

CHAPTER 13

**COORDINATION OF NATIONAL SOCIAL SECURITY SYSTEMS
(REGULATIONS EC/883/2004 AND EC/987/2009)¹**

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I. INTRODUCTION

2025 marks the 67th anniversary of the Social Security coordination Regulations. As early as 1957, the Treaty of Rome foresaw the need for Community rules to ensure that the exercise of freedom of movement did not result in workers losing their social security rights³. The Regulation EEC/3/1958 (the basic one) and ECC/4/1958 (the implementing one), the first substantive regulations adopted by the EEC, were replaced by Regulations EEC/1408/71 and EEC/574/7⁴. This chapter deals with the current Regulations EC/883/2004 and EC/987/2009, applicable since 1 May 2010, which have simplified and replaced the previous regulations. After a series of amendments⁵, the Commission proposed the first major reform of these regulations on 13.12.2016⁶. In the end, this reform could not be adopted before the dissolution of the European Parliament in 2024, although there were approaches in 2019 and 2021.

The coordination Regulations are long, highly technical and complex. They have given rise to more than 500 judgments of the Court of Justice, most of them in response to preliminary interpretative rulings. The competent institutions of each Member State, through the Administrative Commission for the Coordination of Social Security Systems (AC)⁷, have reached a consensus on the interpretation of some of the more complex provisions. Indeed, the AC adopts Decisions and Recommendations, which are published in the Official Journal of the EU⁸, but which are soft law in the sense that they are not legally binding⁹. Similarly, following the COVID-19 pandemic, the AC has issued numerous Guidance notes in relation to international telework, which lacks an ad-hoc regulation in the framework of the Regulations. These Guidance notes

³ EEC Treaty Art.51, EC Treaty Art.42 and currently TFEU art. 48.

⁴ ROBERTS, Simon: «A short history of Social Security coordination» en *VVAA 50 years of Social Security Coordination. Past – Present – Future. Report of the conference celebrating the 50th Anniversary of the European Coordination of Social Security*. Prague 7 y 8 –2009. EU Commission. P. 8 DOI: 10.2767/94087.

⁵ Regulation EC/883/2004 has been amended by the following regulations: 988/2009; 1244/2010; 465/2012; 1224/2012; 1224/2012; 517/2013; 1372/2013; 1368/2014 and 2017/492. Regulation EC/987/2009 has been amended by the following Regulations 1244/2010; 465/2012; 1224/2012; 1372/2013; 1368/2014 and 2017/492

⁶ COM (2016) 815 final 2016/0397 (COD) <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM%3A2016%3A815%3AFIN>.

⁷ The AC is composed of one government representative from each government, assisted by a technical advisor when necessary. A representative of the European Commission itself attends the meetings (Regulation EC/883/2019 Art. 71 et seq.).

⁸ Find an updated list of Decisions and Recommendations <https://ec.europa.eu/social/BlobServlet?docId=4987&langId=en>

⁹ See, among others, judgments of 5 December 1967, *Van der Vecht*, C-19/67, EU:C:1967:49; 14 May 1981, *Romano*, C-98/80, EU:C:1981:104, paragraph 20; 8 July 1992, *Knoch* C-102/91, EU:C:1992:303, paragraph 52; 10 February 2000, *FTS*, C-202/97, EU:C:2000:75, paragraph 32.

have been compiled and finally published in a AC Decision¹⁰. There should be coordination between the activities of the AC and those of the European Labour Authority, as one of the main objectives of this “new” agency is to effectively implement and enforce the coordination Regulation, facilitating access to information and cooperation between the national institutions involved¹¹.

This chapter deals only with the scope of the Regulations and their guiding principles¹², always taking into account the relevant case law of the Court of Justice.

1. Coordination: basic premises

For a proper analysis of the Coordination Regulations, the following basic premises need to be taken into account:

1. Regulations are an instrument for achieving freedom of movement¹³ which is also its main hermeneutical canon¹⁴. The first recital of the preamble of Regulation EC/883/2004 states « *The rules for coordination of national social security systems fall within the framework of free movement of persons and should contribute towards improving their standard of living and conditions of employment.*». The coordination Regulations counteract the ‘territorialist tendency’ of national social security systems. These rules often wrongly assume that those to whom they are addressed necessarily work and reside with their families on their own territory, and forget those who move internationally¹⁵.

2. The main legal basis for the Regulations is the TFEU Art. 48, which, as in the previous treaties, calls for the adoption of secondary legislation to protect freedom of movement. In particular, it envisages for a system of coordination of national social security systems which, as a minimum content, should include the aggregation of periods and the export of benefits, which we will discuss later. This article, amended for the first time by the Treaty of Lisbon, contains the following new features compared to the Treaty of Rome:

¹⁰ Decision H14 of 21 June 2023 <http://data.europa.eu/eli/C/2024/594/oj>

¹¹ Regulation (EU)2019/1149 Art. 1(4).

¹² For a more detailed and recent analysis of the current coordination regime, see PENNING, F. ‘European Social Security Law’. Intersentia.7th edition 2022 p.484 or my contribution to the chapter “Trabajo en el extranjero” of the Memento Práctico Social 2024, Madrid, Lefebvre, 2024 marginal 9440-9529 p. 1961-2005.

¹³ See judgment of 13 October 1977, Manzioni, C-112/76, EU:C:1977:152, paragraph 10. In the same vein judgment of 12 June 1997, Merino García, C-266/95, EU:C:1997:292, paragraph 27.

¹⁴ See judgments of 9 June 1964, Nonnenmacher, C-92/63, EU:C:1964:40, and of 23 November 2000, Elsen, C-135/99, ECLI:EU:C:2000:647, paragraph 35.

¹⁵ CORNELISSEN, R.: «Les axes de réforme et les principes généraux du règlement n° 883/2004» Revue Droit Sanitaire Social Janvier-Fevrier, 2010.

- For the first time, coverage of the self-employed is explicitly mentioned. This group had already been covered since the 1980s under a different legal basis¹⁶.
- This article no longer requires unanimity for the adoption of the Regulations, but only a qualified majority under the ordinary legislative procedure of co-decision between the Parliament and the Council¹⁷.

3. The EU legislator did not opt for harmonization, which would have meant the creation of a common social security system for all Member States, a possibility that remains utopian¹⁸. On the contrary, it was chosen coordination, which can be described as a neutral technique¹⁹, in the sense that it does not replace or change national social security systems, which remain the responsibility, the competence, of Member States, albeit in accordance with EU law²⁰. At any rate, it should be emphasized that harmonization and coordina-

¹⁶ In fact, Regulation EC/883/2004 itself, which was adopted before the entry into force of TFEU Art. 48, continues to take as its legal basis for the inclusion of self-employed persons TFEU Art. 308 - former Art. 235 TEC - (recital 2 of the Regulation preamble). This Article 308 introduces a “flexibility clause” which allows the Council to adopt unanimously, despite a lack of clear competence, Commission proposals concerning the internal market, which is one of the main objectives of the EU.

¹⁷ However, as a counterbalance to the abolition of unanimity, certain measures to protect national interests (regarding social security systems, e.g. its scope, cost or financial structure, or affects the financial balance of that system), were introduced in the Treaty on European Union, Art. 48. These measures have not been implemented so far.

¹⁸ The TFEU Art. 153(1)c, maintains the EU’s harmonization competence in the field of social security, as established by the Treaty of Amsterdam. This competence is “merely theoretical, as it has never been used and is not foreseen to be used in the near future”. Apart from the fact that there is no real political interest - not even from the citizens themselves according to the Eurobarometers - in harmonizing these legislations, and the insurmountable unanimity requirement (now 27 Member states), there are other obstacles that could further hinder this hypothetical harmonizing intervention. On the one hand, the need for such an EU intervention to comply with the subsidiarity requirement, and on the other hand, the legal limitation that prevents this intervention from affecting the right of the Member States to define the fundamental principles of their social security systems, or from having a significant impact on the financial balance (TFEU Art. 153 (4)).

¹⁹ See Recital 4 of the Regulation EC/883/2004 Preamble: “It is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination”. Directive (EU)2011/24 in relation to health reimbursement overlaps with the chapter on sickness benefits in the Coordination Regulations, but also contains certain harmonization measures. See about the relationship between both instruments CARRASCOSA BERMEJO, D.: «Cross-border healthcare in the EU: Interaction between the Directive 2011/24/EU and the coordination Regulations on Social Security» Springer ERA Forum October 2014, Volume 15, Issue 3. <https://link-springer-com-443.webvpn.synu.edu.cn/article/10.1007/s12027-014-0358-8> and STRBAN G. (ED); BERKI, G.; CARRASCOSA BERMEJO, D.; VAN OVERMEIREN, f.: Access to healthcare in cross border situations. Analytical Report 2016. FreSsco European Commission DG Employment. January 2017.

²⁰ See Judgment 1-8-2022, S, C-411/20, EU:C:2022:602, paragraph 58. Furthermore, national legislators may not enact regulations that impede free movement (Judgment of 26 January 1999, Terhoeve, C-18/95, EU:C:1999:22, paragraphs 37 to 39) or discriminate on grounds of nationality (Judgments of 25 February 1986, Spruyt, C-284/84, EU:C:1986:79, and of 7 July 1988, Stanton, C-143/87, EU:C:1988:378). Of course, national social security legislation must not hinder the freedom to provide services (Judgment

tion should not be seen as antagonistic but complementary legal techniques, since coordination requires a minimum degree of similarity between systems in order to achieve its protective objectives in practice. Furthermore, the coordination Regulations should not widen or increase divergences between systems, nor impose unnecessary ad-hoc differential treatment between them which would add to the inherent differences in the social security systems of the Member States²¹.

4. In a nutshell, the coordinating regulations use a number of instruments to address the social security problems of those who make use of the free movement of persons:

- a) First, they identify the single national legislation applicable to their insurance and the payment of contributions (Title II of Regulation 883/2004). They also identify the legislation(s) under which they can claim one or more benefits in the event of a contingency (Title III of Regulation 883/2004).
- b) Secondly, the Regulations guarantee equal treatment under the applicable national social security legislation by prohibiting any direct or indirect discrimination on grounds of nationality. (Art. 4 Regulation 883/2004).
- c) Thirdly, in order to preserve rights in the course of acquisition and to facilitate the fulfilment of the conditions required for the recognition of benefits under these national legislations, provisions are made for
 - the assimilation of foreign benefits, income, facts or events occurring under other national legislation as if they had occurred in the territory of the legislation which is applied (Art. 5 Regulation EC/883/2004).
 - similarly, the aggregation technique allows specific account to be taken of periods of foreign insurance, employment, self-employment or residence. Aggregation specifically addresses the fragmented nature of migrants' careers, which may prevent them from meeting the qualifying conditions (contributions or residence pe-

of 28 April 1998, Kroll, C-158/96, EU:C:1998:171) or the free movement of goods (Judgment of 28 April 1998, Decker, C-120/95, EU:C:1998:167).

²¹ See, for instance, judgment of 31 May 2001, Leclere Diaconescu, C-43/99, EU:C:2001:303. See previously the paradigmatic judgment of 15 January 1986, Pinna I, C-41/84, EU:C:1986:1, which annulled Regulation EEC/1408/71, art. 73.2, which, with regard to family benefits, derogated from the general rule laid down in the first paragraph of the same provision exclusively in favor of France, and which was considered to contain indirect discrimination on grounds of nationality contrary to the free movement of workers.

riods) required by the applicable national legislation (Art. 6 Regulation EC/883/2004)

- d) Finally, in order to preserve acquired rights to social security benefits, the coordination regulations provide for the exportability of benefits. This prevents the payment of benefits from being made conditional on the maintenance of residence in the territory of the system that owes them. (Art. 7 Regulation EC/883/2004)

5. The coordinating regulations have a purely protective purpose, which is reflected in the so-called ‘Petroni principle’ or the intangibility of national rights²². Indeed, the application of regulations cannot lead to the loss of rights acquired exclusively under applicable national law. This hermeneutic principle, recognised by the ECJ in the case of various benefits²³ only allows Regulations to offer more protection than that resulting from the strict autonomous application of national legislation, preventing them from eliminating or reducing the protection obtained exclusively under the latter. In short, regulations must supplement, or at least not diminish, the protection afforded by the applicable national social security legislation.

6. Social security is Public Law, so once the nationality of the applicable legislation has been determined by the coordination Regulations²⁴, the nationality of both the social security institutions, that can apply that legislation, and the courts, that can resolve any disputes arising from its application, will be the same²⁵. In such cases, the law determines the forum, since the

²² See acknowledging this hermeneutic principle, PERL, G.: «L’interprétation des instruments de coordination de sécurité sociale». RBSS. Aout-Septembre, 1991, p. 468.

²³ This principle implies that the objective of the Treaty would not be achieved if migrant workers, by exercising their right to freedom of movement, were to lose the social security benefits guaranteed to them by the legislation of a Member State. This principle was already recognized in the context of Regulation EEC/3/1958 (judgment of 15 July 1964, Van der Veen, C-100/63, EU:C:1964:65) and then clearly confirmed in the Petroni case on the cumulation of pensions (judgment of 21 October 1975, Petroni, C-24/75, EU:C:1975:129). This principle is reiterated in judgments of 23 October 1986, De Jong, C-254/84, EU:C:1986:78, paragraph 15; 14 December 1989, Dammer, C-168/88, EU:C:1989:652, paragraph 21; 5 October 1994, Van Munster, C-165/91, EU:C:1994:359, paragraph 27; 26 September 2000, Engelbrecht, C-262/97, EU:C:2000:492, paragraph 37.

²⁴ The national law applicable to the social security legal relationship must not coincide with the law governing your employment contract (Private Law), which is determined by other conflict rules (according to Rome Convention of 19-6-1980 -OJEU C334, 30-12-05- or EU Regulation Rome I -Regulation CE/593/2008).

²⁵ See, *obiter dicta*, judgment of 14 November 2002, Baten, C-271/00, EU:C:2002:656, paragraph 44, where it is established that under coordination Regulations there is a “system under which as a matter of principle the exclusive legislative competence of a Member State is matched by the competence of the administrative and judicial authorities of the same State. It follows that legal situations are effectively protected by the designation of a national system competent in its entirety and do not require recognition of judgments relating to that area”.

“territorialist” nature of public social security law prevents social security foreign law from being applied by a national Court. Although the ECJ itself refers to the concept of ‘conflict of laws’²⁶, this cannot exist in the technical legal sense of Private International Law²⁷, since it is impossible for a national court, applying a foreign social security legislation, to impose insurance or benefit obligations on the social security institutions of another Member State. In short, it is not possible for a social security system to assume obligations based on a foreign legislation or by the imposition of a judgment handed down in another Member State²⁸. For instance, considering pensions, more than one legislation could be applicable, and the migrant could be entitled to more than one pension. In such cases “when migrant workers have problems with the calculation of their pro rata temporis pensions, they must take legal action in each of the payer/debtor Member State. This circumstance has never been challenged, because a Member State would not accept that a foreign national court could rule over a decision of its public administration.”²⁹ Indeed, social security is expressly excluded from the scope of the Brussels I bis Regulation, which aims to determine the competent national courts for civil, commercial and employment contracts³⁰.

7. Finally, it should also be remembered that, as common and uniform rules, the Regulations apply directly and take precedence over national legislation. Thus, a breach of the EU coordination rules attributable to any public administration - including the national courts themselves - which causes damage in the field of social security to persons protected by the Regulations would enable them to seek redress before the courts and even to claim compensation from the defaulting Member State³¹.

²⁶ Judgment of 24 March 1994, Van Poucke, C-71/93, EU:C:1994:120.

²⁷ See about the concept of conflict-law FREYRIA, Ch. «Sécurité sociale et Droit International privé» *Revue critique de Droit International privé*. 1956. p. 409.

²⁸ This does not preclude the possibility that, once the main national legislation applicable (to the insurance or protection of the person concerned) has been determined, the coordination Regulations may establish obligations of cooperation between social security institutions, or they may envisage assimilation of conditions or even aggregation of foreign contributions made under foreign legislation applied just in an ancillary way. A comparison of the application of the social security coordination Regulations by national courts in the different Member States in CARRASCOSA BERMEJO, D.; LHERNOULD, J.-P. “MoveS Legal report 2019. The application of free movement of workers and social security coordination rules by national courts”. MoveS. European Commission. 2019. P. 50. ISBN 978-92-76-16224-7 doi: 10.2767/564151 KE-01-20-104-EN-N. <https://ec.europa.eu/social/BlobServlet?docId=22857&langId=en>

²⁹ Carrascosa Bermejo, D., Molina Millán, J. The binding nature of posting PDA1 issued under EU social security Coordination Regulations and the possible role of national courts. ERA Forum 24, p. 79 (2023). <https://doi.org/10.1007/s12027-023-00749-6>

³⁰ Regulation (EU) 1215/2012 Art. 1 (2) c.

³¹ For instance, Judgment of 28 June 2001, Larsy, C-118/00, EU:C:2001:368, paragraphs 33 ff.

2. Coordination Regulations relationship with the bilateral social security conventions concluded between Member States

As a rule, the Regulations replace bilateral conventions concluded between Member States prior to their entry into force. By way of exception, the basic Regulation provides that a bilateral agreement may be preferentially applied if two conditions are met: on the one hand, that it is mentioned in Annex II of Regulation 883/2004 itself and, on the other hand, that this convention is more favorable or protective than the Regulations themselves³².

Moreover, the ECJ case-law also allows for the preferential application of these more favorable conventions over the Regulations, even if they were not mentioned in that Annex. The court considers that the conventions, once ratified, are part of the national law of the signatory states. Therefore, in accordance with the aforementioned principle of the intangibility of national rights (the so-called Petroni principle), they would take precedence over the coordinating regulations, which cannot eliminate national rights and can only be of a purely protective nature³³. This preferential application is subject to the additional condition that the rights in the process of being acquired under such conventions must have been created before the entry into force of the Regulations themselves in the two signatory Member States³⁴. This may, of course, have occurred on different dates, depending on their accession to the EU.

II. SCOPE OF APPLICATION OF THE COORDINATION REGULATIONS

1. Territorial scope of application

The current territorial scope of the Regulations covers the 27 EU Member States and their outermost regions³⁵. The Regulations also apply, by agreement, in the three countries with which the EU forms the European Economic Area (EEA) (Norway, Iceland and Liechtenstein) and in Switzerland, 31 Mem-

³² Regulation EC/883/2004 Art.8.

³³ Judgment of 7 February 1991, *Rönfeldt*, C-227/89, EU:C:1991:52, rectifying the previous doctrine set out in the judgment of 7 June 1973, *Walder*, C-82/72, EU:C:1973:62.

³⁴ Judgments of 9 November 1995, *Thévenon*, C-475/93, EU:C:1995:371; 5 July 98, *Gómez Rodríguez*, C-113/96, EU:C:1998:203; 9 November 2000, *Thelen*, C-75/99, EU:C:2000:608; 5 February 2002, *Kaske*, C-277/99, EU:C:2002:74.

³⁵ On the Spanish side, the Regulations apply to Ceuta, Melilla and the Autonomous Community of the Canary Islands. For France they apply in Mayotte, Guyana, Guadeloupe, Martinique, Réunion and Saint Martin. For Finland in the Åland Islands and for Portugal in the Azores and Madeira.

ber States in total. Exceptionally, the application of the coordination Regulations to mobility with a final destination in a third country has been allowed if there has been a previous exercise of free movement and there is a sufficient legal link with the social security system of one of these 31 Member States³⁶.

The UK left the EU on 1 February 2020, after long negotiations and much uncertainty³⁷. Brexit was the result of a non-binding referendum in June 2016, preceded by a heated debate on immigration. Earlier there were also shameful concessions made by the European Council itself in an attempt to retain the UK, which distorted the right to free movement of workers³⁸. There are currently two international treaties between the EU and the UK in force which are ‘simultaneously applicable, although not to the same persons at the same time’³⁹. Regarding social security coordination, the Withdrawal Agreement endorses the application of the EU coordination Regulations, in whole or in part, to EU or British citizens who exercised their right to free movement before the end of 2020, as well as to their family members and survivors. For those not covered by the Withdrawal Agreement, essentially for cross-border situations between the EU and the UK arising after 2021, the Trade and Cooperation Agreement applies, in particular a 131-page Protocol on the Coordination of Social Security, which is very similar to the Coordination Regulation, but with certain limitations. For example, important benefits such as family, dependent or special non-contributory benefits are excluded from its scope of application. In addition, neither unemployment benefits nor permanent disability benefits, whether contributory or non-contributory, are exported⁴⁰. The Withdrawal Agreement applies to Gibraltar, which is excluded from the Trade

³⁶ See, for example, the judgment of 29 June 1994, *Aldewereld*, C-60/93, EU:C:1994:271, which upheld the application of the Regulations to a Dutch worker employed by a German temporary employment agency - and insured under the German social security system - for the purpose of being posted to work in Thailand. See also on the application of the Regulations to mobility beyond the 31 Member States: judgments of 19 March 2015, *Kik*, C-266/13, EU:C:2015:188, and of 7 June 2012, *Bakker*, C-106/11, EU:C:2012:328, or, more recently, judgment of 25 November 2021, *QY*, C-372/20, EU:C:2021:962.

³⁷ Thanks to a transitional period set out in the Withdrawal Agreement, the application of EU law was maintained until the end of 2020 even though the UK no longer participated in the EU institutions.

³⁸ Reference can be made, for example, to the indexation of family benefits granted to migrant workers in the UK, who adjust their amount to the standard of living in the country of residence of the children and who receive, in most cases, lower family benefits than their non-migrant co-workers, thus allowing for an inequality of treatment prohibited by the current coordination rule (Regulation EC/883/2004 Art.67), as confirmed years later by the ECJ in the judgment of 16 June 2022, *Commission vs Austria*, C-328/20, EU:C:2022:468. On concessions to the UK, see the document “A new regime for the UK in the EU”, extract from the conclusions of the European Council of 18-19 February 2016, OJEU 23-2-16, C-691 (2016/C 69 I/01). Point 2(e) and Annex 5.

³⁹ See an analysis of both Treaties regarding mobility and social security coordination in CARRAS-COSA BERMEJO, D. “Key Ideas on Mobility and Social Security after Brexit” ERA Forum (2021) Vol 22. P. 387_406. <https://doi.org/10.1007/s12027-021-00685-3>

⁴⁰ *Ibidem*.

and Cooperation Agreement. Therefore, a complicated agreement between the EU and the UK is being negotiated to cover mobility to Gibraltar that has not been signed at the time of writing this chapter.

2. Temporal scope of application

The application of EC Regulation 883/2004 (the basic Regulation), although in force since April 2004, was delayed until 1-5-2010, i.e. until the entry into force of EC Regulation 987/2009 (the implementing Regulation). In principle, they only give rise to rights from this date (1.5.2010); however, their protective purpose and the progressive formation of social security rights require that situations prior to the entry into force of the regulations be taken into account⁴¹. In this sense, the aggregation of periods of insurance, employment and residence completed before 1.5.2010 in other Member States is provided for, including those completed in a State prior to its accession to the EU⁴². Of course, in the case of aggregation of insurance periods, the prior obligation of insurance and payment of contributions in that State is a prerequisite⁴³. The current basic Regulation also offered generous transition periods that allowed the change of applicable legislation to be postponed until 2020⁴⁴.

3. Material scope of application

3.1 COORDINATED NATIONAL LEGISLATIONS

The Regulations coordinate the national social security legislation of the 31 States mentioned. The term legislation has been defined very broadly covering “laws, regulations and other statutory provisions and all other implementing measures”⁴⁵, in force or future, that must be related to certain social security

⁴¹ Among these, it is worth mentioning the possible revision of the benefits amount previously recognized (Regulation EC/883/2004 Art.87.4) or the previous refusal of benefits (Regulation EC/883/2004 Art.91).

⁴² Regulation CE/883/2004 Art.87(2).

⁴³ For example, an Austrian seafarer who worked in the Netherlands (prior to Austria’s accession to the EU in 1995) was not entitled to the required aggregation because he had not paid any contributions in the Netherlands, due to the prohibition of insurance for non-EU nationals under Dutch legislation, which at the time could not be considered against the equal treatment principle (Judgment of 27 October 2016, Wieland, C-465/14, EU:C:2016:820).

⁴⁴ See Regulation EC/883/2004 Art.87(8) or 87a.

⁴⁵ Regulation Art.1(l).

branches. This concept of legislation generally excludes agreements concluded by collective bargaining between employers and employees or by their representatives⁴⁶. So, it is also excluded from coordination Regulations the so called “second pillar of social protection”, regarding, e.g. companies’ pensions established in collective agreements whose protection in cases of employees concerned free movement, is articulated through another EU legislation ad hoc⁴⁷.

Coordinated national social security legislation is that which necessarily connects with any of the following contingencies/risks listed in Regulation EC/883/2004 Art.3: sickness benefits (including healthcare); maternity and equivalent paternity benefits; invalidity benefits; old-age benefits; survivors’ benefits; benefits in respect of accidents at work and occupational diseases; death grants; unemployment benefits; pre-retirement benefits and family benefits. The connection does not have to be very close, allowing coordination of national social security rules on registration, affiliation, registration of companies and contributions⁴⁸. Inclusion concerns general or special schemes (including those for civil servants), it is irrelevant whether they refer to contributory or non-contributory schemes.

This list of contingencies/risks is exhaustive, with each of them covered by a specific chapter of Title III of Regulation EC/883/2004, with provisions not applicable, unless expressly referred to, to a contingency other than the one for which they are intended⁴⁹. This referral occurs, for example, from the chapter on invalidity to the regulation contained in the chapter on old age. When identifying the contingency concerned, in order to determine whether the Regulations apply, it is not the national designation of the benefit (the *nomen iuris*) that must be taken into account but its constituent elements, purpose, conditions for granting it, etc⁵⁰. E.g. the ECJ has defended the coordination of a German legislation associated with the risk of long term care, a

⁴⁶ However, such agreements could be considered if they have been the subject of a decision by the public authorities which makes them obligatory or extends their scope and the Member State concerned makes a declaration to that effect, notified to the President of the European Parliament and the President of the Council of the EU and published in the OJEU. This was the case in France in relation to certain collective agreements regulating supplementary but compulsory old-age benefits (AGIRC and ARRCO), see Regulation EC/1386/2001.

⁴⁷ See Directive EC/98/49/EC and Directive (EU) 2014/50/EU or judgment of 10 March 2011, Casteels, C 379/09, EU:C:2011:131.

⁴⁸ See judgments of 29 June 1994, Aldewereld, C-60/93, EU:C:1994:271; 10 February 2000, FTS, C-202/97, EU:C:2000:75; 19 March 2002, Hervein and others, C-393/99 and C394/99, EU:C:2002:182.

⁴⁹ See judgment of 20 February 1997, Martínez Losada, C-88/95, EU:C:1997:69, where it is confirmed that national rules on unemployment benefits cannot be the subject of coordination rules under the old age chapter of Title III of the basic Regulation.

⁵⁰ See for example judgment of 11 June 1998, Kuusijärvi, C-275/96, EU:C:1998:279, in which a Swedish “maternity” benefit was qualified as a family benefit. The national *nomen iuris* is not relevant for being considered a social security legislation or a tax legislation, see judgments of 15 February 2000, Commission v France, C-169/98, EU:C:2000:85, and of 26 February 2015, de Ruyter, C-623/13, EU:C:2015:123.

contingency not included in the list, considering it to be assimilated to a sickness benefit with which it understood there was a close relationship⁵¹.

In order to facilitate the identification of coordinated national social security legislation, Member States are required to notify the Commission annually of a statement of the national legislation which they consider falling within the objective scope of the coordinating legislation⁵². It should be borne in mind that a Member State may presume the coordination of any national legislation included in the declaration of another Member State. However, the absence of certain national legislation from the declaration does not, by itself, make it possible to state for sure that it does not fall within the substantive scope of the Regulations if the conditions for being included are met. However, other Member States could infer from such an exclusion of the declaration that a specific legislation does not fall within that scope⁵³.

3.2 SPECIAL NON-CONTRIBUTORY BENEFITS (SNCB)

The difficulty of distinguishing between social assistance, which is excluded from the scope of application of the Regulations, and social security led to the express inclusion in the objective scope of the SNCB Regulation with characteristics of both⁵⁴.

The introduction of this category in 1992 responded to the following compromise⁵⁵: on the one hand, its non-exportability was expressly recognized⁵⁶ and, on the other hand, the application of the principle of equal treatment - the prohibition of discrimination on grounds of nationality - was imposed within the framework of the national legislation of the State of residence, which alone was competent for its recognition and payment. In addition, it was possible to aggregate the periods of foreign residence necessary for recogni-

⁵¹ Judgment of 5 June 1998, *Molenaar*, C-160/96, EU:C:1998:84. The failed 2016 EC Proposal to amend the Regulations provided for long-term care benefits to be the subject of a new chapter ad hoc. Furthermore, long term care benefits are defined for the first time, to be the subject of a new chapter ad hoc.

⁵² Regulation EC/987/2009 Art. 9 .

⁵³ Judgment of 3 March 2016, *Commission v Malta*, C-12/14, EU:C:2016:135.

⁵⁴ The origin of this regulation is to be found in Regulation EC/1247/1992 which amended the previous basic coordination regulation (Regulation EEC/1408/71).

⁵⁵ Judgment of 11 November 2014, *Dano*, C-333/13, EU:C:2014:2358, paragraph 54. See, in this sense, LHERNOULD, J. P. (ed.), EICHENHOFER, E., RENNUIY, N., VAN OVERMEIREN, F. and WOLLENSCHLÄGER, F., *Assessment of the impact of amendments to the EU social security coordination rules to clarify its relationship with Directive 2004/38/EC as regards economically inactive persons*, Analytical Report 2015, FreSsco, European Commission, June 2015, p. 25.

⁵⁶ Express exclusion from the objective scope of Art. 7 of the basic Regulation.

tion⁵⁷. The aim was thus to put an end to the controversial reluctance of some Member States to export certain benefits which were considered internally as social assistance and which, nevertheless, were repeatedly qualified by the Court of Justice as non-contributory social security benefits and, therefore, fully exportable⁵⁸.

The identification of SNCBs is not simple, as they are non-contributory benefits that can affect different contingencies and have been described as hybrids (between social security and social assistance): considering their personal scope of application, their objectives and their implementing rules. To classify a benefit as an SNCB, the following three cumulative requirements must be met⁵⁹. Firstly, the SNCBs must be mentioned in Annex X of Regulation EC/883/2004. Secondly, SNCBs must be a non-contributory benefit⁶⁰. Finally, the purpose of the SNCB must be either replacement or auxiliary coverage of contingencies covered by the Regulations with the aim of guaranteeing beneficiaries a minimum subsistence income or specific protection for people with disabilities⁶¹.

It is also not straightforward to identify the Member State of residence where the Regulations determine that the SNCBs could be recognized. The basic Regulation defines residence very vaguely as “*the place where a person habitually resides*”, as opposed to the term “stay” which is defined as tempo-

⁵⁷ Moreover, in accordance with judgment of 4 November 1997, Snares, C-20/96, EU:C:1997:518, paragraphs 47 and 48, the State of residence must treat benefits due under the legislation of other Member States as if they had been granted under the applicable legislation, as regards entitlement to supplementary benefits; and to take into account a first declaration of invalidity or disability in the territory of another Member State as a first declaration in the State of residence. finally, under these new rules, entitlement to a benefit is not subject to the condition that the claimant has previously been subject to the social security legislation of the State in which he intends to receive the allowance, whereas this was the case prior to the entry into force of Regulation EC/1247/92 (see judgment of 20 June 1991, Newton, C-356/89, EU:C:1991:265).

⁵⁸ See judgments of 9 October 1974, BIASON, C-24/74, EU:C:1974:99, and of 22 June 1972, FRILLI, C-1/72, EU:C:1972:56, which gave rise to the proposal for Regulation COM (85) 396 final (OJEC 1 985 C 240, p.6), which, after a complex procedure, and various judgments in favour of exportability (such as the judgment of 20 June 1991, Newton, C-356/89, EU:C:1991:265), was adopted by Regulation EC/1247/92. On this process see VERSCHUEREN, H. “Les prestations spéciales à caractère non contributif et les règlements communautaires 140817”, *Droit social*, n° 11/1995, pp. 921 930, Nov1995; and SÁNCHEZ RODAS, C.: *La aplicación del derecho comunitario a las prestaciones especiales no contributivas*. Comares, 1997, p.30.

⁵⁹ The identification of this type of services is controversial, the Administrative Commission has tried to clarify the issue in the judgments of 29 April 2004, Skalka, C160/02, EU:C:2004:269; 8 March 2001, Jauch, C-215/99, EU:C:2001:139; 31 May 2001, Leclere, C-43/99, EU:C:2001:303; 18 October 2007, *Commission v European Parliament and Council of the EU supported by Finland, Sweden and United Kingdom*, C-299/05, EU:C:2007:608.

⁶⁰ In the sense that its financing must come exclusively from compulsory taxation to cover general public expenditure, and that its recognition and calculation must be independent of the contributions made by the applicant. See, for instance, judgment of 19 September 2013, Brey, C-140/12, EU:C:2013:565, paragraph 35.

⁶¹ See Regulation EC/883/2004 Art.70 (2)(a).ii.

rary residence⁶². The Implementing Regulation provides indicative, non-hierarchical criteria for identifying the residence or “center of interest” of the person in question⁶³. In any case, this is a concept of residence specific to the Regulations and, therefore, does not necessarily coincide with the concept of legal residence used in Directive 2004/38/EC, for the purposes of free movement, or with the concept of tax residence in national rules.

It should be noted that the case law of the Court of Justice seems to have broken the compromise reached in the regulation of SNCBs (non-exportability in exchange for equal treatment in the State of residence), endorsing in several judgments⁶⁴ that some Member States refused to recognize inactive citizens, nationals of other Member States, the recognition of benefits aimed at guaranteeing subsistence (minimum income). The Court argued that these inactive citizens did not meet the legal residence requirement (under Dir 2004/38/EC, the free movement directive, and its transposition), itself required by the national social security legislation of the competent State (the State of residence, this time identified under the Coordinating Regulations). In this context, some SNCBs have been considered as social assistance⁶⁵, so that their application itself prevented them from proving temporary legal residence, as it showed that they did not have sufficient resources and that they intended to become a burden on the social assistance of the host Member State⁶⁶. Surprisingly, the Court found no infringement of the right to equal treatment on grounds of nationality in the refusal of these SNCB subsistence benefits to inactive EU citizens whom it considered to lack legal residence, even though the Member State of residence guaranteed the same benefits to its nationals in the same situation of need.

⁶² Regulation EC/883/2004 Art.1(j) and (k).

⁶³ Regulation EC/987/2009 Art.11 which offers different criteria in case of controversy, such as the duration and continuity of the subject’s presence in the territory of a State or his personal situation etc. In any case, if the application of the criteria does not make it possible to determine the actual place of residence, it is necessary to consider the will of the person, as is apparent from the facts and circumstances, and in particular the reasons that led him/her to move.

⁶⁴ See judgments of 19 September 2013, Brey, C-140/12, EU:C:2013:565; 11 November 2014, Dano, C333/13, EU:C:2014:2358; 15 September 2015, Alimanovic, C-67/14, EU:C:2015:597; 25 February 2016, García Nieto, C-299/14, EU:C:2016:114.

⁶⁵ Judgment of 19 September 2013, Brey, C 140/12, EU:C:2013:565.

⁶⁶ Temporary legal residence starts after 3 months of temporary stay and ends after 5 years of legal residence when permanent residence starts and equal treatment is granted, as far as this is relevant here, for access to social assistance. During temporary residence, apart from sufficient resources, it is required to have health insurance covering all risks covered in the host Member State (Directive 2004/38/EC art.7). See on both requirements the Commission Guidelines (Brussels, 2.7.2009 COM (2009) 313 final Communication from the Commission to the European Parliament and the Council, pp. 8 and 10). <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0313:FIN:EN:PDF>.

This was the case, firstly, for inactive persons who did not appear to be seeking employment⁶⁷. Secondly, for EU nationals who had worked in Germany for less than one year (11 months) and who lost their status as workers 6 months after the end of their employment according to the free movement directive. These job seekers, in a state of need, were kept in a kind of limbo as they remained. In that Member State from which they could not be expelled, while they accredited that they were actively seeking employment and had real possibilities of being hired⁶⁸. Thirdly, the refusal to recognize this type of assistance benefits during the initial three-month stay in another Member State was also endorsed⁶⁹.

The ECJ went even further, and upheld, in the context of an infringement procedure, just before Brexit, the refusal of common - not special - non-contributory family benefits to inactive persons who did not meet the legal residence requirement⁷⁰. Fortunately, this doctrine can be considered overcome, as it has been clarified that a family benefit cannot be considered social assistance and therefore the equal treatment laid down in the coordination Regulation should prevail⁷¹.

3.3 EXPLICIT EXCLUSIONS

The Regulations exclude from their objective scope of application the so-called social assistance and medical assistance both for persons in a need situation⁷².

⁶⁷ Judgment of 11 November 2014, *Dano*, C333/13, EU:C:2014:2358.

⁶⁸ Judgment of 15 September 2015, *Alimanovic*, C67/14, EU:C:2015:597. However, as it was clarified later on by the ECJ case-law, if these jobseekers were the primary carers of their own children attending school in the host Member State, they would have a derived right of residence based on Article 10 of Regulation EC/492/2011 on free movement of workers. This derived right of residence is independent of the free movement Directive, so it is not necessary to fulfil the requirement of sufficient resources established under it in the case of inactive EU citizens temporary residing in another Member State. Judgment of 6 October 2020, *Jobcenter Krefeld*, C-181/19, EU:C:2020:794, paragraph 34. See CAR-RASCOSA BERMEJO, D. "Chapter 19. The Legal Status of EU National Jobseekers: Their Right to Free Movement and Social Protection"/en/ JORENS, Y. *The Lighthouse Function of Social Law*. Proceedings of the ISLSSL XIV European Regional Congress Ghent 2023. Springer, 2023.P. 377

⁶⁹ Judgment of 25 February 2016, *Garcia Nieto*, C299/14, EU:C:2016:114.

⁷⁰ Judgment of 14 June 2016, *Commission v United Kingdom*, C308/14, EU:C:2016:436. On this judgment, see O'BRIEN Charlotte.: «Don't think of the children! ECJ approves automatic exclusion from family benefits in case C-308/14 *Commission v. UK*» EU Law Analysis <http://eulawanalysis.blogspot.pt/2016/06/dont-think-of-children-ECJ-approves.html>

⁷¹ Judgment of 1 August 2022, case S, C-411/20, EU:C:2022:602. The ECJ recognized the right of inactive nationals of another Member State to family allowances during the first three months of residence. The Court emphasizes that EU citizens enjoy equal treatment and that exceptions must be applied restrictively and must always be limited to social assistance during the first three months of residence (*Dir 2004/38/EC Art. 24.2*)

⁷² Regulation EC/883/2004 Art.3(5)(a).

As noted above, it is very difficult to distinguish social assistance from non-contributory social security benefits, whether they are special or not, as it shares constituent elements with them⁷³. The exclusion of social assistance from the scope of application of the Regulations does not prevent it from obtaining protection under other EU legislation, such as the principle of non-discrimination on grounds of nationality, which protects EU citizens themselves⁷⁴, or the right to free movement of workers, which prevents such discrimination in access to social benefits⁷⁵.

Also excluded are the obligations of a shipowner which are not covered by the specific coordination rules on benefits (Regulation EC/883/2004 Title III)⁷⁶. However, those coordination rules relating to the affiliation relationship, or the payment of social security contributions (Regulation EC/883/2004 Title II) are applicable to shipowners⁷⁷.

Finally, the following benefits are out of the scope of coordination Regulations: those compensating for damage suffered by individuals, or envisaged in favor of victims of war and military action, victims of crime, murder or terrorist acts, or even damage caused by State agents in the performance of their duties, etc.

4. Personal scope of application

For a long time, the coordination of systems was limited to EU national migrant workers who are or have been covered by the social security legislation of one or more Member States within the material scope of coordination Regulations. Initially, only employees were covered, including frontier workers⁷⁸ and posted workers⁷⁹. Later, self-employed workers were also covered⁸⁰, as well as the civil servants insured under a special social security scheme⁸¹.

⁷³ Regulation EC/883/2004 Art.3(2). On the difficult delimitation of social assistance and the *vis atractiva* that social security enjoys when the benefits' nature is controversial, see. SÁNCHEZ RODAS NAVARRO, C: «Las prestaciones no contributivas y el Reglamento 883/2004» in *Revista del Ministerio de Trabajo e Inmigración*, nº 64 (2006), pp. 130 et seq.

⁷⁴ TFEU Art.18

⁷⁵ TFEU Art.45 and Regulation UE/492/2011 Art.7. See also, for example, judgments of 27 May 1993, Schmid, C310/91, EU:C:1993:221, and of 12 May 1998, Martínez Sala, C85/96, EU:C:1998:217.

⁷⁶ Regulation EC/883/2004 Art. 3(4)

⁷⁷ Regulation EC/883/2004 Art. 3(2)

⁷⁸ Defined as any person who is employed or self-employed in one Member State and resides in another Member State to which he/she normally returns daily or at least once a week (Regulation EC/883/2004 Art.1(f).

⁷⁹ They are not, as usual, migrants in search of work, but employees sent abroad temporarily by their employers, with whom they already have an employment relationship that is maintained during this posting.

⁸⁰ Regulation EC/1390/1981.

⁸¹ Regulation EC/1606/1998.

Currently, the coordination Regulations cover EU citizens regardless of their professional situation. The requirement is that they have to be subject to the national social security legislation (i.e. by means of insurance or residence), even if it is not occupational, whether general or special, contributory or non-contributory, full or partial, voluntary or involuntary, current or former.

The EU nationality requirement was also nuanced, as stateless persons and refugees who are legally resident in a Member State, insured under a national social security system, and in a situation of transnationality were admitted for coverage. In addition, they may also be nationals of Norway, Iceland and Liechtenstein (EFTA countries that formed the European Economic Area with the EU) or Switzerland, as ad-hoc agreements were signed with these countries⁸².

Irrespective of their nationality, the coordination rule also protects derived social security rights⁸³ of the family members and survivors of the insured persons mentioned in the previous paragraph, which are always defined by the legislation providing the benefits in some cases with the help of the coordination Regulations⁸⁴. The Regulations also specifically protect the rights derived by survivors, in this case necessarily EU, EEA and Swiss nationals, stateless persons or refugees residing in a Member State, who have survived non-EU nationals who, in turn, have been subject to more than one national social security system⁸⁵.

It should be stressed that a reading of the coordination Regulations in isolation could lead to the erroneous conclusion that non-EU nationals are not protected with regard to their original social security rights⁸⁶. However, since June 2003, the coordination Regulations can be applied to non-EU nationals who are legally resident in a Member State and who are linked or insured to a social security system of a Member State when they are in a transnational situation⁸⁷. So the protection is not restricted to family members or survivors

⁸² On the application of both agreements separately to an Austrian citizen who also worked in Liechtenstein and Switzerland, see judgment of 26 September 2024, C-329/23, ECLI:EU:C:2024:802.

⁸³ E.g. widow's, widower's or orphan's pensions

⁸⁴ For instance, if this legislation does not distinguish family members from other beneficiaries, according to the Regulations these are at least: the spouse, minor children and dependent children of full age (Regulation EC/883/2004 Art.1(i) (2)). In addition, if such national legislation requires a cohabitation condition, this condition is deemed to be fulfilled when it is proved that the family member is dependent on the insured person (Regulation EC/883/2004 Art.1(i)).

⁸⁵ The Regulation aims to defend the rights derived from EU national survivors regardless of the nationality of the migrant who caused them (Regulation EC/883/2004 Art.2.2).

⁸⁶ For instance unemployment, old-age pensions...

⁸⁷ Regulation EC/859/2003 and currently Regulation EU/1231/2010 in the framework in force since 1 1 2011. This regulation, like its predecessor, is not applicable in Denmark, where it is directly inapplicable due to its legal basis (Treaty on European Union, Art. 79).

derived rights anymore. Thus, for example, a Moroccan national working and insured in Belgium would have access to the European health insurance card and if he were to suffer a road accident in Spain on his way to his home town, he would be treated by the Spanish health services as if he were Spanish and these institutions would bill Belgium for the cost of the Spanish healthcare treatment provided⁸⁸.

The application of the coordination Regulations to non-EU nationals raises questions such as how are these regulations, which are based on freedom of movement, to be interpreted when they apply to persons who do not have such freedom? In the latter respect, it is worth noting the impossibility of exporting their unemployment benefits if they are not authorized to reside and work in the Member State of destination.

III. COORDINATION REGULATIONS BASIC PRINCIPLES

This section begins by looking at the determination of the applicable national social security legislation, the backbone of any coordination system. In applying the designated national legislation, other principles must be considered: the right to equal treatment, the application of assimilations of facts or conditions and the aggregation/‘aggregation’ technique. The latter technique could be accompanied by the so-called *pro rata temporis* associated with the calculation of pensions. Another important element is the non-accumulation of benefits, in order to avoid over-protection of the migrant, and the coordination of national mechanisms set up for this purpose. The basic principle of the preservation of acquired rights, i.e. the export of benefits, is also discussed. Finally, the essential collaboration between administrations that is essential for the coordination mechanism to work is also addressed.

1. Determination of applicable national legislation

The determination of the applicable national legislation is crucial, as the substantive content of the different coordinated national legislations differs considerably: the level of contributions to be paid, the conditions for recogni-

⁸⁸ On the coverage of foreigners, see judgment of 7 February 2019, *Bogatu*, C-322/17, EU:C:2019:102.

tion of the benefit claimed and even the amount of the benefit may vary significantly. Indeed, “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”⁸⁹.

The EU coordination regulations establish in the Title II of the Regulation EC/883/2004 a complete system of binding and protective conflict rules⁹⁰. It is based on the unicity principle as “it is necessary to subject persons moving within the Community to the social security scheme of only one single Member State in order to avoid overlapping of the applicable provisions of national legislation and the complications which could result therefrom”⁹¹. Furthermore, according to the exclusivity principle, the unicity principle is mandatory, there is only one applicable social security law and only the law designated by the EU conflict rules can be applied⁹², which provides legal certainty.

This system is intended “not only to prevent the simultaneous application of a number of national legislative systems and the complications which might ensue, but also to ensure that the persons covered by Regulation are not left without social security cover because there is no legislation which is applicable to them”⁹³. The binding nature of the EU conflict rules prevents the requirements laid down in the national rules to define their scope of application from detracting from the mandatory application of the national rule selected by the coordination regulations on the basis of uniform and objective criteria. In other words, the provisions of Title II have the effect “to divest the legislature of each Member State of the power to determine the ambit and the conditions for the application of its na-

⁸⁹ Judgment of 19 March 2002, *Hervein*, C-393/99 and C-394/99, EU:C:2002:182, paragraph 51.

⁹⁰ See judgment of 10 July 1986, *Luijten v Raad van Arbeid*, C-60/85, EU:C:1986:307.

⁹¹ That principle is expressed, *inter alia*, in Article 11(1) Regulation EC/883/2004. See also Recital 15 of the Preamble to Regulation EC 883/2004. Reiterated in judgment of 11 July 2018, *Commission v Belgium*, C-356/15, ECLI:EU:C:2018:555, paragraph 70, and, by analogy, judgments of 12 June 2012, *Hudzinski and Wawrzyniak*, C-611/10 and C-612/10, EU:C:2012:339, paragraph 41, and of 12 February 2015, *Bouman*, C-114/13, EU:C:2015:81, paragraph 33.

⁹² Judgments of 13 October 1976, *Perenboom*, C-102/76, EU:C:1977:71, paragraph 13; 24 March 1994, *Van Poucke*, C-71/93, EU:C:1994:120; 29 June 1994, *Aldewereld*, C-60/93, EU:C:1994:271, paragraph 26.

⁹³ See judgment of 3 May 1990, *Kits van Heijningen*, C-2/89, EU:C:1990:183, paragraph 12, referring to positive conflict rule which may generate the payment of double contributions or overprotection and the so-called negative conflicts which could lead to a coverage gap or lack of insurance.

tional legislation so far as the persons who are subject thereto and the territory within which the provisions of national law take effect are concerned.”⁹⁴ In short, the mandatory nature implies that the national legislation designated by the coordination conflict-rules is invested with an EU competence⁹⁵, and must be directly applicable, replacing the national conflict rules adopted unilaterally under this national legislation. Indeed, their effectiveness cannot be restricted at the national level; the conflict rules are intended to ensure that the persons included in the scope of application of the coordination rules are protected⁹⁶.

As a general rule, Title II identifies the law of the place of work or *lex loci laboris* as the only law applicable to the migrant worker, where he/she must be affiliated and pay contributions. However, as will be seen in the following section, there are important exceptions, which are listed in a table (see section a). In nearly, all of this cases a portable document A1 (a PD A1) is issued by the competent social security institution (see section b). Among these exceptions, only the one relating to the conflict-of-posting rule will be briefly developed (see section c).

The soft law solutions agreed by the Administrative Commission for the case of intra-EU interactive teleworking of employees are also concisely analyzed (see section d).

In addition to the system of conflict rules in Title II, there are some special conflict rules in Title III concerning the claim and calculation of certain benefits. Rules which are of preferential application, which follow a different logic, other principles, also according to the interpretation of ECJ case-law. For instance, the principle of uniqueness or unicity of the applicable legislation is not respected in these two following cases: on the one hand, regarding pensions⁹⁷, for the recognition of which, as a general rule, all the national legislations to which the worker has been subject are

⁹⁴ Judgment of 12 June 1986, Ten Holder, C-302/84, EU:C:1986:242, paragraph 21, where the ECJ underlines that “As the Court pointed out in its judgments of 23 September 1982 in Case 276/81 (Kuijpers [1982] ECR 3027) and in Case 275/81 (Koks [1982] ECR 3013), ‘the Member States are [not] entitled to determine the extent to which their own legislation or that of another Member State is applicable’ since they are ‘under an obligation to comply with the provisions of Community law in force’”.

⁹⁵ LYON-CAEN, Gerard. «La jurisprudence sociale de la Cour de Justice des Communautés en 1964». *Revue Trimestrelle de Droit Européen*, 1965, pág. 84.

⁹⁶ On the residency requirement see judgments of 4 April 1980, Una Coonan, C-110/79, EU:C:1980:112; 4 October 1991, De Paep, C-196/90, EU:C:1991:381; 3 May 1990, Kits Van Heijningen, C-2/89, EU:C:1990:183; 7 July 2005, Van Pommeren, C-227/03, EU:C:2005:431.

⁹⁷ Not only for old age or widow/er benefits, but also for invalidity, if they are type B benefits (i.e. those which take into account the period of contribution to determine their amount)

applied. Thus, in each of these legislations, if the conditions are met, a pension is recognized, the amount of which is adjusted to the period of insurance contribution in each of these legislations by means of the *pro rata temporis* method (see section III.D). On the other hand, regarding family benefits as two national legislations may be applicable simultaneously⁹⁸, the second with a supplementary role⁹⁹.

Nor is the principle of exclusivity respected in the coordination of family benefits. The application of the *lex loci laboris* under the coordination rules does not prevent the State of residence from maintaining the payment of family benefits which it grants for this very reason (residence in its territory) to a person who is not covered for this contingency by the law of the place of employment¹⁰⁰. The ECJ in Bosmann judgment prioritizes the principle of the intangibility of national rights obtained autonomously under the national legislation of residence (Petroni principle), which cannot be lost through the application of the coordination Regulations whose objective must be purely protective¹⁰¹.

Finally, the *lex loci laboris* application is also not respected in a few cases. On the one hand, as already mentioned, in the case of special non-contributory benefits which are recognized only by the legislation of the State of residence¹⁰². On the other hand, in the case of the total unemployment benefits of frontier

⁹⁸ See Regulation EC/883/2004 art. 68(2). Indeed, the priority is given to the family benefit entitlement under the legislation of the Member State where a parent works and live with his/her children, the concurrent family benefit of the other parent working abroad is suspended. However, if the suspended benefit is higher than the prioritized benefit, there is still an obligation to pay a differential supplement to ensure that the beneficiary receives the higher benefit to which their children would have been entitled

⁹⁹ The priority legislation would be the main legislation granting full entitlement and the supplementary legislation would only be responsible for paying a differential supplement, where appropriate, to ensure that children always receive the highest amount (judgments of 19 February 1981, Beeck, C-104/80, EU:C:1981:48; 10 July 1986, Luijten, C-60/85, EU:C:1986:307; 7 July 2005, Weide, C-153/03, EU:C:2005:428; 7 June 2005, Dodl, C-543/03, EU:C:2005:364). See, recently regarding the necessary cooperation between institutions involved, 25 April 2024, C-36/23, EU:C:2024:355.

¹⁰⁰ See Judgment of 20 May 2008, Bosmann, C-352/06, EU:C:2008:290. The case concerned a Belgian national who lived in Germany with her two children but worked in Belgium. The applicable legislation was Belgian (*lex loci laboris*). She was not entitled to benefits in Belgium –due to the age of her children, but was entitled to family benefits in Germany. EU coordination law does not prevent the loss of entitlement in Belgium, but neither does it prevent the acquisition of a German benefit solely on the basis of residence. Similarly, with regard to long term care benefits, see judgment of 16 July 2009, Chamier-Glisczynski, C-208/07, EU:C:2009:455.

¹⁰¹ In this judgment the ECJ avoids coordinating rules, which may be too complex, and bases its decision on the Treaties, always at the expense of the uniform application of secondary coordinating law and of legal certainty on a key issue such as the determination of the competent national legislation, following an interpretation that also calls into question the basic principles of mandatory application and uniqueness.

¹⁰² Regulation EC/883/2004 art.70(4). See section II.C.b.

workers, which must be recognized under the legislation of the Member State of residence on the basis of the foreign salary, even though this Member State has not received any contributions and therefore certain reimbursement systems are established between the institutions involved¹⁰³. The failed EC proposal to amend the Regulations tried to change that controversial rule¹⁰⁴.

1.1 THE LEX LOCI LABORIS AND ITS EXCEPTIONS

The *lex loci laboris*, the legislation of the Member State where the work is carried out, is an appropriate link because it facilitates equal treatment of all employees of a company operating in the same territory, irrespective of their nationality¹⁰⁵. The application of the legislation of the Member State of employment obliges companies to pay the same social security contributions for national and migrant workers, so that these social costs cannot be reduced by ‘importing’ ‘cheaper’ workers. All of them are treated equally. The same applies to self-employed persons who are subject to the legislation of the Member State in which they pursue a professional activity (Regulation EC/883/2004 Art. 11(3)(a)).

All the exceptions to the *lex loci laboris* set out in the following table are necessarily of restrictive application¹⁰⁶. It should also be borne in mind that all conflict rules (the general rule or its exceptions) may themselves be waived, even retroactively, by agreement between the institutions of the national systems concerned (Regulation EC/883/2004 Article 16). In any event, such agreements must always be for the benefit of the persons involved and their consent¹⁰⁷. Despite, it must be considered soft law, it is interesting consider the interpretation and examples included in the Administrative Commission’s practical Guide on social security applicable legislation published in December 2013 which is currently under review¹⁰⁸.

¹⁰³ Regulation EC/883/2004 Art. 65. For a critical account of this provision.

¹⁰⁴ The Member State of last employment was responsible for the payment of unemployment benefits provided that the frontier worker had worked there for at least twelve months, thus eliminating cumbersome inter-institutional reimbursements.

¹⁰⁵ With a view to guaranteeing the equality of treatment of all persons occupied in the territory of a Member State as effectively as possible, it is appropriate to determine as the legislation applicable, as a general rule, that of the Member State in which the person concerned pursues his activity as an employed or self-employed person.” See recital 17 of the Regulation EC/883/2004 Preamble.

¹⁰⁶ Judgment of 6 September 2018, Alpenrind and others, C-527/16, EU:C:2018:669, paragraph 95.

¹⁰⁷ Judgment of 29 June 1995, Joop Van Gestel, C-454/93, EU:C:1995:205.

¹⁰⁸ <https://ec.europa.eu/social/BlobServlet?docId=11366&langId=en>

EXCEPTIONS (* a PD A1 is issued by the competent institution)	CONFLICT-RULE AND NATIONAL LEGISLATION APPLICABLE
Persons receiving a short-term benefit related to employment or self-employment. However, there are some exceptions ¹⁰⁹ .	Art. 11(2) Regulation EC/883/2004 <i>Lex loci laboris</i>
(*) Temporarily posted workers to another Member State (employed or self-employed) (see section c)	Art. 12 Regulation EC/883/2004 They may temporarily (for a maximum of 24 months) maintain the application of the legislation under which they were already insured as a self-employed person or as an employee (where their employer is established) before the posting in the home Member State.
(*) Civil servants	Art. 11(3)(b) Regulation EC/883/2004 Legislation of the Member State to which the administration employing him/her is subject.
A person called up or recalled for service in the armed forces or for civilian service in a Member State	Art. 11(3)(d) Regulation EC/883/2004 Legislation of that Member State where is providing those services
(*) Auxiliary staff of the European Communities	Art. 15 Regulation EC/883/2004 They can choose once between: a) Legislation of the Member State in which they are employed, b) Legislation of the Member State to which they were last subject c) Legislation of the Member State of which they are nationals
(*) Activity as an employed or self-employed person normally pursued on board a vessel at sea flying the flag of a Member State	Art. 11(4) Regulation EC/883/2004 General rule: Legislation of the Member State of the vessel's flag. Exception: Legislation of the Member State where the employer's place of business is situated when it coincides with the employee's place of residence. (1).

¹⁰⁹ On the one hand, the persons that receive invalidity, old age or survivors' pensions, and pensions derived from accidents at work or occupational diseases or to sickness benefits in cash covering treatment for an unlimited period are out of the scope of the Regulation EC/883/2004 Art. 11(2). On the other hand, the legislation of the Member State of residence (or *lex loci domicilii*) is applicable to the workers that according to the Article 65 of Regulation EC/883/2004 receives unemployment benefits from that Member State of residence (Regulation EC/883/2004 Art. 11(3)(c)).

<p>EXCEPTIONS (*) a PD A1 is issued by the competent institution</p>	<p>CONFLICT-RULE AND NATIONAL LEGISLATION APPLICABLE</p>
<p>(*) Activity as a flight crew or cabin crew member performing air passenger or freight services</p>	<p>Art. 11(5) Regulation EC/883/2004 Legislation of the Member State where the home base is established ¹¹⁰.</p>
<p>(*) A person who normally pursues an activity as an employed person in two or more Member States (2)(3)</p>	<p>Art. 13(1) Regulation EC/883/2004.</p> <ul style="list-style-type: none"> – Legislation of the Member State of residence if s/he pursues a substantial part of his/her professional activity in that Member State (+ 25% of the working time or remuneration in the State of residence) ¹¹¹. – If s/he does not pursue a substantial part of his/her professional activity in the he Member State of residence there are different options: <ol style="list-style-type: none"> 1) Employed by one undertaking or employer (NO moonlighting): the legislation of the Member State in which the registered office or place of business of the undertaking or employer is situated ¹¹². 2) Employed by two or more undertakings or employers (Moonlighting): <ol style="list-style-type: none"> a. The companies have their registered office or place of business in only one Member State: to the legislation of that Member State. b. The companies have their registered office or place of business in two Member States, one of which is the Member State of residence of the worker: to the legislation of the Member State in which the registered office or place of business of the undertaking or employer is situated other than the Member State of residence. c. At least two of the companies have their registered office or place of business in different Member States other than the Member State of residence of the worker: Legislation of the Member State of residence.

¹¹⁰ Home base is defined as «the location, assigned by the operator to the crew member, from where the crew member normally starts and ends a duty period or a series of duty periods and where, under normal circumstances, the operator is not responsible for the accommodation of the crew member concerned» Regulation EEC/3922/1991 Annex III.

¹¹¹ Regulation EC/987/2009 Article 14(8)(a).

¹¹² However, if the company, the employer is established outside the territory of the Union, and if this person resides in a Member State without pursuing substantial activity there, he shall be subject to the legislation of the Member State of residence Regulation EC/987/2009 Article 14(11).

EXCEPTIONS (*) a PD A1 is issued by the competent institution	CONFLICT-RULE AND NATIONAL LEGISLATION APPLICABLE
(*) A person who normally pursues an activity as a self-employed person in two or more Member States (3)	Art. 13(2) Regulation EC/883/2004 (4). Firstly, the legislation of the Member State of residence if s/he pursues a substantial part of his/her activity in that Member State (overall assessment of the turnover, working time, number of services rendered and/or income) ¹¹³ . Secondly, if s/he does not reside in one of the Member States in which s/he pursues a substantial part of his/her activity: the legislation of the Member State in which the centre of interest of his/her activities is situated ¹¹⁴ .
(*) A person who normally pursues an activity as an employed person and an activity as a self-employed person in different Member States	Art. 13(3) Regulation EC/883/2004 (4). Legislation of the Member State in which s/he pursues an activity as an employed person. (*) if s/he pursues such an activity in two or more Member States, to the legislation determined in accordance with Art. 13(1) Regulation EC/883/2004.
(*) A person who is employed as a civil servant by one Member State and who pursues an activity as an employed person and/or as a self-employed person in one or more other Member States	Art. 13(4) Regulation EC/883/2004 Legislation of the Member State to which the administration employing him/her is subject (3).
Inactive persons or those who are not subject to any other conflict rule of Title II of the Basic Regulation ^{115z}	Art. 11(3)(e) Regulation EC/883/2004 Legislation of the Member State of residence (1).

¹¹³ Regulation EC/987/2009 Article 14(8)(b).

¹¹⁴ The social security institution must consider of all the aspects of that person's occupational activities, notably the place where the person's fixed and permanent place of business is located, the habitual nature or the duration of the activities pursued, the number of services rendered, and the intention of the person concerned as revealed by all the circumstances (Regulation EC/987/2009 Article 14(9)). The institutions concerned shall consider the situation projected for the following 12 calendar months (Regulation EC/987/2009 Article 14(10)).

¹¹⁵ Judgment of 8 May 2019, SF, C-631/17, EU:C:2019:381.

EXCEPTIONS (*) a PD A1 is issued by the competent institution	CONFLICT-RULE AND NATIONAL LEGISLATION APPLICABLE
(*) General exception to all Title II conflict-rules, through ad-hoc agreements between two or more social security institutions involved.	Art. 16 Regulation EC/883/2004. Always in the in the interest of certain persons or categories of persons (not companies).
<p>(1) Residence must be identified according to the criteria established in Regulation EC/987/2009 art.11.</p> <p>(2) Article 13 “the multistate conflict-rule” is increasingly used as it is not subject to the constraints or requirements established for the “posting conflict-rule (ex Art.12)”. It is used for the so-called “highly mobile workers” such as truck drivers ¹¹⁶. It could also be relevant for seasonal workers, including those in the agricultural sector ¹¹⁷.</p> <p>(3) Marginal activities should be disregarded Regulation EC/987/2009 Article 14 (less than 5% according to the AC Guide on Applicable legislation).</p>	

1.2 THE BINDING NATURE OF THE PD A1

In the above table of exceptions to the *lex loci laboris*, the possibility of issuing a portable document A1 (PD A1) at the request of the company or the workers, certifying that the holder is insured in the State issuing such a document, is marked with an asterisk ¹¹⁸. It would be advisable to issue the PD A1 prior to the mobility, but its retroactive issue is allowed ¹¹⁹.

¹¹⁶ “Almost two thirds of the PDs A1 under Article 13 are granted to persons in the services sector, more specifically 45.3 % of forms go to persons active in road freight transport. Especially in Croatia, Latvia Lithuania, Malta, Poland, Slovakia, and Liechtenstein, more than one third of forms are issued for activities in road freight transport. In Lithuania and Malta, the share even exceeds 50 %. Poland makes up the lion’s share in absolute terms (229 595 out of 360 424 PDs A1) in line with the importance of international road freight transport in the country’s economy” DE WISPELAERE, F.; DE SMEDT, L. and PACOLET, J. “Posting of workers. Report on A1 Portable Documents issued in 2022”. October 2023. Publications Office of the European Union.

¹¹⁷ See CARRASCOSA BERMEJO, D. and CONTRERAS HERNANDEZ, O. “Posted workers from and to Spain facts and figures” Leuven: POSTING.STAT project VS/2020/0499. P. 23 <https://hiva.kuleuven.be/en/news/docs/posted-workers-from-and-to-spain-facts-and-figures.pdf>

¹¹⁸ Regulation EC/987/2009 art. 19 and 15(1). Currently, PD A1s are also issued to seafarers and aircrew. They were explicitly included in the EC’s failed proposal to amend the coordination Regulations. Where the *lex loci laboris* applies, the PD A1 cannot be issued.

¹¹⁹ For instance, after the posting began or even when it ended. See judgments of 30 March 2000, Banks and others, C-178/97, EU:C:2000:169, paragraphs 52 to 57, and of 6 September 2018, Alpenrind and others, C-527/16, EU:C:2018:669, paragraph 70.

The binding nature of the PD A1 as proof of the applicable legislation¹²⁰, especially in the case of posting Art. 12 PD A1, has been confirmed by the ECJ case-law in the following cases¹²¹:

Firstly, it is binding to the social security institution of the host Member State¹²². The institution issuing a PD A1 should carry out an appropriate prior assessment of all the relevant elements mentioned for determining the applicable legislation¹²³. So, in the event of a disagreement between institutions, it is not possible to ignore a foreign PD A1 or to insure directly the person involved under the national social security system of the host Member State. On the contrary, it is necessary to contact, as soon as possible, the issuing social security institution and ask for an explanation or even the withdrawal of the controversial PD A1. In the AC Decision A1 is established a, non-legally binding, dialogue and a mediation procedure “not always efficient and satisfactory in practice”¹²⁴, but based on mutual trust and sincere cooperation, that can finish with a mere opinion of the AC Conciliation board¹²⁵. In the event of the failure of this dialogue and conciliation procedure, the institutions of the host Member State, in theory, could, on the one hand, challenge the foreign PDA1 before the courts of the Member State which issued it; and, on the other hand, the host Member State institution can also bring an infringement proceeding against the issuing Member State before the ECJ¹²⁶. In practice, none of these options

¹²⁰ In any case, inclusion in the subjective scope of the coordination Regulations is independent of the existence or falsity of a PD A1, see judgment 23 January 2025, EX, C-421/23 of ECLI:EU:C:2025:36 paragraph 31.

¹²¹ See Carrascosa Bermejo, D., Molina Millán, J. The binding nature of posting PDA1 issued under EU social security Coordination Regulations and the possible role of national courts. *ERA Forum* 24, p. 85 and 86 (2023). <https://doi.org/10.1007/s12027-023-00749-6>

¹²² Whether the social security institution of the host Member State obliged a posted worker to affiliate under its social security scheme, it would undermine the principles of unicity and exclusivity of the applicable law that provide predictability and legal certainty for companies and posted workers. See judgments of 10 February 2000, FTS, C-202/97, EU:C:2000:75, paragraph 54; 26 January 2006, Herbosch Kiere, C-2/05, EU:C:2006:69, paragraph 25; 11 July 2018, Commission v Belgium, C-356/15, EU:C:2018:555, paragraph 88; 27 April 2017, A-Rosa Flussschiff, C-620/15, EU:C:2017:309, paragraphs 41 and 42.

¹²³ The issuing institution should collect all relevant information as identified in soft law AC Recommendation A1(OJEU 29-5-2018, C-183) which contains a standardized and non-exhaustive list of questions to be answered by applicants for a PD A1 and the documentation to be provided prior to issuing the PD A1.

¹²⁴ See judgment of 11 July 2018, Commission v Belgium, C-356/15, EU:C:2018:555, paragraph 107.

¹²⁵ See AC Decision AC n° A1, based on mutual trust and cooperation between national institutions (Regulation EC/883/2004 Art.72(a) and 76; Regulation CE/987/2009 Art.5 and 6.3). See, on this procedure, judgment of 27 April 2017, A-Rosa Flussschiff, C-620/15, EU:C:2017:309. Regarding the non-binding nature of the AC Conciliation Board, see judgment of 6 September 2018, Alpenrind and others, C-527/16, EU:C:2018:669, paragraphs 62 to 64.

¹²⁶ See, mentioning both options, judgments of 27 April 2017, A-Rosa Flussschiff, C-620/15, EU:C:2017:309, paragraph 46, and of 6 September 2018, Alpenrind and others, C-527/16, EU:C:2018:669, paragraph 61.

have never been used. Secondly, the PD A1 is binding to the company calling upon the services of the posted worker¹²⁷. Thirdly, they are also binding to the courts of the host Member State that cannot “scrutinise the validity” of a PD A1¹²⁸, in the light of the factual background against which it was issued. This is the case, even if the host Member State institutions believe that the situation clearly does not fall within the material scope of the posting rule, or in the event of a manifest error¹²⁹, as “there would be a risk that the system based on the duty of cooperation in good faith between the competent institutions of the Member State would be undermined”¹³⁰. Besides, the opposite result would undermine the principle that employees must be covered by only one social security system, would make it difficult to know which scheme is applicable and would consequently impair legal certainty¹³¹. It is advisable, “defining a unique competent jurisdiction is indispensable to avoiding contradictory non-unifiable national judgments. This does not imply mistrust on the objectivity and independence of any national court, it just means that one sole court must be appointed. The competent court would have to assess the correct application of the EU conflict-rule and its requirements under issuing and withdrawal procedures defined in the national legislation of the home Member State”¹³². Finally, in a certain sense, foreign PD A1s are also bound to the legislators of the host Member State, as they cannot adopt national legislation that allows their own institutions to compulsorily subject workers to their own social security scheme ignoring a foreign PD A1¹³³.

¹²⁷ The question was raised in a case in which a posted worker was insured as self-employed in the home and provided the correspondent PDA1 but should have been insured as an employee in the host Member State. The principles of unicity and exclusivity still apply to the receiving undertaking (Judgment of 30 March 2000, *Banks and others*, C-178/97, EU:C:2000:169, paragraphs 41 and 48).

¹²⁸ Judgment of 26 January 2006, *Herbosch Kiere*, C-2/05, EU:C:2006:69, paragraphs 31 and 32.

¹²⁹ Judgments of 27 April 2017, *A-Rosa Flussschiff*, C-620/15, EU:C:2017:309, paragraph 51, and of 11 July 2018, *Commission v Belgium*, C-356/15, EU:C:2018:555, paragraph 93.

¹³⁰ Judgments of 26 January 2006, *Herbosch Kiere*, C-2/05, EU:C:2006:69, paragraphs 30 to 32, and of 6 September 2018, *Alpenrind and others*, C-527/16, EU:C:2018:669, paragraph 47. These principles are established under Art. 4(3) TFEU, in Art. 76(4) of Regulation (EC) 883/2004 and in Recital 2 of the Preamble and Art. 20 of Regulation (EC) 987/2009.

¹³¹ “In cases in which it was difficult to determine the scheme applicable, each of the competent institutions of the two Member States concerned would be inclined to take the view, to the detriment of the employees concerned, that their own social security scheme is applicable to them (judgments of 26 January 2006, *Herbosch Kiere*, C-2/05, EU:C:2006:69, paragraph 25, and of 27 April 2017, *A-Rosa Flussschiff*, C-620/15, EU:C:2017:309, paragraph 42.” See judgment of 11 July 2018, *Commission v Belgium*, C-356/15, EU:C:2018:555, paragraph 88.

¹³² CARRASCOA BERMEJO, D., MOLINA MILLÁN, J. The binding nature of posting PDA1 issued...” op.cit. p. 86 (2023). <https://doi.org/10.1007/s12027-023-00749-6>

¹³³ See judgment of 11 July 2018, *Commission v Belgium*, C-356/15, EU:C:2018:555, paragraphs 94 and 95

The binding nature of the PD A1 has an exception established by the ECJ in *Altun* judgment¹³⁴, refined by *Vueling*¹³⁵ and *Bouygues*¹³⁶ judgments¹³⁷. The ECJ held that the national courts (not the institutions) of the host Member State may disregard (not invalidate or withdraw) fraudulent PD A1s under certain conditions, in order to give a ruling on the criminal or civil liability of the companies involved in the host Member State. The first condition is that the institution of the host Member State must initiate the mentioned dialogue and cooperation procedure promptly¹³⁸ without obtaining the appropriate answer¹³⁹. This procedure should also be followed, *mutatis mutandis*, in the case of doubts as to the authenticity of the PD A1 where the alleged issuing social security body has received contributions. In my view, this last issue should also have been clarified in the context of this dialogue and conciliation procedure¹⁴⁰. If under this procedure the alleged issuing institution confirms that it did not issue them, the host Member State court may conclude that they are false documents which are not binding on it¹⁴¹. However, if the procedure had not been followed, the court could not decide unilaterally on the authenticity of PD A1 or on the fraudulent nature of the posting¹⁴². The second condition is that the host Member State courts must declare proven in the context of a fair trial,

¹³⁴ Judgment of 6 February 2018, *Altun*, C-359/16, EU:C:2018:63.

¹³⁵ Judgment of 2 April 2020, *Vueling Airlines & CRPNPAC*, C-370/17 and C-37/18, EU:C:2020:260.

¹³⁶ Judgment of 14 May 2020, *Bouygues travaux publics*, C-17/19, EU:C:2020:379.

¹³⁷ See on these judgments on fraud, PENNINGGS, F. *European Social Security Law op. cit.* p. 129-135. HOUWERZIJL, M. VERSCHUEREN, P. «Chapter 4. Free movement of (posted) workers and applicable labour and social security law» /in/ JASPERS, T., PENNINGGS, F. and PETERS, S. (eds.) «European Labour Law» Intersentia. 2nd ed. 2024. P. 241-245. CARRASCOSA BERMEJO, D., MOLINA MILLÁN, J. The binding nature of posting PDA 1 issued under EU social security Coordination Regulations. *op. cit.* p. 91-98.

¹³⁸ The home Member State must have the opportunity to review the grounds for the issue of the PD A1 in the light of the concrete evidence submitted by the institution of the host Member State. Confirmed in the judgment of 2 April 2020, *Vueling Airlines & CRPNPAC*, C-370/17 and C-37/18, EU:C:2020:260, paragraphs 71 and 77.

¹³⁹ Basically, the institution that issued the PDA 1, must not have carried out the required control within a reasonable period in view of the evidence provided by the institution that challenges its PD 1 and/or should have failed to make a decision within a reasonable time

¹⁴⁰ See judgment 23 January 2025, EX, C-421/23 of ECLI:EU:C:2025:36 paragraphs 38 to 41

¹⁴¹ See judgment 23 January 2025, EX, C-421/23 of ECLI:EU:C:2025:36 paragraphs 43 to 47. This ruling confirms that even in extreme cases of false documentation, unilateralism makes no sense in the framework of a coordination system, which can only function thanks to dialogue and cooperation, and which is based on mutual trust between institutions. CARRASCOSA BERMEJO, D. "Posting of workers in the EU and false A1 portable documents: the value of dialogue and cooperation versus unilateralism. A propósito de la sentencia del TJUE 23-1-2025, EX C-421/23", Briefs AEDTSS, number 7/2025, Asociación Española de Derecho del Trabajo y de la Seguridad Social, 2025 https://www.aedtss.com/wp-content/uploads/2025/02/7_Dolores-Carrascosa-STJUE-A1.pdf

¹⁴² See judgment 23 January 2025, EX, C-421/23 of ECLI:EU:C:2025:36 paragraphs 48 and 49

backed with a consistent body of evidence, that there is fraud of the EU coordination Regulations¹⁴³.

Under the Altun doctrine, the applicable social security legislation established under a PD A1 would not change, as the courts of the host Member State cannot invalidate or withdraw a foreign PD A1¹⁴⁴. These actions remain the exclusive competence of the institutions and courts of the home Member State, and these institutions and courts are not bound by the decision of the court of the host Member State. It does not appear that this doctrine allows the simultaneous application of two social security legislations¹⁴⁵. The principle of the uniqueness of the applicable national social security legislation has been a fundamental principle of coordinating regulations since 1958¹⁴⁶. It is of paramount importance in the context of insurance and payment of social security contributions as it avoids double contributions and the associated legal uncertainty.

1.3 NATIONAL LEGISLATION APPLICABLE TO POSTED WORKERS

We do not know the exact number of posted workers, but the latest estimations mention around 1.8 million in 2022, concentrated in some member states and in sectors such as construction¹⁴⁷. The European Commission's

¹⁴³ According to judgment of 6 February 2018, Altun, C-359/16, EU:C:2018:63, paragraphs 56 to 58, fraud has an objective factor (meaning that it must be proven that the EU requirements for issuing the PDA1 are not met) and an subjective factor (the parties concerned had the intention to evade or circumvent the conditions for the issue of the PDA1, and were aiming to obtain an advantage, either by deliberate omission, such as the concealment of relevant information, or by deliberate action, such as the misrepresentation of the real situation of the worker or the undertaking). A similar definition was proposed under the failed EC proposal to amend coordination Regulations.

¹⁴⁴ See VERSCHUEREN, H.: "The ECJ's case law on the role of posting certificates: a missed opportunity to combat social dumping." Maastricht J. Eur. Comp. Law n° 27/2020 p.494. In extenso, about these judgments CARRASCOSA BERMEJO, D., MOLINA MILLÁN, J. "The binding nature of posting PDA1 issued under EU social security Coordination Regulations..." op. cit. p. 91 to 98.

¹⁴⁵ On the contrary, it has been understood that the simultaneous application of the legislation of the host Member State whose courts have disregarded the PD A1 is possible, see RENNUIY, N. "Posting of workers: Enforcement, compliance and reform." European Journal of Social Security Vol. 22(2)/2020 p. 212–234. DOI:10.1177/1388262720931658.

¹⁴⁶ See Recital 15 of the Preamble of Regulation EC/ 883/2004 "It is necessary to subject persons moving within the Community to the social security scheme of only one single Member State in order to avoid overlapping of the applicable provisions of national legislation and the complications which could result therefrom" and Art. 11(1) of the same Regulation "Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title."

¹⁴⁷ These estimations are mainly based on the PD A1 and posting notifications that companies are required to make following the transposition of the Enforcement Directive. (Directive EC /2014/67 Article 9). De Wispelaere, L. De Smedt & J. Pacolet, *Posting of workers - Report on A1 Portable Documents is-*

Posting-Stat project, which has been relaunched, continues to seek relevant data to enable informed decision-making¹⁴⁸.

The Regulations provide that, in the case of temporary assignments whose foreseeable duration does not exceed 24 months, the law of the Member State of destination where the professional activity is actually carried out may be derogated from or not applied, so that the posted person remains subject to the social security law of the place of employment of the Member State of origin where the undertaking is established¹⁴⁹. This solution favors the freedom to provide services in the internal market and simplifies the administrative complications that a change of legislation would entail for social security institutions, companies and the mobility of workers who temporarily can maintain the continuity of their insurance career in a system that they already apply¹⁵⁰. In order to prevent fraud and abuse of this posting conflict-rule, the following conditions apply¹⁵¹:

a) The posted workers must have an employment relationship of dependence with their employer, an organic employment relationship that must continue throughout the posting period¹⁵². The conflict rule on posting applies to all workers covered by the coordination Regulations, including third-country nationals (TCNs) who are legally resident in the host Member State where the posting employer is established, even if they are only staying there temporarily¹⁵³. Employers who lawfully and regularly employ TCN are not required to obtain work permits for such TCN workers from a national immigration autho-

sued in 2022... op.cit. The main receiving Member States are Germany, France, Austria, Belgium, the Netherlands, and Switzerland. The main sending Member State is Germany followed by Poland (p. 28). About the number of posted workers (p. 36). See also De Wispelaere, F. and Vukorepa, I. "Chapter 11: The EU social security rules on posting: defining problems and potential solutions" /in/ Pennigns, F. and Vonk, G. (ed) *Research Handbook on European Social Security Law*. 2023. Edwar Elgar P. 225-251. DOI: <https://doi.org/10.4337/9781800886353.00019>

¹⁴⁸ On the results of the first Posting Stat project in the 10 Member States involved see <https://hiva.kuleuven.be/en/news/newsitems/posting-stat-enhancing-collection-and-analysis-national-data-on-intra-eu-posting> On the new project Posting Stat 2.0 with 11 Member States involved, see <https://hiva.kuleuven.be/en/research/theme/welfarestate/p/POSTING-STAT20>

¹⁴⁹ This temporary derogation from the *lex loci laboris* of the Regulations is the same solution generally adopted in all international social security conventions.

¹⁵⁰ See judgment of 10 February 200, Fitzwilliams, C-202/97, EU:C:2000:75, paragraphs 28 and 29; Reiterated in judgments of 9 November 2000, Plum, C-404/98, EU:C:2000:607, paragraphs 19 and 20, and of 6 February 2018, Altun, C-359/16, EU:C:2018:63, paragraphs 32 and 33.

¹⁵¹ In extenso, CARRASCOSA BERMEJO, D., MOLINA MILLÁN, J. The binding nature... op. cit. p. 81

¹⁵² Some relevant criteria were set out in the (non-binding) AC Decision No A2 Point 1.3. relationship breaks when a so-called, "double posting" takes place.

¹⁵³ See judgment of 24 January 2019, Balandin, C-477/17, EU:C:2019:60, considering Regulation EC/1231/2010.

riety and do not have to bear the costs of doing so¹⁵⁴. However, it has recently been clarified that TCN posted workers may require a residence permit issued by the host Member State if the posting exceeds 90 days out of a period of 180 days¹⁵⁵.

b) The posted employees must have been previously subject to the social security legislation¹⁵⁶ that they intend to maintain¹⁵⁷. Recruitment for the purpose of posting is possible if the hired worker was subjected to the social security legislation of the home MS immediately before being recruited¹⁵⁸.

c) The posting undertaking must carry out significant business activities¹⁵⁹ in the home Member State, or else it will be considered a letterbox company¹⁶⁰. This requirement in respect of temporary work agencies implies that they must assign workers to a significant extent in the home Member State¹⁶¹.

d) The anticipated duration of the work cannot exceed 24 months¹⁶². If it is foreseen that is going to exceed this duration, the maintenance of the home MS legislation can only be achieved by means of specific agreements between the corresponding social security institutions¹⁶³.

¹⁵⁴ Judgment of 9 August 1994, *Vander Elst*, C-43/93, EU:C:1994:310.

¹⁵⁵ Judgment of 20 June 2024, *SN and others*, C-540/22, EU:C:2024:530.

¹⁵⁶ In AC Decision A2, Member States agreed on a minimum attachment to the social security system of origin of 1 month prior to posting, subject to exceptions. If the proposed amendment had been successful, this requirement would no longer be soft law and would be increased to 3 months (proposed amendment to Regulation EC/987/2009 Art.14.1).

¹⁵⁷ The ECJ considers that any kind of previous attachment is valid in this regard, even mere habitual residence if the person is subject to social security rules. Judgment of 25 October 2018, *Walltopia*, C-451/17, EU:C:2018:861. In the same vein see the (non-binding) AC Guide on applicable legislation, Administrative Commission

¹⁵⁸ See Art. 14(1) of Regulation (EC) 987/2009

¹⁵⁹ The mere management activities do not suffice. Art. 14(2)(3) of Regulation (EC) No 987/2009. For instance, a turnover of approximately 25% of the total turnover, is mentioned under the AC Guide on Applicable legislation. The criteria gathered in this Guide are the same provided by the ECJ in judgment of 10 February 2000, *FTS*, C-202/97, EU:C:2000:75, paragraphs 42 and 43.

¹⁶⁰ Art. 12 Regulation EC/883/2004 and Art 14 Regulation EC/987/2009 and AC Decision A2. In the same vein, judgments of 30 March 2000, *Banks and others*, C-178/97, EU:C:2000:169, and of 26 January 2006, *Herbosch Kiere*, C-2/05, EU:C:2006:69.

¹⁶¹ Judgment of 3 June 2021, *Team Power*, C-784/19, EU:C:2021:427.

¹⁶² According to AC Decision A2 point 3, on the one hand, brief interruptions, such as holidays or sickness leave, should not be considered in calculating the 24 months period. On the other hand, posting to the same Member State would be considered one posting situation, even if services are provided to two or more companies. Finally, it is considered that a new posting period begins, resetting the counter to zero, when a worker is posted to another MS or two months after the end of the previous posting. AC See Decision No A2 Point 3.

¹⁶³ See Art. 16 of Regulation EC/883/2004 and judgment of 17 May 1984, *Brusse*, C-101/83, EU:C:1984:187. These agreements are also used to extend the application of the home Member State legislation if the posting finally is going to be longer than these 24 months.

e) A posted worker cannot replace another posted employee, to avoid a rotational system of postings to the destination company¹⁶⁴. In practice, replacement is allowed when the previous posting did not exhaust the 24-month period¹⁶⁵.

There is a similar conflict rule for self-employed persons, who are much less numerous, who decide to temporarily pursue a similar professional activity in another Member State, regardless of whether they are employed or self-employed there¹⁶⁶. In this case, it is understood that they must be subject to the social security system which they wish to maintain for two months prior to the posting and that they must maintain the conditions for resuming their professional activity on their return¹⁶⁷. However, the replacement ban is not applicable in the case of self-employed persons¹⁶⁸.

1.4 NATIONAL LEGISLATION APPLICABLE TO INTRA-EU TELEWORK

The Regulations do not provide a specific rule of conflict for telework in Title II of the Regulation EC/883/2004, neither is it mentioned in the Administrative Commission's Practical Guide on the Applicable Legislation, thus there is a problem of legal uncertainty¹⁶⁹. Following the principle that "*Ubi lex non distinguit, nec nos distinguere debemus*", i.e. where the law does not make a distinction, we should not make one either, we continue to apply the common conflict rules to telework cases, both the *lex loci laboris*, and its exceptions¹⁷⁰. However, these rules were designed for the

¹⁶⁴ The focus must be on the job, because once it has been filled by a posted worker, it cannot be replaced by a new posted worker, even if he or she comes from another company or a different Member State (Judgment of 6 September 2018, Alpenrind and others, C-527/16, EU:C:2018:669).

¹⁶⁵ The failed EC 2016 the amendment of the Coordination Regulations included this provision in the Art.12(2)(a) Regulation (EC) No 883/2004.

¹⁶⁶ Regulation CE/987/2009 art.14.4 and judgment of 20 March 2000, Banks and others, C-178/97, EU:C:2000:169.

¹⁶⁷ According to the Administrative Commission Decision A2 it is required to have been subject to this legislation for at least 2 months, and for the control of the maintenance of the requirements objective criteria are requested such as: maintenance of the office or premises, payment of taxes, professional card or VAT number, registration in chambers of commerce or professional associations...

¹⁶⁸ This would have changed had the Commission's failed reform proposal preventing the substitution of both employees and self-employed workers been adopted.

¹⁶⁹ In this respect, see: Y. JORENS, J.-P. LHERNOULD, J.-C. FILLON, S. ROBERTS, B. SPIEGEL, Towards a new framework for applicable legislation, trESS, 2008 (available at http://www.tressnetwork.org/TRESS/EUROPEAN%20RE%20SOURCES/EUROPEANREPORT/ThinkTank_Mobility.pdf). See also LHERNOULD, J.P. « Conflits de lois en matière de sécurité sociale: la *lex loci laboris* en question ». *Droit social*, No 5 (May)/2015, p. 457.

¹⁷⁰ STRBAN, G (ED); CARRASCOSA BERMEJO, D.; SCHOUKENS, P.; VUKOREPA L., *Analytical report 2018. Social Security coordination and non-standard forms of employment and self-employ-*

physical mobility of workers and are therefore not well adapted to just cross-border online telework.

Faced with the COVID 19 pandemic, the Administrative Commission (AC) has sought a consensus among the Member States and has set out some practical solutions in Guidance Notes which are not binding legal rules, but were finally been published under a recent AC Decision¹⁷¹. From July 2023¹⁷², with regard to a specific type of off-site teleworking¹⁷³ from a Member State other than the one in which the company premises are established, the following has been established by the AC last Guidance Note:

First of all, the law of the place of work, the *lex loci laboris*, could be understood as applicable, but where is the place of work of someone who teleworks from his or her home in Italy for a company in Spain? The Guidance Note does not clarify this concept. It only confirms that the social security administrations have understood, on the basis of a traditional and physical interpretation, that it is Italy from which this teleworker connects, resides and types on his computer¹⁷⁴. However, there have also been proposals from some authors that would allow the Spanish law to be applied. On the one hand, an updated interpretation of the *lex loci laboris* for virtual work has been suggested. The *lex loci laboris* could be the place where the server of the company that hired and trained the worker is located, from where the instructions for the work are given, the laptop is provided, and the salary is paid. This interpretation would ensure equal treatment between teleworkers and face-to-face workers, and is predictable and stable, among many other advantages. However, to avoid social dumping, it would be necessary for the company to have substan-

ment: *Interrelation, challenges, and prospects*. Brussels, EC, 2020. P. 44 Available in: <https://op.europa.eu/en/publication-detail/-/publication/d5ae78c2-c578-11ea-b3a4-01aa75ed71a1/language-en>

¹⁷¹ AC Decision No H14 of 21 June 2023. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32024D00594>

¹⁷² Until June 2022, always with the intention of avoiding any change in the social security legislation applicable to teleworkers, the AC ignored telework in determining the applicable social security legislation as if it did not exist, considering the COVID 19 pandemia to be a situation of force majeure. From July 2022, the AC tried to impose a flexible interpretation of certain conflict rules by extending the transitional periods several times.

¹⁷³ It is just referred to voluntarily agreed, between the employer and the employee, telework, using technology that allows the employee to remain connected to the company's work environment and to perform the same work as he/she does in the company itself.

¹⁷⁴ This interpretation is usually based on judgment of 27 September 2012, Partena, C-137/11, EU:C:2012:593, which does not relate to an international teleworking employee, and which interprets the EU concept of the workplace, taking into account its usual meaning in everyday language, the context and the purpose of the rule, as "the place where the person carries out the actions related to that activity", which has been understood as the physical location of the teleworker, although the ECJ did not say exactly that.

tial activities in the home country¹⁷⁵. On the other hand, it has also been considered that an ad hoc conflict rule could be included that would establish for teleworkers a ‘fictitious place of work’ which would be the employer’s premise¹⁷⁶.

Although in practice the AC did not raise this possibility, the law of the teleworker’s place of residence, i.e. Italy, could also have been considered applicable, if it were held that there were no rules applicable to telework¹⁷⁷. However, this solution (the *lex domicilii*), apart from its possible instability¹⁷⁸ and the difficulty of determining the place of residence under the coordination Regulations¹⁷⁹, could lead to social dumping. In fact, companies could tend to recruit teleworkers residing in Member States with the lowest contributions¹⁸⁰.

Thirdly, with regard to ad hoc or occasional transnational telework, it was agreed in the framework of the AC to apply the posting conflict-rule, irrespective of whether the telework was not for the purpose of providing any service in the State of posting and the initiative came from the worker, if there was a consensus with the company¹⁸¹.

Fourthly, so-called hybrid regular telework could be subject to the multi-state conflict rule¹⁸². Thus, that a person who teleworks two days a week from home in a Member State other than the one where the company is based, where he or she works the other three days, could be subject to the law of the place of residence if he or she carries out a substantial activity (25% or more) there¹⁸³. In view of the restrictions imposed by some companies on teleworking by persons residing in

¹⁷⁵ This interpretation preserves the objective of the conflict rules, which is none other than to provide predictability, stability and equal treatment and to facilitate control. CARRASCOSA BERMEJO, D. “Teletrabajo internacional y legislación de Seguridad Social aplicable: estado de la cuestión y perspectivas en los Reglamentos de coordinación de la UE.” *Revista Internacional y Comparada de relaciones laborales y derecho del empleo* 10, 217–249 https://ejcls.adapt.it/index.php/rldc_adapt/article/view/1153

¹⁷⁶ VERSCHUEREN, H.: The application of the conflict rules of the European social security coordination to telework during and after the Covid-19 pandemic. *Eur. J. Soc. Secur.* 24, 79–94 (2022).

¹⁷⁷ Article 11(3) (e) of Regulation EC/883/2004, as interpreted by the ECJ in judgment of 8 May 2019, SF, C-631/17, EU:C:2019:381.

¹⁷⁸ Should the applicable national social security legislation change each time the worker unilaterally decides to change his place of residence? It would not make sense, especially in cases such as that of digital nomads.

¹⁷⁹ The determination of the habitual residence under Article 11 of Regulation (EC) No 987/2009, is far from clear.

¹⁸⁰ In this sense see Y. JORENS, J.-P. LHERNOULD, J.-C. FILLON, S. ROBERTS, B. SPIEGEL, Towards a new framework for applicable legislation, *TrESS*, op. cit. p. 5.

¹⁸¹ Although this is a good solution in practice, doubts have been raised about the application of posting rules, which must be always applied restrictively as an exception to the *lex loci laboris*. See CARRASCOSA BERMEJO, D. “Teletrabajo internacional y legislación de Seguridad Social aplicable...” ... op. cit. p. 236-238.

¹⁸² Art. 13 Regulation EC/883/2004.

¹⁸³ Art. 14 Regulation EC/ 987/2009.

other Member States in order to avoid a change in social security rules in such cases¹⁸⁴, the AC promoted a framework agreement on cross-border hybrid teleworking applicable between the signatory Member States as from 1 July 2023¹⁸⁵. This agreement makes it possible to ask the institution of the State in which the company has its headquarters to apply its social security rules for a maximum of three years, renewable and always with the consent of the teleworker, who has to perform regular hybrid telework in the State of residence for a period of less than 50% but equal to or greater than 25% of his working time¹⁸⁶. The agreement allows direct derogation from the legislation of the State of residence without the need to negotiate individual Art. 16 agreements between national social security institutions, which may of course continue to apply for the benefit of teleworkers.

2. Equal treatment and non-discrimination on the grounds of nationality

Within the framework of the national social security legislation designated as applicable by the coordination Regulations, they guarantee equal treatment and non-discrimination on grounds of nationality¹⁸⁷. This means that the person concerned, without having to be a resident or a national of that Member State, may obtain the same benefits and be subject to the same obligations as are imposed by that social security legislation on its own nationals and under the same conditions; unless the Regulation itself provides otherwise¹⁸⁸. It is not a question of reciprocity on a case-by-case basis, but of generalized equality, even if it is only formal legal equality.

This right to non-discrimination on grounds of nationality of those exercising their right to free movement is also recognized in the current TFEU in

¹⁸⁴ This employer position could even constitute an obstacle to free movement.

¹⁸⁵ Applicable for a period of 5 years, renewable for a further 5 years and deposited with the Belgian Social Security Administration, where the list of the 22 signatory Member States of the framework agreement and the date from which the framework agreement applies in each of the Member States concerned can be found:<https://socialsecurity.belgium.be/en/internationally-active/cross-border-telework-eu-eea-and-switzerland>

¹⁸⁶ In extenso about the Framework agreement and the previous AC Guidance notes see DE PAUW, B., VERSCHUEREN, H. "The Framework Agreement on the applicable social security law in case of habitual cross-border telework after the pandemic." *ERA Forum* 24, 467–480 (2023). <https://doi.org/10.1007/s12027-023-00766-5>

¹⁸⁷ Regulation EC/883/2004 Art.4.

¹⁸⁸ Equal treatment is respected if the national applicable social security 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" Judgment 30 January 1997, *Hervein*, C-221/95, EU:C:1997:47 paragraph 50.

favor of EU citizens. Inactive EU citizens can have access to social assistance benefits¹⁸⁹, according to the transposition of the Free Movement Directive¹⁹⁰, or entitlement to a social security benefit in accordance with the equal treatment of the coordinating Regulations, provided they fulfil the legal residence requirement that could be imposed by national rules¹⁹¹. Since the Treaty of Rome, for those EU citizens who have been in employment there is enhanced protection for the free movement of workers¹⁹². They have access to the “social advantages”¹⁹³, that must be also recognized for frontier workers¹⁹⁴. Equal treatment is also linked to the freedom of establishment and freedom to provide services for self-employed workers also covered by coordination Regulations¹⁹⁵.

Prohibited discrimination against nationals of other Member States can be both direct and indirect. The ECJ has on several occasions found indirectly discriminatory provisions in national social security legislations. This is

¹⁸⁹ TFEU Art. 18.

¹⁹⁰ For instance, Directive EC/2004/38 Art. 24(2) contains a derogation to equal treatment, that allows the host Member States to refuse to grant social assistance to the EU citizen who exercises his or her right to free movement to its territory, during the first three months of that residence (see, to that effect, judgment of 25 February 2016, *García-Nieto and Others*, C-299/14, EU:C:2016:114, paragraph 43 and the case-law cited) Judgment 1-8-2022, S, C-411/20, EU:C:2022:602, paragraphs 41-55.

¹⁹¹ “Article 4 of Regulation EC/883/2004 gives specific expression to the principle of equal treatment with regard to Union citizens who rely, in the host Member State, on the social security benefits referred to in Article 3(1) of that regulation (see, to that effect, judgment of 15 July 2021, *A (Public health care)*, C-535/19, EU:C:2021:595, paragraph 40). In accordance with Article 4, unless otherwise provided for by Regulation No 883/2004, persons to whom that regulation applies are to enjoy the same benefits and are to be subject to the same obligations under the legislation of any Member State as the nationals thereof” Judgment 1-8-2022, S, C-411/20, EU:C:2022:602, paragraphs 59-60.

¹⁹² TFEU Art. 45 that can be directly applicable.

¹⁹³ Regulation EU/492/2011 art.7.2. The social advantages of migrant workers are a macro-category, as they range from social security benefits, such as German child-raising benefits (Judgment of 12 May 1998, *Martínez Sala*, C-85/96, EU:C:1998:217, paragraph 26), to maintenance or study allowances (Judgment of 20 June 2013, *Giersch*, C-20/12, EU:C:2013:411, paragraph 35) or aid in favour of disabled workers or their families (Judgment of 8 July 1992, *Taghavi*, C-243/91, EU:C:1992:306), or mere reductions to public transport (Judgment of 30 September 1975, *Cristini*, C-32/75, EU:C:1975:120).

¹⁹⁴ After an ambivalent period (see opinion of Advocate General of 2 June 2016, *Linares Verruga*, C-238/15, EU:C:2016:389, paragraph 36). Access to the labour market of a Member State is now considered to create a sufficient link of integration into the society of that State to underpin migrants’ access to social advantages. Workers are understood to contribute to the financing of the social policies of the host Member State through their social contributions and the payment of taxes for the work they perform there (judgments of 14 December 2016, *Linares Verruga*, C-238/15, EU:C:2016:949, paragraphs 49 ff, taking up the doctrine laid down in judgments of 14 June 2012 *Commission v Netherlands*, C-542/09, EU:C:2012:346, paragraphs 65 ff, and of 20 June 2013, *Giersch*, C-20/12, EU:C:2013:411, paragraphs 63); see in the same vein, recently, judgment 16 May 2024, C-27/23, EU:C:2024:404, applying just free movement of workers EU legislation. Although it should be recalled that frontier workers can pay their taxes in the State of residence, under a bilateral tax treaty avoiding double taxation and posted workers can keep their social contribution in the State of origin and not change their tax domicile fixed in the home Member State.

¹⁹⁵ TFEU Treaty Art.49 and 56

the case, for instance, when national legislation takes into account only national work for the entitlement to a benefit¹⁹⁶, or imposes a habitual residence requirement on the migrant¹⁹⁷, or requires that the nationality of the migrant's children is the nationality of the national legislation applicable for the recognition of family benefits¹⁹⁸. In the same vein, when a Member State denies a benefit for the care of a family member on the grounds that the parent to be cared does not receive a dependency benefit of a certain amount from that State¹⁹⁹. In these cases, detrimental to migrants, the national courts have to assess if such requirements were proportional and established in the general interest and for objective reasons unrelated to the nationality of the migrant.

Equal treatment only protects, almost as if it were a positive action, those who are in a situation of transnationality, as it does not apply to sedentary citizens, who are excluded from the scope of application of the Regulations, although they are treated in a less protective way than, for example, migrant workers²⁰⁰.

From this principle of equal treatment also derives the right of any EU national to benefit from the application of bilateral conventions concluded between a Member State and a third State²⁰¹, but also from those concluded between Member States, if certain conditions are met (see *supra* section I.B), even if the person concerned does not possess the nationality of any of the signatory States.

3. Assimilation of benefits, income, facts or events

The assimilation of certain foreign conditions (benefits, income, facts or events) represents a step forward from the mere principle of formal legal

¹⁹⁶ Where part-time work prior to retirement is required to have been carried out exclusively in accordance with the national provisions of the State which recognises the benefit. The competent German institution must carry out an analysis of the foreign part-time scheme in order to determine whether the differences identified are liable to compromise the attainment of the objectives legitimately pursued under the applicable German legislation (Judgment of 18-December-2014, Larcher, C-523/13, EU:C:2014:2458).

¹⁹⁷ Judgments of 15 January 1986, Pinna, C-41/84, EU:C:1986:1, and of 27 November 1997, Meints, C-57/96, EU:C:1997:564.

¹⁹⁸ Judgment of 12 July 1979, Toia, C-237/78, EU:C:1979:197.

¹⁹⁹ Judgment of 11 April 2024, C-116/23, ECLI:EU:C:2024:292

²⁰⁰ Judgments of 13 October 1977, Mura C-22/77, EU:C:1977:154; 5 May 1983, Van der Bunt-Craig, C-238/81, EU:C:1983:124; 6 July 2000, Movrin, C-73/99, EU:C:2000:369

²⁰¹ Judgment of 15 January 2002, Gottardo, C-55/00, EU:C:2002:16. TFEU art.351; AC Recommendation H1 EDL 2013/178083, OJEU 27-9-13; also, on healthcare AC Recommendation S2, OJEU C-46, 18-2-14.

equality of treatment. The Regulation provides for its application in the following situations:

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 also apply to the receipt of equivalent benefits acquired under the legislation of another Member State or to income acquired in another Member State²⁰². As confirmed by the ECJ, this technique allows foreign benefits to be taken into account in order to allow the recognition of a benefit in the competent State²⁰³. However, this assimilation of foreign benefits could have a negative impact on the migrant's acquired rights if national legislation provides for the reduction or suspension of the national social security benefit if other equivalent foreign benefits or income are also received at the same time. Nevertheless, there are specific rules under coordination Regulations regarding overlapping of benefits that protect the migrant in such cases, that must be considered (see section E).

b) Furthermore, “where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory”²⁰⁴.

The assimilation of conditions is not a new legal technique, as it was already provided for in certain cases in the previous Regulations²⁰⁵ and was accepted by the case law of the Court of Justice, which in some cases identified the absence of assimilation as indirect discrimination²⁰⁶. Under the current Regulations, the approach is different, as assimilation is general “unless the Regulations themselves state otherwise”²⁰⁷. However, in practice, assimi-

²⁰² Regulation EC/883/2004 Art. 5(a).

²⁰³ Judgment of 5 December 2019, *Bocero Torrico*, C-398/18 and C-428/18, EU:C:2019:105.

²⁰⁴ Regulation EC/883/2004 Art. 5(b).

²⁰⁵ See, for example, the assimilation of foreign insurance or for the recognition of pensions (Regulation EC/1408/71 art 45.5).

²⁰⁶ See, for example, judgments of 9 July 1997, *d'Amico*, C-20/75, EU:C:1975:101 and of 22 February 1990, *Bronzino*, C-228/88, EU:C:1990:85, which assimilate unemployment status in other Member States for the purpose of obtaining benefits. See, for example, in relation to certain Swedish family benefits judgment of 15 December 2011, *Bergström*, C-257/10, EU:C:2011:839, on the recognition of certain Swedish family benefits and the requirement to prove certain minimum periods of work comparable to those performed in Switzerland by the claimant.

²⁰⁷ Regulation EC/883/2004 Art. 5. An example of an express exception to assimilation can be found in Annex XI Spain (point 4) of Regulation EC/883/2004 which, with the same legal value as the articles themselves, prevents the assimilation of foreign contributions to contributions made before 1-1-1967 for the calculation of (retirement) pensions.

lation of express conditions is still inconsistently found in their articles²⁰⁸. The ECJ has already recognized the effects of the assimilation of conditions in a generous way²⁰⁹ and the Preamble to the Basic Regulation clarifies the following issues²¹⁰:

1. The assimilation of conditions only comes into play once the applicable law has been identified. This technique cannot undermine the conflict rules of the Regulation by conferring jurisdiction on another Member State. At any rate, the main applicable legislation should not be confused with foreign legislation applied as a mere fact in an ‘ancillary’ manner through the assimilation of conditions²¹¹.

2. In the application of assimilation of conditions, the principle of proportionality must be considered. It is necessary ensure that any assimilation does not lead to objectively unjustified results or to the accumulation of benefits of the same type for the same period.

3. Although aggregation could be understood as an assimilation of foreign periods of insurance, residence or work, aggregation has its own regulation and must be considered apart.

The assimilation of conditions, as well as coordination itself, can only work if it is based on mutual trust between the social security institutions of the different national systems. In such a way that, unless fraud is proven, the validity and accuracy of the foreign documents proving the assimilable conditions must be accepted¹³³. Moreover, assimilation only occurs between similar or identifiable conditions because of their similarity or because they fulfil a certain similar function, without the need for them to be identical. In fact, some conditions have only been assimilated once certain concordances have been established, as is the case, for example, with the levels of invalidity in

²⁰⁸ See, for example, Regulation CE/883/2004 Art.67 which assimilates the foreign residence of family members to national residence for the purpose of recognizing family benefits. 133. See judgments of 2 May 1996, Paletta, C-206/94, EU:C:1996:182, and of 2 December 1997, Dafeki, C-336/94, EU:C:1997:579.

²⁰⁹ Judgments of 21 January 2016, Knauer, C-453/14, EU:C:2016:37, and of 18 December 2014, Larcher C-523/13, EU:C:2014:2458.

²¹⁰ See Recital 10, 11 and 12 of the Preamble of the Regulation EC/883/2004.

²¹¹ The assimilation of conditions only allows that the legislation applied as the principal legislation consider, for the fulfilment of the requirements it imposes, the legal effects deriving from the application of the legislation of other Member States, but as mere facts or conditions allowing its own application. Inextenso Carrascosa Bermejo, Dolores thesis (2003) “La coordinación comunitaria de los sistemas nacionales de seguridad social: determinación de la Ley nacional aplicable. Recognition and calculation of the right to a contributory old-age pension” specially p. 153. URI: <https://hdl.handle.net/10016/11723>

certain Member States²¹². Again, the need for some basic harmonization seems essential for coordination to work.

4. Aggregation of periods and *pro rata temporis*

To meet the requirements of the competent legislation, aggregation (or ‘totalization’) allows periods of insurance, employment, self-employment or residence completed under the legislation of another Member State to be considered as if they had been completed under the legislation which will recognize the benefit or is calculating it. Aggregation of periods, through the fiction that they have been generated under the competent legislation, allows the person concerned to fulfil, for example, the contribution period required under such legislation, protecting the ongoing social security rights of those whose insurance or residence careers have been fragmented by migration. This technique may also be relevant in the subsequent calculation of benefits²¹³.

In order to avoid controversy, the national legislation under which such periods were covered shall be the sole competent authority for their definition, admission and accreditation, and their nature cannot be questioned in the framework of the foreign legislation that aggregates or assimilates them.

In principle, aggregation applies to all coordinated benefits²¹⁴, except only for the recognition of a pre-retirement benefit²¹⁵. On the other hand, the failed proposal to amend the Regulations only allowed aggregation for the purpose of obtaining an unemployment benefit if a minimum of 3 months of contributions had been paid in the Member State where the unemployed person becomes unemployed, whereas under the current Regulations the right to aggregation arises from the first day of work²¹⁶.

²¹² See Regulation EC/883/2004 Annex VII for four of the founding states of the EEC: France, Italy, Belgium and Luxembourg.

²¹³ Where only national contributions are taken into account, gaps in contributions due to insurance in another Member State during the reference periods considered have caused serious problems in the calculation of pensions. See, for example, the Spanish system for calculating pensions (judgment of 17 December 1998, Grajera C-153/97, EU:C:1998:615; judgment of 21 February 2013, Salgado González, C-282/11, EU:C:2013:86 and ECJ 28-6-18, Crespo Rey case C-2/17, EU:C:2018:511; all these judgments without taking into account the changes in Regulation EC/883/2004 Annex XI Spain (2)(a), which do not solve all the problems). See CARRASCOSA BERMEJO, D.: «Base reguladora de la jubilación para migrantes tras el asunto Salgado González». *Aranzadi Social* n° 9/10, enero/febrero 2014.

²¹⁴ Regulation EC/883/2004 Art.6.

²¹⁵ Regulation EC/883/2004 Art.66.

²¹⁶ At any rate, the proposed EC amendment provided that the worker retains any entitlement that may exist under the legislation of the previous State of employment which becomes competent again if he/she does not reach such a period of three months. In short, under the current Regulations, a migrant who

a. *Pro rata temporis*

The *pro rata temporis* is a supplement to the aggregation in the procedure for calculating pensions²¹⁷, which makes it possible to adapt the amount of the pension to the specific contribution effort made in the State that calculates it. The *pro rata temporis* is simply the percentage, a fraction, resulting from dividing the specific time during which the person concerned was subject to that national legislation (numerator) by the insurance period completed in all the systems involved in his insurance career (denominator). For its application, the following issues must also be considered:

1. The calculating State is only required to take into account periods of insurance completed before the risk covered by the benefit being calculated materializes. This requirement is somewhat confusing when deciding on the computation of fictitious periods that are difficult to locate in time.
2. In the case of type B pensions (retirement or invalidity pensions calculated on the basis of the number of contributions made), the number of years of contributions associated with the payment of a full or maximum pension under each legislation must be taken into account. In effect, the totalization of foreign periods is limited until this number of periods is reached, as it is unreasonable to penalize - via *pro rata temporis* - those who worked and contributed for the longest time²¹⁸.

5. Non-accumulation of benefits and/or income

Generally speaking, anti-cumulation legislation aims to mitigate or prevent the accumulation or simultaneous recognition of several social security benefits in favor of the same beneficiary, in order to avoid overprotection. The aim is to avoid their unjust enrichment, taking into account the limited nature

has worked for one year in Member State X who migrates to State Y where he/she works for 1 month, if he/she becomes unemployed in the latter State, he/she can access unemployment benefits in State Y as if he/she had worked there for 13 months. Under the failed Reform Proposal, however, he would not get any benefits in State Y, but the competent State would be State X which would have to total the month worked in State Y. Moreover, under the Proposal, the migrant would be entitled to have his or her unemployment benefits exported in cash from State X to State Y, and would have to register with the employment services of State Y by fulfilling the obligations required of recipients of unemployment benefits under the legislation of that Member State (see the proposed Art. 64a of Regulation EC/883/2004).

²¹⁷ Unlike for the recognition and calculation of short-term benefits (such as unemployment, sickness benefits in cash, etc.), where only one legislation applies, for the calculation of pensions, all the legislations under which the migrant was insured for a period of more than one year are competent and apply.

²¹⁸ Regulation EC/883/2004 Art.56(1)(a).

of public available resources and the need to achieve an equitable in their distribution. The mere existence of anti-cumulation rules in the Regulations is controversial, as there is not a supranational EU social security system with its own internal logic. Thus, the necessarily negative impact on the coverage of the migrant can only be possible on the benefits that were obtained precisely thanks to the application of the coordinating Regulations, for example, thanks to aggregation. It is therefore impossible for the coordinating Regulations, because of their purely protective nature, to lead to the reduction or suppression of a benefit recognized exclusively under the national social security legislation, as the Court of Justice itself has reiterated²¹⁹. Whether a national legislator adopts national anti-cumulation provisions they must also be coordinated:

1. The basic anti-cumulation rule stipulates that the right to receive several benefits of the same nature relating to the same period of compulsory insurance cannot be conferred or maintained - a derived right and an original right never have the same right - (Regulation EC/883/2004 art.10). The practical application of this principle would start with the prevention of the very accumulation of benefits through the mandatory application of a single national rule competent for the recognition of a benefit²²⁰.

2. In the chapter on pensions (old-age and survivors' pensions, but also invalidity pensions), alongside the ad hoc pension calculation system based on aggregation and *pro rata temporis* established under Regulations, there are specific anti-cumulation rules. Their aim is to coordinate the possible simultaneous application of national anti-cumulation rules that reduce, suspend or suppress their own pension when they detect cumulation with pensions and/or income paid in other Member States. In short, the Regulations seek to limit the negative effects of an uncoordinated application of such national anti-cumulation clauses on the pension rights of migrants²²¹. With this aim in mind, firstly, the following

²¹⁹ There is no Community anti-cumulation rule in the field of pensions, as the Court of Justice recognised very early on that the Regulation cannot reduce the amount of a pension acquired exclusively under national legislation by cumulating it with two or more pensions recognised in other Member States (Judgment of 21 October 1975, Petroni, C-24/75, EU:C:1975:129). See also Recitals 29 to 31 of the Explanatory Memorandum to Regulation EC/883/2004.

²²⁰ See, for example, Regulation EC/883/2004 art.68.1, choosing between the concurrent ones in relation to family benefits. Moreover, in cases where more than one national rule finally applies, techniques are put in place to prevent overprotection. See, for example, the secondary role of the national law that recognizes a differential supplement on the full family benefit recognized in another Member State Regulation EC/883/2004 art.68.2) or the aforementioned *pro rata temporis* in the case of pensions. On the need for dialogue between administrations to achieve a fair distribution of family benefits, see judgement of 25 April 2024 C-36/23, ECLI:EU:C:2024:355.

²²¹ See Regulation EC/883/2004 Art.53, 54 and 55 This regulation was laid down in Regulation EC/1248/1992.

general limitations apply to all types of overlapping, i.e. irrespective of whether the overlapping is between pensions of the same or different nature²²²:

a) A national institution may reduce, suspend or discontinue its pensions on the basis of accumulation with foreign income or benefits, “only where the legislation it applies provides that foreign-acquired earnings or benefits are taken into account”. Therefore, the national provisions must be ‘external’ (explicitly referring to the foreign origin of the overlapping income or benefits) in order to be applicable.

b) National anti-cumulation rules, as a general rule, shall apply on gross amounts “before deduction of taxes and contributions”.

c) The prohibited overlapping may not relate to benefits obtained in another Member State “on the basis of voluntary or optional insurance”.

d) Where only one State applies its anti-cumulation rules for simultaneous receipt of foreign benefits or income, you may only reduce your pension up to the amount received in those States.

Secondly, in the specific context of an accumulation of benefits of the same nature, it is established that a national anti-cumulation rule cannot be applied to a pension calculated on a *pro rata temporis* basis and, therefore, as a result of aggregation²²³. It can only be applied to an independent national pension (neither totalized nor *pro rata*) in certain cases: on the one hand, when it is a type A pension (of an amount independent of the contribution effort) or, on the other hand, when it is a type B+A pension (its amount is determined on the basis of a fictitious period considered to have been completed between the date of the materialization of the risk and a later date). In the latter case, it is also required that the accumulation be with another type B+A or type A pension. Furthermore, it is a prerequisite for the application of an anti-cumulation rule for Type A and Type B+A pensions that these are expressly mentioned in Annex IX of Regulation EC/883/2004. Precisely the failure to comply with the latter requirement of inclusion in the relevant Annex prevented the application of an anti-cumulation rule on a national pension considering its accumulation with another foreign retirement pension of the same nature²²⁴.

²²² Regulation EC/883/2004 Art.53(3). Pensions are of the same nature if they have been calculated or awarded on the basis of the periods of insurance or residence completed by the same person. There is an accumulation of pensions of different nature when the above requirement is not fulfilled. Thus old-age pensions are of the same type and an old-age pension and a widow’s or widower’s pension are of different types.

²²³ Regulation EC/883/2004 Art.54(2).

²²⁴ Judgment of 15 March 2018, Blanco Marqués, C-431/16, EU:C:2018:189.

Finally, with regard to the cumulation of pensions with benefits of a different nature²²⁵, the application of the national anti-cumulation rules on either separate or pro-rata pensions or both is allowed. In the first case, the amount of the reduction, suspension or withdrawal of the national pension itself has to be divided by the number of benefits received. In the second case, pro rata temporis is applied to the negative consequences provided for by the national rules in order to avoid excessively detrimental consequences for the interests of migrants.

6. Exportability of benefits

The exportability of benefits, within the framework of the territorial application of the Regulations, prevents the change of residence of the beneficiary to a Member State other than that of the debtor of such benefits from entailing the forfeiture or suspension of such rights, or the modification, reduction or confiscation of their amount²²⁶. This mechanism for preserving acquired rights makes it possible to export benefits that have not been recognized under the coordinating Regulations. This principle protects not only the migrants but also the sedentary worker who has never exercised his/her freedom of movement from an professional point of view and, once retired, decides to change his/her place of residence to another Member State and export his/her national pension there.

In principle, all cash benefits are exportable, the main exception being the special non-contributory “SNCB” benefits mentioned in Annex X of Regulation EC/883/2004 (see section II.C.b). These subsistence benefits are extremely linked to the economic situation of the beneficiary in the Member State where he/she resides and which pays them. For this reason, their exportability to another Member State may lead to a perversion of their purpose and could prevent the state of need that motivated them from being checked.

There is also reluctance on the part of national schemes to fully export unemployment benefits to beneficiaries who wish to seek employment in another Member State²²⁷. The difference in living standards may discourage a beneficiary

²²⁵ Regulation EC/883/2004 Art.55.

²²⁶ Regulation EC/883/2004 Art. 7 “Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his family reside in a Member State other than that in which the institution responsible for providing benefits is situated.”

²²⁷ Partial or temporary unemployment benefits, when the employment relationship has not ended, are not exportable. See AC Decision n° U3 12/6/2009.

receiving a high benefit from actively seeking employment if the Member State of destination is one with a lower standard of living. In addition, the debtor social security institution will want to be able to apply all active employment policies to its beneficiary in order to enable him to return to the labour market as soon as possible. It should also be emphasized that it will be able to exercise greater control over possible fraud on its own territory. These reasons led to the creation of a special exportability regime (Regulation EC/883/2004 art.64) which allows export only between two periods of employment, and not before the unemployed person is at the disposal of the employment services of the Member State which owes him/her the benefit and which intends to relocate him/her for a minimum period of 4 weeks. At the end of this period, the unemployed person may be exported for a period of 3 months after leaving the employment services of the State of origin, which may be extended by the debtor institution for a further 3 months without specifying the conditions to be met²²⁸. The unemployed person must register, within 7 days, as a jobseeker with the services of the Member State of destination of the export and submit to the control procedure organized there, as well as comply with the conditions laid down by the legislation of that Member State. If the jobseeker returns to the Member State of origin before the expiry of these time limits, he will continue to receive the benefit to which he is entitled, but if he returns after the expiry of the time limit, he may lose all his entitlements.

The underuse of this exportability channel²²⁹ and the desire to facilitate the mobility of jobseekers led the failed 2016 Commission Proposal to extend the export period to 6 months.

7. Administrative collaboration

This principle is essential for coordination, the proper functioning of which requires the various Member States to exchange information, cooperate and provide mutual assistance in accordance with the common procedural

²²⁸ It has been held to be in conformity with EU law for the Dutch administration to refuse in principle, albeit with reasons, any request for extension, and to accept it only when the person concerned is included in a selection procedure with a chance of getting a job or when he submits a declaration of intent from an employer offering him real prospects of employment in the State of export to be extended (Judgment of 21 March 2018, Schiphorst, C-551/16, EU:C:2018:200). On the reluctance of some States to such an extension see CARRASCOSA BERMEJO, D. "Chapter 19. The Legal Status of EU National Jobseekers: op. cit. p. 381-382

²²⁹ DE WISPELAERE, F., DE SMEDT, L., & PACOLET, J. (2022). Export of unemployment benefits. Report on U2 portable documents. Reference year 2020. Publications Office of the European Union. <https://doi.org/10.2767/327721>.

channels laid down in the Implementing Regulation (Regulation EC/987/2009 art.76). The mutual trust can only be maintained if fraud situations are effectively combated with the help of the ELA. A concept of fraud, which had been advanced in an AC Decision and by the ECJ case-law, was included in the failed Proposal for amendment of the coordination Regulations²³⁰.

Relations between social security institutions are handled through electronic documents thanks to EESSI (Electronic Exchange of Social Security Information) which, after many delays, became operational in 2019.

From an institutional point of view, administrative collaboration is promoted by the Administrative Commission for the Co-ordination of Social Security Systems or AC, which is composed of one government representative from the 27 Member States, assisted, where necessary, by technical advisors. This body adopts interpretative (non-legally binding) Decisions and Recommendations or certain guidance notes on telework, already mentioned in this paper (see section III.A.d). The AC is also in charge of setting the administrative procedures related to the application of the Regulations, encourages the exchange of good practices, promotes the use of new technologies for the application of the coordination or submits to the Commission proposals to improve and update the coordination Regulations.

There is also an Advisory Committee for the Coordination of Social Security Systems, composed of a representative of the governments of the Member States, a representative of the trade unions and a representative of the employers' organizations. At the request of the Commission, the AC or on its own initiative, it may examine problems arising from the application of the coordination regulations and may deliver opinions on the subject to the AC or make proposals for the revision of certain provisions.

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