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SOCIAL PROTECTION OF (IM)MIGRANTS BY THE EU SOCIAL SECURITY COORDINATION SCHEME

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Summary

As we could see above, the EU Coordination Regulations on social security are no longer the only instrument that deals with the social protection of migrant workers (e. g. cross border health care directive, etc.). Indeed, the Coordination Regulations do work within a wider environment of the European Union, with a growing realisation of an internal market. This leads to globalisation and increased migration, characterised by new patterns, including more temporary migrant workers and migration by persons other than the traditional economically active migrant persons.

The Coordination Regulations were confronted with a growing intrusion of fundamental principles of EU law such as the free movement of workers, services and goods, European citizenship, and the protection of the fundamental rights of human beings.

As a result of these challenges, it might have to be accepted that the Coordination Regulations, although they still have a very important role to play in the social protection of migrant persons, are no longer the only instruments. Different parallel coordination instruments are emerging from the application of EU primary law.¹

In this article we wanted to introduce the main logic and basic provisions of the mainstream social security coordination in the European Union. This regulations will be immediately applicable when any new candidate country will join the EU. Basically every migrant persons are potential user of these provisions.

Key words: migrant workers, social protection, EU, EU social security coordination.

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¹ Yves JORENS (ed.) - Bernhard SPIEGEL (ed.) - Jean-Claude FILLON - Grega Straban: Key challenges for the social security coordination Regulations in the perspective of 2020, trESS Think Tank report 2013 pp.7-8.

INTRODUCTION

Migrant workers are among the most excluded from even basic coverage by social protection instruments and schemes, in particular undocumented migrant workers. They risk losing entitlement to social security benefits in their country of origin due to their absence and may at the same time encounter restrictive conditions under the social security system of the host country. They may contribute to social security schemes, either in their home countries or countries of destination. They may face constraints in the portability of these rights. Schemes may have long residency requirements, making it difficult for temporary migrants to claim their benefits, effectively amounting exclusion from any form of social protection when engaged in temporary or informal work.

In certain parts of the world one of the most accepted solution is the social security coordination mechanism. In a wide sense there are three sources of international provisions for the coordination of social security systems:

1. bilateral agreements;
2. multilateral agreements;
3. supra-national laws (social security coordination regulations in EU).

Eventhoughsocialsecurityregulation is traditionally perceivedas a national prerogative par excellence, but at the same time social security increasingly has become subject to international rules and coordination. This not only holdstrue with reference tothe European Union level. Various economic and social rights treaties and other international documents deal with social security.²

This article deals with the social security coordination instruments currently in place. First, a very brief introduction to bilateral agreements will be provided, and then multilateral and supra-national instruments will be presented.

1. BILATERAL AGREEMENTS

Bilateral agreements – as shown by their name – *are unanimous agreements that are concluded by two states and elicit legal effects*. In the majority of cases bilateral agreements tend to reflect migration patterns between countries.

Their great advantage is that as they are concluded between two states only, they are better placed to facilitate the unique features of each country's social security system than so-called multilateral agreements involving several states.

In practice, bilateral agreements made between individual states vary greatly in terms of personal scope, material scope, etc.

²See, e.g., Art. 22 of the Universal Declaration of Human Rights (UDHR); Art. 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); Art. 22 of the Revised European Social Charter (RESC); and materials of the International Labour Organisation (ILO). See also Art. 34 of the Charter of Fundamental Rights of the European Union (CFR).

Bilateral agreements vary in terms of *personal scope*. Some bilateral agreements are restricted in this respect covering only nationals of the contracting parties, thus the requirement of nationality needs to be met. Others, on the other hand, are unrestricted and apply to any person who stays lawfully in the territory of a given state and is covered by the social security systems in the contracting parties (regardless of the given person's original nationality).

Bilateral agreements also vary in terms of their *material scope*: some of them may be restricted to certain social risk(s) or confined to contributory (insurance-type systems) rather than non-contributory benefits.

Bilateral agreements vary greatly in spite of the Council of Europe (Strasbourg, 1949) having produced a set of model provisions for bilateral agreements. These model provisions represent a guide for those states and legal experts that wish to conclude social security coordination agreements. The model provisions are not binding and leave states with a great deal of flexibility to conclude a bilateral agreement best suited for their needs and requirements. Their aim is to make the negotiation and implementation of bilateral agreements simpler and quicker. Once two states have agreed to coordinate their social security systems they will share the problems, expense and risk entailed in the complexity of drafting their own provisions. The model provisions of the Council of Europe cover all four of the basic principles of social security coordination: 1. equality of treatment, 2. determination of the applicable legislation, 3. maintenance of acquired rights and 4. export of benefits.

2. MULTILATERAL CONVENTIONS

Multilateral instruments of coordination are typically prepared by international organisations. These multilateral conventions are made available for their member states to join or to have them ratified by the organ entitled to ratify international conventions in the given state. It is important to note that the member states of the international organisation are not obliged to ratify these instruments but should they choose to do so they shall be bound by the provisions. In Hungary, the Parliament is entitled to ratify and to promulgate the ratified convention in the form of an act. The ratified international norm becomes thereby part of domestic law.

There are two principal international organisations concerned with establishing multilateral social security coordination instruments that affect Europe.

1. One is the International Labour Organisation (hereinafter: ILO), which is a universal type of international organisation, i.e. its norms may potentially cover all the countries of the world and its conventions may be accepted in the majority of the countries of the world (Member States).

2. The other is the Council of Europe (hereinafter: CoE), which is a regional international organisation in terms of its geographical scope.

The activities of these two organisations will be briefly presented below.

2.1. THE INTERNATIONAL LABOUR ORGANISATION

ILO was established in 1919 as a world-wide organisation committed to protecting employees' labour and social rights by a) raising health and safety standards, b) promoting the equality of opportunities, c) fighting social exclusion and d) campaigning for the enforcement of measures which aim at safeguarding dignity at work.

Based on ILO's objectives mentioned above, it can be stated that the organisation has always been involved in protecting the social security rights of migrant workers. In 1925, ILO adopted its first coordination instrument, Convention No. 19 on Equality of Treatment (Accident Compensation) which provides for the equal treatment of the nationals of the contracting parties in respect of industrial injuries.

Convention No. 48 on Maintenance of Migrants' Pensions Rights was adopted in 1935 and provides for the exportability of pensions as well as their aggregation and pro-rata payment.

However, one of the most outstanding and important conventions is Convention No. 102 of 1952 on Minimum Standards of Social Security, which was the first convention setting up the basic requirements for social security standards.

These ILO Conventions will be briefly presented below.

2.1.1. CONVENTIONS ON MAINTENANCE OF MIGRANTS' PENSIONS RIGHTS (1935) AND ON MINIMUM STANDARDS OF SOCIAL SECURITY(1952)

It frequently occurs that persons who work in a foreign country, in spite of being employed legally and paying contributions, do not receive the benefits due to the nationals of that country. They face the risk that they lose their entitlement at home during their stay abroad and at the same time they do not receive benefits in the country of employment either. This may happen due to the lack of their citizenship or residence, or due to the short period of their employment. Therefore it is particularly important for them that their access to benefits be regulated in legislation and that they maintain their entitlements obtained after returning to their home country.³ ILO also recognised the importance of these problems, therefore conventions on social security constitute a major part of its activity focussing on the protection of migrant workers.⁴

³ ILO 2004, p. 77.

⁴ Ryszard CHOLEWINSKI: Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment Clarendon Press, Oxford 1997, p. 113.

The first such convention was Convention No. 48 of 1935 concerning the maintenance of migrant persons' pension rights.⁵ The Member States ratifying the Convention undertake the obligation to maintain and aggregate the rights acquired or to be acquired in invalidity, old-age, widows' or orphans' insurance, and to pay such benefits abroad, but only in the case of reciprocity. The propagation of the ratification of the convention was suspended in 1982 as it was replaced by Convention No. 157 ratified at that time. Today the significance of this Convention lies mainly in the fact that all the states formed after the disintegration of Yugoslavia are parties to it,⁶ and benefits to each other's nationals are provided on the basis thereof.

Convention No. 102 of 1952 on *Minimum Standards of Social Security* is the main document in respect of ILO's activities concerning social security.⁷ However, it provides for the rights of foreign employees only in a few words. Part XII of the Convention – which consists of one Article only – provides for the rights of non-national employees. According to the first paragraph, non-national residents shall have the same rights as national residents but special rules may be prescribed in respect of benefits payable mainly out of public funds, while the second paragraph extends the scope of contributory social security schemes to them. However, the application of the second paragraph may be made subject to the existence of a bilateral or multilateral agreement providing for reciprocity, which significantly weakens the protection given by Convention No. 102.

The practical significance of the Convention is primarily that it specifies the risks and the types of benefits – but the scope of the provisions protecting migrant workers is very narrow. At the same time, with 41 ratifying States⁸ it is a relatively widely-known Convention, which at least – even if in short – refers to the problems of migrant workers.

⁵ Convention No. 48 concerning the Establishment of an International Scheme for the Maintenance of Rights under Invalidity, Old-Age and Widows' and Orphans' Insurance, 1935.

⁶ The parties to the Convention include Slovenia, Croatia, Bosnia-Herzegovina, Macedonia, Serbia and Montenegro as well as Italy and Israel. Spain, the Netherlands and Poland denounced the convention just like Hungary, which ratified it in 1937 and denounced it in 1983.

⁷ Lays down the minimum standard for the level of social security benefits and the conditions under which they are granted. It covers the nine principal branches of social security, namely medical care, sickness, unemployment, old age, employment injury, family, maternity, invalidity and survivors' benefits. To ensure that it could be applied in all national circumstances, the convention offers states the possibility of ratification by accepting at least three of its nine branches and of subsequently accepting obligations under other branches, thereby allowing them to progressively attain all the objectives set out in the convention. The level of minimum benefits can be determined with reference to the level of wages in the country concerned.

⁸ Hungary did not ratify this Convention.

2.1.2. EQUALITY OF TREATMENT (SOCIAL SECURITY) CONVENTION (1962)

The detailed rules concerning migrant workers' equal access to social benefits are specified in the ILO Convention No. 118.⁹, which is far more detailed than the one discussed above. Its aim is to provide equal treatment for the nationals of the states which ratified the Convention in the listed areas of social security such as medical care, sickness benefit, maternity benefit, invalidity benefit, old-age benefit, survivors' benefit, employment injury benefit, unemployment benefit and family benefit. The ratifying states may choose in which areas they accept the obligation of providing the equal treatment of non-nationals and in which they do not. The provision of the benefits may not be made subject to the period of stay in the given country with the exception of contributory benefits – but medical care, sickness benefit, employment injury benefit and family benefit shall be provided for everybody on the condition of reciprocity.

In respect of the Convention, reciprocity means not only that the migrant worker's state of origin has ratified the Convention but also that it has accepted the obligation in respect of the given area of social security. This strictness is one of the major deficiencies of the Convention as it may only be considered to be a framework recommendation replacing bilateral social policy agreements. What is more, the Convention specifically refers to the possibility of departing from these provisions in bilateral agreements if this does not violate the rights of third-country nationals. For this reason, in spite of the fact that 38 states ratified it,¹⁰ the practical importance of this Convention lies only in the fact that the rights included therein have to be provided to stateless persons and refugees.

2.1.3. MAINTENANCE OF SOCIAL SECURITY RIGHTS CONVENTION AND RECOMMENDATION (1982)

Convention No. 157 adopted at Session 68 of the General Conference of ILO¹¹ is aimed at the maintenance and enforcement of social security rights acquired or to be acquired. Once again, this is of outstanding importance for migrant workers as it frequently happens that they are deprived of rights – for reasons of the insufficient length of the period of residence or return – which would otherwise be due to them. Therefore the Convention calls for the establishment of an international system which allows the maintenance of entitlements and their payment abroad.

The areas of social security covered by Convention No. 157 are the same as the ones listed in Convention No. 118. Ratifying states have the possibility to specify or to modify the content of these in bilateral agreements. This Convention does not

⁹ Convention No. 118 of 1962 concerning Equality of Treatment of Nationals and Non-Nationals in Social Security.

¹⁰ Hungary did not ratify this Convention either.

¹¹ Convention No. 157 of 1982 concerning the Establishment of an International System for the Maintenance of Rights in Social Security.

only require formal equality but it also specifies the ways these rights may be exercised, it determines the applicable legislation (Article 5), lays down the rules for adding together periods of insurance (Article 7) and states that benefits for which rights have been acquired lawfully shall be paid irrespective of the place of residence (Article 9 (1)). The more specific rules of this Convention could provide higher-level protection for migrant workers, which may exactly be the reason why only three states – the Philippines, Spain and Sweden – have ratified it to date.¹²

Recommendation No. 167¹³ adopted simultaneously with the Convention provides examples of the conclusion of bilateral agreements on rights acquired or to be acquired. The possible methods of providing the rights concerning the different benefits are laid down with a view to the fact that different states have largely different schemes. The practical significance of the recommendation is difficult to assess as it is not legally binding, but it presents useful examples of the conclusion of bilateral agreements.

2.2.THE COUNCIL OF EUROPE

The Council of Europe (CoE) was established in 1949 by 10 member states and by 2007 its membership covered 47 states spanning western, central and eastern Europe.¹⁴ The organisation is committed to ensuring the protection of social rights and achieving increased social cohesion. Its instruments in the field of coordination are generally drafted by an Expert Committee on Social Security and adopted by the Committee of Ministers of the Council of Europe. The multilateral coordination instruments drafted and adopted are detailed below.¹⁵

2.2.1. THE EUROPEAN INTERIM AGREEMENT ON SOCIAL SECURITY SCHEME RELATING TO OLD AGE, INVALIDITY AND SURVIVORS

This instrument entered into force in 1954 and was intended as a first step in the coordination of social security within the member states of the Council of Europe. It applies to benefits for old age, invalidity and survivors (but not death grants) provided that they are not paid as part of an employment injury scheme.

Despite including both contributory and non-contributory schemes, the Agreement does not apply to social assistance or special schemes for civil servants or war invalids.

¹² The latter two states also concluded a bilateral agreement on the exercise of the rights provided for in the Convention, the importance of which is diminished by the fact that both are members of the social security coordination system of the European Union.

¹³ Recommendation No. 167 of 1982 concerning the Establishment of an International System for the Maintenance of Rights in Social Security.

¹⁴ Hungary joined COE in 1990.

¹⁵ S. Günter NAGEL - Francis R. KESSLER: Social Security Law, Council of Europe, Kluwer Law International, The Netherlands, 2010 pp. 66-74.

The Interim Agreement primarily focuses on the equal treatment of migrants with respect to social security benefits. The principle of equal treatment (reciprocity) must be ensured for all nationals of the contracting parties. In practice, this means, when a national from one of the contracting parties ('home state') moves to the territory of another contracting party ('host state') he/she should receive the same social security benefits under the same conditions as the nationals of the host state. However, the right to equal treatment is not conveyed automatically as certain residence conditions may be required, for example in respect of non-contributory invalidity pensions.

Furthermore, the Interim Agreement provides that any bilateral or multilateral agreement concluded between two or more contracting parties should be extended to the nationals of all the other contracting parties. For example, if a national of a contracting party leaves his/her home state (State A) and moves to the territory of another contracting party (State B), and later to another contracting party (State C), the scope of the bilateral social security coordination agreement between State B and State C shall also cover the nationals of State A. For the purpose of the agreement between States B and C, the migrant from State A is treated as if he/she was a national of State B or State C and is entitled to the advantages derived from this agreement.

2.2.2. THE EUROPEAN INTERIM AGREEMENT ON SOCIAL SECURITY OTHER THAN SCHEMES FOR OLD AGE, INVALIDITY AND SURVIVORS

This instrument also entered into force in 1954 and it extends the equal treatment provisions of the European Interim Agreement on Social Security relating to Old Age, Invalidity and Survivors to schemes relating to medical care, sickness and maternity cash benefits, unemployment benefits, death grants, employment injuries benefits and family allowances.

The general coverage and structure of this Interim Agreement follows that of the Interim Agreement on Social Security relating to Old Age, Invalidity and Survivors, but the main rule is (except for employment injuries benefits) that the person in question must be a permanent resident in the territory of the contracting party in which he/she claims the benefit. One of the reasons for having two separate Interim Agreements is that some states may have been prepared to coordinate only short-term benefits (like sickness cash and maternity benefits) but not long-term ones (like old age pensions).

2.2.3. THE EUROPEAN CONVENTION ON SOCIAL AND MEDICAL ASSISTANCE

This instrument also entered into force in 1954. It essentially fills in the gap left by the two Interim Agreements described above. It covers those schemes where the granting of benefits is based on need and a lack of sufficient resources. These are typically benefits belonging to social assistance. The Convention provides for the

equal treatment of nationals from other contracting parties and limits the situations in which migrants are repatriated simply because they are in need of social assistance. It allows contracting states to impose certain minimum periods of residence before a person earns the right not to be repatriated because of their need of assistance. It further ensures that repatriation may only be applied when it is really necessary and does not offend any humanitarian considerations.¹⁶

2.2.4. THE EUROPEAN CONVENTION ON SOCIAL SECURITY

This instrument came into force in 1977 and represents much more comprehensive coordination than that provided for under the Interim Agreements. The European Convention on Social Security extends the coordination of social security systems beyond the principle of equal treatment by providing for the principles of a) the determination of the applicable legislation, b) the maintenance of acquired rights, and c) the export of benefits.

The European Convention on Social Security is not divided into separate legislation for long and short-term benefits but covers all of the following schemes: a) sickness and maternity benefits, b) invalidity benefits, c) old age benefits, d) survivors benefits, e) occupational injury and disease benefits, f) death grants, g) unemployment benefits, and h) family benefits.

The wider ranging European Convention is thus intended to replace the Interim Agreements by developing a more comprehensive coordination mechanism. It should be noted that the provisions of the Convention can be divided into two groups: a) those that take immediate effect as soon as a state ratifies the Convention and b) those that will not come into effect until implementing measures are concluded between the contracting parties. In the latter case, even though the state has ratified the Convention, it is not bound by these particular provisions until the conclusion of a bilateral agreement with another contracting party for its application. These provisions do not have immediate force and have therefore only the character of model provisions.

2.2.5. PROTOCOL TO THE EUROPEAN CONVENTION ON SOCIAL SECURITY

The Protocol extends the personal scope of the Convention to all persons who are, or have been, subject to the legislation of one or more of the contracting parties, as well as members of their families and survivors. This means that the personal scope of the Convention, as amended by the Protocol, is not limited to the nationals of the contracting parties only. The Protocol was adopted in 1994 but is not yet in force.¹⁷

¹⁶ S. Günter NAGEL - Francis R. KESSLER: Social Security Law, Council of Europe, Kluwer Law International, The Netherlands, 2010 pp. 75-78.

¹⁷ <http://www.minoritycentre.org/library/protocol-european-convention-social-security>(14.02.2017.)

2.2.6. THE EUROPEAN SOCIAL CHARTER (TURIN, 1961, AND REVISED ESC IN 1996)

The European Social Charter is one of the most important international conventions of the Council of Europe for the promotion of the nationals' fundamental freedoms and social security. It was signed by the most developed West European countries dedicated to securing human and social rights under the aegis of the Council of Europe in Turin, on October 19, 1961.

The European Social Charter supplements the European Convention on Human Rights in the field of economic and social rights. It lays down various fundamental rights and freedoms and establishes a supervisory mechanism based on a system of collective complaints and national reports, guaranteeing their respect by State Parties. The Charter was amended in 1996 and is now ratified by 43 of the 47 Council of Europe member States (32 being bound by the Revised Charter and 11 by the original Charter).

Many of the rights guaranteed by the Charter have relevance to migrant workers. Articles 18 and 19 contain rights governing exclusively the rights of migrant workers and their families to protection and assistance. Migrants are considered more vulnerable to, for example, racism, discrimination, exclusion, and other difficulties, such as finding suitable accommodation. Article E of the Revised Charter, contains a non-discrimination clause.¹⁸

The bearing of the Social Charter on the EU came to the foreground with the Treaty of Amsterdam (1997) when the Social Charter was incorporated in the Treaty as one of the main reference sources for employees' and social rights to be followed by the Member States.¹⁹

3. SUPRA-NATIONAL LEGISLATIONS: EUROPEAN UNION

3.1. PRELIMINARY LEGAL ISSUES FOR SUPRANATIONAL SOCIAL SECURITY COORDINATION

Supra-nationality is embodied in establishing a political organisation over the nations with instruments which may be binding upon the Member States. Supra-national law means that Member States, by joining the community, voluntarily renounce part of their sovereignty and surrender it to the supra-national body. Supra-national norms are created by the small number of supra-national bodies in the world. The most important, and for us decisive, supra-national organisation in

¹⁸ http://www.coe.int/t/democracy/migration/bodies/escr_en.asp (15.02.2017.)

¹⁹ Hungary signed the European Social Charter and its Additional Protocol in 1991, and ratified it in 1999.

Europe is the European Union, which is currently comprised of 27 Member States. The European Union seeks to improve the standard of living of its people by continuously developing an internal market. The four freedom principles constitute the prerequisite to an internal market: the free movement of goods, services, capital and persons over the boundaries of the Member States.

The great majority of supra-national (Community) norms is binding upon the Member States. In contrast with classic international legal norms (e.g. ILO), Member States are not free to decide whether to ratify supra-national norms or not. These become part of domestic law automatically – in other words as a norm taking immediate effect (e.g. Regulation) – or with the help of implementing measures issued by the competent legislative organs of the Member State (e.g. Directive). A supra-national instrument of this kind is not only binding on the Member States but it is supreme over any national (domestic) legislation dealing with the same matters. In other words if national law conflicts with supra-national law, then the latter is supreme and must be applied over the former. This is the principle of supremacy of Community law.²⁰

In the EU it was clear right from the outset that in order to enable the free movement of workers a migrant's social security position would have to be protected. In the early stage of integration it was obvious that people are not going to want to move from their home state if they lose all their acquired rights to their pension, or they would not be able to claim unemployment benefit if they were to lose their job after they have moved to another Member State. Provisions for the coordination of social security within the Member States of the European Economic Community (as it was then called) have been in place since the birth of that institution in 1957 (Treaty of Rome). First, economic integration was focussed on and social issues were somewhat pushed into the background. However, the European Economic Community has evolved considerably since the 1950s. The emphasis is no longer purely on the economy but from the beginning of the 1970s also on the need for social regulation and the protection of social rights. One of the major instruments of this is the coordination of the social security schemes of the Member States.

The primary instrument for the coordination of social security within the European Union is Regulation 1408/71 (hereinafter: Regulation), which belongs to secondary law and applies the *key principles* of a) equal treatment, b) determination of the applicable legislation, c) the maintenance of acquired rights, and d) the export of benefits.

The *material scope* of the Regulation covers the social provisions/risks listed in the European Convention of the Council of Europe and in the ILO Convention No. 102.

Initially, the *personal scope* of the Regulation was limited to employed persons who were nationals of the Member States and their families, but it has been gradually

²⁰ HAJDÚ József – HOMICSKÓ Árpád Olivér: Bevezetés a társadalombiztosítási jogba, Patrocinium, Budapest, 2016 pp. 128-129.

extended to the self-employed, to pensioners, to students and to civil servants – provided that there are no special schemes of social security for them on Member State level – and recently, pursuant to Regulation 1231/2010, to third country nationals. The necessary administrative measures for the application of Regulation 883/2004 (Basic Regulation: BR) are dealt with in Regulation 987/2009 (Implementing Regulation: IR). This provides detailed regulation for issues which are not dealt with or are regulated inadequately in the main Regulation. The *territorial scope* of the provisions of the EU social security coordination mechanisms has been extended to the four – non-EU – EFTA states.²¹

3.2. BRIEF HISTORY OF THE SOCIAL SECURITY COORDINATION

The Treaty of Rome, which founded the European Economic Community, set certain objectives and established Community Institutions necessary to attain them. One of these objectives was the free movement of workers. Article 42 of the Treaty provides for the adoption of social security measures necessary to realise this objective. The first such measure, Regulation No. 3, providing social security rights for employed migrant workers, pensioners and their dependants, was adopted by the Community in 1958. Regulation No. 3 on the coordination of social security schemes, later replaced by Regulations (EEC) No. 1408/71 and 574/72 and, finally, replaced and modernized by Regulations (EC) No. 883/2004 and 987/2009, which are currently in force (here after called ‘the Coordination Regulations’ or simply ‘the Regulations’). These aimed to contribute to the realisation of one of the fundamental principles within the European Union: the free movement of persons.

Taking into account the wide variety of social security systems, a coordination of all these systems was not an easy task. In the history of social security coordination, the Coordination Regulations had to be adapted at several intervals. This was not only to integrate new systems in the different enlargement phases of the European Union, but more essentially due to developments in the social security systems of the Member States themselves.

Indeed, the changing societal environments in which social security systems were developing forced the Regulation to modify its rules from time to time to be able to respond better to the need to protect migrant persons. One of the basic problems of law is that it is most of the time developed as a reaction to societal developments. Law follows reality or should follow it and is therefore often forced to catch up with it.²²

One of the most significant changes was to widen the personal scope of the coordination. As a result, the personal scope of the Regulation now covers migrant employed and self-employed persons, students, pensioners etc. and members of

²¹ Iceland, Norway, Liechtenstein and Switzerland.

²² Yves JORENS (ed.) - Bernhard SPIEGEL (ed.) - Jean-Claude FILLON - Grega Straban: Key challenges for the social security coordination Regulations in the perspective of 2020, tress Think Tank report 2013 p.7.

their families. However, it does not cover non-active persons i.e. those who have never worked and are not already covered as a member of the family of an employed or self-employed person.

3.3. THE AIM OF SOCIAL SECURITY COORDINATION

Coordination aims to protect the acquired social security rights of migrant persons moving within the European Union and the European Economic Area. The Regulations do not harmonise the social security schemes of the different Member States. Instead, by means of coordination, they protect the social security rights of migrant persons and their family members (e.g. by the recognition and aggregation of periods of insurance or employment acquired in another Member State, etc.).

The coordination of the social security schemes is a prerequisite for the enforcement of the principle of the free movement of persons – laid down in Article 48 of the Treaty of Rome. It enables workers, self-employed persons, pensioners, students and other categories of persons to effectively exercise their rights to move and reside freely within the EU and in wider sense within the European Economic Area. In order to achieve this, the EU has adopted regulations aimed at coordinating social security systems in all Member States.

As a result of the coordination regulations, in theory and in practice, EU citizens – and from 2003 third country nationals residing lawfully in the territory of the EU or EEA – moving (migrating) from one Member State to another shall not lose any of their social security rights earned when staying in one Member State. Although this may seem to be simple in principle, given the fact that the social security systems in all EU Member States differ substantially from one another, the coordinating instruments are quite complex to manage.²³

3.4. THE MAIN PRINCIPLES OF THE SOCIAL SECURITY COORDINATION

Regulation 1408/71 is based on a number of general principles which the ‘competent State’ must take into account when deciding whether a migrant worker or self-employed person is entitled to social security benefits. There are *four main principles*:

1. Equal treatment or prohibition of discrimination on the grounds of nationality

The Regulation clearly states that discrimination on the grounds of nationality is prohibited. Member States must not discriminate against the nationals of other Member States of the EU or EEA. In sum, the prohibition of discrimination based on citizenship is as follows: persons residing lawfully in the territory of a Member State

²³[http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/593783/EPRS_BRI\(2017\)593783_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/593783/EPRS_BRI(2017)593783_EN.pdf) (16.02.2017.)

to whom the Regulation applies are subject to the same obligations and enjoy the same benefits under the legislation of a Member State as the nationals of that State.

2. Principle of aggregation

This principle prescribes that periods of insurance and employment – necessary for awarding most of the social security benefits – acquired in different Member States shall be aggregated.

This principle has a bearing on cases when national legislation requires a worker to have been insured or employed for a certain period of time, for example, before he/she is entitled to certain benefits (e.g. sickness, old age, invalidity, unemployment benefits etc.). The aggregation principle means that the competent Member State must take account of periods of insurance and employment completed under another Member State's legislation when deciding whether a worker satisfies the requirement regarding the duration of the period of insurance or employment. The application of this principle means that the rights acquired by a migrant person – e.g. in the case entitlement to unemployment or sickness benefit – may be transferred directly from one Member State to another Member State.

3. Principle of exportability

This principle means that certain social security benefits may be claimed and paid anywhere in the European Union and EEA. Pursuant to this paragraph of the Regulation, the Member State obliged to pay the benefits is prohibited from refusing the payment of benefits to people resident in another Member State. It is important to note, however, that the principle of exportability does not apply to all social security benefits.

Different rules apply to exporting cash benefits (e.g. sickness benefit or pensions) and benefits in kind (e.g. medical assistance). As a rule, benefits in kind are governed by the rules of the country in which the person entitled to them resides or stays. If the 'competent state' is not the state of residence, the 'competent state' must reimburse the institution in the state of residence or stay its expenditure on benefits in kind.

4. Principle of one legislation applicable

A migrant person is subject at any given time to the legislation of one Member State only (the 'applicable legislation' principle). The rules on determining the applicable legislation aim to ensure that a person is insured according to the legislation of a single Member State at a time.

The legislation to which a migrant person is subject is applicable both for the levy of contributions and for the payment of benefits. The purpose of having one legislation applicable is to avoid conflicts of law (problems of collision) which could

arise from the application of the different criteria for coverage under the national social security schemes. The basic rule is that a person must be insured in the state where they work. (principle of *lex loci laboris*). Similarly, contributions shall be paid and benefits shall be provided in the state where the migrant person works,²⁴ regardless of their place of residence or the location of the employer.²⁵

3.5. PERSONAL SCOPE OF THE SOCIAL SECURITY COORDINATION

The personal scope of the Regulation covers all the migrant workers (employed or self-employed) who are the nationals of the EU, EEA or a third country, or are stateless/refugees staying or residing lawfully in the territory of an EU or EEA Member State. Similarly, the scope of the Regulation covers the members of family and surviving relatives of the above-mentioned group of persons. Surviving relatives need not be nationals of an EU or EEA State. The personal scope of the Regulation also extends to students, pensioners and employees in the public sector, in the case of students to those receiving vocational training and their members of family.

The personal scope of coordination is extended by Regulation 2010/1231 to nationals of a third (non-EU) country who reside lawfully in the territory of the EU or EEA. They are called third-country nationals.²⁶ However, the provisions of the Regulation are applicable to third-country nationals only if these persons are migrant workers (moving between Member States).²⁷

According to the personal scope - prescribed in Article 2 of the 883/2004/EC Regulation - the following persons are covered: a) nationals of a Member State plus EEA states (intra-EU migrants), b) stateless persons and c) refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors. The

²⁴ Article 13 of Regulation (EEC) 1408/71

²⁵ Yves JORENS - József HAJDÚ: Training and reporting on European Social Security, European Report, Gent, 2009. 126 p. (www.europa.eu.int)

²⁶ Since 1 January 2011, Regulation (EU) No 1231/2010 extends modernized coordination to nationals of non-EU countries (third-country nationals) legally resident in the EU and in a cross-border situation. Their family members and survivors are also covered if they are in the EU. It does not apply to Denmark or the United Kingdom. Regulation (EU) No 1231/2010 will be a source of rights, for example, in the case of a third-country national who has moved from one EU country to another for work, but whose children have stayed in the previous EU country. Non-EU nationals can continue to benefit from the previous EU coordination rules in cases concerning the United Kingdom as Regulation (EC) No 859/2003 (which extended Regulation (EEC) No 1408/71 to nationals of non-EU countries) continues to apply there.

²⁷ For example, if a US national resides and works in Hungary, he/she is not covered by the personal scope of the Regulation because of the absence of the element of migration in the EU. Although such a US national is actually a third-country national, his/her residence and employment in Hungary are indifferent with respect to EU coordination. The situation would be different if he/she extended his/her activity in the meantime and regularly visited another Member State (other Member States) for the purpose of performing work. In this case he/she is to be regarded as a third-country national and will belong to the scope of the regulation on account of his/her activity in another Member State. The Ministry of Internal Affairs decides who qualifies as a person legally resident in Hungary.

Regulation also applies to the survivors of persons who have been subject to the legislation of one or more Member States, irrespective of the nationality of such persons, where their survivors are nationals of a Member State or stateless persons or refugees residing in one of the Member States.²⁸

3.5.1. NATIONALS OF A MEMBER STATE: ECONOMICALLY ACTIVE AND INACTIVE PERSONS UNDER EU LAWS

The *economically active persons* are workers,²⁹ self-employed and services providers. In fact, the majority of EU nationals moving to another EU country do so to work. Consequently, as EU migrant workers contribute to the social welfare system of the host country, they should benefit from the same social advantage as national workers. This equal treatment provision is present in Article 45 TFEU – and reaffirmed in several secondary legislation instruments: Regulation 883/2004 on the coordination of social security systems and Regulation 492/2011 on freedom of movement for workers within the Union.³⁰ This right has been extended by the Court of Justice to family members that accompany the worker, although they derive their rights from the main holder. Family members from non-EU states also have these rights.³¹

However, a tougher regime can nevertheless be imposed on *job seekers* as an intermediate category between workers and economically inactive persons. The Court has held that a Member State may subordinate the entitlement to a job seeker's allowance to a residence requirement if such a requirement complies with the proportionality test and is independent of the nationality of the person concerned.³²

Economically inactive persons benefit from even fewer social assistance rights.³³ Economically inactive persons are defined by the fact that they do not have a job and are either not actively looking for a job or are not immediately available to work (or both), i.e. they are neither employed nor unemployed. Most of them, but not all, are not interested to work. Actually, people economically inactive have a varying degree of attachment to the labour market, which can be analysed from the viewpoint of their behaviour with regard to the three following main variables: Do

²⁸ Az Európai Unió szociális joga – különösképpen a szociálisbiztonságkoordinációra (Social law in the European Union – Social security coordination) JATE Press Szeged, 2008. pp. 176-179.

²⁹ Workers have the right to move to a different Member State, to look for work and be employed under the same conditions as nationals of that State (subject to a number of reserved areas as greatly varying according to country), number and benefit from the same social and tax advantages.

³⁰ The ECJ defended this provision on several occasions: C-237/94, O'Flynn v Adjudication Officer, (23.05.1996), C-337/97, Meeusen v Hoofddirectie van de InformatieBeheerGroep (8.06.1999), C-212/05, Hartmann v Freistaat Bayern (18.07.2007), C-527/05, Renneberg v Staatssecretaris van Financiën (16.10.2008).

³¹ http://europa.eu/rapid/press-release_MEMO-13-1041_en.htm

³² Case C-138/02, Collins v Secretary of State for Work and Pensions, 23.03.2004.

³³ The social security coordination regulations basically exclude them from their personal scope.

they want to work? Are they actively seeking a job? Are they available to start immediately in a new job? These variables are interrelated.³⁴

However, it is worth mentioning that the 2004/38 Directive introduced the right of permanent residence – and in its *Lassal* ruling (Case C-162/09, Secretary of State for Work and Pensions v Lassal, 7.10.2010) the ECJ confirms that once this right acquired, EU citizens residing in a different Member State than their country of origin are entitled to social assistance, even if they become a social burden for the host society.³⁵

3.5.2. SOCIAL PROTECTION OF STATELESS PERSONS (UNDER EU SOCIAL SECURITY COORDINATION)

Article 2 of the 883/2004/EC Regulation must be applied with the accordance of Subsection (b) Article 24 of the UN Status of Stateless Persons Convention³⁶ relating to the Status of Stateless Persons, which states that social security³⁷ is subject to the following limitations:

(i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;

(ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.

3.5.3. SOCIAL PROTECTION OF REFUGEES (UNDER EU SOCIAL SECURITY COORDINATION)

Article 2 of the 883/2004/EC Regulation must be applied with the accordance of Subsection (b) Article 24 of the UN Refugee Convention³⁸ relating to the Status of Refugees, which states that social security³⁹ is subject to the following limitations:

(i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;

(ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable

³⁴ http://ec.europa.eu/eurostat/statistics-explained/index.php/People_outside_the_labour_market

³⁵ <http://elib.kkf.hu/jogaink/data/24.htm>

³⁶ Convention relating to the Status of Refugees of 28 July 1951.

³⁷ Legal provisions in respect of employment, injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme.

³⁸ Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951.

³⁹ Legal provisions in respect of employment, injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme.

wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.

In sum, since then, UNHCR has offered protection and assistance to tens of millions of refugees, finding durable solutions for many of them. Global migration patterns have become increasingly complex in modern times, involving not just refugees, but also millions of economic migrants. However, refugees and economic migrants, even if they often travel in the same way, are fundamentally different, and for that reason are treated differently under international and European laws.

3.6. TERRITORIAL SCOPE OF THE REGULATION

The Regulation is a legal norm binding on each Member State of the EU or EEA as well as Switzerland.

The *EU Member States* are the following: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Greece, the Netherlands, Ireland, Poland, Latvia, Lithuania, Luxembourg, Hungary, Malta, United Kingdom, Germany, Italy, Portugal, Romania, Spain, Sweden, Slovakia, and Slovenia.

The *EEA Member States* are the following: Iceland, Lichtenstein and Norway.

3.7. MATERIAL SCOPE OF THE REGULATION

The Regulation aims at providing for social security schemes in their entirety. It is applicable for every general and special, contributory and non-contributory benefit. The following benefits are covered by the Regulation:

1. sickness and maternity benefits (including benefits in kind, or in other words medical care),
2. accident at work benefits,
3. old-age, invalidity and survivors' benefits
5. death grants,
6. unemployment benefits, and
7. family benefits.

The material scope of the Regulation does not cover social and medical assistance, occupational pension schemes and benefits for war invalids.

In addition to the classical social benefits, the material scope of the Regulation also covers so-called special non-contributory benefits. The list of special non-contributory benefits is provided in Annex X of Regulation No.883/2004. The state of residence is obliged to pay these social benefits and they are paid in the same Member State, which means they are not exportable.

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