Social Security and Migrant Workers

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Selected Studies of Cross-Border Social Security Mechanisms

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CHAPTER 6

Coordination of Social Security within the EU Context

Frans Pennings

§6.01 THE CONTEXT OF COORDINATION WITHIN THE EU

In comparison with coordination of social security in other parts of the world, EU coordination law is special in two main aspects: (1) it is part of a special legal order and (2) this legal order was created predominantly to promote free movement, and for our topic this is free movement of workers.

[A] The Legal Context of Coordination

This is not the place to describe the legal order of the EU in all detail; for us it is relevant that the Treaty underlying this legal order (called: the Treaty on the Functioning of the EU – TFEU) provides that a regulation shall have general application (Article 288). It shall be binding in its entirety and directly applicable in all Member States. It follows that since the EU coordination rules are laid down in a regulation, they are binding on all Member States and directly applicable. Thus no transposition rules are required. Benefit administration have to apply the coordination rules and if national rules are not consistent with these, the national rules are overruled. Also national courts have to interpret national legislation in view of the regulation; in case of uncertainty they can ask preliminary questions to the Court of Justice. The task of the latter court is to ensure, by its case law, uniform interpretation of the rules. If a Member State does not, in the view of the European Commission, apply its rules in consistency with the

regulation or other relevant EU law, it can start an infringement procedure and finally address the Court of Justice.[1]

This is different from other coordination systems, including the coordination rules of the International Labour Organization, that are laid down in treaties; if a contracting party does not apply a rule correctly, it is much more difficult for supervisory bodies (or individuals) to correct this.

However, exactly because of the inescapability of the coordination rules, the decision procedure on adopting such rules is sometimes difficult. Social security is one of the most sensitive topics in EU discussions and decision making, since Member States fear, among other reasons, the costs which will result from them for their country. Until the TFEU, unanimity of all Member States was required for adopting coordination rules. Still, in any case they had to continue negotiating until they reached a text, since if coordination rules are necessary the Treaty requires them to be made. Such negotiations could be very tedious and the outcome could be a rather unclear compromise. It was often the Court of Justice that, by interpreting such texts in favour of the objectives of free movement, realized progress of the coordination.

The coming into force of the TFEU (Lisbon Treaty)[2] on 1 January 2010 involved a new text of the legal basis of the coordination Regulations, i.e., Article 48 TFEU. The major change in the text of this Article was that the Article does not require unanimity of decision making anymore. This is an important deviation from the unanimity rule in force so far, but a dissenting Member State can still 'appeal' to the European Council.[3]

[B] The Objective of Coordination within the EU

EU coordination rules are made in order to ensure free movement of workers. This follows from the legal basis for making coordination rules in the area of social security, i.e., Article 48 TFEU.[4] This Article is part of Title IV of the Treaty, entitled the Free Movement of Persons, Services and Capital. Situating Article 48 is relevant, since its position in the Treaty may be important to its interpretation. Indeed, the Court of

1. The decisions of the Court are published in the *European Court Reports* (hereafter abbreviated as ECR). This collection provides the authentic texts. It is published in all languages of the Union. Judgments of the Court (from June 1997) can also be found on the web site of the Court: curia.europa.eu; all judgments, including older ones, can be found on europa.eu/documentation/legislation/index_en.htm.
2. OJ C 115/1 of 9 May 2008.
3. I will not discuss all aspects, such as the exact procedure, the role of European Parliament and the legal basis required for others than workers and self-employed.
4. Article 48 TFEU provides that: 'The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependents:

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

   In addition it regulates the decision procedure.

Justice of the EU often refers to the place of the legal basis of the coordination rules when giving arguments for its interpretation of the Regulation: because of its wording and its place, Article 48 is to be interpreted in view of securing freedom of movement, especially of employees, and not merely as a technical coordination provision.[5]

Article 48 gives the powers to take measures which are 'necessary in the area of social security to provide the freedom of movement of workers' and mentions a series of arrangements which have to be taken in any case.

Also Article 45 TFEU is relevant to coordination. This Article prohibits any discrimination on grounds of nationality between workers of the Member States in relation to employment, remuneration and other conditions of employment. Article 45 is often referred at in order to give an interpretation of a provision of the Regulation or to deal with coordination issues beyond the scope of Article 48.

[C] The Present Coordination Regulation

The first coordination regulation was Regulation 3,[6] which was one of the earliest EEC regulations (1958; the EEC was established in 1957). Coordination of social security was indeed already at that time considered essential for the free movement of workers, although we have to add that there was also a false start from the point of view of other instruments, as preparatory work for coordination had already started some time before the establishment of the EEC.

Regulation 3 was succeeded by Regulation 1408/71[7] in 1971; the latter regulation was on its turn succeeded by the present coordination regulation, Regulation 883/2004 (full title: Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems). This is sometimes called the Basis Regulation. In addition, the so-called Implementing Regulation is relevant, i.e., Regulation 987/2009, Regulation of the European Parliament and of the Council laying down the procedure for implementing Regulation (EC) No. 883/2004 on the coordination of social security systems.[8]

§6.02 MIGRATION IN THE EU

EU citizens have the right to move to another Member State and to seek and accept work. They must not be discriminated against on ground of nationality. However, if they apply for social assistance in an early stage of staying in a country (as regulated by the State in question, which may be until five years of residence), the person can be expelled.

5. See, for instance, *Nonnenmacher,* Case 92/63, ECR 1261 (1964).
6. OJ 30 of 16 December 1958.
7. Regulation 1408/71 was published for the first time in OJ 149 of 5 July 1971.
8. Regulation 883/2004 was published in OJ L 166/1 of 2004. The implementing regulation, Regulation 987/2009, was published in OJ L 284/1 of 2009.

Migration figures are, however, still low if we compare them with the total population of the EU, although there may be considerable differences between the Member States.[9]

In the course of time, there have been differences in migration patterns.

Initially it was mainly persons from Italy, later also Spain, who moved from their poor surroundings to the richer, Northern States, for instance to work in the mines. These workers moved on a long-term basis to another Member State and coordination problems appeared to concern mainly the right to and calculation of (old-age, invalidity) pensions when they returned to the country of origin, and the position of family members who lived in the State of origin.

When the Southern countries became richer, this type of movement decreased and the period of movement became much shorter, and also the working patterns became different. It happened more often that a person worked temporarily in a job abroad, or worked in two Member States at the same time or was sent by his employer to work in another Member State.

Also the self-employed came under the scope of the coordination Regulation in the 1980s. Their working pattern was most often also of the 'irregular type', described in the previous paragraph.

Thus for these workers the rules on working in two countries or as posted worker are relevant, and also rules on short-term benefits, such as unemployment and sickness benefits.

In addition, frontier work became a frequently occurring form of free movement.

Frontier work is also a form of employment different from that in the early days (long-term movement to another State), since the frontier worker often remains living in the same State, while he (for a shorter or longer period) works in another.

As from 2004, also Central and Eastern European countries (often post-communist countries) acceded the EU. Because of the important differences in their economies and the Western ones, this led to a strong movement from these countries to the old Member States.[10] These workers most often also belonged to the modern type, i.e., they did and do not permanently settle in the new country of employment, but have a more nomadic form of working. They jump from work to work, and from country to country, wherever they are most needed (and earn most).

Also for them frequently posting rules, which allow the contribution rates of the country of origin to be applicable for some time, are often invoked. These rules cause some tensions in the old Member States as they may cause competition because of the lower wage costs they involve (workers posted to a Member State remain subject to the social security system of the country where they previously worked, up to a maximum of twenty-four months).

9. http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Migration_and_migrant_population_statistics (accessed on 11 December 2012).
10. See *ibid*.

§6.03 THE INTERPRETATION OF COORDINATION RULES IN THE LIGHT OF FREE MOVEMENT

In abstracto, coordination can be limited to the protection of the social security rights of migrant workers or to merely ensuring a proper administration of benefits (avoiding double payments or non-insurance). If such approach, coordination rules do not require an active policy to promote the free movement of workers.

Article 48 TFEU provides that the Council has to adopt such measures in the field of social security as are necessary to provide freedom of movement for workers. From this text the Court derives the interpretation that the mobility of workers has to be *promoted*. Hence, the rules of the Regulation are interpreted by the Court in the light of the objective of promoting free movement.[11] Often this means that rules of the interpretation are given a broad meaning, as to allow as many persons as possible the use of the coordination rules or to give an interpretation of rules which as most favourable to them.

Examples are the interpretations of the term 'wage earner' in the *Unger* case[12] under the first regulation, Regulation 3. The personal scope of Regulation 3 was limited to 'wage-earners and assimilated workers'. The Regulation gave, however, no definition of this term. Therefore, in the *Unger* case, the Court had to give an interpretation of wage-earners and assimilated workers. Although this is already a very early judgment and the applicable rules were changed radically later, it still is relevant as it shows the approach by the Court very clearly.

In the judgment, the Court considered that the Regulation was made in order to meet the requirements of Article 51 EEC Treaty (now Article 48 TFEU). The establishment of complete freedom of movement for workers constitutes the principal objective of this Article and thereby conditions the interpretation of the Regulations adopted in the implementation of that Article. If the definition of the term 'wage earner' were a matter falling within the competence of national law, it would be possible for each Member State to modify the meaning of this concept and to eliminate at will the protection afforded by the Treaty to certain categories of persons. If the meaning of such a term was to be unilaterally fixed and modified by national law, Article 48 (now Article 45 TFEU) and Article 51 EEC would be deprived of all effect and the objectives of the Treaty would be frustrated.

Therefore the Court decided that the term 'wage earner' had a Community meaning. The Court also decided what this term meant: if a person is covered by a national social security scheme, he was a wage earner for the Regulation, even if he did not have a contract of employment. Thus it was decisive how a national social security scheme defined its personal scope. However, if the national scheme included particular categories of persons, these were also covered by the Regulation. See for such an approach also the *Van Roosmalen* judgment,[13] in which the Court decided that a

11. See, for instance, *Fellinger*, Case 67/79, ECR 1980, 535 (1980).
12. Case 75/63, [1964] ECR 369.
13. Case 300/84, ECR 3097 (1986).

missionary was to be considered as self-employed, since he was supported by his parishioners, and thus within the scope of the Regulation.

Under the current regulation, all nationals are included, regardless of their economic position. At the time of the judgments mentioned in this section, however, the exact meaning of the terms 'wage earner/worker' and 'self-employed' was very important.

§6.04 THE CONDITIONS FOR APPLICABILITY OF THE REGULATION

Before Regulation 883/2004 can be applied on a particular situation, it is important to check whether all conditions for application of this regulation are fulfilled. These are:

- not all the facts of the case are restricted to one single Member State;
- the person concerned is within the personal scope of the Regulation;
- the benefit concerned is within the material scope of the Regulation;
- the situation is within the territorial scope of the Regulation.

[A] The Facts of the Case Must Not Be Restricted to One Member State

The Regulation is applicable if a person moves to another Member State. However, it does not require that the person concerned himself or herself *moves* to another Member State. Also if s/he was born having the nationality of another Member State, or if his or her children or spouse move to another Member State, the Regulation applies. In case of mobility, the *reason* for the movement of a worker is irrelevant. Consequently, movement need not be for economic reasons: visiting one's family in another Member State is, for example, sufficient to have the Regulation applied.[14] The Regulation is also applicable if a person had never moved across the border before s/he retired and then goes to another Member State. Thus pensioners who never worked in another Member State also benefit from the Regulation.

The Regulation is only applicable if the facts of the case are not limited to one Member State. If there is no cross-border situation, the person concerned cannot invoke the Regulation, even if s/he is confronted with national rules with discriminatory effects. This was confirmed in the *Petit* judgment.[15] In this case, an employee was confronted with conditions on the use of language to be used in legal procedures in Belgium. The Belgian law on languages to be used in legal proceedings prescribed the Dutch language in a case like this, whereas Mr Petit used French, which made his case inadmissible. Mr Petit thought that the Regulation could help him in this, but the Court of Justice considered that it has consistently held that the rules of the Treaty ensuring the free movement of workers and the coordination Regulation were not applicable to activities all elements of which are restricted to the territory of a single Member State only.

14. See, for instance, the *Unger* judgment.
15. Case 153/91, ECR I-4973 (1992).

[B] Personal Scope of Regulation 883/2004

The personal scope of Regulation 883/2004 is not limited to the economically active population. Article 2 reads that this Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.

[C] The Material Scope of Regulation 883/2004

The coordination Regulation can be applied only in respect of benefits which are within its material scope. The material scope of Regulation 883/2004 is defined in Article 3; it reads that the Regulation applies to all legislation concerning the following branches of social security: (a) sickness benefits; (b) maternity and equivalent paternity benefits; (c) invalidity benefits; (d) old-age benefits; (e) survivor's benefits; (f) benefits in respect of accidents at work and occupational diseases; (g) death grants; (h) unemployment benefits; (i) pre-retirement benefits; and (j) family benefits. Benefits not mentioned here, such as study grants and housing benefits, are not covered.

Furthermore, the material scope is limited to *legislation* on these benefits. The term 'legislation' excludes for instance collective agreements and supplementary pension schemes and private social security. As a result, export of benefits established by a collective agreement is not required by the Regulation. Nor can periods fulfilled abroad be used to satisfy waiting periods in supplementary pension schemes.

This is unsatisfactory, since the share of non-statutory forms of social security is growing, and here we will see again the old problems of 'insurance' gaps, because periods of coverage are not aggregated or of non-exportability to the State of origin or residence. However, the effects of extending all coordination rules to collective agreements and other contractual schemes are hard to oversee, for instance if an employee works in two countries.

Social and medical assistance is excluded from the material scope of the Regulation by Article 3(5).

The Court interpreted the term 'social assistance' narrowly, which has as effect that more types of benefits fall within the scope of the Regulation. It ruled that subsistence benefits designed for a specific risk, e.g., minimum income for the elderly, or basis income of the disabled, are not social assistance, and therefore not excluded from the Regulation. So this is again an example of the broad interpretation of coordination rules by the Court of Justice in order to have coordination rules contribute to free movement.

Member States appeared to have problems with this case law, in particular because they had to allow export of these benefits. Therefore the regulation was amended to include a new rule on this type of benefit, i.e., the special non-contributory benefits (Article 70).These benefits are within the scope of the Regulation, but they are not exportable to other Member States.

[D] Territorial Scope

The scope of Regulation 883/2004 is limited to the territory of the European Union. By additional treaties its provisions also include the European Economic Area (EEA). The EEA comprises the Member States of the European Union and Norway, Liechtenstein and Iceland.

On the basis of an Agreement between the EU and Switzerland, the Regulation also included Switzerland.

§6.05 THIRD COUNTRY NATIONALS

[A] The Applicability of the EU Coordination Regulation

According to Article 2, one of the requirements for falling within the personal scope of the Regulation is that a person must be a national of one of the Member States. Nationals of one of the European Economic Area countries and Switzerland are assimilated with nationals of EU Member States. By 'nationality' is meant the formal legal position of an individual as appears from the official Registry Office or passport. Long-term residency and 'citizenship' are therefore the same as being national of a Member State.

The nationality condition was severely criticized for excluding the so-called third country nationals, i.e., persons who do not have nationality of an EU Member State. For instance, for a Moroccan who first works in France and subsequently in Belgium, his periods completed in France could not be used in order to satisfy the conditions for Belgian unemployment benefit. A major point of discussion was whether Article 42 EC (now Article 48 TFEU) could be a suitable legal basis for this extension.[16] This issue was solved in the *Khalil* judgment,[17] from which followed that Article 48 TFEU cannot be a legal basis for the extension of the personal scope to third country nationals, as according to the Court the scope of this Article is limited to EU nationals: since Article 48 is part of Title IV of the Treaty, entitled the Free Movement of Persons, Services and Capital, it is limited to those who enjoy the freedom of movement of the Treaty, i.e., EU nationals.

Thereupon, the Commission made a new proposal, this time based on Article 63(4) EC (now Article 79 TFEU). This Article concerns the conditions for admission and residence of third country nationals to the Community. This legal basis for making a

16. See, on this issue also D. Pieters, *Enquiry into the Legal Foundations of a Possible Extension of Community Provisions on Social Security to Third-Country Nationals Residing and/or Working in the European Union*, in *Prospects of Social Security Co-ordination* 15 (P. Schoukens ed., Leuven 1997); and S. Roberts, *Our View Has Not Changed: The UK's Response to the Proposal to Extend the Co-ordination of Social Security to Third Country Nationals* 189 (European Journal of Social Security 2000), who explains the reason of the UK government not to be in favour of extension the scope of the Regulation to third country nationals.
17. Case 95/99, ECR I-7413 (2001).

Regulation was accepted by the Council and in 2003 Regulation 859/2003 was accepted.[18]

This Article does not bind the United Kingdom, Ireland and Denmark, unless these countries explicitly accept regulations based on it.[19] Therefore the opposition against the regulation was much weaker.

This Regulation had, apart from a transitional provision, only one provision, which extended the provisions of Regulation 1408/71 and Regulation 574/72 to nationals of third countries who were 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 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.

Thus third country nationals have to be legally resident in the territory of a Member State and they must be in a situation which is not confined in all respects within a single Member State. This means that only if a situation concerns facts in at least two Member States (e.g., a worker from France who goes to work in the UK) the Regulation is applicable. If, however, a person came from a non-EU State and remained in one and the same EU Member State, the Regulation is not applicable. This limitation can also be found in the *Khalil* judgment, and earlier in the *Petit* judgment. Still, this limitation could be criticized, as, different from these two cases, the Regulation was not based on Article 48 TFEU, but on Article 63(4) EC. This separate legal basis is not related to the right to free movement, which is an EU right, so why require that at least the facts of two Member States have to be involved?

Thus third country nationals cannot invoke the Regulation in, for instance, a case of discrimination on grounds of nationality which occurs within a Member State if they have not worked, resided or stayed in another Member State. There has been no case law of the Court yet, so it is hard to know how these conditions are interpreted.

Regulation 883/2004 is limited to nationals of EU Member States in the same way as Regulation 1408/71. Therefore, a Regulation like Regulation 859/2003 was necessary in order to have coordination rules applied to third country nationals. After long and intensive discussions Regulation (EU) 1231/2010 was adopted, the successor of Regulation 859/2003.[20] This regulation has the same requirements as its predecessor.[21]

[B] Other Instruments

The EU can conclude treaties with States not belonging to the European Union. Some of these are relevant to the coordination of social security. Examples of such treaties are the agreements with Egypt, Israel, Jordan, Lebanon, Morocco, Tunisia and Algeria. In some of these treaties – with Marocco and Algeria – provisions are included which aim to achieve the principle of equal treatment on the basis of nationality. These treaties

18. OJ L 124. See the preparatory work in Com 2002, 59.
19. This is laid down in Protocols to the Treaty of Amsterdam.
20. OJ L 344.
21. See on this topic extensively G. Vonk, *Social Security Rights for Migrant Workers: New Links between the Hemispheres, Some Remarks from a European Union Perspective*, in this volume.

also include some provisions on the aggregation of periods of insurance or residence and on the payment of benefits.[22]

These provisions can also be interpreted by the Court of Justice. In some cases the Court decided that the non-discrimination rule has direct effect, e.g., Article 65 of the Euro-Mediterranean Agreement.[23]

Some Association Treaties give the Community and the cooperating country the possibility of making coordination rules. So far only Decision 3/80 on the application of social security schemes of the Member States of the European Community to Turkish workers and members of their families has been adopted.[24] This decision has not been implemented by the contracting parties. Its purpose is the coordination of the social security schemes of the Member States for Turkish nationals and not the coordination of the Turkish social security scheme with the coordination rules of the EU.

The Decision has to a large extent the same content as (an early version of) Regulation 1408/71. Since the implementing rules have never been adopted, it has no direct applicability, the Court decided in *Taflan-Met*. However, in the *Sürül* judgment[25] the Court decided that the non-discrimination rule was directly applicable. As a result, the Sürüls could not be denied German social security (family benefits) on the ground that they did not have a permanent residence permit yet. Thus, Turkish nationals are better off than other third country nationals, whose situations must not be limited to one Member State, whereas that condition did not apply in Sürül.

§6.06 THE RELATION TO THE EU TREATY AND HUMAN RIGHTS

[A] The Impact of the Treaty

Within EU coordination itself there are no human rights cases as such. However, non-discrimination on ground of nationality is the basis of the coordination regulation. In several Treaties, such as the UN ICPCR and the ECHR, non-discrimination on ground of nationality is indeed a human right. However, the EU Treaty has never extended this to residents of the territory and in respect to all advantages. The economic area has been the playing area. However, the extent of the provision has considerably been extended through the years, from workers to all nationals with EU nationality. However, the material scope is still limited. Whether free movement is a human right is debatable.

In any case, the Court of Justice has always seen the coordination rules as an elaboration of the right to free movement and non-discrimination. Where there were contradictions, it gave priority to the Treaty. For instance, where a young disabled worker lost his job when he moved from the Netherlands to Belgium since he was no

22. OJ 2000, L 70.
23. This was decided in the *Kziber* judgment (Case 18/90, ECR 199 (1991)) on the corresponding provision of the predecessor of the Euro-Mediterranean Treaty.
24. OJ 1983 C 110, 60.
25. Case 262/96, ECR I-2685 (1999). See also H. Verschueren, *The Sürül Judgment: Equal Treatment for Turkish Workers in Matters of Social Security*, European Journal of Migration and Law 371 (1999).

longer entitled to the Dutch non-contributory disability benefit (as this benefit is not exportable), the Court decided that this treatment was to be interpreted in line with the free movement and non-discrimination rules, which finally led to entitlement to this benefit.[26]

[B] Article 21: European Citizenship

Recent case law on Article 21 (European citizenship) has introduced the applicability of the non-discrimination rule of the Treaty (Article 18 TFEU) also to persons and benefits not within the scope of the coordination regulation. As a result, community law rights – in particular the right not to be subjected to unjustified discrimination – are no longer bestowed upon citizens solely when they make use of the economic freedoms and assume a corresponding status (worker, provider of services etc.), but directly by virtue of their status as a citizen of the Union (AG in Förster case).

Article 20 TFEU provides that citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship. Article 20(2) further provides that citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have the right to move and reside freely within the territory of the Member States.

Article 21 provides that every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.

Article 18 TFEU provides that within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

In the *Martínez Sala* judgment,[27] a landmark decision, the combination of these provisions led to an interesting outcome. Mrs Martínez Sala was a Spanish national, who has lived in Germany since May 1968. She had various jobs there at intervals and since October 1989 she has received social assistance. In January 1993, that is to say during the period in which she did not have a residence permit, she applied for child-raising allowance for her child born during that month. Her application was rejected on the ground that she did not have German nationality, a residence entitlement or a residence permit. Since it was uncertain whether she was an employed person for the coordination Regulation or a worker for Regulation 1612/68 (Now Regulation 492/2011),[28] the Court relied on (what are now) Articles 18 and 21 TFEU.

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26. See *Hendrix* judgment, Case C-287/05, ECR I-6909 (2007).
27. Case 85/96, ECR I-2691 (1998).
28. The referring court had not furnished sufficient information to enable the Court to determine whether a person in the position of the appellant is a worker within the meaning of Art. 45 TFEU and Regulation 1612/68, by reason, for example, of the fact that she is seeking employment. Annex I, point I, C ('Germany'), of Regulation 1408/71, provided in the context of family benefits that only a person compulsorily insured against unemployment or who, as a result of such insurance, obtains cash benefits under sickness insurance or comparable benefits may be classified as an employed person. For this reason there was uncertainty on her status.

It argued that Article 21 TFEU attaches to the status of citizen of the Union the rights and duties laid down by the Treaty, including the right, laid down in Article 18 TFEU, not to suffer discrimination on grounds of nationality within the material scope of the Treaty. In order to be able to invoke this Article, the Court added, the facts of the case have to fall within either the material scope or the personal scope of the Treaty. Since the child-raising allowance in question falls within the scope of the coordination Regulation it indisputably falls within the material scope of Community law. In so far as the personal scope is concerned, as a national of a Member State lawfully residing in the territory of another Member State, the appellant in the main proceedings comes within the personal scope of the provisions of the Treaty on European citizenship. Thus, since the child-raising benefit, disputed in this case, was in the scope of secondary legislation (Regulations 1408/71 and 1612/68), it was also within the material scope of Article 18. As a result, Ms Martínez Sala could invoke Article 18 TFEU in order to combat the refusal of the benefit. Before this decision on Article 18 she would have had no EU instrument for doing so, as the only other instruments were the mentioned Regulations.[29]

In the *Bidar* judgment[30] the Court accepted that Member States are permitted to ensure that the grant of social assistance does not become an unreasonable burden upon them and that the grant of such assistance may be limited to students who have demonstrated 'a certain degree of integration'. This was further elaborated in the *Förster* Judgment.[31] Jacqueline Förster, of German nationality, was confronted with the Dutch rule that study finance may be granted to students who are national of a Member State if, prior to the application, they have been lawfully resident in the Netherlands for an uninterrupted period of at least five years. Mörs Foster settled in the Netherlands in 2005 where she enrolled in 2001 for a course in educational theory. During her studies she had various forms of paid employment. From September 2000 she was granted a grant, since she was regarded as a worker within the meaning of Article 45 TFEU. Between July and December 2003 she was no longer a worker and therefore the decision to grant her maintenance grant was annulled for the period after this date.

The question was therefore whether the policy rule which required five years of residence was prohibited by (what is now) Article 18 TFEU. The Court investigated whether such a requirement can be justified by the objective of the host State's policy of ensuring that students who are nationals of other Member States have to a certain degree be integrated into its society. The Court decided that this condition is appropriate for the purpose of guaranteeing that the applicant is integrated into the society of the host State.

The requirement has also to be proportionate to the legitimate objective pursued by the national law. The Court decided that the condition concerned cannot be held excessive. For this purpose it is relevant that Article 16(1) of Directive 2004/38 provides that Union citizens will have a right to permanent residence in the territory of

29. Also in the *Grzelczyk* judgment (Case 184/99, ECR I-6193 (2001)) and the *Trojani* judgment (Case 456/02, ECR I-7573 (2004)) Arts 18 and 21 TFEU were relevant.
30. Case C-209/03, ECR I-2119 (2005).
31. *Jacqueline Förster*, Case C-158/07, ECR I-8507 (2008).

a host Member State where they have resided legally for a continuous period of five years. The residence requirement for study grants was applied on the basis of clear criteria known in advance. Therefore the residence requirement does not go beyond what is necessary to attain the objective of ensuring that students from other Member States are to a certain degree integrated into the society of the host Member State. Member States are allowed, however, the Court added, to award maintenance to students who do not fulfil the five year residence requirement.

Thus, Article 18 in conjunction with Article 21 does not take away all discrimination on basis of nationality; instead, Member States may require a certain degree of integration of a claimant into its society before this Article can be invoked. Five years is considered a period which is proportional.

In a case before the Court, the Commission accused the Netherlands of infringing the Treaty by the rule that for exporting the study grant (for a stay abroad when studying in the Netherlands) must have resided lawfully in the Netherlands for at least three out of the six years preceding enrolment at an educational establishment abroad. This requirement applies irrespective of students' nationality. The European Commission started the infringement procedure since this rule also affected children of frontier workers, and thus could be seen a form of indirect discrimination hindering free movement.

In its judgment of 14 June 2012,[32] the Court ruled that the 'three-out-of-six' rule is indeed inconsistent with Article 45 TFEU. Requiring a specified period of residence primarily operates to the detriment of migrant workers and frontier workers who are nationals of other Member States and is therefore indirectly discriminatory.

In the present case, the Netherlands invoked two reasons to justify the contested residence requirement. First, it claimed that the requirement is necessary in order to avoid an unreasonable financial burden. Second, given that the national legislation at issue is intended to promote higher education outside the Netherlands, the requirement ensures that the portable funding is available solely to those students who, without it, would pursue their education in the Netherlands.

The Court considered that as regards the justification based on the additional financial burden, budgetary considerations cannot justify discrimination against migrant workers. The Netherlands had contended that, in *Bidar*, the Court accepted the legitimacy of the objective of limiting, by means of a residence requirement, to ensure that the grant of that assistance did not become an unreasonable burden for the host Member State. The Court replied to this that the *Bidar* and *Förster* cases concerned students from other Member States who were not migrant workers or members of their families. The existence of a residence requirement to prove the required degree of integration is, in principle, inappropriate when the persons concerned are migrant workers or frontier workers.

The Court justifies the difference between migrant workers as others by considering that as regards migrant workers and frontier workers, the fact that they have participated in the employment market of a Member State establishes, in principle, a

32. Case C-542/09, not yet published.

sufficient link of integration with the society of that Member State, allowing them to benefit from the principle of equal treatment, as compared with national workers, as regards social advantages.

The objective of avoiding an unreasonable financial burden can therefore not be regarded as an overriding reason relating to the public interest, capable of justifying the unequal treatment of workers from other Member States as compared with Netherlands workers.

A second reason is that the residence requirement may be rendered legitimate by the purpose to increase student mobility and to encourage students to pursue studies outside the Netherlands. The Court accepted that the objective of encouraging student mobility is in the public interest and this constitutes an overriding reason justifying a restriction on the principle of non-discrimination on grounds of nationality. However the condition has to be appropriate for securing the attainment of the legitimate objective pursued and must not go beyond what is necessary in order to attain it.

The Netherlands contended that the purpose of the portable funding scheme is that it goes only to the students whose mobility must be encouraged. The Court then discussed the question whether the requirement does not go beyond what is necessary in order to attain that objective. It is up to the Netherlands to show that the measure is appropriate for securing the attainment of the objective relied upon and does not go beyond what is necessary to attain it.

The Netherlands had contended that a requirement to the effect that the student must know the national language or have a diploma from a Netherlands school would not be an effective means of promoting the objective pursued by the national legislation in question. According to the Netherlands such requirements would give rise to discrimination on grounds of nationality.

The Court replied that it is not sufficient for a Member State simply to refer to two alternative measures which, in its opinion, are even more discriminatory than the requirement laid down in its Act. The Netherlands must therefore at least show why it opted for the 'three out of six years' rule, to the exclusion of all other representative elements.

The Court does not further explain which arguments could have been sufficient. Since it closely follows the Conclusion of the AG, this can shed some light on this. The AG suggests (point 158) that the Netherlands needs at least to show why it favours residence of three out of six years to the exclusion of all other representative elements, such as (e.g.,) residence of a shorter duration, or why the target group cannot be identified through other (possibly less restrictive) measures, such as (e.g.,) a rule prescribing that the study grant for studying outside the Netherlands cannot be used to study in the place of residence.

Thus there is still a difference between economically active and non-economically active persons. It seems that persons with a foreign nationality cannot be refused benefit if they have a sufficient link with the country concerned. In case of economic activities, the link is directly and unconditionally assumed. In case of non-economically active persons the link has to be established in other ways.

Even though it is not so easy to justify this difference from a purely philosophical view, it is a clear difference, and in any case the case law has improved the position of the non-economically active persons considerably.

[C] Third Country Nationals

The position of the third country nationals is still different from that of EU nationals, although the Regulations 859/2003 and 1231/2010 have brought progress. However, they can still not invoke the provisions discussed in this section, i.e., on citizenship provisions.

For them the European Convention on Human Rights may be relevant, which is a Treaty developed by the Council of Europe. Article 14 ECRM provides that the enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Thus nationality is a forbidden ground for making distinction.

Article 14 is not a free standing provision, but it complements the other substantive provisions of the Convention and the Protocols. Thus it has effect solely in relation to 'the enjoyment of the rights and freedoms' safeguarded by these provisions. Consequently, this provision cannot be applied in any case of alleged discrimination.[33] The Court held this approach consistently in its case law, e.g., in the *Gaygusuz* judgment.[34] However, the discrimination provision can be applied in social security cases, since in the *Gaygusuz* judgment the Court also ruled that a benefit can be within the ambit of Article 1 of the First Protocol, i.e., the protection of property, and thus within the scope of the Convention.[35] Article 1 reads: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.'

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The *Gaygusuz* case concerned the refusal of the so-called emergency assistance, a kind of Austrian social assistance, to Mr Gaygusuz, on the ground that he did not have Austrian nationality; instead, he had Turkish nationality.

In this judgment, the Court required, for property protection to be acceptable, that a link can be established between the financing method and the benefit concerned,

33. Protocol 12 has introduced a more general equality clause. However, few countries have ratified it so far, and it is not a Protocol which is part of the EU accession agreement.
34. No. 39/1995/545/632, *Reports* 1996-IV, 1129. On this judgment, see also S. van den Bogaerd (ed.), *Social Security, Non-discrimination and Property* (Antwerpen 1997); H. Verschueren, *EC Social Security Coordination Excluding Third-Country Nationals: Still in Line with Fundamental Rights after the Gaygusuz Judgment* 991 (CMLR 1997); F. Pennings, *The Potential Consequences of the Gaygusuz Judgment* 181 (EJSS 1999).
35. The First Protocol is part of the Accession agreement.

more specifically that contributions had been paid. In this case the link between the contributions paid and the emergency assistance was an indirect one, but considered sufficient by the Court. The link was created by the fact that the emergency assistance was payable only after the right to (contributory) unemployment benefit had expired. Therefore, in the Court's view, the emergency benefit was linked to the payment of contributions to the unemployment insurance fund and as a result, this benefit was within the ambit of the Protocol and, consequently, Article 14 was applicable on this case.

So, where Regulation 1231 requires the involvement of the facts of two Member States and limits the scope to the benefits of the coordination regulation, Article 14 can have broader impact.

This is the more interesting in view of the negotiations on the accession of the European Union to the European Convention on Human Rights. It is unclear what the effect will be, but it may mean that the conditions of the coordination regulation are not consistent with the criteria as developed in *Gaygusuz*.

§6.07 CONCLUSION

As was pointed out in the first section, and shown by means of describing case law, the coordination rules of the EU have direct effect and can be invoked by individuals. The European Commission and European Court of the European Union have both, in their own way, contributed to maintaining the legal force of these rules. Moreover, we have seen that these rules and their interpretations have to contribute to the free movement of workers. This has led to broad interpretations of terms where this would be beneficial for free movement. It was not the literal meaning of the words which had to be interpreted which was essential, but the objective underlying these rules.

This strong and generous, for the persons concerned, impact has as counterpart that the coordination rules have been limited to particular groups, although their impact has been growing steadily. It started with a limitation to workers ('wage earners'), then was extended to self-employed. Still only EU nationals can invoke these rules. The extension to third country nationals still has important limitations (not all EU countries participate, the territorial scope does not include country of origin, the facts must not be limited to one EU Member State).

Furthermore, the non-discrimination rule (on the ground of nationality) for benefits outside the coordination regulation works out differently for EU nationals and third country nationals, and between economically active persons and others.

However, differences have to be objectively justified, both under EU law and under the case law of the ECHR. This need for objective justification is the basis for a dynamic development of coordination law, which cannot found in other regions of the world so far.