The new European social security regulations in context

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Abstract

Regulations 883/2004 and 987/2009 replaced Regulations 1408/71 and 574/72 from May 1, 2010. The new regulations started life as part of the programme to simplify the legislation governing the internal market, but may now be regarded more as a modernisation of the legislation on the co-ordination of statutory social security schemes falling within the material scope of the regulations than a simplification of it. This article offers an overview of the new regulations and sets them in the context of the growing significance of citizenship of the Union in the field of entitlement to a range of assistance available when such citizens are in a country other than that of their nationality. Because of the reluctance of Member States to work more closely together in this field, case law developments are likely to continue to play an important part in the development of entitlements.

INTRODUCTION

The co-ordination of social security provision in the Member States has been the subject of secondary legislation of the European Union (and its predecessors) for over 50 years. Regulation 3 of September 25, 1958 concerning the social security of migrant workers was the first Community instrument in this area, and indeed one of the very first regulations adopted by the European Economic Community. It was accompanied by an implementing regulation, thus setting the pattern of secondary legislation in this area. Both regulations entered into force on January 1, 1959. Regulation 3 was amended 14 times before it was replaced, with effect from April 1, 1973 by Regulation 1408/71 and its implementing Regulation 574/72. Regulation 1408/71 has for over 37 years been the main Community instrument enabling national social security systems in the fields it covers to work together to avoid disadvantage to the migrant worker whose pattern of work will have brought them into contact with two or more national systems. Regulation 1408/71

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3 A basic regulation setting out the substance of co-ordination and an implementing regulation dealing with the administrative detail of its implementation.
was amended 39 times, and has been replaced with effect from May 1, 2010 by Regulation 883/2004, and its sister implementing Regulation 987/2009. Regulation 883/2004 has needed to be amended even before its entry into force. The genesis of the new regulations can be traced back to a call at the Edinburgh European Council in 1992 for a revision of Regulation 1408/71 to make it simpler. Nothing happened for a number of years, but in March 1997 the Commission issued a proposal to simplify and modernise Regulation 1408/71. The controversial nature of social security regulation, even when it concerns only co-ordination of national systems rather than harmonization, meant that it was not until just before the 2004 enlargement that the supposedly simplified regulation was adopted. There is anecdotal evidence that the regulation was rushed through prior to the accession of the ten new Member States on May 1, 2004 in order to avoid having to open formal negotiations with the new Member States. The regulation certainly had to be corrected in a later edition of the Official Journal. It has taken nearly six years from adoption of Regulation 883/2004 to complete the preparation for its entry into force.

The delay in finalising the annexes to Regulation 883/2004 and in adopting the new implementing regulation has meant that, in some respects, the case law of the Court of Justice has produced developments which are not reflected in the text of the new basic regulation. Whether the new basic regulation achieves its stated objectives of being simpler than its predecessor remains to be seen, but may be doubted. The new legislation is, however, a modernisation of the key instruments affecting the co-ordination of those parts of the social security systems of the Member States which fall within the material scope of the new regulations.

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4 Regulation 883/2004 on the coordination of social security systems, corrected version at [2004] OJ L200/1, as amended; referred to at times in this article as ‘the basic regulation’.

5 [2009] OJ L284/1; referred to at times in this article as ‘the implementing regulation’


8 Most notably in relation to the provisions on health care.
ISSUES RELATING TO LEGAL BASE

The original legal base for Regulation 3 and Regulation 1408/71 was what is now Article 42 of the EC Treaty, which fell within the treaty rules on free movement of workers and concerned the removal of obstacles to such free movement. This original legal base has led the Court of Justice to note that the objectives of Community rules on social security contained in the regulations are limited. They concern only the co-ordination of the social security systems of the Member States, and do not seek to harmonize their social security systems. Thus, the primary objective is to enable different social security systems to work together where a worker would be disadvantaged by the application solely of national social security systems operating in isolation. For example, in the Hervein case, the Court said:

“50. However, the Treaty did not provide for the harmonisation of the social security legislation of the Member States. In particular, as regards employees, Article 51 provides only for the coordination of the legislation. Substantive and procedural differences between the social security systems of individual Member States, and hence in the rights of persons working there, are therefore unaffected by that provision ... .

51. Accordingly, the Treaty offers no guarantee to a worker that extending his activities into more than one Member State or transferring them to another Member State will be neutral as regards social security. Given the disparities in the social security legislation of the Member States, such an extension or transfer may be to the worker’s advantage in terms of social security or not, according to circumstance. It follows that, in principle, any disadvantage, by comparison with the situation of a worker who pursues all his activities in one Member State, resulting from the extension or transfer of his activities into or to one or more other Member States and from his being subject to additional social security legislation is not contrary to Articles 48 and 52 of the Treaty if that legislation does not place that worker at a disadvantage as compared with those who pursue all their activities in the Member State where it applies or as compared with those who were already subject to it and if it does not simply result in the payment of social security contributions on which there is no return.”

But this approach is tempered by what has come to be known as the ‘Petroni principle’, under which the Luxembourg Court has consistently stated that the aims of the co-ordinating regulation would not be met if workers were to lose, through the application of the co-ordinating rules, advantages in the field of social security guaranteed to them by

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9 Formerly Article 51 of the EC Treaty. Article 42 has become Article 48 of the Treaty on the Functioning of the European Union (TFEU) following the entry into force on December 1, 2009 of the Treaty of Lisbon.

the laws of a single Member State. The Di Prinzio case is an example of the application of the principle. The Court advised that a retirement pension to which the appellant had become entitled wholly under national law could not be reduced by the application of the overlapping provisions of the regulations. Those provisions could only be applied if they allowed the migrant worker to be granted a benefit at least as high as that payable under the national legislation alone.

The original legal base of Regulation 1408/71 had to be extended by the use of the reserve power in what is now Article 308 of the EC Treaty when its provisions were amended in 1981 to cover self-employed persons.

A more recent development which must also be considered when the social security regulations are applied is citizenship of the Union, for which provision was made in Articles 17 to 22 of the EC Treaty, and which is elaborated in the Citizenship Directive.

The legal base of Regulation 883/2004 remains Articles 42 and 308 of the EC Treaty. There are two significant consequences which have flowed from this legal base in relation to amendments to its provisions. First, like the regulation itself (and its predecessor in recent times), any amendments have been made using the co-decision procedure set out in Article 251 of the EC Treaty, but unanimity in the Council is required rather than qualified majority voting. Secondly, Article 39 of the EC Treaty on the free movement of workers has been the primary focus of inspiration in interpreting any uncertain provisions of the regulation, with Article 43 of the EC Treaty on freedom of establishment sitting in the background, as well as—and perhaps rather more powerfully—Article 18 of the EC Treaty on the rights of free movement which attach to citizenship of the Union. Many

13 §65.
14 Formerly Article 235 of the EEC Treaty; and now Article 352 TFEU.
16 Now Articles 20-25 TFEU.
18 Following amendments made by the Treaty of Amsterdam to the EC Treaty.
regulations amending Regulation 1408/71 required the use of both Articles 42 and 308 of
the EC Treaty. This meant that only clear consensus amendments could be introduced
since Articles 42 and 308 of the EC Treaty required unanimity among the Member States.
Under Article 308 of the EC Treaty, the procedure only required consultation with the
European Parliament, rather than co-decision with the European Parliament.

The entry into force on December 1, 2009 of the Treaty of Lisbon has resulted in an
amendment to Article 42, which permits legislation in this field to be passed by qualified
majority, subject to a referral to the European Council where a Member State declares
that the consequences of the proposed legislation would ‘affect important aspects of its
social security system’. Article 48 of the Treaty on the Functioning of the European Union
reads:

“The European Parliament and the Council shall, acting in accordance with the ordinary
legislative procedure, adopt such measures in the field of social security as are necessary
to provide freedom of movement for workers; to this end they shall make arrangements to
secure for employed and self-employed migrant workers and their dependants:

(a) aggregation, for the purpose of acquiring and retaining the right to benefit
and of calculating the amount of benefit, of all periods taken into account
under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Member States.

Where a member of the Council declares that a draft legislative act referred to in the first
subparagraph would affect important aspects of its social security system, including its
scope, cost or financial structure, or would affect the financial balance of that system, it
may request that the matter be referred to the European Council. In that case, the ordinary
legislative procedure shall be suspended. After discussion, the European Council shall,
within four months of this suspension, either:

(a) refer the draft back to the Council, which shall terminate the suspension of the
ordinary legislative procedure; or

(b) take no action or request the Commission to submit a new proposal; in that
case, the act originally proposed shall be deemed not to have been adopted.”

The new text takes matters forward only slightly; the provision still displays clear signs of
the sensitivity of the whole area of Union legislative competence touching on the social
security systems of the Member States. Article 308 of the EC Treaty has become Article
352 of the Treaty on the Functioning of the European Union under amendments made by
the Treaty of Lisbon. Unanimity is still required, but there are further limitations designed
to avoid competence creep. The Commission is required to draw the attention of

19 Which is now Article 48 TFEU.

20 A term used by writers to describe a situation in which the competence of European
Union institutions is acquired by implication, rather than by explicit allocation of
national parliaments to proposals based on Article 352, and measures based on the provision cannot ‘entail harmonisation of Member States’ laws or regulations where the Treaties exclude such harmonisation.’

WHAT’S NEW IN REGULATION 884/2004

SOME PRELIMINARY REMARKS

As noted above, the new regulations can more convincingly be presented as a modernisation of the rules on the co-ordination of social security than a simplification of an area of law which is generally regarded as inherently complex. Some of that complexity is the result of a lack of social solidarity in this field among the Member States, who quite often seem to be keener to exclude a claimant from access to benefit than to include them. The opportunity has, however, been taken to include a limited amount of new material, and to seek to streamline, as far as practicable, inter-State communications in the field of social security.

The underlying principles governing co-ordination of social security have not changed, but a fifth principle has arguably been added. The four traditional principles are:

1. In respect of any claim to benefit, the beneficiary is subject to the social security system of one country alone, which, as a general rule subject to exceptions, is the Member State of the place where the person is working.

2. All those covered by the co-coordinating rules are subject to the same rights and obligations as the nationals of the Member State. This is the principle of equal treatment.

3. Periods of insurance, employment, self-employment or residence accrued in different Member States may be added together where this is necessary to secure entitlement to a benefit covered by the regulations. This is the principle of aggregation.

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21 Article 352(3) TFEU.

22 See later in this article for further comment on the issue of social solidarity.

23 Article 11(1) of the basic regulation.

24 Article 4 of the basic regulation.

25 Article 6 of the basic regulation.
4. There are limitations on the territoriality of benefits, so that a benefit to which title has been acquired in one Member State may be taken to another Member State. But there are now very many exceptions and limitations on the exportability of benefit.26

There is now added to these principles a new principle, which might be defined as follows:

5. Member States undertake to co-operate in the administration of the co-coordinating rules in the regulations. We might label this the principle of co-operation.

This fifth principle is drawn primarily from the words of the preamble to the implementing regulation and its technical requirements. There are very many provisions calling for improved collaboration between the competent institutions in the Member States, and for a move to electronic communication of information between them.27

It is not within the scope of this overview to elaborate on all the developments to be found in the new regulations.28 What follows are some of the more important developments which are set in a context which will enable the reader to see how the new regulations go beyond the Regulation 1408/71 regime. The focus is also principally upon the provisions of the basic regulation rather than the detail in the implementing regulation.

ASSIMILATION OF LEGAL EFFECTS AND FACTS

Article 5 of the basic regulations reads:

“Equal treatment of benefits, income, facts or events

Unless otherwise provided for by this Regulation and in the light of the special implementing provisions laid down, the following shall apply:

(a) where, under the legislation of the competent Member State, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation shall also apply to the receipt of equivalent benefits acquired under the legislation of another Member State or to income acquired in another Member State;

(b) 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

26 Article 7 of the basic regulation.

27 See also Article 76 of the basic regulation which is entitled ‘Cooperation’.

28 For more detailed coverage of Regulation 883/2004, see the articles in the special double issue of Volume 11 of the European Journal of Social Security (Nos 1 and 2) of June 2009, on 50 years of European social security coordination.
account of like facts or events occurring in any Member State as though they had taken place in its own territory.”

This provision is not entirely new, but might now be viewed as a sixth general principle. There were similar provisions applying to particular benefits in Regulation 1408/71, but the earlier provisions have been elevated in Regulation 883/2004 to principles of general application sitting alongside such requirements as equality of treatment and aggregation of periods in Articles 4 and 6 respectively. Under the first paragraph of Article 5, where a person’s social security entitlements have legal effects in one Member State, those legal effects must be recognised in other Member States. So, if a person is in receipt of an old-age pension in one Member State, another Member State considering a question concerning that person’s social security entitlements must recognise that person as a pensioner. Under the second paragraph of Article 5, where the legal effects in one Member State are attributable to the occurrence of certain facts or events determined by the competent institution of that State, those facts and events are to be recognised in other Member States. Under this principle, it is not open to Member State B to question, for example, whether a person determined to have suffered an industrial accident in Member State A actually suffered such an accident. In other words, there must be mutual recognition of factual matters relating to the award of a benefit by a competent State.

THE CONCEPT OF RESIDENCE

There is guidance in the implementing regulation on the issue of residence. Residence under the regulations refers to ‘habitual residence’, which is a Community concept. Residence plays an important part at a number of points in the operation of the coordinating regulation. Among them, of course, is the limitation of the payment of special non-contributory benefits in the Member State of residence. However, such is the nature of ‘habitual residence’ that there is a risk that a person would be found not to have a residence in any Member State. For this reason, Article 11 of the implementing regulation provides:

29 The concept of ‘habitual residence’ has been imported into national social security legislation as a condition of entitlement to mean-tested benefits. See, for example, Regulation 21AA of the Income Support (General) Regulations 1987, (SI1987/1967 as amended) excluding from entitlement to income support as persons from abroad those who are not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland. Currently claimants to means-tested benefit have to show both that they have a ‘right to reside’ and are ‘habitually resident’ here. The circumstances in which the right to reside arises is the current battleground in relation to benefit entitlement. See below.

30 See also Recital (11) of the Preamble to the implementing regulation.
“Elements for determining residence

1. Where there is a difference of views between the institutions of two or more Member States about the determination of the residence of a person to whom the basic Regulation applies, these institutions shall establish by common agreement the centre of interests of the person concerned, based on an overall assessment of all available information relating to relevant facts, which may include, as appropriate:

(a) the duration and continuity of presence on the territory of the Member States concerned;

(b) the person’s situation, including:

(i) the nature and the specific characteristics of any activity pursued, in particular the place where such activity is habitually pursued, the stability of the activity, and the duration of any work contract;

(ii) his family status and family ties;

(iii) the exercise of any non-remunerated activity;

(iv) in the case of students, the source of their income;

(v) his housing situation, in particular how permanent it is;

(vi) the Member State in which the person is deemed to reside for taxation purposes.

2. Where the consideration of the various criteria based on relevant facts as set out in paragraph 1 does not lead to agreement between the institutions concerned, the person’s intention, as it appears from such facts and circumstances, especially the reasons that led the person to move, shall be considered to be decisive for establishing that person’s actual place of residence.”

This provision should ensure that a situation does not arise in which a person is not found to be resident in any Member State. However, it remains for national law to determine whether a person meet the conditions for affiliation to its social security system, for example, through thresholds for making contributions. 31

PERSONAL SCOPE

Regulation 3 covered ‘wage earners or assimilated workers’, and this use of words spawned the earliest case law defining the Community concept of ‘worker’. 32 Regulation 1408/71 began life referring to ‘employed persons’, but in 1981 was extended to include

31  See definition of ‘insured person’ at Article 1(c) of the basic regulation.

32  See Case 75/63, Hoekstra (née Unger), [1964] ECR 177.
self-employed persons. In 1999 it was further extended to include students. There was also judicial consideration of the extent to which the regulation covered members of the family of employed and self-employed workers. The result was that the definition of the personal scope of Regulation 1408/71 became exceedingly complex not only in considering the wording of Article 2, but also having regard to the statement to be found in Annex I on various aspects of the application of the personal scope of the regulation within particular national legal orders. All that detail is swept away and replaced by just a few lines of text in Article 2(1), which (leaving aside the reference to ‘survivors’ in paragraph 2) reads:

“This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been the subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.”

That simplicity is somewhat compromised by the further definitions in Article 1 of ‘activity as an employed person’; ‘activity as a self-employed person’; ‘insured person’; ‘civil servant’; ‘frontier worker’; ‘refugee’; ‘stateless person’; and ‘member of the family’. Furthermore Articles 23 to 27 refer in a heading to ‘pensioners’, and the text of the articles refers to persons ‘who receive a pension or pensions under the legislation’ of the Member States. But what constitutes a pension is not defined in Article 1, and so is to be given its ordinary meaning subject to the extension of that meaning by the definition contained in Article 1(w). The outcome is that, although it will not be difficult to show that a person is within the personal scope of the regulation, there are likely to be other conditions relating to individuals which must be satisfied before the benefits of particular provisions of the regulation can be taken. The position of the economically active and the economically inactive is not the same. The most obvious example relates to entitlement to sickness benefits. Section 1 of the sickness benefit chapter of the regulation applies to ‘insured persons and members of their family’, whereas Section 2 applies to ‘pensioners and members of their family’. There are likely to remain issues of interpretation relating to those within the personal scope of the basic regulation, which will need to be resolved concerning particular conditions of entitlement within the framework of the specific benefits covered by the basic regulation.

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33 See Case C-308/93, Cabanis-Issarte, [1996] ECR I-2097, reversing Case 40/76, Kermaschek, [1976] ECR 1669, which extended the protection afforded by the regulation to family members.

34 Does this refer only to recipients of old-age or survivors’ pensions, or also to invalidity benefits which are paid in the form of an invalidity pension?

35 Which extends the meaning of pension to include lump-sum benefits which can be substituted for them, payments in the form of reimbursement of contributions, and certain revaluation increases or supplementary allowances.
MATERIAL SCOPE

The material scope of the regulation remains statutory social security schemes. Paragraph (6) of the Preamble notes the links between legislative and contractual provisions, and alludes to the requirement in some jurisdictions for the contractual schemes to be compulsory. Such a link is suggested to require similar protection for such compulsory schemes to that provided by the regulation. But all that is indicated is that ‘the experience of Member States who have notified such schemes might be evaluated.’ Social and medical assistance and benefit schemes for victims of war or its consequences continue to be excluded from the application of the regulation.

The increase in the material scope of the regulation is exceedingly modest, although that is because many new forms of benefit have, through judicial decisions, been found to fall within the existing material scope of Regulation 1408/71. So, for example, various care allowances have been classified as cash sickness benefits, 36 and child-raising allowances have been categorised as family benefits. 37 This case law which emphasises the consideration of substance over form in the classification of benefits will continue to be of great importance in the interpretation and application of the new regulations.

Regulation 883/2004 applies to the following areas of social security

(a) Sickness benefits;
(b) Maternity and equivalent paternity benefits;
(c) Invalidity benefits;
(d) Old-age benefits;
(e) Survivors’ benefits;
(f) Accidents at work and occupational diseases;
(g) Death grants;
(h) Unemployment benefits;
(i) Pre-retirement benefits;
(j) Family benefits. 38

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36 As, for example, in Case C-286/03, Hosse, [2006] ECR I-1771.
37 As, for example, in Joined Cases C-245/94 and C-312/94, Hoever and Zachow, [1996] ECR I-4895.
38 Article 3(1)(a) to (j).
What’s new in Regulation 884/2004

The additions are ‘equivalent paternity benefits’ which are added to maternity benefits, which are themselves separated out, entirely appropriately, from sickness benefits, and pre-retirement benefits.

The provisions of the regulation on pre-retirement benefits are exceedingly brief, consisting of a single article which excludes the provisions in Article 6 on aggregation of periods of insurance from applicability in this field. This means that acquiring title to a pre-retirement benefit must be achieved solely under the provisions of the national social security system which has the benefit. Paragraph (33) of the Preamble indicates that the aggregation principle does not apply because only a few Member States have statutory pre-retirement benefits. That is not a convincing reason for excluding for pre-retirement benefits the possibility of aggregation. Pre-retirement benefits are defined at length in Article 1(x):

“‘pre-retirement benefit’ means: all cash benefits, other than an unemployment benefit or an early old-age benefit, provided from a specified age to workers who have reduced, ceased or suspended their remunerative activities until the age at which they qualify for an old-age pension or an early retirement pension, the receipt of which is not conditional upon the person concerned being available to the employment services of the competent State; ‘early old-age benefit’ means a benefit provided before the normal pension entitlement age is reached and which either continues to be provided once the said age is reached or is replaced by another old-age benefit;”

The definition distinguishes a pre-retirement benefit from either an early old-age benefit or unemployment benefit. It will be interesting to see whether the case law on substance over form raises questions of the classification of benefits for those not expected to be employed further before reaching a Member State’s statutory retirement age. The most significant advantage for those in receipt of a pre-retirement benefit is the ability to export the benefit if they move to another Member State.

THE APPLICABLE LEGISLATION

Title II of Regulation 1408/71 contained a complete code for determining which legislation applies in respect of any given claim for benefit, based upon the starting point that the competent State will be that of the place where the beneficiary works. The extension of the personal scope of the regulation to non-economically-active persons has resulted in a

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39 Although they come back together in Title III, which contains the special provisions on the various categories of benefits.

40 See, for example, Case C-4065/04, De Cuyper, [2006] ECR I-6947.

41 Lex loci laboris. The preference for the place of work has not gone unquestioned; see A Christensen and M Malmstedt, ‘Lex Loci Laboris versus Lex Loci Domicili— an Inquiry into the Normative Foundations of European Social Security Law’ (2000) 2 EJSS 69-111.
different principle applying to such persons. The competent State in these cases will be the place of the beneficiary’s residence. As before, residence means ‘habitual residence’. There are special provisions to deal with those who are on sick leave, and those who are in receipt of pensions or are on unlimited sick leave. Those in receipt of old-age, invalidity, or survivors’ pensions, or in receipt of pensions following an accident at work or the onset of an occupational disease are not considered to be economically active. Article 11 draws a distinction between those in receipt of sickness benefits in cash for an unlimited period, who are also considered not to be economically active, while those receiving short-term sickness benefits in cash, who remain employed or self-employed persons, are deemed to be economically active.

The rules on the posting of workers in Regulation 1408/71 raised some tensions between sending States and receiving States. The benefit of posting is, of course, that the posted worker remains affiliated to the social security system of the sending State, rather than becoming affiliated to the social security system of the host State. This can be to the advantage of both the sending State, which continues to receive social security contributions, and to posted workers, who do not have to concern themselves with the intricacies of the social security system of the place where they are working. There is some revision to these rules in the new regulation. Article 12 of Regulation 883/2004 extends the maximum period of posting from one year to two years without any possibility of renewal, though historically agreements under Article 17 of Regulation 1408/71 have enabled special longer arrangements to be agreed between the competent institutions of the Member States. Such agreements remain available.

Article 12 incorporates the case law requirements that enterprises posting workers to the territory of another Member State must be ones ‘which normally carry out activities’ in the originating State.

Somewhat paradoxically, posting also applies to self-employed persons, who can post themselves to another Member State provided that the work to be performed in the

42 Article 11(3)(e) of the basic regulation.
43 Article 1(j) of the basic regulation, and see comment above on the definition of residence in the implementing regulation.
44 Article 11(2) of the basic regulation.
45 See, for example, Case C-178/97, Banks, [2000] ECR I-2005.
46 For employed persons, and for self-employed persons in an analogous position.
47 Article 16 of the basic regulation.
Member State to which they move is similar to that performed in the originating Member State. Under Regulation 1408/71 no such restriction applied to self-employed persons.

Title II of Regulation 883/2004 is rather shorter than its predecessor because the exceptions for those in employment, or self-employment, in two or more Member States at the same time have been brought together. The displacement of the place of work with the place of residence as determining the competent State will only arise where a substantial part of the activity takes place in the Member State of residence.\(^49\) In order to be substantial, more than one quarter of the time on the activities will have to take place in the Member State of residence.\(^50\) The special provisions for international transportation workers disappear, but it may be difficult to apply the new rules to this group of workers.

There is a separate rule in Article 13(3) covering those who are employed in one Member State but undertake self-employment in another Member State. Such persons are to be subject to the law of the Member State in which they are employed. There appear to be no exceptions to this allocation of competence.

Under the new regulation, only one group gets the favourable treatment of being able to choose the competent State; the reasons for the granting of this favourable treatment are not obvious. Article 15 gives this right of election to contract staff of the European Communities. The only limitation is that the power of election can only be exercised once.

**SICKNESS BENEFITS**

There are few changes to the provisions on sickness benefits in cash and in kind. This is because the new regulation ‘leaves the development of patient mobility to case law and has virtually ignored the developments initiated by the Kohll and Decker judgments.’\(^51\) The time has surely come when benefits in kind should be taken out of this regulation and be subject to a separate Community legal instrument which better reflects the framework of modern transnational health care. The complexities of Chapter 1 of Title III on sickness benefits largely relates to the provision of treatment, and issues relating to reimbursement of the cost.\(^52\)

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\(^49\) Article 13 of the basic regulation.

\(^50\) Article 14(8) of the implementing regulation.

\(^51\) F Marhold, ‘Modernisation of European Coordination of Sickness Benefits’, (2009) 11 EJSS 119, 120. On patient mobility, see Proposal for a Directive on the application of patients’ rights in cross-border healthcare, COM(2008) 414 final, July 2, 2008. It seems that this proposal has stalled; in its meeting on December 2, 2009, the Council failed to reach an agreement on the proposed Directive. It may now be re-drafted.

\(^52\) See, for example, Article 34 of the basic regulation on the overlapping of long-term care benefits which have to be treated as sickness benefits, and benefits in kind.
OLD-AGE PENSIONS

The provisions in Regulation 883/2004 merely tweak rather than radically change the provisions on co-ordination of old age benefits. These provisions are, of course, among the most important in the scheme of co-ordination, since they guarantee that workers do not lose pension entitlement as a result of a pattern of employment in two or more Member States. The three part computation remains. First, each the competent institution in each Member State computes the pension entitlement applying only its own law; this is called the ‘independent benefit’. Each competent institution then computes the pension entitlement on the assumption that the aggregated periods of insurance had been completed under its own legislation; this is called ‘the theoretical amount’. Finally, each competent institution computes the ‘pro-rata benefit’ according to the proportion of periods completed in that Member State. The beneficiary receives the higher of the ‘independent benefit’ and the ‘pro-rata benefit’. The result is a bundle of individual pensions from the relevant Member States which form the total pension of the beneficiary. It has always been possible to waive the calculation of the pro rata benefit where the computation of the ‘independent benefit’ results in an amount equal to or in excess of the pro rata benefit, but the conditions for waiving this calculation are expressed in greater detail in Article 52(4) of the basic regulation than in Regulation 1408/71. There are some changes to the overlapping benefit rules, but these are just as complicated and difficult to understand as the earlier provisions.

UNEMPLOYMENT BENEFIT

Regulation 1408/71 applied co-ordinating rules to unemployment benefit for self-employed persons only partially. Self-employed persons were not able to aggregate periods of unemployment. Under Regulation 883/2004 all the provisions apply both to employed and self-employed persons, thus improving access to unemployment benefit for persons who have been self-employed.

53 Article 52(1)(a) of the basic regulation.
54 Article 52(1)(b)(i) of the basic regulation.
55 Article 52(1)(b)(ii) of the basic regulation.
56 See Articles 53-5 of the basic regulations, re-enacting Articles 46a-46c of Regulation 1408/71.
57 Provided, of course, that the relevant national scheme provides unemployment benefit for those whose self-employment has ended. Denmark, for example, has a scheme which pays unemployment benefit to those who have been self-employed; see D Pieters (ed), The Social Security Systems of the Member States of the European Union, (Antwerp, Intersentia, 2002), 65.
The new regulation could have, but does not, redraw the rules relating to frontier workers much more simply.\(^{58}\) The rather complex provisions on wholly unemployed and partially unemployed persons (which distinguish between frontier workers and other workers) to be found in Article 71 of Regulation 1408/71 are largely reproduced in Article 65 of Regulation 883/2004.

One tension which has always existed in relation to unemployment benefit has been the desire of the paying Member State to supervise the job search activities of the beneficiary. This presents obvious difficulties when the beneficiary is in another Member State. Hence the tough and limited rules in Regulation 1408/71 permitting export of the benefit for a maximum period of three months. Initial proposals that the period be extended to six months were rejected by the Member States. But Regulation 883/2004 does allow an initial period of three months for the export of unemployment benefit to be extended to six months.\(^{59}\) It is also possible under the new regulation to rely on Article 64 to move to another Member State on more than one occasion in a period of unemployment, provided that the maximum period of three months (or six months if the extended period applies) is not exceeded. This allows the countries in which job search activities are undertaken to be widened.

FAMILY BENEFITS

The co-ordinating rules on family benefits have traditionally been complex where the family circumstances are themselves complex.\(^{60}\) An example is where one parent works in one country but the children and the other parent live in a different country. Even more complex are those situations in which the family lives in one country, one parent draws a pension from another country, and the other parent works in yet a third country. The complexities are compounded where there are significant differences in the levels of family benefits payable.

There is some real simplification in relation to family benefits, though the underlying principles remain largely the same. The distinction to be found in Regulation 1408/71 between ‘family benefits’ and ‘family allowances’ disappears, with a new definition of ‘family benefit’ provided in Article 1(z):

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\(^{58}\) There remains debate as to whether the basic regulation intends to indicate that the Court’s judgment in Case 1/85, Miethe, [1986] ECR 1837, is no longer applicable: see F Pennings, ‘Coordination of Unemployment Benefits under Regulation 883/2004’, (2009) 11 EJSS 177, 188-90, and 195-8.

\(^{59}\) Article 64(1)(c) of the basic regulation.

\(^{60}\) See, for example, Case C-119/91, McMenamin, [1992] ECR I-6393; and Case C-255/99, Humer, [2002] ECR I-1205; and
“family benefit’ means all benefits in kind or in cash intended to meet family expenses, excluding advances of maintenance payments and special childbirth and adoption allowances mentioned in Annex I.”

The family arrangements alluded to above give rise to overlapping national regimes for the award of family benefits. Article 68 of Regulation 883/2004 sets out clear rules of priority. Where the national rules pay benefits on different bases, the order of priority is as follows:

1. Rights available on the basis of an activity as an employed or self-employed person.
2. Rights available on the basis of receipt of a pension.
3. Rights obtained on the basis of residence.

Where the national rules pay benefits on the same basis, Article 68(1)(b) applies, as follows:

(a) in the case of rights available on the basis of an activity as an employed or self-employed person: the place of residence of the children, provided that there is such activity, and additionally, where appropriate, the highest amount of the benefits provided for by the conflicting legislations. In the latter case, the cost of benefits shall be shared in accordance with criteria laid down in the Implementing Regulation;

(b) in the case of rights available on the basis of receipt of pensions: the place of residence of the children, provided that a pension is payable under its legislation, and additionally, where appropriate, the longest period of insurance or residence under the conflicting legislations;

(c) in the case of rights available on the basis of residence: the place of residence of the children.

Article 68(2) provides that where the application of the priority rules means that the family benefits are not the most favourable available among the rules of the relevant Member States, a differential supplement must be paid by the institutions of the Member State with the higher family benefits in order to top up the benefits paid by the Member State accorded priority under the priority rules.

Some examples will help to give substance to these provisions. The mother works in Member State A, where the children also reside; the father works in Member State B. Member State A is the competent State under the priority rules. But if the benefits

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61 For example, in one Member State on the basis of employment activity, and in another Member State as a universal benefit based on residence.

62 Article 68(1)(a) of the basic regulation. Note that the corresponding provision of Regulation 1408/71 (Article 76) gave priority to the Member State of residence of the family or the children.
payable in the other Member State are higher than those in the Member State with priority, then a differential supplement is payable to bring the amount up to the higher rate.

Let us now suppose that, in a similar situation, the family resides in Member State C (perhaps the mother is a frontier worker). Here the Member State paying the highest amount is the competent State.

SPECIAL NON-CONTRIBUTORY BENEFITS

The history of special non-contributory benefits, which fell within the material scope of Regulation 1408/71, but were not exportable is well known.\(^{63}\) Special non-contributory benefits get their own chapter in Title III of Regulation 883/2004, but this chapter contains a single article.\(^{64}\) Article 70 essentially codifies the position set out in the case law of the Court of Justice. However, the contribution of the Court of Justice to the development of this area of social security law is, almost certainly, not over. Though completely re-drafted by comparison with the provisions of Regulation 1408/71, the substance of Article 70 is not materially different from that of the earlier regulation. The fallout from the inter-institutional challenge,\(^{65}\) which resulted in politically-agreed determinations that certain benefits in Finland, Sweden and the United Kingdom were special non-contributory benefits being struck down, continues. A reference has been made by the Upper Tribunal on the application of the principles in this case to the mobility component of disability living allowance.\(^{66}\)

PUTTING THE NEW REGULATIONS IN CONTEXT

The delay in the entry into force of the new co-ordinating regulations, and more particularly the presence of a legislative text rooted in 2004, coupled with a lengthy debate prior to that, has meant that the new regulation has a dated feel to it. It has its foundations firmly located in the context of the free movement of workers despite the


\(^{64}\) Article 70 of the basic regulation. Some 67 benefits are listed in Annex X as special non-contributory benefits. The United Kingdom entry lists: State pension credit; income-based allowances for jobseekers; income support, and disability living allowance mobility component.


\(^{66}\) See RB v Secretary of State for Work and Pensions, [2009] UKUT 286 (AAC). The Luxembourg Court’s reference to this case is Case C-537/09, Bartlett, Ramos and Taylor v Secretary of State for Work and Pensions.
extension of its personal scope to a much wider group. It was adopted on April 29, 2004. On that same day, the Citizenship Directive was also adopted.\(^{67}\) That Directive entered into force on April 30, 2006, and is beginning to have a significant influence on the Court’s conclusions on the content of citizenship of the Union. It may, at first sight, appear to have comparatively little to do with the co-ordinating rules of Regulation 883/2004 and Regulation 987/2009. Indeed, where contributory benefits are in issue and require a period of employment or insurance, that is probably true. But the co-ordinating regulations govern a much wider range of benefits than those which are contributory, though they do not cover social assistance.

The Citizenship Directive provides that Member States need not grant social assistance in the first three months of residence, and must grant complete equality of treatment once permanent residence is acquired after five years of residence.\(^{68}\) Entitlement arising in the period from three months until permanent residence is attained would seem to turn on the degree of social integration of the citizen in the fabric of the host Member State.\(^{69}\) Residence conditions for benefit entitlements might be appropriate provided that they are proportionate and do not discriminate on grounds of nationality or residence.\(^{70}\) Those exercising their rights of free movement who do not make direct use of the co-ordinating regulations will nevertheless be accruing periods of employment, self-employment, insurance, or residence which may at some future date be of benefit to them.

Where a person is able to retain worker status, there is yet a third route to benefit entitlement in Article 7(2) of Regulation 1612/68.\(^{71}\) This covers not just social security benefits and social assistance, but all manner of benefits flowing from worker status.

While the Court of Justice has required gaps in the scheme set out in Regulation 1408/71 to be filled by applying an interpretation consistent with the underlying purposes of the free movement of workers, it is perfectly likely that the Court will in due course also require consistency with the constitutional concept of citizenship of the Union.

The Court required an interpretation of Regulation 1408/71 consistent with Article 39 of the EC Treaty on the free movement of workers in the *Petersen* case.\(^{72}\) The benefit in issue

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68 Article 24 of the Citizenship Directive.

69 See, for example, Case C-209/03, *Bidar v London Borough of Ealing*, [2005] ECR I-2119.


was found to be an unemployment benefit, which Petersen wished to export from Austria to Germany. He was not assisted by the provisions of Regulation 1408/71. That was, however, not an end to the matter. The Luxembourg Court ruled that Austria would need to justify its claim to make such payments only to those resident in its territory; the Austrian authorities were required to show that in exercising their choices they had paid due regard to the fundamental freedom of workers to move freely among the Member States. Since they had failed to put forward any objective justification for a requirement for residence in Austria for entitlement to receipt of the Austrian benefit, their decision was in breach of Community law. It did not matter that export of the benefit in the circumstances of the case did not come within the provisions to be found in Regulation 1408/71.

In other case law, the Luxembourg Court has emphasised the importance of citizenship of the Union, repeatedly saying:

“... in accordance with settled case law, citizenship of the Union is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to receive the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for ...”73

Although the new co-ordinating regulations are silent on the relationship with citizenship of the Union,74 the enfranchisement of virtually every citizen on the Union as within the personal scope of the regulations indicates that the concept cannot be ignored. Here is yet another example of rights being decoupled—at least to a certain extent—from economic activity. That said, the heart of the co-ordinating regulations remains anchored to economic activity, and the legal base of the new regulations remains principally, but not exclusively, the provisions of the EC Treaty on the free movement of workers. Comment was made earlier in this overview of the new regulations on the amendments to the decision-making process under Articles 48 and 352 of the Treaty on the Functioning of the European Union, replacing Articles 42 and 308 of the EC Treaty. Where amendments touch on either self-employment or on those who are not economically active, the current legal base is Article 308 of the EC Treaty. That becomes Article 352 of the Treaty on the Function of the European Union. The legislative process under this provision requires

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72 Case C-228/07 Petersen, [2008] ECR I-6989.


74 The word ‘citizenship’ does not appear in Regulation 883/2004.
The new European social security regulations in context

unanimity among the Member States. That makes it even less likely that Regulation 883/2004 will be amended to widen its provisions among the economically inactive. But the Luxembourg Court will continue to receive references raising questions of social entitlements arising in the many differing situations which occur among the 500 million citizens of the Union. Its response to those references will almost certainly enhance the entitlement of citizens to benefits falling both within and outside the material scope of Regulation 883/2004.

Indeed the Opinions of two different Advocates General in the two housing assistances cases both confirm that the EC Treaty itself grants certain rights of residence, which are unaffected by the secondary legislation. The language of both Opinions reflects an expectation of social solidarity among the Member States in addressing the problems of those within their territories who fall on hard times (which are particularly strong where there has been some economic activity). Advocate General Kokott is explicit on this:

“82. Moreover, a certain degree of financial solidarity by the host Member State with nationals of other Member States has, until now, already been inherent in all Community instruments relating to the rights of free movement and residence, not least in regard to persons not gainfully employed. This idea finds renewed expression in the preamble to Directive 2004/38 in that, even during a person’s initial period of residence in the host Member State, recourse to the social assistance system is not categorically ruled out, although it should not become an unreasonable burden on the system. In addition. Article 14(3) of Directive 2004/38 provides that an expulsion measure is not to be the automatic consequence of a Union citizen’s recourse to the social assistance system.”

Judgments in these two cases was delivered on February 23, 2010, and the Luxembourg Court followed the Opinions of its Advocates General. Both judgments are, however, firmly rooted in an independent right of residence for children of workers or former workers which flows from Article 12 of Regulation 1612/68; and the judgments avoid any

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75 There are currently at least five references to the Luxembourg Court from United Kingdom courts and tribunals raising various aspects of the compatibility of the requirement that claimants for housing assistance and a variety of means-tested benefits have a ‘right to reside’ in the United Kingdom: London Borough of Harrow v Ibrahim, [2008] EWCA Civ 386; Teixeira v London Borough of Lambeth, [2008] EWCA Civ 1088; Secretary of State for Work and Pensions v Lassal, [2009] EWCA Civ 157; Secretary of State for Work and Pensions v Dias, [2009] EWCA Civ 807; and McCarthy v Secretary of State for the Home Department, (House of Lords reference referred to in Secretary of State for Work and Pensions v Dias).


77 Footnotes in the original omitted.
discussion of principles of social solidarity. But often the seeds of ideas subsequently taken up by the Court itself are sewn by their Advocates General.

If the principle of social solidarity applies in the context of entitlement to housing assistance, then it must also apply in the context of the application and interpretation of the co-ordinating rules in Regulation 883/2004. Just as Article 39 of the EC Treaty has been found to be important in interpreting provisions of Regulation 1408/71, it cannot be too long before Article 18 of the EC Treaty is used explicitly to assist in the interpretation of the obligations flowing from the co-ordinating regulations. It is also worth noting in support of this proposition that Article 21 of the Treaty on the Functioning of the European Union contains a new paragraph (3) which reads:

[For the purposes of securing the right to move and reside freely within the territory of the Member States] and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.

A HELPFUL MODERNISATION AND SIMPLIFICATION?

There are both things to be welcomed and disappointments in the new social security regulations. One test of whether the co-ordinating rules on social security have been modernised and simplified is to ask whether someone coming new to Regulation 883/2004 and its implementing regulation will find its provisions clear and helpful without any prior knowledge of the predecessor regulations. Unfortunately the new regulations do not pass that test. Though Regulation 883/2004 is shorter than its predecessor, the new basic regulation and its implementing regulation require some knowledge and understanding of the history of Community legislation in this field for a full understanding of their provisions, as well as a knowledge of the case law interpreting the earlier regulations. The impact of the case law reflects the contribution of the Luxembourg Court in setting secondary legislation in the proper context of the fundamental principles to be found in the EC Treaty. Whereas Member States may have been reluctant to take matters forward, the Court has had little hesitation in adopting an interpretation which enhances the principle of free movement of workers by applying a broad interpretation to entitlement, and a narrow interpretation to exceptions. The role of the Court should, however, not overshadow the impact of a Community Regulation, which over-rides any incompatible national law in a way which decisions of the Luxembourg Court cannot achieve.

Do the new regulations pass the test of modernisation? Only to a limited extent. The reluctance of Member States to bring their social security systems into closer alignment, and the co-ordinating nature of the new regulations, means that the new regulations

78 As in Case C-228/07 Petersen, [2008] ECR I-6989, discussed above.

79 Now Article 21 TFEU.
touch only on parts of national social security systems. The rules in the regulations are designed to make different social security systems work together where the need arises in order to avoid a disadvantage to citizens of the Union who have had contact with two or more social security systems in fields covered by the material scope of the regulations. That is not to diminish the importance of co-ordination. The provisions of Regulation 3 and of Regulation 1408/71 have been of considerable benefit to thousands of individuals over the years. However, as long as Member States see the choices inherent in their national systems of social protection in the fields of social security and social assistance as matters close to their national sovereignty, there is no likelihood of imaginative and progressive modernisation across the Member States. Any prospects for such a development probably recede as the Union grows larger and more diverse in its approach to social protection. All this means that case law developments which secure a greater degree of equal treatment by virtue of a shared citizenship of the Union are more likely to take matters forward than legislative initiatives. A spur to this may be found in the new Article 21(3) which directly links—in a treaty provision—social security and social protection in the context of rights attaching to citizenship of the Union.

Regulation 1408/71 was extended to EEA nationals and a separate agreement with Switzerland also brought Swiss nationals within the ambit of the co-ordination rules. It is almost certain that the EEA countries of Iceland, Liechtenstein and Norway, together with Switzerland, will be brought within the family enjoying the benefits of social security co-ordination.

Regulation 1408/71 could not, however, be extended to third country nationals who had been subject to the social security systems of two or more Member States. Regulation 859/2003 covered this group. The legal base for this regulation was Article 63(4) of the EC Treaty within Title IV on asylum, immigration and other policies related to free movement of persons. A separate Union instrument is needed to extend the provisions of Regulation 883/2004 to third country nationals. A proposal is currently before the Union institutions. It seems that Member States will be able to opt in or opt out of the new regulation. The United Kingdom’s current position is that it will opt out. The result is that, for the purposes of the operation of Regulation 859/2003, the provisions of

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81 Once again social security was a pioneer; this was the first regulation adopted under Title IV.

Regulation 1408/71 remain in force until such time as Regulation 859/2003 is repealed or modified. This is hardly either simplification or modernisation.

**FINAL REFLECTIONS**

Solidarity is a key aspect of national social security systems. It is often embodied in the principle that a nation will act in solidarity with individuals who need support. Pieters speaks of circles of solidarity. Traditionally the circle of solidarity has been drawn around the nationals of a State (and those assimilated with nationals). Citizenship of the Union challenges us to broaden the circle of solidarity, so that solidarity operates to protect not just the nationals of the Member State concerned, but also those with whom those nationals share a citizenship of the Union. There are signs of a widening of the circles of solidarity, but there are also signs of a tightening of conditions of entitlement in order to keep the circle of solidarity no wider than is a matter of formal legal obligation.

Regulation 883/2004 and its predecessors have played a part in drawing a circle of solidarity which requires the national social security systems to work together in order to avoid an obstacle to the free movement of persons which is now an inherent feature of citizenship of the Union. That circle of solidarity has had a flexible diameter, whose length varies according to the activities of the citizen and the nature of the benefit sought.

To the extent that the new social security regulations consolidate and, to a limited extent, enhance the position of the citizen of the Union, they are welcome developments. Where they disappoint is in highlighting the limits of social solidarity among the Member States towards less fortunate citizens of the Union who fall on hard times and need to rely on help from the host Member State.

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83 Article 90(1)(a) of the basic regulation.

84 D Pieters, *Social Security: An Introduction to the Basic Principles*, (Kluwer, 2008), esp. ch.1

85 Ibid., 21.