INTRODUCTION: REGULATION 883/2004 – THE THIRD COORDINATION REGULATION IN A ROW

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1. THE CELEBRATION OF FIFTY YEARS OF COORDINATION

This issue is dedicated to Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, which will coordinate social security schemes in cases where people use their right to free movement. The regulation is not brand new; it is already five years old. However, it could not come into force because a detailed implementing regulation is necessary for its implementation. After Regulation 883/2004 was adopted, work started on making this regulation, which now (April 2009) seems to be almost complete.[1]

In September 2008 a conference was organised by Eberhard Eichenhofer in Berlin on 50 years of coordination of European social security. This anniversary was very well timed since the Council of Ministers adopted the first coordination regulation, Regulation 3,[2] on 25 September 1958. This issue of *EJSS* includes the edited papers prepared for this conference. We decided to include them all and to make a double issue, as the contributions give a very interesting and comprehensive insight into both the development of coordination rules and the main characteristics of the new regulation.

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1 Proposal for a Regulation of the European Parliament and the Council laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, COM(2006)16 final, Brussels, 31 January 2006.

2 Regulation (EEC) No. 3 of 25 September 1958, *OJ* No. 30 of 16 December 1958.

2. REGULATION 3 AND REGULATION 1408/71

As mentioned *supra*, Regulation 3 was adopted on 25 September 1958. It seems that at that time making an implementing regulation was not so complicated; Regulation 4[3] was adopted a couple of months later. We can also see by the number of these regulations that legislative production at the time was still modest.

Both regulations came into force on 1 January 1959. The fact that working with 6 Member States is more efficient than with 27, does not completely account for the early birth of the coordination regulation. As a matter of fact, Regulation 3 was prepared before the EEC itself was established, because by 1958 the text for a European Convention on social security for migrant workers had just been completed (Convention of 9 December 1957). This Convention was related to Article 69(4) of the Treaty of the European Coal and Steel Community. After the EEC was established, the text was used for drafting the regulation required by Article 51 EC Treaty (now Article 42 EC). Article 51 of the Treaty provides the legal basis for a coordination regulation. It 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 measures which have to be taken in any case. Measures based on this article must relate to the free movement of workers and it is not possible to base other types of measures, for example, to realise a 'social Europe', on it. The measures have to prevent the rules of social security from impeding free movement. Since the multilateral convention would require making additional provisions, a regulation to govern future EC coordination was much more efficient. This article requires unanimity of the Council for making a regulation on coordination of social security.

In 1971 Regulations 3 and 4 were replaced by Regulation 1408/71[4] and Regulation 572/72,[5] as a new text was required at the time. Both Regulation 3 and Regulation 1408/71 led to many judgments from the Court of Justice, often containing important interpretations of their provisions.[6]

The Treaty of Amsterdam created a new article as basis for Regulation 1408/71: Article 42 EC. The main difference between the text of Article 42 EC and Article 51 EC Treaty is that under Article 42 the European Parliament has to be consulted in accordance with the co-decision procedure of Article 251. This means that without the consent of Parliament, Regulation 1408/71 and Regulation 574/72 cannot be

3 Regulation (EEC) No. 4 of 3 December 1958, *OJ* No. 30 of 16 December 1958.

4 OJ L 149 of 14 July 1971.

5 OJ L 74 of 21 March 1972.

6 See, for an overview, Frans Pennings, *Introduction to European Social Security Law*, Antwerp: Intersentia, 2003. A lot of information can also be found on the trESS website: www.tress-network.org.

amended. In Parliament a majority of the vote suffices for consent; in the Council it must be unanimous.

Regulation 1408/71 is not only applicable in the territory of the European Union, but also in that of the European Economic Area (EEA). The EEA comprises the Member States of the European Union and those Member States of the European Free Trade Association (EFTA) which have not yet become a member of the EU, *i.e.* Norway, Liechtenstein and Iceland.

A Treaty with Switzerland was made later, extending the scope of the Regulation to this country as well.

3. THE MODERNISATION AND SIMPLIFICATION OF COORDINATION

In the course of time the need grew for a new regulation because Regulation 1408/71 was often criticised for being very complicated.[7] This complexity was problematic as it could interfere with the main objective of the Regulation: the promotion of free movement of workers. Some of the main causes of the complexity were:

- the text of the Regulation should not and was not be interpreted without taking the judgments of the Court of Justice into account. The case law has grown considerably in length and complexity in the course of time;
- the Regulation provided for many exceptions to its main rules; and
- there was no explanatory memorandum to the Regulation. This meant that all provisions had to be interpreted as they stood, unless the Court interpreted them differently.

Another complex element was that amendments to the Regulation often required lengthy negotiations, in which compromises were made in order to reach consensus on the proposal. These compromises often meant new exceptions and rules (in annexes to the Regulation), which led to an even larger text. Prior to making a proposal for a new text, the European Commission organised conferences in all Member States on the problems with Regulation 1408/71.[8]

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7 See on the proposal, E. Eichenhofer, 'How to Simplify the Coordination of Social Security', EJSS 2000, p. 229; 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 Swedish National Social Insurance Board and European Commission, 25 Years of Regulation (EEC) No. 1408/71 on Social Security for Migrant Workers – A Conference Report, Stockholm 1997, p. 197; F. Pennings, 'The European Commission Proposal to Simplify Regulation 1408/71', EJSS 2001, p. 45 ff.

8 The final report on the results of the conferences was published in D. Pieters (ed.), *The Coordination of Social Security at Work*, Leuven, Acco, 1999. For the preparatory materials, see P. Schoukens (ed.), *Prospects of Social Security Coordination*, Leuven, Acco, 1997.

On 21 December 1998, the European Commission published a proposal for a new coordination regulation to replace Regulation 1408/71.[9] The objective of the proposal was to provide simpler rules than Regulation 1408/71. After the publication of the proposal, the Council of Ministers started discussions on the proposal. These were quite complicated as the proposal not only involved a simplification, but also a modernisation. This modernisation led to many provisions that were politically very sensitive, making the discussions problematic. Finally, a solution was found in defining so-called parameters, which were to be guidelines for the new Regulation and on which consensus was reached.[10] In the subsequent half year Summits of the Council, part after part of the regulation was adopted and finally this led to Regulation 883/2004,[11] adopted on 29 April 2004. The new regulation is much less radical than the proposal and leaves several of the issues raised during the preparing conferences unsolved. After all, consensus had to be reached between all Member States (fifteen at the time). Still, the Regulation has made some interesting changes, as we will see below and in the subsequent contributions, and it has also simplified many provisions of the Regulation compared with Regulation 1408/71. After Regulation 883/2004 was adopted, work started in implementing this regulation that is almost finished now,[12] and the new regulations will probably become applicable in 2010.

The Preamble of Regulation 883/2004 contains some arguments in favour of the new regulation: it states that Regulation 1408/71 has been amended and updated on numerous occasions in order to take into account not only developments at Community level, including judgments of the Court of Justice, but also changes in legislation at national level. Such factors have played their part in making the Community coordination rules complex and lengthy. Replacing while modernising and simplifying these rules was therefore essential to achieve the aim of the free movement of persons. Still, making compromises was essential, as appears already from the sentences which immediately followed the consideration: Another object of concern is that it is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination.

An important innovation of the new regulation is it personal scope. Regulation 1408/71 was limited to employed and self-employed persons, thus to persons who were economically active. The new regulation is relevant to all nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors. Thus, there is no longer a limitation

9 COM (1998) 779.

10 Council 15045/01.

11 Regulation 883/2004 of 29 April 2004, OJ L 166/1 of 30 April 2004.

12 Proposal for a Regulation of the European Parliament and the Council laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, COM(2006)16 final, Brussels, 31 January 2006.

to economically active persons. With respect to the material scope, the extension is less ambitious. The inclusion of pre-retirement benefits and paternity benefits is an innovation, but of limited meaning, since pre-retirement benefits are predominantly of a contractual nature, whereas the scope of the regulation is still limited to statutory schemes. The Preamble acknowledges that this is a limitation and considers 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 to that afforded by this Regulation. As a first step, the experience of Member States who have notified such schemes might be evaluated. This is a very cautious step but evidently it was hard to reach agreement on a more ambitious provision. Still, given privatisation processes and the creation of protection schemes by employers (organisations), the need to include some categories of contractual schemes is clear.

A real innovation is the provision on equal treatment of benefits, income and facts. However, periods completed under the legislation of another Member State should be taken into account solely by applying the principle of aggregation of period, and the assimilation of facts or events occurring in a Member State can in no way render another Member State competent or its legislation applicable. It is hard to see the consequences of the new article; Preamble 12 remarks that in the light of proportionality, care should be taken to ensure that the principle of assimilation of facts or events does not lead to objectively unjustified results or to the overlapping of benefits of the same kind for the same period.

These are interesting aspects which mean that the new regulation, even though innovations were limited and compromises had to be made, can and will contribute to the further development of coordination law, and which will also give the Court of Justice new departing points for refining its case law. This will be seen clearly in the following contributions. In the final chapter I will raise some further issues.