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Inclusion and Exclusion of Persons and Benefits in the New Co-ordination Regulation

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I INTRODUCTION

At the end of December 1998, the European Commission published a proposal[1] for a new co-ordination regulation which was meant to replace Regulation 1408/71.[2] The purpose of proposing a new regulation was twofold: to introduce a much shorter co-ordination instrument, and to modernise the existing co-ordination rules. The modernisation involved, in particular, the personal and material scope of Regulation 1408/71. Extension of both scopes was considered necessary as the present Regulation excludes considerable parts of the population and considerable parts of social security. During the process which followed the publication of the 1998 proposal, the Council and Parliament reached a consensus on a much more limited extension than that envisaged by the European Commission, which was eventually adopted as Regulation 883/2004 on the coordination of social security systems.[3] This chapter will study this reform process so as to clarify which categories of persons and benefits are still excluded from the co-ordination regime.

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1 COM(1998) 779.

2 Reg 1408/71 was published for the first time in 1971 OJ L149/2 and since then it has been revised several times. A consolidated version of Reg 1408/71 and Reg 574/72 was published in 1997 OJ L28/1. For the website of the (non official, but most recent) consolidated version, *see* http://europa.eu.int/eur-lex/en/consleg/pdf/1971/en_1971R1408_do_001.pdf. On the Regulation, see F Pennings, *Introduction to European Social Security Law* 4th ed, (Intersentia, 2003).

3 2004 OJ L200/1.

II THE REASONS FOR SIMPLIFICATION AND MODERNISATION OF THE REGULATION AND THE PROCEDURE WHICH WAS FOLLOWED

The objective of Regulation 1408/71 is to take away impediments in the area of social security in order to facilitate the free movement of workers and self-employed persons. The Regulation is based on Article 42 EC, which provides for both the obligation and the power to take measures which are 'necessary in the field of social security to provide freedom of movement for workers'. Apart from certain provisions in the field of non-discrimination,[4] Regulation 1408/71 is the only Community instrument that restricts the powers of the Member States to decide exclusively on main elements of their social security systems, including the latter's personal and territorial scope, and the distribution of the costs of benefits. It will not require much explanation to understand that Member States are aware of possible extra expenses for their country as a result of the Regulation and are therefore not very enthusiastic about extending its scope.

In comparison with the co-ordination instruments of other international organisations, such as the ILO,[5] Regulation 1408/71 has incomparably more impact: it is unique in that it contains rules binding all Member States. These rules have to be interpreted in the same way and, very importantly, interpretation problems are solved by the supranational Court of Justice, which gives binding judgments that are often very important for the development of social security co-ordination.

From a different perspective, one's assessment of Regulation 1408/71 can be more critical. In the course of time, the Regulation has been extended considerably by amending regulations. These amending regulations were often accepted only after long negotiations, sometimes taking even several years. Member States try to avoid and / or limit the costs resulting from changes to the Regulation; and for this reason, changes, if found necessary, often take the form of very complicated compromises—which often means new exceptions to the main rules. The result is usually difficult for migrant workers to understand. This may lead to uncertainty which can seriously infringe on the main objective of the Regulation: free movement of workers.

Moreover, there are gaps in the coverage of the present Regulation, such as the position of third country nationals, the non-working population and the exclusion of non-statutory social security. Although these gaps have been acknowledged for many years, there has been but very slow

[4] Such as Dir 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, 1979 OJ L6/24.

[5] In particular: ILO Conventions Nos 48, 118 and 157.

progress in filling them. The 1998 Proposal for simplification and modernisation of the Regulation was a radical and comprehensive attempt to extend the scope of the Regulation.[6] It was inspired by a series of conferences, addressing the problems with Regulation 1408/71, organised in all Member States.[7]

It was a far from easy process to have a new regulation adopted. Article 42 EC requires unanimity of the Council in the decision making process. In addition, the Council has to follow the co-decision procedure of Article 251 EC, which means that the European Parliament is involved. This made the realisation of a new regulation problematic.

For a long time after the publication of the 1998 Proposal, little progress was made and the fate of the Proposal did not look very favourable. In 2001, however, an important development took place, since so-called 'parameters' for the new regulation were worded. These were to serve as starting points, based on general consensus, for drafting the new regulation.[8] After the adoption of these parameters, progress was made. In several meetings of the Council, the chapters of the Proposal were successively discussed. The Council succeeded in reaching political agreement on the Proposal in December 2003.[9] Meanwhile the European Parliament was involved via the co-decision procedure. It adopted 47 amendments on the Proposal, of which the Council agreed to 37.

The final text differs considerably from the 1998 Proposal. A provisional version was published in January 2004,[10] and was finally adopted by Council and Parliament in April 2004 as Regulation 883/2004.[11]

Regulation 883/2004 deserves, of course, extensive discussion and analysis, but that would require a book on its own. In this chapter, I will concentrate on the inclusion and exclusion of (new) categories of persons and benefits, and their legal position. For this purpose, a comparison of Regulation 883/2004 with the 1998 Proposal is important.

[6] COM(1998) 779. On the principles of a new co-ordination regulation, see E Eichenhofer, 'How to Simplify the Co-ordination of Social Security' (2000) 2 *European Journal of Social Security* 231; M Sakslin, 'Social Security Co-ordination: Adapting to Change' (2000) 2 *European Journal of Social Security* 169; M Sakslin, 'Can the Principles of the Nordic Conventions on Social protection Contribute to the Modernisation and Simplification of Regulation (EEC) No. 1408/71' in *25 Years of Regulation (EEC) No. 1408/71 on Social Security for Migrant Workers—A Conference Report* (Swedish National Social Insurance Board and European Commission, 1997) p 197. On the 1998 Proposal, see F Pennings, 'The European Commission Proposal to Simplify Regulation 1408/71' (2001) 3 *European Journal of Social Security* 45.

[7] The final report of the results of the discussions can be found in D Pieters (ed), *The Co-ordination of Social Security at Work* (Acco, 1999). For the conferences, preparatory materials were published in P Schoukens (ed), *Prospects of Social Security Coordination* (Acco, 1997).

[8] Council Document 15045/01 (6 December 2001).

[9] 2549th Council Meeting (1–2 December 2003).

[10] The text was published as COM(2004) 44.

[11] 2004 OJ L200/1.

III THE PERSONAL SCOPE

A Extension of the Personal Scope to all Nationals

Regulation 1408/71 is limited to employed persons and self-employed persons. The 1998 Proposal was much broader in scope: it would have applied to all nationals of a Member State resident in the territory of a Member State who are or have been subject to the social security legislation of one or more Member States, as well as to the members of their families and to their survivors. This important and principal extension is maintained in Article 2(1) Regulation 883/2004: consequently, the right to free movement—in so far as social security is involved—is no longer limited to employed persons and self-employed persons. Although in the memorandum to the parameters,[12] some Member States made a reservation in respect of this extension, as they could not accept all of its potential consequences, the extension was accepted as part of the final version. Remarkable in this respect is that Recital 7 of the Preamble to Regulation 83/2004 reads that 'due to the major differences existing between national legislation in terms of the persons covered', it is preferable that the Regulation applies to nationals of a Member State. Recital 7 seems to consider the extension of the personal scope to all Community nationals as a form of harmonisation of the terms 'employed' and 'self-employed' persons.

However, the practical effect of this extension seems to be limited, given recent developments in EU law. From the main elements of co-ordination (non-discrimination; aggregation of periods of insurance, work or residence; payment of benefits; and determining the legislation applicable), for persons who are not an employed or self-employed person, the non-discrimination rule seems the most important. But for non-workers and non-self-employed persons who are members of a worker or self-employed person's family, the *Cabanis* judgment had already permitted them to invoke the non-discrimination rule contained in Article 3 Regulation 1408/71.[13] In fact, the Court of Justice ruled that members of the employed or self-employed person's family can invoke all the provisions of Regulation 1408/71 unless these specifically refer to employed or self-employed persons. In addition, for non-workers and non-self-employed persons who are not members of an employed or self-employed person's family, the interpretation of Article 18 EC by the Court is relevant. In the *Martínez Sala* judgment, the Court ruled that the claimant, a Community national, could invoke Articles 18 and 12 of the Treaty to have discrimination on nationality in a social security scheme removed.[14]

[12] Council Document 12296/01 (28 September 2001).
[13] Case 308/93 *Cabanis-Issarte* [1996] ECR I–2097.
[14] ase 85/96 *Martínez Sala* [1998] ECR I–2691.

Still, there can be situations in which these non-discrimination provisions do not have the same effect as the application of Regulation 1408/71 itself,[15] or when it is unclear whether Regulation 1408/71 is applicable.[16] For that reason, the extension of personal scope in Regulation 883/2004 is to be welcomed. Moreover, this extension may also be useful in cases where there is no discrimination *strictu sensu*, but when aggregation of periods and assimilation of facts abroad (as provided for under Articles 5 and 6 Regulation 883/2004) are necessary for an individual to qualify for benefits.[17] The extension of the personal scope to all Member State nationals therefore simplifies the co-ordination rules.

B (No) Extension to Third Country Nationals

The personal scope of Regulation 1408/71 has often been criticised for its limitation to nationals of one of the Member States. The European Commission proposed the extension of Regulation 1408/71 to third country nationals in 1997, but that proposal was not adopted.[18] The exclusion of third country nationals means, for instance, that if a Moroccan national works successively in Germany and the Netherlands, he cannot have his periods of employment completed in Germany aggregated to those fulfilled in the Netherlands. Such aggregation may be desirable for the person concerned if the periods completed in the Netherlands are insufficient to become entitled (for example) to unemployment benefit. For persons falling within the scope of Regulation 1408/71, aggregation enables them to satisfy the benefit conditions of the State where they have to claim benefit. It is not easy to justify this difference in treatment between EU nationals and non-EU nationals.

The 1998 Proposal made a new attempt to include third country nationals within the personal scope of the social security coordination system. This attempt was, however, effectively overruled by the judgment of the Court of Justice in *Khalil*,[19] from which it followed that Article 42 EC cannot be a legal basis for co-ordination rules covering third country nationals. In the light of that judgment, the Commission made a separate proposal, this time based on Article 63(4) EC, for a new regulation

[15] For instance, if a residence scheme of disability benefits does not take periods fulfilled abroad into account.
[16] Such as in the case of *Martínez Sala*, where it was unclear whether she was still covered by Reg 1408/71.
[17] See below for an example of such a situation.
[18] COM(1997) 561. On this topic, see Y Jorens and B Schulte (eds), *European Social Security Law and Third Country Nationals* (Brugge, die Keure, 1998).
[19] Case 95/99 *Khalil* [2001] ECR I–7413.

extending the advantages of Regulation 1408/71 to third country nationals. This proposal was adopted and became Regulation 859/2003.[20]

Regulation 859/2003 provides that the provisions of Regulation 1408/71 shall apply also to persons who, solely because of their nationality, cannot invoke Regulation 1408/71. Article 63(4) EC, which concerns the Community's powers to adopt measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States, was accepted as a legal basis for this new Regulation. However, Article 63(4) EC allows certain Member States to be exempted from the instruments based upon it—an opportunity which Denmark made use of, though this perhaps explains why there was now sufficient 'consensus' on extending the co-ordination rules to third country nationals. Article 90(1) Regulation 883/2004 now states that Regulation 1408/71 shall remain in force and continue to have legal effect for the purposes of Regulation 859/2003, for as long as the latter instrument has not been repealed or modified.

There is, however, still an important difference between Regulation 1408/71 (and now Regulation 883/2004) on the one hand and Regulation 859/2003 on the other hand. This is the result of an addition to the text of Regulation 859/2003 during the negotiations, to the effect that this measure cannot be invoked in a wholly internal situation. This means that only in a situation concerning facts in at least two EU Member States (as with a Moroccan worker who subsequently works in both France and the United Kingdom) is Regulation 859/2003 applicable. The fact that the person concerned is originally from another State, not an EU State, is irrelevant. This limitation can also be found in the *Khalil* judgment, and earlier in the *Petit* judgment.[21] Still, its effect is different for third country nationals than for EU nationals such as Mr Petit, as the former are from a third country and therefore much more likely to be discriminated against on grounds of nationality than Union citizens. An example in which the non-discrimination rule would be useful for third country nationals can be found in the *Sürül* case,[22] where national law excluded foreigners from the national security system. In this particular case, Decision 3/80 of the EC-Turkey Association Council could successfully be invoked. This instrument contains a non-discrimination provision which can be invoked by Turkish nationals in an EU Member State. In the *Sürül* case, it was relied upon by Turkish nationals who were disqualified from German family allowance on the grounds that they did not have a permanent residence permit. This was considered a form of discrimination

[20] Reg 859/2003 extending the provisions of Reg 1408/71 and Reg 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality, 2003 OJ L124/1.
[21] Case 153/91 *Petit* [1992] ECR I–4973.
[22] Case 262/96 *Sürül* [1999] ECR I–2685.

on grounds of nationality. For third country nationals having a nationality other than Turkish, Decision 3/80 is not applicable, and Regulation 859/2003 does not have the same result. This is an unsatisfactory result. Moreover, the reservation that Regulation 1408/71 is not applicable in the strictly internal affairs of one Member State is not even necessary in respect of Regulation 859/2003, since the latter instrument is not based on Article 42 EC, but on Article 63(4) EC, so the *Petit* and *Khalil* judgments do not actually require this limitation. Consequently, the modernisation of the co-ordination rules is not yet complete.

IV THE MATERIAL SCOPE

A A Limitative or Enumerative Approach

Under the 1998 Proposal, the material scope of the co-ordination regime was no longer to be limited to specified risks. Article 2 of the Proposal provided that 'this Regulation shall apply to all social security legislation concerning the following, in particular.' This approach did not survive the discussions in the Council and is not reflected in the material scope as described in Article 3 Regulation 883/2004.

The material scope as defined in the 1998 Proposal has interesting implications: it takes account of the continuous stream of new types of benefits, for example, parental benefits, care insurance benefits and benefits in case of interruption of employment (for whatever reason). The fact that Article 42 EC requires measures 'in the field of social security' can be used as an argument for this broad approach.

However, an enumerative list has its own problems. Since the term 'social security' is not defined, the material scope envisaged in the 1998 Proposal could become very wide and the consequences would be hard, if not impossible, to oversee. What to do with housing benefits and study grants? And what about tax reductions?

The problems caused by the non-limitative enumeration would have been particularly serious, as the 1998 Proposal included the liability of employers. Under Regulation 1408/71, the liability of employers falls within the material scope of the Regulation only insofar as national law imposes an obligation for employers which is related to the contingencies falling under the Regulation. An example is the employer's obligation to continue to pay wages during sickness, which can be found in several systems, such as the German and the Dutch ones. In the 1998 Proposal, there was no longer any limitation to risks, and therefore employers' obligations with respect to, for instance, holiday payments, loyalty payments etc could have fallen within the scope of the new co-ordination regime as well.

Regulation 883/2004 does not follow the 1998 Proposal; its extension is limited to statutory pre-retirement and paternity benefits.[23] As the scope of the final version is limited to legislation, pre-retirement benefits governed by collective agreements (which is in fact the usual situation) are still beyond the scope of the Regulation (unless they are declared generally binding and the Member State concerned makes a declaration that the agreement is within the scope of the Regulation). In the Preamble to Regulation 883/2004, Recital 33 reads that, given the fact that statutory pre-retirement schemes exist in a very restricted number of Member States, the rule on the aggregation of periods should not be included. Apart from the lack of logic in this consideration (why not include the rule for the rare cases where it can be used?), it shows indeed that the extension of the material scope carried out under Regulation 883/2004 is very limited.

B Supplementary Social Security

The 1998 Proposal provided that agreements declared generally binding fall within the material scope of the coordination regime; a declaration from the Member State concerned that the scheme is within the material scope would no longer have been required. This extension did not reach the final version of Regulation 883/2004.

The approach of the 1998 Proposal was meant to terminate the exclusion of important parts of social security from the co-ordination rules. Supplementary social security provisions in collective agreements do not fall within the scope of Regulation 1408/71 and export of these benefits is therefore not required if the collective agreement limits payment to the national territory. Nor can periods fulfilled abroad be used to satisfy waiting periods in supplementary pension schemes. For posted workers, for instance, the problem arises that contributions levied on the basis of collective agreements for supplementary benefits in the State of employment may overlap with the benefits for which they remained insured in the State of residence.[24]

The effects of extending the co-ordination rules to collective agreements and other contractual schemes are, however, hard to oversee, since all kinds of provisions can be found in collective agreements. Holiday pay, study and training grants, sabbatical leave, loyalty stamps and bad-weather stamps are common examples of supplementary social security.

[23] Paternity benefits were added as a result of an amendment adopted by the European Parliament.

[24] Such double contributions were the subject of the judgment in Case 272/94 *Guiot* [1996] ECR I–1905, in which the Court considered levies in some cases inconsistent with the freedom to provide services. See M Houwerzijl and F Pennings, 'Double Charges in case of Posting of Employees: the *Guiot* Judgment and its Effects on the Construction Sector' (1999) 1 *European Journal of Social Security* 91.

Sometimes collective agreements provide for supplements to statutory social security (increases to the benefit rates) or replace statutory protection which was withdrawn (privatisation). Some co-ordination rules are very well applicable to the advantages mentioned in collective agreements, such as the non-discrimination clause and the provision on export of benefits. In fact, non-discrimination rules are already applicable on collective agreements, such as Article 7(2) Regulation 1612/68.[25] Other co-ordination rules can lead to problems if they are applied to these advantages without restrictions. One example is a sabbatical leave provision which requires a waiting period of seven years of work for the same employer. An employer cannot be expected to allow an employee to aggregate the periods of work for other employers for the purpose of satisfying this condition, since this employer has to pay the full costs of the sabbatical. The same problem arises in the case of loyalty benefits. Problems arise also in the case of employees working in two countries. If the rules for determining the legislation applicable apply to these agreements as well, the employee concerned falls under one collective agreement only, insofar as its social security provisions are considered. The effects are hard to oversee and some of the effects are undesirable. Member States could prevent these problems by no longer extending collective agreements, but that would be an unattractive effect.

In the final version of Regulation 883/2004, the approach of Regulation 1408/71 is fully maintained, so there is no further extension to include supplementary social security. Although it is understandable that contractual schemes, even if extended or made obligatory by the public authorities, are not brought unconditionally within the scope of the Regulation, the progress made in extending the co-ordination rules to these types of benefit is disappointing. So far very little use has been made of the declarations,[26] even in cases when there are no obvious problems. It is preferable that Member are encouraged to issue in more cases declarations to include extended contractual schemes within the scope of Regulation 883/2004 and for this purpose they should have the burden of proof to explain why such a declaration cannot be given.

In the memorandum to the parameters, it is remarked that contractual schemes are by nature not suitable to be subject to the co-ordination rules applicable to statutory schemes. Other forms of co-ordination are sometimes more adequate, according to the parameter.[27] The memorandum does not explain which other forms of co-ordination are meant, but currently

[25] Reg 1612/68 on freedom of movement for workers within the Community, 1968 OJ L257/2.

[26] France has been the exception so far and has brought supplementary pensions and unemployment benefit schemes governed by collective agreements within the scope of Reg 1408/71.

[27] Council Document 12296/01 (28 September 2001) p 9.

these 'other forms of co-ordination', whatever they are, are not often used.[28] In any case, they leave many problems for migrant workers unsolved. In the 1998 Proposal, the solution should not have been found in a mere simplification of the rules, as they lead to many new problems, but in making additional, specific rules for these types of schemes.

In the Preamble of Regulation 883/2004, Recital 6 reads that the close link between social security legislation and those contractual provisions which complement or replace such legislation and which have been the subject of a decision by the public authorities rendering them compulsory or extending their scope may call for similar protection with regard to the application of those provisions as that afforded by the new regulation; as a first step, the experience of Member States who have notified such schemes might be evaluated. This recital was inserted into the text after adoption of an amendment proposed by the European Parliament. To this text, the Council added the cautious last phrase that, first, appropriate national experiences have to be studied. The question is whether such an evaluation is really necessary. There are very few declarations, and the schemes concerned—which have national scope—seem to fit very well into the co-ordination system.

Still, the recital leaves more room than the text of the parameters, as now it is no longer argued that co-ordination of supplementary social security has to take place outside the Regulation.

C Social Assistance and Benefits for Victims of War

In both the 1998 Proposal and Regulation 883/2004, social assistance remains excluded from the material scope of the coordination regime. It is not explained why this is the case. Given the nature of social assistance, two co-ordination aspects are relevant to this type of benefit: non-discrimination and export. Aggregation of periods is not necessary, as social assistance has no requirements as to periods of insurance etc.

The non-discrimination rule applies already to social assistance, on the basis of the EC Treaty.[29] Export could, if this were considered undesirable, have been excluded on the basis of a specific rule in the new Regulation relating to social assistance, as is the case with special non-contributory benefits.

The 1998 Proposal no longer excluded benefits for victims of war or its consequences. As in the case of social assistance, only two co-ordination aspects are relevant to such benefits: non-discrimination and export. But here, the application of these aspects will be different: such benefits require room

[28] Perhaps the drafters had in mind Dir 98/49 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community, 1998 OJ L209/46; this directive provides a very limited solution to the problems with the supplementary pensions.

[29] See Case 85/96 *Martínez Sala* [1998] ECR I–2691.

for the national authorities to discriminate, as benefits for the victims of war are meant to compensate for the consequences of war. The co-ordination rules should not lead to the obligation to pay these benefits also to the nationals of the former enemy or of neutral countries.[30] It is, however, hard to see any good arguments against export of this type of benefit. Exclusion of export may lead to infringements on the right to free movement, as appears from experiences with Regulation 1408/71: think of an elderly woman, entitled to this type of benefit, who wishes to join her daughter living in another Member State. The free movement of these persons is limited if export is not allowed and there are no good reasons for this from the point of view of co-ordination. This is even more true now that Regulation 883/2004 is meant to enable free movement of persons, instead of free movement of workers only.

D Non-Contributory Benefits

One of the problems with Regulation 1408/71, which attracted considerable political attention, concerns the so-called special non-contributory benefits. Regulation 1408/71 provides that these benefits, if listed in Annex IIa, do not have to be exported. In the past, Member States met but few problems if they wished to have special non-contributory benefits listed in this Annex. However, the Court's judgments in *Jauch*[31] and *Leclere*[32] meant that not all benefits listed in Annex IIa could stand the test. The Court required that these benefits have to be special, in that they are not granted to all residents, but only to those with insufficient means of their own. As this description still leaves much uncertainty on which benefits are allowed to be listed in the Annex and which are not, the 1998 Proposal attempted to give a sharper definition. It defined the benefits concerned as non-contributory cash benefits whose granting procedures are closely linked to a particular economic and social context and which are granted after means-testing or which are intended solely to afford specific protection for the disabled in so far as such benefits are mentioned in Annex I. This provision requires a means test, except in the case of benefits for the disabled. As a result, the non-means tested British mobility allowances (DLA and DWA) benefits, discussed in the *Snares* judgment,[33] can, being disability benefits, if they are also listed in the new Annex, still be restricted to the territory of the UK. However, a non-means-tested old-age benefit, for example, is no longer a special benefit.

[30] See the judgment in Case 207/78 *Even* [1979] ECR 2019, in which the Court ruled that Member States are free to award this special form of compensation based on solidarity with the victims of the war only to their own nationals.
[31] Case 215/99 *Jauch* [2000] ECR I–1901.
[32] Case 43/99 *Leclere* [2001] ECR I–4265.
[33] Case 20/96 *Snares* [1997] ECR I–895.

In the final version of Regulation 883/2004, the rules concerning special non-contributory benefits are found in Article 70. Article 70(2) defines special non-contributory cash benefits as benefits which:

(a) are intended to provide either:
  (i) supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 3(1), and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned;
  or
  (ii) solely specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned,

and

(b) where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary. However, benefits provided to supplement a contributory benefit shall not be considered to be contributory benefits for this reason alone,

and

(c) are listed in Annex X.

These benefits are payable in the State of residence only.

It follows that according, to the final version of Regulation 883/2004, a means test is no longer required to make a benefit special. Instead, the Regulation requires that the benefit has to provide for a minimum subsistence income, which does not necessarily require a means test. The text excludes the benefits disputed in the *Leclere* judgment as these were not subsistence benefits, but were payable to all persons who gave birth to a child. However, the issue of the special non-contributory benefit is not unambiguous. If a benefit is considered a special non-contributory benefit, it means that it is no longer exportable and therefore persons are disqualified who are insured in the country concerned and then move to another Member State. Consequently, it *excludes* persons who leave the country. However, the approach that these benefits are payable in the country of residence only means that persons who move to a country with such benefits are *included* in the scheme. For instance, if a country has a scheme for the young handicapped, a person born and had grown up in another country who goes after the age of 18 to the country with the disability scheme, has to be treated as if he had grown up in that country. This follows from the present Article 10a Regulation 1408/71. Article 70 Regulation 883/2004 does not have this assimilation rule, but the more general Article 5(2) of the new Regulation would still apply. This provides that where, under the legislation of the competent Member State, legal effects are attributed to the

occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory. This is an important assimilation rule.

Note that, in respect to this set of rules (Article 70 on special non-contributory benefits and Article 5(2) on the assimilation of facts), the extension of the personal scope of the Regulation to all Community nationals may be relevant in a situation such as the following. A person disabled from birth who moves to another Member State can now, in his own right, invoke Article 5(2) and apply for the benefit under the young disability benefit scheme. A non-discrimination clause would not have the same effect: if events which occurred outside the territory of the Member State would have been excluded, that would be a form of indirect discrimination on nationality (the same rule would apply to persons of the nationality of the State who were born abroad as well). In that case, there could be an objective justification for not taking foreign facts into account. Article 5(2) places claimants in a much stronger position.

The same set of rules also shows that the limitation placed by Regulation 859/2003 on the right of third country nationals to invoke the co-ordination regime if all the facts are limited to one Member State can have important effects: a person from Russia cannot invoke these rules if he is in a Member State and there is no relation with another Member State.

V THE RULES FOR DETERMINING THE LEGISLATION APPLICABLE

A General

The 1998 Proposal contained important reductions in the texts of Regulation 1408/71. This was an important improvement. Regulation 883/2004, however, still has 91 articles and is much less reduced in extent than the 1998 Proposal. Fortunately, the section concerning the rules for determining the applicable legislation in the final version is still shorter than that of Regulation 1408/71.

Article 11(1) Regulation 883/2004, like Article 13 Regulation 1408/71, provides for the exclusive effect of the rules for determining the legislation applicable. But Article 11(3) Regulation 883/2004 is a simplification compared to Article 13(2) Regulation 1408/71, since the former refers to employed and self-employed persons in one single phrase. In the text of Article 11(3) Regulation 883/2004, the phrase 'even if he resides in the territory of another Member State' (which can now be found in Article 13(2) Regulation 1408/71) is lacking. This phrase was the basis for the binding effect of the rules for determining the legislation applicable; we assume that the new Regulation does not depart from this caselaw and that the drafters wish the caselaw on this topic to remain applicable.

Article 11(2) Regulation 883/2004 provides that, for the purposes of this Title, persons enjoying cash benefits because of or as a consequence of their activity as an employed or self-employed person shall be considered to be pursuing the said activity. This shall not apply to invalidity, old-age or survivors' pensions or to pensions in respect of industrial accidents or occupational diseases or to sickness benefits in cash covering treatment for an unlimited period.

A person pursuing an activity as an employed or self-employed person in the territory of a Member State is subject to the legislation of that State (Article 11(3) Regulation 883/2004). Any person to whom the other subparagraphs of Article 11 (concerning civil servants and persons called up for military or civilian service etc) do not apply, shall be subject to the legislation of the Member State in whose territory he resides. This provision makes clear that, among other categories, persons are subject to the legislation of the State of residence.

The approach of Article 11(2) Regulation 883/2004 towards non-active persons is interesting and clearer than that of Regulation 1408/71. The new article provides that, as a main rule, the persons receiving benefit are considered as pursuing their activity, provided these benefits are related to their activities as an employed or self-employed person. Consequently, they remain covered by the legislation of the country where they last worked. An exception applies for recipients of the benefits listed in Article 11(2); they are subject to the legislation of the State of residence.

According to the present rules—Article 13(2)(f) Regulation 1408/71 and Article 10b Regulation 574/72—Member States can decide when a person who no longer resides in their territory is no longer insured by their system. This rule does not offer (explicit) limitations on the scope for excluding non-residents who are no longer in work from coverage; the Court of Justice accepted these rules in the *Kuusijärvi* judgment.[34] The Court's interpretation of Article 13(2)(f) Regulation 1408/71—in theory—does not preclude Member States also from applying it in the case of temporary interruptions of work, such as sickness or unemployment. During the negotiations over the amending regulation which inserted Article 13(2)(f) into Regulation 1408/71, it was proposed that, in the case of short interruptions to work, this Article should not be applicable. However, these negotiations were not successful. The final version of Regulation 883/2004 shows that more progress has now been made in this respect. It gives new criteria for determining situations in which a person no longer falls under the legislation of the former country of employment. This is, therefore, an improvement.

For some categories, however, Regulation 883/2004 may represent a deterioration in their legal position. At present, a Member State can provide, for instance, that persons remain covered by their legislation if they

[34] Case 275/96 *Kuusijärvi* [1998] ECR I–3443.

reside in another Member State and receive disability benefit. The new text no longer provides for this opportunity.

A special provision is made for a person receiving unemployment benefit according to Article 65 Regulation 883/2004; this concerns the situation in which he receives unemployment benefit according to the rules of the State of residence. He is subject to the legislation of the State of residence. This is an improvement. Suppose a person falls ill. Under the old rules, he has to claim sickness benefit in the country of work. Now he remains subject to the same legislation. This solves one of the problems highlighted in the operation of Regulation 1408/71.[35]

B Posting

Article 12 Regulation 883/2004 concerns posting, which was called in the 1998 Proposal 'the temporary pursuit of an activity in another Member State', but is now referred to simply as 'special rules'. Article 12(1) concerns the situation in which a person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to the territory of another Member State to perform work on that employer's behalf. This person continues to be subject to the legislation of the first Member State, provided that the anticipated duration of that work does not exceed 24 months and that he is not sent to replace another person. This provision, which allows for posting during 24 months, is more generous than Regulation 1408/71 and even than the 1998 Proposal (which mention only 12 months).

Article 12(2) provides for the opportunity of posting as a self-employed person. This provision concerns a person normally pursuing an activity as a self-employed person in a Member State who goes to perform a similar activity in the territory of another Member State. Also here, posting is possible for a maximum period of 24 months. The new text requires 'similar activities', whereas Regulation 1408/71 merely required 'work', which could be of a different type from that which was performed before, and indeed, could also be work as an employed person (as emerged from the *Banks* judgment).[36] It is not clear whether, under Article 12(2) Regulation 883/2004, the term 'similar activity' requires that the work in the host State must be self-employed work, though that is not explicitly required.

Although the new provisions are more clearly drafted than the present ones, they leave several of the present questions concerning posting unan-

[35] See F Pennings, 'The European Commission Proposal to Simplify Regulation 1408/71' (2001) 3 *European Journal of Social Security* 57.
[36] Case 178/97 *Banks* [2000] ECR I–2005.

swered and do not give specific criteria, such as for what is meant by 'normally pursues an activity' in Article 12(2). For such provisions, the caselaw developed under Regulation 1408/71 has kept its relevance.

VI CO-ORDINATION OF SICKNESS BENEFITS

In the 1998 Proposal, the European Commission proposed to give the members of the family of frontier workers the possibility of obtaining benefits in kind according to their own choice, in the State of residence or the State of employment, just as in the case of frontier workers themselves. In particular, members of the family of a frontier worker who move from the State of employment to another State (whereas the frontier worker remains to work in the former State) may want to continue to make use of the healthcare of their country of origin, since they are often more familiar with the system. The frontier worker has the choice, and it is not easy to explain why his children and spouse have to go to the healthcare providers in the State of residence. The final version of Regulation 883/2004 follows the new approach but with certain restrictions. Member States are given the opportunity to limit the right of the members of the family to choose *if* they make use of Annex III. In that case, members of the family can apply for benefits in kind only if they become necessary during their stay in the competent State. The right to choose was added after an amendment adopted by the European Parliament, but the Council inserted the possibility of deviating from this rule by means of the Annex, in order to reach consensus among the Member States.

If the frontier worker terminates his activities as a frontier worker, he can claim benefit in the State of residence only. In Article 17 of the 1998 Proposal, the Commission had proposed to give the post-active frontier worker and his family members the right to choose between the system of the State of residence and the State of employment, if they have already made use of this freedom to choose before the retirement of the frontier worker. This Proposal would have answered criticism of the rules contained in Regulation 1408/71,[37] whereby, if a frontier worker already has a general practitioner or specialist in his country of employment (for instance, because he lived there previously), it is problematic if he has to visit another general practitioner or specialist after his retirement. Consequently, acceptance of this proposal would have been desirable. During the discussions in the Council, the Commission's proposed provision was deleted, but it was re-introduced as a result of an amendment adopted by the European Parliament. Article 28(2) Regulation 883/2004 provides that a pensioner who, during the last five years before he became entitled to an old-age pension or invalidity pension, worked at least two years as a frontier worker is

[37] See Y Jorens and B Schulte (eds), Brugge, p 30.

entitled to benefits in kind in the Member State where he worked as a frontier worker. Here, the compromise was made possible in Council by providing that this is possible only if the Member State in which the person worked as a frontier worker and the Member State in which the competent institution responsible for the costs of the benefits in kind have agreed on this and are both listed in Annex V.

VII CO-ORDINATION OF UNEMPLOYMENT BENEFITS

A Determining the Applicable Unemployment Legislation

The 1998 Proposal contained a single rule on an unemployed person who, during his last employment, resided in a Member State other than the competent State. Such a person who resides in the territory other than the competent State, and who makes himself available to the employment services of the State of residence, would have received benefit from the competent State. The claimant would have had to be available to the employment services in the State of residence. This proposal was in line with the argument of the Court that the unemployed person has the best chances of finding work in his State of residence and would, therefore, have been consistent with the coordination system.[38]

An effect of the proposal is also that the problems related to the present rules which allow non-frontier workers who do not work in the competent State to choose between benefits in the State of employment and the State of residence are taken away.

Finally, the 1998 Proposal would have added a provision which is new compared to Regulation 1408/71. Article 50(2) of the Proposal provided that a person seeking work who satisfies the conditions of maintaining the right to benefit will receive unemployment benefits whose aim it is to facilitate access to work under the same conditions as its own nationals. The benefits meant here are not cash benefits, but (for instance) training opportunities. This provision concerned only those seeking work abroad.

This provision treated wholly unemployed, partially unemployed persons and persons unemployed because of unforeseen circumstances in the same way: they are entitled to receive unemployment benefit in (mostly) the State of employment. This was a real simplification compared to the present rules. The concept of frontier worker would have disappeared entirely. The 1998 Proposal would also have taken away a series of interpretation problems with Regulation 1408/71, such as what is meant by 'partially unemployed' or 'wholly unemployed'.[39] Also, the distinction between frontier worker,

[38] Consider, eg Case C–454/93 *Van Gestel* [1995] ECR I–1707.
[39] See the judgment in Case 444/98 *De Laat* [2001] ECR I–2229.

the non-frontier worker who returns to his State of residence and the so-called *Miethe* cases[40] (persons not considered frontier workers) would have disappeared as a result of the Commission's proposal.

Moreover, the 1998 Proposal would have solved the problem that the rules contained in Regulation 1408/71 constitute a form of indirect discrimination against frontier workers. Although the Court accepted an objective justification for these rules, in the *Miethe* judgment mentioned above, this does not take away from the fact that these rules are not really satisfactory. Another advantage of the Commission's proposal would have been that unemployment benefits are to be paid by the country which also received the insurance contributions, and this is a fair result.

The rules on unemployment benefits caused considerable problems for the Council and belonged to the last file which had to be discussed before political agreement was reached. The new approach contained in Regulation 883/2004 is much less simple than the 1998 Proposal, and largely follows the approach of Regulation 1408/71. Under the new regime, there is again a distinction between the person, not living in the competent State, who became partially unemployed or unemployed because of unforeseen circumstances (on the one hand) and a wholly unemployed person (on the other hand). According to Article 65(1), the partially and unforeseen unemployed person must be available for his employer or the employment services in the competent State. He is entitled to unemployment benefit from the competent State.

According to Article 65(2), the wholly unemployed person who does not live in the competent State while performing his last activities, and keeps living in or returns to that other Member State, has to be available to the employment services of the State of residence. A new rule is that, in addition, he may make himself available to the employment services in the Member State where he performed his last activities. If he is not a frontier worker and he does not return to the Member State of residence, he has to be available to the employment services of the State to whose legislation he was last subject. This person is entitled to unemployment benefit from the State of residence. Although these costs are for the Member State of residence, Article 65(6) now sets out reimbursement rules with the competent institution of the Member State to whose legislation the claimant was last subject. Consequently, this section of the coordination regime has hardly been modernised or simplified. Instead of giving wholly unemployed persons the right to benefit from the competent State, there is now a reimbursement rule. Meanwhile, as with sickness benefits, the concept of the frontier worker has returned once more to the text of Regulation 883/2004.

[40] Case 1/85 *Miethe* [1986] ECR 1837.

B Export of benefit

In its 1998 Proposal, the Commission proposed extending the period during which a person can seek work from three months to six months. This proposal fits with the principle of free movement of persons which underlies the Treaty: unemployed persons, in particular, may wish to make use of freedom of movement since they have to seek work wherever it is available. The European Commission gave few arguments for its proposal: it did not make clear why the three-month period is too short, and it did not give any statistical data for the proposed extension. The Proposal was not followed and Article 64 Regulation 883/2004 provides that the maximum period for seeking work in another Member State while remaining in receipt of unemployment benefit is limited to three months. This period can be extended up to a maximum of six months by the competent State.

Under Regulation 1408/71, if a person is late in returning to his Member State of origin, and the three-month period abroad has not been extended, the claimant loses all remaining benefit rights. This is an unsatisfactory rule, as this can involve the loss of potentially long periods of benefit. A proposal made by the European Commission in 1980 to mitigate the present rules was never adopted.[41] According to the 1980 Proposal, unemployed persons would have retained their right to unemployment benefits in accordance with the national legislation of the competent State, provided that they returned to the territory of that State either within the three-month period laid down in Article 69 Regulation 1408/71, or after the expiry of this period but before the expiry of the period during which (under the legislation of the competent Member State) the worker may leave the national territory without thereby forfeiting his right to benefits.

In the final version of Regulation 883/2004, Article 64(2) provides that forfeiture of the right to benefit will not take place where the legislation of the competent Member State is more favourable. In other words, the new Regulation still allows forfeiture of benefit rights, but does not impose such forfeiture upon the Member States.[42]

VIII CONCLUSIONS

The Commission took the task of simplifying Regulation 1408/71 very seriously and reduced the extent of the text considerably in its 1998 Proposal. It did not restrict itself to simplifying the text: many politically sensitive proposals were made. The connection between the simplification and the

[41] COM(1980) 312; see also 1980 OJ L169/22.

[42] Under the Dutch rules, for instance, a right to benefit can be revived provided that no more than 6 months has elapsed between leaving the country and returning.

modernisation operations is not easy. Although some modernising rules would have made the coordination regime more simple (and vice versa), it also meant that they were very radical in the eyes of the Member States, for example, on the material scope of the new regulation, where it was also hard to foresee the effects of the Commission's proposals. The final result—now embodied in Regulation 883/2004, is much more modest in its modernising effect, and also far less simple than the 1998 Proposal.

Of course, this is not the end of the process, and the Commission can continue to investigate the possibilities for extending the scope of the coordination regime. The European Parliament in fact offered a good basis for this by stressing the relevance of the link between statutory and non-statutory social security. The adoption of Regulation 883/2004 should not bring the process of modernisation to a halt, as there are still pressing issues. For this purpose, it is necessary to analyse in more detail the problems which arise in particular areas, such as the exclusion of generally binding contractual schemes. New initiatives should contain a thorough analysis of the problems and of the effects of any proposed new text. Such an analysis was missing in the 1998 Proposal and this made it difficult to understand the full consequences of what the Commission envisaged.

One possibility would be to make an inventory of different types of non-statutory schemes, and the likely effects of the co-ordination rules on each of these types. For some types, there will not be any effect (such as a national scheme with centralised funds); whereas for other types, there may be more problems (such as a collective agreement applicable in the construction sector only). Subsequently, the Commission could elaborate special chapters to be added to Regulation 883/2004 for each of these types. For modernisation to be truly effective, there are probably *more* co-ordination rules needed in Regulation 883/2004 rather than *fewer*!

After all, simplification means a reduction in the number of problems, and this may sometimes require even more rules. And so, sometimes it is preferable to have more text, especially in the case of known problems under Regulation 1408/71 which are still unsolved under Regulation 883/2004. There is indeed a tension between simplification and modernisation.