

**SOCIAL SECURITY FOR PERSONS, HAVING SPECIAL REGARD TO LAWYERS,  
MOVING WITHIN THE EUROPEAN COMMUNITY**

By

**Sean VAN RAEPENBUSCH**

Legal Secretary at the European Court of Justice  
Professor at the University of Liège

**1. Objective.** The lack of harmonisation of national social security legislation between Member States hinders the freedom of movement of workers within the Community. For this reason, the authors of the Treaty of Rome expressly directed the Council to adopt a series of measures to ensure the free movement of employed workers within the European social security system. Article 42<sup>1</sup> of the Treaty provides for the establishment of a system which shall secure the following rights for migrant workers and their dependants:

- a) the aggregation, for the purpose of acquiring and retaining the right to benefits and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;
- b) the payment of benefits to persons resident in the territories of Member States.

---

<sup>1</sup> Following the ratification of the Treaty of Amsterdam, the European Parliament was conferred express legal powers under Article 42 of the new Treaty which refers to the co-decision procedure as it is set out in Article 251 of the same Treaty.

These are just two of the possible measures which the Council may consider adopting in order to facilitate the free movement of workers.<sup>2</sup>

From its first rulings on this matter, the Court of Justice has not hesitated to utilise the teleological argument in order to reinterpret former article 51 of the Treaty and any case-law regarding the freedom of movement of workers. On several occasions, it has ruled that “It would be contrary to Articles 48 to 51 of the Treaty (now Articles 39 to 42) if, as a consequence of the exercise of their freedom of movement, migrant workers were to lose the social security advantages guaranteed to them by the laws of a single Member State, since such a consequence might discourage Community workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom.” (Judgment of 9 December 1993, Lepore and Others. C-45 and C-46/92, E.C.R. p. I-6535; see to similar effect judgments of 4 October 1992, Paraschi, C-349/87, E.C.R. p. I-4501, par. 22; 30 March 1993, de Wit, C-282/91, E.C.R. p. I-1238; 5 March 1994, C-165/91, ECR p. I-466).

**2. Self-employed Workers.** The Treaty does not contain any specific provision, analogous to Article 42, providing for the removal of any obstacles in the social security system to allow for the free movement of self-employed persons, freedom of establishment, and the free provision of services.

The Commission, although it did not take concrete action at the time, had already foreseen the need for co-ordination of security policies for self-employed workers when it amended Regulations 3 and 4 in 1996. This became increasingly vital as a result of the development of social security systems in the original six member states and following the progress that was achieved in the areas of freedom of establishment and the free provision of services. These systems increasingly tended to guarantee and strengthen social protection for self-employed workers, while in the case of two of the new member states in 1973, self-employed workers benefited from identical - or almost identical - rights as wage-earners.

It was not until 1981 that (EEC) Regulation 1390/81<sup>3</sup> was finally adopted, founded on former Article 235 (now Article 308) of the Treaty, and extending Regulations 1408/71 and 574/72 to self-employed workers and members of their family. Since then, Community law is therefore applicable to lawyers and to any category of self-employed workers.

**3. Civil servants and students.** The move to extend these regulations to other categories of workers was pursued in the context of the desire to establish a “space without frontiers” in keeping with the spirit of Article 14 of the Treaty. The idea was to ultimately permit all insured persons, that is all those covered by a social security system in any Member State, irrespective of their status (be they students, civil servants, unemployed persons,...) to benefit from community wide coordination of social security legislation.

---

<sup>2</sup> See judgments of 19 March 1964, Unger 75/63, E.C.R. p. 362; 9 June 1964, Nonnenmacher, 92/63, E.C.R. p. 557; 16 July 1964, Van der Veen, 100/63, E.C.R. p. 1105; of 12 July 1984, Patteri, 242/83, E.C.R. p. 3171.

<sup>3</sup> OJ L 143, 29 May 1981.

This was how the Council came to recently adopt two regulations: Regulation 1608/98 of 29 January 1998<sup>4</sup>, which extended the community law to cover special regimes for civil servants; and Regulation 307/99, of 8 February 1999<sup>5</sup>, which extended the scope of the Regulation to include students.

**4. Nationals of third countries.** At the dawn of the twenty-first century, the time had come to extend the benefits of coordinated social security regimes within the Community to all third country nationals, in their own right, provided they were legally resident in the territory of a Member State. This has been the case since Council Regulation (EC) 859/2003<sup>6</sup> came into effect on 1 June 2003. The Regulation was introduced in the wake of the European Council meeting at Tampere, which in October 1999 had recommended equal treatment for nationals of third countries who legally reside in the Union as well as the harmonisation of their legal status with that enjoyed by nationals of Member States.

Such a broadening of the scope of former regulations on free movement does not mean that a third country national now has the right to move freely within the Community but rather that persons who already regularly do so will, from now on, be protected.<sup>7</sup> In this regard, the influence of the European Court of Human Rights was undoubtedly instrumental. The Court's judgment in case *Gaygusuz v Austria* upheld the principle of non-discrimination in respect of the granting of social security benefits to a Turkish national<sup>8</sup>.

Regulation 859/2003 limits the application of Regulation 1408/71 and Regulation 574/72 to «nationals of third countries who are not already covered by those provisions solely on the ground of their nationality, as well as to members of their families and to their survivors,

---

<sup>4</sup> OJ L 209, 25 July 1998.

<sup>5</sup> OJ L 38, 12 February 1999.

<sup>6</sup> Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality, OJ L 124 of 20 May 2003, p. 1. This Regulation is based on Article 63(4) of the EU treaty, which is contained in Title IV «Visas, asylum, immigration and other policies related to free movement of persons», which incorporates in the community pillar, a part of the third pillar, following on from the Treaty of Amsterdam. This explains why Denmark did not adopt the abovementioned Regulation, in accordance with Articles 1 and 2 of the protocol on the position of Denmark, annexed to the Treaty on European Union. Denmark therefore is not bound by this Regulation.

<sup>7</sup> Readers may recall that before the introduction of the new Regulation, third country nationals were already protected under Regulation No 1408/71 in their capacity as spouse or as a family member of a community worker, a stateless person or refugee. They were also protected under agreements concluded between the Community and certain third countries, notably with Turkey and the Maghreb countries.

<sup>8</sup> V.H. Verschueren, «EC social security coordination excluding third country nationals: still in line with fundamental rights after *Gaygusuz* judgment?», *CML Rev.*, 1997, p. 991; D. Pieters, «The legal foundations of a possible extension of Community provisions on social security to third country-nationals legally residing and/or moving in the European Union» in P. Schoukers (ed.): *Prospects of Social Security coordination*, Leuven, Acco, 1997, p. 15.

provided they are legally resident in the territory of a Member State and are in a situation which is not confined in all respects within a single Member State» (Article 1).

Article 2 of Regulation 859/2003 contains important transitional provisions aimed in general at guaranteeing the future application of the Regulation (from 1 June 2003), including the future consequences of situations that arose in the past, based on what was already envisaged under Regulation 1408/71, especially since the provisions of the latter were extended to non-salaried workers in 1981.

**5. Current status of regulations:** (EC) Regulation 118/97 of 2 December 1996<sup>9</sup> gave rise to Regulations 1408/71 and 574/72 and have since been amended on several occasions<sup>10</sup>.

In December 1998 the Commission presented a draft Regulation to the Council which would have greatly simplified Regulation 1408/71 following the European Council's appeal to this effect made in Edinburgh in 1992<sup>11</sup>. This proposal, which is not included in the scope of the present paper, is still being considered.

**6. Aim.** The scope of the present paper is to provide a comprehensive picture of present Community law in the field of social security for migrant workers, as interpreted by the Court of Justice. The report focuses on those aspects which may prove of particular interest to lawyers, even though the rulings are horizontal in nature, and therefore applicable to all categories of workers - be they wage-earners or self-employed workers - who individually or together with other family members, find themselves outside their national system.

The report is developed in two sections; the first is devoted to identifying the field of application (substantive, physical, and geographical) of Regulations 1408/71 and 574/72. The second section examines the guiding principles underlying the coordination of national social security systems (equality of treatment, identification of applicable law, acquired law and legislation currently being drafted, cooperation) and its consequences for each of the areas of social security covered, including the measures relating to the regulation of the aggregation of benefits.

Given the very broad nature of the subject under examination, it goes without saying that it was not possible to provide a detailed account of the various rules on coordination applicable in each area of social security policy, in order to determine the exact extent of a particular lawyer's entitlements to social security on having exercised their right to freedom of movement among Member States.

---

<sup>9</sup> OJ L 28, 30 January 1997, p. 1.

<sup>10</sup> Last amended by Regulation (EC) No 1386/2001, OJ L 187, of 10 July 2001, p.1.

<sup>11</sup> See the draft regulation (EC) of the Council on the coordination of social security systems presented by the Commission to the Council in December 1998 (Doc COM (1198) 779).



CHAPTER 1            SUBSTANTIVE SOCPE

7.            **Concept of social security:** Regulation 1408/71 does not cover the entire range social security benefits that are currently provided for by national legislation in the individual Member States. It would have proved extremely difficult to propose a “comprehensive” definition of social security for migrant workers to which Community law could refer in order to define its material area of application.

Nor does Regulation 1408/71 set out to define what is not included by the term social security benefit; a task which would have proved almost certainly impossible given the disparities which continue to characterise national legislation and the constantly changing notion of what social security is. Nor was it the aim of this Regulation to harmonise<sup>12</sup> existing differences.

Article 4 of Regulation 1408/71 limits itself to listing in paragraph 1, those branches of social security covered by the Regulation:

- sickness and maternity benefits;
- invalidity benefits, including those intended for the maintenance or improvement of earning capacity
- old-age and survivors’ benefits;
- benefits in respect of accidents at work and occupational diseases;
- death grants;
- unemployment benefits;
- family benefits<sup>13</sup>.

---

<sup>12</sup>            On the harmonisation social security systems, see either Article 137, paragraph 3, of the Treaty (giving the Council powers to make a unanimous ruling, following a proposal put forward by the Commission, and after consultation with the European Parliament, the Social and Economic Committee and the Committee of the Regions), or to Article 138 (on social dialogue).

<sup>13</sup>            It is worth noting that early retirement benefits do not fall into the regulation’s are of application. This does not mean however that the person who is entitled to such payments can not be considered as a worker as defined under Article 1(a) of the Regulation and benefit thereby from the provisions of the Article, especially as regards healthcare payments, in virtue of Article 19 of Regulation n 1408/71. In jurisprudence it is accepted that “the definition of a wage-earning (or self-employed) worker as decreed in Article 1,(a), of Regulation n 1408/71 for the purposes of the application of the Regulation, has a general scope, extending to all those persons who, whether or not they pursue a profession, has the capacity of a person insured under the social security legislation of one or more Member States” (judgment of 31 May 1979, Pierick, 182/78, Rec. p. 1977). However, several judgments of the Court have revealed gaps in Community law on workers who take early retirement. The Court has ruled that a Member State may deduct sickness insurance contributions from early retirement allowances (or supplementary retirement allowances) which are not part of the material scope of Regulation 1408/71, and which have been paid to persons residing in another Member State where they already benefit, under the legislation of that State, from sickness insurance benefits. The principle of the uniqueness of the applicable legislation (especially as regards the payment of social security contributions) therefore do not apply to beneficiaries of early retirement or supplementary retirement allowances who are not included in Articles 13(2), and 14 to 17 of Regulation 1408/71. In the same way a Member State may refuse to grant family benefits to persons who receive an early

Since 25 October 1998 (see Regulation 1606/98) this Regulation also applies to special social security schemes for civil servants.

Furthermore, in order to avoid any ambiguity, Article 4, paragraph 4, formally excludes social assistance<sup>14</sup>, as well as “benefit schemes for victims of war” aimed essentially at compensating for damages or hardship endured during the two world wars..

As regards the legal and financial structures put in place, the Regulation is applicable to all social security schemes whether “special” - targeting certain categories of workers, or “general” - contributory or non-contributory (Article 4, paragraph 1).

**8. Legislation:** The identification of risks would never be sufficient in order to define the material application of the Regulation without having defined the term “legislation”. This is what Article 1, (j) of the Regulation does, stating:

“‘legislation’ means all the laws, regulations, and other statutory provisions and all other present or future implementing measures of each Member State relating to the branches and schemes of social security covered by Article 4 (1) and (2)”. According to the Court of Justice, “this definition is characterised by its broad scope, bringing together all kinds of legislative, regulatory and administrative measures adopted by Member States and must be understood as referring to the entire body of national measures applicable in this area.”<sup>15</sup>.

It is incumbent upon the Member States to mention, in conformity with Article 5 of the Regulation, applicable laws and schemes that have been approved in all declarations which are submitted to the President of the Council and published in the European Community’s Official Journal. These declarations, according to established case-law, are of a purely indicative and non-binding nature<sup>16</sup>. However, if a Member State cites a law in a declaration, the benefits which this law accords, are to be understood as social security benefits in accordance with Regulation 1408/71<sup>17</sup>.

---

retirement pension when they do not live in the Netherlands (judgment of 28 November 1991, *Commission v Netherlands*, C-198/90, E.C.R. P. I-5799).

<sup>14</sup> This can however be defined as a “social advantage” in keeping with Article 7, paragraph 2 of Regulation n 1612/68. See 249/83, *Hoeckx*, and 122/84, *Scrivener*, Rec. 1985, pp. 974 and 1028, regarding financial aid which guarantees a minimum of basic rights (*minimex*) enshrined in Belgian law on 7 August 1974. For more information on research carried out by the Court of Justice into sufficiently reliable and accurate criteria for distinguishing between the two main forms of social protection; social security and social assistance, see our paper “The Material Application of (EEC) Regulation n 1408/71 concerning social security for migrant workers”, *Journal des tribunaux du travail*, 1986, p. 369; *infra*, n 9.

<sup>15</sup> Judgment of 31 March, 1977, *Bozzone* 87/76, E.C.R. p. 687, par. 10.

<sup>16</sup> Judgment of 15 July 1964, *Van der Veen*, 100/63, E.C.R. p.1105; of 2 December 1964, *Dingemans*, 24/64, E.C.R. p. 1263.

<sup>17</sup> Judgments of 29 November 1977, *Beerens*, 35/77, E.C.R. p. 2249; of 18 May 1995, *Rheinhold and Mahla*, 327/92, E.C.R. p. I-1223; of 11 July 1996, *Otte*, 25/95, E.C.R. p. I-3745; of 20 February 1997, *Martinez Losada*, 86, 102 and 103/95, E.C.R. p. I-869.

**9. Conventional provisions.** In principle conventional provisions are excluded from the regulation's area of application, which explains the abundance of additional schemes in Member States, as well as the heterogeneous nature of these schemes, regrettable as this is for migrant workers.

Nevertheless, when it comes to conventional provisions necessary for the putting in place of an entitlement to assistance arising from laws relative to the schemes and branches of social security mentioned in Article 4, this limitation may be lifted by a declaration of the Member State concerned<sup>18</sup>.

Since 1999, the French supplementary retirement and early retirement schemes ARGIC and ARRCO, which were specifically mentioned in just such a declaration, fall within the Regulation's area of application.

It may well prove useful in this context, to refer to Council Directive 98/49/EC of 29 June 1998 on the safeguarding of supplementary pension rights of employed persons moving within the Community.<sup>19</sup> This Directive aims essentially at ensuring equality of treatment in respect of pension rights, in particular when the beneficiaries of such schemes move from one Member State to another, as well as cross-border payments and the payment of contributions for workers who have been posted to another Member State.

It is worth highlighting that while supplementary retirement schemes or early retirement benefits have not featured in any declaration, and do not therefore form part of any legislation under Regulation 1408/71; these schemes must nonetheless adhere to the rule concerning equality of treatment enshrined in Article 39 of the Treaty and Article 7 of Regulation 1612/68. It follows that any national provision in this regard must be considered to be indirectly discriminatory if it creates unequal treatment between migrant and national workers. (See judgment of 27 November, 1977, Meints, C-57/96, E.C.R. p. I-6708, par. 45; see also judgment of 24 September, 1998, Commission v. France, C-35/97, E.C.R. p. 5341 on the collective convention concerning rules of residency for the awarding of "free points" for supplementary pension schemes, in favour of workers who have been asked to take early retirement).

**10. Extension of scope as a result of established case-law.** While the eight traditional branches of social security listed in Article 4, paragraph 1 both constitute and define the limits of the Regulation's scope; the Court of Justice has always adopted a broad and functional interpretation of these branches. The Court was undoubtedly aware of changes underway in the field of social security and even of the "attractiveness" - to borrow the expression used by Attorney General Mayras<sup>20</sup>, - of such changes. As well as implying

---

<sup>18</sup> This clause was introduced principally in order to enable the French Government to extend the area of application of the Regulation to include the French unemployment insurance scheme, Unedic.

<sup>19</sup> OJ L 209, 25 July 1998, p. 46.

<sup>20</sup> Expression borrowed from French case-law regarding the concept of "public work". See the conclusions of the Attorney General in 1/72, Frilli, E.C.R. 1972, p. 457.



curative measures, some systems also began referring to risk prevention. Mayras also spoke of the tendency to move beyond the mere improvement of the standard of life, and towards improvement in the quality of life, which would influence future policies on work. This was how the Court of Justice came to consider that the following measures were part of the range of admissible Social Security benefits.

- prophylactic measures in healthcare<sup>21</sup> ;
- vocational assistance defined as unemployment benefits by the Court of Justice so long as they concern workers who are already unemployed or who are still working but who are subject to a verifiable risk of unemployment<sup>22</sup>
- benefits in kind to dependents (“home-help”), to improve the health and quality of life of beneficiaries, considered by the Court as constituting sickness benefits (judgment of 5 March 1998, Molenaar, G-160/96, E.C.R. p. I-843, and of 8 March 2001, Jauch, C-215/99, E.C.R. p. I-1901);
- advance payments of maintenance allowances, to compensate for damages resulting from the non-payment of the allowance by one of the parents, considered by the Court as constituting family benefits (judgment of 15 March 2001, Offermanns, C -85/99, Rec. p. I-2261). Thus persons residing on the territory of a Member State where the provisions of this Regulation are applicable, are entitled to receive the same benefits envisaged under the legislation of this State as nationals, in accordance with Article 3 of the abovementioned regulation (in this instance, the children of divorced parents - German nationals residing in Austria - had requested an advance on the maintenance allowance in view of their father’s insolvency. They had been refused on the sole basis of their nationality);
- in particular: mixed non-contributory benefits, “frontier” benefits resulting from the progressive integration into the range of social assistance services<sup>23</sup>. of benefits covered under national legislation

---

<sup>21</sup> Judgments of 16 November 1972, Heinze, 14/72, Land Niedersachsen, 15/92, and Allgemeine Ortskrankenkassen, Hamburg, 16/72, E.C.R. Pp. 1105, 1127 and 1141. See also judgment of September 1980, Allgemeine Ortskrankenkassen Mittelfranken, 818/79, E.C.R. p. 2729.

<sup>22</sup> Judgment of 4 June 1987, Campana, 375/85, E.C.R. p. 2404. It is incumbent upon the national authorities, on the motion of the Judge’s, to evaluate whether a worker who requests assistance towards vocational training can be considered as being threatened by unemployment (paragraphs 12 and 13).

<sup>23</sup> In this regard benefits for disabled persons in France fall within the scope of the Regulation (judgment of 16 December 1976, Inzirillo, 63/76, E.C.R. p. 2057), in Belgium (judgments of 13 November 1974, Costa, 39/74, E.C.R. p. 1251; of 17 June 1975, Epoux F., 7/75, E.C.R. p. 679; of 28 May 1974, Callemeyn, 187/73, E.C.R. p. 553) and in the UK (judgments of 20 June 1991, Stanton Newton, C-356/89, E.C.R. p. I-3017; judgment of 4 November 1997, Snares, C-20/96, E.C.R. p. I-6082; of 11 June 1998, Partridge, C-297/96, ECR p. I-3477); guaranteed incomes for the elderly in Belgium (judgments of 22 June 1972, Frilli, I/72, E.C.R. p. 457; of 12 July 1984, Castelli, 261/83, E.C.R. 1984) and in France (judgments of 9 October 1974, Biason, 24/74, E.C.R. p. 999; of 24 February 1987, Giletti and Others, 379, 380, 381/85 and 93/86, E.C.R. p. 971; of 12 July 1990, Commission/France, C-236/88, E.C.R. p. I-3177; of 11 June 1991, Commission/France, C-307/89, E.C.R. p. I-2403); pensions in Italy (judgment of 5 May 1983, Piscitello, 139/82, ECR p. 1427); the UK’s ‘family credit’ scheme

In general, case-law would seem to confirm that the difference between the benefits which are excluded from the scope of Regulation 1408/71 and those which are expressly included, resides essentially in the constitutive parts of each single benefit, and principally in the purpose of the benefit and the conditions for its allocation, as well as in the legal status of the beneficiary. The decisive factor for inclusion of the benefit in the substantive scope of the Regulation as defined in Article 4, paragraph 1, is the linking of said benefits as a substitute or supplement to one of the risks identified in the Resolution (see for example, C-66/92, Acciardi, abovementioned; C-57/96, Meints, abovementioned). On the other hand, it is the Court's opinion that the way in which a benefit is financed shall not play any part in determining whether it shall be defined as a social security benefit or not (Case 379 B 381/85 and 93/86, Giletti, abovementioned; Case. 78/91, Hughes, abovementioned).

This evaluation should be carried out freely, in conformity with the underlying objective of Article 42 of the Treaty.

## CHAPTER 2 PERSONS COVERED<sup>24</sup>

**11.** Persons covered under Regulation No 1408/71 is set out in Article 2. The Regulation applies to:

- salaried and self-employed workers and students who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as also to the members of their families and their survivors.
- the survivors of workers who have been subject to the legislation of one or more Member States, irrespective of the nationality of such workers, where their survivors are nationals of one of the Member States, or stateless persons or refugees residing within the territory of one of the Member States.

### Paragraph 1: Definition of worker

**12. Community view.** This point shall not be subject to lengthy considerations given that the figure of the lawyer, the object of this paper, is included in the persons covered under Regulation 1498/71.

Under article 1 (a) the notion of worker is defined solely in terms of the social security system to which they belong: to be defined as such it is sufficient to be a national of one of

---

(judgment of 16 July 1992, Hughes, C-79/91, E.C.R. p. I-4839); social benefits accorded by the Netherlands to certain categories of unemployed persons (Judgments of 2 August 1993, Acciardi, C-66/92, ECR 1993, p. I-4567); maternity allowances in Luxembourg (judgments of 10 March 1993, Commission/Luxembourg, C-111/91, E.C.R. p. I-840).

<sup>24</sup> See our paper "Persons Covered Under (EEC) Regulation No 1408/71 and European Citizenship: from the migrant worker to the European citizen", *Journal des tribunaux du travail*, 1997, p.1.

the Member States and to belong or have belonged to a social security system in one or several Member States. In general, all persons receiving assistance even in respect of a single risk<sup>25</sup> and irrespective of the motives for such payments, are held to be “workers”. These persons adhere to general or special social security schemes applicable to both employed and self-employed workers, to all residents and the active population (under certain conditions)<sup>26</sup> and are entitled to obligatory, optional or voluntary assistance (again, once certain conditions are met)<sup>27</sup>. In other words, it is the fact that a worker belongs to a social security regime that “anchors” him to the Community Regulations, irrespective of what category of activity he or she falls into according to the legislation of the single Member State<sup>28</sup>

In practice, the distinction between employed and self-employed workers is limited given that, to a large extent<sup>29</sup>, the same measures in the Regulation apply to both categories. The need for a broad interpretation of the notion of a salaried worker - in line with the stated objective of Article 42 of the Treaty - was held to be equally important by the Court of Justice in respect of the notion of self-employed person: “Since regulation No 1390/81 was adopted in order to achieve the same objectives as regulation no 1408/71, the concept of 'self-employed person' is intended to guarantee to such persons the same protection as is accorded to employed persons and must therefore be interpreted broadly”<sup>30</sup>.

It should be emphasised that the persons covered by the Regulation, identified according to the criterion of social security, goes well beyond the rather more limited scope of the provisions related to freedom of movement of persons guaranteed by the Treaty.

It very quickly became evident to the Court that it would not be in keeping with the spirit of the Treaty to limit the notion of “worker” to only migrant workers in the strict sense of the term, called on to move to another Member State to exercise their profession. Rather the Court felt that this definition must include, in a generalised manner, all those who stay<sup>31</sup> in another Member State, for whatever reason, and furthermore, all those who “worked in an

---

<sup>25</sup> Qualification or otherwise for social security must therefore be determined with regard to each eventuality mentioned in the Regulation, and this must be done irrespective of the person’s working status (judgments of 12 May 1998, Martínez Sala, C-85/96, E.C.R. p. I-2708; of 11 June 1998, Kuusijärvi, C-275/96, E.C.R. p. I-3443.

<sup>26</sup> For example, general benefits in the UK, in Ireland, Denmark, Finland and Sweden, old-age pensions and widower and orphan pensions in Holland, family benefits in Luxembourg, Germany, France and Greece. For these schemes, reference must be made to “modes of management or financing in so far as this information enables the requesting party to be identified as a salaried or self-employed worker, or in a subsidiary capacity, according to the definition of “salaried workers” and “self-employed workers” given in Annex 1 of the Regulation.

<sup>27</sup> See Article 1, (a) (iv) of the Regulation.

<sup>28</sup> See judgments of 30 June 1997, de Jaeck, C-340/94, E.C.R. p. I-461, and Hervein, C-221/95, E.C.R. p. I-609.

<sup>29</sup> Except for Charter 6 (“unemployment”) which applies to salaried workers only..

<sup>30</sup> Judgment of 23 October 1986, Van Roosmalen, 300/84, E.C.R. p. 3097.

<sup>31</sup> Unger, cited above; judgment of 11 March 1965, Bertholet, 31/64, E.C.R. p. 113.

international situation of the kind provided for under the terms of the Regulation”<sup>32</sup>. The lack of any link with “real migrations” can lead to the blurring of distinctions between migrant workers and workers who do not move within the Community which goes beyond the strict interpretative framework of Articles 39 to 42 on the freedom of movement. In fact, the heading of Regulation 1408/71 does not refer to migrant workers but rather refers much more generally to workers who move within the Community.

**13. Conditions governing affiliation.** It is important to note that the conditions which must be fulfilled in order to be affiliated to the different social security schemes are set down by national legislators – as the Court of Justice emphasised in C-266/78 (Brunori)<sup>33</sup>. Regulation 1408/71 aims essentially at the harmonisation of national security social schemes and the free movement of persons, but not the harmonisation of the conditions applicable to individual national schemes.

Of course, this does not mean that discrimination between nationals and residents of a Member State is admissible, as per Article 3 of the Regulation<sup>34</sup>.

For the record, it should be noted that since 1998, special schemes for civil servants are subject to specific rules of co-ordination, especially as regards the overlapping of benefits.

#### Paragraph 2: The concept of survivor and of family member

**14.** As A. Touffait observed, “community law does not define the migrant worker as a mere provider of work, but as a member of the Community of States, both in his own right and in respect of his family members, and the rulings attempt to remove the obstacles which limit the workers’ movement or hinder the integration of the worker’s family into the Social Security system of the host country”<sup>35</sup>.

In order to define the concept of “family members” and “survivor” Article I, (f) and (g) of Regulation 1408/71 refer to the legislation on the provision of benefits<sup>36</sup>. However, even if

---

<sup>32</sup> Judgments of 12 November 1969, *Entraide médicale*, 27/69, E.C.R. p. 405; of 9 December 1965, *Singer*, 44/65, E.C.R. p. 1191; of 11 March 1965, *Van Dijk*, 33/64, E.C.R. p. 131; see also judgments of 17 September 1980, *Lenoir*, 313/86, E.C.R. p. 5391; of 5 March 1998, *Kulzer*, 194/96, E.C.R. p. I-921.

<sup>33</sup> Judgment of 12 July 1979, E.C.R. p. 2705.

<sup>34</sup> See judgment of 24 April, 1980, *Coonan*, 110/79, E.C.R. p. 1445, especially par. 12. See also Judgments of 28 February 1989, *Schmitt*, 29/88, E.C.R. p. 581 and of 18 May 1980, *Toiani*, 368/87, E.C.R. p. 1347; of 23 September 1982, *Koks*, 275/81, E.C.R. p. 3031; of 3 May 1990, *Kits*, C-2/89, E.C.R. p. I-1969; of 24 September 1987, *De Rijcke*, 43/86, E.C.R. p. 3611.

<sup>35</sup> *Mélanges Teitgen*, 1984, p. 312. See case-law relative to Articles 10 and 12 of Regulation 1612/68: C-9/74, *Casagrande*, E.C.R. 1974, p. 773; 76/72, *Michael S.*, E.C.R. 1973, p. 457; 68/74, *Alaimo*, E.C.R. 1975, p. 109; 197/86, *Brown*, E.C.R. 1988, p. 3237.

<sup>36</sup> In the case of medical care for family members - mentioned in Articles 22, Paragraph 1(a) and Article 32 - the workers must consult the laws of their country of residence. It is also useful to refer to the definition in Annex I. II, when the legislation of a Member State on sickness or maternity benefits does not cover family members.

the legislation does not consider persons living with a worker or who lived in the past with a worker as being a family member or survivor, nonetheless, this condition is met when this person is or was dependant on the worker or the deceased person.

It should be noted that where the legislation of a Member State does not enable the family members of affiliated persons to whom the law applies to be identified, then the term “family member” shall have the meaning ascribed to it under Annex 1 (Article 1(f)(i), amended by Regulation 1290/97 of 27 June 1997, OJ L 176).

Regarding the allocation of benefits for disabled persons, the term “family members” shall include, at least, the partner, minors and older children who are dependent on the salaried or non-salaried worker (Regulation 1408/71, Article 1(f), amended by Regulation 1247/92 of 30 April 1992, OJ L 136).

The same considerations which enabled the Regulation to cover categories of workers other than those who moved with the Community for the purposes of work, is equally relevant in the case of family members and survivors<sup>37</sup>: for example, the child of a non-migrant, who spends his holidays in another Member State, has the right to benefit from healthcare services in accordance with Article 22, paragraph 1, (a) and (b) of the Regulation..

**15. Primary and secondary rights:** It follows from the judgment of 30 April 1996, *Cabanis v Issarte* (308/93, E.C.R. p. I-2123), that a family member would not be entitled to benefit from the same measures outlined in Regulation 1408/71 and applicable exclusively to workers ( in this case, unemployment benefits). However a family member of a worker must be able to invoke the principle of equality of treatment, as set out in Article 3, paragraph 1, of Regulation 1408/71, which states that there is no distinction between the person in their capacity as worker, family member or survivor of a worker.<sup>38</sup> .

### Paragraph 3: Students

**16.** Regulation 307/99 of February 8, 1999 extended Regulation 1408/71 to include students, in their own right, and independent of whether or not they are also a family member of a worker. The Regulation intended to ensure them sufficient social protection while moving within the Community (see Council Directive 93/96/EEC, of 29 October 1993 on the right of students to reside in Member States other than their own, OJ L 317, 18 December 1993, p.59). Essentially this Regulation means that certain rules on coordination in healthcare, accidents at the workplace or work-related illnesses and family benefits, now also apply to students.

---

<sup>37</sup> See judgments of 10 December 1969, *Duffy*, 34/69, E.C.R. p. 567; of 16 March 1978, *Laumann*, 113/777, E.C.R. p. 805; of 30 June 1966, *Vaassen-Göbbels*, 61/65, E.C.R. p. 377; of 12 November 1969, *Entraide médicale*, 27/69, Rec. p. 405.

<sup>38</sup> See judgment of 30 April 1996, *Cabanis-Issarte*, C-308/93, E.C.R. p. I-2123.

According to Article 1(c)a of Regulation 1408/71, the term “student” is applicable to any person, other than employed or self-employed workers or a family member or survivor as defined in the Regulation, who has undertaken studies or vocational training leading to a qualification which is officially recognised by the authorities of a Member State and who is affiliated to a general or special social security scheme applicable to students.

#### Paragraph 5: Other Categories of Workers

17. There are several categories of workers who, while in accordance the definition of workers in Article 1 (a), are nonetheless not workers in the narrower sense of the term, and as such, are subject to special provisions – essentially when it comes to the determination of applicable legislation. The following groups are included:

- frontier workers [see Article 1(b) of the Regulation];
- seasonal workers [see Article 1(c)];
- persons working at sea [see Article 14(3)];
- persons employed by diplomatic missions and consular posts (see Article 16);
- auxiliary staff of the European Community (see Article 16).

#### Paragraph 6 : Implications of European Citizenship

18. We know that following the entry into force of the Maastricht Treaty, the right to move freely and stay in any Member State is conferred in Article 18 (EC) to all European citizens irrespective of their economic activity («subject to the limits and conditions envisaged by the Treaty and by measures taken for its implementation»)<sup>39</sup>. This important reform was certainly reflected in the interpretation of Regulation 1408/71, as the ruling of 23 November 2000 (*Elsen C-135/99*, E.C.R.. p.I -10409) confirms<sup>40</sup>.

In this instance, in May 1981 Mrs Ursula Elsen, who is of German nationality, moved from Germany to France. Until March 1985, she had a gainful occupation subject to compulsory insurance in Germany, and after transferring her residence to France she acquired the status of frontier worker. Her occupational activity was interrupted between July 1984 and February 1985 owing to maternity leave for the birth of her child. After March 1985, Mrs Elsen no longer engaged in an occupational activity subject to compulsory insurance in either Germany or France.

Mrs Elsen’s request that the periods spent rearing her son be taken into consideration, as periods of insurance for the purpose of an old-age pension, were rejected by the competent German institution on the grounds that the child-rearing had taken place abroad.

---

<sup>39</sup> In fact the limits are set out in the three directives on the right of retired persons, those not in active employment and students to stay in another Member State (Dir. 364 and 365/90/EEC: OJ L 180, p. 26 and 28, and 93/96/EEC: OJ L 317, 18 December 1993, p. 59), according to which this right is subject notably to the condition that persons must have adequate means of subsistence i.e. so that they do not pose an «unreasonable» burden on public finances.

<sup>40</sup> See our study «Persons covered under Regulation (EEC) No 1408/71 and European citizenship: from the migrant worker to the European citizen», *Journ. T. trav.*, 1997, p. 1.

Yet Mrs Elsen had never worked anywhere other than Germany, her country of origin, even though she had moved to France and had continued to work for some time in Germany as a frontier worker – before ceasing all professional activities when her son was born in order to rear him.

The Court referred to former Articles 8a, 48 and 51 of the Treaty (now, after amendment, Articles 18 EC, 39 EC and 42 EC) stating that these articles *«require that, for the purpose of the grant of an old-age pension, the competent institution of a Member State take into account, as though they had been completed in the national territory, periods devoted to child-rearing completed in another Member State by a person who, at the time when the child was born, was a frontier worker employed in the territory of the first Member State and residing in the territory of the second Member State.»*

The Court arrived at this conclusion after confirming that German national legislation was indeed applicable to persons who, having ceased to work in Germany and who reside in another Member State, request that periods of child-rearing be taken into consideration since at the time of the child's birth, the worker in question was a frontier worker subject to German legislation. Consequently the Court found that *«a close link can be established between the periods of child-rearing concerned and the periods of insurance completed in Germany by virtue of her occupational activity in that State. It is precisely because she had completed the latter periods that Mrs Elsen requested the German institution to take into account the subsequent periods devoted to rearing her child»* (par. 26).

Once the Court had established that the German state was the competent state, it considered that national laws hindering, in this instance, the taking into account of periods of child-rearing carried out in another Member State were liable to be disadvantageous *«to Community nationals who have exercised their right to move and reside freely in the Member States, as guaranteed in Article 8a of the EC Treaty (now, after amendment, Article 18 EC)»* (par. 34). And *«Furthermore, Regulation No 1408/71 itself, which was adopted on the basis, inter alia, of Article 51 of the EC Treaty (now, after amendment, Article 42 EC), contains a number of provisions designed to ensure that social security benefits are payable by the competent State, even where the insured, who has worked exclusively in his State of origin, resides in or transfers his residence to another Member State. Those provisions undoubtedly help to ensure freedom of movement not only for workers, under Article 48 of the EC Treaty (now, after amendment, Article 39 EC), but also for citizens of the Union, within the Community, under Article 8a of the Treaty»* (par. 35)

### CHAPTER 3 AREA OF APPLICATION

**19. Concept.** The territory covered by Regulation 1408/71 aimed at ensuring the free movement of workers within the Community, necessarily corresponds to that covered by the Treaty's provisions on the free movement of persons.

The achievement of free movement implies the gradual formation of an area devoid of internal borders - such an area would be unique the world over, substituting the 15 Member States and extending the spatial scope of national legislation to cover the entire Community.

This phenomenon is of particular relevance to the field of social security where national systems initially appear to be territorially bound. One of the key objectives of Regulation 1408/71 and of Article 42 of the Treaty is to ensure the retention of rights (and their continuance) irrespective of where the worker resides and of family members. The real issue is to understand whether, beyond the territoriality of the national systems which the Council in fact aims to repress - or at least to curb in virtue of Article 42 - there may exist objective circumstances which can justify the preservation of different modes of retaining rights, in a State other than the competent State which would imply the partial maintenance of barriers and thereby risk creating inequality among workers<sup>41</sup>.

It would appear therefore that the “territory” of the Community is more than a mere juxtaposition of national territories given that its formation is accompanied by the partial dismantling of the spatial scope of regulations in the individual Member States.

**20. Activities outside of the Community:** If the application of community provisions on the freedom of movement in general - and in particular with regard to social security for migrant workers – must be “located” within the Community’s territory; community law and the rules concerning equality of treatment continue to hold even when the professional activity in question is located outside the Community<sup>42</sup>.

The fact that the social security benefits in question originate, even exclusively, during periods of work accomplished outside of the Community territory, is not in itself enough to lead to the non-application of the Regulation. This is because there is a strong link between the right to social security benefits and the Member State who is liable to make the payments. This is true when the social security system is overseen by the State and run by a public office established on national territory<sup>43</sup>.

Article 2 of Regulation 1408/71 is therefore applied to the legislation of a Member State in the following instances:

- the Belgian law of 16 June 1960 which places all social security organisms which insure employees in the Belgian Congo and Rwanda-Urundi under the competency of the Belgian state, which guarantees benefits to these categories<sup>44</sup>;

---

<sup>41</sup> See ruling of 13 July 1976, *Triches*, 19/76, E.C.R. p. 1243.

<sup>42</sup> On Freedom of Movement in general, judgments of 12 December 1974, *Walrave*, 36/74, E.C.R. p. 1405; of 12 July 1984, *Prodest*, 237/83, E.C.R. p. 3153.

<sup>43</sup> See judgments of 31 March 1977, *Bozzone*, 87/76, E.C.R. p. 687; of 11 July 1980, *Commission/Belgium*, 150/79, E.C.R. p. 2621 and the remarkable conclusions reached by the Advocate General Capotorti. See also judgments of 22 March 1972, *Merluzzi*, 80/71, E.C.R. p. 175; *Fiege and Hirardin*, 110/73 and 112/75, cited above; of 23 October 1986, *Van Roosmalen*, 300/84, E.C.R. p. 3116; of 9 July 1987, *Laboreo and Sabato*, 82 and 103/86, E.C.R. p. 3401; of 29 June 1994, *Alderwereld*, C-60/93, E.C.R. p. 1-2991, concerning a Dutch national who was hired by a German based company to immediately transfer to Thailand.

<sup>44</sup> C- 87/76, *Bozzone* and C-150/79, *Commission v Belgium*, cited above.



- the Belgian law of 17 July 1963 regarding overseas social security schemes, which provided for an optional insurance scheme for persons who carry out their professional activities in countries other than the Member States “even when the benefits involved can only be payable for the periods of activity carried out in the third countries<sup>45</sup>”;
- the Algemene Arbeidsongeschiktheidswet (AAW - Dutch law on incapacity for work). This law covers people who carry out or have carried out activities partially or exclusively outside of Community territory<sup>46</sup>.

The applicability of community law is therefore in no way determined by where the professional activity is carried out. It is true that community regulations in this regard were not originally conceived in terms of the free movement of workers between the Community and third countries. In this sense, community law does not oblige Member States to take into account any periods of insurance owing in the framework of a third country’s social security system, nor does it protect the right to social security benefits which a worker may have obtained following a working period spent in a third country.

A similar conclusion was reached in case 16/72, Ortskrankenkasse Hamburg<sup>47</sup>. In this instance, periods of affiliation to a third country’s social security system were judged to fall outside of the scope of Regulation 3, precisely because the social system in question did not fall under the legislation of a Member State but rather arose from a bilateral agreement between a Member State and a third country, with respect to the legislation of this third country<sup>48</sup>.

But it is also true that community law obliges Member States to allow both nationals and non-national workers to adhere to their national social security system, under the same conditions and with respect to the same benefits, even if the insured professional activity on which the right to social security is founded, was undertaken outside of the community territory.

#### CHAPTER 4 : COMMUNITY LEGISLATION AND BILATERAL SOCIAL SECURITY CONVENTIONS

##### Paragraph 1 : *Conflict between community law and social security conventions between Member States*

**21.** In principle, subject to the provisions of Article 6, Regulation 1408/71 replaces the provisions of any pre-existing social security convention binding either two or more Member

---

<sup>45</sup> C- 82 and C-103/86, Laborero and Sabato, cited above.

<sup>46</sup> C- 300/84, Van Roosmalen, cited above and especially par. 30.

<sup>47</sup> Judgment of 16 November 1972, E.C.R. p. 494, paragraphs 8 and 9.

<sup>48</sup> See conclusion of Advocate General Mischo in joined cases 82 and 103/86, Laborero and Sabato, cited above p. 3418.

States exclusively (a) or at least two Member States and one or more other States, where settlement of the cases concerned does not involve any institution of one of the latter States (b)<sup>49</sup>.

However, a series of international instruments have remained in force subject to the provisions of Article 7 of the Regulation and therefore continue to apply in full to all situations envisaged therein.<sup>50</sup>

Unless otherwise provided for, the continuing application of an agreement between Member States which is incompatible with community law could be considered as constituting a failure to ensure fulfilment of its obligations as laid down by Article 10 of the Treaty establishing the European Community<sup>51</sup>.

**22.** Prior to the ruling on *Rönfeldt*<sup>52</sup>, it had been established that in accordance with the above, the simple fact that a social security convention proves more advantageous for a migrant worker than the provisions of Regulation 1408/71 is not in itself enough to justify its continuing application. It was nonetheless still necessary for the relevant provisions of the convention to be listed under Annex III (Article 7).

In *Walder (C-82/72)*<sup>53</sup>, with regard to Articles 5 and 6 of Regulation 3, which lay down similar provisions to Articles 6 and 7 of Regulation 1408/71 the Court ruled that «It is clear from these provisions that *the principle that the provisions of social security conventions concluded between member states are replaced by Regulation No. 3 is mandatory in nature and does not allow of exceptions save for the cases expressly stipulated by the regulation*».

At first glance, the *Rönfeldt* ruling seems to invalidate this analysis, by referring to the principle enunciated by the Court in its ruling on *Petroni*<sup>54</sup>: while Article 51 of the Treaty empowers and obliges the Council to confer rights to migrant workers, it does not allow it, so long as different social security regimes exist, to legislate in such a way as to deny workers those rights which are accorded to them under national law. In *Rönfeldt* the recourse to the principle of **the inviolability of rights acquired under the national legislation of a single Member State**, irrespective of community law, required that the Court assimilate rights accrued under national law and those accrued on the basis of an international convention incorporated into the legislation of a single Member State.

The *Rönfeldt* ruling caused quite a stir among legal experts. Some maintained that it was regrettable that the Court had chosen to set aside, in this instance, the simple almost

---

<sup>49</sup> In the same way, in accordance with Article 5, the Regulation substitutes the arrangements for the application of agreements contained Article 6 of Regulation 1408/71.

<sup>50</sup> Article 5 of Regulation 574/72 also envisages the ongoing application of the provisions of several bilateral agreements listed in Annex 5 to the same Regulation.

<sup>51</sup> See CJCE 27 September 1988, *Matteucci*, C- 235/87, E.C.R. p. 5589, par. 19.

<sup>52</sup> CJCE 7 February 1991, C-227/89, E.C.R. p. I-323.

<sup>53</sup> E.C.R., 1973, p. 599.

<sup>54</sup> C- 24/75, E.C.R., 1995, p. 1149.

automatic and mandatory rule of the **effect of substitution** of community law with regard to social security conventions, in favour of an argument which was seen as being quite unsound.<sup>55</sup>

23. Undoubtedly aware of these arguments, in the *Thévenon* ruling of 9 November 1995 (C-475/93, E.C.R. p. I-3813), the Court took the opportunity to impose strict limits on the consequences of the *Rönfeldt* ruling. Accordingly it introduced a distinction whereby case-law would only apply where the migrant worker in question had exercised his right to free movement prior to the introduction of Regulation 1408/71.

In *Rönfeldt*, the Court had been called on to settle a dispute over a social security convention between Germany and Denmark dating from 1953 and certain provisions of Regulation 1408/71 on the granting of pension rights to a German national for insured periods completed in Germany and Denmark, prior to the adhesion of the latter to the Community. Unsurprisingly, while he was completing these periods, the worker in question expected that the provisions of the social security convention between Germany and Denmark would apply to him on retirement, given that Community law was not yet applicable to relations between the two countries.

The Court was therefore able to uphold, on a transitional basis, the provisions of the pre-existing convention that applied at that time to the periods of insurance completed and which were more favourable to Mr. Rönfeldt than the provisions of Regulation 1408/71.

The premises of the *Thévenon* case – which also concerned the calculation of a pension with reference to a bilateral convention between Member States that pre-dated the entry into force of Community legislation and the provisions of which were more favourable to the plaintiff – were entirely different. In this instance, all the periods of insured work completed by Mr Thévenon in France and in Germany had occurred following the entry into force of Regulation 3. Thus, the rule of substitution of community law with the Franco-German convention on social security concluded in 1953 was fully applicable even where the convention provisions would have been more favourable to workers (see conclusions of *Walder*).

24. The Court's ruling of 5 February 2002, *Kaske* (C-277/99, E.C.R. p. I-1261), provides another example of the application of the precedent set by *Rönfeldt*. It enabled an Austrian national to avail of the more favourable provisions of a pre-existing convention on unemployment insurance between the Federal Republic of Germany and Austria, instead of applying the provisions of Regulation 1408/71<sup>56</sup>, which, in this instance, would have overridden the right to the benefits being claimed. In fact, while Regulation 1408/71 normally substitutes bilateral conventions, the later may be invoked where they are **more favourable** and where they refer to **periods of insurance completed prior to adhesion**. The Court observed the sole purpose of the principles laid down in *Rönfeldt* was «*to perpetuate entitlement to an established social right not enshrined in Community law at the time when the national of a Member State relying on it enjoyed that right. Accordingly, the fact that Regulation No 1408/71 became applicable in a national's Member State of origin on the date*

---

<sup>55</sup> See our study, «Regulation (EEC) No 1408/71 and international agreements in the field of social security for workers moving within the Community », *Cahiers de droit européen*, 1991, p. 449.

<sup>56</sup> Articles 3, 6, 67 and 71 of Regulation 1408/71.

*when that Member State acceded to the European Community does not affect his established right to benefit from a bilateral rule which was the only one applicable to him when he exercised his right to freedom of movement. Indeed, as the Commission maintains, that approach is derived from the notion that the person concerned was entitled to entertain a legitimate expectation that he would benefit from the provisions of the bilateral convention» (par. 27).*

Paragraph 2 : *Bilateral social security conventions and equal treatment*

**25.** Another interesting development that merits attention with regard to Regulation 1408/71 and bilateral social security conventions is the implications for the principle of equal treatment

The Court had already extended to the field of social security its settled case law regarding double-taxation conventions (see CJCE of 21 September 1999 *Saint-Gobain ZN*, C-307/97, E.C.R. p. I-6161, paragraphs 57 to 59). It followed from the benchmark ruling of 25 January 2002, *Gottardo* (C-55/00, E.C.R. p. I-413) that *«when giving effect to commitments assumed under international agreements, be it an agreement between Member States or an agreement between a Member State and one or more non-member countries, Member States are required, subject to the provisions of Article 307 EC, to comply with the obligations that Community law imposes on them. The fact that non-member countries, for their part, are not obliged to comply with any Community-law obligation is of no relevance in this respect» (par. 33).*

It followed from the foregoing that *«when a Member State concludes a bilateral international convention on social security with a non-member country which provides for account to be taken of periods of insurance completed in that non-member country for acquisition of entitlement to old-age benefits, the fundamental principle of equal treatment requires that that Member State grant nationals of other Member States the same advantages as those which its own nationals enjoy under that convention unless it can provide objective justification for refusing to do so.» (par. 34).*

The Court deemed that *«disturbing the **balance and reciprocity of a bilateral international convention** concluded between a Member State and a non-member country may, it is true, constitute an objective justification for the refusal by a Member State party to that convention to extend to nationals of other Member States the advantages which its own nationals derive from that convention (see, to that effect, *Saint-Gobain ZN*, cited above, paragraph 60)» (par. 36; our emphasis).*

However, the Italian government (which had concluded a convention with the Swiss Confederation that took into account periods of insurance accomplished in Switzerland by the Italian authorities for the purposes of calculating old-age benefits) failed to establish that, in the case in the main proceedings, the obligations which Community law imposed on them would compromise those resulting from the commitments which the Italian Republic had entered into vis-à-vis the Swiss Confederation. Nor could a possible increase in Italy's financial burden and administrative difficulties in liaising with the competent authorities of the Swiss Confederation justify the Italian Republic's failure to comply with its Treaty obligations.

Consequently it was incumbent upon the Italian authorities to take into account, for the purposes of acquiring entitlement to Italian old-age benefits, insurance periods completed in Switzerland by a French national given that subject to the provisions of the bilateral convention, Italy (under identical conditions of contributions), envisaged the taking into account of such insurance periods completed by their own nationals.

This decision diminished the impact of the **principle of reciprocity** which governs the establishment of conventions in order to give full effect to the fundamental principle of equal treatment across community legislations.

## TITLE II THE FUNDAMENTAL CHARACTERISTICS OF COORDINATION

**26. Co-ordination.** Community law in general uses the method of co-ordination to achieve the free movement of persons with regard to social security. Without changing the content of single national laws, it aims at harmonising national social security systems by enacting certain basic principles which guarantee the comprehensive and ongoing protection of workers who carry out professional activities, in whole or in part, in a country other than their country of origin.

The co-ordination of the various social security legislations in Member States implies a systematic legislative approach to four types of problem:

- the status of migrant workers and their families with regard to the law which is applicable to them;
- the identification of laws applicable to the parties concerned;
- the proper procedure for the upholding by one Member State of acquired rights in another,
- the acquisition of rights and the calculation of accrued benefits during periods of employment, insurance, or residence in a Member State other than the one which is responsible for the payment of the benefit.

For each of these issues there exists a corresponding key principle: respectively the principle of equality of treatment between nationals and other Community members; the principle of the uniqueness of the applicable law (as a general rule, the *lex loci laboris*); the principle of the retention of rights already acquired (the “exportation” of benefits); and the principle of the maintenance of rights currently being acquired (using the techniques of aggregation of insurance periods, of employment, of residence, and of the proportional payment of benefits).

### CHAPTER 1 EQUAL TREATMENT

**27.** The rule concerning equal treatment, as expressed in Title 1 of Article 39(2) of the Treaty, with respect to the free movement of workers, and in Articles 43(1), and 50(3), of the Treaty, with respect to the freedom of establishment and services, is further enhanced by Article 3 of Regulation 1408/71. Article 3 states that all persons resident in a Member State to whom the Regulation applies are “subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State, subject to special provisions of the present Regulation”<sup>57</sup>.

---

<sup>57</sup> And any differentiations in this regard must be founded on objective criteria (see 36 below and seq.). Any persons treated inequality in this instance would not be permissible, as this would risk rendering the rule regarding equality of treatment null and void.

Paragraph 1: The criteria for differentiation

**28. Nationality.** Any discrimination within the Community by Member States on the basis of nationality is strictly prohibited.

Nor does community law prevent the extension of the principle of equality of treatment in favour of nationals from third countries. The rule regarding equality of treatment as set out in Article 3(1) of Regulation 1408/71 also applies to the family members of a worker, irrespective of their nationality.

**29. Overt and covert discrimination:** According to a formula which is often cited, the rules regarding equal treatment not only forbid overt discrimination on the basis of nationality, but also concern any form of hidden discrimination, which arises as a result of the application of other forms of discriminating criteria<sup>58</sup>.

Such criteria include the **duration of residence** in the national territory, considered to be discriminatory by the Court in C-326/90, *Commission v Belgium*<sup>59</sup>, regarding the allocation of benefits to disabled persons, guaranteed income for the elderly and in C-111/91, *Commission v Luxembourg*<sup>60</sup>, regarding the allocation of children's allowances and maternity funds.

Also pertinent in this sense is the Court's ruling of 21 September 2000 (*Borowitz* C-124/99, E.C.R. p. I-7293, pars. 29 and seq.) In this instance national legislation (German) had fixed a higher threshold amount in respect of payments made abroad than that applicable to domestic payments, operating in practice like a residence requirement which was more easily satisfied by national beneficiaries than by beneficiaries from other Member States.

The judgment given in C-41/84 (*Pinna*)<sup>61</sup>, which invalidated former Article 73(2) of the regulation on family benefits<sup>62</sup>, was undoubtedly a remarkable step forward in this regard.

---

<sup>58</sup> Judgment of 12 February 1974, *Sotgiu*, 152/73, E.C.R. p. 153.

<sup>59</sup> Judgment of 10 November 1992, E.C.R. p. I-5517.

<sup>60</sup> Judgment of 10 March 1993, E.C.R. p. I-840.

<sup>61</sup> Judgment of 15 January 1986, Rec. p.1. See our paper "The limits of community co-ordination of national social security legislations with regard to the principle of equal treatment after the *Pinna* ruling", *Cah. dr. eur.* 1986, p.475. See also judgments of 2 March 1989, *Pinna II*, 359/87, E.C.R. p. 585; of 12 July 1979, *Toia*, 237/78, E.C.R. p. 2645, on allocations in France of benefits to Mothers whose children have French nationality; of 30 May 1989, *Allue*, 33/88, E.C.R. p.1591, regarding the application of an Italian law limiting the place of work between universities and foreign language teachers, while such a limit does not exist, in principle, for other workers; of 12 June 1997, *Merino Garcia*, 266/95, E.C.R. p. I-3279.

<sup>62</sup> See E 75 below.

The case addressed the need to verify whether the criteria - in this instance - **the place of residency of the family members of a worker**, apparently applied irrespective of said persons nationality, was accorded “the same importance” for “migrant workers” as for national workers. The fact that the Court in its judgment referred to “migrant workers” rather than “nationals of another Member State” was highly significant in that it considerably widened the interpretation of the rule on equal treatment.

Similarly, in C-27/91, *Le Manoir*<sup>63</sup>, the Court considered that national legislation which made social security contributions to trainee workers who had not been educated under the employer’s national education system more onerous, led in reality to discrimination between national trainee workers and trainee workers from other Member States. This was because “the vast majority of persons who, as part of vocational training provided by an educational establishment, undertake a practical traineeship as workers, come under the national education system of their State of origin.”

The question of whether a person has exercised or not the right to freedom of movement within the Community, with regard to the criterion of nationality, was examined in C-10/90, *Masgio*<sup>64</sup>, which reached a striking conclusion. The Court was called on to verify whether the calculation of benefits for a worker who receives an old-age pension from one Member State and an accident pension paid by an insurance institution of another Member State, even though it applies without regard to the nationality of the workers involved was “liable to place migrant workers in a worse position as regards social security than those who have worked in only one Member State”(par. 19). The Court noted that the rules on overlapping of benefits were liable to operate differently according to whether the benefits were paid in one Member State or by another Member State and that this was in fact discriminatory by “hindering the free movement of workers”. The Court ruled that the issue at hand was therefore contrary to Article 7 (now 12) and Articles 48 and 51 of the EEC Treaty (now Articles 39 to 42) as well as to Article 3(1) of Regulation 1408/71.

On the other hand, community law allows national legislations to modify the procedures for granting insurance against incapacity for work, even by making these procedures more stringent, so long as the special conditions do not lead to any instance of overt or covert discrimination among community workers (judgment of 20 September 1994, *Drake*, 12/93, E.C.R. p. I-4347). In this instance, the Netherlands legislation had introduced special procedures for the award of benefits under the *Algemene Arbeidsongeschiktheidswet* (AAW), the law on insurance against incapacity for work. This procedure was held to be an objective procedure which was applied equally to national workers and workers from other Member States.

**30. Inverse Discrimination.** The question of inverse discrimination: that is whether or not Article 12 of the Treaty forbids a Member State to treat its own nationals in a more rigorous fashion than workers from another Member State, is one which the Court has been

---

<sup>63</sup> Judgment of 21 November 1991, E.C.R. p. I-5538.

<sup>64</sup> Judgment of 7 March 1991, E.C.R. p. I-1134.



called on to clarify on numerous instances. The same criterion of differentiation - nationality - applies.

A general summary of established case-law regarding the free movement of persons may be made as follows: reverse discrimination is admissible so long as it applies to persons who are not included in the scope of the Treaty; but when the person in question falls within the scope of community law, the national of a Member State may invoke community practice in order to avoid being penalised by the stricter conditions of their national legislation.

It is necessary to distinguish between situations which are entirely a matter for the Member State in question, and for which no community law is foreseen, and those situations which instead are subject to community legislation.

In Case 55/77 (Maris)<sup>65</sup>, the Court ruled that if under “article 84 (4) of Regulation 1408/71 the authorities, institutions and tribunals of the member states are bound, notwithstanding any provision of their national laws to a different or contrary effect , to accept all claims or other documents which relate to the implementation of the said regulation and which have been drawn up in an official language of another member state and they are not allowed in this connexion to make any distinctions on grounds of nationality or residence between the persons concerned” (par. 19), “the only application of such a provision is in favour of workers who have moved between two or more Member states, as well as their dependants” (par. 13). This means for example, that a non-migrant French-speaking Belgian national who wishes to submit his case to the court of Antwerp will be in a worse situation than a French national, who has migrated to Antwerp, and who would be able to submit a request drawn up in French. Contrariwise any national who has exercised his right to freedom of movement is covered by Article 84 (4) of the regulation: this was the case of Madame Maris, of Belgian nationality, who had worked previously in Belgium, then in France, where she had resided since 1947.

**31. Posting of a worker to another Member State.** A worker employed in the territory of a Member State by an undertaking to which he is normally attached who is posted by that undertaking to the territory of another Member State to perform work there *shall continue to be subject to the legislation of the first Member State*, provided that the anticipated duration of that work does not exceed twelve months and that he is not sent to replace another worker who has completed his term of posting (Article 14a) of Regulation 1498/71 (see par. 46 hereafter).

This was the situation of Mr. Terhoeven, a Dutch national, who had taken up residence in the UK in order to carry out a salaried activity for a Dutch company which had posted him there. Throughout this period he continued to be subject to the social security legislation of the Netherlands, his country of origin (judgment of 26 January 1999, Terhoeven, C-18/95, E.C.R. p. I-345).

The Court was called on to judge the compatibility of Dutch law with regard to former Article 48 of the EC Treaty (now Article 38 EC). In particular, with regard to the financing of social security regimes, the Court examined situations where workers transferred their

---

<sup>65</sup> Judgment of 6 December 1977, E.C.R. p. 2327.

residence to another Member State for work purposes, and who were then subject to higher social security contributions than those which, in analogous circumstances, would have been paid by workers who had maintained their residence in the Netherlands for that year (provided that the party in question did not qualify for supplementary social benefits)<sup>66</sup>.

Whilst recalling that, in the absence of harmonisation at Community level, it is for the legislation of each Member State to determine the conditions governing national social security schemes, Member States must nevertheless comply with community law when exercising that power, and with Article 48 of the EC Treaty which opposes all “measures which might place Community nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (see especially *Bosman*, judgment of 15 December 1995, C-415/93, E.C.R. p. I-4921, par. 94)” (paragraphs 34 to 39). It follows that “a national of a Member State could be deterred from leaving the Member State in which he resides in order to pursue an activity as an employed person, for the purposes of the Treaty, in the territory of another Member State if he were required to pay greater social contributions than if he continued to reside in the same Member State throughout the year, without thereby being entitled to additional social benefits such as to compensate for that increase” (par. 40).<sup>67</sup> It follows that a national legislation of this kind runs contrary to the spirit of Article 48 of the Treaty.

### **32. Non discrimination and the assimilation of occurrences in different territories.**

The issue is whether the principle of equal treatment, which considers the nationals of all Member States to be equal under law with the nationals of the host Member State, also covers “the assimilation of occurrences which took place outside of the host country with analogous incidents in the host Member State or the Competent State”<sup>68</sup>.

Strictly speaking there is no general community principle which obliges, in the absence of specific provisions, the institution of a Member State to assimilate occurrences in another Member State where the national legislation deems such events to be without legal consequence unless they occur on the national territory.<sup>69</sup>

However, without the assimilation of certain occurrences or undertakings, which have taken place outside of a particular Member State’s national territory; the application of legislation,

---

<sup>66</sup> This disadvantage arises from the fact that social security contributions in the Netherlands are strictly linked to the taxation of workers’ salary and income and where a person has been subject in the same year to resident tax and non-resident tax, whilst remaining affiliated to an obligatory social security scheme for that same year, then that person is liable to a combined tax assessment representing the maximum tax base on which social insurance contributions may be paid.

<sup>67</sup> For the purposes of calculating the amount of benefits accrued, the Court said, all forms of income considered as such under national legislation should be taken into account, (in the absence of other forms of income, those deriving from property holdings) and not only those incomes which are strictly related to the salaried activity of the worker (par. 51 to 53).

<sup>68</sup> Conclusion of Advocate General Mayras in C-1/78, *Kenny*, o.c. p. 1506.

<sup>69</sup> See Advocate General Trabucchi’s comments in C-20/75, *D’Amico*, E.C.R. 1975, p.102.

regulations or administrative provisions in order to uphold social or fiscal benefits can constitute a source of discrimination<sup>70</sup>.

In the field of social security, the established case-law of the Court has varied in this regard. Initially many judgments appeared to be hostile to any attempt to oblige a Member State (beyond what was foreseen by Regulations 1408/71 and 574/72) to assimilate an event which took place in another Member State to a corresponding event as though it had occurred on its national territory.

In Case 66/77, *Kuyken*<sup>71</sup>, the Court ruled that for the purposes of granting unemployment benefits to former students who had never been employed under the legislation of another Member State, studies undertaken could not be assimilated with studies carried out in an establishment which was provided, recognised or subsidized by the competent Member State<sup>72</sup>.

Especially in recent times other judgments of the Court, have tended to do the opposite; ruling in favour of the technique of assimilation of occurrences or undertakings in order to uphold the free movement of workers.

For example:

- that, “where the legislation of a Member State which provides certain family benefits requires, as a condition for the grant of those benefits, that a member of the worker's family must be registered as unemployed with the employment office for the territory in which that legislation applies, that condition must be considered to be fulfilled where the family member is registered as unemployed with the employment office of the Member State in which he resides” (judgments of 22 February 1990, *Bronzino*, 228/88 and *Gatto*, C-12/89, E.C.R. pp. I-549 and 577);
- regarding the calculation of an old-age pension which was formerly an invalidity pension, community law upholds the right of the migrant worker to benefit from

---

<sup>70</sup> See judgment of 15 October 1969, *Ugliola*, 15/69, E.C.R. 1969, p. 36, where the Court ruled that it was possible to assimilate, in accordance with the principle of equal treatment laid down by former Article 48 of EEC Treaty, periods of military service carried out in the worker's country of origin with those that would have been carried out in the country of employment. This ruling was made in order to allow the community worker to enjoy identical rights as regards conditions of employment to national workers.

In the same way in C-419/92, *Ingetrant Scholz* (judgment of 23 February 1994, E.C.R. p. I-517), the Court considered that former article 48(2) of the EC Treaty prohibited a public institution of a Member State intending to recruit staff, from operating any distinction when considering past professional activities, according to whether these activities had been exercised in the public service of a competent Member State or other.

<sup>71</sup> Judgment of 1 December 1977, E.C.R. p. 2711.

<sup>72</sup> See also judgments of 9 July 1975, *D'Amico*, 20/75, E.C.R. p. 202; and of 28 June 1978, *Kenny*, cited above.

national legislation (Belgian in this instance) which allows for the assimilation of periods of invalidity with periods of activity even when the incapacity for work occurred when the worker was employed in another Member State (in this case outside of Belgium) (judgment of 9 December 1993, Lepore and Others, C-45 and C-46/92, E.C.R. p. I-6497);

- that, where the legislation of a Member State ties the payment of invalidity benefits to a minimal period of insurance preceding the occurrence of the invalidity, while allowing, in certain cases, for the prolongation of this period of reference, such legislation must also provide for the extension of the period of reference where events or circumstances corresponding to the events or circumstances which would enable a prolongation to be granted occur in another Member State (judgment of 4 October 1991, Paraschi, C-349/87, E.C.R. I-4501);
- that where the legislation of a Member State provides for the prolongation of the right to orphan benefits after 25 years of age for beneficiaries whose education was interrupted due to the undertaking of military service, this State is obliged to assimilate the period of military service carried out in another Member State under its own legislation (judgment of 25 June 1997, Mora Romero, 131/96, E.C.R. p. I-3659).
- that articles 39(2) EC and 42 EC are contrary to any national legislation which does not envisage the possibility of extending a reference period for the purposes of granting a pension where the payment of accident annuities, corresponding to those which would enable such a prorogation, are made in another Member State<sup>73</sup>;
- this is also true of any national law, which, in order to determine periods of insurance and periods treated as such for the purpose of old-age insurance, introduces a difference in treatment in that it unconditionally takes into account child-raising periods completed in national territory and makes the taking into account of child-raising periods spent in another State subject to receipt of cash maternity allowances in the national territory;<sup>74</sup>.

These cases highlight the significant changes which have taken place in this field since the Kuyken judgment cited above.

It is useful to note that quite aside from the rule on non-discrimination, the technique of assimilation of events is widely used in the framework of Regulations 1408/71 and 574/72 (principle of the aggregation of insurance and employment periods, and periods of residency, for the establishment of entitlement to and calculation of social security benefits).

**33. Civil Certificates.** We shall now turn to the issue of civil certificates and their recognition. It is hardly necessary to emphasise their importance in the obtaining of social security benefits.

---

<sup>73</sup> CJCE 18 April 2002, *Duchon*, C-290/00, E.C.R. p. I-3567.

<sup>74</sup> CJCE 7 February 2002, *Kauer*, C-28/00, E.C.R. p. I-1343, paragraphs 43 and 44; see also, *Elsen*, cited above, paragraphs 25 to 28.

In C-336/94, Dafeki (judgment of 2 December 1997, E.C.R. p. I-6774) the Court was asked to rule on whether community law obliges competent national institutions in matters of social security and the national jurisdiction of Member States to accept analogous certificates and deeds relative to the age of persons issued by the competent authorities of other Member States.

In the case in point, a Greek national working in Germany won her case against a German pension fund to which she had presented a document issued by a Greek court which rectified her date of birth, in order to avail of early retirement benefits for women aged sixty years. The pension fund rejected her request for early retirement on the grounds that only documents certifying to a persons age which are issued by German authorities are presumed accurate under German law. Furthermore, when the documents under consideration are foreign documents, the German authorities will take into account only the document which was issued nearest in time to the event it certifies.

The Court noted that German law regarded certificates of age issued by the competent institutions of another Member State as having less probative force than those issued by German authorities, and that this in practice was to the detriment of workers who were nationals of other Member States (paragraphs 12 and 13). It is certainly the case, observed the Court, that “considerable differences exist between national legislations as regards the procedures which enable a person’s date of birth to be modified” and that “the Member States have not to date moved to harmonise these procedures, nor have they put in place a system of mutual recognition of these decisions, in keeping with what was decided in the Convention of 27 September 1968 regarding judiciary competence and decisions on civil and commercial matters (OJ 1972, L 299, p.32)” (par. 16).

Therefore, “the administrative and judiciary authorities of a Member State are obliged to recognise analogous certificates and acts concerning the age of persons issued by competent authorities in other Member States, unless their accuracy is seriously undermined by concrete counter indications with regard to the individual in question.”

#### Paragraph 2: The comparability of circumstances

**34. The Rule of Relativity.** Case-law in this matter has been very consistent. The Court has ruled that all forms of discrimination are prohibited whether arising from different treatment applied to similar situations, or identical treatment applied to different situations. In short, there can be no discrimination where different situations are treated differently.

This was the case in C-28/92, Leguaye-Neelsen<sup>75</sup>. Madame Marie-Hélène Leguaye-Neelsen, a French national, was refused the reimbursement of obligatory contributions paid into a

---

<sup>75</sup> Judgment of 16 December 1993, E.C.R. p. I-6857.

German pension insurance scheme, after having joined the French civil service and even though people who take up employment in the German public administration are entitled to request the reimbursement of contributions paid by them. In fact, according to German law, as a general rule people who cease to be liable for obligatory insurance in Germany, and who have not acquired the right to a pension in the future, have no entitlement whatsoever to reimbursement of obligatory contributions, but they may opt to continue to pay voluntary contributions in order to acquire the right to a pension in the future. That rule applies regardless of the employee's nationality.

It is precisely because those workers who, prior to joining the German public administration, have made obligatory insurance contributions for a period of less than sixty months, are excluded from the right to voluntary contributions (in order to avoid situations of double insurance) *that* the right to reimbursement of the contributions paid makes up, in those circumstances, for the loss of entitlement to a pension in the future. "According to the Court, the worker's situation is not comparable to that of workers, who in the same circumstances enter the civil service of another Member State, since the latter, unlike the former enjoy the right to pay voluntary contributions in Germany" (par. 15). "It follows that the application to workers who enter the civil service of another Member State of the general scheme applicable to workers who cease to be subject to the payment of voluntary contributions, does not constitute an act of discrimination prohibited by Article 3 of the Regulation 1408/71."

Furthermore in its judgment of April 22, 1993, *Levatino*, C-65/92<sup>76</sup>, the Court recalled a previous judgment (*Mura*)<sup>77</sup>, regarding community rules on the calculation of retirement benefits where it had considered that "if the application of community law gives the migrant worker an advantage over non-migrant workers, this in itself shall not be considered discriminatory as migrant workers are not in a comparable situation to workers who have never left their country." In addition, "any differences which may exist to the benefit of migrant workers do not result from the interpretation of community law but rather from the lack of any common social security system or of any harmonization of the existing national schemes, which cannot be mitigated by the mere coordination at present practised" (par. 49).

**35. Divergences within a Member State.** Circumstances must be examined at the level of each Member State. It is clear that the rule regarding equal treatment is not concerned with any disparities in treatment which "may result, between member states, from divergences existing between the laws of the various Member States, so long as the latter affect all persons subject to them in accordance with objective criteria and without regard to their nationality"<sup>78</sup>.

The advantage that a migrant worker may enjoy over a worker who does not leave his country of origin, arising out of "any divergences which exist between the laws of the various Member States which do not result from the interpretation of Community law but rather from

---

<sup>76</sup> E.C.R. p. I-2027.

<sup>77</sup> Judgment of 13 October 1977, 22/77, E.C.R. p. 1699, paragraphs 9 and 10.

<sup>78</sup> C- 1/78, *Kenny*, o.c., par. 18; judgment of 27 September 1988, *Lenoir*, 313/86, E.C.R. p. 5391.

the lack of any common social security system or of any harmonization of the existing national schemes, which cannot be mitigated by the mere coordination at present practised” is not illegal and not discriminatory as the divergences refer to legal situations which are not comparable (judgment of 13 October 1977, Mura I, 22/77, E.C.R. p. 1699; and to similar effect, judgment of 22 April 1993, Levantino, 65/92).

As Advocate General Roemer observed in C-14/68, Wilhelm, the banning of discrimination does not aim to harmonise laws across the Community<sup>79</sup>.

Furthermore, in the abovementioned C-41/48, Pinna, the Court of Justice condemned the disparities of treatment existing in France, between employees, whose children were resident in France and who were mostly French nationals – and who benefited from family allowances insofar as they were French nationals – and employees whose children resided in another Member State, who were mostly migrants, and who were accorded family allowances at the rate of their country of residence, in accordance with former Article 73(2), of Regulation 1408/71. On the other hand, the existence of divergences among the national systems of Member States in the matter of family benefits would not be considered to be intrinsically discriminatory.

### Paragraph 3: Objective Differentiation

**36. Pro-birth benefits.** Comparable situations may not be treated differently, unless the difference can be objectively justified, or is not arbitrary.

Hence pro-birth policies, cannot, according to the Court, justify different treatment according to nationality, in the field of social security, “Regulation No 1408/71 makes no distinction between different social security schemes to which it applies, whether or not these schemes pursue objectives of demographic policy”<sup>80</sup>.

**37. Territoriality of benefits.** Equally, the arguments put forward regarding the territoriality of social security benefits do not, in themselves, constitute an objective justification. One of the fundamental objectives of Regulation No 1408/71 and of Article 42 of the Treaty was precisely that of allowing workers’ to retain acquired rights (and export them) irrespective of where they or their dependents resided. In reality, national social security schemes are, in the first analysis, territorial; the issue is therefore to establish whether, aside from their territoriality - which the Council’s mission is to limit, if not to abolish, in virtue of Article 42 of the Treaty - there can be any circumstances where objective justifications exist for special procedures regarding the retention of acquired rights, without

---

<sup>79</sup> E.C.R. 1968, p. 30; see also the conclusions of Advocate General Capotorti in C-155/80, Oebel, E.C.R. 1981, p. 2013.

<sup>80</sup> See judgments of 12 June 1979, Toia, 237/78, E.C.R. p. 2645; of 14 January 1982, Reina, 65/81, E.C.R. p. 33, on birth allowances which, according to the Court, could not be made subject to the rules of the Community regarding the free movement of persons “on the sole grounds that these benefits were paid in accordance with a demographic policy” (par. 15); C-41/84, Pinna, cited above..

leading to inequality between workers (See judgment of 13 July 1976, Triches, 19/76, E.C.R. p. 1243, and Lenoir, previously cited.)

The drawbacks which arise as a result of the dividing up of social security benefits, especially with regard to old-age benefits, where a person's professional activity has been carried out in more than one Member State (and this division is limited as much as possible by Regulation 1408/71) are again not enough to constitute a violation of the principle of non-discrimination. In fact these drawbacks, as the Court observed in C-46/93 (judgment of 7 July 1994, McLachlan, E.C.R. p. I-3229; and judgment of 21 March 1990, Cabras, 1999/88, E.C.R. p. I-1023) naturally occur in so far as Article 42 of the Treaty does not "aim to organise a common social security system but rather to establish rules of co-ordination between the different national systems of the Member States."

The fact that periods of insurance accrued under the legislation of another Member State are not taken into account in the calculation of a pension owed by a Member State, where the employee has acquired the right to a pension, does not violate the principle of non-discrimination (judgment of 7 July 1994, cited above).

Paragraph 4: The absolute character of the prohibition of discrimination

**38.** The prohibition of discrimination, once established, is absolute and unconditional, irrespective of the nature or gravity of the discrimination (for example, judgments of 4 April 1974, Commission v France, 167/73, E.C.R. p.359; of 12 December 1974, Walrave, 36/74, E.C.R. p. 1405; of 3 December 1974, Van Binsbergen, 33/74, E.C.R. p. 1299).

Action must be taken both at the level of the Community (for example, the invalidation of former Article 73(2) of Regulation 1408/71 following the judgment of 15 June 1986 as regards family benefits, led to the modification of the regulation) and of the single Member States. It makes no difference whether the measures are "determined by rules laid down by the government, the authorities of a Member State or federal state or other national bodies or even by authorities who are governed by national legislation" (judgment of 3 July 1974, Casagrande, 9/74, E.C.R. p. 773). In reality, the fact that a certain issue falls under the jurisdiction of a Member State in no way exempts them from their obligation to apply legislation in a non-discriminatory manner and without hindering the free exercise of the rights enshrined under Articles 39 and successive articles in the Treaty guaranteeing the free movement of persons.

Individual members of the Community are equally bound to ensure they are not discriminatory (Walrave, cited above). This statement is less theoretical than it might appear in the field of social security when one considers the various forms of private social insurance that exist, which are certainly not covered by Regulation 1408/71 but rather by the rules on equality of treatment as set forth in Articles 12 and 39(2) of the Treaty.

CHAPTER 2 : THE DETERMINATION OF APPLICABLE LEGISLATION



**39. Objective.** Community regulations in this regard illustrate in a given international situation and covering all contingencies, the social security legislation of a given Member State known as the “Competent Member State” which gives rise to certain obligations or benefits<sup>81</sup>.

Title II of Regulation 1408/71 (Article 13 to 17a) lists the rules that enable the applicable legislation to be determined in the majority of cases, but it is also advisable to refer to other special rules of affiliation contained in Title III of the Regulation (concerning the different categories of benefits) and the applicable regulation itself (574/72).

“These provisions, as the Court of Justice has emphasised, aim to avoid any overlapping in the application of national legislations and the complications which might ensue but also to ensure that the persons covered by Regulation No 1408/71 are not left without social security cover because there is no legislation which is applicable to them”<sup>82</sup>.

Paragraph 1: Prevalence of the *lex loci laboris*

**40.** In principle, in accordance with Article 13 (2) (a) and (b) of Regulation 1408/71, the employee shall be subject to the legislation of the State where he (a) carries out his salaried activity or (b) where he is self-employed, even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State.

Note that Article 13 (2) (a) does not make any distinction between whether the activity in question is carried out on a full-time or part-time basis (see C -2/89, cited above, par. 14).

As regards obligatory contributions, both the worker and his employer are subject to the State where the activity is undertaken, even if the employer resides in another Member State.<sup>83</sup>

The decision to apply the *lex loci laboris* (law of the place of work), which implies a secondary affiliation to the law of the country of residence, especially with regard to workers who exercise their activities in several locations<sup>84</sup>, is in conformance with the “Bismarck”

---

<sup>81</sup> The terms “competent authority”, “competent institution”, and “competent Member State” are defined in Article 1(1)(o), and (q) of Regulation No 1408/71.

<sup>82</sup> See judgment of 3 May 1990, *Kits van Heijningen*, C-2/89, E.C.R. p. I-769; see also judgments of 10 July 1986, *Luijten*, 60/85, Rec. p. 2365; of 24 March 1994, *Va Poucke*, C-71/93, E.C.R. p. I-1101; of 16 February 1995, *Calle Grenzshop Andresen*, C-425/93, E.C.R. p. I-269; of 13 March 1997, *Huijbrechts*, C-131/95, E.C.R. p. I-1409.

<sup>83</sup> See judgment of 24 June 1975, *Andlau Football Club*, 8/75, E.C.R. p. 739.

<sup>84</sup> In certain circumstances, it has happened that Community legislation departs from this general rule:

- when professional activities are carried out in several Member States: in this case either the legislation of the country of residence may be applicable in a subsidiary capacity (cf. Article 14 (2)(b) and 14a(2)) or the legislation of the State where the worker is employed (Article 14);

tradition still prevalent in Community legislation. This tradition dictates that the costs of social security must be borne by the State where the worker carries out his activity and contributes to the state system. The positive law in Europe of the big Six, was, after all, dominated by the work insurance scheme. Following the accession to the Community of States with universalistic systems of social security and considering the tendency of national social security policies to move towards covering the entire population of each Member State, active or not, some criticisms were levelled at what was seen as a “static” Community approach to the resolution of conflicts of law<sup>85</sup>. However, it is appropriate to note that the choice of affiliation as a determining factor in the identification of applicable legislation falls within the framework of the free movement of workers, both employed and self-employed. Given this, it seems logical to refer to the place where the economic activity is carried out in order to determine applicable legislation. The absence of any homogeneity between existing national social security systems reinforces this point. Clearly, the issue of the choice of which social security system is the competent one is also, and above all, concerned with the sharing of the financial costs of social security systems by Member States for workers who move within the Community. And this issue is linked to the principle of financial solidarity.

In any event, in the absence of any specific provision in the regulation, which expressly designates the national applicable law in a certain judicial circumstance, the Court of Justice holds that the competent Member State is the one where the activity is carried out, in conformance with Article 13(2) of the regulation<sup>86</sup>.

**41. Persons not in active employment.** Regulation 2195/91 of 25 June 1991 (OJ L 206 1991) introduced to Article 13(2) of Regulation 1408/71 a new point concerning persons to whom the legislation of one Member State ceases to be applicable without the legislation of another Member State becoming applicable to them. Under this provision, persons to whom the legislation of a Member State ceases to apply without the legislation of another Member State becoming applicable to them shall be subject to the legislation of the Member State in whose territory they reside if no other legislation becomes applicable as per Articles 13 and 17 of the regulation.

- 
- in the case of an employee who is posted to another Member State for a limited period of time, who continues to be subject to the legislation of the first Member State (Article 14 sub-paragraph 1(a) and 14a;
  - and in situations where the overlapping of certain benefits may occur; legislation on the place of birth (Article 8 (1) of Regulation No 574/72), of the place of death (Article 9 (1), or legislation to which the party was last subject (Article 8 (1); Article 8 (2), Article 8 is; Article 9a; Article 10a; etc.)

<sup>85</sup> See P. RODIERE, “The Bentzinger judgment and case-law of the Court of Justice on conflicts of law”, RTDE, 1974, pp. 431 and 441. The international rules on affiliation are clearly determined by the fundamental characteristics of the national social security systems. On their evolution, see in particular J.J. DUPEYROUX, *Social Security Law*, Paris, Précis, Dalloz, 1984, pp. 202 and seq.; G. PERRIN “*One Hundred Years of Social Insurance*”, *Belgian Review of Social Security*, 1983, p. 837; “*Social Security Past and Present*”, RFAS, 1979, p. 87.

<sup>86</sup> See C-58/87, Rebmann, judgment of 29 June 1988, E.C.R. 1988, p. 3467.

The Regulation also stipulates when, and under what conditions, this legislation ceases to be applicable<sup>87</sup>.

There are certain exceptions to the application of new Article 13 (2) (f) of Regulation 1408/71 (regarding the aggregation of insurance periods) in States where periods of residency are sufficient for gaining entitlement to certain social security benefits (Regulation 1408/71, Annex VI, section “G. Ireland” and section “P. United Kingdom” amended by Regulation 2195/91 cited above).

**42. Employer.** Where the worker is subject to the legislation of the State of employment, it is implicit that the employer shall also be subject to pay contributions under this same legislation, even if the latter does resides outside this State. (judgment of 24 June 1975, Andlau Football Club, 8/75).

- An employer shall not be bound to pay increased contributions by reason of the fact that his place of business or the registered office or place of business of his undertaking is in the territory of a Member State other than the competent State (Article 91);
- Contributions payable to an institution of one Member State may be collected in the territory of another Member State in accordance with the administrative procedure and with the guarantees and privileges applicable to the collection of contributions payable to the corresponding institution of the latter State (Article 92).

Employers who have no place of business in the Member State in whose territory the worker is employed may arrange for that worker to act on their behalf as regards the payment of contributions. The employer shall notify the competent institution or, where necessary, the institution designated by the competent authority of the said Member State of any such arrangement (Regulation 574/72, Article 109). Of course, the employer will reimburse the worker for any such payments made on the employer’s behalf.

Paragraph 2: *Obligation to give precedence to applicable legislation*

**43.** The rules of affiliation contained in the regulation are compulsory; the natural result of the primacy of community law over internal laws. It follows that workers are not free to choose which legislation is applicable to them, even when they may have satisfied the conditions for access to several national social security systems. In the same manner “the Member States may not choose the extent to which their own legislation is applicable or that of another Member State”, given that they must “respect the provisions of community law in force”<sup>88</sup>. The applicability of national legislation is determined according to a set of objective

---

<sup>87</sup> See new Article 10ter of Regulation No 574/72, introduced by Regulation No 2195/91 of 25 June 1991, abovementioned.

<sup>88</sup> See judgment of 23 September 1982, Kuijper, 276/81, E.C.R. p. 3027. Compare judgments of 24 April 1980, Coonan, 110/79, E.C.R. p. 1445 of 23 September 1982, Koks, 275/81, E.C.R. p. 3013. See also C-308/24, Ten Holder, cited above, par. 21, and judgments of 10 July 1986, Luijten, 60/85; E.C.R. p. 2368; of 4 October 1991, De Paep, C-196/90, E.C.R. p. I-48284828.

criteria laid down by Community rules. As noted by the Court of Justice in C-12/67 (Guissart), a worker's affiliation to a specific national legislation, designated by Community law, is subject to the objective circumstances of the worker over which he does not exercise control<sup>89</sup>. In reading his conclusions in C-276/81 (Kuijpers), Advocate General VerLoren van Themaat pointed out that "Member States are not entitled to determine rules, either in regard to their own legislation, or with reference to the legislation of another Member State, in order to avoid overlapping of national systems, because the Regulation itself indicates what course should be followed as and when conflicts arise" (E.C.R. 1982, p.3051).

The laws regarding unemployment benefits for frontier-workers have confirmed the obligatory nature of the rules of affiliation<sup>90</sup>. Unlike other categories of wholly unemployed persons who, as per Article 71 (1) (b) of Regulation 1408/71, may choose between receiving benefits from the State where they are employed or where they reside; frontier-workers may avail of benefits only from the State where they are resident (Article 71(1)(a)ii ). According to the Court of Justice, "Article 71(1)(a)ii of Regulation 1408/71 must be interpreted in the sense that a wholly unemployed frontier-worker who comes under the scope of the Regulation may only claim benefits from the State where he is resident, even though he also fulfils the conditions for entitlement to benefits under the legislation of the State where he was last employed" (C-Miethe, cited above).

The judgment of 5 March 1998, Moleenaar (C-160/96, E.C.R. p. I-843) also emphasised the obligatory nature of the rules of affiliation to a social security system in a given Member State, as laid down by Regulation 1408/71. Indeed, insured persons are not entitled to refuse the benefits allotted to them under such a scheme, and consequently, may not be exonerated from any corresponding contributions.

These measures are in full accordance with Community law whose aim is to avoid any errors of calculation or accrual of surcharges which might ensue as a result of the simultaneous application of different legislations in several Member States.

Paragraph 3: The unique and exclusive nature of the applicable legislation

**44.** Article 13(1) defines the principle of the unique nature of the applicable legislation, governing the rules on affiliation contained in Articles 13(2), to 17a of the regulation.

These rules state that no Member State, other than the competent Member State, is entitled to receive the contributions of the worker in question<sup>91</sup>, given that the applicable schemes for the payment of contributions and benefits run parallel to each other. In some instances

---

<sup>89</sup> Judgment of 13 December 1967, E.C.R. p. 551.

<sup>90</sup> Judgment of 12 June 1986, Miethe, 1/85, E.C.R. 1837; see also judgment of 29 June 1988, Rebmann, 58/87, E.C.R. 3467.

<sup>91</sup> See C-102/76, Perenboom, E.C.R. 1977, p. 824.

payments even when contributions have not been made <sup>92</sup>: in social security schemes; benefits and contributions are not always linked and in some cases the receipt of contributions may condition the payment of benefits.

Besides identifying what legislation applies, the question arises as to whether the rules of affiliation exclude any other circumstances in which the legislation of a Member State - other than the State which has been officially designated by Community rules - may apply without breaching Articles 39 and 42 of the Treaty.

Case-law has been anything but consistent in this regard.

The judgments handed down in C-92763 (Nonnenmacher), cited above, and 19/67 (Van der Vecht, judgment of 5 December 1967, E.C.R. p. 445) conceded the simultaneous application of several national legislations, even though this meant increasing the burden of contributions for both the worker and his employer, where this increase was compensated by “complementary social protection” for the party in question. But successively, the Court of Justice has defended the strict application of the rule of exclusivity when it comes to designating applicable legislation as set out in the regulations; in C-302784 (Ten Holder), C-60/85 (Luijten) and C-1/85 (Miethe), cited above.

**45. Effects on conditions of payment.** In concrete terms, the designation of applicable legislation implies that the social security system in a given Member State is wholly applied to the worker. The conditions for the payment of benefits are therefore those laid out in the relevant national legislation<sup>93</sup>.

However, in order to ascertain whether the conditions for the payment of benefits have been fulfilled, it is appropriate to take other directing principles of the Community into consideration, namely the retention of previously acquired rights or rights currently being acquired and equality of treatment.

It goes without saying that the conditions governing the affiliation of a person to a social security system must not result in the exclusion of any persons to whom the legislation applies, under Regulation 1408/71<sup>94</sup>.

**46. Rights of institutions responsible for benefits against liable third parties.** Article 93(1) of the Regulation permits social security institutions who have paid benefits in respect of an injury resulting from an occurrence in the territory of another State, to claim

---

<sup>92</sup> See the conclusions of Advocate General VerLoren Van Themaat in C-275/81, Koks, E.C.R. 1982, p. 3026.

<sup>93</sup> Among other examples, see judgments of 19 January 1978, E.C.R. 84/77, E.C.R. p. 7; of 12 July 1976, Brunori, 266/78, E.C.R. p. 2705; of 24 April 1980, Coonan, 110/79, E.C.R. p. 1445; of 17 May 1984, Brusse, 101/83, E.C.R. p. 2223; of 24 September 1987, De Rijke, 43/86, E.C.R. p. 3611; of 28 February 1989, Schmitt, 29/88, E.C.R. p. 581; of 18 May 1989, Troiani, 368/87, E.C.R. p. 1333; of 3 May 1990, Kits van Heijningen, C-2/89, E.C.R. p. I-1755; of 13 March 1997, Huijbrecht, C-139/93, E.C.R. p. I-1409; of 11 June 1998, Kuurijärvi, C-275/96, E.C.R. p. I-3419.

<sup>94</sup> Judgments of 4 October 1991, De Paep, C-196/90, E.C.R. p. I-4828; of 3 May 1990, Kits van Heijningen, C-2/89, E.C.R. p. I-1755.

compensation for the injury from a liable third party, when the institution is subrogated to the rights which the recipient has against the third party or by using any other judicial technique at its disposal. (See judgment of 12 November 1959, *Entr'aide médicale*, 27/69, E.C.R. p. 405, par. 15). The rights therein accorded to national social security institutions are the logical and equitable complement of the rules on determining applicable legislation and the extension of obligations to said institutions on the whole of the Community territory. (Rules regarding extension of obligations are contained in the Regulation, see also judgments of 11 March 1965, *Van Dijk*, 33/64, E.C.R. p. 131; of 9 December 1965, *Hessische Knappschaft*, 44/65, E.C.R. p. 1191).

Consequently, where the institution responsible for benefits is subrogated to the rights which the recipient has against the third party, such subrogation shall be recognised by each Member State. And where the said institution has direct rights against the third party, such rights shall also be recognised by each Member State; while both legal recourses in favour of the institution responsible for the payment of benefits are provided for in the legislation of the Member State where they arise<sup>95</sup>.

Paragraph 4: Special rules and exceptions to the principle of Lex Loci Laboris

47. The principle of *lex loci laboris* (whereby the worker is tied to the country of employment for the purposes of social security) has been subject to some modifications and special rules under Articles 14 and 17a of Regulation 1408/71. In fact the Court of Justice observed in *C-101/83 Brusse*<sup>96</sup>, that in certain circumstances, the mere application of the rule cited in Article 13(2)(a) risked achieving the opposite of what it set out to do i.e. creating rather than eliminating administrative complications which would slow down the accompanying documentation and hinder the worker's right to free movement (conclusion 10). Specific rules on the payment of benefits to worker or their dependants in situations justified by the nature of the undertaking, and as a result of "consideration of a social and practical nature", are also set out in Title III of Regulation 1408/71 and 574/72.

The groups to whom special rules apply may be classified as follows:

- civil servants and persons treated as such: application of the "legislation of the Member State to which the administration employing them is subject" [Article 13(2)(d)]
- persons called up for civil service or service in the armed forces of a Member State: "subject to the legislation of that State" [Article 13(2)(e)]
- persons to whom the legislation of a Member State ceases to be applicable without the legislation of Member State becoming applicable to them in accordance with the other

---

<sup>95</sup> See judgment of 2 June 1994, *DAK*, C-428/92, E.C.R. p. I-2270.

<sup>96</sup> Judgment of 17 May 1984, E.C.R. p. 2223; see also judgment of 29 June 1988, *Rebmann*, 58/87, abovementioned.

rules on affiliation: application of the legislation of the State where persons are resident.

- persons working at sea: application of the rule regarding the flying of Member States' flags [Article 13 (2)(c)]<sup>97</sup>.
- Workers in the ports or territorial waters of a Member State: subject to the legislation of that State [Article 14(3)]
- Posted workers: subject to the legislation of the State to which he is normally attached provided that the posting does not exceed 12 months (unless prolongation has been especially approved) and so long as the person is not sent to replace another posted worker whose period of 12 months has expired (to avoid the practice of repeated "turnover" [Article 14(1)]

In the notorious Manpower judgment of 17 December 1970 (35/70, E.C.R. p. 1251), the Court highlighted the aim of this last exception to the rule on the *lex loci laboris* [which at the time was confined to Article 13(a) of Regulation 3]: to ensure that workers moving in the Community are subject to a single social security system in order not to impede freedom of movement and to promote the exercise by undertakings of their freedom to provide services (par. 10). Equally a business established in a given Member State whose workers are normally affiliated to that national social security system, should not be obliged to affiliate its workers to another Member State where they have been sent to complete an undertaking for a limited period of time (par. 11). The Court therefore considered that the last exception would be applicable to frontier service based businesses who post workers to other states on a temporary basis, provided that they normally carry out their undertakings in the Member State where the business is registered. (Par. 16).

In its judgment of 10 February 2000, Fitzwilliam (C-202/97, not yet published in the Community Reports), the Court further clarified the conditions for the application of Article 14 (1)(a) of Regulation 1408/71 to temporary workers posted to another Member state; in order to prevent this exception from being deliberately misconstrued and from being used in order to avoid the application of the general rule concerning the payment of benefits by the country of employment.

There are two conditions which must be respected according to the Court.

There must be an organic link between the business and the workers who have been sent to perform an undertaking in the territory of another Member State throughout the period of their posting. It is sufficient that the worker in question responds to the business on all matters related to his employment.

Secondly, any business giving temporary employment must normally pursue its activities in the Member State where it was established, i.e. "must regularly carry on significant activities" there. The Court cites a number of criteria which may characterise such activities:

---

<sup>97</sup> Article 14(3) of the Regulation lists several exceptions to this rule.

“the place where the undertaking has its seat and administration; the number of administrative staff working in the Member State in which it is established and in the other Member State; the place where the posted workers were recruited or where the majority of contracts were concluded with clients; the laws governing contracts concluded by the company with its workers on the one hand, and its clients, on the other; the turnover during an appropriately typical period in each Member State concerned” (par. 43).

The nature of the undertaking carried out by workers situated in the territory of a Member State where the undertaking has its registered office and of workers who are posted to the territory of another Member State, is not considered to be relevant to the issue at hand.

When posting workers abroad, the competent institution of the Member State or an undertaking providing temporary staff normally issue an E 101 certificate which certifies that an employee remains affiliated to its social security system for the duration of the posting. In respect of the principles concerning the uniqueness of the applicable legislation and for reasons of judicial security, “this certificate necessarily implies that the social security system of the State to which the workers are posted, is not liable” (par. 49). “There is a presumption that posted workers are regularly affiliated to the social security regime of the Member State where the undertaking providing temporary personnel was established” and this presumption must be respected by the competent institution of the Member State where the workers have been posted (par. 53). Furthermore, “unless Certificate E101 is withdrawn or declared invalid, the competent institution of the Member State where the posted workers have been sent is bound by it, and must accept that the latter are already subject to the social security legislation of the State or undertaking which employs them, and may not therefore be subject to its own social security system” (par. 55).

The Court points out, however, that the principle of sincere cooperation, as laid down by Article 5 (now Article 10 EC) “requires the competent institution to take special care when applying the rules relative to the determination of applicable legislation in the field of social security, and therefore to guarantee the correctness of the information contained in an E 101 certificate” (par. 51). However, “where the institutions of other Member States raise doubts as to the correctness of the facts on which the certificate is based or as to the legal assessment of those facts; it is incumbent on the issuing institution to re-examine the grounds on which the certificate was issued and, where appropriate, withdraw it” (par. 56).

In the event of a dispute, the other Member States concerned may refer the matter to the Administrative Commission of the European Communities on Social Security for Migrant Workers and, if necessary, bring proceedings before the Court of Justice for failure to fulfil Article 170 of the Treaty (now Article 227 EC) (par. 58).

- Self-employed workers who move to another Member State to carry out a profession: Article 14a(1) of 1408/71 sets out similar provisions to those enunciated in Article 14(1), applicable in this case to non-salaried workers who travel to another Member State to carry out a temporary undertaking : these workers remain subject to the legislation of the State where they normally carry out their non-salaried activity.



In the case of Banks and Others, cited above, the Court was invited to clarify the term “work” carried out in another Member State: did it cover all kinds of assignment, be it salaried or non-salaried, or did it only cover non-salaried work?

In this instance, Mr. Banks, other opera singers and a conductor initiated proceedings following a dispute with the *Théâtre royal de la Monnaie* (TRM) concerning contributions which the latter deducted from the artists' fees under the general system of Belgian social security for employed persons. They argued that since, while normally working as self-employed persons in the United Kingdom, they performed work in Belgian territory for a duration of less than 12 months, they remained, in accordance with Article 14a(1)(a) of Regulation No 1408/71, subject to United Kingdom legislation only. They further argued that they had been engaged by the TRM to work in Belgium over a three-year period for less than three months of total activity (with the exception of one party whose contracts meant he worked for a little over four months in total).

The Court, basing its arguments on the wording of Article 14a(1)(a) (para.21), as well as, exceptionally, on preliminary rulings (para. 23)<sup>98</sup>, held that the term should cover any performance of work, whether in an employed or self-employed capacity. **The “assignment” must consist in “a defined task, the content and duration of which are determined in advance, and the genuineness of which must be capable of proof by production of the relevant contracts”** (para, 27).

- Travellers working in different Member States: the legislation of the State where the worker is resident applies, so long as he carries out part of his activity there (Article 14(2)(b), and 14a(2) of the regulation). Failing this, the legislation of the State where the undertaking has its registered office or headquarters<sup>99</sup>.

---

<sup>98</sup> The initial proposal of the Commission (OJ 1978, C 14, p. 9) used the terms “provision of services”, in the sense that the application of the provision would be limited exclusively to the carrying out of a non-salaried assignment on the territory of another Member State.

<sup>99</sup> For related rulings see:

- Judgment of 16 February 1995, *Calle Grenzshop Andresen*, C-425/93, E.C.R. p. I-291, regarding a Danish worker, living in Denmark, employed exclusively by an undertaking specialised in the sale of wines, spirit and gifts, registered in Germany. The worker regularly spent several hours a week - and over a period which exceeded 12 months - in Denmark.
- The Court found that the worker was subject to the Danish social security system under Article 14(2)(b) and that consequently, the competent German institution could not claim contributions from the worker as he already was already liable for said contributions in Denmark.
- Given that the undertaking of the worker in question exceeded 12 months, Article 14(1)(a) (which concerns the placing by an undertaking established in a Member State, of a worker to another Member State for a period not exceeding 12 months) was not applicable. In that case the applicable legislation is that of the country where the undertaking has its registered office.
- Judgment of 13 October 1993, *Zinnecker*, C-121/92, E.C.R. p. I-5023 regarding a German national, resident in Germany, who was self-employed both in Germany and in the Netherlands: under Article 14a of Regulation No 1408/71, the applicable legislation is that of the Member State where the self-employed worker resides, in this case in Germany. In this instance, where the worker was not insured in Germany or in the Netherlands, he was nonetheless not subject to the payment of contributions for his activities in the Netherlands.

- Persons who work both as employees and on a self-employed basis in different Member States: Article 14(a) of Regulation 1408/71 defines the legislation applicable to persons who carry out salaried and non-salaried work simultaneously on the territory of two or more Member States; the state where the person carries out his salaried work is the competent state, or, if the salaried activity is carried out on the territory of two or more Member States, the competent state is determined in accordance with Article 14(2) or (3) (in general, in a subsidiary capacity, the state where the worker is resident)<sup>100</sup>.

The application of Article 14 of the Regulation requires that the nature of the activities carried out in the various Member States must be able to be determined. The regulation, however, fails to define the concept of employed and self-employed work. The practical difficulties that arose as a result led the Court of Justice to rule on the matter. The Court decided that, for the purposes of applying Title II of the Regulation, concerning the determination of applicable legislation, it was appropriate to refer to the social security legislation of the state where the activity was carried out, in order to ascertain whether this activity was to be classified as salaried or non-salaried work (judgments of 30 January 1997, *de Jaeck*, C-340/94, E.C.R. p. I-461 and *Hervein*, C-221/95, E.C.R. p. I-609).

In 1984, Mr. de Jaeck, of Belgian nationality, worked in two capacities. He was self-employed in Belgium, where he resided, and he was the director of, and sole shareholder in, a limited company in the Netherlands where he normally worked two days a week. In respect of the latter activity he was required to pay contributions to the Netherlands national insurance scheme. The question raised was therefore to determine whether he should be considered as being employed or self-employed in the Netherlands for the purposes of applying Articles 14a or 14(4) of the Regulation, and more generally Title II.

Mr. Hervein, a French national resident in France, had worked in a similar capacity in France and in Belgium (as Director General and Vice President of Belgian and French law firms). At the time of litigation, Mr. Hervein was not tied by a contract of employment to the firms in question. Under Belgium's social security system, Mr. Hervein was classified as an independent worker, while under French legislation, he was deemed to be subject to the social security system applied to employed persons (while nonetheless maintaining his status as self-employed worker, according to the employment laws, since he was not tied to the French undertaking by any subordinated contract). The Court was called on to establish how Mr. Hervein's activity in France should be classified with regard to Articles 14a or 14(4) of the regulation, and more generally Title II.

In both cases, the Court considered that: "Since the provisions of Title II refer, in particular, not to employed and self-employed workers ('travailleurs salariés'/non-salariés') but to persons who are engaged in carrying out a salaried activity or persons who are engaged in

---

<sup>100</sup> Subject to the special cases mentioned in Annex VII to the Regulation in accordance with Article 14 quarter (b) which gives rise to the joint application of two national legislations. A person who is self-employed work in France and employed in any other Member State (except Luxembourg) or a self-employed agricultural worker who carries out his undertaking in France and is simultaneously employed in Luxembourg. In these instances, persons are subject to the legislation of each of the States with regard to the activity carried out in their territories. The employed activity carried on the territory of another State can however be taken into account under the second social security system which may classify the self-employed activity as a complementary activity, with favourable consequences for the worker as regards contributions (Article 14(5)2).

carrying out a non-salaried activity ('personnes qui exercent une activité salariée'/non-salariée'); a logical and consistent interpretation of the scope *ratione personae* of the regulation and of the system of rules of conflict of laws which it establishes requires 'employed' and 'self-employed' in Title II of the regulation to be interpreted in the light of the definitions in Article 1 (a) thereof. "Accordingly, just as the description 'employed person' or 'self-employed person' for the purposes of Articles 1(a) and 2(1) of the regulation depends on the national social security scheme under which the person is insured, 'a person who is employed' (or 'engaged in paid employment') and 'a person who is self-employed' for the purposes of Title II of the regulation should be understood to refer to activities deemed such by the legislation applicable in the field of social security in the Member State in whose territory those activities are pursued."

-Civil servants who are simultaneously employed or self-employed on the territory of several Member States: under Article 14(6) of the Regulation 1408/71 these persons are subject to the legislation of the Member State where they are covered by the special civil service scheme.

As for workers cited in Article 14(4)(b), persons covered under Article 14(5) shall be treated, for the purposes of application of the legislation, as though they pursued their professional activity or activities in the territory of the Member State concerned.

- Persons employed by the civil service of more than one Member State: under Article 14(7), a person who is simultaneously employed as a civil servant in two or more Member States (or assimilated persons), and who is subject to the special social security scheme for such staff in at least one of the aforementioned states, shall be subject to the legislation of both Member States.

Civil servants are therefore not covered by the rule on the "uniqueness" of applicable legislation.

- Frontier-workers: application of the law of the seat of the undertaking [Article 14(3) and 14a(3)]

- Persons employed by diplomatic missions and consular posts, and auxiliary staff of the European Communities: application of the *lex loci laboris*; where it is possible to opt to be subject to the legislation of the accrediting or sending state or to the legislation of the Member State whose nationals they are (Article 16)<sup>101</sup>.

- Workers who benefit from the exceptions to the provisions of Articles 13 to 16, as a result of bilateral or multilateral agreements concluded in their interest by Member States or social security institutions (Article 17).<sup>102</sup>

---

<sup>101</sup> Note that the decision of a person in the service of a consul or diplomatic mission to opt for the application of the social legislation of the sending state does not exclude his dependants from social security benefits (such as family allowances), which continue to be guaranteed to him by the legislation of the Member State where he resides, provided there is no overlapping in benefits according to Community rules (see Article 10(1)(a) of Regulation No 574/72) (see also judgment of 3 June 1999, Gomez Rivero, C-24/97, E.C.R. p. I-3219).

<sup>102</sup> See C-101/83, Brusse, cited above.

- Recipients of pensions or other allowances due under the legislation of one or several Member States who reside in the territory of another Member state may, at their request, be exempted from the legislation of the latter State (especially when they are already entitled to sickness or child benefits under the legislation of another Member State), provided that they are not subject to that legislation because of pursuit of an occupation. (Regulation 1408/71, Article 17a).

- Persons working in a third country: case-law has consistently shown that the fact that the worker's professional activities are carried out in a third country is not, in and of itself, sufficient grounds to invalidate Community regulations on the free movement of workers, for so long as the worker continues to be affiliated to the territory of the Community. In the case of a Dutch national, resident in the Netherlands, who worked for an undertaking established in Germany and who was subsequently posted to Thailand, this affiliation consisted in the fact that the community worker was hired by an undertaking of another Member State, and consequently, was affiliated to the social security system of that state (judgment of 29 June 1994, Alderwereld, C-60/93, E.C.R. p. I-2291).

The Court was called on to determine which legislation was applicable to this worker. The Court, after having demonstrated a link to the legislation of a Member State (the worker's country of residence or the place of business), recalled that the application of the legislation of the country in which the person resides should not be applied, unless there is a link connecting it with the employment relationship. When the worker does not reside in the territory of one of the Member States where he carries out his activity, the legislation that is normally applied is that of the Member State where the employer is established. The Court also referred to Article 14(2)(b)(ii) of Regulation 1408/71 which also rules that the applicable legislation is that of the country where the undertaking has its registered office or place of business. The interested party, by virtue of his employment, was therefore not liable to pay contributions under the social legislation of the country where he resided.

**48** The special provisions applicable to different categories of benefits under Title III of the Regulation also contain many rules on affiliation. Some of the most important are:

- Article 57(1) on occupational diseases where the person concerned has been exposed to the same risk in several Member States (in principle the applicable legislation is that of the state where the person was last exposed to the risk);

- Article 71 on unemployment benefits, when the unemployed person during his last employment, was residing in the territory of a Member State other than the competent State (see 74 below);

- Article 73 on family benefits for workers whose families reside in a Member State other than State of employment (see 76 below);

- Article 76 on overlapping entitlement to family benefits or family allowances in pursuance of Articles 73 and 74 by reason of the pursuit of a professional activity in the country of residence of the members of the family (the legislation of the latter State shall prevail);

- Article 77(2) on child allowances for persons receiving pensions for old age or other allowances (see 80 below);

- Article 78(2), on orphans' benefits (see 80 below);
- Article 79(2) and (3) on the overlapping of benefits for dependent children of pensioners and for orphans and of benefits linked to professional activity (the legislation of the State of employment prevails).

**49. Differential supplement in family benefits.** Regarding the payment of family benefits (Chapter 7 of Title III of the regulation) and benefits for dependent children of pensioners and for orphans (Chapter 8), the Court of Justice has developed the so-called “rule of differential supplement”. According to this rule, workers who move within the Community must be guaranteed that all benefits acquired in different Member States in respect of dependant children, be allocated according to “the highest amount of benefit which is provided under the legislation of one of these states”. The rules against overlapping contained in Articles 76 and 79(3) of Regulation 1408/71 and 10(1) of Regulation 574/72, which suspend the payment of concurrent benefits, as well as the rules of affiliation laid down in Articles 73, 77(2) and 79(2), which designate the applicable legislation for the payment of the entitlements in question, can only be partially applied when the amounts of the allowances that have been suspended are greater than that of the rights to acquired benefits as laid down by the abovementioned Community provisions: in this case, these provisions apply only to the extent of the amount actually paid and in accordance with the designated or applicable legislation.

The rule of “partial application” was first set out in C-100/78 (judgment of 6 March 1979, Rossi, E.C.R. p. 831), which serves as a timely illustration of the importance of a teleological interpretation of the implementation of Community law<sup>103</sup>.

---

<sup>103</sup> See

- Regarding Article 76: judgments of 23 April 1986, Ferraioli, 153/84, E.C.R. P. 1401; of 27 June 1989, Georges, 24/88, E.C.R. p. 1905;
- Regarding Article 77 (2)(b)i: judgments of 12 June 1980, Laterza, 733/79, E.C.R. 1915; of 11 June 1991, Athanasopoulos and Others, C-251/89, E.C.R. p. I-2797;
- Regarding Article 77(2)(a): judgment of 14 March 1989, Baldi, 1/88, E.C.R. p. 667;
- Regarding Article 78(2)(b)(i): judgments of 9 July 1980, Gravina, 897/9, E.C.R. p. 3811; of 12 July 1984, Patteri, 242/83, E.C.R. p. 3171; of 14 March 1989, Baldi, cited above; of 11 June 1991, Athanosopoulos and others, cited above; of 19 March 1992, Doriguzzi-Zordanin, C-188/90, E.C.R. p. I-2053; of 18 February 1993, Gobbis, C-218/91, E.C.R. p. I-720;
- Regarding Article 78 (2)(b)(ii): judgment of 14 December 1988, Ventura, 269/87, E.C.R. p. 6411;
- Regarding Article 78(2): judgment of 24 November 1983, D’Amario, 320/82, E.C.R. p. 3811;

Article 76 was amended by Regulation 3427/89 of 30 October 1989 (OJ L 331, p. 1) to take into account the rule regarding “supplementary benefits” which arose from case-law. This regulation added a second paragraph to Article 76 stating “if an application for benefits is not made in the Member States in whose territory the members of the family are residing, the competent institution of the other Member State may apply the provisions of paragraph 1 (Community rule against overlapping) as if benefits were granted in the first Member State”. Given that Community rules against overlapping may only apply according to the relevant case-law, when the worker has demonstrated that he is entitled to be affiliated to two social security schemes in two separate jurisdictions, and that he has made his request in a timely manner to the two competent institutions; this amendment tends to lessen the financial burden of family allowances in respect of the dividing of financial burdens among the Member States involved<sup>104</sup>.

The extent to which the Court has set precedence in respect of “supplementary benefits” has yet to be ascertained. According to the Court, when the rights to benefits for dependant children, and entitlement to pensions, other allowances or orphans’ benefits, have been acquired by virtue of the application of the aggregation rules provided for by the regulation; the granting of a supplementary allowance is not guaranteed. In fact, the application of Articles 77 and 78 of Regulation 1408/71, does not deprive the persons concerned of the benefits granted solely under the legislation of another Member State (see judgment of 27 February 1997, Bastos Moriana, C-59/95, E.C.R. p. I-1071; see also judgment of 7 May 1998, Gomez Rodriguez, C-13/96, E.C.R. p. I-1071).

In other words, pursuant to Articles 77(2)(i) and 78(2)(b)(i) of the regulation, in order for a Member State to be obliged to grant supplementary family benefits to pensioners or orphans residing in another Member State, where the amount of the family benefits paid by the Member State of residence is lower than that of the benefits provided for by the laws of the first Member State, these rights to receive benefits must have been acquired solely by virtue of insurance periods completed in that State.

### CHAPTER 3 THE RETENTION OF ACQUIRED RIGHTS

**50. Aim.** The retention of acquired rights is one of the fundamental aims of international co-ordination in the field of social security. This principle, which is a cornerstone of classic international law on social security, basically means that a worker may not lose the right to

---

- Regarding Article 10(1)(a) of Regulation No 574/72 (in the version prior to Regulation 1660/85): judgments of 19 February 1981, Beeck, 104/80 E.C.R. p. 503; of 4 July 1981, Krombout, 104/84, E.C.R. p. 2213;

- Regarding Article 10(1)(a) and (b), I (in the version prior to Regulation No 1249/92): judgment of 9 December 1992, McMenamin, C-119/91, E.C.R. p. I-6393.

<sup>104</sup> See judgments of 20 April 1978, Ragazzoni, 134/77, E.C.R. p. 963; Rossi 100/78, cited above; of 13 November 1984, Salzano, 191/83, E.C.R. p. 3741; Ferraioli, 153/84, cited above; of 4 July 1990, Kracht, C-117/89, E.C.R. p. I-2794.

social security benefits because he resides in a Member State other than the one where he acquired the right or could acquire the right. This is in order to offset the consequences of territoriality which dominate national legislations as regards the payment or acquisition of social security benefits.

Under Community law the rule regarding the retention of acquired rights aims to guarantee the right to freedom of movement<sup>105</sup>. Article 42 (b) of the Treaty explicit mention of this right.

Community law identifies three categories of benefit:

- invalidity, old-age and survivor benefits, pensions resulting from an accident at work an occupational disease and death; long-term benefits where the entitled parties are no longer in gainful employment and normally desire to return to their country of origin;
- special non-contributory benefits;
- other benefits, generally short-term.

For the first category there is a general provision waiving the residency clauses (Article 10(1) of Regulation 1408/71), while taking into account the various applications of Regulation 574/72 regarding the modality of payment of benefits. For the second category Article 10a of Regulation 1408/71 introduces an exception to the rule of exportability, justified by the nature of the benefits in question. For the third category, it is sufficient to refer to the special provisions contained in Title III of Regulation 1408/71 concerning each branch of social security and the corresponding rules on application.

Paragraph 1: Pensions for accidents at work or occupational diseases

**51.** According to Article 10(1) of the Regulation; “Save as otherwise provided in this Regulation<sup>106</sup>, invalidity, old-age or survivors' cash benefits, pensions for accidents at work or occupational diseases and death grants acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated.”

As the Court has held on many occasions, the aim of this provision is to “promote the free movement of workers whilst protecting any damage to their interests which may arise as a result of the transfer of their residency from one Member State to another”<sup>107</sup>.

---

<sup>105</sup> See judgment of 7 November 1973, Smieja, 51/73, E.C.R. p. 1213; of 4 July 1990, Camera, 92/81, E.C.R. p. 2213; of 24 February 1987, Giletti e.a., 379, 380, 381/85 and 93/86, E.C.R. p. 971; of 2 May 1990, Winter-Lutzins, 293/88, E.C.R. p. I-1639.

<sup>106</sup> See Article 10a of the Regulation on the exportation of mixed non-contributory benefits, 53 below.

<sup>107</sup> See C-53/73, Smieja; 92/81, Camera; and 379, 380, 381/85 and 93/86, Giletti e.a., cited above.

It is understood that Article 10(1) waives not only the clauses on residency as regards the payment of benefits but also those clauses relative to the acquisition of the right to benefits, when the entitled party is no longer, or was never, resident in the competent state (see for example the case of a surviving dependant of a migrant worker who had never lived outside the worker's country of origin)<sup>108</sup>.

Finally, it is useful to point out that Article 10(1) covers only invalidity, old-age or survivors' cash benefits, pensions for accidents at work or occupational diseases and death grants; in other words, the Article refers to those persons entitled to benefits, who, in general, are no longer engaged in gainful employment and who, in general, wish to return to their country of origin. The Article is applicable only in the case of the benefits which are expressly mentioned. For example family benefits are not covered (judgment of 11 June 1998, Kuusijäri, C-275/96).

This does not mean that other social security benefits are not exportable (sickness, unemployment, and family benefits) but rather for the purpose of their administration, it is advisable to consult the special provisions governing them as set out in Title III of the regulation.

**52. Insurance system based on the sole criterion of residency.** It should be noted that the aforementioned Article 10(1) is subject to restrictions when applied to an insurance system where the mere fact of residing on a national territory is sufficient in order to be insured. This is the case with the general old-age insurance scheme in the Netherlands, and explains why Annex VI par. 2 of Regulation 1408/71, entitled "The Netherlands", contains special provisions for the implementing of the principle of exportability with respect to Dutch law, whose legislation in this regard tends to establish a sufficiently strong link<sup>109</sup> between the Dutch system and the entitled party.

#### Paragraph 2: Special non-contributory benefits

**53.** The Regulation contains special rules on co-ordination that are applicable to non-contributory benefits destined to cover (by substituting, complementing or adding to) each of the contingencies implied by the various branches of social security cited in Regulation 1408/71, or to insure the specific protection of disabled persons (see new Article 4(2)a).

These benefits, which are described on a State by State basis in Annex IIa of the Regulation shall be granted exclusively in the territory of the State of residency, and subject to the legislation of that State by aggregating, if necessary the periods of employment, professional activity or residence carried out in another Member State. They are allocated by the competent institution of the place of residence. Various rules of equivalence exist in order to

---

<sup>108</sup> See the proceedings re Smieja, Camera and especially Giletti cited above, and Van Roosmalen, cited above. See also judgment of 6 July 2000, Movrin, C-73/99, E.C.R. 5265, par. 33.

<sup>109</sup> See the aforementioned Judgment re. Winter-Lutzins, confirming the validity of a specific rule of this kind, contained in Annex VI of the Regulation. See also Judgment of 30 March 1993, de Wit, C-282/91, E.C.R. p. I-1238.



palliate the existing divergences between national legislations with respect to the granting of benefits (see new Article 10a).

In its judgment of 4 November 1997, *Snares* (C-20/96), the Court reconfirmed the validity of Regulation 1247/92. The legality of this regulation vis à vis the Treaty had been challenged on the grounds that it restricted the exportability of certain benefits, thereby hampering the free movement of persons.

In the case at hand, Mr. Snares, who was formerly employed in the UK for 25 years, had been granted an allowance for disabled persons (DLA) following an accident. Shortly afterwards, he decided to take up residency in Tenerife and advised the British social security administration of his intention. The latter decided to suspend his right to DLA from the date of his departure, given that the grant was dependent on the recipient being resident in the paying State, in accordance with Article 10a of Regulation 1408/71, as amended by Regulation 1247/92, and Annex IIa, which specifically classifies this kind of grant as a special non-contributory benefit.

The Court held that the benefits which were “strictly tied to their social environment”, such as the DLA allowance, could be allocated subject to residency (see judgment of 27 September 1988, 313/86, *Lenoir*, par. 16) par. 42). Furthermore, the fact that Mr. Snare did not qualify for an analogous grant according to the criteria laid down by the new State of residence, was not sufficient in and of itself to invalidate the Community legislation in this regard which permits the condition of residency to be maintained.

“In fact, according to the Court’s rulings on this matter (see in particular judgment [of 20 February 1997], *Martínez Losada and Others* [C-89/95, C-102/95 and C-103/95, par. 43) in the absence of harmonisation in the field of social security, Member States remain competent in respect of the definition of the conditions for the granting of social benefits, even if they make these conditions more stringent, so long as the conditions adopted do not give rise to any covert or overt discrimination between workers in the Community” (par. 45).

The Court made it clear, in this regard, that the system implemented by Article 10a of Regulation 1408/71 contains rules on co-ordination which have been specifically drawn up with a view to protecting the interests of migrant workers in conformity with Article 42 of the Treaty. Hence the State where the worker resides cannot disregard periods of the worker’s life which have been spent in another Member State (periods of employment and residency, the occurrence of an invalidity or handicap, the granting of benefits) (paragraphs 46 to 48) (see also regarding DLA grants; aforementioned judgment of 11 June 1998, *Partridge*, C-297/96).

Furthermore, the Court judged that the concept of “Member State where persons reside” as defined in Article 10a of Regulation 1408/71 means the State where the persons in question habitually reside and place where the habitual centre of their interests is (judgments of 25 February 1999, *Swadding*, C-90/97 E.C.R. p. I-1090). In this regard, it may prove useful to give special consideration to the family situation of workers, to the reasons which led them to move from their country of origin, to the duration and continuity of their residence, the fact of having access to stable employment, and the worker’s intentions, in the various circumstances in which he finds himself (see, *mutatis mutandis*, Article 71(1)(b)(ii) of

Regulation 1408/71; judgments of 17 February 1977, Di Paolo, 76/76, E.C.R. p. 315; of 8 July 1992, Knoch, C-102/91, E.C.R. p. I-4341).

According to the Court, the duration of residence in the State where the payment of the benefit is requested is not regarded as being pertinent to the concept of residency as set out in Article 10a of Regulation 1408/71.

In the case in point, the plaintiff returned to his State of origin after having exercised his right to free movement. In requesting the granting of income support, he clearly demonstrated his intention to stay in his native State where his close family also resided, whilst also remaining available for occasional postings to other Member States for undertakings in the future. The Court ruled that he must be considered as having satisfied the condition of residency laid down by Article 10a and could not be refused his request on the sole grounds of insufficient duration of residency in his State of origin.

Finally the Court held that the provisions of Article 10a of Regulation 1408/71, which provide for derogations from the principle of the exportability of social security benefits, must be interpreted strictly and apply only to those benefits which fulfil the conditions set out under Article 4(2a) of the regulation i.e. those benefits which **are both special and non-contributory**, and which are listed in Annex IIa to the regulation (judgment of 8 March 2001, Jauch, C-215/99, E.C.R. p. I-1901). Inclusion in the annex is not therefore sufficient to justify a derogation from the principle of exportability. Benefits which are not both special and non-contributory include:

- **care allowance benefits** under Austrian law which were considered by the Court as sickness benefits in cash, financed indirectly by sickness insurance contributions and not liable to be classified as “special” (judgment Jauch, above, pars. 28; see also Molenaar, above);
- **maternity benefits in Luxembourg**, arising from the characteristics of such benefits defined under Article 4(1)(a) of the regulation covering “maternity benefits” and not liable to be classified as “special” within the meaning of Article 4(2a) (judgment of 31 May 2001, Leclere and Deaconsescu, C-43/99, E.C.R. p.I-4265).

### Paragraph 3: Other benefits

**54.** The benefits not mentioned in Article 10(1) of the regulation are: sickness and maternity benefits, unemployment benefits, family benefits or allowances, benefits for child dependants of persons entitled to pensions or other grants or orphans’ benefits. The retention of these acquired rights is subject to the same guarantees as other rights in virtue of Title III of the regulation and the provisions for the application of Regulation 574/72.

a) Sickness benefits

**55. Residence in a State other than the competent state.** Generally speaking, in the case of beneficiaries who reside in a State other than the Competent State:

- benefits in kind are provided on behalf of the competent institution by the institution of the place of residence in accordance with the legislation administered by that institution as though the beneficiaries were affiliated to it;
- cash benefits are provided by the competent institution in accordance with the legislation which it administers. However, by agreement between the competent institution and the institution of the place of residence, such benefits may be provided by the latter institution on behalf of the former, in accordance with the legislation of the competent State (Article 19 of Regulation 1408/71).

Article 19 of Regulation 1408/71 is applicable to employed and self-employed persons and to family members resident in a Member State other than the competent State. It establishes the body of law in this area which is summarised in the abovementioned rules. Clearly, in order to be entitled to receive said benefits, the worker must fulfil all the conditions of the competent State, including, if this is the case, the rules regarding the aggregation of periods of insurance, employment or residence.

It is taken as given that sickness benefits provided by the State of residence continue to be payable by the competent State (which fully refunds the State of residence in accordance with Article 36 of the Regulation and with articles 93 to 95 of the Implementing Regulation No 574/72.)

**56. Stay in a Member State other than the competent state.** Two groundbreaking judgments of the Court meant that European citizens were free in their choice of medical treatment and the purchase of medical products in the Community. The judgments guaranteed, in principle, the reimbursement of medical costs at the tariffs in force in the competent state (judgments of 28 April 1998, Decker, C-120/95, E.C.R. p. I-1831 and Kohll, C-118/98, E.C.R. p. I-1931), even though Community regulations on sickness benefits in kind (Article 22(1) of the regulation) states that the refund of medical expenses payable by the competent State and subject to prior authorisation (without urgency) by the competent institution is based on the tariffs in force in the State where the treatment was provided or where the products were purchased. According to the Court, “interpreted in the light of its purpose, [Article 22 of Regulation No 1408/71] is not intended to regulate and hence does not in any way prevent the reimbursement by Member States, at the tariffs in force in the competent State, of the cost of medical products purchased in another Member State, even without prior authorisation” (Decker, pars. 29) and “the costs incurred as a result of medical treatment provided in another Member State, even in the absence of prior authorisation” (Kohll, par. 27).

It is useful therefore to examine the two systems of health care in a State other than the competent State: the system set out in Article 22(1) of the Regulation and that which has arisen as a result of the Court’s rulings in respect of the principle of free movement of goods and services within the Community.

#### *1. Article 22 (1) of the Regulation*

**57.** In the case of a (temporary) stay in a Member State other than the competent State, analogous rules to those contained in Article 19 of the regulation (see pars. 65) govern the

granting of sickness benefits (cf. Article 22 of Regulation 1408/71). However, in order to be eligible, the beneficiaries must be in one of the following three situations:

- a) his “condition necessitates immediate benefits during a stay in the territory of another Member State”;
- b) “after having become entitled to benefits chargeable to the competent institution, (he) is authorised by that institution to return to the territory of the Member State where he resides, or to transfer his residence to the territory of another Member State”;
- c) he “is authorised by the competent institution to go to the territory of another Member State to receive there the treatment appropriate to his condition”<sup>110</sup>.

Some comments are called for.

First, the condition that the care required must be a matter of urgency in order to benefit without prior authorisation from benefits in kind while staying in the territory of a Member State, is not applicable when the worker is staying in this State for professional reasons (Article 22(3) introduced by Regulation 3096/95 of 22 December 1995). This is equally true of: posted workers; employed workers exercising their activity in the territory of several Member States or workers exercising their activity in an undertaking which has its seat in another Member State who finds himself on the other side of their common border; self-employed workers or persons working at sea who find themselves in analogous situations; or persons to whom the derogations under Articles 13 to 16 of the regulation apply by virtue of an agreement between the competent authorities.

Furthermore, paragraphs b) and c) are badly formulated: it is clearly incumbent on the competent institution to authorise the requesting parties to travel to the territory of another Member State to receive medical care or to return to the Member State where they reside. Such authorisation is given only in the context of the right to retain acquired rights to sickness insurance in the territory of a State other than the competent State, and at the tariffs in force in the former, where the benefits are provided.

In conclusion, Article 22(2) of the Regulation provides important indications as to the limits of the power of an institution in a Member State to grant or refuse authorisation to a person to whom the regulation is applicable: this “may be refused only if it is established that movement of the person concerned would be prejudicial to his state of health or the receipt of medical treatment” or “when, although the treatment required is covered by the benefits accorded by the legislation of the Member State where the requesting party resides, given his current state of health and the likely development of the illness, the treatment is more readily available in another Member State”.

---

<sup>110</sup> It should be noted that in order to facilitate temporary stays and access to medical treatment in the Community with the authorisation of the competent authority (Article 22 (1) (a) and (c)); sickness and maternity benefits are extended to all insured Community citizens in virtue of the legislation of any single Member State and to the members of their family who reside with them, even if the latter are not qualified as employed or self-employed persons (Article 22a).

**58. Medical examination.** The special provisions of Regulation 374/72, which for the purposes of the present paper shall not be examined at length, govern the medical check-ups of insured persons staying or residing in a State other than the Competent State (see Article 18 (1 – 5) of Regulation 574/72 and judgments of 12 March 1987, Rindone, 22/86, E.C.R. p. 1339; of 3 June 1992, Paletta, C-45/90, E.C.R. p. I-3423; and of 2 May 1996, Paletta II, C-206/94, E.C.R. p. I-2382).

2. *Free movement of goods (medical products) and freedom to provide services (medical treatment)*<sup>111</sup>).

**59.** The Court's rulings of 28 April 1998, Decker, C-120/95, and Kohll, C-158/96 (E.C.R. respectively p. I-1831 et p. I-1931), which primarily had to do with the free provision of services (healthcare) and the free movement of goods (medical products), caused a considerable stir not only among healthcare insurance specialists, but equally, and more unusually, due to the technical nature of the subject, in the public domain. It is possible that these judgments, which acted as catalysts for the initiation of further proceedings at the Court of Justice, will require, in the long term<sup>112</sup>, an adjustment of the principles governing sickness insurance in the Member States, in order to guarantee the full enjoyment of freedoms enshrined in the Treaty.

What is clear, is that “Community law does not detract from the powers of the Member States to organise their social security systems (judgments of 7 February 1984, C-238/82 Duphar et al., E.C.R. p. 523, par. 16; and of 17 June, C-70/95 Sodemare et al., E.C.R. p. I-3395, par. 27)” (Decker, par. 21; Kohll, par. 17). And “in the absence of harmonisation at Community level<sup>113</sup>, it is therefore for the legislation of each Member State to determine, first, the conditions concerning the right or duty to be insured with a social security system and second, the conditions for entitlement to benefits (see in particular judgments of 24 April 1980, Coonan, 110/79, E.C.R. p. 1445, par. 12; of 4 October 1991, Paraschi, C-349/87, E.C.R. p. I-4501, par. 15; of 30 January 1997, Stöber and Piosa Pereira, C-4/95 and C-5/95, E.C.R. p. I-511, par. 36; Decker, abovementioned, par. 23 and Kohll, abovementioned, par. 19).

---

<sup>111</sup> See our paper “The Freedom to choose medical products and treatments for European citizens; social consequences of the internal market”, *Cahiers de droit européen*, 1998, p.683..

<sup>112</sup> See Judgments of 12 July 2001, Vanbraeckel, C-368/98, E.C.R. p. I-5363, and Smits and Peerbooms, C-157/99, E.C.R. p. I-5423; of 13 May 2003, Muller-Fauré, C-385/99, E.C.R. I-4509; of 23 October 2003, Inizan, C-56/01, forthcoming in the E.C.R., and of 3 July 2003, van der Duin and ANOZ Zorgverzekeringen, C-156/01, forthcoming in the E.C.R. See also Judgment of 25 February 2003, Ioannidis, C-326/00, E.C.R. p. I-1703, which regards more particularly the case of pension holders who are staying temporarily in another Member State.

<sup>113</sup> It should be remembered that Community law on this subject (and in particular Council Regulation (EEC) No 1408/71 of 14 June 1971, on the application of social security regimes to salaried workers, non-salaried workers and to members of their families who move within the Community, has been amended and updated by Council Regulation (EEC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p.1). The latter aims essentially at achieving the coordination of national social security schemes in order to guarantee freedom of movement to persons in the European Union, but does not contain any provisions for the harmonisation of conditions of affiliation or the granting of benefits. The aim, without changing any laws, is to govern the relationships between social security systems in order to give effect to some fundamental principles (such as equality of treatment, the unique character of the applicable legislation, the maintenance of accrued rights and rights in the process of being accrued) to guarantee full and on-going protection for workers who carry out their professional activities wholly or partially in a country other than their country of origin, as well as for their family members.

It follows that the “States must, when exercising those competencies, nevertheless comply with Community law” (Decker, par. 23; Kohll, par. 19). This is a very good example of the interweaving of community and national law. While community law often restricts itself to delineating a goal to be reached, such as the freedom of movement of persons or equality of treatment irrespective of nationality or gender, national legislations remain subsist but they must nonetheless be compatible with the rules of the treaty and derived law, with which they may not enter into conflict.

What conclusions can we draw from established case-law? And what questions remain as yet unanswered? This is what we shall now attempt to clarify, as comprehensively as the scope of the present paper will allow.

i) Kohll and Decker<sup>114</sup>

**60.** Mr. Decker, a Luxembourg national, contested the refusal of the *Caisse de Maladie* in Luxembourg to reimburse the cost of a pair of spectacles which he had purchased from an optician in Arlon, Belgium, on a prescription from an ophthalmologist established in Luxembourg. The *Caisse de Maladie* refused Mr. Decker’s request on the grounds that they had been purchased abroad without prior authorisation as required by national legislation.

In Mr. Kohll’s case, also a Luxembourg national, the plaintiff had made a prior request for authorisation from the Luxembourg “Union des caisses de maladie” to which he was affiliated. He had requested authorisation for his daughter to receive orthodontic treatment in Trèves (Germany). He was refused on the grounds that the required treatment was not of an urgent nature and that adequate treatments were already available in Luxembourg.

In reality, Article 22(1) of Regulation 1408/71 authorises the competent institutions to make the reimbursement of medical expenses chargeable to them subject to prior authorisation<sup>115</sup>, but in accordance with the tariffs in force in the State where the benefits had been administered or the products purchased.

However in this case, Messrs. Kohll and Decker had called for the reimbursement of a medical treatment and the purchase of a pair of spectacles at the tariffs in force in Luxembourg, the Competent State. The Court dismissed for this reason the pertinence of Article 22 of Regulation 1408/71 in respect of the dispute, stating: “interpreted in the light of its purpose, [Article 22 of Regulation No 1408/71] is not intended to regulate and hence does not in any way prevent the reimbursement by Member States, at the tariffs in force in the competent State, of the cost of medical products purchased in another Member State, even without prior authorisation” (Decker, par. 29) or the costs incurred as a result of medical treatment provided in another Member State, even in the absence of prior authorisation” (Kohll, par. 27).

---

<sup>114</sup> See our paper “The Freedom to choose medical products and treatments for European citizens; social consequences of the internal market”, *Cahiers de droit européen*, 1998, p.683.

<sup>115</sup> Which however, in accordance with Article 22(2) must be granted when the care in question, in view of the medical condition of the insured person, cannot be provided in a sufficiently timely fashion.

**61.** The Court was invited to rule on the compatibility of the national legislation in these cases with sole regard to the **obstacles** it presented to the free movement of goods in respect of Articles 30 and 36 of the EC Treaty(now, after amendment, Articles 28 and 30 EC) (C-120/95), and the free provision of services by enterprises, especially with regard to the beneficiaries of these services, pursuant to Articles 59(now, after amendment, Article 49 EC) and 60 of the Treaty (now article 50 EC) (C-158/96).

In both cases, the Court considered that the rule concerning prior authorisation, a condition for reimbursement by the State of affiliation, constituted a barrier both to the free movement of goods and free provision of services, emphasising that the legislation in question was a disincentive to the purchase of medical products or recourse to treatment in a Member State other than that where the plaintiffs were insured (Decker, par. 36; Kohll, par. 35).

**62.** The Court was even more detailed in its examination of the justifications provided regarding the protection of public health, within the meaning of Article 36 of the Treaty.

As regards the protection of public health and the need to guarantee **access to quality treatment** for all insured persons, the Court in its ruling on Decker, referred to EEC Directive 92/51 on a second general system for the recognition of professional education and training (OJ L 184),<sup>116</sup> which “means that the purchase of a pair of spectacles from an optician established in another Member State provides guarantees equivalent to those afforded on the sale of a pair of spectacles by an optician established in the national territory” (par. 43).<sup>117</sup> The Court was even more specific in its ruling on Kohll. Regarding Community rules on the co-ordination and harmonisation of the conditions governing the exercise of the profession of doctor and dentist in the Community, it ruled that this means all doctors and dentists who are established in another Member State “must be accorded all the guarantees equivalent to those afforded to doctors and dentists established on the national territory in order to ensure the free provision of services” (par. 48).

The Luxembourg government in the case of Kohll, and with respect to the issue of public health, also invoked the need to ensure a **balanced and accessible hospital service for all affiliated persons**. The Court’s position was less clear-cut on this issue. It conceded that this objective, although strictly linked to the question of the financing of national social security systems, could nonetheless be subject to derogations for reasons of public health within the meaning of Article 56 of the Treaty, to the extent that it contributed to the achievement of a high standard with regard to the safeguarding of public health (paragraph 50).

Having said this, the Court considered that in this instance, it had not been established that the contested legislation was “indispensable to the maintenance of a healthcare service or medical expertise on the national territory”. **Meaning that a regulation which proved restrictive to the free provision of services, but which was justified on the grounds that**

---

<sup>116</sup> OJ L 184, p. 21.

<sup>117</sup> Furthermore, the Court noted that in the proceedings at issue, the glasses had been purchased on prescription by an ophthalmologist, ensuring a supplementary protection of public health (par. 44).

**it was necessary in order to ensure an accessible and regular healthcare service and hospital facilities, could be justified within the meaning of Article 56 of the Treaty<sup>118</sup>.**

Finally, this justification is strictly linked to the fundamental principle of general interest, liable to justify the obstacle which is represented by **the need to maintain a financial balance across social security systems** and therefore to limit spending on health.

Certainly, it should be remembered that objectives of a purely economic nature cannot justify a barrier to the fundamental principle of free provision of services (see in this sense, judgments of 5 June 1997, SETTG, C-398/95, E.C.R. p. I-3091, par. 23, and Kohll, abovementioned, par. 41). However, it cannot be excluded that the risk of seriously undermining the financial balance of the social security system may constitute an overriding reason in the general interest capable of justifying a barrier of that kind. (Decker, par. 39, and Kohll, par. 41).

Having said this, the Court held that such a risk had not been established in these cases. In fact, on the one hand, it found that “the reimbursement at a flat rate of the cost of spectacles and corrective lenses purchased in other Member States has no effect on the financing or balance of the social security system” (Decker, par. 41) and, “the reimbursement of dental charges accrued in another Member State according to the tariffs in force in the State of affiliation, would not have a significant impact on the financing of a social security system” (Kohll, par. 42).

**63.** In conclusion, while reaffirming the validity of Article 22 of Regulation 1408/71, whose scope was limited to the reimbursement of medical costs at the tariffs in force in the country of stay “including the granting of sickness benefits accorded by the State of affiliation”, the Court considered that a system based on obtaining prior authorisation, as in Luxembourg, was contrary to Articles 30, 59 and 60 of the Treaty.

However, the Court was not hostile to all the justifications put forward for the existence of barriers to the freedoms in question.

ii) Judgments re Vanbraekel, Smits and Peerboms, with respect to hospital charges.

**64.** The judgments of the Court on Kohll and Decker had to do with medical benefits outside of the hospital system. The question then arose as to whether the grounds for the conclusions (acknowledgement of a barrier and the analysis of justifications put forward)

---

<sup>118</sup> On this issue, the conclusions of the Advocate General are more explicit. Mr. Tesouro referred to situations where the management and number of hospitals, by contrast to private medical practices “are a function of the planning of needs” (E.C.R. p. I-1686). “It is self-evident that if large numbers of insured persons were to turn to hospitals located in the territories of other Member States, then national structures would be partially un-used, while continuing to bear fixed costs in terms of staff and equipment which would remain unchanged regardless of whether they were being utilised to the full or not ” (pp. I-1868-1869). In these circumstances the reimbursement by the competent institution of medical services provided in the hospitals of other Member States, would, even on the basis of a fixed amount, represent an additional financial cost for the system concerned and could reasonably be made subject to prior authorisation, in order to ensure the balance of the underlying financial system as well as the maintenance of a service accessible to all.



were equally applicable to benefits administered by hospitals? The response (after the Court delivered its judgment on 12 July 2001 Vanbraekel C-368/98 and on Smits and Peerboms, C-157/99, abovementioned) was clearly in the affirmative:

- in the first case, the proceedings concerned the refusal by a Belgian sickness insurance fund to reimburse hospital treatment costs incurred in connection with orthopaedic surgery on the ground that the request was not adequately supported, since the plaintiff had failed to provide the opinion of a doctor practising in a national university institution at a hospital in France;
- the second concerned the refusal by a Netherlands sickness insurance fund to reimburse hospital appropriate and adequate treatment for the illness in question was already available in the Netherlands.<sup>119</sup>

The judgments of 12 July 2001 are instructive from the point of view of **justifying obstacles to the free provision of services**.

**65.** In the Vanbraekel proceedings the Court recalled that the risk of seriously undermining the financial balance of a social security system might constitute an overriding reason in the general interest capable of justifying a barrier to the principle of freedom to provide services, but did not accept, in this instance, the existence of such a risk as the plaintiff was in fact entitled to obtain the authorisation provided for by the national legislation under which she was covered and by Article 22(1)(c) of Regulation No 1408/71. In such circumstances, it could not be claimed that payment of additional reimbursement, covering the difference between the system of cover laid down by the legislation of the Member State of registration and that applied by the Member State in which the treatment was provided, when the former is more advantageous than the latter, would be liable to jeopardise the maintenance, in the Member State of registration, of “a balanced medical and hospital service open to all”. Furthermore, this did “not in theory impose any additional financial burden on the sickness insurance scheme of that State by comparison with the reimbursement to be made if hospital treatment had been provided in that latter State”.

**66.** The proceedings of Smits and Peerbooms were even more interesting in that they revolved around a dispute on a so-called **benefits in kind regime**<sup>120</sup>. In this instance the Netherlands regime guaranteed benefits in kind and was based on a system of agreements made between sickness funds and providers of health care, while the judgments on Kohll and Decker were made with regard to a so-called “reimbursement” sickness insurance regime (Luxemburg)<sup>121</sup>.

---

<sup>119</sup> Mrs Smits suffered from Parkinson’s disease and had undergone treatment for the condition in a clinic in Germany. Mr. Peerbooms had fallen into a coma following a road traffic accident and had been transferred in a vegetative state to a clinic in Austria.

<sup>120</sup> The questions raised as the application of established case-law in Kohll and Decker to this kind of scheme (which exists not only in the Netherlands but also in Austria and in Germany) were also raised as regards national health services that guarantee universal cover to the entire population of the Member State (UK and Ireland - centralised service, and Spain, Italy, Portugal, Greece, Denmark, Finland and Sweden – decentralised service).

<sup>121</sup> However the costs of the vast majority of hospital services, in Luxembourg, are assumed directly by the *Union des caisses de maladie* (UCM); where no individual tariffs of reimbursement have been established, they are made directly by the hospitals themselves (see R. Kieffer “Notes on the nature of hospital services in Luxembourg and

In this instance the law in the Netherlands made the reimbursement of medical costs for hospital treatments by a non-contracted care provider (whether this is in the Netherlands or abroad) conditional upon prior authorization by the sickness insurance fund. Authorisation was granted on two conditions. First, if the treatment envisaged could be “regarded as normal in the professional circles concerned” and second, if adequate care cannot be provided without undue delay by a care provider which has entered into an agreement with a sickness insurance fund in the first Member State. Such conditions, were by their very nature, liable to impose strict limits on obtaining such authorisation, and therefore constitute an obstacle to the free provision of services. While it is true that the problem was equally present for non-contracted providers of medical services in the Netherlands, and that the Netherlands sickness insurance funds were entirely free to enter into agreements with foreign providers, it was nonetheless the case that in reality, insured persons wishing to benefit from treatment by providers established outside of the Netherlands were more often required to obtain prior authorisation than insured persons who availed of providers based on the national territory. The fundamental question for the Court then, was to establish whether the prior authorisation requirement and the conditions to which its granting was subject, could objectively be justified by the presumed existence of a “serious risk to the financial balance” of the Netherlands social security system.

In view of the “distinct characteristics” of the medical services provided in a hospital environment, that the system of prior justification was justified. In fact, “the number of hospitals, their geographical distribution, the mode of their organisation and the equipment with which they are provided, and even the nature of the medical services which they are able to offer, are all matters for which planning must be possible” (par. 77), in order to guarantee “sufficient and permanent access to a balanced range” of high-quality hospital treatments as well as to ensure cost-control and to avoid wastage of resources.(par. 79).

“.....it is clear that, if insured persons were at liberty, regardless of the circumstances, to use the services of hospitals with which their sickness insurance fund had no contractual arrangements....all the planning which goes into the contractual system .... would be jeopardised at a stroke. (par. 81). This is the summary of the considerations made by Advocate General Tesauro in his summing up of the Kohll and Decker proceedings (see par. 62 above).

Regarding the conditions set by the Netherlands fund for the purposes of obtaining authorisation, and more specifically the condition linked to the normal nature of the treatment ; while the Court recalled the general rule for Member States to define the range of medical services covered by their social insurance system (see judgment of 7 February 1984, Duphar and Others, 238/82, E.C.R. p. 253, par. 89), it nonetheless judged that this condition, in order to conform to the principle of non-discrimination cannot be based **only** on “normal treatments carried out on the national territory or existing scientific literature and thinking within national professional circles” as this would risk creating a prejudice in favour of providers of medical services based in the Netherlands. On the contrary, in order to be objective, the condition that treatment must be regarded as “normal” must be extended in

---

on the justification for the prior authorisation requirement for treatment abroad”, (*Bull. luxembourgeois des Questions sociales*, vol. 9, 2001, p. 1).

The so-called reimbursement scheme is currently applied in France and Belgium.

such a way that “where treatment is sufficiently tried and tested by international medical science”, the authorisation sought cannot be refused on that ground (paragraphs 97 and 98).

Secondly, concerning **the necessary character of the proposed treatment**, the Court held that this could be justified with regard to the provision of free services, so long as the authorisation was refused only when “the same or equally effective treatment can be obtained without undue delay from an establishment with which the insured person's sickness insurance fund has contractual arrangements (par. 103). This condition is, in fact, liable to “allow an adequate, balanced and permanent supply of high-quality hospital treatment to be maintained on the national territory and the financial stability of the sickness insurance system to be assured” (par. 105).

Note again the active role that is expected of the Judges in the national Courts in order to guarantee the full effects of Community law. This is one of the key characteristics of the Community's legal system, and especially after the judgment of 9 March 1978, *Simmethal* (106/77, E.C.R. p. 629, par. 21).

**67.** In the judgments on *Kohll* and *Decker* the Court dismissed the very principle of prior authorisation for access to non-hospital medical benefits, except where it had been clearly demonstrated that a **serious** risk existed to the financial balance of a social security system or that the need to ensure a balanced medical system, accessible to all and capable of ensuring a high level of health protection was jeopardised. By contrast, in the judgments on *Smits* and *Peerbooms*, the Court accepted the principle of prior authorisation with regard to costs incurred as a result of hospital care, but nonetheless carefully delineated the framework in which national insurance funds could motivate and thereby justify refusals to authorise reimbursement.

### iii) Judgment of the Court of Justice in Joined Cases C-385/99 *Müller and Fauré*

**68.** The judgment of 13 May 2003, *Müller-Fauré* (C-385/99, E.C.R. p. I-4509) clarified many doubts regarding the established case-law of the Court. The case is of particular interest in that it concerns in part charges for **non-hospital care assumed by a benefits in kind regime** (Netherlands).

The main proceedings of the case were as follows:

- Mrs Müller applied to the *Zwijndrecht* sickness insurance fund to assume the costs of dental treatment (the fitting of six crowns and a fixed prosthesis on the upper jaw) which she underwent during a holiday period, in October/November 1994, in Germany;
- Mrs Van Riet, who had been suffering from pain in her right wrist since 1985, requested that the Amsterdam Fund assume the costs of an arthroscopy and an ulnar reduction which she underwent in May 1993, in Belgium. Care before and after the treatment, and the treatment itself, were provided in Belgium, partly in hospital and partly elsewhere.

In both cases, it is not the coverage of care by the Netherlands insurance fund in itself that was at issue, but rather the consequences of the effective assumption of the care provided, without prior authorisation, by a doctor/dentist in a medical institution which had no agreement with the fund (which is almost always the case when medical treatments are provided outside of national territories).

Was the Court obliged to rule in accordance with its judgment on Kohll and Decker (i.e. no prior authorisation necessary, except where duly demonstrated on a case by case basis) or, in accordance with Smits and Peerbooms (prior authorisation admissible which however, cannot be refused on certain grounds liable to jurisdictional verification) given the inherent characteristics of the benefits in kind regime where an agreement exists with the insurance fund?

On the taking into account of the essential characteristics of a national sickness insurance regime.

**69.** Up to the present day, the Court has had the opportunity to rule on the consequences of the free provision of services (healthcare) and the free movement of goods (medical products) in the above proceedings which involved:

- both a so-called reimbursement system, in terms of access to non-hospital treatments<sup>122</sup> and care received within hospital structures<sup>123</sup>,
- both a benefits in kind system, by virtue of which insured persons have the right to receive benefits free of charge, but only in so far as this implied access to hospital-based care.<sup>124</sup>

But to what extent is the distinction between the two categories pertinent?

This question was at the centre of the proceedings. There were three basic reasons which enabled the Court to dismiss the argument of the essential characteristics of the national sickness insurance system at issue:

- already in the framework of the application of Regulation 1408/71, Member States having established a benefits in kind system, or a national health system, are bound to set up mechanisms for the *ex post facto* reimbursement of care provided in another Member State than the Competent State. This is equally true of cases where the formalities could not have been fully carried out during a stay of the concerned party in the latter State (see Article 34 of Regulation 574/72), or where the competent Member State specifically authorised, in accordance with Article(1)(c) of Regulation 1498/71, access to healthcare abroad.

---

<sup>122</sup> Kohll and Decker.

<sup>123</sup> Vanbraeckel.

<sup>124</sup> Smits and Peerbooms.

– the cover guaranteed to the insured person who goes to another Member State for treatment is, in any case, that of the sickness insurance regime of the State of affiliation, according to the conditions to which the granting of benefits is subject – so long as, clearly, these conditions are not discriminatory and do not constitute an obstacle to the free provision of services.;

– finally the Court observed, that there is nothing to hinder a competent Member State where there is a benefits in kind system in place, from setting limits on the amount of reimbursement to which patients who have received care in another Member State shall be entitled to, so long as the amounts are set according to objective, non-discriminatory and transparent criteria.

In other words, the needs of persons with respect to free movement implies making adjustments to national sickness insurance systems, which however, do not undermine the sovereignty of Member States, who continue to decide the range of cover guaranteed under the respective national legislations.

#### Distinguishing between services provided by hospitals and other institutions

**70.** In reality, this debate raises a series of difficulties encountered by persons affiliated to a benefits in kind system (or national health service) due to long waiting lists, as a result of the need to define medial priorities and the extent of available financial resources. In order to avoid long delays, an insured person will naturally be tempted to seek care in another Member State and claim reimbursement of the costs from the competent sickness fund, even when the national system guarantees the administration of care free of charge based on a system of agreements.

In general then, the issue is that of how to control expenses in healthcare. A system based on agreements between healthcare providers and insurance funds – which can, furthermore, co-exist with a so-called reimbursement system – is generally based on the prior negotiation of tariffs, the nature of interventions and prescriptions (choice of treatments, medicines, medical projects, duration of stay in hospitals), in order to not exceed what is strictly necessary for recovery, given that the demand for care is mostly generated by the medical corps itself. The agreement system therefore constitutes an efficient means for Member States to control and act to ensue a financial balance in their sickness insurance systems.

Certainly, there are more radical ways to limit expenses, such as for example the lowering of reimbursement rates or the decrease in medical intervention and prescriptions. However, recourse to such measures would imply a transfer of additional charges to insured persons and effectively lead to making access to healthcare more difficult for persons with low-level insurance, thereby reducing the level of health protection.

It follows that the removal of the condition that there should be a system of agreements in respect of services supplied abroad would adversely affect the ways in which health-care expenditure may be controlled. But would the financial balance of national social security systems be seriously upset? And could the overall level of public-health protection be jeopardised as a result? Therein lies the question: bearing in mind that considerations of a

purely economic nature can never, in and of themselves, justify a barrier to the fundamental principle of the free provision of services.

In this regard the prudent approach of the Court's established law (in the last instance in the judgment on Müller-Fauré, paragraphs 75 to 98) is founded on a distinction between medical services provided by a practitioner in his surgery and those provided in a hospital establishment.

In the first case, it must be stated that services provided by a practitioner in his surgery do not represent the lion's share of sickness insurance costs in Member States. In any case, according to the Court, nothing indicates that removing the requirement for prior authorisation for that type of care would give rise to patients travelling to other countries in such large numbers, despite linguistic barriers, geographic distance, the cost of staying abroad and lack of information about the kind of care provided there, that the financial balance of social security systems would be seriously upset and that, as a result, the overall level of public-health protection would be jeopardised - which might constitute proper justification for a barrier to the fundamental principle of freedom to provide services. (Par. 95).

As for care provided by hospitals, the Court has already accepted, as we have seen in Smits and Peerbooms, the principle of prior authorisation, which can only be refused on the basis of objective reasons, made known in advance, and without any arbitrary behaviour on the part of national authorities.

Among these reasons, according to the Court, there is the possibility for the patient to benefit from the same or equally effective treatment "without undue delay" on the territory of the Competent State (see par. 103 of the judgment). This expression "without undue delay" certainly requires some clarification by the Court: must it be based on purely objective motives of a medical kind, including the probable course of the disease ; or can one take into account more subjective factors, such as the degree of pain, the nature of the disability, the personal situation of the concerned party, or even the foreseen length of time envisaged before obtaining treatment i.e. length of waiting list in the Competent State?

The Smits and Peerbooms judgments already provided an indication in this regard, under par. 104, where the Court called on national authorities must «have regard to all the circumstances of each specific case, not only the patient's medical condition at the time when authorisation is sought, but also of his medical history». The Müller-Fauré judgment makes two substantial additions:

– on the one hand, regarding the **circumstances of each specific case**, that the national authorities are required to take due account of both the «degree of pain» or «the nature of the patient's disability» which might, for example, make it impossible or extremely difficult for him to carry out a professional activity (par. 90). In this way the Court has upheld a particularly wide interpretation of the concept of «medical condition»;

– on the other hand, «*a refusal to grant prior authorisation which is based not on fear of wastage resulting from hospital overcapacity but solely on the ground that there are **waiting lists** on national territory for the hospital treatment concerned, without account*

*being taken of the specific circumstances attaching to the patient's medical condition, cannot amount to a properly justified restriction on freedom to provide services. On the contrary, a waiting time which is too long or abnormal would be more likely to restrict access to balanced, high-quality hospital care.» (par. 92).*

b) Childbirth benefits

**71.** Article 1(u)(i), of Regulation 1408/71 excludes from the notion of family benefits within the meaning of the same regulation “special childbirth or orphan allowances mentioned in Annex II”, among which are listed “prenatal allowances” and “childbirth benefits” in Luxembourg. This exclusion means that these allowances are not-exportable as per Article 73 of the regulation. This latter article lifts all conditions of residency of family members to which the granting of “family benefits” might otherwise have been subject..

Asked to rule on the legality of this exclusion, the Court recalled, in its judgment on Leclere and Deaconescu, abovementioned that:

*“Having regard to the wide discretion which the Council enjoys in implementing Articles 48 and 51 of the Treaty (See Case C-360/97 Nijhuis [1999] ECR I-1919, paragraph 30), the fact that a category of benefits is not affected by the co-ordination provisions of Regulation No 1408/71 cannot on any view render the relevant provisions of that regulation invalid. Restriction of the scope of Regulation No 1408/71 cannot in itself have the effect of adding further disparities to those resulting from the lack of harmonisation of national legislation or of infringing the principle of equal treatment ” (par. 29).*

Again, the Court declared it was incumbent on Member States to ensure that “no other rule of Community law, deriving in particular from Regulation No 1612/68, precludes the imposition of a residence condition.” (par. 31). Here the Court was clearly thinking about the principle of equal treatment, in terms of social benefits, enunciated in Article 7(2) of the regulation

However, the concerned party, in order to avail of this provision, must qualify as a worker. Given that, in the proceedings at issue, Mr. Leclere, resident in Belgium, received an invalidity pension from the Grand Duchy of Luxembourg; he was protected under Article 48 of the Treaty (now, after amendment, Article 39 EC) against any discrimination affecting rights acquired during the former employment relationship but, since he was no longer engaged in an employment relationship, he could not thereby claim to acquire new rights having no links with his former occupation (par. 59).

In fact, Mr. Leclere fathered a child **after** the termination of his work relationship and could not found his argument on Article 7 of Regulation 1621/68 in order to claim childbirth benefits in Luxembourg.

c) Unemployment benefits

**72.** The retention of acquired rights in the field of unemployment insurance is guaranteed by two provisions in Chapter 6 of Title III of Regulation 1408/71. The first concerns the payment of unemployment benefits to unemployed persons who are seeking employment in a State other than the competent State. The second concerns the acquisition of rights to

unemployment benefits in favour of unemployed persons, who when employed, were resident in a State other than the competent State.

**73. Payment of unemployment benefits to persons seeking employment in a State other than the competent State.** Article 69 of the regulation lays down the conditions for the retention of rights for unemployed workers who go to other Member States in search of employment to benefits. Such rights may be maintained for up to a maximum of three months (unless subject to prolongation). Article 70 establishes the rules for the provision of benefits (to be provided by the institution of each of the States to which an unemployed person goes to seek employment) and the reimbursement of these benefits by the competent institution.

Note that unemployment-insurance, at the Community level, continues to be largely dominated by the principle of territoriality. It is hard to deny that the non-exportability of unemployment benefits does little to encourage the free movement of workers, especially in period of depression in the labour-market. In periods of crisis the worker is ultimately discouraged from returning to or leaving his country of origin to pursue his professional activities, if he knows that were he to become unemployed, he would be obliged to remain in the host country in order to retain his entitlement to unemployment benefits (except under the circumstances provided for in Article 69 of the Treaty). The above considerations did not, however, prevent the Court of Justice from acknowledging in joined cases 41, 121 and 796/79 (Testa and Others)<sup>125</sup>, that Article 69 is nonetheless compatible with former Article 51 of the Treaty, given that it does not prevent single legislations from attaching conditions to the rights and advantages which it accords in order to ensure freedom of movement for workers or from determining the limits thereto<sup>126</sup>.

**74. Acquisition of rights to unemployment benefits by frontier workers and seasonal workers.** Article 71 of the regulation establishes the rules for the granting of unemployment benefits in favour of (employed) workers who has become unemployed, and who, during the course of his last undertaking, resided in a Member State other than the competent State. In particular, with regard to frontier workers, (Article 71(a)(i)) states:

- in the case of partial or intermittent unemployment, the interested party shall receive benefits in accordance with the legislation of the country where he is employed (i);
- a frontier worker who is wholly unemployed shall receive benefits in accordance with the legislation of the Member State in whose territory he resides as though he had been subject to that legislation while last employed – the institution of the place of the residence shall provide such benefits at its own expense<sup>127</sup>(ii).

---

<sup>125</sup> Judgment of 19 June 1980, E.C.R. p. 1979.

<sup>126</sup> It is true that Community law does not formally guarantee the free movement of unemployed workers, or more precisely the right of an unemployed worker in one Member State to travel to, and stay in, another Member State in search of employment for an indefinite period of time: if he fails to find employment within a reasonable amount of time after his arrival, he may be requested to leave the State's territory (see Judgment of 26 February 1991, Antonissen, C-292/89, E.C.R. p. I-773).

<sup>127</sup> Regarding the calculation of unemployment benefits which are based on the last salary received, it follows from Judgment of 28 February 1980, Fellingner, C-67/69, Rec. p. 535, that, in the case of an unemployed frontier worker, the competent institution of the State in whose territory he resides, must calculate the benefits due taking into account the last salary that the worker received for an undertaking in a Member State immediately prior to his



The rule of affiliation to the legislation of the country of residence, set out in Article 71(1)(a)(ii) of the Regulation must be fully applied. Consequently this rule does not permit the institution of the State where the unemployed person resides, who is competent for payment of unemployment benefits to wholly unemployed frontier workers, to apply any rule on ceilings laid down in the legislation of the Member State of employment when calculating the benefits due.<sup>128</sup>

**75. Inclusion of family members.** According to Article 68(2) of Regulation 1408/71, while the amount of benefits may varies with the number of members of the family, members of the family who are residing in the territory of another Member State that that where the worker is employed shall also be taken into account (except when in the country of residence of the members of the family, another person is entitled to unemployment benefits for the calculation of which the members of the family are taken into consideration.)

d) Family benefits

**76.** Article 73 states that family benefits<sup>129</sup> are provided to employed and self-employed workers subject to the legislation of the first Member State for members of his family residing in the territory of another Member State, as though they were residing in the residing in the territory of the first State, subject to the provisions set out in Annex VI.

In this scenario, the benefits are provided by the competent institution of the State to whose legislations the employed worker is subject, in accordance with the provisions administered by such institutions, whether “whether the natural or legal person to whom such benefits are payable is staying, residing or situated in the territory of the competent State or in that of another Member State” (Article 75 (1) ).

Similar provisions govern the grant of family benefits to unemployed workers whose family reside in a Member State other than the competent State (see Articles 74 and 75 of Regulation 1408/71 and Articles 88 and 89 of Regulation 574/72).

In its judgment of 5 October 1995 (Martinez, C-321/93, E.C.R. p. I-2821), the Court further clarified the scope of Article 73.

The dispute centred on the calculation of family benefits under German law.

---

becoming unemployed (by analogous application of Article 68(1) or Regulation No 1408/71, given that the case of the frontier worker had clearly not been taken into account when drawing up this Article).

<sup>128</sup> See Judgment of 1 October 1992, Grivard and Kreitz, C-201/91, E.C.R. p. I-5009.

<sup>129</sup> Under Article I (u) of Regulation No 1408/71 the concept of “family benefits” is defined as meaning all benefits “intended to meet family expenses” excluding the special childbirth allowances mentioned in Annex II of the Regulation. The term “family allowances” on the other hand is defined referring only to “periodical cash benefits granted exclusively by reference to the number and, where appropriate, the age of members of the family”. It is worth adding that since the nature of, and conditions governing, the granting of special adoption allowances are similar to childbirth allowances, it is advisable to consider that they are excluded from family benefits (under (u) ).

(“supplementary allowance”). The calculation of the allowance in Germany was indirectly<sup>130</sup> subject to the worker’s children and spouse being resident in German territory. The question put to the Court was whether the national fund should also take into account cases where the children and spouse were resident in another Member State and allocate funds as though they were resident in Germany?

The Court responded in the affirmative. The fact that the condition of residency is not referred to in the legislation relative to family benefits per se, but rather in the fiscal legislation to which social legislation refers in order to identify the beneficiaries and total amount due, did not prevent the competent institution, in accordance with Article 73, from taking into account, for the purposes of calculating the allowance due, the residence of a child in another Member State as though he resided in the competent State.

Furthermore, according to the Court, Article 73 of the regulation also implied that for the purposes of calculating the benefit, a spouse who resided in the territory of another Member State should be treated as though resident in the competent State. Again, this was in conformity with the stated objective of Article 73 which promotes the free movement of workers in the community..<sup>131</sup>

**77. Child-raising allowance in favour of the worker’s spouse.** Article 73 is equally applicable in the case of an child-raising allowance in favour of a spouse, who is resident, along with the worker and their children, in a Member State other than the State of employment (judgment of 10 October 1996, Hoever and Zachow, C-245 and 312/94, E.C.R. p. I-4895). This Article is entirely aimed at preventing a Member State from making the grant of family benefits dependant on the worker’s family being resident in the competent State, so as not to dissuade community workers from exercising their right to freedom of movement (see also Martinez, cited above, par. 21). In the case in point, the granting of a child-raising n allowance under German law, considered by the court as constituting a family benefit, was subject to the spouse who did not reside in Germany, exercising an employed activity in Germany.

**78. Spouse’s entitlement.** It is appropriate to note that Article 73 does not consider it necessary for the spouse to carry out an activity in the competent Member State. It refers precisely to a situation where the family of a worker resides in another Member State. For the

---

<sup>130</sup> Subject to certain fiscal provisions concerning tax allowances for dependant minors and joint tax allowances for spouses. In some cases these provisions made the granting of certain tax advantages (“splitting” of married persons income) conditional upon the residence of children and/of of the spouse being in the national territory. In other cases the tax allowance as calculated on a pro rata basis depending on the duration of the tax liability under the German tax system.

In the case in par., the amount of the supplementary allowance paid to Mr. Martinez was the result of an indirect and combined application of these fiscal measures.

<sup>131</sup> See also Judgment of 10 October 1996, Hoever and Zachow, C-245/94 and C-312/94, E.C.R. p. I-4895, par. 34. In the Martinez case, the Court took the precaution of referring to Council Directive 79/799 EEC of 19 December 1977, regarding mutual assistance between competent authorities in the field of direct taxation (OJ 1977 L 336, p. 15) which provides for ways of overcoming administrative difficulties in taking into account the personal and family circumstances of non-residents.

purposes of granting family benefits, it is not relevant whether in fact the spouse has never resided in or been employed in the State to whom the legislation applies<sup>132</sup>.

**79. Employment office.** Bearing in mind the objectives of Article 73 and 74, which is that of preventing a Member State from refusing family benefits on the sole grounds that the family members of the requesting party do not reside in the State providing the benefits, “a condition whereby in order to be entitled to certain family benefits, the worker’s child must be registered as unemployed with the employment office of the Member State providing the benefits. This condition can only be fulfilled if the child resides within the territory of that State and must be considered to be fulfilled where the child is registered as unemployed with the employment office of the Member State in which he resides”<sup>133</sup>.

d) Benefits for dependent children of pensioners and orphans

80. Articles 77 and 78 of Regulation 1408/71 broadly defines the applicable legislation for the granting of benefits to dependent children of pensioners and orphans, irrespective of the Member State in whose territory the “the pensioner or the children” are residing and, where applicable, the “orphan or the natural or legal person actually maintaining him is resident or situated” (see especially Articles 77 (2) and 78 (2) ).

The system, as established by the rules, waives all clauses on residency which otherwise would condition the acquisition of the right to such benefits. The rules may be summarised as follows<sup>134</sup>.

Article 77 (2) establishes two different schemes for the payment of benefits to **dependent children of pensioners**, that apply according to whether they receive such benefits subject to the legislation of one, or several, Member States.

- In the first case, the benefits are due in accordance with the legislation of the Member State responsible for the pension (Article 77 (2) (a) ).
- If the pensioner draws pensions under the legislation of more than one Member State and resides in one of the two States, where he is entitled to a child allowance, these benefits are granted according to the legislation of this State (Article 77 (2) (b) (i) ).

In other cases, the pensioner receives benefits according to the legislation under which he has completed the longest insurance period, if the right is acquired under such legislation. If not, the “conditions for the acquisition of such right under the legislations of the other States concerned shall be examined in decreasing order of the length of insurance periods completed under the legislation of those States” (Article 77 (2) (b) (i)). In a case where the effect of applying these rules would be to make several Member States responsible, the length of the

---

<sup>132</sup> Judgment of 16 July 1992, Hughes, C-78/91, E.C.R. p. I-4839.

<sup>133</sup> Judgments of 22 February 1990, Bronzino, 228/88, E.C.R. p. I-549; of 22 February 1990, Gatto, C-12/89, E.C.R. p. I-557.

<sup>134</sup> For rulings on the “differential supplement”, see supra 41.

insurance periods being equal, benefits shall be granted in accordance with the legislation of the Member State to which the worker was last subject (Article 79 (2))<sup>135</sup>.

In the case of **orphans' benefits**, it is advisable to refer to the rules of calculation contained in the chapter entitled "Pensions" of the Regulation (Chapter 3 of Title III) inserted following the approval of Regulation No 1399/1999 of 29 April 1999 (OJ L 164, 30 June), amending Regulation 1408/71. (Unless the deceased, at any time, was insured "under a scheme which accorded only family benefits or supplementary or special benefits to orphans" (new Article 78a)<sup>136</sup>).

When the benefits constitute family benefits or supplementary or special allowances for orphans, they come under the scope of Chapter 8 (Article 78 (1) ). The rules on the determination of applicable legislation are similar to those governing benefits for dependant children of pensioners.

- If the deceased worker was subject to the legislation of one Member state only, the orphan is entitled to benefits in accordance with the legislation of that State (Article 78 (2) (a) ).
- If the deceased worker was subject to the legislation of two or more Member states and if the orphan resides in the territory of one of the two States where the right was acquired, these benefits will be granted in accordance with the legislation of that State (Article 78 (2) (b) (i) ).

In other cases, the benefits are granted in accordance with the legislation of the Member State under which the deceased worker had completed the longest insurance period provided that, the right to the benefits referred was acquired under the legislation of that State. If not, "the conditions for the acquisition of such right under the legislations of the other States in question shall be examined in decreasing order of the length of insurance periods completed under the legislation of these Member States" (Article 78(2) (b) (i) ). In a case where the effect of applying these rules would be to make several Member States responsible, the length of the insurance periods being equal, benefits shall be granted in accordance with the legislation of the Member State to which the worker was last subject (Article 79 (2) ).

The benefits are provided, in accordance with Article 79, according to the legislation determined in Articles 77 and 78, by the institution responsible administering such legislation and at its expense, as though the pensioner or the deceased person had been subject only to the legislation of the competent State.

**81. Restrictions on the exportation of family benefits.** Articles 77 (1) and 78 (1) of the Regulation restrict the exportation of benefits in as much as they only grant "family allowances" and not "family benefits" within the meaning of Article 1 (u) to pensioners or orphans who stay in a Member State other than the competent State.

---

<sup>135</sup> For a concrete example of Article 77 (2) (a) and (b), see Judgment of 14 March 1989, Baldi, 1/88, Rec. p. 667, par. 21.1.

<sup>136</sup> These schemes are listed in Annex VII to the Regulation.

In its ruling on Lenoir, 27 September 1998 (313/86, E.C.R. 5391), which concerned the conditions governing the granting of family benefits, the Court observed that these kinds of benefits “are in most cases closely linked with the social environment and therefore with the place where the persons concerned reside” (par. 16). This is a most significant point in the ruling as it illustrates the extent to which the Council is obliged to guarantee acquired rights in the field of social security, in favour of workers who move within the Community and of their families.

#### CHAPTER 4 THE RETENTION OF ACQUIRED RIGHTS

**82.** The acquisition to rights to social security benefits is subject to the completion of periods of employment, insurance or residence. It follows that a change of country of employment or residence may give rise to grave consequences for workers or their families if the concerned party has not completed, under the legislation of the competent State, the period necessary to acquire rights to the benefits. This is particularly true of rights to long-term benefits - if the worker under the various legislations to which he is affiliated has not completed the minimal periods necessary to gain entitlement to a pension which is comparable to that which he would have been granted had he spent his entire working life in a single State.

The importance of the principle of the retention of rights, enshrined in international law, is self-evident. To guarantee it, two well known techniques must be used: aggregation and the paying of benefits on a pro rata basis.

##### Paragraph 1: Aggregation of insurance periods

**83.** Article 42 (a) of the Treaty, on the right of workers to free movement within the Community, and especially with regard to social security, specifically provides for “the aggregation of all periods taken into account under the various national legislations for the purpose of acquiring and retaining the right to benefits, as well as of calculating the amount of benefits”.

The technique of aggregation must be taken into account both in order to acquire rights as well as for the purposes of calculating long-term benefits which are linked to the duration of the worker’s career (old-age, survivor and invalidity benefits). This is true even when the legislation of a Member State makes entitlement conditional to the completion of training periods which workers did not complete in that State, but which must be calculated as though they had. The institution of a Member State must therefore, take into account the periods completed by the migrant worker in any other Member State, “without discrimination against other workers by reason of the exercise of his right to freedom of movement”<sup>137</sup>.

---

<sup>137</sup> Judgment of 13 July 1966, Hagenbeek, 4/66, E.C.R. p. 625.

The rule on the aggregation of periods of insurance (or, as the case may be, on the aggregation of periods of employment or non-salaried work, or of residence), completed under the legislation of two or more Member States, shall be applied in accordance with Articles 15 and 46 of Regulation No 574/72. The rules are also set out in several provisions of Regulation No 1408/71 relative to the different branches of social security<sup>138</sup>.

As regards old-age, survivor or invalidity pensions<sup>139</sup>, Article 45 (1) of the Regulation sets out the general rule governing aggregation: an institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits conditional upon the completion of insurance period shall take into account, to the extent necessary, insurance periods completed under the legislation of any Member State as though they had been completed under the legislation which it administers.

Where the legislation of a Member States makes the granting of certain benefits conditional upon the completion of insurance periods in an occupation subject to a special scheme applicable to employed workers (for example, miners) or, where appropriate, in a specific employment, periods completed under the legislations of other Member States are not taken into account for the granting of these benefits. This remains true unless these periods were completed under such a scheme or, failing this, in the same occupation or, where appropriate, in the same employment. If, taking into account periods thus completed, the person concerned does not satisfy the conditions for receipt of these benefits, those periods shall be taken into account for the granting of benefits under the general scheme or, failing this, under the scheme applicable to manual or clerical workers, as appropriate (Article 45 (2)).

Similarly, if the legislation of a Member State makes the granting of certain benefits conditional upon the completion of insurance periods in an occupation subject to a special scheme applicable to self-employed workers, periods completed under the legislations of other Member States shall be taken into account for the granting of such benefits only if completed under such a scheme or, failing this, in the same occupation. If, taking into account periods thus completed, the person concerned does not satisfy the conditions for receipt of these benefits, those periods shall be (subject to certain conditions) taken into account for the granting of benefits under the general scheme or, failing this, under the scheme applicable to manual or clerical workers, as appropriate (Article 45 (2)).

**84. Scope of the rule of aggregation.** Two of the Court's rulings regarding the aggregation of insurance periods (or, failing this, periods of employment or residence), which have been completed under the legislations of two or more Member States, considerably widened the scope of the rule beyond the issues of the acquisition of such rights and their calculation which had given rise to the original rule. The judgments in question are that of the

---

<sup>138</sup> Sickness and maternity benefits: Article 18; invalidity benefits: Articles 38 and 40(1); old-age and survivor benefits: Articles 45 and 48 (for periods of insurance or residence not exceeding one year); occupational diseases: Article 57(4); death: Article 64; unemployment: Article 67; family benefits: Article 72; benefits for child dependants of pensioners and for orphans: Article 79(1).

<sup>139</sup> When the person concerned has carried out their activities under two separate legislations: A (according to which the amount of invalidity benefits is calculated without reference to the duration of periods of insurance) and B (when benefits are tied to insurance periods). See 94 below.

26 of October 1995, Moscato, C-481/93 (E.C.R. p. I-3537) and Klaus, C-482/93 (E.C.R. p. I-3560).

Mr. Moscato, an Italian national, had worked first in Belgium and subsequently in Holland. He then became unemployed in Belgium before retaining to work in the Netherlands. But two months later, he was obliged to cease work for health reasons. Although he received sickness benefits payable by the Dutch sickness scheme, he was refused incapacity for work benefits by reference to Dutch national legislation on invalidity. The refusal was justified on the grounds that when Mr. Moscato took up his last employment in the Netherlands, his state of health clearly indicated that he would become incapable of working within six months.

The question put to the Court was whether the Dutch institution was entitled – in order to establish the duration of Mr. Moscato’s affiliation – to refer to the date on which the concerned party was affiliated to the Dutch system, not taking into account former periods of affiliation completed by him under the legislation of another Member State? The Court held that this was inadmissible. The rule on aggregation, as it appears in Article 42(a) of the Treaty and as implemented by Article 38(1) of Regulation 1408/71 regarding invalidity benefits, obliges the competent institutions to treat the worker as though he had worked for his entire career on its territory.

In the judgment re. Klaus, the Court reiterated this interpretation of the rule of aggregation, but in this case with regard to sickness insurance.

Ms. Klaus, a Dutch national, had worked at various times in Spain and in the Netherlands, and permanently, from October 1989, in the Netherlands. Just fifteen days after she took up her new employment in the Netherlands she was obliged to cease work due to back pains. The competent Netherlands’ sickness fund refused her application for benefits on the grounds that, on the 20 October 1989, the date on which her insurance cover resumed effect, she was already unfit to work.

In accordance with the objective of Article 38; Article 18 of the regulation was interpreted as meaning that the competent institutions must also take into account periods of insurance completed by the concerned party under the legislation of another Member State, as if those periods had been completed under the legislation which it administers. This is particularly true when the legislation of the competent State in question provides that the granting sickness benefits are not applicable if the worker was already unfit for work at the time when he became insured under the scheme.

**85. Civil servants.** Article 43a(2) and 51a(2) lays down the conditions for a derogation from the general principle of aggregation with regard to the liquidation of invalidity or old-age pensions which come under the special scheme for civil servants. If the legislation of a Member State makes the acquisition of rights to such benefits conditional upon the concerned party having completed all periods of insurance in the framework of either the special schemes for civil servants in that State or when such periods are assimilated to other periods completed elsewhere in virtue of that State’s legislation, only those periods of insurance which are acknowledged under the legislation in question will be taken into account. However, in order to avoid the loss of any insurance periods, should they of insufficient

duration necessary for the acquisition of rights to benefits under the special scheme, they can nonetheless be taken into consideration for benefits accorded by the general scheme.

**86. Conditions governing affiliation.** It is useful to recall that in this context, Regulation No 1498/71 essentially aims at achieving the co-ordination of national social security systems to guarantee the free movement of persons. It is not concerned with the harmonisation of the conditions governing affiliation. These conditions, as the Court emphasised in C-266/78, *Brunori*<sup>140</sup> are the sole competence of national legislations<sup>141</sup>.

It follows that the various provisions of the Regulation dealing with the aggregation of periods of insurance do not, in and of themselves, govern the question of prior affiliation to a national social security system, except as regards the taking into account of periods for the purposes of acquiring rights to benefits.

Article 9(2) of Regulation 1408/71<sup>142</sup>, “does not govern the other conditions to which the legislation of any Member State may make subject the acquisition of a right, such as the right to contribute to a national scheme of voluntary or optional continued insurance” (see aforementioned judgment of *Hartmann Troiani*, par. 16).

Given this, “it is for the legislature of each Member State to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch under such a scheme, provided always that in this connection there is no discrimination between nationals of the host State and nationals of other Member States” (see especially judgment in *Hartmann Troiani*, cited earlier, par. 21)<sup>143</sup>.

## **Paragraph 2: *The apportionment of benefits***

**87.** While the rule on aggregation was applied in favour of workers who completed periods of insurance, employment or residence in two or more Member States; it is clear that the worker will not receive from the competent State, the total amount of such benefits as though he had completed all of the periods in that territory. He receives a part of the national

---

<sup>140</sup> Judgment of 12 July 1979, E.C.R. p. 2705.

<sup>141</sup> See also judgments of 23 September 1982, *Koks*, 275/81, E.C.R. p. 3013; of 24 September 1987, *De Rijke*, 43/86, E.C.R. p. 3611; of 3 May 1990, *Kits*, C-2/89, E.C.R. p. I-1769.

<sup>142</sup> This article lays down the rule of aggregation in order to ensure the equivalence of insurance periods carried out in different Member States. In this way, concerned parties may fulfil the conditions regarding a minimum duration of insurance periods, in the case of a national legislation that makes the entitlement to voluntary or optional continued insurance conditional upon such minimum duration (Judgment of 18 May 1989, *Troiani*, 368/87, E.C.R. p. 1333, par. 15).

<sup>143</sup> Judgment of 20 October 1993, *Baglieri*, C-297/92, E.C.R. p. I-5228, paragraphs 12 and 13.



benefits to which he is entitled, in proportion to the period of time effectively spent in that State. This is the so-called system of pro rata payments or the distribution system<sup>144</sup>

This system only affects long-term benefits where the amounts due vary according to the duration of the career in question (old-age, invalidity and survivor benefits). It is only relevant for the purposes of calculating such benefits and does not affect the acquisition of rights by concerned parties.

**88. Principle of the intangibility of acquired rights.** The implementation of techniques for the aggregation of periods of training and for the pro-rata payment of benefits in respect of the retention of rights, has led to a significant body of corrective rulings on the matter by the Court of Justice. These corrective rulings were in fact based in general, on the principle of the intangibility of acquired rights in the field of social security under a national legislation. The underlying principle of Articles 39 and 42, which are often referred to as defining the foundation, the framework and the limits of the Community regulations, is that of removing the barriers to the free movement of workers within the Community. This objective could not be met if the application of Regulations were to bring about the elimination or reduction of social security benefits which a worker would otherwise enjoy under the single legislation of a Member State. Were this to occur, the worker would find himself in a less favourable situation than that guaranteed by national legislations<sup>145</sup>.

In conclusion, the sole aim of the techniques of aggregation and the corresponding mechanism of pro rata payments of benefits, is that of providing guarantees to persons who have worked in different Member States by ensuring they receive social security benefits which amount to at least as much as what they would have obtained had they only ever worked in one Member State. On the rule on aggregation or pro rata payments do not apply in the case of worker who, on the basis of employment or insurance periods completed in a Member State, is entitled under the legislation of that State to the whole of the amounts due, even if the worker could refer to this legislation to acquire the rights to benefits in another Member State<sup>146</sup>.

**89. Liquidation of pensions.** Article 46 of Regulation 1408/71 is of crucial importance when referring to the liquidation of pensions. Its application has been subject to many rulings of the Court of Justice, often “corrective”, in particular as regards the relationship between

---

<sup>144</sup> At times this system is replaced by the so-called “integration” system which accords full benefits subject to a single legislation. The Community rules apply this system to the branch of invalidity benefits when the concerned party was subject to type A legislation only.

<sup>145</sup> See among recent Judgments, those of 12 July 1984, Patteri, 242/83, E.C.R. p. 3171; of 6 October 1987, Stefanutti, 197/85, E.C.R. p. 3874; of 21 March 1990, Cabras, C-199/88, E.C.R. p. I-1049; of 22 February 1990, Bronzino, 228/88, E.C.R. 1990, p. I-549; of 7 March 1991, Masgio, C-10/90, E.C.R. 1991, p. I-1134.

<sup>146</sup> See for example, Judgments of 15 July 1964, Van der Veen, 100/63, mentioned above; of 9 June 1964, Nonnemacher, 92/63, also mentioned above; of 6 December 1973, Mancuso, 140/73, E.C.R. p. 1449; of 28 May 1974, Niemann, 191/73, E.C.R. p. 571; of 6 October 1987, Stefanutti, 197/85, E.C.R. p. 3874; of 9 July 1987, Burchell, 377/85, cited above.

Community law and national laws against overlapping, which abound in the field of old-age insurance<sup>147</sup>.

Community legislation acknowledged case-law in this regard by approving Regulation No 1248/92 of 30 April 1992<sup>148</sup>. This radically overhauled existing formulas for the liquidation of pensions: clarifying and simplifying those provisions which in the light of the Court's rulings, had become increasingly difficult to interpret. The Regulation came into force on 1 June 1992, and its general principles are outlined hereinafter.

**90.** Two calculations must be made when:

1. When the conditions for entitlement to benefits have been satisfied in a Member State without having to apply the rule on aggregation, the concerned party shall receive, from the competent institution of that State, a pension calculated only according to the provisions of the legislation which it administers; that is based solely on the periods completed under the legislation of that State (method of direct calculation) or *autonomous benefits*. Article 46(1)(a) )The institution shall also calculate the theoretical amount of the benefit to which the persons concerned could lay claim by applying the rule of apportionment (par. 2), and the person concerned shall be entitled to the highest amount calculated (Article 46(1)(a)(ii) and par. 3)<sup>149</sup>.

These calculations must take into account, when appropriate, national rules on overlapping.

2 When the conditions for entitlement to benefits have been satisfied in a Member State only after aggregating the periods of insurance or residence (or in order to establish the comparison of amounts as per 1 above), the concerned party shall receive from the competent institution of that State and at its expense, a part of the pension calculated according to the method of apportionment:

- first, the Institution shall calculate the “theoretical” amount of the benefit to which the persons concerned could lay claim had they completed all periods of insurance and/or of residence under the same legislation (“progressive calculation”) (Article 46, (2)(a));

---

<sup>147</sup> See for example, Judgments of 21 October 1975, *Petroni*, 24/75, E.C.R. p. 1149; of 3 February 1977, *Strehl*, 62/76, E.C.R. p. 211; of 13 October 1977, *Manzoni*, 112/76, E.C.R. p. 1656; of 25 November 1975, *Massonet*, 50/75, E.C.R. p. 1473; of 20 October 1977, *Giulani*, 32/77, E.C.R. p. 1857; of 13 March 1986, *Sinatra*, 296/84, E.C.R. p. 1056; of 17 December 1987, *Collini*, 323/86, E.C.R. p. 5503; of 18 April 1989, *Felice*, 128/88, E.C.R. p. 836; of 6 June 1990, *Spits*, 342/88, E.C.R. p. I-2268; of 21 March 1990, *Cabras*, C-199/88, cited above; of 5 April 1990, *Bianchin*, C-109/89, E.C.R. p. I-1619.

<sup>148</sup> OJ L 136.

<sup>149</sup> However, the concerned party may choose to waive this calculation if the amount is equal or inferior to that which is calculated subject to the national legislation, so long as the legislation of the State in question does not have any rules against overlapping which might result in the depreciation of the amount calculated. The new Annex IV, C, mentions for each Member State the circumstances in which they can decide not to use the technique of apportionment for the purposes of calculating the amount due (no circumstances are mentioned under the legislations of Belgium, Germany, Spain, France, Greece, Luxembourg, Austria and Finland) (Article 46(1)(b)).

- on the basis of the theoretical amount, the institution subsequently determine the actual amount of the benefit in accordance with the ratio of the duration of the periods of insurance or of residence under the legislations of all the Member States concerned; the so-called apportionment mechanism (Article 46 (2)(b))<sup>150</sup>.

3. In the case of dual calculations (benefits calculated according to the legislation of one Member State or benefits calculated according to the mechanism of apportionment) the worker or survivor has the right to the superior amount of the two. But both of these pensions must be calculated in full, and any national rules against overlapping must be taken into account, within the bounds of, and apart from the exceptions admitted in new Articles 46a, 46(3) and 46(4).

These different methods of calculation (direct or proportional) can be applied separately in each Member State where rights have been acquired so that the concerned party receives one or several autonomous pensions and/or one or several proportional pensions.

**91. Rules against overlapping.** Regulation No 1408/71 governs the application of national rules against overlapping of benefits [46a, 46(3) and 46(4)].

In general the rules apply to:

- the amount of benefits payable by another Member State before tax, social security contributions and other individual taxes [Article 46a(b)];
- rules against overlapping may not apply to benefits acquired subject to the legislation of another Member State and which correspond to periods of voluntary insurance or optional continued insurance [Article 46a(c)];
- benefits due by virtue of the relevant legislation cannot be reduced by the application of an overlapping clause, unless this clause is applied solely to the acquisition of benefits or revenues in other Member States [Article 46(3)(d)].

Furthermore, special provisions are applicable when the amounts under consideration regard benefits of the same kind, due under the legislation of two or more Member States, or benefits of different kinds.<sup>151</sup>

---

<sup>150</sup> On the application of Article 46(2)(a) and (b), where the applicable legislation stipulates a maximum period required by the legislation for receipt of full benefits and when, after aggregation, the duration of the periods is superior to that stipulated, the competent institution shall take into consideration the former maximum period under national legislation and not the total of all periods in various Member States (Article 47(1)(a)).

<sup>151</sup> Article 46a(1) of Regulation 1408/71 defines the overlapping of benefits of the same kind as “meaning all invalidity, old-age and survivor benefits calculated or provided on the basis of periods of insurance and/of of residence completed by the same person”. On the other hand, the overlapping of different benefits mean “all overlapping of benefits which cannot be considered to be of the same kind within the meaning of paragraph 1” (Article 46a(2)).

If the benefits in question are **of the same kind**, the clauses against overlapping cannot be applied to a benefit which has been calculated on a proportional basis (Article 46(3)1) and cannot generally be applied to an “autonomous benefit” except in very specific circumstances, as describe in Article 46(3)(2) (extended by Annex IV, D), aimed at preventing any abuse of the rules of overlapping.

The exceptions, according to Article 46(2) of the Regulation, are:

a) a benefit which has been calculated irrespective of the duration of the periods of insurance or of residence completed, and which is not already covered in Annex IV D, (type “A” legislation)

or

b) a benefit which has been determined with reference to a fictive period assumed to have occurred between the date of the materialisation of the risk and a subsequent date. The clauses on overlapping apply:

- to benefits of the same type, unless they were subject to a specific agreements between several Member States aimed at avoiding overlapping;
- to benefits covered by a) above.

The benefits and agreements which are subject to inter-state agreements are listed in Annex IV D.

When **benefits are of different types**, it is advisable to refer to Article 46 quarter, which aims at palliating any unfavourable consequences for the migrant worker or survivor, of a joint application of anti-overlapping rules by two or more Member States. If several benefits which have been calculated with reference to a single national legislation, are be simultaneously reduced by virtue of the simultaneous application of these rules, the amount which is subject to reduction, suspension or withdrawal shall be divided by the number of benefits subject to reduction, suspension or withdrawal. Similarly, for the purposes of applying rules against overlapping, only a fraction of proportional benefits of a different kind shall be taken into consideration on a ratio basis in accordance with the ratio of the duration of the periods of insurance or of residence which formed the basis of the calculation of the proportional benefit.

**92. Minimum pension.** A pensioner residing in the State, subject to the State’s legislation where the right to a pension was acquired, must receive benefits which are equal to or superior to the minimum established by this legislation for a period of insurance or residence equivalent to all the periods completed by the requesting party in the territory of several Member States. The competent institution of this State shall pay to the concerned party, for the duration of his residence in that State, a supplement equal to the difference between the minimal amount and the amount of benefits calculated according to community

rules on aggregation and the rule of apportionment described above (Article 50 of the Regulation)<sup>152</sup>

**93. Revalorisation and recalculation of benefits.** Article 51 of Regulation 1408/71 was introduced in order to reduce the administrative burden implied by the recalculation of benefits in accordance with the provisions of Article 46 when the benefits of the Member State have simply been adapted to “situations which are extraneous to the individual circumstances of the insured persons” and linked to “general economic and social developments” (increase in the cost of living or changes in the level of wages or salaries etc.) (Article 51 (1))<sup>153</sup>

On the other hand, according to Article 51 (2) a recalculation shall be carried out if the method of determining, or the rules for calculating benefits should be altered, bringing about a change in the personal circumstances of the worker.

In C-65/92, *Levantino*<sup>154</sup>, the question put before the Court was whether Article 51 of the Regulation could be applied to the adjustment of the amount of a benefit such as the guaranteed income. This benefit has always been regarded as an “old-age benefit” within the meaning of the Regulation, and therefore, as falling within the scope of Article 46<sup>155</sup>

According to the Court, given the “special nature” of guaranteed income benefits for elderly people, the application of Article 51 (1) could “disrupt the scheme of the national legislation” and alter the purpose of the benefit, which was that of securing for recipients supplementary resources of an amount equal to the difference between the minimum resources guaranteed by law and part of their resources of any kind. In fact inasmuch as it would preclude taking account of resources which should normally be deducted from the amount of minimum income guaranteed by the Law, the application of Article 51 (1) would “adversely affect the supplementary nature of a benefit whose amount varies according to the resources of the person concerned and which is designed to offset the insufficiency of those resources”

On the other hand, the Court observed, Article 51 (2) must apply to the case in point given that “any change in the beneficiary's resources, whatever its origin, affects the beneficiary's personal situation vis-à-vis the applicable legislation and alters the method for determining the benefit paid to him” (par. 43).

This was a key judgment on “mixed non-contributory benefits”, which, following the example of the *Lenoir* case (on the allocation of special family benefits)<sup>156</sup>, corrected the

---

<sup>152</sup> See Judgments of 30 November 1977, *Torri*, 64/77, E.C.R. p. 2299; of 17 December 1981, *Browning*, 22/81, E.C.R. p. 3357.

<sup>153</sup> See Judgments of 2 February 1982, *Sinatra*, 7/81, E.C.R. p. 137; of 1 March 1989, *Jordan*, 141/88, E.C.R. p. 2387; of 21 March 1990, *Ravida*, C-85/89, E.C.R. p. I-1063; of 20 March 1991, *Cassamali*, C-93/90, E.C.R. p. I-1041, paragraphs 15 and 16; of 18 February 1993, *Bogana*, C-192/92, E.C.R. p. I-755.

<sup>154</sup> Judgment of 22 April 1993, E.C.R. p. I-2027.

<sup>155</sup> See judgment of 22 June 1972, *Trilli*, 1/72, E.C.R. p. 457, par. 18.

<sup>156</sup> Judgment of 27 November 1988, 313/86, E.C.R. p. 5391.

extreme consequences which might arise as a result of merely assimilating such benefits to others linked to them in a complementary or supplementary manner (i.e. old-age benefits, family benefits, unemployment benefits).

Recalculation is however excluded in the case of the granting of a benefit in another Member State which is assimilated to family benefits, such as the Italian family benefit (judgment of 22 September 1994, Bettaccini, C-301/93, Rec. p. I-4361). In fact, according to Article 51 (2) of Regulation No 1408/71, a new calculation should be made in accordance with Article 46 only when the method of determining, or the rules for calculating old-age, survivor or invalidity benefits. Nothing in Article 51 suggests that the rule should be applied in any other case.

**94. Liquidation of invalidity benefit.** As regards the determination of the institution who shall pay invalidity benefits the Regulation distinguishes between workers who are exclusively subject to Type A legislations<sup>157</sup> which do not take the duration of insurance periods into account for the purposes of calculating the amount of the benefit (Articles 37 and 39) – and – workers who are subject to differential legislations where at least one ties the amount of the benefit to completed insurance periods (Type B legislation) (article 40)<sup>158</sup>.

1. In the first instance, the amount of the benefit is fixed in accordance with the provisions of the legislation which was applicable at the time when incapacity for work followed by invalidity occurred. The recipient shall obtain the benefits exclusively from the said institution, in accordance with the legislation which it administers.
2. In the second instance, the amount of the benefit is fixed according to the rules regarding retirement or survivor benefits.

Note: When the applicable legislation in a Member State (Belgium, in this particular case), makes the amount of the invalidity benefit dependant on the worker's salary at the time when invalidity occurred and when the worker was not, at that time, subject to the social security system of that State because he was working in another Member State, the competent institution in applying Article 46 (2) of the Regulation must calculate the theoretical amount of the benefit on the basis of the last salary received by the worker in the other Member State. (judgment of 9 August 1994, Reichling, C-406, E.C.R. p. I-4073).

The obligation of the competent institution to take into consideration the actual salary earned in another Member State, as though it had been earned in the competent Member State, at the time when the invalidity occurred, is according to the Court, fully in accord with the objective of Regulation 1408/71. Indeed, the Regulation states that workers must not lose

---

<sup>157</sup> This is the case in Belgium, France, the Netherlands, Spain, Finland (for national pensions for people born with disabilities or people who become disabled early in life), in Ireland, the UK, and in Greece (re. agricultural insurance schemes).

<sup>158</sup> This is the case in Germany, Austria, Italy, the Grand Duchy of Luxembourg, Portugal, Denmark, Greece (aside from its agricultural scheme), in France (special scheme for miners), in Finland (except for persons who are born with severe disabilities or become disabled early on in life) and in Sweden.

rights to social security benefits, nor must these benefits be subject to any deductions, merely because the recipients had exercised their right to free movement as conferred by the Treaty.

In the following circumstances however, the rule in 1. above shall be applied:

- if, at the time when invalidity occurred, the worker was subject to Type A legislation;
- if the worker satisfies all the conditions of this legislation or other similar legislations, and does not have to refer to periods of insurance under Type B legislation;
- if the worker does not satisfy all the conditions required for entitlement to benefits with regard to Type B legislation.
- **administrative checks and medical examinations** shall be carried out, at the request of that institution responsible for payment, by the institution of the place of stay or residence of the recipient in accordance with the procedures laid down by the legislation administered by the latter institution. The institution responsible for payment shall, however, retain the right to arrange for the examination of the recipient by a doctor of its own choice. (Article 51 of Regulation 574/72).

According to the Court of Justice, when the institution responsible for payment opts to request that a doctor of its own choice examine a claimant who resides in another Member State, the concerned party may be obliged to travel to the Member State where the competent institution is established. However the costs incurred by the claimant for travel and accommodation are payable by the competent institution and the journey may only be undertaken if it is first established that the claimant may travel without risking any deterioration in his condition. The limits of the powers of the institution responsible for the payment of sickness and maternity benefits are not admissible in the case of invalidity. (judgment of 27 June 1991, Martinez Vida, C-344/89, E.C.R. p. I-3245).

The place of residency must, in any case, carry out a preliminary examination of the claimant, and this rule is equally applicable in the case of former frontier workers even when their place of residency is nearer to the institution of the competent State than to the institution in the State of residency (judgment of 10 December 1988, Voeten, C-297/97, E.C.R. p. I-8293). In fact, according to the Court, “in principle it is in the interest of the recipients of invalidity benefits to be examined by the medical service with whom they are most familiar and with whom they can communicate in their native language”. However, in view of the stated objectives of Article 51 (1) of the Regulation, which aims to protect the interests of the beneficiary of invalidity benefits, the latter must be able to refuse a preliminary examination by the institution of the place of residence, once this refusal is freely made and unequivocal.

Contrary to Article 18 of Regulation 474/72 which makes provision for an administrative or medical examination in the case of sickness and maternity benefits, to be carried out on its own initiative by the institute in the place of residence, Article 51(1) on invalidity benefits provides for such a check or examination only following a request by the competent institution. According to the Court, this difference can be explained by the very marked

differences between the legislations of the Member States as regards invalidity benefits (especially as to the determination of the degree of invalidity).

## CHAPTER 5 : THE PRINCIPLE OF SINCERE COOPERATION

**95.** The judgment delivered by the Court in case C-165/91, Van Munster (judgment of 5 October 1994, Rec. p. I-4686) provided a new insight on the scope of the obligations of competent authorities of Member States when applying national provisions to a migrant worker who requests old-age insurance. According to the Court, the application of national legislation to a migrant worker, applied in the same way as to a sedentary worker, could have unpredictable consequences and might clash with the stated objectives of Articles 48 to 51 of the Treaty. It is the duty of the competent authorities to eliminate or at least attenuate these consequences as much as possible. In order to do this, they must use all the instruments at their disposal as well as ensuring that their internal rules are compatible with the “requirements of Community law” and in accordance with the principle of sincere co-operation contained in Article 5 of the EC Treaty.

The Van Munster case lends itself to this kind of analysis. In Holland, all married persons aged 65 year are entitled to a personal pension corresponding to 50% of the minimum net salary. This amount is subject to a 50% increase if the dependent spouse is less than 65 years old (i.e. in this case the pension is equivalent to 100% of the minimum net salary). In Belgium, on the other hand, the retirement pension is calculated on the basis of periods of insurance up to a limit of 75% of the worker’s gross salary when the spouse has ceased all professional activity or is not in receipt of a pension (“mixed rate”) and up to 60% for other workers (“single rate”).

In the case at hand, Mr. Van Munster, had already received a “mixed rate” retirement pension in Belgium. He was subsequently applied a “single rate” pension under Belgian legislation because his spouse, who was resident in Holland and not in active employment, had turned 65 years of age and had acquired the right to a personal pension under Dutch law (50% of minimum net salary). Yet the granting of this pension did not result in any global increase in the couple’s financial resources (given that it was concomitant to a reduction by a similar amount of the husband’s pension). In view of the above, the Court ruled that the obligation of sincere co-operation “implies that (the Belgian authorities) should verify whether their legislation may be applied *pari passu* to the migrant traveller and the traveller who has never left national territory, without occasioning a loss in social security benefits to the migrant worker and thereby dissuading him from exercising his right to free movement within the Community.” As for the national jurisdiction, it is up to it “do all in its power to ensure that the internal rules governing the allocation of benefits are in accordance with the requirements of Community law”.

**96.** But what happens when the internal rules do not permit an “interpretation in conformity with the requirements of Community law?” Is the national judge obliged to dismiss the national provisions in question?



According to the **jurisprudence set by Simmenthal**<sup>159</sup>, national jurisdictions are obliged to ensure the full application of Community law “if necessary by setting aside, in a case within its jurisdiction any contradictory national provisions whether prior or subsequent to the Community rule” (par. 21; our emphasis). Should this principle be extended to include cases where the national provisions, while not contrary to Community law, nonetheless in certain circumstances constitute a barrier to the free movement of workers, especially when applied to a situation which involves simultaneous reference to the application of the legislation of another Member State?

The Court did not beat about the bush in its judgment in the Engelbrecht case:

"Where application in accordance with those requirements is not possible, the national court must fully apply Community law and protect the rights conferred thereunder on individuals, if necessary disapplying any provision in the measure application of which would, in the circumstances of the case, lead to a result contrary to Community law (see, to similar effect, Case 249/85 Albako v BALM [1987] ECR 2345, paragraph 13 et seq.)" (par. 40; our emphasis).

In this instance the worker had lost a social advantage simply because of a benefit of the same kind awarded to his spouse, according to the legislation of another Member State, even though the grant of that latter benefit had not led to any increase in the couple's total income (given that there was a concomitant reduction of the same amount in the personal pension received by the worker under the legislation of that same State) and this loss « constituted a barrier to the right to free movement within the Community », enshrined in Article 39 of the Treaty. (paragraphs 41 and 42).

This judgment is in accordance with the established case-law of the Court relative to Article 10 of the Treaty. In fact, it follows that the principle of sincere cooperation involves the specific duty, on the part of all Member States, to eschew any behaviour or action which is contrary to Community law. It is furthermore incumbent on them to ensure, even with respect to their own sovereign competencies, the effectiveness of Community law and to guarantee the achievement of the aims of the Community, arising out of their adhesion to it.

Therefore, at times the full application of Community law obliges the national judge, in respect of the principle of sincere co-operation, to set aside a national regulation whose application would have consequences for or hinder the achievement of the Treaty's objectives. The Court has ruled to this effect on many occasions; ; indeed with regard to the procedural autonomy of Member States, such a national law was not admitted by the Judge as it hindered the putting in place of the procedure outlined in Article 234 EC<sup>160</sup>, and taking into account the specific circumstances of the case, made it excessively difficult to exercise those rights conferred under Community law.<sup>161</sup>; in the case v Factortame <sup>162</sup>, the national judge

---

<sup>159</sup> Judgment of 9 March 1978, 106/77, E.C.R. p. 629.

<sup>160</sup> See Judgment of 16 January 1974, Rheinmühlen, 166/73, E.C.R. p. 32, paragraphs 2 and 3.

<sup>161</sup> Judgment of 14 December 1991, Peterbroeck, C-312/93, E.C.R. p. I-4599.

was called on, in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law, to set aside a principle of English law according to which interim junctions could not be granted against the Crown.

Certainly in the *Van Munster and Engelbrecht* proceedings it was the application of a national law, in liaison with the national legislation of another Member State that gave rise to the barrier. In fact, the same kind of barrier to the free movement of workers had been created as that deriving from the disparity between national social security systems, which it was incumbent upon the Council to eliminate in accordance with Article 42 EC by introducing the principle of coordination. It is equally true that the duty of Member States with regard to sincere cooperation included the obligation to do all in their power in order to achieve the objectives of the Treaty, even in the absence of specific community measures, and especially when the circumstances show that such an action is necessary, in the interest of the Community and that it has not already been undertaken by the latter.<sup>163</sup>

Given the constant evolution of national legislations on social security, it is inevitable that Community law cannot guarantee that, in all circumstances, the right to free movement within the Community shall not be impaired by existing disparities between national systems.

If one adopts this line of reasoning, it shall be incumbent upon the authorities of a single Member State and in particular on its judicial organs, to set aside any national provisions which in certain circumstances could imply the loss of social advantages as a result of workers exercising their right to free movement as guaranteed by the Treaty (for example, the rules against overlapping of pensions, in the proceedings of *van Muster and Engelbrecht*).

In any case, in a situation where a migrant worker and his family are simultaneously subject to several national legislations in the field of social security (in this instance, regarding pensions), and where the concurrent application of such legislation is the cause of the barrier to free movement, Member States have a duty to co-operate in order to overcome the difficulties which arise as a result of existing disparities in their legislations.<sup>164</sup> Having said

---

<sup>162</sup> Judgment of 19 June 1990, C-213/89, E.C.R. p. I-2433.

<sup>163</sup> See also, Judgment of 10 July 1980, *Commission v UK*, E.C.R. p. 2403, paragraphs 10, 15 and 25. The Court held in its ruling of 10 July 1980, that in virtue of former Article 5 (now Article 10) the UK was bound to take all necessary measures to ensure the conservation of fishing resources in the zone in question in accordance with one of the stated objectives of the Treaty. The Court also found that the UK was obliged to adopt such measures prior to the expiry of the transition period laid down by the act of adhesion and therefore prior to the matter falling exclusively under Community law (especially given that the Community had not yet formulated any specific policy on this because of divergent opinions in this regard within the Council). The Court also set strict limits regarding the adoption of national provisions in order to ensure the continued operation of Community organs in this regard – but most importantly, it confirmed the principle of an obligation on the part of the Member State within the meaning of Article 10 of the Treaty.

<sup>164</sup> See Judgment of 27 September 1988, *Matteucci*, 235/87, E.C.R. p. 5589, on the implementation of a cultural agreement between Germany and Belgium which risked hindering the application of a rule of Community law.

Note that Article 84 of Regulation No 1408/71 also refers to the obligation of Member States to co-operate in order to ensure the proper application of the Regulation.

this, when a disproportionate loss in social security rights or benefits results directly from the application of such a national provision, it is first and foremost the duty of the State to recall its duty towards the Community to which it belongs. Of course the consequences of these observations shall vary according to the circumstances of the case at hand.

## **TABLE OF CONTENTS (\*)**

<b>INTRODUCTION</b>	1
<b>TITLE I:</b> The scope of Regulations No1408/71 and No 574/72	7
Chapter 1: Substantive scope	7
Chapter 2: Persons covered	9
Chapter 3: Territories covered	19
Chapter 4: Community law and bilateral social security conventions	21
<b>TITLE II:</b> The basic characteristics of co-ordinated systems	26
Chapter 1: Equality of treatment	27
Chapter 2: Determination of the applicable legislation	39
Chapter 3: The retention of acquired rights	50
Chapter 4: The retention of rights in the process of being acquired	82
Chapter 5: The principle of sincere cooperation	95

(\*) The page numbers refer to the paragraphs.