Point – Project H5NCP; the Cross Border Operational Forum; and the Six Countries Benefit Fraud Group. French law provides that French old-age institutions can exchange data with equivalent institutions in an EU Member State for the purpose of preventing or sanctioning the payment of undue benefits (*Code de la sécurité sociale*, Article L114-22). The exchange of data can include income-related information. Exchange of information at cross-border level is also provided within the framework of bilateral conventions. The cooperation may include: exchange of data including personal data, mutual information on the revision of relevant national legislation, information about the location of the place of residence, about receipt of benefits, about payment of contributions, cooperation for recovery of undue benefits and for recovery of unpaid contributions, and cooperation for controls. Liechtenstein has also ratified a number of bilateral social security agreements that contain cooperation rules, although the content depends on the different agreements. Bulgaria responds to requests for legal and administrative information, for verification of official documents and has bilateral meetings with some countries. Cyprus exchanges information on an ad hoc basis, including the verification of EU documents, and takes part in informal meetings. All competent Czech institutions exchange information at an international level with other social security institutions. However, the intensity and smooth running of such cooperation varies from country to country. In addition to the exchange of information pursuant to Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009, Croatia has agreements on the electronic exchange of data regarding the fact-of-death with competent pension institutions in some EU Member states. Currently there is monthly automatic exchange of data only with Slovenia, and similar arrangements are currently being trialled with Bulgaria, Germany and Poland. However, Denmark reports that apart from the exchange of information concerning death with Sweden, Germany, Norway and Iceland, international exchange of information has proved difficult. Italy reports that this possibility is linked to conventions which, at present, do not exist.

Sometimes, however, there are limitations to this exchange of information or international transfers of data to foreign social security/labour inspectorates which are often due to data protection and privacy legislation. Although this is certainly the case when dealing with non-EU/EEA countries, also between Member States issues around privacy are used to limit exchange of data.

In most countries limitations on the exchange of information or international transfers of data to e.g. foreign social security/labour inspectorates are contained in data protection legislation. For example, in Switzerland and Liechtenstein the federal data protection law contains such a limitation. Thus, limitations are prescribed by national law on personal data and the corresponding legislation in other countries. The legislation sets the purpose, terms and conditions under which data may be exchanged and may be supplemented by secondary legislation and guidelines. Finland has a general clause on data exchange in the Act on the Openness of Government Activities (621/1999, Section 30 – Granting access to confidential information to the authority of a foreign state or to an international institution). In addition to the specific statutory provisions, an authority may grant access to confidential official documents to an authority of a foreign state or to an international institution, if an international agreement binding on Finland contains a provision on such cooperation between Finnish and foreign authorities, or there is a provision to this effect in an Act binding on Finland, and if the Finnish authority in charge of the cooperation could under this Act have access to the documents. In France the same limitations apply as to the exchange of information within the country. It is specified that the exchange of data is subject to domestic and EU rules (Directive 95/46/EC on the protection of personal data). Germany follows European law on data protection and has a very rigid privacy law in social security. In Greece data concerning a person's health and social security fall within the concept of sensitive personal data. The legal obligation to protect the privacy and confidentiality of these data requires the person's consent in order for them to be provided to a third party. Similarly, in Hungary it is only possible if the person concerned consents to the data exchange. Iceland does

not send information on health or mental illness due to privacy legislation. Financial information is also very sensitive and is not provided unless the applicant has approved it at the beginning of the application process. However, no limitations that are due to privacy legislation are reported for Italy.

In this respect privacy regulations will play an important role. The impact of these privacy arguments may not be underestimated just as the borderlines are not always very clear. It cannot be ignored that the issue of privacy introduces limits to the anti-social fraud strategy. This can be clearly illustrated by a recent case before the CJEU.

2.4.1.2. The curious case of *Smaranda Bara and others*: an inconvenient European truth?

The Rumanian National Tax Administration Agency (*ANAF*) had transferred data relating to the declared income of a number of self-employed Rumanians to the National Health Insurance Fund (*CNAS*). Based on these data, the *CNAS* required the payment of arrears of contributions. Smaranda Bara and others disputed the lawfulness of this transfer, arguing that their data "*were, on the basis of a single internal protocol, transferred and used for purposes other than those for which it had initially been communicated to the ANAF, without their prior explicit consent and without their having previously been informed*", thus contrary to Directive 95/46/EC.[117] According to Rumanian law, however, public bodies are allowed "*to transfer personal data to the health insurance funds so that the latter may determine whether an individual qualifies as an insured person. The data concern the identification of persons (surname, first name, personal identity card number, address) but does not include data relating to income received*."[118]

In this context, the referring judge requested the CJEU to clarify whether it is contrary to EU law that a public body in a Member State transfers personal data to another public body in order to subsequently process these data, without informing the data subjects about this transfer and processing.[119] Of the four questions referred, the CJEU only held the last one admissible: "*May personal data be processed by authorities for which such data were not intended where such an operation gives rise, retroactively, to financial loss?*"[120]

The CJEU held that the tax data transferred by the Rumanian tax agency to the health insurance fund are personal data within the meaning of Article 2 (a) of Directive 95/46/EC,[121] since they are "*information relating to an identified or identifiable natural*

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[117] Judgment of 1 October 2015, *Smaranda Bara and Others*, C-201/14, EU:C:2015:638, paragraph 14-15; Court of Justice of the European Union, PRESS RELEASE No 110/15 of 1 October 2015, Judgment in Case C-201/14.

[118] Judgment of 1 October 2015, *Samaranda Bara and Others*, C-201/14, EU:C:2015:638, paragraph 16; Court of Justice of the European Union, PRESS RELEASE No 110/15 of 1 October 2015, Judgment in Case C-201/14, 1. "*The referring court states that the Romanian legislation provides in a strict and limitative way for the transmission of the data necessary to certify that a person qualifies as an insured person, that is to say, his personal identification details (surname, first name, identification number, habitual or ordinary residence in Romania) and therefore excludes data about income earned in Romania*." (Opinion of AG Cruz Villalón of 9 July 2015 in *Smaranda Bara and Others*, C-201/14, EU:C:2015:461, paragraph 13).

[119] Judgment of 1 October 2015, *Smaranda Bara and Others*, C-201/14, EU:C:2015:638, paragraph 14-15; Court of Justice of the European Union, PRESS RELEASE No 110/15 of 1 October 2015, Judgment in Case C-201/14, 1.

[120] Judgment of 1 October 2015, *Smaranda Bara and Others*, C-201/14, EU:C:2015:638, paragraph 18-27. The CJEU considered the first three questions inadmissible, as all three concerned the interpretation of Article 124 TFEU and clearly bear no relation to the actual facts or object of the dispute in the main proceedings, which concerns the protection of personal data (judgment of 1 October 2015, *Smaranda Bara and Others*, C-201/14, EU:C:2015:638, paragraph 27).

[121] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p. 31–50.

person".[122] Therefore, both the transfer of the data by the tax agency, "*the body responsible for the management of the database in which they are held, and their subsequent processing*" by the health insurance fund "*constitute 'processing of personal data' within the meaning of Article 2(b) of the Directive*".[123]

This means, the CJEU continues, that in the light of the lawfulness all processing of personal data must comply with the principles on data *quality* laid down in Article 6 of the Directive and with one of the "*criteria for making data processing* legitimate" listed in Article 7 of the Directive.[124] The CJEU subsequently states that the data controller or his representative must also inform the person concerned about the processing of the latter's personal data,[125] and that the requirements to do so depend on whether or not the data

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[122] Judgment of 1 October 2015, *Smaranda Bara and Others*, C-201/14, EU:C:2015:638, paragraph 29. (The CJEU thereby refers to the judgment of 16 December 2008, *Satakunnan Markkinapörssi and Satamedia Oy*, C-73/07, EU:C:2008:727, paragraph 35).

[123] "*within the meaning of Article 2(b) of the directive (see, to that effect, inter alia, judgments in Österreichischer Rundfunk and Others, C‑465/00, C‑138/01 and C‑139/01, EU:C:2003:294, paragraph 64, and Huber, C‑524/06, EU:C:2008:724, paragraph 43*" (judgment of 1 October 2015, *Smaranda Bara and Others*, C-201/14, EU:C:2015:638, paragraph 29).

[124] Judgment of 1 October 2015, *Smaranda Bara and Others*, C-201/14, EU:C:2015:638, paragraph 30. See also Opinion AG Cruz Villalón of 9 July 2015 in *Smaranda Bara and Others*, C-201/14, EU:C:2015:461, paragraph 50-54.

"*Article 6*

1. Member States shall provide that personal data must be:

(a) processed fairly and lawfully;

(b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards;

(c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;

(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;

(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. Member States shall lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use.

2. It shall be for the controller to ensure that paragraph 1 is complied with.

Article 7

Member States shall provide that personal data may be processed only if:

(a) the data subject has unambiguously given his consent; or

(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; or

(c) processing is necessary for compliance with a legal obligation to which the controller is subject; or

(d) processing is necessary in order to protect the vital interests of the data subject; or

(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1".

[125] Article 10 of the directive states that the information that has to be provided — except if the person concerned is already informed— consists of:

" (a) the identity of the controller and of his representative, if any;

(b) the purposes of the processing for which the data are intended;

(c) any further information such as

- the recipients or categories of recipients of the data,

- whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply,

- the existence of the right of access to and the right to rectify the data concerning him

in so far as such further information is necessary, having regard to the specific circumstances in which the data are collected, to guarantee fair processing in respect of the data subject.".

have been collected from the data subject.[126] The CJEU furthermore agrees with the Advocate General, who states in his conclusion that the obligation to inform the data subject is all the more important, "*since it affects the exercise by the data subjects of their right of access to the data being processed […] and their right to object to the processing of those data*."[127] According to the CJEU, it follows that "*the requirement of fair processing of personal data laid down in Article 6 of Directive 95/46 requires a public administrative body to* inform the data subjects of the transfer of those data to another public administrative body *for the purpose of their processing by the latter in its capacity as recipient of those data*."[128]

The Rumanian government argued that the law obliges the tax agency "*to transfer to the regional health insurance funds the information necessary for the determination by the CNAS as to whether persons earning income through self-employment qualify as insured persons*."[129] However, the CJEU refutes this argument. The CJEU does consider the fact that the Rumanian law concerned expressly provides that "*the data necessary to certify that the person concerned qualifies as an insured person are to be communicated free of charge to the health insurance funds by the authorities, public institutions or other institutions in accordance with a protocol*". Nevertheless, "*it is clear from the explanations provided by the referring court that the data necessary for determining whether a person qualifies as an insured person, within the meaning of the abovementioned provision, do not include those relating to income, since the law also recognises persons without a taxable income as qualifying as insured*."[130] The CJEU is therefore clear: "*In those circumstances, Article 315 of Law No 95/2006 cannot constitute, within the meaning of Article 10 of Directive 95/46, prior information enabling the data controller to dispense with his obligation to inform the persons from whom data relating to their income are collected as to the recipients of those data. Therefore, it cannot be held that the transfer at issue was carried out in compliance with Article 10 of Directive 95/46*."[131]

Next, the CJEU examines whether the failure to inform the data subjects can be qualified as one of the exceptions or limitations to the obligation to inform them, as laid down by

[126] "*... and subject to the exceptions permitted under Article 13 of the Directive*" (judgment of 1 October 2015, *Smaranda Bara and Others*, C-201/14, EU:C:2015:638, paragraph 31). This point is not unimportant and contains the difference between Articles 10 and 11 of Directive 95/46/EC. (See also Opinion AG Cruz Villalón of 9 July 2015 in *Smaranda Bara and Others*, C-201/14, EU:C:2015:461, paragraph 55-58).

[127] Formulated in Articles 12 and 14 of Directive 95/46/EC, respectively. (See also the judgment of 1 October 2015, *Smaranda Bara and Others*, C-201/14, EU:C:2015:638, paragraph 29; and Opinion AG Cruz Villalón of 9 July 2015 in *Smaranda Bara and Others*, C-201/14, EU:C:2015:461, paragraph 55-58, argument put forward by the European Commission).

[128] Judgment of 1 October 2015, *Smaranda Bara and Others*, C-201/14, EU:C:2015:638, paragraph 34 (emphasis added).

[129] Mainly pursuant to Article 315 of Law No 95/2006 (judgment of 1 October 2015, *Smaranda Bara and Others*, C-201/14, EU:C:2015:638, paragraph 36).

[130] Judgment of 1 October 2015, *Smaranda Bara and Others*, C-201/14, EU:C:2015:638, paragraph 37.

[131] Judgment of 1 October 2015, Smaranda Bara and Others, C-201/14, EU:C:2015:638, paragraph 38. On this matter see also the Opinion of AG Cruz Villalón of 9 July 2015 in *Smaranda Bara and Others*, EU:C:2015:461, paragraph 75-80.

Article 13 of the Directive.[132] The CJEU held that this cannot be the case: "*Apart from the fact, noted by the referring court, that data relating to income are not part of the personal data necessary for the determination of whether a person is insured, it must be observed that Article 315 of Law No 95/2006 merely envisages the principle of the transfer of personal data relating to income held by authorities, public institutions and other institutions.* It is also apparent from the order for reference that the definition of transferable information and the detailed arrangements for transferring that information were laid down not in a legislative measure but in the 2007 Protocol agreed between the ANAF and the CNAS, which was not the subject of an official publication."[133] According to the CJEU, "*[i]n those circumstances, it cannot be concluded that the conditions laid down in Article 13 of Directive 95/46 permitting a Member State to derogate from the rights and obligations flowing from Article 10 of the directive are complied with*." [134]

The CJEU then explains that, moreover, Article 11 of the Directive provides that the controller of the data *which were not obtained from the data subject* must provide the latter with the information concerning the identity of the data controller, the purposes of the processing, and any further information necessary to ensure the fair processing of the data. [135] Must be considered as "any further information": "*the categories of data concerned*" and "*the existence of the right of access to and the right to rectify the data concerning him*".[136] The data subjects should thus have been informed about the

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[132] Judgment of 1 October 2015, *Smaranda Bara and Others*, C-201/14, EU:C:2015:638, paragraph 38. Article 13 of the Directive states: "*1. Member States may adopt legislative measures to restrict the scope of the obligations and rights provided for in Articles 6 (1), 10, 11 (1), 12 and 21 when such a restriction constitutes a necessary measures to safeguard:*

(a) national security;

(b) defence;

(c) public security;

(d) the prevention, investigation, detection and prosecution of criminal offences, or of breaches of ethics for regulated professions;

(e) an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters;

(f) a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority in cases referred to in (c), (d) and (e);

(g) the protection of the data subject or of the rights and freedoms of others.

2. Subject to adequate legal safeguards, in particular that the data are not used for taking measures or decisions regarding any particular individual, Member States may, where there is clearly no risk of breaching the privacy of the data subject, restrict by a legislative measure the rights provided for in Article 12 when data are processed solely for purposes of scientific research or are kept in personal form for a period which does not exceed the period necessary for the sole purpose of creating statistics."

[133] Judgment of 1 October 2015, *Smaranda Bara and Others*, C-201/14, EU:C:2015:638, paragraph 40 (emphasis added).

[134] Judgment of 1 October 2015, *Smaranda Bara and Others*, C-201/14, EU:C:2015:638, paragraph 41.

[135] Article 11.1 a) to c) Directive 95/46/EC stipulates:

"*1. Where the data have not been obtained from the data subject, Member States shall provide that the controller or his representative must at the time of undertaking the recording of personal data or if a disclosure to a third party is envisaged, no later than the time when the data are first disclosed provide the data subject with at least the following information, except where he already has it:*

(a) the identity of the controller and of his representative, if any;

(b) the purposes of the processing;

(c) any further information such as

- the categories of data concerned,

- the recipients or categories of recipients,

- the existence of the right of access to and the right to rectify the data concerning him

in so far as such further information is necessary, having regard to the specific circumstances in which the data are processed, to guarantee fair processing in respect of the data subject."

[136] Judgment of 1 October 2015, *Smaranda Bara and Others*, C-201/14, EU:C:2015:638, paragraph 42; *cf. supra* concerning the remark of the Advocate General about the possibility for the persons concerned to exercise the rights granted to them by the Directive.

purposes of the processing and about the categories of the data concerned.[137] This had not been done in this case. [138]

The CJEU adds that also the final exception listed in Article 11(2) of Directive 95/46/EC – *i.e*. disclosure is expressly laid down by law[139] – does not offer a way out.[140] After all, the law only lays down the *principle* of data exchange: the *definition of transferable information and the detailed arrangements for transferring that information* were laid down *not* in a legislative measure but in a non-officially published protocol between the tax agency and the social security institution. [141] The CJEU is therefore of the opinion that the provisions of Law No 95/2006 and the protocol do not establish a basis for applying either the derogation under Article 11(2) or the derogation provided for under Article 13 of the Directive.[142]

The CJEU concluded in response to the request for a preliminary ruling is as follows:

> "*Articles 10, 11 and 13 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data, must be interpreted as precluding national measures, such as those at issue in the main proceedings, which allow a public administrative body of a Member State to transfer personal data to another public administrative body and their subsequent processing, without the data subjects having been informed of that transfer or processing*."

So far the administrative authorities seem to be mostly ignoring the *Bara* case.[143] There is a risk that the exceptions laid down by Article 13 of Directive 95/46/EC can be interpreted too broadly: not only may the scope of the obligation to inform the data subjects be limited, but also the scope of the principles on data quality, the right of access and the obligation to publicise processing operations.[144]

It is crystal clear what the consequences of the *Bara* judgment are for the many forms of exchanging personal data between administrative authorities in cases that are similar to the *Bara* case. In our opinion, especially in a cross-border context this can be considered a leading case. In many cases the exchange of information between administrations of different Member States is as we have described above based on various types of agreements,[145] which are rarely published. It therefore seems very clear that in most

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[137] Judgment of 1 October 2015, *Smaranda Bara and Others*, C-201/14, EU:C:2015:638, paragraph 43.

[138] Judgment of 1 October 2015, *Smaranda Bara and Others*, C-201/14, EU:C:2015:638, paragraph 44.

[139] Article 11 (2) of Directive 95/46/EC states: "*2. Paragraph 1 shall not apply where, in particular for processing for statistical purposes or for the purposes of historical or scientific research, the provision of such information proves impossible or would involve a disproportionate effort or if recording or disclosure is expressly laid down by law. In these cases Member States shall provide appropriate safeguards*.".

[140] Judgment of 1 October 2015, *Smaranda Bara and Others*, C-201/14, EU:C:2015:638, paragraph 45; *cf.* supra and judgment of 1 October 2015, *Smaranda Bara and Others*, C-201/14, EU:C:2015:638, paragraph 40-41.

[141] Judgment of 1 October 2015, *Smaranda Bara and Others*, C-201/14, EU:C:2015:638, paragraph 40.

[142] Judgment of 1 October 2015, *Smaranda Bara and Others*, C-201/14, EU:C:2015:638, paragraph 45. See also the Opinion of AG Cruz Villalón of 9 July 2015 in *Smaranda Bara and Others*, EU:C:2015:461, paragraph 81-85.

[143] See Jorens, Y., Gillis, D. and De Potter, T., "De strijd tegen sociale fraude en sociale dumping: quo vadis?", in Strafrecht en strafprocesrecht: doel of middel in een veranderde samenleving", Traest, Ph, Verhage, A. en Vermeulen, G, XLIII Post-Universitaire Cyclus Delva, Kluwer, Mechelen, 2017, forthcoming, 23 and following.

[144] D. De Bot, "Ook voor Belgische burgers recht op informatie over gegevensoverdrachten", *Juristenkrant* 2015, No 316, 16.

[145] It is with good reason that Decision H5 of the Administrative Commission for the Coordination of Social Security Systems uses the words "*agreements* and bilateral cooperation arrangements" instead of cooperation *treaties* (Annex 1(3) of Decision No H5 of 18 March 2010 concerning cooperation on combating fraud and error within the framework of Council Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 of the European Parliament and of the Council on the coordination of social security systems).

cases exchanges of information based on all kinds of "*agreements* and bilateral cooperation arrangements" or on administrative agreements not ratified by law and not published, the data subjects thereby not being sufficiently informed, will not pass the *Bara* test.[146] Moreover, the Bara judgment possibly also has disastrous consequences for the exchange of information in purely national situations. All too often, a transfer is provided for by law, whereas this law does not lay down a definition of the transferable data and does not stipulate the implementation of the transfer.[147]

Furthermore, the question can be asked whether all cases in which data are exchanged in the context of countering (cross-border) social fraud are actually in compliance with all privacy and data protection requirements. In our opinion, in no way can one simply argue that the anti-social fraud strategy is more important than data protection. After all, it is up to the courts to make sure that the rights of those they judge are respected, also – and particularly – when these (basic) rights are violated or risk being violated by the executive branch – thereby respecting the hierarchy of legal norms.[148]

2.4.1.3. Also the European social security coordination Regulations cannot escape privacy and data protection

The Proposal amending the coordination Regulations also contains a number of provisions that aim to, on the one hand, provide a legal basis for the exchange of personal data in the context of a correct application of these Regulations, and on the other hand make sure that this exchange of data is in compliance with the acquis communautaire with respect to data protection.[149]

The reasons are clear. This needs to help the Member States in their efforts to counter social fraud and abuse. "*This would enable a Member State to periodically compare data held by its competent institutions against that held by another Member State in order to identify errors or inconsistencies that require further investigation*."[150] The Proposal furthermore refers to cross-border cooperation and exchange of data when countering *fraud and error*, as well as the possibility that the validity or correctness of documents could be harmed and the necessity of the exchange of data to make it possible to withdraw forms.[151]

More concretely, after Recital 39 of Regulation (EC) No 883/2004[152] a paragraph 39a will be added, which refers to the acquis concerning data protection[153] and more specifically

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"The Protocol of 26 October 2007 quoted by the Romanian Government evidently does not, as the Commission points out, meet the first of those requirements, since it is not at all akin to a legislative measure of general scope, duly published and enforceable in relation to those persons who are the subjects of the transmission of the data at issue."

[146] The same goes for the exchange of personal data between administrations of a different level within one Member State.

[147] Cf supra for what concerns the necessity of this.

[148] See Jorens, Y., Gillis, D. and De Potter, T., "De strijd tegen sociale fraude en sociale dumping: quo vadis? ", in Strafrecht en strafprocesrecht: doel of middel in een veranderde samenleving", Traest, Ph, Verhage, A. en Vermeulen, G, XLIII Post-Universitaire Cyclus Delva, Kluwer, Mechelen, 2017, forthcoming, 21 and following.

[149] COM(2016) 815 final.

[150] *Idem*.

[151] See, among others, COM(2016) 815 final, 3, 14, 22, 24 and 38.

[152] Regulation (EC) No 883/2004.

[153] "*After Recital 39, the following is inserted:*

"(39a) The relevant EU data protection acquis, in particular Regulation (EU) 679/2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) shall apply to the processing of personal data pursuant to this Regulation."" (COM(2016) 815 final, 28).

to the General Data Protection Regulation[154]; Article 8 of the Charter of Fundamental Rights of the European Union, amongst others, is referred to as well.[155]

In Regulation (EC) No 987/2009 as well explicit reference to the acquis with regard to data protection will be added.[156] These state that it is in the interests of legal certainty to include in the implementing Regulation a clear legal basis that allows competent institutions to exchange personal data with the relevant authorities of the Member State of stay or residence. "*It is also necessary to specify the circumstances in which personal data may be processed for a purpose other than social security including to monitor compliance with legal obligations at Union or national level in the fields of labour, health and safety, immigration and taxation law*."[157]

Far-reaching is the third paragraph which is to be inserted in Article 3 of the implementing Regulation. It unambiguously stipulates that when collecting, transmitting or processing personal data for the purposes of implementing the Regulation (EC) No 883/2004, Member States "*shall ensure that the persons concerned are able to exercise fully their rights regarding personal data protection in accordance with Union provisions on the protection of individuals with regard to the processing of personal data and the free movement of such data in particular concerning the rights to have access, to rectify, to object to the processing of such personal data and are fully informed of the safeguards concerning automated individual decisions*."[158]

It is clear what this new provision means for the processing of personal data in the framework of the coordination of social security systems. Its actual impact, however, is in our opinion not so clear,[159] the more so since the proposal provides for a far-reaching form of information sharing. In Article 19, a new paragraph is added – among others – which stipulates that necessary "*relevant information regarding the social security rights and obligations of the persons concerned shall be exchanged directly between the competent institutions and the labour inspectorates, immigration or tax authorities of the States concerned*", and that this exchange may also include the processing of personal data for purposes other than those under the coordination Regulations, in particular "*to ensure compliance with relevant legal obligations in the fields of labour, health and safety, immigration and taxation law*." It is surprising that rules on this have to be formulated in a Decision by the Administrative Commission, considering that the latter is in the first place, with all due respect, not exactly a body of expertise with regard to

[154] Regulation (EU) No 2016/679.

[155] COM(2016) 815 final, 9, 10 and 26.

[156] See the proposal to insert new Recitals 25 and 26 by Article 2 (3) of COM(2016) 815 final, 9, 10 and 26.

[157] New Recital 25 to be inserted by Article 2 (3) proposing to insert new Recitals 25 and 26 (COM(2016) 815 final, 37).

[158] See especially the proposed new Article 3 (3), which explicitly provides that "*Member States shall ensure that the persons concerned are able to exercise fully their rights regarding personal data protection in accordance with Union provisions on the protection of individuals with regard to the processing of personal data and the free movement of such data in particular concerning the rights to have access, to rectify, to object to the processing of such personal data and are fully informed of the safeguards concerning automated individual decisions*." (Article 2(6) of the proposal to insert new Recitals 25 and 26 by Article 2 (3) of COM(2016) 815 final, 38).

[159] This also gives rise to the question about possible reactions of advocates of the application of this provisions with respect to the general directives on data-protection: should these provisions be considered as a *lex specialis* or does rather the *priori derogat anterior* principle applies.

privacy and data protection.[160] In addition decisions taken by the Administrative Commission are not legally binding. [161]

Furthermore, the 'detailed explanation of the provisions of the proposal' states that Article 75 of the Regulation (EC) No 987/2009 is amended "*to provide a legal basis for the Member States to use the information exchanged, in the field covered by this Regulation, also for the purpose of assessment and enforcement of taxes and duties covered by Directive 2010/24/EU. It furthermore introduces a legal basis for authorities to exchange information, without prior request, in cases of refund of social security contributions*."[162] The new Article 75 will read:

> "*Information exchanged in conformity with this Section may be used for the purpose of assessment and enforcement including the application of precautionary measures with regard to a claim, and in addition may be used for the purpose of assessment and enforcement of taxes and duties covered by Article 2 of Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures. Where a refund of social security contributions relates to a person who resides or stays in another Member State, the Member State from which the refund is to be made may inform the Member State of residence or stay of the upcoming refund, without prior request*."[163]

The introduction of these new provisions once again shows that on the European level data protection and associated rights are gaining – more – importance.[164] Therefore, we believe it wise to investigate the exchange of personal data in general, and more specifically in a social security context, and examine it for possible violations of persons' rights and of the relevant regulatory framework, the latter recently – and rightfully – being applied and complied with more and more strictly. We must not forget that privacy and the protection of personal data are and remain cornerstones in the democratic welfare state. Especially informing citizens about the possible forms of processing of their personal data in a way that is clear and that provides legal certainty seems sensible in order to respect the rights of the persons involved and respect the principle of a state under the rule of law and in order to avoid procedures such as the *Bara* case.[165] It is not possible to correctly apply social security law provisions, both on a European and Member State level, and prevent and counter fraud, error and abuse without the lawful and legal exchange of personal data. "*In order to protect the rights of data subjects while at the same time facilitating the legitimate interest of Member States to collaborate in enforcement of legal obligations, it is necessary to clearly specify the circumstances in which personal data exchanged pursuant to these Regulations may be used for purposes other than social security and to clarify the obligations of Member States to provide specific and adequate information to data subjects*."[166]

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[160] See new Article 19 (4) as proposed by Article 2(11) of COM(2016) 815 final, 40; see See Jorens, Y., Gillis, D. and De Potter, T., "De strijd tegen sociale fraude en sociale dumping: quo vadis?", in Strafrecht en strafprocesrecht: doel of middel in een veranderde samenleving", Traest, Ph, Verhage, A. en Vermeulen, G, XLIII Post-Universitaire Cyclus Delva, Kluwer, Mechelen, 2017, forthcoming, 27 and following.

[161] See Article 72 (a) of Regulation (EC) No 883/2004: the Decisions taken by the Administrative Commission shall be adopted, without prejudice to the right of the authorities, institutions and persons concerned to have recourse to the procedures and tribunals provided for by the legislation of the Member States, by this Regulation or by the Treaty.

[162] COM(2016) 815 final, 17.

[163] See new Article 75(4) as proposed by Article 2(29) of COM(2016) 815 final, 44.

[164] The European level is thus well aware of the sense of urgency regarding data protection.

[165] See also the unmistakable exhortation in the explanation of the provisions: "*The competent authority shall be required to provide specific and adequate information to data subjects* about the purposes for which personal data is processed." (COM(2016) 815 final, 15; emphasis added). See Jorens, Y., Gillis, D. and De Potter, T., "De strijd tegen sociale fraude en sociale dumping: quo vadis? ", in Strafrecht en strafprocesrecht: doel of middel in een veranderde samenleving", Traest, Ph, Verhage, A. en Vermeulen, G, XLIII Post-Universitaire Cyclus Delva, Kluwer, Mechelen, 2017, forthcoming, 27 and following.

[166] COM(2016) 815 final, 24.

3. COOPERATION, ENFORCEMENT AND RECOVERY IN THE FRAMEWORK OF DIRECTIVE 96/71/EC AND DIRECTIVE 2014/67/EU

If improvements to today's cooperation under Regulations (EC) No 883/2004 and (EC) No 987/2009 are being discussed it might be interesting to look into other fields of European law where cooperation between Member States is necessary, and examine if these rules could serve as a model also for social security.

Directive 96/71/EC (Posting Directive) concerning the posting of workers in the framework of the provision of services, to start with, establishes a core set of clearly defined terms and conditions of employment which are to be complied with by cross-border service providers in cases of temporary cross-border postings. Due to the ongoing criticism and public debate regarding social dumping with respect to cross-border posting, the EU reacted in 2014 by adopting the so-called 'Enforcement Directive'.[167] This Directive aims to improve the enforcement of the posting rules through a combination of awareness-raising measures (via websites and brochures, translations in other languages (for foreign workers) and simple, up-to-date, accessible information), government enforcement measures (mutual legal assistance) and private law enforcement mechanisms (a system of joint and several liability). Together, these measures were to improve posted workers' rights, eliminate abuse, and attain fairer competition with a better level playing field.

As in the field of social security coordination, the proper implementation of the European rules requires ongoing cross-border cooperation of competent authorities. Article 4 of the Posting Directive already introduced the idea of national liaison offices as well as the obligation to cooperate, including replying to reasoned requests from public authorities "*for information on the transnational hiring-out of workers, including manifest abuses or possible cases of unlawful transnational activities*".[168] Moreover, it was clarified that mutual assistance between public authorities should be free of charge.[169] In practice however, this was not sufficient to enable reliable cross-border cooperation. Thus, the legislature included two full chapters dealing with administrative cooperation and cross-border enforcement of financial administrative penalties and/or fines.

3.1. Administrative cooperation

The Posting Directive introduced a number of mutual assistance principles:

- **Replying to reasoned requests**: The Enforcement Directive reiterates the obligation of Member States to reply to reasoned requests for information in carrying out inspections of posting situations. With respect to the Posting Directive the notion of request for information is further defined and may include information with respect to a possible recovery of an administrative penalty and/or fine or the notification of a decision imposing such a penalty and/or fine.[170]

- **Sending and service of documents**: It is clarified that the cooperation may include the sending and service of documents.[171]

[167] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), OJ L 159, 28.5.2014, p. 11-31.

[168] Article 4 (2) Directive 96/71/EC.

[169] Article 4 (2) Directive 96/71/EC.

[170] Article 6 (2) Directive 2014/67/EU.

[171] Article 6 (3) Directive 2014/67/EU.

- **Information obligation of service providers**: Member States are obliged to ensure that service providers established in their territory have to supply all the information necessary in order to supervise their activities. Thus, every Member State should have mechanisms in place allowing it to obtain the information required in a request for assistance from another Member State.[172]

- **Time limits**: The Directive introduces clear time limits in order to speed up mutual assistance. Information shall be transmitted by electronic means and within a maximum of 25 working days from the receipt of the request, in urgent cases requiring the consultation of registers even within a maximum of two working days.[173]

- **Principle of equivalent access with regard to particular registers**: Member States have to ensure that registers in which service providers have been entered and can be consulted by competent authorities, may also be accessed by equivalent competent authorities of other Members States. This provision is quite remarkable and can be qualified as a practical implementation of the 'principle of equivalent access'.[174] However, it has to be borne in mind that the scope of equivalent access is limited to registers listed by the Member States in the IMI, *i.e*. semi-public national trade registers or business registers, and therefore does not enable competent authorities to have access to internal databases of equivalent authorities in another Member State.

- ***Ex officio* obligation to inform:** Where there are facts that indicate possible irregularities, a Member State shall, on its own initiative, communicate to the Member State concerned any relevant information without undue delay.[175] Thus, the Directive clearly introduces an *ex officio* obligation to inform (push factor).

- **Practical implementation via an electronic system:** The practical implementation of administrative cooperation and mutual assistance shall be implemented via the Internal Market Information System (IMI).[176]

- **Bilateral agreements and arrangements:** The Enforcement Directive does not preclude Member States from applying bilateral agreements or arrangements regarding administrative cooperation and mutual assistance between competent authorities.[177] Member States shall, however, inform the Commission of the bilateral agreements and/or arrangements they apply and shall make the text of those bilateral agreements generally available.

3.2. Cross-border enforcement of penalties and fines

The Posting Directive also addresses the issue of cross-border enforcement of financial administrative penalties and fines. The scope of those provisions is limited to administrative fines or penalties; penalties included in the scope of European instruments of judicial cooperation are explicitly excluded.[178] Nevertheless, the content of the provisions seems to be inspired by principles and mechanisms from the field of judicial cooperation. The most important points include:

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[172] Article 6 (4) Directive 2014/67/EU.

[173] Article 6 (6) a Directive 2014/67/EU.

[174] See also Chapter 4.3 below.

[175] Article 7 (4) Directive 2014/67/EU.

[176] Article 21 Directive 2014/67/EU.

[177] Article 21 (2) Directive 2014/67/EU.

[178] Article 13 (2) Directive 2014/67/EU.

- **Mutual recognition**: In general a requested authority has to recognise an incoming request for recovery "*without any further formality being required*".[179]

- **Grounds for refusal**: The Directive clearly defines (and thus limits) the possible grounds for refusal for a requested authority. Besides formal inconsistencies (*e.g*. lack of information, failure to use the uniform instrument) these grounds include disproportionate costs or resources or significant difficulties with regard to the recovery procedure, a penalty or fine below a minimum threshold of € 350 or reasons of protection of fundamental rights or constitutional principles.[180]

- **Costs**: There shall not be any reimbursement of costs arising from mutual assistance. The amounts recovered accrue to the requested authority.[181]

[179] Article 13 (3) Directive 2014/67/EU.

[180] Article 17 Directive 2014/67/EU.

[181] Article 19 Directive 2014/67/EU.

4. COOPERATION, ENFORCEMENT AND RECOVERY IN THE FIELD OF TITLE V TFEU (JUDICIAL AND POLICE COOPERATION IN CRIMINAL MATTERS)

4.1. Judicial and police cooperation – general remarks

When dealing with the issue of mutual assistance with regard to unduly paid social security benefits or the failure to pay social security contributions it might prove worthwhile to look beyond the legal framework of the coordination Regulations in order to see how other legal fields are dealing with comparable problems. Title V of Part Three of the TFEU provides that the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.[182] *Inter alia*, this title includes a legal basis for Union acts in the field of judicial cooperation in both civil[183] and criminal matters[184] as well as police cooperation in relation to the prevention, detection and investigation of criminal offences.[185]

The following analysis does not seek to give a complete picture of the current status quo in those particular fields. As provided for in the mandate we simply try to give a short overview of the EU's competence in the field of judicial cooperation as well as (selected) existing instruments in order to look at possible interrelations. In this way, we hope to provide some guidance on two underlying questions:

- To what extent may selected instruments of judicial and police cooperation already be used for mutual assistance in the field of social security (in the case of unduly paid social security benefits and/or the failure to pay social security contributions)?

- How are those instruments dealing with particular problems of cross-border mutual assistance? May particular provisions complement or serve as an example for social security regulation?[186]

4.2. EU competences in the area of judicial and police cooperation

Judicial cooperation in the EU is twofold and consists of cooperation in civil matters[187] and cooperation in criminal matters.[188] One of the cornerstones of judicial cooperation is the principle of mutual recognition.[189] This principle is designed to strengthen cooperation between Member States but also to enhance the protection of individual rights. Its application requires mutual trust between Member States, built upon shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law.[190]

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[182] Article 67 (1) TFEU.

[183] Chapter 3 of Title V TFEU.

[184] Chapter 4 of Title V TFEU.

[185] Chapter 5 of Title V TFEU.

[186] This part will be dealt with in Chapter 4.3.

[187] Chapter 3 of Title V TFEU.

[188] Chapter 4 of Title V TFEU; the following analysis does not deal with instruments of judicial cooperation in civil and commercial matters.

[189] Article 81 (1) and 82 (1) TFEU.

[190] *Cf.* Programme of measures to implement the principle of mutual recognition of decisions in criminal Matters, OJ C 12/10, 15.1.2001; Communication from the Commission to the Council and the European Parliament: Mutual Recognition of Final Decisions in Criminal Matters, COM(2000) 495 final p.4.

In criminal matters, the EU has the following major types of competences[191]:

- **Judicial cooperation** and mutual recognition: Rules and procedures to ensure the recognition of all forms of judgments and judicial decisions, to prevent and settle conflicts of jurisdiction between Member States, to support the training of the judiciary and judicial staff, and to facilitate cooperation between judicial or equivalent authorities in relation to proceedings in criminal matters and the enforcement of decisions (Article 82 (1) TFEU).

- **Serious crimes and approximation of laws**: Minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.[192] Those areas include terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. The Council may adopt a decision identifying other areas of crime that meet the criteria. The measures have to be adopted in accordance with the ordinary legislative procedure by means of Directives.[193]

- **'Annex competence':** Minimum rules with regard to the definition of criminal offences and sanctions in an area which has been subject to harmonisation measures if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy.[194] This competence can be traced back to the CJEU's case law stating that an EU harmonisation measure can require Member States to adopt "*effective, proportionate and dissuasive criminal penalties*" in order to guarantee the effective implementation of the European rules.[195]

- **Crime prevention:** Measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States.[196]

Police cooperation on European level includes the prevention, detection and investigation of criminal offences. The Union may establish measures concerning

- the collection, storage, processing, analysis and exchange of relevant information[197];

- support for the training of staff and cooperation on the exchange of staff, on equipment and on research into crime detection[198];

- common investigative techniques in relation to the detection of serious forms of organised crime[199];

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[191] It has to be taken into account that this list is not complete but limited to aspects that are relevant for our analysis. We do not take into account competences to establish a European Public Prosecutor (Article 86 TFEU) or competences in the field of safeguarding the Union's financial interests (Article 325 TFEU).

[192] Article 83 (1) TFEU.

[193] Article 82 (2) TFEU.

[194] Article 83 (2) TFEU.

[195] *E.g*. judgment of 13 September 2005, *Commission v Council*, C-176/03, EU:C:2005:542; judgment of 21 September 1989, *Commission v Greece,* C-68/88, EU:C:1989:339.

[196] Article 84 TFEU.

[197] Article 87 (2) a TFEU.

[198] Article 87 (2) b TFEU.

[199] Article 87 (3) c TFEU.

- measures concerning operational cooperation between the competent authorities;[200]

- Europol's structure, operation, field of action and tasks;[201]

- conditions and limitations under which the competent authorities of the Member States may operate in the territory of another Member State in liaison and agreement with authorities of that State.[202] This provision applies to both judicial cooperation in criminal matters and police cooperation, irrespective of the systematic position in Chapter 5 of the TFEU.

In addition, it has be to be borne in mind that most of the current legislative acts in the areas of judicial and police cooperation predate the Treaty of Lisbon and were adopted as Conventions in the framework of Justice and Home Affairs[203] or, after the treaty of Amsterdam, as Framework Decisions within the former third pillar on PJCC (police and justice cooperation in criminal matters).[204] The legal effects of those acts are preserved until they are repealed, annulled or amended.[205]

Lastly, judicial and police cooperation rely heavily on the so-called 'Schengen Acquis', which was developed outside the remits of the European Union but was integrated at a later stage into the Union's legal order, including provisions on cross-border information exchange as well as the so-called SIS II (Schengen Information System).

4.3. Important principles in the field of judicial cooperation in criminal matters and police cooperation

Mutual recognition and mutual assistance: One of the cornerstones of judicial cooperation is the principle of mutual recognition.[206] This principle is designed to strengthen cooperation between Member States but also to enhance the protection of individual rights. Its application requires mutual trust between Member States, built upon shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law.[207] When looking at particular legal instruments in the field of judicial cooperation in criminal matters, one is confronted with a plethora of different legal acts, covering cooperation in the areas of obtaining and securing evidence, enforcing search and seizure orders, common investigations and the enforcement of arrest warrants, fines *etc*. Traditionally, many of those instruments used to be based on the underlying principle of mutual assistance, including the European Conventions on mutual assistance in criminal matters, the Schengen Agreement and the Convention on mutual assistance in criminal matters and its Protocol. Gradually, many of those instruments were replaced or complemented by legislative acts focusing on the principle of mutual recognition, trying to limit the requirement of (or verification of) dual criminality, using orders instead of requests, using fixed deadlines, direct contact between competent authorities, standardised forms *etc*.[208]

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[200] Article 87 (3) TFEU.

[201] Article 88 TFEU; for more details *cf.* below.

[202] Article 89 TFEU.

[203] *E.g*. Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union.

[204] *E.g*. Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties as amended by Council Framework Decision 2009/299/JHA of 26 February 2009.

[205] Article 9 Protocol No 36 on Transitional Provisions.

[206] Articles 81 (1), 82 (1) TFEU.

[207] Programme of measures to implement the principle of mutual recognition of decisions in criminal Matters, OJ C 12, 15.1.2001, p.10; COM(2000) 495 final p.4.

[208] European Commission, Green paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, COM(2009) 624 final p. 3.

Principle of equivalent access: The so-called 'Swedish Initiative' established rules, including deadlines, for the exchange of information and intelligence between Member State law enforcement authorities for the purpose of conducting criminal investigations or criminal intelligence operations. It applies the principle of equivalent access, *i.e*. Member States have to ensure that procedures and conditions applied to cross-border exchanges of information are not stricter than the ones applied to national level.[209]

Principle of availability: The so-called The Hague Programme (2005-2010)[210] introduced the principle of 'availability' as the guiding concept for law enforcement information exchange. This concept means that throughout the Union, information that is available to law enforcement authorities in one Member State should also be made accessible to law enforcement authorities in other Member States. In 2005, the European Commission proposed a Council Framework Decision on the exchange of information under the principle of availability.[211] This proposal, however, was withdrawn in 2009.[212]

4.4. Particular legal instruments of judicial cooperation in criminal matters at a glance

In order to implement the principle of mutual recognition in criminal matters the EU and the Member States adopted a series of different legislative measures, covering various aspects of criminal investigations (*i.e*. gathering evidence, joint investigations, information exchange *etc*) as well as the enforcement of judgments and judicial decisions (*i.e*. arrest warrants, financial penalties, custodial sentences); it would go far beyond the current mandate to deal with the whole arsenal of different legal acts, instruments and institutions that were developed over decades in the European context. Thus, we decided to focus on a selective sample, including the following instruments/institutions:

1) The Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union*[213]*

The Convention essentially supplements the so-called 'Schengen Acquis' as well as the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, and seeks to ensure that mutual assistance is provided in a fast and efficient manner. The Convention extends the scope of mutual assistance in criminal matters to "*proceedings brought by the administrative authorities in respect of acts which are punishable under the national law of the requesting or the requested Member State, or both, by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters*".[214] This also includes proceedings relating to "*offences or infringements for which a legal person may be held liable in the requesting Member State*".[215] It mainly deals with formalities and procedures in the execution of a request for mutual assistance (*i.e*. deadlines, sending of documents, transmissions of requests, as well as the spontaneous exchange

[209] Article 3 (3) of Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union.

[210] OJ C 53, 3.3.2005 p. 1.

[211] Proposal for a Council framework decision on the exchange of information under the principle of availability COM(2005) 490 final.

[212] Communication from the Commission to the European Parliament and the Council: Consequences of the entry into force of the Treaty of Lisbon for ongoing interinstitutional decision-making procedures, COM(2009) 665 final.

[213] Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 107, 12.7.2000, p. 1.

[214] Article 3 (1) of the Convention.

[215] Article 3 (2) of the Convention.

of information).[216] Title II and III focus on specific forms of mutual assistance including restitution, temporary transfer of persons held in custody, hearing by video or telephone conference, controlled deliveries, joint investigation teams, covert investigations and the interception of telecommunication.

2) Directive 2014/41/EU regarding the European Investigation Order in criminal matters

The Directive aims to simplify and speed up cross-border criminal investigations in the EU. It introduces the European Investigation Order, which enables judicial authorities in an issuing state to request that evidence be gathered in and transferred from an executing State. The substantive scope includes all acts that are considered to be criminal offences or infringements of the rule of law in the issuing State.[217] The Directive lays down a standardised form for a European Investigation Order (EIO)[218] and includes rules on transmission, recognition and execution, grounds for non-recognition or non-execution and time limits for recognition and execution.[219] The Directive also provides for a possibility for the issuing authority to assist and be present in the execution of the EIO in the executing Member State.[220] Furthermore, it includes rules on the temporary transfer of persons in custody in order to gather evidence, hearing by video and telephone conferences, obtaining information on bank and other financial accounts, financial operations, covert investigations, interception of telecommunications *etc*.

3) Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence

This Framework Decision establishes rules under which a Member State shall recognise and execute in its territory a freezing order issued by a judicial authority of another Member State in the framework of criminal proceedings. It applies to freezing orders issued by a judicial authority of another Member State in the framework of criminal proceedings for the purposes of securing evidence or subsequent confiscation of property.[221] The Framework Decision establishes a list of offences that shall not be subject to the verification of double criminality of the act if, in the issuing State, they are punishable by a maximum custodial sentence of at least three years.

4) Joint investigation teams (JIT)[222]

Where a criminal investigation within the EU requires coordinated and concerted action, at least two EU countries may set up a Joint investigation teams (JIT). This includes cases where a Member State's investigations into criminal offences require difficult and demanding investigations having links with other Member States, or where a number of Member States are conducting investigations into criminal offences in which the

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[216] Article 4-7 of the Convention.

[217] Article 4 of Directive 2014/41/EU provides: "*An EIO may be issued: (a) with respect to criminal proceedings that are brought by, or that may be brought before, a judicial authority in respect of a criminal offence under the national law of the issuing State; (b) in proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law and where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters; in proceedings brought by judicial authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters; and (d) in connection with proceedings referred to in points (a), (b), and (c) which relate to offences or infringements for which a legal person may be held liable or punished in the issuing State*."

[218] Annex A of Directive 2014/41/EU.

[219] Article 12 of Directive 2014/41/EU.

[220] Article 9 (4) of Directive 2014/41/EU.

[221] Articles 1 and 3 (1) of Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L 196, 2.8.2003, p. 45-55.

[222] Article 13 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union; Council Framework Decision of 13 June 2002 on joint investigation teams (2002/465/JHA).

circumstances of the case necessitate coordinated, concerted action in the Member States involved.[223] To that end, the competent authorities of the relevant EU countries enter into an agreement determining the procedures to be followed by the team. The JIT must be set up for a specific purpose and a limited time period that may be renewed by mutual agreement. The Convention and the Council Framework Decision provide the necessary legal framework to enable the present of seconded officials in another Member State the use of lawfully obtained information as well as criminal and civil liability regarding officials.

5) Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties*[224]*

The Framework Decision introduces specific measures allowing a judicial or administrative authority to transmit a financial penalty directly to an authority in another EU country and to have that fine recognised and executed without any further formality. It applies to decisions on financial penalties if they are linked to criminal offences.[225] Furthermore, it abolishes the requirement of (or verification of) double criminality for a list of criminal offences.[226]

6) Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States

A European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.[227] Based on the principle of mutual recognition, it largely replaced the traditional extradition system by obliging Member States to recognise and act on requests with fewer formalities and clear timelines. It can be issued for acts punishable in the issuing Member State by a custodial sentence of a maximum period of at least 12 months or, where a sentence has already been passed, for sentences of a maximum period of at least 4 months.[228] With regard to cross-border cooperation the Framework Decision regulates mandatory and optional grounds for non-execution of a European Arrest Warrant (EAW), a standardised format for an EAW, time limits and the payment of expenses incurred due to the execution of an EAW.[229]

7) Examples of institutional arrangements fostering cooperation

- **Europol[230]:** The EU agency for law enforcement cooperation (Europol) supports and strengthens action by the competent authorities of the Member States and

[223] Article 1 (1) of Council Framework Decision of 13 June 2002 on joint investigation teams (2002/465/JHA).

[224] As amended by Council Framework Decision 2009/299/JHA of 26 February 2009.

[225] A detailed definition of the terms "*decisions*" and "*financial penalties*" is included in Article 1 (a) and (b) of Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties as amended by Council Framework Decision 2009/299/JHA of 26 February 2009.

[226] Article 5 (1) of Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties as amended by Council Framework Decision 2009/299/JHA of 26 February 2009.

[227] Article 1 (1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

[228] Article 2 (1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

[229] Articles 3, 4, 8, 17, 23 and 30 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

[230] Regulation (EU) No 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, OJ L 135, 24.5.2016, p. 53-114.

their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy. Those crimes can be found in Annex I of the Europol Regulation and include serious crimes like terrorism, organised crime trafficking in human beings *etc*. Moreover, Europol also covers "*related criminal offences defined as criminal offences committed in order to procure the means of perpetrating acts, facilitate or perpetrate acts or ensure the impunity of acts in respect of which Europol is competent*".[231] Europol's tasks are quite far-reaching, including (*inter alia*) notification of Member States without delay of any information and connections between criminal offences concerning them,[232] coordination, investigation and operational actions to support and strengthen actions by the competent authorities of the Member States,[233] support of Member States' cross-border information exchange activities, operations and investigations, as well as joint investigation teams, including by providing operational, technical and financial support.[234] The Europol structure is complemented by national units which are established in and by the Member States, and acting as liaison bodies between Europol and the competent authorities in each Member State.[235]

- **Eurojust**[236]**:** Eurojust is a body of the EU with legal personality based in Den Haag. It has one national member per Member State who is a prosecutor, judge or police officer of equivalent competence and is complemented by the 'Eurojust national coordination system' consisting of correspondents in the Member States.[237] Eurojust's mission is to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States' authorities and by Europol (Article 85 (1) TFEU). Its competence covers the same types of crime and offences in respect of which Europol is at all times competent to act (see above) as well as other offences committed together with those types of offences and crimes.[238] For other types of offences Eurojust may in addition assist in investigations and prosecutions at the request of a competent authority of a Member State.

- **European Judicial Network:**[239] The European Judicial Network in criminal matters (EJN)[240] is a network of national contact points for the facilitation of judicial cooperation in criminal matters. It is composed of the Member States' central authorities responsible for international judicial cooperation and the judicial or other competent authorities with specific responsibilities within the context of international cooperation.[241] Every Member State establishes one or more national contact points as well as one national correspondent. The EJN has a

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[231] Article 3 (2) of Regulation (EU) No 2016/794/EU.

[232] Article 4 (1) b of Regulation (EU) No 2016/794/EU.

[233] Article 4 (1) c of Regulation (EU) No 2016/794/EU.

[234] Article 4 (1) h of Regulation (EU) No 2016/794/EU.

[235] Article 7 of Regulation (EU) No 2016/794/EU.

[236] Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime as amended by Council Decision 2003/659/JHA and by Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust.

[237] Article 12 of Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime as amended by Council Decision 2003/659/JHA and by Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust.

[238] Article 4 (1) of Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime as amended by Council Decision 2003/659/JHA and by Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust.

[239] Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network.

[240] Not to be confused with the European Judicial Network in Civil and Commercial Matters (EJN-civil).

[241] Article 2 (1) of Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network.

Secretariat responsible for the administration of the network and is part of the Eurojust staff as an independent unit. The EJN's tasks include, *inter alia*, disseminating and updating particular information within the network, and setting up a secure telecommunication connection that might be used for operational purposes as well.[242]

4.5. Analysis – Substantive scope of judicial cooperation and social security

The mandate for this report included the question whether the instruments of judicial cooperation in criminal matters may meaningfully supplement mutual assistance under the EU social security coordination rules with regard to unpaid social security benefits or evaded social security contributions. This raises the question if and how those cases might already fall within the scope of those instruments.

First of all, misconduct with regard to social security benefits or contributions may only come within the scope of cooperation instruments in criminal matters, if the behaviour potentially constitutes a criminal or at least administrative offence. Despite the fact that the instruments examined under Chapter 4.4 include different criteria for delineating their substantive scope, as a general rule, their application requires a link to investigations related to criminal proceedings or decisions, penalties, fines imposed upon by judicial authorities with regard to criminal proceedings.

Currently there is no harmonised concept of social security fraud or social security crime. The European Commission's proposal for amendments of Regulations (EC) No 883/2004 and (EC) No 987/2009[243] includes a new Article 1 (2) (e) to (a) of Regulation (EC) No 987/2009, defining fraud as "*any intentional act or omission to act, in order to obtain or receive social security benefits or to avoid to pay social security contributions, contrary to the law of a Member State*". This definition, however, only serves as the basis for particular mutual assistance provisions and will not force Member States to criminalise or sanction this particular behaviour in any harmonised way. Therefore, it is up to the Member States to determine if and when particular behaviour with regard to social security may constitute (criminal) offences in their national legislative framework.

Looking at the Member States' legislations, it is clear that the national frameworks are diverse. Infringements may be sanctioned through an administrative, criminal or civil law method depending on the circumstances (*e.g*. AT, BE, BG, DK, EL, HU, IS, IE and IT) with more serious infringements being punished under criminal law. For example, in Finland, infringements are sanctioned under criminal law and administrative law. Civil law may be used to claim damages if an unduly paid social security benefit cannot be recovered. Finland has specific administrative and criminal provisions sanctioning the failure to pay social security contributions on time. However, there are no specific criminal provisions in Finland for sanctioning unduly paid social security benefits, unless the payment resulted from deceitful or fraudulent actions of the benefit recipient, in which case it may fall within the scope of general criminal law sanctions (*e.g*. fraud or forgery). In France, formerly only criminal sanctions were available to address unduly paid benefits. More recently, however, the French system has moved toward the use of administrative sanctions (fines) which, it is reported, are easier to enforce. This is particularly true for fraud (see Article L114-9 *et seq* of the Social Security Code). In France, criminal sanctions are applicable to contribution offences including those associated with undeclared work. Administrative sanctions may also apply, including temporary closure of the company. In Croatia infringements in paying social security contributions on time as well as making errors in providing accurate data and facts relevant for mandatory records can be sanctioned as misdemeanours. Infringements

[242] Article 9 of Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network.

[243] COM(2016) 815 final.

regarding unduly paid social security benefits are sanctioned in administrative proceedings and then, eventually, recovered in civil law suits. On the other hand, fraudulent behaviour is a criminal offence. Hence, competent public bodies, after the discovery of a potential criminal offence of fraud, will refer the file to the competent State's Attorney's Office.

Secondly, many of the European instruments use lists of criminal offences in order to either delineate their substantive scope from the start[244] or to exclude the possibility for the requested/executing Member State to refuse recognition due to a lack of double criminality.[245] In general, this approach reflects the predominant focus of European criminal cooperation on areas of serious crime, which is further emphasised by the common use of a 'minimum-maximum' requirement for the punishment of the underlying offence.[246] Currently, those lists do not include particular offences with regard to social security. There are, however, a number of criminal offences typically included that, subject to national criminal law, might apply to cases of evasion of social security contributions and benefit fraud (particularly fraud and swindling) or typically accompany those acts (*i.e*. forgery of administrative acts). In conclusion, it can be said that particular cases of unduly paid social security benefits or the failure to pay social security contributions might already allow for a European investigation order, a Joint Investigation Team or even cross-border enforcement via a European Arrest Warrant (EAW) or the mutual recognition of financial penalties *etc*, subject to:

- the existence of targeted national criminal provisions punishing social security infringements in the Member State concerned;

- the possibility of social security fraud falling within the scope of the national concept of fraud or swindling as mentioned in numerous crime lists of particular instruments;

- the level of criminal penalties foreseen for those offences ('minimum-maximum' requirements with regard to the principle of double criminality).

Nevertheless, the competent authorities with regard to judicial and police cooperation on national level will hardly ever be the same as the competent social security institutions. Thus, it has to be guaranteed that there are sufficient legal and organisational possibilities for those different institutions to cooperate. Given the current institutional framework it could also be examined to what extent the existing specialised platform in the area of social security coordination, *i.e*. the Administrative Commission for the Coordination of Social Security Institutions or, on its behalf, the European platform on combating fraud and error, could enter into a dialogue with European networks/institutions from the area of judicial cooperation (Europol, Eurojust, EJN) in order to further analyse possible areas of common interest and cooperation.

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[244] Article 3 (1) of Regulation (EU) No 2016/794; Article 4 (1) of Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime as amended by Council Decision 2003/659/JHA and by Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust.

[245] *I.e*. the act does not constitute an offence in the requested/executing Member State; *cf.* Article 11 (1) g of Directive 2014/41/EU; Article 2 (2) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States; Article 5 (1) of Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties as amended by Council Framework Decision 2009/299/JHA of 26 February 2009; Article 3 (2) of Council Framework Decision 2003/577/JHA.

[246] *I.e*. that the offence in the issuing Member State must be punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years (Article 11 (1) g of Directive 2014/41/EU). Article 2 (1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States lays down a comparable requirement of a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.

This being said, one might be tempted to think about how to achieve a common understanding of social security offences in order to clearly bring it within the scope of judicial cooperation in criminal matters. It could be further reflected upon if and how the Union is competent to do so taking into account the competences mentioned in chapter 4.2. Nevertheless, it has to be borne in mind that even if those instruments were to apply to cases of social security fraud, solutions for cases of error, *i.e*. where the misconduct is not due to intentional behaviour, typically do not constitute criminal offences and would not be covered; clearly, they have to be solved within the framework of social security coordination. As a result it might be advisable to look at the instruments of judicial and police cooperation as well as the applied principles (*e.g*. the principle of mutual recognition, the principle of equivalent access) rather as a source of inspiration how to improve cross-border cooperation within the framework of Regulations (EC) 883/2004 and (EC) 987/2009.[247]

[247] See tax cooperation Chapter 4.3.

5. ELEMENTS OF COOPERATION AND ASSISTANCE

Studying the mechanism of Regulations (EC) No 883/2004 and (EC) No 987/2009 and comparing them to the mechanism of cooperation and administrative assistance in other fields of European law shows similarities but also differences. We have selected some of the most striking aspects and in our recommendations will try to draw from this toolbox some conclusions which might be helpful for further developing and improving cooperation under the social security Regulations.

5.1. Joint teams and participation of officials in other Member States

Judicial cooperation in criminal matters as well as police cooperation allow for different forms of joint investigations, *i.e*. investigations where officials from one Member State participate in investigations on the territory of another Member State. This might be done in the framework of a joint investigation team (JIT)[248] or just in order to assist in the execution of a European investigation order.[249]

A JIT may be set up if difficult and demanding investigations can be expected.[250] The investigations shall be carried out under the domestic law of the Member State where the investigations are carried out.[251] The team members who are seconded from another Member State may be present during such investigations[252] and could also be trusted with investigative measures.[253] Member States have to take the steps necessary to implement this cooperation in accordance with national law.[254] Such joint teams could also be supported by Europol[255] staff. Officials from an international body are thereby added to the teams composed of officials from the Member States.

The setting up of a joint investigation team is also explicitly provided for under the Eurojust rules (cooperation and coordination of investigations and prosecution in criminal matters) without remarkable differences,[256] or already in previous instruments on cooperation in criminal matters which could be regarded as the starting point for many of the subsequent instruments in this field.[257]

Specific forms of legal actions by officials of one Member State in the territory of another Member State are detailed by the instruments on criminal cooperation, including video conference or telephone conference hearings.[258]

In the field of tax cooperation a specific rule allows officials to be present during administrative enquiries (see also Chapter 2.3.4.4).[259]

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[248] Article 13 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union; Council Framework Decision of 13 June 2002 on joint investigation teams (2002/465/JHA).

[249] Article 7 (4) of Directive 2014/41/EU.

[250] Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams, OJ L 162, 20 June 2002, p. 1.

[251] Article 1 (3) (a) of Framework Decision 2002/465/JHA.

[252] Article 1 (5) of Framework Decision 2002/465/JHA.

[253] Article 1 (6) of Framework Decision2002/465/JHA.

[254] Article 4 of Framework Decision 2002/465/JHA.

[255] Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol), OJ L 121, 15 May 2009, p. 37, Article 6.

[256] Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 63, 6 March 2002, p.1, Article 6 (a) (iv), further elaborated by the amending Council Decision 2009/426/JHA of 16 December 2008, OJ L 138, 4 June 2009, p. 14, especially Article 9f, which refers for further details to Framework Decision 2002/465/JHA.

[257] Convention established by the Council in accordance with Article 34 TEU, on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 197, 12 July 2000, p. 3, Article 13.

[258] Convention on Mutual Assistance in Criminal Matters, Articles 10 and 11.

The current framework of social security coordination does not foresee common investigations on a general level. Only after an accident on the way to or from work such investigations on the territory of another Member State are provided for. The idea, however, was already picked up by the EC's proposals amending Regulation (EC) No 987/2007, which includes a new Article 85a allowing for the presence and assistance of officials from the applicant party in the Member State of the requested party.[260] Due to the systematic position of this provision this possibility will be limited to cases of recovery and will not be available for other fields of cross-border cooperation (*i.e*. gathering of evidence *etc*).

5.2. Setting up central European data repositories

Under police cooperation Europol has to set up an information system[261] including the storage of personal data concerning persons who are suspected of having committed or having taken part in criminal offences.[262] This information system can be used directly by national units (which remain part of the national police force) and the bodies of Europol.[263] Europol shall also have access to other relevant databases including national information systems.[264]

Under Regulations (EC) No 883/2004 and (EC) No 987/2009 such European data repositories do not yet exist. From today's point of view also EESSI will not immediately create such instruments of control which could be accessed directly by institutions to receive information. Such information could be of great help *e.g*. when persons not affiliated to the local social security scheme are found working on the territory of a Member State (checking the insurance status and the existence of an A1 form for the persons encountered) or in case of treatment of persons presenting an EHIC (checking if the insurance coverage is still valid).

5.3. Mutual information requirements – pull or push?

Typically, mutual assistance between authorities of different countries requires some sort of request in order to initiate the exchange, *i.e.* the information has to be proactively 'pulled' by the interested authority, which usually requires already some type of initial suspicion that a particular situation is not in compliance with the law.

Nevertheless, there is also the possibility of 'spontaneous exchanges of information', *i.e*. the possibility or even the obligation for authorities to inform their counterparts from another Member State of irregularities or situations that might be of interest for them (push method). Article 7 (1) of the Convention on Mutual Assistance in Criminal Matters provides: "*Within the limits of their national law, the competent authorities of the Member States may exchange information, without a request to that effect, relating to criminal offences and the infringements of rules of law referred to in Article 3(1), the punishment or handling of which falls within the competence of the receiving authority at the time the information is provided*." Other provisions try to make sure that the competent authorities proactively inform each other as soon as they have information that may concern or be of interest for the authorities of another Member State. This can be found in some of the tasks of Eurojust and Europol: Eurojust has to ensure that the competent authorities of the Member States concerned inform each other about investigations and prosecutions of which it has been informed.[265] Europol has a duty to

[259] Article 7 of Directive 2010/24/EU.

[260] *Cf.* Proposal for Article 85a, COM (2016) 815 final p. 45.

[261] Chapter II of Council Decision 2009/371/JHA.

[262] Article 12 of Council Decision 2009/371/JHA.

[263] Article 13 of Council Decision 2009/371/JHA.

[264] Article 21 of Council Decision 2009/371/JHA.

[265] Article 6 (1) (b) of Council Decision 2002/187/JHA as amended by Council Decision 2009/426/JHA.

notify, *i.e*. it shall notify a Member State without delay of any information concerning it.[266]

Comparable examples of an *ex officio* obligation to inform can also be found in (other) areas of administrative cooperation. If certain facts indicate possible irregularities, the Enforcement Directive obliges the authorities of a Member State to, on their own initiative, communicate to the Member State concerned any relevant information without undue delay.[267] With regard to the cross-border push function there are also possibilities to inform without prior request (push method).[268]

In Regulations (EC) No 883/2004 and (EC) No 987/2009 the general principle is that information has to be requested by the interested institution,[269] although already the general principle of mutual cooperation[270] and the explicitly mentioned principle of public service, efficiency, active assistance, rapid delivery and accessibility, including e-accessibility,[271] should already contain the obligation to push information whenever deemed necessary from the point of view of the institutions which get such information. Nevertheless, the European Commission now proposes to include an explicit push function for information relevant to recovery[272] (see Chapter 2.3.4.4). It could be considered if this principle should be made more explicit as a general principle and not only in relation to recovery.

5.4. Grounds for refusal/grounds for non-recognition

Most of the analysed instruments on mutual assistance and mutual recognition contain clearly defined and therefore limited reasons for refusal or non-recognition, in order to enhance cross-border cooperation.[273]

Currently, the social security framework does not contain comparable provisions with regard to cooperation and mutual assistance in general. Only with regard to recovery Article 76 (3) of Regulation (EC) No 987/2009 states that the requested party shall not be obliged to supply information which (a) it would not be able to obtain for the purpose of recovering similar claims arising in its own Member State; (b) which would disclose any commercial, industrial or professional secrets; (c) or the disclosure of which would be liable to prejudice the security of or be contrary to the public policy of the Member State. With regard to requests for information outside the framework of recovery, Decision No H5 clarifies that competent authorities and institutions shall undertake a careful assessment of the legal position before any such request is refused on data protection grounds.[274]

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[266] Article 22 of Regulation (EU) No 2016/794.

[267] Article 7 (4) Directive 2014/67/EU.

[268] *E.g*. with regard to information on tax refunds (Article 6 of Directive 2010/24/EU).

[269] A reader could get the impression that some Articles include a 'push function', *e.g*. Article 2 (2) of Regulation (EC) No 987/2009, which lays down the obligation of making the information at issue 'available' to other institutions. But taking into account the history of these provisions also this 'making available' needs a request of the interested institution as a starter. Making available means only that the information is stored and could be given if requested.

[270] Article 76 (2) of Regulation (EC) No 883/2004.

[271] Article 2 (1) of Regulation (EC) No 987/2009.

[272] Proposal for a new Article 75 (4) of Regulation (EC) No 987/2009, COM(2016) 815 final.

[273] *Cf.* Article 11 of Directive 2014/41/EU; Articles 3 and 4 of Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States; Article 7 of Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties, as amended by Council Framework Decision 2009/299/JHA; Article 17 of Directive 2014/67/EU.

[274] Point 6 of Decision No H5.

5.5. Institutionalised networks and national contact points

For judicial contact points a specialised network has been established for the exchange of legal and practical information, but not for solving concrete cases.[275] This is a method of cooperation which is already established for social security purposes.[276]

The analysis shows that in order to improve police and judicial cooperation on the European level, a number of institutionalised agencies (Europol, Eurojust) and networks European Judicial Network (EJN) were introduced accompanied by systems of national contact points (sometimes called contact points, members or correspondents). The focus thereby lies on both strategic cooperation and exchange of best practices, but also operational cooperation in particular cases.

This concept has already been applied in the field of social security as well. The Administrative Commission for the Coordination of Social Security Systems serves as a permanent network to discuss ongoing problems on a strategic level.[277] Moreover, Decision No H5 introduced the national contact points for fraud and error that form the basis of the European Platform to combat social security fraud and error. Another example is the European platform to enhance cooperation in tackling undeclared work,[278] including, *inter alia,* representatives from Member States. The latter, however, is not equipped to deal with operational cooperation in particular cases.

Contrary to the European Platform to combat social security fraud and error (and also the European platform to enhance cooperation in tackling undeclared work) the underlying legislation in the field of judicial and police cooperation sets out clear requirements for the Member States, in order to guarantee that the national contact points have the necessary powers and tools in order to effectively execute their tasks. This could be exemplified by the provisions on the role and powers of national members of Eurojust,[279] the Europol national units,[280] and the EJN contact points.[281] This might be a model to strengthen the position of the national contact points in the national context, and thus strengthen the existing networks in the field of social security, especially the European fraud and error platform and its national contact points.

5.6. Sending of documents

The sending of documents which are relevant for a person's legal position to persons residing or staying in the territory of another Member State is an important issue which is further developed in some EU instruments. For criminal matters it is laid down that such documents can be sent by mail or, in case of uncertainty regarding the address, via the competent authorities of the other Member State.[282] These instruments also provide for the general principle that the addressee should understand the language of the document and if this is not safeguarded that at least the most important parts should be translated

[275] Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network, OJ L 348, 24 December 2008, p. 130.

[276] Reference can be made to the functions of the Administrative Commission for the Coordination of Social Security Systems under Article 72 of Regulation (EC) No 883/2004, which also has the function of a network, and more specifically to Decision (EU) 2016/344 of 9 March 2016 on establishing a European Platform to enhance cooperation in tackling undeclared work, OJ L 65, 11 March 2016, p. 12.

[277] Article 72 of Regulation (EC) No 883/2004.

[278] Decision (EU) 2016/344 of the European Parliament and of the Council of 9 March 2016 on establishing a European Platform to enhance cooperation in tackling undeclared work, OJ L 65, 11.3.2016, p. 12–20.

[279] Article 9-9f of Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime as amended by Council Decision 2003/659/JHA and by Council Decision 2009/426/JHA.

[280] Article 7 of Regulation 2016/794/EU.

[281] Article 2 (5) of Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network.

[282] Article 5 of the Convention on Mutual Assistance in Criminal Matters.

into (a) the language of the Member State to which the documents are to be sent or the language which the addressee understands. For other fields of European law specific instruments have been created which provide all the details for transmitting documents to recipients in other Member States.[283] Under Regulations (EC) No 883/2004 and (EC) No 987/2009 many questions remain, especially if the receipt of a document is important to set specific deadlines.[284] Under EESSI these questions are still not completely solved, because also in case of electronic transfer of information the question when such messages can be regarded as delivered is still significant. Other questions in this context could be *e.g*. what happens if an institution or authority in another Member State refuses to accept a document (because it is not competent, because some details of the address are not correct *etc*). Is there an obligation to forward the document to the competent institution in the same Member State as the receiving body or can the information simply be rejected? It is recommended to tackle all these questions explicitly either in the Regulations or at least in an Administrative Commission Decision compared to the current situation.

5.7. Time limits

Fixed deadlines and time limits are essential elements of the principle of mutual recognition in judicial cooperation. The decision on the recognition and execution of a European Investigation Order (EIO) has to be taken no later than 30 days after the receipt of the EIO by the competent executing authority.[285] Subsequently it has to be executed not later than 90 days following the taking of the decision.[286] Both time limits may be extended in particular cases. In the case of a European Arrest Warrant (EAW), the final decision on the execution of the warrant should be taken within a period of 60 days after the arrest.[287] The requested person shall be surrendered no later than 10 days after the final decision on the execution of the EAW of the requested person.[288]

For social security coordination, Decision No A1 sets time limits for certain cases: where there is doubt about the validity of a document or about the correctness of supporting evidence which states a person's position for the purpose of the application of Regulation (EC) No 883/2004 or Regulation (EC) No 987/2009; or where there is a difference of views between Member States about the determination of the applicable legislation.[289] The requested institution has to confirm receipt at the latest 10 days after receipt of the request and inform the requesting institution about the outcome of the investigation as soon as possible, but at the latest within 3 months.[290]

The new EC's proposal amending Regulations (EC) No 883/2004 and (EC) No 987/2009 aims to introduce stricter time limits for requests with respect to the validity of a document.[291] When receiving such a request, the issuing institution shall reconsider the grounds for issuing the document and, if necessary, withdraw it or rectify it, or deliver all supporting evidence within 25 working days from the receipt of the request.

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[283] *E.g*. Regulation (EC) No 1393/2007 of 13 November 2007 on the service of documents in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) and repealing Council Regulation (EC) No 1348/2000, OJ L 324, 10 December 2007, p. 79.

[284] *E.g*. concerning the question from which moment interest can be calculated under Article 68 of Regulation (EC) No 987/2009.

[285] Article 12 (3) Directive 2014/41/EU.

[286] Article 12 (4) Directive 2014/41/EU.

[287] Article 17 (3) Council Framework Decision 2002/584/JHA.

[288] Article 23 (2) Council Framework Decision 2002/584/JHA.

[289] Decision No A1 of 12 June 2009 concerning the establishment of a dialogue and conciliation procedure concerning the validity of documents, the determination of the applicable legislation and the provision of benefits under Regulation (EC) No 883/2004 of the European Parliament and of the Council, OJ C 106, 24.4.2010, p. 1-4.

[290] Point 8 of Decision No A1.

[291] *Cf.* Proposal for Article 5(2) COM(2016) 815 final p. 35.

5.8. Expenses incurred

The general principle of mutual recognition includes that expenses incurred on the territory of the executing State should be borne exclusively by that State. When the costs of execution are deemed exceptionally high the executing authority may consult with the issuing authority on whether and how the costs could be shared.[292] In the area of cross-border enforcement it seems to be established that amounts recovered with respect to fines and penalties accrue to the requested authority.[293]

Regarding cooperation in the framework of social security, Article 76 (2) states that administrative assistance given by the authorities and institutions shall, as a rule, be free of charge. However, the Administrative Commission shall establish the nature of reimbursable expenses and the limits above which their reimbursement is due. This general principle is repeated in the field of cross-border recovery (Article 85 (2) of Regulation (EC) No 987/2009). Moreover, Decision No R1 includes specific provisions concerning the interpretation of Article 85 of Regulation (EC) No 987/2009. An explicit exception is provided under Article 87 (6) of Regulation (EC) No 987/2009 concerning medical and administrative control, which obliges to reimburse the costs actually incurred by such control. It could be analysed if changing this principle and stating that costs of administrative cooperation (which exceeds the normal cooperation, *e.g*. if due to a dispute on applicable legislation detailed investigations are requested) should be reimbursed as a rule could encourage the Member States to cooperate more than they do today.

[292] Article 20 (2) of Directive 2010/24/EU; Article 21 (2) of Directive 2014/41/EU.

[293] Article 19 of Directive 2014/67/EU; Article 13 of Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties, as amended by Council Framework Decision 2009/299/JHA.

6. CONCLUSIONS AND RECOMMENDATIONS FOR IMPROVEMENT

6.1. General overview

Regulations (EC) No 883/2004 and (EC) No 987/2009 are conceived to regulate cross-border situations, usually of migrant workers. Contributions and benefits in the broadest sense are the basis for the coordination rules. Therefore, when the coordination instruments abandon their priority objective and penetrate into other areas such as the anti-fraud strategy, specific problems arise which cannot be solved by the existing instruments alone or by applying the philosophy of coordination rules. In fact, the Regulations, despite the many modifications introduced, cannot always act in an efficient and effective way in the field of fraud and abuse. In this respect the concept of mutual assistance transcends the coordination rules to focus directly on the interests of States rather than only on the person concerned, so that, in relation to the coordination Regulations, it is in some respects an unusual element, not so much in its general approaches but in its practical implementation. In fact, countering fraud or abuse is residual and secondary in the coordination Regulations.

Since Member States have been reporting issues with regard to cross-border cooperation and information exchange at various interfaces and in most cases seem unable to resolve these issues themselves, just like in previous years, FreSsco finds that the question as to whether further initiatives at Union level are required should be addressed. The Commission's proposal for amendments to Regulations (EC) No 883/2004 and (EC) No 987/2009 are an important step in this direction and enhance further collaboration. The European Labour Authority proposed by President Junker could – without any doubt – be a next step and indicates the growing European interest. Further work after these two steps should include an open minded discussion. All possible solutions including other ways to address the issues such as, for example, through another instrument such as a framework Directive obliging Member States to harmonise some aspects of procedural law (e.g. common deadlines for cooperation with other Member States) could be discussed and after analysing all pros and cons of the different possibilities the most appropriate solutions should be chosen. The work on these issues has to be seen as an ongoing process and results can only be achieved step by step.

6.2. Concrete recommendations

A comparison of the various instruments which deal with administrative aid and cooperation between institutions or authorities in other fields shows some models to improve the current cooperation provisions of Regulations (EC) No 883/2004 and (EC) No 987/2009, also taking into account the amendments proposed by the European Commission.

- It could be advisable to also insert an explicit push mechanism to improve 'spontaneous exchanges of information' which offers the possibility or even the obligation for authorities to inform their counterparts from another Member State of situations that might be of interest for them, not only for recovery. It could be argued that such an obligation could already today be derived from the general principles of administrative cooperation, but it is advisable to include an explicit rule.

- Extended possibilities for officials of one Member State to participate in investigations in the territory of another Member State should be analysed (not only restricted to the field of recovery as proposed by the European Commission in Article 85a of Regulation (EC) No 987/2009). In this context other ways than physical presence in the territory of the other Member state (*e.g*. video or telephone conferences) could be examined.

- In order to strengthen the role and competences of inspection services in a broader European perspective, it could be considered to set up a Euro-sociopol.

- Subject to the existence and the scope of national criminal and administrative offences, particular cases of unduly paid social security benefits or the failure to pay social security contributions might already fall within the substantive scope of instruments of judicial cooperation in criminal matters, and allow for using a European Investigation Order (EIO), a Joint Investigation Team (JIT) or even cross-border enforcement via a European Arrest Warrant (EAW) or the mutual recognition of financial penalties *etc*.

- Misconduct with regard to social security (benefits or contributions) may only come within the scope of cooperation instruments in criminal matters, if the behaviour potentially constitutes a criminal or at least administrative offence under national law. It could be further investigated if there could not be set up under a separate ad-hoc instrument a list of social security offences that could be considered as criminal offences.

- It could be recommended that the Administrative Commission for the Coordination of Social Security Systems or, on its behalf, the European platform on combating fraud and error enters into a dialogue with European networks/institutions from the area of judicial and police cooperation in criminal matters (Europol, Eurojust, European Judicial Network) in order to further analyse possible areas of common interest and cooperation.

- Aspects of cross-border situations in the field of social security which could theoretically be covered by some other instruments are explicitly excluded from the field of application of these instruments. Further reflection is required here.

- With respect to mutual assistance, considered from a general perspective, the European social security coordination Regulations cannot escape from privacy and data protection rules. This idea cannot be overlooked for the implementation of any instrument.

- It could be analysed if all the costs of administrative cooperation (which exceeds the normal cooperation, *e.g*. if due to a dispute on applicable legislation detailed investigations are requested) should be reimbursed as a rule, which could encourage Member States to cooperate.

- In order to strengthen institutionalised networks like the European Platform on fraud and error (H5NCP) or the European platform to enhance cooperation in tackling undeclared work, it could be envisaged to clearly define the role of these networks and more in particular also the legal tools, composition, role and powers of the corresponding national contact points in their own national context in the anti-fraud strategy. Existing provisions on the role of national members of Eurojust, the Europol national units and the European Judicial Network contact points could serve as an example.

- The benefits of a European data repository could be examined, providing relevant information to all Member States through a central database (*e.g*. information on A1 forms issued).

ANNEX I: REGULATION (EC) NO 883/2004 AND REGULATION (EC) NO 987/2009 – NECESSARY COOPERATION

Regulation (EC) No 883/2004

Domain	Article	Obligatory or not?	Ex oficio	At the request	Relevant text
Cooperation	**76 (1)**	*shall*	*YES*		The competent authorities of the Member States shall communicate to each other all information regarding: (a) measures taken to implement this Regulation; (b) changes in their legislation which may affect the implementation of this Regulation.
	76 (3)	*may*	*YES*		The authorities and institutions of the Member States may, for the purposes of this Regulation, communicate directly with one another and with the persons involved or their representatives.
	76 (4) 1st subparagraph	*shall have a duty of*	*YES*		The institutions and persons covered by this Regulation shall have a duty of mutual information and cooperation to ensure the correct implementation of this Regulation… In the event of difficulties in the interpretation or application of this Regulation which could jeopardise the rights of a person covered by it, the institution of the competent Member State or of the Member State of residence of the person concerned shall contact the institution(s) of the Member State(s) concerned.
	81	*shall*	*YES*		Any claim, declaration or appeal which should have been submitted, in application of the legislation of one Member State, within a specified period to an authority, institution or tribunal of that Member State shall be admissible if it is submitted within the same period to a corresponding authority, institution or tribunal of another Member State. In such a case the authority, institution or tribunal receiving the claim, declaration or appeal shall forward it without delay to the competent authority, institution or tribunal of the former Member State either directly or through the competent authorities of the Member States concerned. The date on which such claims, declarations or appeals were submitted to the authority, institution or tribunal of the second Member State shall be considered as the date of their submission to the competent authority, institution or tribunal.

Domain	Article	Obligatory or not?	Ex oficio	At the request	Relevant text
	82	*may*		*YES*	Medical examinations provided for by the legislation of one Member State may be carried out at the request of the competent institution, in another Member State, by the institution of the place of residence or stay of the claimant or the person entitled to benefits, under the conditions laid down in the Implementing Regulation or agreed between the competent authorities of the Member States concerned.
	84 (2)	*shall*		*YES*	Enforceable decisions of the judicial and administrative authorities relating to the collection of contributions, interest and any other charges or to the recovery of benefits provided but not due under the legislation of one Member State shall be recognised and enforced at the request of the competent institution in another Member State within the limits and in accordance with the procedures laid down by the legislation and any other procedures applicable to similar decisions of the latter Member State. Such decisions shall be declared enforceable in that Member State insofar as the legislation and any other procedures of that Member State so require

Regulation (EC) No 987/2009

Domain	Article	Ex officio	At the request	Obligatory or not?	Relevant text
Scope and rules for exchanges between institutions	**2 (2)**	*YES*		*shall*	The institutions shall without delay provide or exchange all data necessary for establishing and determining the rights and obligations of persons to whom the basic Regulation applies. Such data shall be transferred between Member States directly by the institutions themselves or indirectly via the liaison bodies.
	5 (2)	*YES*		*shall*	Where there is doubt about the validity of a document or the accuracy of the facts on which the particulars contained therein are based, the institution of the Member State that receives the document shall ask the issuing institution for the necessary clarification and, where appropriate, the withdrawal of that document. The issuing institution shall reconsider the grounds for issuing the document and, if necessary, withdraw it.
	6 (5)	*YES*		*shall*	5. If necessary, the institution identified as being competent and the institution which provisionally paid the cash benefits or provisionally received contributions shall settle the financial situation of the person concerned as regards contributions and cash benefits paid provisionally, where appropriate, in accordance with Title IV, Chapter III, of the implementing Regulation. Benefits in kind granted provisionally by an institution in accordance with paragraph 2 shall be reimbursed by the competent institution in accordance with Title IV of the implementing Regulation.
	12 (1)	*YES*		*shall*	For the purposes of applying Article 6 of the basic Regulation, the competent institution shall contact the institutions of the Member States to whose legislation the person concerned has also been subject in order to determine all the periods completed under their legislation.
	16 (2)	*YES*		*shall*	The designated institution of the place of residence shall without delay determine the legislation applicable to the person concerned, having regard to Article 13 of the basic Regulation and Article 14 of the implementing Regulation. That initial determination shall be provisional. The institution shall inform the designated institutions of each Member State in which an activity is pursued of its provisional determination.

Domain	Article	Ex officio	At the request	Obligatory or not?	Relevant text
	16 (4)		*YES*		Where uncertainty about the determination of the applicable legislation requires contacts between the institutions or authorities of two or more Member States, at the request of one or more of the institutions designated by the competent authorities of the Member States concerned or of the competent authorities themselves, the legislation applicable to the person concerned shall be determined by common agreement, having regard to Article 13 of the basic Regulation and the relevant provisions of Article 14 of the implementing Regulation.
Cooperation between institutions	**20 (1)**	*YES*		*shall*	The relevant institutions shall communicate to the competent institution of the Member State whose legislation is applicable to a person pursuant to Title II of the basic Regulation the necessary information required to establish the date on which that legislation becomes applicable and the contributions which that person and his employer(s) are liable to pay under that legislation.
	20 (2)	*YES*		*shall*	The competent institution of the Member State whose legislation becomes applicable to a person pursuant to Title II of the basic Regulation shall make the information indicating the date on which the application of that legislation takes effect available to the institution designated by the competent authority of the Member State to whose legislation that person was last subject.
Sickness	**24 (1)**		*YES*		For the purposes of the application of Article 17 of the basic Regulation, the insured person and/or members of his family shall be obliged to register with the institution of the place of residence. Their right to benefits in kind in the Member State of residence shall be certified by a document issued by the competent institution upon request of the insured person or upon request of the institution of the place of residence
	24 (2)	*YES*		*shall*	The document referred to in paragraph 1 shall remain valid until the competent institution informs the institution of the place of residence of its cancellation. The institution of the place of residence shall inform the competent institution of any registration under paragraph 1 and of any change or cancellation of that registration.

Domain	Article	Ex officio	At the request	Obligatory or not?	Relevant text
	25 (1)		*YES*	*shall*	For the purposes of the application of Article 19 of the basic Regulation, the insured person shall present to the health care provider in the Member State of stay a document issued by the competent institution indicating his entitlement to benefits in kind. If the insured person does not have such a document, the institution of the place of stay, upon request or if otherwise necessary, shall contact the competent institution in order to obtain one
	26 (2)	*YES*		*shall*	If an insured person does not reside in the competent Member State, he shall request authorisation from the institution of the place of residence, which shall forward it to the competent institution without delay. In that event, the institution of the place of residence shall certify in a statement whether the conditions set out in the second sentence of Article 20(2) of the basic Regulation are met in the Member State of residence. The competent institution may refuse to grant the requested authorisation only if, in accordance with the assessment of the institution of the place of residence, the conditions set out in the second sentence of Article 20(2) of the basic Regulation are not met in the Member State of residence of the insured person, or if the same treatment can be provided in the competent Member State itself, within a time-limit which is medically justifiable, taking into account the current state of health and the probable course of illness of the person concerned. The competent institution shall inform the institution of the place of residence of its decision.
	27 (3)	*YES*		*shall*	Where the doctors providing treatment in the Member State of residence do not issue certificates of incapacity for work, and where such certificates are required under the legislation of the competent Member State, the person concerned shall apply directly to the institution of the place of residence. That institution shall immediately arrange for a medical assessment of the person's incapacity for work and for the certificate referred to in paragraph 1 to be drawn up. The certificate shall be forwarded to the competent institution forthwith.
	27 (9)	*YES*		*shall*	If the competent institution refuses the cash benefits, it shall notify its decision to the insured person and at the same time to the institution of the place of residence.

Domain	Article	Ex officio	At the request	Obligatory or not?	Relevant text
	28 (1)	*YES*		*shall*	In order to be entitled to long-term care benefits in cash pursuant to Article 21(1) of the basic Regulation, the insured person shall apply to the competent institution. The competent institution shall, where necessary, inform the institution of the place of residence thereof.
	28 (2)		*YES*	*shall*	At the request of the competent institution, the institution of the place of residence shall examine the condition of the insured person with respect to his need for long-term care. The competent institution shall give the institution of the place of residence all the information necessary for such an examination
	31 (2) and (3)	*YES*		*shall*	The competent institution shall also inform the institution of the place of residence or stay about the payment of long-term care cash benefits where the legislation applied by the latter institution provides for the long-term care benefits in kind included in the list referred to in Article 34(2) of the basic Regulation.. Having received the information provided for in paragraph 2, the institution of the place of residence or stay shall without delay inform the competent institution of any long-term care benefit in kind intended for the same purpose granted under its legislation to the person concerned and of the rate of reimbursement applicable thereto
Accident at work and Occupational disease	**33 (2)**	*YES*		*shall*	When providing special benefits in kind in connection with accidents at work and occupational diseases under the national legislation of the Member State of stay or residence, the institution of that Member State shall without delay inform the competent institution

Domain	Article	Ex officio	At the request	Obligatory or not?	Relevant text
	34 (2) and (3)	*YES*		*shall*	The institution of the Member State in the territory of which the accident at work occurred or in which the occupational disease was first diagnosed, shall notify the competent institution of medical certificates drawn up in the territory of that Member State. 3. Where, as a result of an accident while travelling to or from work which occurs in the territory of a Member State other than the competent Member State, an inquiry is necessary in the territory of the first Member State in order to determine any entitlement to relevant benefits, a person may be appointed for that purpose by the competent institution, which shall inform the authorities of that Member State. The institutions shall cooperate with each other in order to assess all relevant information and to consult the reports and any other documents relating to the accident.
	34 (4) and (5)		*YES*	*shall*	Following treatment, a detailed report accompanied by medical certificates relating to the permanent consequences of the accident or disease, in particular the injured person's present state and the recovery or stabilisation of injuries, shall be sent upon request of the competent institution. The relevant fees shall be paid by the institution of the place of residence or of stay, where appropriate, at the rate applied by that institution to the charge of the competent institution. 5. At the request of the institution of the place of residence or stay, where appropriate, the competent institution shall notify it of the decision setting the date for the recovery or stabilisation of injuries and, where appropriate, the decision concerning the granting of a pension
	35	*YES*		*shall*	Where the competent institution disputes the application of the legislation relating to accidents at work or occupational diseases under Article 36(2) of the basic Regulation, it shall without delay inform the institution of the place of residence or stay which provided the benefits in kind, which will then be considered as sickness insurance benefits. 2. When a final decision has been taken on that subject, the competent institution shall without delay inform the institution of the place of residence or stay which provided the benefits in kind.

Domain	Article	Ex officio	At the request	Obligatory or not?	Relevant text
	36	*YES*		*shall*	In the case referred to in Article 38 of the basic Regulation, the declaration or notification of the occupational disease shall be sent to the competent institution for occupational diseases of the last Member State under the legislation of which the person concerned pursued an activity likely to cause that disease. When the institution to which the declaration or notification was sent establishes that an activity likely to cause the occupational disease in question was last pursued under the legislation of another Member State, it shall send the declaration or notification and all accompanying certificates to the equivalent institution in that Member State. 2. Where the institution of the last Member State under the legislation of which the person concerned pursued an activity likely to cause the occupational disease in question establishes that the person concerned or his survivors do not meet the requirements of that legislation, inter alia, because the person concerned had never pursued in that Member State an activity which caused the occupational disease or because that Member State does not recognise the occupational nature of the disease, that institution shall forward without delay the declaration or notification and all accompanying certificates, including the findings and reports of medical examinations performed by the first institution to the institution of the previous Member State under the legislation of which the person concerned pursued an activity likely to cause the occupational disease in question.
	37 (1)	*YES*		*shall*	In the event of an appeal against a decision to refuse benefits taken by the institution of one of the Member States under the legislation of which the person concerned pursued an activity likely to cause the occupational disease in question, that institution shall inform the institution to which the declaration or notification was sent, in accordance with the procedure provided for in Article 36(2) of the implementing Regulation, and shall subsequently inform it when a final decision is reached.

Domain	Article	Ex officio	At the request	Obligatory or not?	Relevant text
	38	*YES*		*may*	In the cases covered by Article 39 of the basic Regulation, the claimant must provide the institution in the Member State from which he is claiming entitlement to benefits with details concerning benefits previously granted for the occupational disease in question. That institution may contact any other previously competent institution in order to obtain the information it considers necessary
	39 (1)		*YES*	*shall*	Where a previous or subsequent incapacity for work was caused by an accident which occurred when the person concerned was subject to the legislation of a Member State which makes no distinction according to the origin of the incapacity to work, the competent institution or the body designated by the competent authority of the Member State in question shall upon request by the competent institution of another Member State, provide information concerning the degree of the previous or subsequent incapacity for work, and where possible, information making it possible to determine whether the incapacity is the result of an accident at work within the meaning of the legislation applied by the institution in the other Member State;

Domain	Article	Ex officio	At the request	Obligatory or not?	Relevant text
Invalidity	**47**	*YES*		*shall*	... this institution shall, in its capacity as contact institution, promote the exchange of data, the communication of decisions and the operations necessary for the investigation of the claim by the institutions concerned..., the contact institution shall send all the documents relating to the person concerned to the institution with which he was previously insured, which shall in turn examine the case. be applicable to the investigation of claims referred to in Article 44 of the basic Regulation... In situations other than those referred to in paragraph 2, the contact institution shall, without delay, send claims for benefits and all the documents which it has available and, where appropriate, the relevant documents supplied by the claimant to all the institutions in question so that they can all start the investigation of the claim concurrently. The contact institution shall notify the other institutions of periods of insurance or residence subject to its legislation. It shall also indicate which documents shall be submitted at a later date and supplement the claim as soon as possible. 5. Each of the institutions in question shall notify the contact institution and the other institutions in question, as soon as possible, of the periods of insurance or residence subject to their legislation. 6. Each of the institutions in question shall calculate the amount of benefits in accordance with Article 52 of the basic Regulation and shall notify the contact institution and the other institutions concerned of its decision, of the amount of benefits due and of any information required for the purposes of Articles 53 to 55 of the basic Regulation. 7. Should an institution establish, on the basis of the information referred to in paragraphs 4 and 5 of this Article, that Article 46(2) or Article 57(2) or (3) of the basic Regulation is applicable, it shall inform the contact institution and the other institutions concerned.

Domain	Article	Ex officio	At the request	Obligatory or not?	Relevant text
	49	*YES*		*shall*	.... It shall without delay notify the other institutions concerned of that decision. Where the eligibility criteria, other than those relating to the degree of invalidity, laid down in the applicable legislation are not met, taking into account Articles 6 and 51 of the basic Regulation, the contact institution shall without delay inform the competent institution of the last Member State to whose legislation the claimant was subject. The latter institution shall be authorised to take the decision concerning the degree of invalidity of the claimant if the conditions for eligibility laid down in the applicable legislation are met. It shall without delay notify the other institutions concerned of that decision.
	52	*YES*		*shall*	In order to facilitate and accelerate the investigation of claims and the payment of benefits, the institutions to whose legislation a person has been subject shall: (a) exchange with or make available to institutions of other Member States the elements for identifying persons who change from one applicable national legislation to another, and together ensure that those identification elements are retained and correspond, or, failing that, provide those persons with the means to access their identification elements directly; (b) sufficiently in advance of the minimum age for commencing pension rights or before an age to be determined by national legislation, exchange with or make available to the person concerned and to institutions of other Member States information (periods completed or other important elements) on the pension entitlements of persons who have changed from one applicable legislation to another or, failing that, inform those persons of, or provide them with, the means of familiarising themselves with their prospective benefit entitlement... For the purposes of applying paragraph 1, the institution in the first Member State where a person is allocated a Personal Identification Number (PIN) for the purposes of social security administration should be provided with the information referred to in this Article

Domain	Article	Ex officio	At the request	Obligatory or not?	Relevant text
Unemployment benefits	**55**	*YES*		*shall*	4. The institution in the Member State to which the unemployed person has gone shall immediately send a document to the competent institution containing the date on which the unemployed person registered with the employment services and his new address. If, in the period during which the unemployed person retains entitlement to benefits, any circumstance likely to affect the entitlement to benefits arises, the institution in the Member State to which the unemployed person has gone shall send immediately to the competent institution and to the person concerned a document containing the relevant information.
			YES	*shall*	At the request of the competent institution, the institution in the Member State to which the unemployed person has gone shall provide relevant information on a monthly basis concerning the follow-up of the unemployed person's situation, in particular whether the latter is still registered with the employment services and is complying with organised checking procedures.
	56		*YES*	*shall*	At the request of the employment services of the Member State in which the person concerned pursued his last activity as an employed or self-employed person, the employment services in the place of residence shall send the relevant information concerning the unemployed person's registration and search for employment.
Family benefits	**58**	*YES*		*shall*	For the purposes of applying Article 68(1)(b)(i) and (ii) of the basic Regulation, where the order of priority cannot be established on the basis of the children's place of residence, each Member State concerned shall calculate the amount of benefits including the children not resident within its own territory. In the event of applying Article 68(1)(b)(i), the competent institution of the Member State whose legislation provides for the highest level of benefits shall pay the full amount of such benefits and be reimbursed half this sum by the competent institution of the other Member State up to the limit of the amount provided for in the legislation of the latter Member State.

Domain	Article	Ex officio	At the request	Obligatory or not?	Relevant text
	59 (2)	*YES*		*shall*	It shall inform the institution of the other Member State or Member States concerned of the date on which it ceases to pay the family benefits in question. Payment of benefits from the other Member State or Member States concerned shall take effect from that date
	60	*YES*		*Shall* may claim reimbursement	If it appears to that institution that there may be an entitlement to a differential supplement by virtue of the legislation of another Member State in accordance with Article 68(2) of the basic Regulation, that institution shall forward the application, without delay, to the competent institution of the other Member State and inform the person concerned; moreover, it shall inform the institution of the other Member State of its decision on the application and the amount of family benefits paid. 3. Where the institution to which the application is made concludes that its legislation is applicable, but not by priority right in accordance with Article 68(1) and (2) of the basic Regulation, it shall take a provisional decision, without delay, on the priority rules to be applied and shall forward the application, in accordance with Article 68(3) of the basic Regulation, to the institution of the other Member State, and shall also inform the applicant thereof. . 4. Where there is a difference of views between the institutions concerned about which legislation is applicable by priority right, Article 6(2) to (5) of the implementing Regulation shall apply. For this purpose the institution of the place of residence referred to in Article 6(2) of the implementing Regulation shall be the institution of the child's or childrens' place of residence. 5. If the institution which has supplied benefits on a provisional basis has paid more than the amount for which it is ultimately responsible, it may claim reimbursement of the excess from the institution with primary responsibility in accordance with the procedure laid down in Article 73 of the implementing Regulation.

Domain	Article	Ex officio	At the request	Obligatory or not?	Relevant text
	61	*YES*		*Shall*	If there is no provision for the institution competent to grant, by priority right, such additional or special family benefits for orphans under the legislation it applies, it shall without delay forward any application for family benefits, together with all relevant documents and information, to the institution of the Member State to whose legislation the person concerned has been subject, for the longest period of time and which provides such additional or special family benefits for orphans. In some cases, this may mean referring back, under the same conditions, to the institution of the Member State under whose legislation the person concerned has completed the shortest of his or her insurance or residence periods.
Financial Provisions	**62**	*YES*		*Shall*	For the purposes of applying Article 35 and Article 41 of the basic Regulation, the actual amount of the expenses for benefits in kind, as shown in the accounts of the institution that provided them, shall be reimbursed to that institution by the competent institution, except where Article 63 of the implementing Regulation is applicable.
	66	*YES*		*Shall*	The reimbursements between the Member States concerned shall be made as promptly as possible. Every institution concerned shall be obliged to reimburse claims before the deadlines mentioned in this Section, as soon as it is in a position to do so. A dispute concerning a particular claim shall not hinder the reimbursement of another claim or other claims.
Reimbursement unemployment benefits	**70**		*YES*	*Shall*	If there is no agreement in accordance with Article 65(8) of the basic Regulation, the institution of the place of residence shall request reimbursement of unemployment benefits pursuant to Article 65(6) and (7) of the basic Regulation from the institution of the Member State to whose legislation the beneficiary was last subject.

Domain	Article	Ex officio	At the request	Obligatory or not?	Relevant text
Recovery	**72 (1), (2) and (3)**		*YES*	*may*	If the institution of a Member State has paid undue benefits to a person, that institution may, within the terms and limits laid down in the legislation it applies, request the institution of any other Member State responsible for paying benefits to the person concerned to deduct the undue amount from arrears or on-going payments owed to the person concerned regardless of the social security branch under which the benefit is paid. The institution of the latter Member State shall deduct the amount concerned subject to the conditions and limits applying to this kind of offsetting procedure in accordance with the legislation it applies in the same way as if it had made the overpayments itself, and shall transfer the amount deducted to the institution that has paid undue benefits. By way of derogation from paragraph 1, if, when awarding or reviewing benefits in respect of invalidity benefits, old-age and survivors' pensions pursuant to Chapter 4 and 5 of Title III of the basic Regulation, the institution of a Member State has paid to a person benefits of undue sum, that institution may request the institution of any other Member State responsible for the payment of corresponding benefits to the person concerned to deduct the amount overpaid from the arrears payable to the person concerned. If a person has received social welfare assistance in one Member State during a period in which he was entitled to benefits under the legislation of another Member State, the body which provided the assistance may, if it is legally entitled to reclaim the benefits due to the person concerned, request the institution of any other Member State responsible for paying benefits in favour of the person concerned to deduct the amount of assistance paid from the amounts which that Member State pays to the person concerned.

Domain	Article	Ex officio	At the request	Obligatory or not?	Relevant text
	73	*YES*		*shall*	For the purposes of applying Article 6 of the implementing Regulation, at the latest three months after the applicable legislation has been determined or the institution responsible for paying the benefits has been identified, the institution which provisionally paid the cash benefits shall draw up a statement of the amount provisionally paid and shall send it to the institution identified as being competent. The institution identified as being competent for paying the benefits shall deduct the amount due in respect of the provisional payment from the arrears of the corresponding benefits it owes to the person concerned and shall without delay transfer the amount deducted to the institution which provisionally paid the cash benefits. If the amount of provisionally paid benefits exceeds the amount of arrears, or if arrears do not exist, the institution identified as being competent shall deduct this amount from ongoing payments subject to the conditions and limits applying to this kind of offsetting procedure under the legislation it applies, and without delay transfer the amount deducted to the institution which provisionally paid the cash benefits.

Domain	Article	Ex officio	At the request	Obligatory or not?	Relevant text
	76		*YES*	*shall*	At the request of the applicant party, the requested party shall provide any information which would be useful to the applicant party in the recovery of its claim. In order to obtain that information, the requested party shall make use of the powers provided for under the laws, regulations or administrative provisions applying to the recovery of similar claims arising in its own Member State. 2. The requested party shall inform the applicant party of the grounds for refusing a request for information. The requested party shall, at the request of the applicant party, and in accordance with the rules in force for the notification of similar instruments or decisions in its own Member State, notify the addressee of all instruments and decisions, including those of a judicial nature, which come from the Member State of the applicant party and which relate to a claim and/or to its recovery. 2. . 3. The requested party shall without delay inform the applicant party of the action taken on its request for notification and, particularly, of the date on which the decision or instrument was forwarded to the addressee.

Domain	Article	Ex officio	At the request	Obligatory or not?	Relevant text
	78		*YES*	*The applicant party may* only make a request for recovery. *The applicant party shall forward* to the requesting party any relevant information	The request for recovery of a claim, addressed by the applicant party to the requested party, shall be accompanied by an official or certified copy of the instrument permitting its enforcement, issued in the Member State of the applicant party and, if appropriate, by the original or a certified copy of other documents necessary for recovery. 2. The applicant party may only make a request for recovery if: (a) the claim and/or the instrument permitting its enforcement are not contested in its own Member State, except in cases where the second subparagraph of Article 81(2) of the implementing Regulation is applied; (b) it has, in its own Member State, applied appropriate recovery procedures available to it on the basis of the instrument referred to in paragraph 1, and the measures taken will not result in the payment in full of the claim; (c) the period of limitation according to its own legislation has not expired. 3. The request for recovery shall indicate: (a) the name, address and any other relevant information relating to the identification of the natural or legal person concerned and/or to the third party holding his or her assets; (b) the name, address and any other relevant information relating to the identification of the applicant party; (c) a reference to the instrument permitting its enforcement, issued in the Member State of the applicant party; (d) the nature and amount of the claim, including the principal, the interest, fines, administrative penalties and all other charges and costs due indicated in the currencies of the Member States of the applicant and requested parties; (e) the date of notification of the instrument to the addressee by the applicant party and/or by the requested party; (f) the date from which and the period during which enforcement is possible under the laws in force in the Member State of the applicant party; (g) any other relevant information. 4. The request for recovery shall also contain a declaration by the applicant party confirming that the conditions laid down in paragraph 2 have been fulfilled. 5. The applicant party shall forward to the requesting party any relevant information relating to the matter which gave rise to the request for recovery, as soon as this comes to its knowledge

Domain	Article	Ex officio	At the request	Obligatory or not?	Relevant text
	81	*YES*		*shall* *may*	...The applicant party shall without delay notify the requested party of this action. The interested party may also inform the requested party of the action.
	82	*YES*		*shall*	The requested party shall inform the applicant party of the grounds for refusing a request for assistance.
	84		*YES*	*shall*	Upon reasoned request by the applicant party, the requested party shall take precautionary measures to ensure recovery of a claim in so far as the laws and regulations in force in the Member State of the requested party so permit. For the purposes of implementing the first paragraph, the provisions and procedures laid down in Articles 78, 79, 81 and 82 of the implementing Regulation shall apply mutatis mutandis.

Domain	Article	Ex officio	At the request	Obligatory or not?	Relevant text
Miscellaneous Transitional and Final provisions	**87**		*YES*	*shall*	Without prejudice to other provisions, where a recipient or a claimant of benefits, or a member of his family, is staying or residing within the territory of a Member State other than that in which the debtor institution is located, the medical examination shall be carried out, at the request of that institution, by the institution of the beneficiary's place of stay or residence in accordance with the procedures laid down by the legislation applied by that institution. The debtor institution shall inform the institution of the place of stay or residence of any special requirements, if necessary, to be followed and points to be covered by the medical examination. 2. The institution of the place of stay or residence shall forward a report to the debtor institution that requested the medical examination. This institution shall be bound by the findings of the institution of the place of stay or residence. The debtor institution shall reserve the right to have the beneficiary examined by a doctor of its choice. However, the beneficiary may be asked to return to the Member State of the debtor institution only if he or she is able to make the journey without prejudice to his health and the cost of travel and accommodation is paid for by the debtor institution. 3. Where a recipient or a claimant of benefits, or a member of his family, is staying or residing in the territory of a Member State other than that in which the debtor institution is located, the administrative check shall, at the request of the debtor institution, be performed by the institution of the beneficiary's place of stay or residence. Paragraph 2 shall also apply in this case. 4. Paragraphs 2 and 3 shall also apply in determining or checking the state of dependence of a recipient or a claimant of the long-term care benefits mentioned in Article 34 of the basic Regulation. 5. The competent authorities or competent institutions of two or more Member States may agree specific provisions and procedures to improve fully or partly the labour-market readiness of claimants and recipients and their participation in any schemes or programmes available in the Member State of stay or residence for that purpose. 6. As an exception to the principle of free-of-charge mutual administrative cooperation in Article 76(2) of the basic Regulation, the effective amount of the expenses of the checks referred to in paragraphs 1 to 5 shall be refunded to the institution which was requested to carry them out by the debtor institution which requested them

Domain	Article	Ex officio	At the request	Obligatory or not?	Relevant text
SPECIAL PROVISIONS CONCERNING THE VARIOUS CATEGORIES OF BENEFITS					
Sickness, maternity and equivalent paternity benefits					
Stay in a MS other than the competent MS	**25 (5) 2nd subparagraph**		*YES*	*shall*	The institution of the place of stay shall provide the competent institution, upon request, with all necessary information about these rates or amounts.
Cash benefits relating to incapacity for work in the event of stay or residence in a MS other than the competent MS	**27 (5)**	*YES*		*shall*	[…] The report of the examining doctor concerning, in particular, the probable duration of the incapacity for work, shall be forwarded without delay by the institution of the place of residence to the competent institution.
Long-term care benefits in cash in the event of stay or residence in a Member State other than the competent	**28 (1)**	*YES*		*shall*	[…] The competent institution shall, where necessary, inform the institution of the place of residence thereof.
	28 (2)	*YES*		*shall*	[…] The competent institution shall give the institution of the place of residence all the information necessary for such an examination.
Application of Article 34 of Regulation (EC) No 883/2004	**31 (2)**	*YES*		*shall*	The competent institution shall also inform the institution of the place of residence or stay about the payment of long-term care cash benefits where the legislation applied by the latter institution provides for the long-term care benefits in kind included in the list referred to in Article 34(2) of the basic Regulation.
	31 (3)	*YES*		*shall*	Having received the information provided for in paragraph 2, the institution of the place of residence or stay shall without delay inform the competent institution of any long-term care benefit in kind intended for the same purpose granted under its legislation to the person concerned and of the rate of reimbursement applicable thereto.

Domain	Article	Ex officio	At the request	Obligatory or not?	Relevant text
Benefits in respect of accidents at work and occupational diseases					
Right to benefits in kind and in cash in the event of residence or stay in a MS other than the competent MS	**33 (2)**	*YES*		*shall*	When providing special benefits in kind in connection with accidents at work and occupational diseases under the national legislation of the Member State of stay or residence, the institution of that Member State shall without delay inform the competent institution.
Procedure in the event of an accident at work or occupational disease which occurs in a MS other than the competent MS	**34 (5)**		*YES*	*shall where appropriate*	At the request of the institution of the place of residence or stay, where appropriate, the competent institution shall notify it of the decision setting the date for the recovery or stabilisation of injuries and, where appropriate, the decision concerning the granting of a pension.
Procedure in the event of exposure to the risk of an occupational disease in more than one MS	**36 (1) 2nd subparagraph**	*YES*		*shall*	When the institution to which the declaration or notification was sent establishes that an activity likely to cause the occupational disease in question was last pursued under the legislation of another Member State, it shall send the declaration or notification and all accompanying certificates to the equivalent institution in that Member State.
Exchange of information between institutions and advance payments in the event of an appeal against rejection	**37 (1)**	*YES*		*shall*	In the event of an appeal against a decision to refuse benefits taken by the institution of one of the Member States under the legislation of which the person concerned pursued an activity likely to cause the occupational disease in question, that institution shall inform the institution to which the declaration or notification was sent, in accordance with the procedure provided for in Article 36(2) of the implementing Regulation, and shall subsequently inform it when a final decision is reached.

Domain	Article	Ex officio	At the request	Obligatory or not?	Relevant text
Assessment of the degree of incapacity in the event of occupational accidents or diseases which occurred previously or subsequently	**39**		*YES*	*shall*	Where a previous or subsequent incapacity for work was caused by an accident which occurred when the person concerned was subject to the legislation of a Member State which makes no distinction according to the origin of the incapacity to work, the competent institution or the body designated by the competent authority of the Member State in question shall: (a) upon request by the competent institution of another Member State, provide information concerning the degree of the previous or subsequent incapacity for work, and where possible, information making it possible to determine whether the incapacity is the result of an accident at work within the meaning of the legislation applied by the institution in the other Member State; (b) take into account the degree of incapacity caused by these previous or subsequent cases when determining the right to benefits and the amount, in accordance with the applicable legislation.
Death grants					
Claim for death grants	**42, 1st paragraph**	*YES*		*shall*	For the purposes of applying Articles 42 and 43 of the basic Regulation, the claim for death grants shall be sent either to the competent institution or to the institution of the claimant's place of residence, which shall send it to the competent institution.
Invalidity benefits and old-age and survivors' pensions					
Claim for benefits	**45 (1)**	*YES*		*shall*	In order to receive benefits under type A legislation under Article 44(2) of the basic Regulation, the claimant shall submit a claim to the institution of the Member State, whose legislation was applicable at the time when the incapacity for work occurred followed by invalidity or the aggravation of such invalidity, or to the institution of the place of residence, which shall forward the claim to the first institution.

Domain	Article	Ex officio	At the request	Obligatory or not?	Relevant text
	45 (3)	*YES*		*shall*	In the case referred to in Article 47(1) of the basic Regulation, the institution with which the person concerned was last insured shall inform the institution which initially paid the benefits of the amount and the date of commencement of the benefits under the applicable legislation. From that date benefits due before aggravation of the invalidity shall be withdrawn or reduced to the supplement referred to in Article 47(2) of the basic Regulation.
	45 (4)	*YES*		*shall*	In situations other than those referred to in paragraph 1, the claimant shall submit a claim to the institution of his place of residence or to the institution of the last Member State whose legislation was applicable. If the person concerned was not, at any time, subject to the legislation applied by the institution of the place of residence, that institution shall forward the claim to the institution of the last Member State whose legislation was applicable.
Investigation of claims by the institutions concerned	**47 (2)**	*YES*		*shall*	In the case referred to in Article 44(3) of the basic Regulation, the contact institution shall send all the documents relating to the person concerned to the institution with which he was previously insured, which shall in turn examine the case.
	47 (4)	*YES*		*shall*	In situations other than those referred to in paragraph 2, the contact institution shall, without delay, send claims for benefits and all the documents which it has available and, where appropriate, the relevant documents supplied by the claimant to all the institutions in question so that they can all start the investigation of the claim concurrently. The contact institution shall notify the other institutions of periods of insurance or residence subject to its legislation. It shall also indicate which documents shall be submitted at a later date and supplement the claim as soon as possible.
	47 (5)	*YES*		*shall*	Each of the institutions in question shall notify the contact institution and the other institutions in question, as soon as possible, of the periods of insurance or residence subject to their legislation.

Domain	Article	Ex officio	At the request	Obligatory or not?	Relevant text
	47 (6)	*YES*		*shall*	Each of the institutions in question shall calculate the amount of benefits in accordance with Article 52 of the basic Regulation and shall notify the contact institution and the other institutions concerned of its decision, of the amount of benefits due and of any information required for the purposes of Articles 53 to 55 of the basic Regulation.
	47 (7)	*YES*		*shall*	Should an institution establish, on the basis of the information referred to in paragraphs 4 and 5 of this Article, that Article 46(2) or Article 57(2) or (3) of the basic Regulation is applicable, it shall inform the contact institution and the other institutions concerned.
Determination of the degree of invalidity	**49 (1) 1st subparagraph**	*YES*		*shall*	[…] It shall without delay notify the other institutions concerned of that decision.
	49 (1) 2nd subparagraph	*YES*		*shall*	Where the eligibility criteria, other than those relating to the degree of invalidity, laid down in the applicable legislation are not met, taking into account Articles 6 and 51 of the basic Regulation, the contact institution shall without delay inform the competent institution of the last Member State to whose legislation the claimant was subject. The latter institution shall be authorised to take the decision concerning the degree of invalidity of the claimant if the conditions for eligibility laid down in the applicable legislation are met. It shall without delay notify the other institutions concerned of that decision.

Domain	Article	Ex officio	At the request	Obligatory or not?	Relevant text
Measures intended to accelerate the pension calculation process	**52 (1)**	*YES*		*shall*	In order to facilitate and accelerate the investigation of claims and the payment of benefits, the institutions to whose legislation a person has been subject shall: (a) exchange with or make available to institutions of other Member States the elements for identifying persons who change from one applicable national legislation to another, and together ensure that those identification elements are retained and correspond, or, failing that, provide those persons with the means to access their identification elements directly; (b) sufficiently in advance of the minimum age for commencing pension rights or before an age to be determined by national legislation, exchange with or make available to the person concerned and to institutions of other Member States information (periods completed or other important elements) on the pension entitlements of persons who have changed from one applicable legislation to another or, failing that, inform those persons of, or provide them with, the means of familiarising themselves with their prospective benefit entitlement.
	52 (3)	*YES*		*should be*	For the purposes of applying paragraph 1, the institution in the first Member State where a person is allocated a Personal Identification Number (PIN) for the purposes of social security administration should be provided with the information referred to in this Article.
Unemployment benefits					
Aggregation of periods and calculation of benefits	**54 (2)**		*YES*	*shall*	For the purposes of applying Article 62(3) of the basic Regulation, the competent institution of the Member State to whose legislation the person concerned was subject in respect of his last activity as an employed or self-employed person shall, without delay, at the request of the institution of the place of residence, provide it with all the information necessary to calculate unemployment benefits which can be obtained in the Member State of residence, in particular the salary or professional income received.

Domain	Article	Ex officio	At the request	Obligatory or not?	Relevant text
Conditions and restrictions on the retention of the entitlement to benefits for unemployed persons going to another MS	**55 (4) 1st subparagraph**	*YES*		*shall*	The institution in the Member State to which the unemployed person has gone shall immediately send a document to the competent institution containing the date on which the unemployed person registered with the employment services and his new address.
	55 (4) 2nd subparagraph	*YES*		*shall*	If, in the period during which the unemployed person retains entitlement to benefits, any circumstance likely to affect the entitlement to benefits arises, the institution in the Member State to which the unemployed person has gone shall send immediately to the competent institution and to the person concerned a document containing the relevant information.
	55 (4) 3rd subparagraph		*YES*	*shall*	At the request of the competent institution, the institution in the Member State to which the unemployed person has gone shall provide relevant information on a monthly basis concerning the follow-up of the unemployed person's situation, in particular whether the latter is still registered with the employment services and is complying with organised checking procedures.
	55 (5)	*YES*		*shall*	The institution in the Member State to which the unemployed person has gone shall carry out or arrange for checks to be carried out, as if the person concerned were an unemployed person obtaining benefits under its own legislation. Where necessary, it shall immediately inform the competent institution if any circumstances referred to in paragraph 1(d) arise.
Unemployed persons who resided in a Member State other than the competent Member State	**56 (1) 2nd subparagraph**		*YES*	*shall*	At the request of the employment services of the Member State in which the person concerned pursued his last activity as an employed or self-employed person, the employment services in the place of residence shall send the relevant information concerning the unemployed person's registration and search for employment.
	56 (3)		*YES*	*shall*	For the purposes of applying Article 65(5)(b) of the basic Regulation, the institution of the Member State to whose legislation the worker was last subject shall inform the institution of the place of residence, when requested to do so by the latter, whether the worker is entitled to benefits under Article 64 of the basic Regulation.
Family benefits					

Domain	Article	Ex officio	At the request	Obligatory or not?	Relevant text
Rules applicable where the applicable legislation and/or the competence to grant family benefits changes	**59 (2)**	*YES*		*shall*	It shall inform the institution of the other Member State or Member States concerned of the date on which it ceases to pay the family benefits in question. Payment of benefits from the other Member State or Member States concerned shall take effect from that date.
Procedure for applying Articles 67 and 68 of the basic Regulation	**60 (2) 3rd subparagraph**	*YES*		*shall*	If it appears to that institution that there may be an entitlement to a differential supplement by virtue of the legislation of another Member State in accordance with Article 68(2) of the basic Regulation, that institution shall forward the application, without delay, to the competent institution of the other Member State and inform the person concerned; moreover, it shall inform the institution of the other Member State of its decision on the application and the amount of family benefits paid.
	60 (3) 1st subparagraph	*YES*		*shall*	Where the institution to which the application is made concludes that its legislation is applicable, but not by priority right in accordance with Article 68(1) and (2) of the basic Regulation, it shall take a provisional decision, without delay, on the priority rules to be applied and shall forward the application, in accordance with Article 68(3) of the basic Regulation, to the institution of the other Member State, and shall also inform the applicant thereof. […]
Procedure for applying Article 69 of the basic Regulation	**61**	*YES*		*shall*	For the purposes of applying Article 69 of the basic Regulation, the Administrative Commission shall draw up a list of the additional or special family benefits for orphans covered by that Article. If there is no provision for the institution competent to grant, by priority right, such additional or special family benefits for orphans under the legislation it applies, it shall without delay forward any application for family benefits, together with all relevant documents and information, to the institution of the Member State to whose legislation the person concerned has been subject, for the longest period of time and which provides such additional or special family benefits for orphans. In some cases, this may mean referring back, under the same conditions, to the institution of the Member State under whose legislation the person concerned has completed the shortest of his or her insurance or residence periods.

Domain	Article	Ex officio	At the request	Obligatory or not?	Relevant text
FINANCIAL PROVISIONS					
Recovery of benefits provided but not due, recovery of provisional payments and contributions, offsetting and assistance with recovery					
Requests for information	**76 (1) 1st subparagraph**		*YES*	*shall*	At the request of the applicant party, the requested party shall provide any information which would be useful to the applicant party in the recovery of its claim.
	76 (3)	*YES? (see 76 (1) 1st subparagraph)*		*shall not be obliged to*	The requested party shall not be obliged to supply information: (a) which it would not be able to obtain for the purpose of recovering similar claims arising in its own Member State; (b) which would disclose any commercial, industrial or professional secrets; or (c) the disclosure of which would be liable to prejudice the security of or be contrary to the public policy of the Member State.
	76 (4)	*YES? (see 76 (1) 1st subparagraph)*		*shall*	The requested party shall inform the applicant party of the grounds for refusing a request for information.
Notification	**77 (1)**		*YES*	*shall*	The requested party shall, at the request of the applicant party, and in accordance with the rules in force for the notification of similar instruments or decisions in its own Member State, notify the addressee of all instruments and decisions, including those of a judicial nature, which come from the Member State of the applicant party and which relate to a claim and/or to its recovery.
	77 (3)	*YES (see 77 (1))*		*shall*	The requested party shall without delay inform the applicant party of the action taken on its request for notification and, particularly, of the date on which the decision or instrument was forwarded to the addressee.
Request for recovery	**78 (5)**	*YES (see 77 (1))*		*shall*	The applicant party shall forward to the requesting party any relevant information relating to the matter which gave rise to the request for recovery, as soon as this comes to its knowledge.
Instrument permitting enforcement of the recovery	**79 (2) 2nd subparagraph**	*YES (see 77 (1))*		*shall*	[…]The requested party shall inform the applicant party of the grounds for exceeding the three-month period.

Domain	Article	Ex officio	At the request	Obligatory or not?	Relevant text
Limits to applying assistance	**82 (1)**	*YES*		*shall not be obliged to*	The requested party shall not be obliged: (a) to grant the assistance provided for in Articles 78 to 81 of the implementing Regulation if recovery of the claim would, because of the situation of the debtor, create serious economic or social difficulties in the Member State of the requested party, insofar as the laws, regulations or administrative practices in force in the Member State of the requested party allow such action for similar national claims; (b) to grant the assistance provided for in Articles 76 to 81 of the implementing Regulation, if the initial request under Articles 76 to 78 of the implementing Regulation applies to claims more than five years old, dating from the moment the instrument permitting the recovery was established in accordance with the laws, regulations or administrative practices in force in the Member State of the applicant party at the date of the request. However, if the claim or instrument is contested, the time limit begins from the moment that the Member State of the applicant party establishes that the claim or the enforcement order permitting recovery may no longer be contested.
	82 (2)	YES		*shall*	The requested party shall inform the applicant party of the grounds for refusing a request for assistance.
MISCELLANEOUS, TRANSITIONAL AND FINAL PROVISIONS					
Medical examination and administrative checks	**87 (1) 2nd subparagraph**	YES		*shall*	The debtor institution shall inform the institution of the place of stay or residence of any special requirements, if necessary, to be followed and points to be covered by the medical examination.
	87 (2) 1st subparagraph	YES		*shall*	The institution of the place of stay or residence shall forward a report to the debtor institution that requested the medical examination. This institution shall be bound by the findings of the institution of the place of stay or residence.

ANNEX II: ANALYSIS OF COM(2016) 815 FINAL – NECESSARY COOPERATION – FRAUD, ERROR AND ABUSE – RECOVERY

Modifications to Regulation (EC) No 883/2004

Domain	Article	Obligatory or not?	Ex oficio	At the request	Relevant text
Cooperation	**Recital 13**				With a view to supporting Member States in their efforts to combat fraud and error in the application of the coordination rules, it is necessary to establish a further permissive legal basis to facilitate the processing of personal data about persons to whom Regulations (EC) No 883/2004 and (EC) No 987/2009 apply. This would enable a Member State to periodically compare data held by its competent institutions against that held by another Member State in order to identify errors or inconsistencies that require further investigation"
	Recital 14				In order to protect the rights of data subjects while at the same time facilitating the legitimate interest of Member States to collaborate in enforcement of legal obligations, it is necessary to clearly specify the circumstances in which personal data exchanged pursuant to these Regulations may be used for purposes other than social security and to clarify the obligations of Member States to provide specific and adequate information to data subjects".
	Recital 15				With a view to expediting the procedure for the verification and withdrawal of documents (in particular concerning the social security legislation which applies to the holder) in case of fraud and error, it is necessary to strengthen the collaboration and the exchange of information between the issuing institution and the institution requesting a withdrawal. Where there is doubt about the validity of a document or about the correctness of supporting evidence or where there is a difference of views between Member States concerning the determination of the applicable legislation, it is in the interest of the Member States and the persons concerned that the institutions concerned reach an agreement within a reasonable period of time

Domain	Article	Obligatory or not?	Ex oficio	At the request	Relevant text
	Recital 20				"Effective recovery is a means of preventing and tackling fraud and abuse and ensuring the smooth functioning of social security schemes. The recovery procedures contained in Chapter III of Title IV of Regulation 987/2009 are based upon the procedures and rules set up in Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measure[294]. This Directive has been superseded by Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures[295], which introduced a uniform instrument to be used for enforcement measures as well as a standard form for notification of instruments and measures relating to claims. In the review by the Administrative Commission in accordance with Article 86 (3) of Regulation 987/2009 most Member States found it advantageous to use a uniform instrument for enforcement similar to that foreseen by Directive 2010/24/EU. It is therefore necessary that the rules for mutual assistance in recovery of social security claims reflect the new measures in Directive 2010/24/EU in order to ensure more effective recovery and smooth functioning of the coordination rules

Regulation (EC) No 987/2009

Domain	Article	Ex oficio	At the request	Obligatory or not?	Relevant text
Mutual Assistance	**Recital 19**				"Procedures between institutions for mutual assistance in recovery of social security claims should be strengthened in order to ensure more effective recovery and smooth functioning of social security schemes. Effective recovery is also a means of preventing and tackling abuses and fraud and a way of ensuring the sustainability of social security schemes. This involves the adoption of new procedures, taking as a basis a number of existing provisions in Council Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures[296], in particular through the adoption of a uniform instrument for enforcement and standard procedures for requesting mutual assistance and notification of instruments and measures relating to the recovery of a social security claim."
Fraud and error	**Recital 25**				The Administrative Commission adopted Decision No. H5 of 18 March 2010 concerning cooperation on combating fraud and error within the framework of Council Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 of the European Parliament and of the Council on the coordination of social security systems[297], which underlines that action to combat fraud and error is part of the proper implementation of Regulation (EC) No 883/2004 and this Regulation. It is, therefore, in the interest of legal certainty that this Regulation contains a clear legal ground permitting competent institutions to exchange personal data with relevant authorities in the Member State of stay or residence relating to persons whose rights and obligations under Regulation (EC) No 883/2004 and this Regulation have already been established, in order to identify fraud and error as part of the ongoing proper implementation of these Regulations. It is also necessary to specify the circumstances in which personal data may be processed for a purpose other than social security including to monitor compliance with legal obligations at Union or national level in the fields of labour, health and safety, immigration and taxation law
Data exchange	**Recital 26**				In order to protect the rights of the persons concerned Member States should ensure that any data requests and responses are necessary and proportionate for the proper implementation of Regulation (EC) No 883/2004 and this Regulation, in accordance with European Data Protection legislation. There should be no automatic removal of benefit entitlement resulting from the data exchange, and any decision taken on the basis of the data exchange should respect the fundamental rights and freedoms of the individual concerned in that it is based on sufficient evidence and is subject to a fair appeal procedure

Domain	Article	Ex oficio	At the request	Obligatory or not?	Relevant text
Personal data	2 Paragraphs 5 to 7		*YES*	*may*	"5.When a person's rights or obligations to which the basic and implementing Regulations apply have been established or determined, the competent institution may request the institution in the Member State of residence or stay to provide personal data about that person. The request and any response shall concern information which enables the competent Member State to identify any inaccuracy in the facts on which a document or a decision determining the rights and obligations of a person under the basic or implementing Regulation is based. The request can also be made where there is no existing doubt about the validity or accuracy of the information contained in the document or on which the decision is based in a particular case. The request for information and any response must be necessary and proportionate.6. The Administrative Commission shall draw up a detailed list of the types of data requests and responses which can be made under paragraph 5 and the European Commission shall give such list the necessary publicity. Only data requests and responses which are listed shall be permitted. 7. The request and any response shall comply with the requirements of the Regulation of the European Parliament and of the Council on the protection of individuals with regard the processing of personal data and on the free movement of such data (General Data Protection Regulation),[298] as also provided for by Article 77 of the basic Regulation."

Domain	Article	Ex oficio	At the request	Obligatory or not?	Relevant text
Fraud and error	**5 paragraph 1 and 2**		*YES*	*shall*	1. Documents issued by the institution of a Member State and showing the position of a person for the purposes of the application of the basic Regulation and of the implementing Regulation, and supporting evidence on the basis of which the documents have been issued, shall be accepted by the institutions of the other Member States for as long as they have not been withdrawn or declared to be invalid by the Member State in which they were issued. Such documents shall only be valid if all sections indicated as compulsory are filled in.2. Where there is doubt about the validity of a document or the accuracy of the facts on which they are based, the institution of the Member State that receives the document shall ask the issuing institution for the necessary clarification and, where appropriate, the withdrawal of that document. a) When receiving such a request, the issuing institution shall reconsider the grounds for issuing the document and, if necessary, withdraw it or rectify it, within 25 working days from the receipt of the request. Upon detection of an irrefutable case of fraud committed by the applicant of the document, the issuing institution shall withdraw or rectify the document immediately and with retroactive effect .b)If the issuing institution, having reconsidered the grounds for issuing the document is unable to detect any error it shall forward to the requesting institution all supporting evidence within 25 working days from the receipt of the request. In urgent cases, where the reasons for urgency have been clearly indicated in the request, this shall be done within two working days from the receipt of the request, notwithstanding that the issuing institution may not have completed its deliberations pursuant to subparagraph (a) above. c)Where the requesting institution having received the supporting evidence continues to have doubts about the validity of a document or the accuracy of the facts on which the particulars contained therein are based that the information upon which the document was issued is not correct, it may submit evidence to that effect and make a further request for clarification and where appropriate the withdrawal of that document by the issuing institution in accordance within the procedure and timeframes set out above.".
Data exchange	**19 Paragraph 4**	*YES*		*shall*	"Where necessary for the exercise of legislative powers at national or Union level, relevant information regarding the social security rights and obligations of the persons concerned shall be exchanged directly between the competent institutions and the labour inspectorates, immigration or tax authorities of the States concerned this may include the processing of personal data for purposes other than the exercise or enforcement of rights and obligations under the basic Regulation and this Regulation in particular to ensure compliance with relevant legal obligations in the fields of labour, health and safety, immigration and taxation law. Further details shall be laid down by decision of the Administrative Commission"

Domain	Article	Ex oficio	At the request	Obligatory or not?	Relevant text
Unduly benefits	**Article 73**		*YES*	*shall*	In case of a retroactive change of the applicable legislation including situations referred to in Article 6(4) and (5) of the implementing Regulation, at the latest three months after the applicable legislation has been determined or the institution responsible for paying the benefits has been identified, the institution which unduly paid cash benefits shall draw up a statement of the amount paid and shall send it to the institution identified as being competent for the purpose of their reimbursement. The same applies with respect to benefits in kind, which shall be reimbursed by the institution identified as being competent in accordance with Title IV of the implementing Regulation. 2. The institution identified as being competent for paying the cash benefits shall deduct the amount it has to reimburse to the institution which was not competent or only provisionally competent from the arrears of the corresponding benefits it owes to the person concerned and shall without delay transfer the amount deducted to the latter institution. If the amount of unduly paid benefits exceeds the amount of arrears payable by the institution identified as being competent, or if arrears do not exist, the institution identified as being competent shall deduct this amount from ongoing payments subject to the conditions and limits applying to this kind of offsetting procedure under the legislation it applies, and without delay transfer the amount deducted to the institution which had unduly paid the cash benefits for the purpose of their reimbursement. 3. The institution which has unduly received contributions from a legal and/or natural person shall not reimburse the amounts in question to the person who paid them until it has ascertained from the institution identified as being competent the sums due to it by the person concerned. Upon request of the institution identified as being competent, which shall be made at the latest three months after the applicable legislation has been determined, the institution that has unduly received contributions shall transfer them to the institution identified as being competent for that period for the purpose of settling the situation concerning the contributions owed by the legal and/or natural person to it. The contributions transferred shall be retroactively deemed as having been paid to the institution identified as being competent. If the amount of unduly paid contributions exceeds the amount the legal and/or natural person owes to the institution identified as being competent, the institution which unduly received contributions shall reimburse the amount in excess to the legal and/or natural person concerned. 4. The existence of time limits under national legislation shall not be a valid ground for the refusal of the settlement of claims between institutions under this Article. 5. This Article shall not apply to claims related to periods which are older than 60 months at the date when a procedure in accordance with Articles 5(2) or 6(3) of this Regulation commenced.”

Domain	Article	Ex oficio	At the request	Obligatory or not?	Relevant text
Mutual assistance	**75 paragraph 4**	*YES*		*may*	"Information exchanged in conformity with this Section may be used for the purpose of assessment and enforcement including the application of precautionary measures with regard to a claim, and in addition may be used for the purpose of assessment and enforcement of taxes and duties covered by Article 2 of Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures.[299] Where a refund of social security contributions relates to a person who resides or stays in another Member State, the Member State from which the refund is to be made may inform the Member State of residence or stay of the upcoming refund, **without prior request**
Notification	**77 paragraph 4**		*YES*	*shall*	"4. The applicant party shall make a request for notification pursuant to this Article only when it is unable to notify in accordance with the rules governing the notification of the document concerned in its Member State, or when such notification would give rise to disproportionate difficulties.
Recovery	**78 paragraph 1**		*YES*	*shall*	At the request of the applicant party, the requested party shall recover claims which are the subject of an instrument permitting enforcement in the Member State of the applicant party. Any request for recovery shall be accompanied by a uniform instrument permitting enforcement by the Member State of the requested party."
Recovery	**78 paragraph 3**	*YES*		*shall*	Before the applicant party makes a request for recovery, appropriate recovery procedures available in the Member State of the applicant party shall be applied, except in the following situations a) where it is obvious that there are no assets for recovery in the Member State of the applicant party or that such procedures will not result in the payment in full of the claim, and the applicant party has specific information indicating that the person concerned has assets in the Member State of the requested party b) where recourse to such procedures in the Member State of the applicant party would give rise to disproportionate difficulty
Recovery	**81 paragraph 1**	*YES*		*shall*	If, in the course of the recovery procedure, the claim, the initial instrument permitting enforcement in the Member State of the applicant party or the uniform instrument permitting enforcement in the Member State of the requested party, the validity of a notification made by an authority in the Member States of the applicant party are contested by an interested party, the action shall be brought by this party before the appropriate authorities of the Member State of the applicant party, in accordance with the laws in force in that Member State. The applicant party shall without delay notify the requested party of this action. The interested party may also inform the requested party of the action."

Domain	Article	Ex oficio	At the request	Obligatory or not?	Relevant text
Recovery	**81 paragraph 4 and 5**		*YES?*	*shall*	"4.The applicant party shall inform the requested party immediately of any subsequent amendment to its request for recovery or of the withdrawal of its request, indicating the reasons for amendment or withdrawal." "5. If the amendment of the request is caused by a decision of the appropriate authority referred to in Article 81 (1), the applicant party shall communicate this decision together with a revised uniform instrument permitting enforcement in the Member State of the requested party. The requested party shall then proceed with further recovery measures on the basis of the revised instrument. Recovery or precautionary measures already taken on the basis of the original uniform instrument permitting enforcement in the Member State of the requested party may be continued on the basis of the revised instrument, unless the amendment of the request is due to invalidity of the initial instrument permitting enforcement in the Member State of the applicant party or the original uniform instrument permitting enforcement in the Member State of the requested party
Precautionary measures	**84**		*YES*	*shall*	Upon reasoned request by the applicant party, the requested party shall take precautionary measures, if allowed by its national law and in accordance with its administrative practice, to ensure recovery where a claim or the instrument permitting enforcement in the Member State of the applicant party is contested at the time when the request is made, or where the claim is not yet the subject of an instrument permitting enforcement in the Member State of the applicant party, in so far as precautionary measures are also possible, in a similar situation, under the national law and administrative practices of the Member State of the applicant party. The document drawn up for permitting precautionary measures in the Member State of the applicant party and relating to the claim for which mutual assistance is requested, if any, shall be attached to the request for precautionary measures in the Member State of the requested party. This document shall not be subject to any act of recognition, supplementing or replacement in the Member State of the requested party.

Domain	Article	Ex oficio	At the request	Obligatory or not?	Relevant text
Agreements	**85 a**		*YES*	*may*	1. By agreement between the applicant party and the requested party and in accordance with the arrangements laid down by the requested party, officials authorised by the applicant party may, with a view to promoting mutual assistance provided for in this Section: (a) be present in the offices where the administrative authorities of the Member State of the requested party carry out their duties; (b) be present during administrative enquiries carried out in the territory of the Member State of the requested party; (c) assist the competent officials of the Member State of the requested party during court proceedings in that Member State. 2. In so far as it is permitted under the legislation in force in the Member State of the requested party, the agreement referred to in paragraph 1(b) may provide that officials of the Member State of applicant party may interview individuals and examine records. 3. Officials authorised by the applicant party who make use of the possibilities offered by paragraphs 1 and 2 shall at all times be able to produce written authority stating their identity and their official capacity

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