COORDINATION OF UNEMPLOYMENT BENEFITS UNDER REGULATION 883/2004

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Abstract

The coordination of unemployment benefits is a politically sensitive issue. Questions, which have been raised in the past years, are, among others: is the rule that the State of residence is responsible for unemployment benefits for frontier workers acceptable? How can atypical frontier workers be dealt with? Is the division of costs between the State of employment and the State of residence adequate? Can the period of paying benefit be prolonged beyond the present three month period and can the radical sanction in the case of late return (total loss of remaining benefit rights) be softened? These issues have also been dealt with when drafting Regulation 883/2004. This contribution makes an analysis of the solutions found.

Keywords: unemployment benefits; frontier workers; coordination; export; reintegration

1. INTRODUCTION

Unemployment benefits constitute a special phenomenon for coordination, which is caused by the close link that exists in all unemployment benefit systems between the right to benefit and the obligation for the claimant to do his utmost to find work. Coordination rules must not only loosen this link, but as we will see below, they must also allow the State that pays unemployment benefit to be able to supervise these obligations.

A second characteristic of unemployment benefits is that they often, if not always, require periods of insurance or employment for benefit entitlement. Such requirements are not absolutely exclusive for unemployment benefits, but they are much stronger

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for these types of benefits than for others; the coordination (*i.e.* aggregation) rules have to take special account of these requirements.

These two characteristics explain, to a large extent, the special coordination rules for unemployment benefits. At present, these rules are found in Chapter 6 of Regulation 1408/71[1] (henceforth the present regulation) and are also part of the chapter with the same number of Regulation 883/2004[2] (henceforth the new regulation), which will replace Regulation 1408/71 in the near future.

In view of the characteristics of unemployment benefits mentioned *supra*, three articles of Regulation 883/2004, which lay down important general coordination principles, are not applicable to unemployment benefits. These are the following:

- Article 5: this article requires, among other things, that if legislation of a Member State attributes legal effects to the occurrence of certain facts or events, facts or events occurring in any Member State, these have to be treated in the same way;
- Article 6: this article gives a general provision on the aggregation of periods; a State which makes the right to benefit conditional upon completion of periods of insurance, employment, self-employment or residence shall also take these periods into account when completed in another Member State;
- Article 7: this article gives a general waiver of residence rules.

These articles all start with the phrase '*unless provided otherwise by this Regulation*', which allows for the deviations for unemployment benefit, made in Chapter 6, which are discussed below.

The Commission's proposal for a simplification and modernisation of Regulation 1408/71, which was published in 1998 and was intended as the draft of the new regulation,[3] followed an inclination towards unemployment benefits radically different from the present and the new regulation. The proposal was not, however, adopted by the Council, and instead Regulation 883/2004 reached the *Official Journal of legislation*. In this article I will analyse the differences between Regulation 1408/71, Regulation 883/2004 and, where relevant, the Proposal.

I mentioned that the Regulations are based, to a large extent, on the same principles. There is, however, one important difference between Regulation 883/2004 and Regulation 1408/71. When in 1989 the personal scope of Regulation 1408/71 was extended to self-employed persons, this extension was, with one exception (*i.e.* the export of benefit in Article 69), not applied to unemployment benefits. As a result, a self-employed person, who consecutively worked in two Member States, could not

1 *OJ* L. 149 of 5 July 1971, as amended.

2 *OJ* L 200 of 7 June 2004.

3 COM (1998) 779, OJ C 38 of 12 February 1999, p. 10. See on the preparatory process Eichenhofer (2000: 229); Pieters (1999); Schoukens (1997) and Schulte (2007: 9 *et seq*).

aggregate periods of insurance or employment if he claimed benefit in the country of last employment[4] if it had a scheme for the self-employed. If, however, he became entitled to unemployment benefit in one Member State, he could export his benefit for the period under the conditions as regulated in Article 69. In the new regulation, all articles of the unemployment chapter take account of self-employed people.

In the following sections I will discuss the definition of unemployment benefit (Section 2), and the rules that apply if the competent State[5] and the State of residence are the same (Section 3). Section 4 deals with the situation in which these States are not the same. In this section I will discuss the situation of the frontier worker,[6] the non-frontier worker who does not reside in the competent State, and the atypical frontier worker. It is in these situations especially, that the special characteristics of unemployment benefits coordination, mentioned in the first paragraph, have important consequences. Section 5 also deals with these characteristics, discussing the rules on seeking work in another Member State while remaining in receipt of benefit. Conclusions and recommendations will be made in Section 6.

2. THE LACK OF A DEFINITION OF UNEMPLOYMENT BENEFIT

Like Regulation 1408/71, the new regulation does not give a definition of unemployment benefit. Article 1 defines some types of benefit, including pre-retirement benefit and family benefit, but unemployment benefit is not defined. This is regrettable, since it is not always clear when a benefit does or does not qualify as unemployment benefit. At first sight one may be inclined to say that unemployment benefit is a benefit payable to persons who have reduced, ceased or suspended their remunerative activities and are available to the labour market. Such criteria follow from the *Acciardi* case,[7] in which the court mentioned these characteristics in concluding that there was unemployment benefit. The court decided that it was relevant that the right to benefit was restricted to unemployed persons; that it ended as soon as the beneficiary reached the statutory retirement age; that one became entitled to this benefit immediately upon expiration of the right to unemployment benefit under

4 By State of last employment I mean the State where the unemployed person last performed activities as an employed or self-employed person before becoming unemployed.

5 Most of the time this is the State of employment, but it can also be the legislation of a State determined by posting rules or an Article 17 agreement.

6 Frontier workers are people pursuing an activity as employed or self-employed people in a Member State, who reside in another Member State to which they return, as a rule, daily, or at least once a week (Article 1(f) of Regulation 883/2004, which is basically the same as the definition under Article 1(b) of Regulation 1408/71).

7 Case 66/92, [1993] ECR I-4567.

the Unemployment Benefits Act; and that the law imposed several conditions on the beneficiary which ensured that he was available for work. All these circumstances were relevant to the decision that this benefit qualified as unemployment benefit.

From later case law it appears, however, that the availability condition is not always decisive: some unemployment benefit schemes exempt particular categories of beneficiaries from the obligation to seek work, such as persons over a particular age. It can then be disputed that the benefit in question is unemployment benefit. In answer to this, the court decided in the *De Cuyper* case[8] that such benefit can be unemployment benefit. In this case Mr De Cuyper had obtained dispensation, under the national legislation applicable at that time, from the obligation to submit to the local control procedures imposed on unemployed persons. The European Commission argued that the benefit in question was not an unemployment benefit, but rather a preretirement benefit. The court disagreed: the allowance was aimed at enabling the workers concerned to provide for themselves following an involuntary loss of employment when they still had the capacity for work. It added to this, that in order to distinguish between different categories of social security benefits, 'the risk covered' by each benefit must also be taken into consideration. Thus, an unemployment benefit covers the risk associated with the loss of revenue suffered by a worker following the loss of his employment when he is still able to work. A benefit granted if that risk materialises, namely loss of employment, and which is no longer payable if that situation ceases to exist as a result of the claimant engaging in paid employment, must be regarded as constituting an unemployment benefit. The allowance paid to Mr De Cuyper was calculated in the same way as for all unemployed persons, and had the same conditions on past employment as in the case of other recipients of the benefit. The allowance at issue in the main proceedings was an allowance subject to the Belgian statutory unemployment benefits scheme, and even if Mr De Cuyper did not have to register as a job-seeker or accept any suitable employment, he still had to remain available to those services so that his employment and family situation could be monitored. For all these reasons, the Court held in this case that an unemployment benefit existed.

It follows from the *De Cuyper* judgment that a main criterion in labelling a benefit as unemployment benefit is whether benefit is part of a scheme for unemployment benefits and whether the person concerned has to be subject to monitoring by the employment services.[9] However, these criteria are not always helpful, for example,

8 Case 406/04, [2006] ECR I-6947.

9 The definition in the new regulation of preretirement benefits may cause problems in this respect: preretirement benefits are all cash benefits, other than unemployment benefit or an early old age benefit, provided from a certain age to workers who have reduced, ceased or suspended their remunerative activities until the age at which they qualify for an old-age benefit or an early retirement benefit, the receipt of which is not conditional upon the person concerned being available to the employment services of the competent State (Article 1). This definition presupposes that we know

in cases in which partly different conditions apply for categories exempted from the condition to seek work. Furthermore, sometimes benefits require availability for work but are part of mixed schemes, for instance, disability benefit schemes. Disputes may arise easily on the qualification of such benefits.

A further category in which problems of qualification can occur is that of *reintegration schemes* for unemployed persons, for example, schemes that provide training or allow unemployed persons to work while remaining in receipt of benefit. In the *Knoch* judgment, the court opined that unemployment benefits are those benefits that replace wages lost by unemployment, the objective of which is to provide an income for the costs of living of the employee.[10] It appears from the *Campana* judgment that these benefits comprise not only benefits in cash after the start of a period of unemployment, but also training benefits in the case of imminent unemployment.[11] Consequently, benefits granted to persons still in employment, in order to prevent unemployment, can also be unemployment benefits. Reintegration measures can thus be covered by the term 'unemployment benefits,' but it remains unclear which measures are included and which are not. Whether they are covered by the Regulation may be relevant, for instance, if reintegration schemes require periods of insurance or employment; when reintegration measures are denied to frontier workers; and when the export of a reintegration provision to another Member State is sought.

The discussion of the case law in this section shows that there have been disputes on the term 'unemployment benefit,' and that looking at the characteristics of the benefit involved can solve these. We may expect further disputes on this issue, now that benefits are being further developed and their scope is extended to schemes for the self-employed. It is therefore regrettable that no definition of unemployment benefits is included in the new regulation.

3. THE RULES IN THE SITUATION IN WHICH THE COMPETENT STATE AND THE STATE OF RESIDENCE ARE THE SAME

The first main rule of the coordination of unemployment benefits concerns the situation in which the State of residence and the competent State (most often the State of last employment) are the same. This is the situation when the unemployed person lives in the competent State: Article 61 of Regulation 883/2004 is largely the same as

what is meant by unemployment benefit, but it will be hard to distinguish between unemployment benefits, payable to those who do not have to be available for work, and preretirement benefits.

10 Case 102/91, [1992] ECR I-4341.

11 Case 375/85, [1987] ECR 2387.

Article 67 of Regulation 1408/71. This means that if an employee becomes unemployed in the competent State and resides in that State, he is entitled to unemployment benefit from that State if he satisfies the conditions of the State's legislation. This already follows from the national scheme in question, so the Regulation does not provide this expressly. However, the Regulation is relevant in the case that the applicant does not satisfy the conditions on employment or insurance: Article 61 gives aggregation rules. For the application of these aggregation rules, it is required that the person concerned has most recently completed periods of insurance, employment or self-employment in the State, depending on which type the legislation requires. This rule is laid down in Article 61(2) of the new regulation, which corresponds to Article 67(3) of Regulation 1408/71. The unemployed person, therefore, cannot use the Regulation to apply for benefits from States in which he previously worked.[12]

Article 61 makes a distinction according to whether a national scheme requires periods of insurance, employment, or self-employment. It deviates therefore from the general aggregation rule of Article 6, quoted in Section 1 *supra*. Instead, Article 61(1), sentence 2, reads that when the applicable legislation makes the right to benefits conditional upon the completion of periods of insurance, periods of employment or periods of self-employment completed under the legislation of another Member State, these shall not be taken into account unless such periods would have been considered to be periods of insurance had they been completed in accordance with the applicable legislation.

The Court of Justice gave an interpretation of this rule – which is materially the same as Article 67(1) – in the *Frangiamore* judgment.[13] It ruled that Article 67(1) provides that periods of insurance or employment completed in another Member State are to be treated as periods of insurance in the competent State, provided that the periods of employment would have been counted as periods of insurance had they been completed under the legislation of the competent State. The requirement that a period of employment is to be counted as a period of insurance, only if it qualifies as such in the competent State, thus only applies for periods of employment and not for periods of insurance. In other words, if a person fulfils periods of insurance in another country, these count as periods of insurance in the country where benefit is claimed, even if they would not count as periods of insurance according to the national scheme of the latter State.[14] Therefore, if a period is considered as a period of insurance in the other State, this condition does not apply and this period has therefore to be taken into account. This also follows from Article 1(t) of the new regulation, which defines

12 The requirement that unemployed person last worked or was insured in the State where he claims benefit does not apply in the case of persons who do not reside in the competent State (frontier workers and non frontiers not residing in the competent State, see next section); also this rule is in the present regulation.

13 Case 126/77, [1978] *ECR* 724.

14 See also Pennings (2003: chapter 17).

the term 'periods of insurance' in the same way as the old regulation.[15] Thus, the old case law in relation with the materially same wording of the new regulation leads to the same outcome as the old regulation.[16] It also means that a period of insurance for a scheme for the self-employed counts as a period of insurance for a scheme for the employed and vice versa.

I have my doubts whether all benefit administrations and migrant workers are aware of this system, as (superficial) reading of the text of Article 61 of Regulation 883/2004 suggests otherwise. It would be good to pay attention to this in the information on the Regulation; in future it is advisable to lay down this rule down more clearly in the Regulation itself.

4. THE RULES IN THE SITUATION IN WHICH THE COMPETENT STATE AND THE STATE OF RESIDENCE ARE NOT THE SAME

4.1. REGULATION 1408//71 AND PERSONS NOT RESIDING IN THE COMPETENT STATE

Regulation 1408/71 provides that wholly unemployed frontier workers are entitled to unemployment benefit from the country of residence (Article 71(1)(a)(ii)). Partially or intermittently unemployed frontier workers receive unemployment benefits from the competent State (Article 71(1)(a)(i)).

Non-frontier workers (*i.e.* persons who do not return at least once a week from a State to the Sate of residence) who do not reside in the competent State are addressed by Article 71(1)(b). If they are partially, intermittently *or wholly unemployed* and remain available to their employer or employment services in the competent State, they receive benefits from that State as if they were residing in the State (my italics). If they are wholly unemployed and return to the State of residence or are available for the employment services of the State, they are entitled to benefits from the State of residence.

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15 For the same conclusion, see Cornelissen (2007: 218). In the *Warmerdam* case (Case 388/87, [1989] ECR 1203) the Court defined periods of work as periods in which work was done which, under the system under which they were performed, are not considered as periods which give the right to affiliation with a system of unemployment insurance. Article 1(s) of Regulation 1408/71 and Article 9(u) of Regulation 883/2004 have the same wording so the latter article will also have to be interpreted in line with this judgment.

16 Thus, a country without an insurance for the self-employed, which requires periods of insurance for entitlement under its employee benefits scheme, has to take the periods of self-employment into account of a system under which these count towards the unemployment insurance. A self-employed person working in State B with a self-employed person's insurance scheme, who moves to a State with an unemployment benefits scheme for employed persons, can thus have these periods in State B aggregated when he applies for benefit in State A.

These articles could be read in such a way that once the person concerned has returned to the State of residence he is entitled only to benefits from that State, but this is not the way the Court of Justice interpreted it: the person concerned has the choice between the systems, provided that he meets the conditions mentioned in these articles (*Aubin* judgment).[17]

4.2. SOME THEORETICAL OBSERVATIONS: THE RELATION BETWEEN PAYING BENEFIT AND SUPERVISING THE OBLIGATIONS TO SEEK WORK

The Regulation contains specific coordination rules for unemployment benefits for the situation in which the claimant does not live in the competent State. These are based on the assumption that people have the best chance of finding work in the countries in which they live. As far as I could gather from published documents, it was the Court of Justice that was the first to make this claim. It mentioned this in the *Mouthaan* judgment, when it had to consider whether Article 71(1)(a) of Regulation 1408/71, which provides that in the case of full unemployment frontier workers are entitled to benefits of the State of residence, was valid.

I do not know whether any research has ever been undertaken to find out whether this hypothesis is correct – it is probable that such research has not been done yet, as very few figures exist on the application of the unemployment benefits chapter. However, the assumption has a high common sense level: State education systems are often different, the languages and cultures differ, and for those reasons it is very likely that a person will find it more difficult to find work in a State in which he does not live, even if we wished it to be otherwise. It is, however, possible to find exceptions to this assumption, such as when a person has worked for twenty years in five different jobs in a neighbouring State. Suppose, however, that the assumption is true. It then follows that, in order to have benefit periods that are as short as possible, it is advisable that people seek work in the country in which they have the best chance of finding work. This means that they have to seek work in the State of residence. Still, this observation would not hinder receiving benefits from the State of employment.

The obligations of the benefit recipient to seek work will then have to supervised either by the competent State in the State in which the recipient lives, or by the State of residence on behalf of the competent State. In practice, however, the first option is not very practical. Supervising beneficiaries in another Member State is neither easy nor efficient and there may also be legal limitations to a State obtaining information in another State without permission. Therefore it is more logical that the State of residence supervises the obligations of the benefit recipient.

[17] Case 227/81, [1982] ECR 1991.

In theory, States should trust other Member States to take their supervision tasks seriously. However, in reality this trust does not exist. This lack of trust explains several of the coordination rules on unemployment benefit. The general feeling of mistrust was worded explicitly during the Council meetings on the Chapter on unemployment benefits, as reported by Rob Cornelissen, one of the attendants.[18] States find it hard to leave the supervision of the obligations to find work to other Member States, despite duties placed on Member States under the EC Treaty to cooperate to realise the obligations flowing from the Treaty, and despite employment strategies that have been developed within the EU framework in the past decade. Nor does the cooperation article (Article 76) of the Regulation itself give them much faith in one other. This article concerns the exchange of information between the Member States. In fact, neither of these provisions provides Member States with serious legal remedies they can use against one another if they do not fulfil their obligations correctly.

It is understandable that Member States are suspicious of each other's willingness and capability to supervise persons for whom they are not financially responsible: often their own employment offices focus their reintegration activities on recipients of unemployment benefit instead of those without benefit. The net gains of investing in finding people jobs are much higher if this leads to termination of benefit entitlement.

With regard to the coordination rules for frontier workers, the argument established so far is followed by a second step: now that they have to seek work in the State of residence, it is this State which has to pay the unemployment benefits to the frontier workers. This system is followed in Regulation 1408/71 and continued in Regulation 883/2004.

Although the steps followed in this argument are understandable, we must bear in mind that this is not the only possible approach. Several steps have to be followed to reach this result, and the link has to be made that because the chances of finding work are greatest in the State of residence, the State of residence has to pay benefits. This step was taken without much elaboration in the documents of the Council and the relevant case law, but it remains quite a radical one. After all, the rule following from this argument and laid down in Article 71(1)(a) of Regulation deprives an unemployed person of benefits for which he has paid contributions. Instead, he receives benefits from a different system with different conditions, possibly even lower benefits, although equally they could be more generous benefits. However, as workers often move to countries with better labour conditions and often better social security systems, we can expect that most workers are worse off as a result of this rule.

[18] Cornelissen (2007: 218): 'In fact, most Member States feared that the employment services of the state of residence would not at all be motivated to find a job for workers for whom they were not financially responsible'.

The rule in question is therefore problematic. There is, for instance, a tension with the *Petroni* principle, developed by the Court in the *Petroni* judgment, which states that coordination rules of the Regulation must not infringe upon benefit rights derived from the application of national law alone. Of course, one could argue that frontier workers are not entitled to unemployment benefit from the State of employment on the basis of national law alone, if that State does not allow for payment of benefit outside its territory. However, in the case of family benefits, the Court ruled that infringements of national benefits rights, which require the Regulation for export, are still contrary to the *Petroni* principle.[19] We will come back to this principle in Section 4.3.

The rule prohibiting indirect discrimination on grounds of nationality is also relevant here since frontier workers may, as a result of the application of the Regulation, be worse off than the workers in the country of last employment – the reference group for comparison under the Regulation. People who live in a country other than their country of last employment are, from a statistical point of view, often people with a nationality other than that of the country of employment. Therefore Article 71 of Regulation 1408/71 is a classical example of (alleged) indirect discrimination. Only if there is an objective justification, this rule can be upheld. As we will see below, as such an objective justification the Court accepted the argument that frontier workers have the best chances in the labour market.

However, in order to be an objective justification, an argument has to be necessary, adequate and proportional. Doubts arise if we apply these criteria. Is it really necessary that benefit is paid by the State of residence in order to guarantee the best chances in the labour market? A division of tasks is still possible: the competent State pays the benefits and the State of residence supervises the claimant's efforts to seek work. Is the rule adequate? For better chances in the labour market, the payment of benefits according to the legislation of the State of residence is not adequate as such. And is it proportional? This is certainly not always the case: some workers can receive a much lower benefit than in the State of employment.

Another fallacy of the argument that unemployed workers must receive benefit under the conditions most favourable to finding new employment is that it is applied only to frontier workers. In, for instance, determining the rules for non-frontier workers not residing in the competent State (see below), this criterion is not used: the unemployed person in these circumstances has the freedom to choose between the States he wishes to be available to. Furthermore, the unemployed person can seek employment in another Member State for three months, even if he has no realistic chance in the labour market of that country.

There is another problem with Article 71 in so far as wholly unemployed frontier workers are concerned. The frontier workers' rule puts the costs of benefits on the shoulders of a State that has not received contributions. As the movement of workers

19 *Beeck* judgment, Case 104/80, [1981] ECR 503.

is often from poorer countries to richer countries, it follows that, in case of frontier workers, it is often the poorer countries that have to pay unemployment benefits, while the richer countries receive the contributions for the benefits. This does not seem to be very fair outcome. Moreover, this argument requires and leads to complicated rules, such as those for partially unemployed people – people in whose case the presumption that they have a better chance of finding work in the State of residence is not justified – and non-frontier workers who do not reside in the competent State. These issues will be discussed in the following sections.

In the Proposal for Simplifying Regulation 1408/71 of 21 December 1998,[20] the European Commission radically departed from the link described above between obligations to seek work and receiving benefit.[21] Article 51 concerned unemployed persons who, during their last employment, resided in a Member State other than the competent State. It stated that those persons who make themselves available to the employment services of the State of residence, should receive benefit from the competent State, the State where they last worked in most cases. Thus, this provision treated wholly and partially unemployed frontier workers and non-frontier workers in the same way. This was a real simplification compared to the present rules. Furthermore, the proposal removed the problem of indirect discrimination of frontier workers that underlies the present rules. We discussed *supra* that the objective justification for these rules is not really satisfactory. Another advantage of the proposal was that it suggested that benefits should be paid by the country which received the contributions, making it fairer. The proposal was, however, not accepted, but it is mentioned here to show that the relationship between the obligation to seek work and the right to benefit can differ from the present rules. Below we will discuss the rules on persons not residing in the competent State of Regulation 1408/71 and its successor.

4.3. THE CASE LAW ON THE FRONTIER WORKERS RULES' OF REGULATION 1408/71

4.3.1. The Mouthaan and Aubin judgements

In the *Mouthaan* judgment,[22] the Court held that the frontier workers' rule of Article 71(1)(a)(ii) was not inconsistent with the Treaty. The Court argued that according to the ninth recital of Regulation 1408/71, Article 71(1)(b) serves to ensure that a worker placed in one of the situations set out therein may receive unemployment benefits in conditions most favourable to the search for new employment. This is remarkable, given that the 9th recital of Regulation 1408/71 does not refer to Article 71 at all.

20 COM (1998) 779, OJ C 38 of 12 February 1999, p. 10.

21 Pennings (2001).

22 Case 39/76, [1976] ECR 1901.

Admittedly, it mentions the objective '*to secure mobility of labour under improved conditions*,' but it actually refers to the provision of Article 69, *i.e.* to grant to an unemployed worker, for a limited period, export of unemployment benefits to search for work in another Member State.[23] So the recital does not mention frontier workers. No further recital was made after the *Mouthaan* judgment, apart from a recital that special rules had to be made for frontier workers. Thus, the Court gave a very free interpretation of recital 9.

The Court's decision was based on this recital only and therefore there is only a very small basis for justifying the disputed rule against the alleged indirect discrimination it causes. In his conclusion to the *Mouthaan* case, the Advocate General mentioned the *Petroni* principle as 'a question that obviously suggests itself,' but he did not discuss this any further. Since the referring judge did not raise this question himself, the Court of Justice did not mention it at all.

An explanation for the approach of the Court may be that Mr Mouthaan was in fact happy with the outcome of the case. He worked in Germany, where he was not insured, lived in the Netherlands and wished to claim Dutch benefit. The outcome of the case was the desired one and issues of indirect discrimination and the *Petroni* principle were not relevant to the applicant. This does not take away from the fact that the justification given in this judgment was also relevant to later cases.

In the *Aubin* judgment, the *Mouthaan* judgment was confirmed.[24] In the *Aubin* case also, the outcome granted was that which the applicant desired (that the applicant was entitled to benefit in the State of residence).

4.3.2. Atypical frontier workers

In the *Miethe* case,[25] the applicant did *not* desire the application of the frontier workers' rule. The Case concerned a person of German nationality, who moved to Belgium in 1976, but who continued working as a salesman in Germany. In Germany he could stay with his mother-in-law, which he did regularly, and which he continued to do when he became unemployed in 1979 and started seeking work in Germany.

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23 The full text of the recital reads: 'Whereas, in order to secure mobility of labour under improved conditions, it is necessary to ensure closer coordination between the unemployment insurance schemes and the unemployment assistance schemes of all the Member States, whereas it is therefore particularly appropriate, in order to facilitate search for employment in the various Member States, to grant to an unemployed worker, for a limited period, unemployment benefits provide for by the legislation of the Member State to which he was last subject.' Note that unemployment assistance schemes mean schemes to help the unemployed back into work. The recital quoted is also included in Regulation 883/2004, recital 32, where the term 'unemployment assistance schemes' is replaced by 'employment services'.

24 Case 227/81, [1982] ECR 1991.

25 Case 1/85, [1986] ECR 1837.

He also applied for unemployment benefit in Germany, but his application was unsuccessful.

In his conclusion the Advocate General discussed the justification for the frontier workers rule as follows: 'It seems wholly appropriate that the wholly unemployed frontier worker should concentrate his efforts on solving his employment problems in the State of residence, since that is the most suitable place for ascertaining whether the conditions governing entitlement to benefits have been fulfilled, and for taking the essential accompanying measures, such as finding employment and registering with the employment office.'

In its judgment, the Court referred to the *Mouthaan* judgment and clarified that Article 71 is intended to ensure that migrant workers receive unemployment benefit in the conditions most favourable to the search for new employment. That benefit is not merely pecuniary, but also includes the assistance that the employment services provide for the workers who have made themselves available to them in finding new employment. The Court concluded that if Mr Miethe was a frontier worker, the legislation to be applied was that of the State of residence and no other. Encouraged by the questions and suggestions of the referring German Court, however, it continued that the objective pursued by Article 71(1)(a)(ii) cannot be achieved where a wholly unemployed person, although satisfying the criteria as a frontier worker, has, in exceptional circumstances, maintained in the State of last employment, personal and business links of such a nature as to give him a better chance of finding new employment there. Such a worker must therefore be regarded as a worker 'other than a frontier worker' within the meaning of Article 71 and consequently falls under the scope of Article 71(1)(b). It is for the national court alone to determine whether an employed person who resides in a State other than that in whose territory he is employed, nevertheless continues to enjoy a better chance of finding new employment in that State.

4.3.3. Problems with Miethe

The approach of the Court was, in any case, consistent with the arguments in the earlier decisions: the deviation from the main rule that benefit is received from the country of employment is justified by the argument that a frontier worker has better chances in the labour market in the State of residence. If this justification does not apply because of the circumstances of the case, the main rule should prevail; the Court's reference to the rules on the non-frontier worker is an appropriate one, as it maintains the possibility that the atypical frontier worker wishes to rely on the State of residence instead of the competent State.

However, the *Miethe* judgment also causes problems. In practice it appears that there are many 'Miethe cases' within the category of frontier workers. How can we determine whether or not the personal and business ties are such that they make a

person an atypical frontier worker? Most, if not all, frontier workers who have the nationality of the State of employment and who live in another Member State may claim that they are atypical frontier workers. How can we avoid the distinction being made purely on basis of nationality? And if a person is an atypical frontier worker, does he have the choice of claiming benefit in the State of residence or in the State of employment, or is the State of employment the only possibility? Although the *Miethe* judgment suggests that the person has a choice, national courts do not always appear to accept this.[26] From a national point of view, this is understandable: if it is decided that a person has the best chances in the State of last employment, why still allow them to claim benefit in the State of residence? After all, claiming unemployment benefit in the State of last employment is the normal situation and contributions for benefit have been paid in this State.

4.3.4. The link between competent State and State of residence confirmed

The close relationship in unemployment benefit law between the State that pays benefit and the State where the claimant resides was also discussed within another framework: Article 18 EC. This article concerns the freedom of movement of EU nationals, subject to the limitations and conditions laid down in the Treaty. The discussion took place in the previously mentioned *De Cuyper* case, in which the outcome was not that which was desired by the applicant.

The Court of Justice considered that from Article 18, it follows that the right to reside within the territory of Member States is not unconditional, and that the relevant conditions are found in Regulation 1408/71. Since Article 10 of the Regulation – the general export article – does not list unemployment benefits, that provision does not preclude the legislation of a Member State from making entitlement to an unemployment allowance conditional upon residence in the territory of that State. The Court further remarked that Regulation 1408/71 provides for the payment of benefits in only two situations in which the claimant is residing in another Member State: Article 69, which allows seeking work in another Member State, and Article 71 which concerns persons not residing in the competent State before becoming unemployed.

Mr De Cuyper was not covered by either of these articles, since he moved to another Member State after becoming unemployed. What was special in his case was that he was exempt from the obligation to seek work.

The Court acknowledged that national legislation, such as that in the case of Mr De Cuyper, which disadvantages some of its citizens simply because they have exercised their freedom to move and to reside in another Member State, is a restriction on the freedoms to move as is awarded to European citizens by Article 18 EC. Such a restriction can be justified only, the Court continued, if it is based on objective

[26] An example is the Dutch Central Appeals Court, CR v B 25 June 1997, RSV1998/58.

considerations of public interest. These considerations must be independent of the nationality of the persons concerned and proportionate to the legitimate objective of the national provisions. The Court then considered that in the case of Mr De Duyper, the residence clause was maintained since there was a need to monitor the employment and family situation of unemployed persons. Thus, inspectors could check whether the situation of a recipient of the unemployment allowance had undergone changes that may have an effect on the benefit granted. The Court concluded that justification is accordingly based on objective considerations of public interest independent of the nationality of the persons concerned. Furthermore it is important that a measure is proportionate. This is the case when the measure, while appropriate for securing the attainment of the objective pursued, does not go beyond what is necessary in order to attain it. The Court then remarked that Mr De Cuyper had suggested some less restrictive monitoring measures, but it was not convinced that these would have been capable of ensuring the attainment of the objective pursued. The family circumstances of the unemployed person concerned and the possible existence of sources of revenue which the claimant had not declared was dependent to a large extent on the fact that the monitoring was unexpected and carried out on the spot, since the competent services had to be able to check whether the information provided by the unemployed person corresponded to the true situation. The Court added that the monitoring of unemployment allowances is of a specific nature which justifies the introduction of arrangements that are more restrictive than those imposed for monitoring other benefits. It follows that less restrictive measures, such as the production of documents or certificates, would mean that the monitoring would no longer be unexpected and would consequently be less effective. Finally, the court concluded that Article 18 EC does not preclude a residence clause imposed on an unemployed person over 50 years of age who is exempt from the requirement of proving that he is available for work, as a condition for the retention of his entitlement to unemployment benefit.

This judgment is remarkable, since in previous cases (*Mouthaan*, etc.), the objective justification for linking residence and entitlement to benefit was that the unemployment benefit recipient had to be supervised in his efforts to seek work. In the *De Cuyper* case there were no such obligations, but the Court referred to the supervision of administrative requirements of the beneficiary.

It is far from obvious that these requirements are so important that they really can be a justification for the limiting the export of benefit. After all, for other types of benefit, administrative issues are also relevant, but these cannot limit the obligation of the Member State to export these benefits.[27] However, the Court often treats unemployment benefit differently from other benefits[28] and this seems to be a new example of such an approach.

27 See also Verschueren (2007).

28 An example is the *Testa* judgment, discussed below.

4.3.5. Partially unemployed frontier workers

As we saw above, the Regulation contains a special rule on partially unemployed frontier workers. In the Regulation, what is meant by 'partially unemployed' or 'wholly unemployed' is not stated. Therefore, the Court of Justice was asked to give an interpretation of these terms, and this happened in the *De Laat* judgment.[29] Mr De Laat worked full-time for a Belgian employer until his contract was terminated and replaced by a new part-time contract. The question was whether or not this was a form of partial unemployment.

The Court considered that by laying down the rule that a wholly unemployed frontier worker is entitled to benefits solely in the Member State in which he resides, Article 71(1)(a)(ii) was based on the assumption that such a worker would find in that State the conditions most favourable to the search for new employment. However, the protection of workers would be weakened if a worker who, in a Member State other than the State of residence, remained employed in the same undertaking, but part-time, while remaining available for work on a full-time basis, was obliged to apply to an institution in his place of residence for help in finding additional work. The fact that he has gone from full-time employment to part-time employment by virtue of a new contract is, in this respect, irrelevant. More specifically, the employment office of the place of residence would be considerably less well placed – when compared with its counterpart in the competent State – to assist the worker in finding additional employment on terms and conditions compatible with his part-time job since, in all likelihood, such employment would have to be in the territory of the competent Member State. It is only when a worker no longer has any link with the competent Member State and is wholly unemployed that he must apply to the institution of his place of residence for assistance in finding employment. Consequently, the Court decided that in the case of Mr De Laat, he could claim unemployment benefit in the State of employment.

This judgment also causes problems for the benefit administration. Examples exist of States that applied the judgment only in cases identical to the *De Laat* case, *i.e.* a worker continuing to work for his employer in a part-time job. This restrictive approach clearly does not fit with the criteria developed by the Court. In order to try to solve such problems, in 2005 the Administrative Commission (AC) made a decision in which a definition of partial unemployment is given.[30] It provides that determination of the nature of partial unemployment depends on whether or not any contractual employment link exists or is maintained between the parties, and not on the duration of any temporary suspension of the workers activity.

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29 Case 444/98, [2001] ECR I-2229.

30 *OJ* 30 of 18 May 2006, p. 37.

So the criterion is now whether or not there is a contractual link. This is more limited than the *De Laat* judgment, that mentions as relevant 'any link with the State of employment'; the old criterion suggesting that, for instance, prospects for further work are also relevant. The new criterion is, however, more precise, so it easier to apply to the benefit administration, and we may assume that the Court finds this precision acceptable.

However, there also seem to be problems with the interpretation of the AC's criterion. Suppose, for example, that a person has two part-time jobs and loses one, or that he has a full-time job and this is succeeded by a job with a new employer. From practitioners, I learnt that some benefit administrations assume whole unemployment in this case, as there no longer exists any contractual link between the employer *of the lost job* and the employee. Indeed, close reading of the text of the decision can lead to such an interpretation, since it says 'whether or not there is any contractual link between *the parties*' (my italics). However, it is also obvious that this interpretation departs fundamentally from the *De Laat* judgment, in which the Court said that there must not be any link *with the country of* employment. Moreover, such interpretation does not fit either with the rationale of the *De Laat* criterion that was based on where the best chances of finding work existed.

4.4. REGULATION 883/2004

Regulation 883/2004 follows the system of Regulation 1408/71 *vis-à-vis* unemployment benefits for frontier workers to a large extent. Article 65(2) provides that a wholly unemployed person who, during his last activity as an employed or self-employed person, resided in a Member State other than the competent State, and who continues to reside in that Member State or returns to that Member State, shall make himself available to the employment services in the Member State of residence. The article contains a new element: a wholly unemployed person may, as a supplementary step, make himself available to the employment services of the Member State in which he pursued his last activity as an employed or self-employed person. Article 65 thus gives priority to defining where the unemployed person has to seek work. Para (5) (a) of the article provides where the person concerned should claim benefit: this is in accordance with the legislation of the Member State of residence, as if he had been subject to that legislation during his last activity as an employed or self-employed person. Benefits should be provided by the institution of the place of residence. In other words, a wholly unemployed frontier worker is subject to the legislation on unemployment benefits in the country of residence, even if he also seeks work in the country of last employment.

As was mentioned in the first section of this article, the chapter on unemployment benefit was extended to the self-employed. This is also relevant to the provisions on the frontier workers. Although the provisions will not have many consequences,

since the number of States with unemployment schemes for the self-employed is still very limited, there may be some consequences. If a self-employed person resides in a country with a scheme for the self-employed, he may become entitled to such benefit, even if he worked in the neighbouring country before becoming unemployed. Under the present rules he is excluded from benefit.

4.4.1. Reimbursement

It is not only the unemployed persons themselves, but also the 'receiving' Member States that may not be happy with the frontier workers rules in the unemployment benefit chapter, since they have to bear the cost. An innovation is that the new regulation now has a reimbursement rule. The benefits provided by the State of residence under Article 65(5) – thus including both the frontier workers and the non-frontier workers not residing in the competent State – shall continue to be at its own expense. However, the competent institution of the State, to whose legislation the person was last subject, has to reimburse the State of residence with the full amount of benefits paid for the first three months. The reimbursement is no more than the value of benefits of the competent State, therefore it may not be a full reimbursement, but, in any case, the competent State is not 'better off' as a result of the coordination rules during this period. The reimbursement period is extended to five months when the person concerned has, during the preceding 24 months, completed periods of employment or self-employment of at least twelve months in the country of last employment.

It follows from this innovation that the problems for the Member States have, for a large part, been solved as a result of this compromise: the link between the supervision and payment of benefits is maintained, while reimbursement rules reduce the costs for the States in which many frontier workers live. For the frontier workers there are no improvements, aside from their right to seek work in two States. The new rule raises the question of why it was not provided that frontier workers should receive a supplement to the unemployment benefit, if lower, to make their benefits equal to those provided in the competent State. After all, the competent State has to reimburse the costs, so the frontier worker could benefit from this and the State of residence would not be worse off.

4.4.2. The non-frontier workers

Article 65(2) refers also to the non-frontier worker who does not return to his Member State of residence: he shall make himself available to the employment services in the Member State to whose legislation he was last subject. This person can claim benefit in the country of last employment. If he returns, he receives benefits from the Sate of residence, but, in principle, during the first three months, he receives benefits from

the competent State in accordance with Article 64(1)(a), which governs the benefits for persons seeking work in another Member State (Article 65(5)(b)).

A difference between the old and the new regulation is that in Regulation 1408/71, it is provided that a wholly unemployed non-frontier worker, who does not reside in the competent State and is available for the employment services, receives benefit from the State of last employment. The new Regulation does not provide an explicit rule that the non-frontier worker who does not return to the State of residence is entitled to benefit from the State of employment. However, it is clearly presumed in the quoted articles that the competent State pays the benefit.

In respect of partially unemployed persons – both frontier workers and non-frontier workers not residing in the competent State – Article 65(1) follows the same rule as Regulation 1408/71: these persons are entitled to benefits from the competent State. As we have seen, Regulation 1408/71 does not define the term 'partial unemployment' and neither does Regulation 884/2003. It was argued above that it is advisable to lay down such interpretation in the Regulation.

4.4.3. Is the Miethe judgment still relevant to the new Regulation?

One difference between the two regulations is, as we have seen, that unemployed frontier workers may make themselves available, in addition to the State of employment, to the State of last employment. Does the difference in approach between the regulations, as discussed in the previous sections, mean that the *Miethe* judgment can no longer be applied? In the literature there has already been a discussion of this issue.

4.4.4. The literature

Rob Cornelissen, former head of the Free Movement of Workers and Coordination of Social Security Schemes unit of DG Employment of the European Commission, argued in the *European Journal of Social Security* that the *Miethe* case law is still in force:[31]

> 'In my opinion, this case law [Miethe – FP] is still important for Regulation 883/04. True, Article 65 has added the possibility for frontier workers of making themselves available to the employment services of the state of last employment. However, it has not made any changes to the rule that the state of residence has, for frontier workers, exclusive competence for providing unemployment benefits. Contrary to frontier workers, workers other than frontier workers do have a choice between the unemployment benefits of the state of last employment and the state of residence. 'Atypical' frontier workers also have this choice.'

[31] Cornelissen (2007), p. 211.

Cees Van den Berg, retired head of the Department of International Treaties of the Dutch Ministry of Social Affairs and Employment, takes the opposite view. He argues that the *Miethe* case law will lose its meaning once the new Regulation comes into force.[32] His main point is that the drafters of the new text have included all existing case law in the new text; thus, if the *Miethe* law is not implemented, it follows that it is not part of the new Regulation.

From a legal point, Van den Berg's argument is not valid. One cannot hold that if a rule of the case law is not implemented, it is no longer valid. On the contrary, where the texts of two successive regulations are materially the same and where the text does not explicitly make clear that a particular rule or interpretation does not exist anymore, the old case law remains valid. Since the rules on unemployment benefits for frontier workers in Regulation 883/2004 remain a deviation from the main rule that benefits are paid by the State of employment and this constitutes a form of alleged indirect discrimination, and the *Miethe* case law is not referred to, the conclusion is that, without further indications, the old case law remains relevant whatever the alleged intention of the legislator.

In view of the intention of the legislator, it is remarkable that another observant of the discussion in the Council, Cornelissen, has a different view on the intention of the legislator.

4.4.5. The text of the new regulation

This issue of the relevance of the *Miethe* case law has also been raised on the basis of a strict literal reading of the text of the new regulation.[33]

The argument is as follows: in the *Miethe* judgment, the Court put the atypical frontier worker on a par with the non-frontier worker, and that means application of the rules of Article 71(1)(b) of Regulation 1408/71. According to the first indent of that provision, the non-frontier worker is entitled to unemployment benefit from the State of last employment if he is available to its employment services. The second indent concerns the situation in which the non-frontier has returned to the State of residence or is available to the employment services of that country.

The new regulation provides that the non-frontier worker who has not returned to the State of residence has to be available to the employment services of the State of employment and, from the system of the regulation and the national law in question, it follows that he is entitled to benefit from the competent State. Unlike Regulation 1408/71, the new Regulation does not contain the rule that the non-frontier worker, who is available to the employment services of the competent State, is entitled to benefit in that State as if he resided in the State. In other words, returning to the State

32 Van den Berg (2008).

33 I heard this interpretation from the Dutch benefit administration.

of residence excludes him from receiving benefit from the competent State. Article 65(5)(b) of the new regulation provides that a non-frontier worker who returns to the State of residence is entitled to unemployment benefit from that State. So if we take the *Miethe* rule, which refers to Article 71(1)(b), the problem is that the corresponding rules are missing in the new regulation. In other words, it is argued that even though, under the new regulation, there are still *Miethe* cases – atypical frontier workers – if they are treated as non-frontier workers, this would always mean that they are paid unemployment benefit according to the rules of the State of residence, since they satisfy the criterion that they have 'returned' to the State of residence.

However, this interpretation does not acknowledge that Article 71(1)(b)(ii) of the old regulation also contained the provision that the non-frontier worker, who makes himself available for work to the services of employment of the State of residence, or who returned to the State of residence, is entitled to benefit from that State. If this rule is applied to the atypical frontier workers, it can be said that they 'returned' to the State of residence, so that is the State where they are entitled to benefit. Still, Article 71(b) has been interpreted in such a way that despite their 'return' to the State of residence, the atypical frontier workers can also make themselves available for the State of employment. Therefore, the case law also did not follow the text of the Regulation too strictly.

Still, the text of the new regulation leaves another problem. Article 65(2) does not provide that the non-frontier workers who are available to the State of employment are entitled to benefit from this State as if they reside in the State. So, unlike Article 71(1)(b)(1), this provision does not waive the residence conditions of national legislation for this category. Also, Article 11, giving the rules for determining the legislation applicable, does not, unlike Article 13 of Regulation 1408/71, waive residence conditions. Instead there is the general article on waiving residence conditions (Article 7), but the waiving of the residence conditions applies, according to Article 63, only in the cases provided for by Articles 64 and 65 and within the limits prescribed therein. So the question remains whether or not the *Miethe* case law can be read as implying that residence conditions have to be waived.

There are arguments in favour of an affirmative answer. It has to be kept in mind that frontier workers are deprived of unemployment benefit of the country of last employment, whereas the *lex loci laboris* is the main principle of the Regulation. If there is no justification for this deviation, it is a case of indirect discrimination. The Court found a solution in the *Miethe* judgment, in which the objective justification was not valid, by referring to the non-frontier workers. This meant that the Court had to depart from the literal text of the regulation, by interpreting the term 'frontier workers'.

The problem of indirect discrimination remains under the new regulation. Even if it is accepted that the new regulation contains provisions that make the application of the *Miethe* rule difficult, this does not solve the issue. One solution may be a reading

of the regulation that allows the payment of benefits by the competent State to atypical frontier workers. Another solution may be that the Court answers the question, without referring to a rule like Article 71(1)(b), while having the same effect as in the *Miethe* judgment. After all, the main problem that there is a form of indirect discrimination which needs a justification has to be solved.

4.4.6. European Parliament

On 9 July 2008, the European Parliament adopted the following amendment, which proposed a new recital 9a of Regulation 883/2004:

> 'This Regulation provides for measures and procedures to promote the mobility of employees and the unemployed. Frontier workers who have become completely unemployed may make themselves available to the employment services in both their country of residence and the Member State where they were last employed. However, they should be entitled to benefits only from their Member State of residence.'[34]

In the report by Jean Lambert, who proposed the amendments, the following justification for this amendment was mentioned: 'With the inclusion of this text there can no longer be any misunderstanding about whether the Miethe judgment is still to be applied or not.' This is a somewhat remarkable wording, implying that it is only a misunderstanding, instead of uncertainty or difference of view that is at stake. In fact, the rapporteur does not even make it clear whether or not the *Miethe* judgment is still to be applied, although we may assume that she meant to answer this question negatively.

The European Parliament did not adopt amendments, nor were these proposed, of the Regulation such as to exclude a *Miethe* interpretation. The dismissal of the *Miethe* approach therefore depends entirely on the recital.

Recitals are indeed relevant to the interpretation by the Court, but the question is whether this recital can really reach the objective mentioned by the rapporteur. Without this clarification the recital would not be clear in its purpose at all: remember that the Court considered persons such as *Miethe* as atypical frontier workers, so it could be said that the recital does not apply to them, since they are not frontier workers. Moreover, in its case law on frontier workers (*Mouthaan*), the Court referred to a recital to justify the rule of frontier workers, but still this recital did not prevent it from following a new approach in the *Miethe* case. So it is unclear why the rapporteur was so confident that she reached her aim through the new recital.

[34] P6_TA(2008)0348.

4.4.7. Conclusion

If the legislator really wants to lay down that the *Miethe* case law is no longer applicable, it has to provide this more clearly. An example could be: 'frontier workers, even those with strong business and personal ties with the competent State, are entitled to benefits only from their Member State of residence.' Even then the Court could argue that this rule is invalid because there is indirect discrimination, but in this case the intention of the legislator would be clear and the Court would be recalcitrant to depart from this. Moreover, in the *De Cuyper* judgment, it had accepted the residence rules for unemployment benefit recipients, so it can be expected that it would also accept this rule for the atypical frontier workers if it was worded explicitly.

5. EXPORT OF BENEFIT

According to Article 42 EC, the coordination regulation has to provide that social security benefits are also paid in other Member States. This is laid down in the general waiving of residence conditions (Article 7). However, this article does not apply to unemployment benefits, as we have already seen.

The export of unemployment benefit is another example of when the relationship between paying benefit and the supervision of the conditions is important, but for the three months as regulated in the regulations, this relationship is loosened: supervision is transferred to another Member State. However, this relationship became dominant again when, in the proposal for the new regulation, it was proposed that the period be extended to six months. In the *European Journal of Social Security,* Rob Cornelissen describes how Member States wished to have an evidence-based overview of the current use of Article 69.[35] It appeared, however, that such information was not available, as Member States had not sufficiently answered a questionnaire of the European Commission on the application of Article 69. Information on the duration and success rate of job seeking, for example, was insufficiently complete and not comparable. During the Council discussions it appeared that many Member States were afraid that an extended research period would be abused, and therefore the Commission proposal was not adopted.

There are two main issues related to this provision: the duration of the export of benefits, and the loss of remaining benefit rights in case of a late return.

Under Regulation 1408/71, wholly unemployed people can seek work in another Member State for three months while remaining entitled to unemployment benefit from the competent State (Article 69). If a person returns to the competent State within the three-month period, the right to benefit is continued, however, the person

[35] Cornelissen (2007: 204).

concerned will lose all entitlement to benefits from the competent State if he does not return before the expiry of that period. In exceptional cases the competent institutions may extend time limit.

In the proposal for simplification, it was proposed that this period should be extended to six months (Article 50), but the proposal was not accepted. In Regulation 883/2004, the period remains three months, but may be extended by the competent Member State to a maximum period of six months. A slight improvement under the new Regulation (Article 64), however, is that the period may be extended by the competent institutions up to a maximum of six months. In addition, the new regulation provides, like the present one, that in exceptional cases the competent institutions may allow the person concerned to return at a later date without loss of entitlement. A difference exists in the number of times the claimant can make use of the rule. Under Regulation 1408/71, the possibility offered by Article 69 could be invoked only once between two periods of unemployment. The provisions of Regulation 883/04 are more flexible: between two periods of employment the unemployed person can make use of Article 64 several times, as long as he respects the overall maximum period of three months (or six months, if extended by the competent institution).

There is an important difference concerning the export of benefit: under the present regulation, the State in which the person is seeking work pays the benefit and it is reimbursed by the competent State. It appeared in recent years that some Member States had financial problems in paying the benefits, as the reimbursements often came much later. The new regulation provides that the competent institution has to pay the benefits. This is an improvement for poorer Member States, which sometimes have difficulties in financing the benefits they have to pay to persons from other countries.

The 1998 proposal provided that a person seeking work who satisfied the conditions of maintaining the right to benefit, would receive unemployment benefit whose aim it is to facilitate access to work under the same conditions as its own nationals. The benefits meant here were not cash benefits, but, for instance, training opportunities. The new regulation does not contain this rule. It is not clear why this provision is left out: this help may reinforce and help to fulfil the supervision obligation of the State in which the unemployed person is seeking work. If money is the problem, a reimbursement rule could have been made. I expect that a combination of this rule and the export rule would make much more sense than the export rule alone.

The second issue relevant to Article 64 concerns the loss of all remaining benefit rights in case of a late return, which exists in both the old and the new regulations. This loss has a rigorous effect. The maximum benefit period for some categories of the unemployed can be very long, so in case the search for work took place in the beginning of the unemployment period, the loss of benefit rights could be excessive. The Court of Justice, however, accepted this rule (Article 69(2)) of Regulation 1408/71) as valid in

the *Testa* judgment.[36] The Court considered that Article 69 is not simply a measure to coordinate national law on social security, but also establishes an independent body of rules, in favour of workers claiming the benefit, which constitutes an exception to national legal rules and which must be interpreted uniformly in all the Member States. The migrant worker has an advantage as Article 69 frees him for a period of three months of the duty to keep himself available to the employment services of the competent State. As part of a special system of rules that gives rights to workers that they would not otherwise have, Article 69(2) cannot therefore be equated with the provisions held invalid by the Court in the *Petroni* judgment, it concluded.

Here again we see an example of the Court treating unemployment benefits differently from other categories of benefits due to the special characteristics of these benefits. In the case of other types of benefits, national law sometimes does not allow export, so the export rules of the Regulation give an advantage to the worker when they allow export of these benefits. However, this advantage in respect of these benefits does not give the room to deprive workers of their nationally acquired rights if they do not obey some rules of the Regulation.

The European Commission had already published a proposal for a less harsh approach in the 1980s, but it was never adopted.[37] Regulation 884/2003, however, has a more lenient rule: the person still loses all benefit rights in case of a late return, unless the provisions of the legislation of the competent State are more favourable. So, for example, according to the Dutch rules, a person who returns before six months have lapsed will not lose the remaining benefit rights.

6. CONCLUSIONS AND RECOMMENDATIONS

Unemployment benefits are a special type of benefits. This article began with this remark, and the analysis of the outcome of the negotiations on the modernisation of Regulation 1408/71 fully supports this statement.

It is hard to call Regulation 883/2004 a simplification in respect of unemployment benefits, as the deviations from the *lex loci laboris* for frontier workers and non-frontier workers not residing in the competent State still involve special, complicated rules. The 1998 proposal for simplification was indeed a simplification, by making the competent State responsible for payment of benefit in all cases. It was also a

36 *Testa* case, joined cases 41/79, 121/79 and 796/79, [1980] ECR 1979.

37 COM (1980) 312, see also OJ 9 July 1980, 169/22. According to the proposal, unemployed persons would retain their right to unemployment benefit in accordance with the national legislation of the competent State, provided that they returned to the territory of that State either within the period determined in Article 69 (*i.e.* three months), or, after the expiry of this period, but before the expiry of the period during which, under the legislation of that Member State, the worker may leave the territory of the said State without thereby forfeiting his right to benefit.

modernisation, as it involved a division of tasks: paying benefits by the competent State, supervising the obligations in the State of residence. This modernisation was clearly too radical. At the end of the day, the new regulation still has most of the main rules of the old one. That means that it has inherited several problems of the old one, such as the unsatisfactory rules for the frontier workers, possibly the *Miethe* case law, the special position of the non-frontier workers not residing in the competent State, and the limited possibility to seek work in another Member State.

If we look at the practice of administering unemployment benefit, the special position of the benefit in the coordination rules is understandable. It is often unclear what activities jobseekers undertake in another Member State and the fear that they are not active enough is understandable. A radical cut of the link between the supervision of work seeking activities and paying benefit may be inadequate and should not made overnight. Still, the question of whether the rights and obligations in the new regulation are balanced remains.

The changes in the new regulation are made for the benefit of the Member States rather than for the unemployed. The new reimbursement rules for the residence States of frontier workers and payment rules in cases of the export of benefit of persons seeking work are clear examples of improvements for the States. For the frontier workers there are few improvements. That the frontier workers rule on unemployment benefits sometimes has a negative impact has been discussed in large detail in the previous sections. We saw that the outcome that frontier workers are subject to the legislation of the State of residence is a political choice rather than an unavoidable rule. Furthermore, it was remarked that, even if it is accepted that a frontier worker has to rely on the State of residence, it is unclear why he is not given a supplement to compensate for the difference in level of benefits. This may sometimes be problematic, of course, if, for instance, differences in duration are also taken into account. Still, a supplement approach would fully fit in the system of the regulation (which is also approached for family benefits) and practical problems should not prevent such innovation.

Even more remarkable is that still, little attention is paid to reintegration measures. The best way to achieve a modernisation is by gradually improving cross border supervision procedures and the procedures and provisions to help the unemployed persons back into work. This could be done, by means of experiments and bilateral agreements, between, in the first instance, neighbouring countries. These could provide, for instance, that an unemployed frontier worker who also seeks work in the competent State, is entitled to benefit from that State. This means that that State applies its obligations to the unemployed person, such as that he has to have one job application per week. For this purpose also, activities in the State of residence can be taken into account, but only to a limited extent.

Such agreements should also be possible for the export of benefit. Agreements, for example, that mean a person is entitled to have his benefit exported for more than six

months if he takes part in a special programme in another State for reintegration, and if he fails to do so, his benefit is suspended. At present there are already experiments with cross border reintegration efforts, especially in border areas and in regions with a shortage or a surplus of labour.

The Regulation should allow for more experiments in this area and in this way contribute to the gradual growth of a pan-European labour market, an objective which fits very well with both the European Employment Strategy and the right of free movement as laid down in the Treaty.

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