Chapter 7
Sixty years of European social security coordination: achievements, controversies and challenges

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Introduction

Under the Juncker European Commission, renewed attention has been directed to Europe's social dimension.[1] Nevertheless, 'social Europe', we argue, has always been a reality, not least for people who are mobile[2] in Europe. From 1958 onwards, the Treaty included a strong legal basis for legislation in the field of coordinating social security. Now enshrined in Article 48 TFEU, this legal basis obliges[3] the legislature – the Council and the European Parliament – to take measures to provide, in the field of social security, protection to people who make use of their right to free movement. In this contribution, we will show that Europe has been trying to fulfil this duty to the best of its ability for the past 60 years. The Regulations currently in place are 'Basic' Regulation 883/2004 (European Parliament and Council 2004a) and 'Implementing' Regulation 987/2009 (European Parliament and Council 2009), hereinafter jointly referred to as the 'Coordination Regulations'. Little, however, is said in public and political debate – or, for that matter, in the 19 previous issues of this edited volume – of the importance of these rules in European social policy, mainly due, it seems, to the perception that they promote 'welfare tourism'[4] and 'social dumping'[5], but perhaps also due to the highly complex nature of the Coordination Regulations. There is a risk, therefore, of the importance of guaranteeing social rights in the case of (labour) mobility, today and in the future, being relegated to the background.

In 2019 we celebrated the 60th anniversary of the European coordination of social security systems. In the form of Regulations 3 (Council of the European Communities 1958a) and 4 (Council of the European Communities 1958b), this was one of the first

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1. For a comprehensive overview of initiatives, we refer to a recently published brochure 'Putting social matters at the heart of Europe: How the European Commission supported employment, social affairs, skills and labour mobility (2014-2019)' (European Commission 2019).
2. EU citizens moving between Member States, be it for reasons linked to work or for other reasons.
3. Article 48 TFEU: 'The European Parliament and the Council *shall* … adopt such measures…' (emphasis added). If the legislature does not take the required measures it does not discharge its obligation under Article 48 TFEU: C-443/93, Vougioukas, EU:C:1995:394, para 34.
4. Or the so-called 'welfare magnet' hypothesis, whereby migrants are attracted to countries that provide more generous welfare (Borjas 1999).
5. Vaughan-Whitehead (2003: 325) defines social dumping as 'any practice pursued by an enterprise that deliberately violates or circumvents legislation in the social field or takes advantage of differentials in practice and/or legislation in the social field in order to gain an economic advantage, notably in terms of competitiveness, the state also plays a determinant role in this process'.

domains in which the Community was active.[6] Entered into force on 1 January 1959, the main objective of these regulations was to protect the social security rights of migrant workers and their families. This 20th edition of *Social policy in the European Union: state of play* is an appropriate moment to reflect on the achievements, but also on the controversies and the challenges that this legislation brings with it. As to the achievements, we will focus on the 'pillars' of the Coordination Regulations as well as on their personal and material scope (Section 1). The challenges and controversies discussed in Section 2 are those at the forefront of the debate around the 2016 Commission proposal to modify the Coordination Regulations (European Commission 2016a). Embodied by the common denominator of fairness, the fight against 'social dumping' and 'welfare tourism' (perhaps even rather the fight against the perception of its existence)[7] was concretised by the Commission proposal to revise certain provisions in the Coordination Regulations. For example, provisions on the export of unemployment benefits and family benefits, on the aggregation of insurance periods for unemployment benefits as well as on access to minimum subsistence benefits for inactive people can be linked to the debate on 'welfare tourism', while certain provisions on intra-EU posting can of course be linked to the debate on 'social dumping'. The last section concludes and looks forward.

Coordination of social security systems at the heart of the 'social acquis'

The group of people protected by the European coordination system is certainly not small[8] and cannot be narrowed down to intra-EU migrants of working age. In fact, the Coordination Regulations nowadays protect, in the field of social security, all EU citizens moving between Member States, be it for reasons linked to work[9] or for other reasons (holiday, planned healthcare, moving abroad as a retired person, etc.). The rules of the Coordination Regulations not only apply to EU nationals but also to nationals of Norway, Iceland and Liechtenstein, thanks to the Agreement on the European Economic Area (EEA),[10] as well as to Swiss nationals by virtue of a bilateral agreement on the free movement of persons.[11] Some figures serve to illustrate the scope of the European coordination system (see Table 1). In 2017, there were 19 million EU/EFTA[12] movers[13] in

6. The first regulation adopted by the Council of the EEC (Regulation 1 of 15 April 1958) determined the languages to be used by the EEC. Regulation 2 of 1st July 1958 established the form of laissez-passer issued to members of the Parliamentary Assembly.

7. For example, the European Commission (2016b: 47) states in its preparatory Impact Assessment that 'Not undertaking action in the field of aggregation could lead to increased public disenchantment and exacerbate criticism of, and anxiety about the consequences of free movement. It could lead to the situation that (more) Member States apply their own interpretation of the current rules in a restrictive way, thus reducing legal certainty and risking that mobile EU workers will lose out on rights.'

8. Moreover, the group of people who have been able to benefit from the EU coordination system has increased considerably over the last 60 years, not least because of the considerable enlargements of the European Union in 2004, 2007 and 2013.

9. Different types of labour mobility can be defined: labour migration, seasonal work, commuting, posting, people normally working in two or more Member States, etc.

10. The agreement was signed in Oporto on 2 May 1992 and entered into force on 1 January 1994. However, for Liechtenstein the EEA agreement only became applicable on 1 May 1995.

11. The agreement entered into force on 1 June 2002.

12. The European Free Trade Association: Iceland, Liechtenstein, Norway and Switzerland.

13. EU/EFTA movers: EU-28 or EFTA citizens who reside in an EU-28 or EFTA country other than their country of citizenship.

the EU/EFTA, according to Eurostat population statistics, including 14 million persons of working age (20-64 years). They made up 3.6% of the total EU/EFTA population and 4.5% of the total working-age population. While these figures give us an idea of the stock of EU/EFTA movers, they do not say anything about annual flows. For instance, some 2.1 million persons migrated within the EU/EFTA in 2017 (Eurostat data). In addition, there were some 1.9 million cross-border workers in the EU/EFTA in 2017, around 1.8 million postings and finally some 1 million persons who normally worked in two or more Member States (Fries-Tersch *et al.* 2018; De Wispelaere and Pacolet 2018a). Furthermore, roughly 1.8 million EU/EFTA citizens aged 65 or over were living in an EU/EFTA country other than their country of citizenship, making up 1.8% of the population aged 65 or over in the EU/EFTA. Finally, EU/EFTA residents also made around 229 million trips with overnight stays in another EU/EFTA country – some 204 million tourist trips and around 25 million trips for business purposes (Eurostat data).

Table 1 Composition of intra-EU mobility by different types, 2017

Type of mobility	Extent
Stock of EU/EFTA movers in the EU/EFTA	19 million
As share of total population in the EU/EFTA	3.6%
Stock of EU/EFTA movers in the EU/EFTA of working age (20-64 years)	14 million
As share of the total working age population in the EU/EFTA	4.5%
Flow of EU/EFTA movers in the EU/EFTA	2.1 million
Cross-border workers in the EU/EFTA	1.9 million
As share of the total employed in the EU/EFTA	0.8%
Postings in the EU/EFTA*	1.8 million
As share of the total employed in the EU/EFTA	0.8%
Persons who normally worked in two or more Member States*	1 million
As share of the total employed in the EU/EFTA	0.4%
Stock of EU/EFTA movers in the EU/EFTA aged 65 or over	1.8 million
As share of the total population aged 65 or over in the EU/EFTA	1.8%
Trips with overnight stay in another EU/EFTA country	229 million

Note: * Based on the number of Portable Documents A1 issued.
Source: Eurostat data; Fries-Tersch *et al.* 2018; De Wispelaere and Pacolet 2018a.

Characteristics and objectives of the Coordination Regulations

The EU coordination system is unique in the world. Under the rules of the Treaty, the power of the legislature[14] to determine the content of the coordination system is subject to the respect of the objectives of Article 48 TFEU on social security and free movement. Indeed, by virtue of Article 267 TFEU the CJEU has jurisdiction to rule not only on the interpretation but also on the validity of the provisions laid down in secondary legislation. Already in its first judgments pertaining to Regulation 3[15] the CJEU clarified that all provisions laid down in the regulations should be interpreted in the light of the objective pursued by Article 51 EEC (now Article 48 TFEU), namely to promote and secure the free movement of workers by offering them protection against the harmful consequences which might result from the exclusive application of national law. This means that a provision laid down in the regulation sometimes has to be interpreted in a way not foreseen by the legislature.[16] It also means that the regulations based on (the predecessor of) Article 48 TFEU cannot be applied in such a way as to deprive a mobile worker of benefits granted solely by virtue of the legislation of a single Member State.[17] The ultimate consequence is that a provision laid down in the regulation has to be considered invalid if it is contrary to the aim of (the predecessors of) Articles 45-48 TFEU. The abundant case law of the CJEU played an essential role in the evolution from the early coordination system set up under Regulation 3 to the system under Regulation 1408/71 (Council of the European Communities 1971) and to today's Regulation 883/2004.

The outcome is a high standard of protection[18] for European citizens who move between Member States, be it for occupational or private reasons. As pointed out by Eichenhofer (2009: 90), the provisions are 'an important part of European legislation, because it makes Europe into a unique 'social space'. Moreover, he concludes that 'The coordination of social security between Member States has been the most significant development so far in social policy at the European level. Its success has been remarkable, yet its implementation has been scarcely noticeable' (Eichenhofer 2000: 231). The European Commission[19] and scholars[20] are certainly doing their bit to change this.

Because of the legal basis of the Coordination Regulations, their objective is both modest and ambitious. The Regulations have a modest objective in that they only 'coordinate' the various national social security systems. Instead of opting for harmonisation, the authors of the Treaty of Rome adopted the more cautious and politically more acceptable method of coordination. Member States are still free to decide who is to be insured,

14. The Council of the EU and the European Parliament.
15. 100/63, Van der Veen, EU:C:1964:65 and 1/67, Ciechelski, EU:C:1967:27.
16. C-205/05, Nemec, EU:C:2006:705; C-352/06, Bosmann, EU:C:2008:290 and C-208/07, Von Chamier, EU:C:2009:455.
17. 24/75, Petroni, EU:C:1975:129.
18. Based on a high-quality level of coordination techniques.
19. For example, a campaign on 50 years of free movement of workers and 60 years of coordination of social security systems was recently launched by the European Commission. The Directorate-General for Employment, Social Affairs and Inclusion (DG EMPL) also finances a legal network (MoveS) and a statistical network (Network Statistics FMSSFE).
20. On 16 and 17 May 2019, HIVA - Research Institute for Work and Society held a conference on 60 years of social security coordination from a workers' perspective.

what benefits should be granted, how they should be calculated and for how long they should be granted. The Coordination Regulations cannot affect the disparities between the various social security systems. As the CJEU has underlined in its case law,[21] the Treaties offer no guarantee to workers that extending their activities to 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 or may not be to the worker's advantage in terms of social security, according to the circumstances. And yet, in the current debate on 'welfare tourism', it is often assumed that such an extension or transfer of work will turn out to be mainly positive for the mobile person.

The Coordination Regulations are, at the same time, ambitious in that they aim at making the right to free movement a reality by ensuring that a person is not penalised in the field of social security for having moved from one Member State to another. The protection offered by social security coordination is indeed an indispensable element of free movement. In line with their different social and political histories, Member States set limits to their solidarity systems, sometimes on the basis of nationality, but mostly on the basis of territoriality (Cornelissen 1996). In general, this means that each state confines the scope of its national scheme by setting territorial conditions, such as the requirement to work or reside in that state. The ambition of the EU system is to overrule, at least partially, the application of these nationality- and territoriality-based criteria. Without such an ambition, the goal of the EU rules – to remove all social security barriers impeding genuine free movement – could not be achieved. However, this ambition seems to be under political pressure due to several Member States putting a stronger focus on their sovereignty.

1. Achievements: a hidden 'European welfare state'

The fact that EU legislation has been coordinating national social security legislation for 60 years is an achievement in itself. Over this period, a number of important adjustments have been made to ensure its sustainability. In 2016 the Commission proposed further significant changes, in particular in the areas of applicable legislation, unemployment and long-term care. The proposal also contains a series of provisions aimed at fighting fraud and abuse (European Commission 2016a). The negotiations on this proposal in March 2019 led to a provisional agreement between Council and Parliament.[22] However, at the time of writing (July 2019) the Council of the EU has not approved it. In addition, Parliament has postponed the vote on it until the next legislature period. Therefore, it is completely unclear at the moment what the outcome will be. We will come back to this when we discuss the related controversies and challenges. But first, we will look at the achievements of this regime, showing that EU legislation has created a kind of 'European welfare state', well-hidden from academic, public and political scrutiny.

21. C-393/99 and C-394/99, Hervein and Hervillier, EU:C:2002:182, para 50-51; C-493/04, Piatowski, EU:C:2006:167, para 34; C-208/07, Von Chamier, EU:C:2009:455, para 85.

22. See the provisional agreement: https://data.consilium.europa.eu/doc/document/ST-7698-2019-ADD-1-REV-1/en/pdf

1.1. The pillars of European social security coordination

Certain key principles protect the social security rights of persons moving within Europe: a) the prohibition of discrimination, reinforced by the equal treatment of cross-border facts and events (i.e. principle of assimilation); b) the aggregation of insurance periods; c) the exportability of benefits; and d) the determination of a single applicable legislation.

The principle of equality of treatment is one of the cornerstones of the Union. The EU rules on the coordination of social security systems guarantee equality between EU nationals. This is done not by striving towards unity, but by managing diversity. The CJEU has given a broad interpretation of this principle, prohibiting not only direct discrimination based on nationality but also covert forms of discrimination which, by applying other distinguishing criteria, *de facto* achieve the same result.[23] It also follows from the CJEU's case law that the principle of equal treatment may require the social security institution of a Member State, when examining whether all qualifying conditions for a benefit are fulfilled, to treat facts and events which occur in another Member State as if they were facts or events occurring in its own state.[24]

In addition, the aggregation of all insurance periods, irrespective of the Member State in which they were accrued,[25] is a technique enabling the career of a migrant worker to be tracked. In this way, the Regulation guarantees the retention of social security rights in the process of being acquired.

The Coordination Regulations guarantee the portability of social security rights in the EEA/Switzerland. The concept of 'portability' has been very well developed by Holzmann *et al.* (2005) in the economic literature. 'Portability' in this context is understood as the mobile person's ability to preserve, maintain and transfer acquired social security rights, independent of nationality and country of residence. According to Holzmann, the social protection status of migrants can be classified in four regimes: Regime I: portability; Regime II: exportability; Regime III: no access, Regime IV: informal.[26] Regime I is the most favourable in terms of formal social protection for migrants. Research by Avato *et al.* (2009) reveals that only a quarter of all migrants worldwide are covered by such a regime. It applies, however, to all EU/EFTA citizens moving within the EU/EFTA. This is a good example of the well-developed social protection that the EU offers to mobile persons, which is far from guaranteed in the rest of the world.

In order to prevent different national criteria leading to conflicts of law in cross-border situations,[27] Regulation (EC) No 883/2004 contains uniform criteria for determining the applicable social security legislation. This is an important issue both for the mobile

23. 41/84, Pinna, EU:C:1986:1 and C-349/87, Paraschi, EU:C:1991:372.
24. C-228/88, Bronzino, EU:C:1990:85, C-12/89, Gatto, EU:C:1990:89 and C-349/87, Paraschi, EU:C:1991:372. This case-law is now in general terms reflected in Article 5 Regulation 883/2004.
25. Article 6 Regulation 883/2004.
26. For a detailed explanation of these regimes, see Holzmann *et al.* 2005.
27. A negative conflict: a person is insured in no Member State. A positive conflict: the person is insured simultaneously in two or more Member States.

person, since it has an impact on what social protection can be enjoyed,[28] and for the employers and Member States concerned, since it determines where social security contributions have to be paid. People who are not economically active are subject to the legislation of the Member State of residence. For economically active people the main rule is that a person is subject to the legislation of the Member State in which they work, even if their place of residence is in another Member State (the so-called *lex loci laboris* principle).[29] However, for specific categories of workers, namely posted workers[30] and workers normally employed in two or more Member States,[31] special rules have been created.

Regulation 883/2004 also contains special conflict of law rules for certain categories of workers for certain benefits. Under the main rule (*lex loci laboris*), mobile workers have to claim benefits in the Member State where they work. However, for unemployment benefits special rules have been created for wholly unemployed persons who reside in a Member State other than the state of last employment.[32] This means that frontier workers have to claim unemployment benefits – and to register as job-seekers – in their Member States of residence. This special conflict of law rule is based on the assumption that frontier workers enjoy the most favourable conditions for seeking new employment in their state of residence.[33] Other unemployed workers who reside in a Member State other than that in which they work, such as seasonal workers, have the right to choose where to claim unemployment benefits: they may either remain in the Member State of last activity and are entitled to draw unemployment benefit there,[34] or they may return to the Member State of residence and draw unemployment benefit there. Special conflict of law rules have also been created for pensioners with regard to access to healthcare[35]. These special rules not only have an impact on which healthcare can be enjoyed by the pensioner but also determine which Member State has to bear the costs for the pensioner's healthcare. The application of these special rules has sometimes surprising results. A pensioner who for instance worked one year in Portugal and then 35 years in Germany and who returns to Portugal after retirement will receive two pensions, one from Portugal[36] and one from Germany.[37] He or she is entitled to healthcare provided in accordance with Portuguese legislation, the costs of which will be borne entirely by Portugal.[38] This is a good example of the financial implications the provisions may have on Member States.[39]

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28. For instance, Rennuy argues that 'it is hardly tenable that a person, who lived and worked his entire life in one Member State, would be most closely connected to another State, in which he started to work part-time the day before' (2017: 251).
29. Article 11(3)(a) Regulation 883/2004.
30. Article 12 Regulation 883/2004.
31. Article 13 Regulation 883/2004.
32. Article 65 Regulation 883/2004.
33. 1/85, Miethe, EU:C:1986:243 and C-444/98, De Laat, EU:C:2001:165.
34. Provided they register as a person looking for a job there.
35. Articles 23-30 Regulation 883/2004.
36. Thanks to the aggregation provision referred to above, the person fulfils the conditions for entitlement; his or her Portuguese pension will be calculated in accordance with the pro-rata method laid down in Article 52(1)(b) Regulation 883/2004.
37. Since the person has worked 35 years in Germany, the conditions for entitlement to a German pension are fulfilled without any need to aggregate periods completed in other Member States. His or her German pension will be calculated in accordance with the provisions laid down in Articles 52-56 Regulation 883/2004.
38. Article 23 Regulation 883/2004.
39. One can therefore question the financial sustainability of this provision (see also Roberts *et al.* 2009).

1.2. Gradual expansion of the personal scope: virtually all European citizens protected

Regulation (EC) No 883/2004 applies to all EU nationals insured under national law, whether employed, self-employed, students, civil servants, pensioners or non-active persons, as well as to the members of their families and survivors, regardless of their nationality. This constitutes major progress *vis-à-vis* the previous regulations which only covered economically active people and members of their families. The group of mobile persons enjoying social protection has therefore expanded considerably over the past 60 years.

For a long time, third-country national workers were excluded from the protection offered by the EU social security regulations, since they do not have the right to free movement within the meaning of Article 45 TFEU.[40] However, developments in primary law in the last two decades have paved the way for extending the Coordination Regulations to third-country nationals (Cornelissen 2018). Regulation (EC) No 1231/2010 (European Parliament and Council 2010) now offers third-country nationals the same protection, in terms of social security, as EU citizens moving within the EU.[41] However, this extension is subject to two conditions: the third-country national must legally reside in a Member State[42] and there must be a cross-border element between at least two Member States.[43] Therefore, the Coordination Regulations do not apply to workers from a third country who remain in one and the same Member State.

1.3. Further extension of the social risks covered, though not to social assistance

The Coordination Regulations can be applied only in respect of legislation concerning benefits covered by the material scope of Regulation 883/2004 as defined in its Article 3. It covers the following branches of social security: sickness benefits, 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.[44] This is an exhaustive list. Benefits not mentioned here are not covered. Article 3(5) explicitly excludes benefit schemes for victims of war or its consequences.

The EU Regulations based on Article 48 TFEU apply only to legislation concerning social security (whether contributory or non-contributory). Social assistance has always been explicitly excluded from the material scope of the EU Regulations,[45] though no

40. C-230/97, Awoyemi, EU:C:1998:521, para 29.
41. Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality.
42. C-477/17, Balandin, EU:C:2019:60.
43. C-247/09, Xhymshiti, EU:C:2010:698.
44. The branches of social security listed in Regulation (EC) No 883/2004 are clearly modelled on ILO Convention No. 102 of 1952, concerning minimum social security standards.
45. Article 3(5) Regulation 883/2004.

specific definition of the term 'social assistance' (differentiating it from social security) is to be found in these Regulations. There are a number of non-contributory benefits – financed not by contributions but by taxes – which have the characteristics of social security and social assistance.[46] The abundant case law of the CJEU under Regulation 1408/71 ruled that many benefits considered as 'social assistance' by the Member State concerned actually fell within the material scope of the EU Social Security Regulations, with all their consequences, such as the waiving of residence clauses for entitlement to benefits. The reaction of the legislature to this case law was to create[47] a separate coordination system for 'special non-contributory benefits' in order to avoid their exportability. Under Article 70(4) Regulation 883/2004, the 'special non-contributory benefits' listed in Annex X are provided exclusively in the Member State in which the persons concerned reside, in accordance with the legislation of that state.

Regulation (EC) No 883/2004 extended the material scope to pre-retirement benefits and paternity benefits. The importance of this extension should not be overestimated, as it only applies to statutory schemes and thus not to the numerous pre-retirement schemes laid down in collective agreements. Apart from the extension to paternity and pre-retirement benefits, the branches of social security covered by the material scope of Regulation 883/2004 are identical to those laid down in Regulation 3 adopted 60 years ago. Nevertheless, the experience of the last decades shows that the European coordination system has, to a large extent, been able to deal with the introduction of many new branches of social security. However, this is the result of the work not of the legislature but of the CJEU.

A few examples serve to illustrate this. As a response to demographic developments and declining fertility rates, several Member States introduced new kinds of benefits, such as child-raising allowances or parental benefits. These allow a parent to devote himself or herself to raising a young child, mitigating the financial disadvantage of giving up income from full-time employment. However, the list of branches covered by the Coordination Regulations was not adapted accordingly. This led to the CJEU ruling[48] that such benefits should be treated as 'family benefits' for the purposes of the coordination system, since parental benefits were also intended to meet family expenses. As a result, when a person works in one Member State while his or her family lives in another Member State, that person's spouse is entitled, under Article 67 of Regulation 883/2004, to receive a family benefit such as parental benefit from the first state. However, treating parental benefits in exactly the same way as traditional family benefits could, for the application of other provisions of the EU regulations, in some situations lead to negative consequences for those involved. The CJEU ruled[49] that, in such situations, parental benefits must be regarded as different from traditional family benefits. These developments finally led to the intervention of the legislature. In its 2016 proposal to modify the Coordination Regulations, the Commission inserted provisions in Regulation 883/2004 aimed at

46. Some examples are the guaranteed income for elderly persons in Belgium, the disability and mobility allowances in Ireland, the state unemployment allowance in Estonia, the social pensions in Poland, Cyprus and Italy and the old-age solidarity allowance in France.
47. Regulation 1247/92, O.J. L 136 of 19 May 1992.
48. C-245/94 and C-312/94, Hoever-Zachow, EU:C:1996:379 and C-275/96, Kuusijärvi, EU:C:1998:279.
49. C-347/12, Wiering, EU:C:2014:300.

taking account of the special nature of parental benefits. As stated above, this proposal is still pending before Council and Parliament.

Another example is the 'long-term care insurance' introduced by several Member States. This provides for benefits designed to cover the costs of care provided at home by another person. Though the material scope of the Coordination Regulations has not been adapted accordingly, the CJEU ruled[50] that such benefits must be regarded as 'sickness cash benefits' for the purposes of the Coordination Regulations. The result is that the care allowance must be paid by the Member State where the person is covered by care insurance,[51] even if the beneficiary resides in another Member State.[52] However, treating 'care allowances' in exactly the same way as traditional 'sickness benefits' could, for the application of other provisions of the EU regulations, in some situations lead to negative consequences for those involved. The CJEU ruled[53] that, in such situations, the other provisions must be interpreted in such a way that the person concerned is not disadvantaged for having moved to another Member State. These developments again led to an intervention of the legislature. In its 2016 proposal to modify the Coordination Regulations, the Commission included long-term care benefits as a distinct branch of social security and inserted a separate chapter 'long-term care benefits' in Title III Regulation 883/2004.

1.4. Some protection goes beyond mere coordination

In some aspects, the Coordination Regulations provide social protection going beyond mere coordination, creating rights which citizens would not otherwise have. We give two examples in the area of cross-border healthcare.

A person who is insured for healthcare in one Member State and who stays temporarily in another Member State (e.g. during a city trip, family visit, holiday) is entitled to any healthcare which becomes necessary in that other Member State as if he or she is insured in that other Member State. In order to benefit from this arrangement, the person only has to show his or her European Health Insurance Card (EHIC) to the care provider. It is estimated that there are currently more than 236 million EHICs in circulation (De Wispelaere and Pacolet 2018b). One of the basic principles is that the cost of healthcare provided by the Member State of stay is fully reimbursed by the competent Member State, in accordance with the tariffs of the Member State of treatment and not of the competent Member State. This financing mechanism avoids a high financial burden being put on a patient receiving healthcare abroad and shifts the higher cost to the competent Member State. This is particularly important for patients who come from Member States with relatively low tariffs and obtain healthcare in a Member State with higher medical charges. Consequently, the provision facilitates the free movement of

50. C-160/96, Molenaar, EU:C:1998:84, C-215/99, Jauch, EU:C:2001:139 and C-286/03, Hosse, EU:C:2006:125.
51. Provided, of course, that the person fulfils the conditions for entitlement in accordance with the legislation of that Member State.
52. Article 7 Regulation 883/2004.
53. C-388/09, Da Silva Martins, EU:C:2011:439.

persons, strengthens the social rights of EU citizens and is a visual reminder of the social character of the Coordination Regulations.

The Regulation also enables a person insured for healthcare in one Member State to go to another Member State to obtain medical treatment there, at the expense of the competent institution, provided he or she receives authorisation from that institution. If that authorisation is granted, he or she will benefit from reimbursement conditions far more favourable than those contained in the so-called Patient Mobility Directive (Directive 2011/24/EU)[54]. As the CJEU has underlined in its case law,[55] the Regulation thus helps facilitate the free movement of persons covered by social insurance and, to the same extent, encourages the provision of cross-border medical services between Member States.

2. Controversies and challenges

Over the years, the EU Regulations on the coordination of social security systems have been well received by both those covered and the Member States. While it is true that the Coordination Regulations are highly complicated, hardly anybody would contest that they provide a high standard of social protection for people moving across borders within the EU.

Yet there have always been voices claiming that the protection offered by these Coordination Regulations, as interpreted by the CJEU, goes too far and that Member States with the highest level of social protection have to pay disproportionately favourable benefits to people covered by these EU rules. The impression sometimes arises that this interpretation by the CJEU has the potential to jeopardise the high level of protection provided by the social security schemes of the 'old' Member States.

Some of the issues which have been the subject of controversy over the last few years are the export of family benefits and unemployment benefits, the aggregation of periods for unemployment benefits, access to subsistence benefits for inactive people and, last but not least, the posting of workers. These controversies are briefly described in the sections below. Their legal and socio-economic impact, with the exception of posting, was also extensively discussed in the Commission's Impact Assessment (European Commission 2016b),[56] resulting in the above-mentioned Commission proposal to amend certain provisions.

54. Directive 2011/24/EE of The European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare.
55. C-56/01, Inizan, EU:C:2003:578, para 21 and C-145/03, EU:C:2005:211, para 46.
56. However, the phenomenon was analysed by the European Commission in preparation of the revision of the Posting of Workers Directive (European Commission 2016c).

2.1. Export of family benefits

According to Regulation (EC) 883/2004, a person who works in one Member State and whose children reside in another Member State is entitled to family benefits from the state of employment (as the primarily or secondarily competent Member State), as if the children were residing in that state. Recently a number of 'old' Member States have requested a modification of the Coordination Regulations, allowing the Member State of employment to index such benefits to the standard of living of the Member State where the children reside. The Member States concerned refer to the controversial deal offered by EU leaders to the UK before the 2016 British referendum as proof that such indexation is legally viable (European Council 2016). Despite this political pressure, the 2016 Commission proposal does not contain any amendment to the existing EU rules on the export of family benefits (European Commission 2016a).[57] However, the discussions on this issue continue. Indeed, since 1 January 2019 Austria has implemented such indexation in its national law.[58] It therefore seems that the controversial EU proposal to the UK has opened Pandora's box. It is also remarkable that the settlement with the UK on this point was even agreed by the EU, as the UK exports just 0.2% of its family allowance budget to other Member States (De Wispelaere and Pacolet 2018b).

2.2. Export of unemployment benefits

Subject to strict conditions and for a limited period of time, an unemployed person receiving unemployment benefit in the competent Member State can go to another Member State to seek work there and retain entitlement to unemployment benefit. Figures show a negative relationship between the share of unemployed persons exporting their benefit and the unemployment rate of the Member State paying the benefit (De Wispelaere and Pacolet 2018b). In other words: workers probably have reasons weighing more heavily than the unemployment rate for exporting their unemployment benefit. For instance, these may be mobile workers who return to their country of origin after they became unemployed. The concern is that this group is not always really looking for work. This may also explain the low percentage of unemployed who found work abroad (i.e. 'success rate') during the export period. For example, success rates seem to be low in the Netherlands, one of the main 'benefit-exporting' Member States, and in Poland as the main 'benefit-importing' Member State.[59] Given such low success rates, a number of Member States, including the Netherlands, are reluctant to extend the export period. This reluctance existed right from the start, making it very difficult to adjust EU rules (Cornelissen 2007).

The discussions above also divert attention from the risk of non-take-up of social rights. For instance, despite the large outflow of people from Poland and Romania, we observe

57. EU commissioner Marianne Thyssen defended this with the slogan 'equal benefits for equal contributions at the same place'.

58. We estimate that this could lead to public savings of around €100 million. This is mainly due to the fact that Austria exports a large amount of family allowances to Hungary and Slovakia (as secondarily competent Member State).

59. The Netherlands granted some 4,800 authorisations in 2017 (De Wispelaere and Pacolet 2018b). Poland received some 8,800 persons who exported their unemployment benefit from another Member State.

that these Member States only granted a limited number of authorisations to export the unemployment benefit (De Wispelaere and Pacolet 2018b). Based on the EU Labour Force Survey, we estimate that in 2013 more than 90,000 people were unemployed when they moved to another Member State. However, the number of authorisations granted to export the unemployment benefit has remained around 30,000 (De Wispelaere and Pacolet 2018b), meaning that there is a formal non-take-up of this social right by two out of three unemployed people who have moved to another Member State. However, in reality, a (large) group of unemployed people may in fact have exported their unemployment benefit abroad without reporting it (i.e. informal take-up).

2.3. Aggregation of periods for unemployment benefits

According to Regulation 883/2004,[60] aggregation is subject to the condition that the person becoming unemployed has most recently completed periods of insurance or employment in the Member State where the claim for unemployment benefit is made. The philosophy behind this provision is clear: the state in which the unemployed person last worked or paid contributions should bear the burden of providing the unemployment benefit. However, Article 61 of the 'Basic' Regulation does not specify how long the person must have 'most recently' completed such periods in the Member State where he or she became unemployed before being able to invoke aggregation. The result is a divergent implementation of this provision in the EU. Some Member States permit aggregation after just one day of insurance in the Member State concerned. Other Member States require a minimum period of four weeks (Finland) or even three months (Denmark and Belgium).

The 2016 Commission proposal inserted a minimum qualifying period of three months in the Member State of most recent activity before a right to aggregate arises. Under the March 2019 provisional agreement between Council and Parliament, this has been reduced to one month. Some Member States, in particular Belgium, expressed the view that this period is not long enough to ensure that the financial burden for paying unemployment benefits is not incurred in situations where mobile EU workers have not yet made a significant contribution to the scheme of the host state. For this reason, Belgium was one of the Member States opposing the March 2019 provisional agreement. However, on the basis of the available data, it appears that in roughly seven out of ten cases of aggregation a period of insurance, employment or self-employment of more than three months had already been completed by the unemployed mobile worker in the Member State of last activity (De Wispelaere and Pacolet 2018b). This is an indication that intra-EU movers of working age who become unemployed in their new host state after only working there for a very short period represent just a minority of cases.

60. Article 61(2) Regulation 883/2004.

2.4. Access to subsistence benefits for inactive people

One of the provisions in the Coordination Regulations that sparked the most controversy in the last decade was access to subsistence benefits in the host state by economically non-active people coming from other Member States. In this context it is worthwhile recalling that the current Regulation 883/2004 applies to all EU citizens insured under national law, whether they are economically active or not. For many people, fears of welfare tourism are inextricably linked to the free movement of economically non-active persons. Directive 2004/38/EC specifies the residence rights of EU citizens (and members of their families) moving within the EU and defines certain conditions and limitations (European Parliament and Council 2004b). By virtue of Article 7(1) of this Directive, economically inactive persons are entitled to residence for more than three months, subject to the condition that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State, and that they have comprehensive sickness insurance.[61]

As we have seen above under Section 1.3., the legislature has created a separate coordination system for 'special non-contributory benefits' to avoid their exportability. The special non-contributory benefits listed in Annex X of Regulation (EC) No 883/2004 are provided exclusively in the Member State in which the persons concerned reside, in accordance with the legislation of that Member State.

A number of Member States, such as Austria and the UK, have imposed a condition on the entitlement to special non-contributory benefits listed in Annex X of Regulation (EC) 883/2004 for non-active people coming from another Member State: these must have right of residence there in accordance with Directive 2004/38/EC. Since Directive 2004/38/EC and Regulation (EC) No 883/2004, adopted on the same day, do not refer to each other, the CJEU has had to rule on the relationship between the two legal instruments. In its famous Brey judgment[62] and subsequent case law,[63] the CJEU clarified that the notion 'social assistance' within the meaning of the Directive could comprise special non-contributory social security benefits within the meaning of Regulation 883/2004. There is nothing to prevent the entitlement to such benefits for Union citizens who are not economically active being made subject to the requirement that those citizens fulfil the conditions of the host Member State for obtaining a right of residence under Directive 2004/38.

61. These conditions regarding sufficient resources and comprehensive sickness insurance do not apply to workers or self-employed people.

62. C-140/12, EU:C:2013:565.

63. C-333/12, Dano, EU:C:2014:2358, C-67/14, Alimanovic, EU:C:2015:597, C-299/14, Garcia-Neto, EU:C:2016:114 and C-308/14, Commission versus UK, EU:C:2016:436.

2.5. Rules determining the applicable social security legislation

2.5.1. Are these rules still fit for purpose?

Changes in the nature of the labour market have an impact on the rules determining the applicable social security legislation. And yet these rules have not been substantially modified over the last 60 years. The Coordination Regulations were adopted at a time when it was the norm for workers to have full-time and permanent jobs. While this form of employment still accounts for a large proportion of jobs, over the last decades we have seen a significant rise in new types of work, such as fixed-term, part-time, on-call or framework contracts. Telework has become a common phenomenon. We have also seen an increase in forms of mobility which are not new but which have become more common, such as intra-corporate transfers and people who regularly work in two or more Member States.

A case currently pending before the CJEU[64] illustrates very well that the current rules determining the applicable social security legislation do not take sufficient account of these developments. As said before (Section 2.1.), for economically active people the main rule is that a person is subject to the legislation of the Member State in which they work. This rule does not differentiate between full-time and part-time employment.[65]

The pending case concerns persons who worked in a mini-job in Germany while residing in the Netherlands. It refers to facts and events that occurred under Regulation 1408/71. Like Regulation 883/2004, Regulation 1408/71 contained an explicit provision[66] that 'persons to whom this Regulation applies shall be subject to the legislation of a single Member State only'. The wording of that provision could not be clearer. However, it follows from the case-law of the CJEU[67] that a Member State not designated as the competent one by the Regulation nevertheless has the 'right' to grant benefits to a worker who resides on its territory. The persons concerned by the pending case were, as mini-jobbers, not covered for sickness, unemployment and old-age in Germany. In addition, they could not invoke Regulation 1408/71 to claim German family benefits, because they were explicitly excluded[68] from the notion of 'employed person' within the meaning of Regulation 1408/71. According to the legislation of the Netherlands, everybody residing in the Netherlands is covered for family benefits and old-age, except people who are subject to the legislation of another Member State. The persons concerned claimed family benefits and old-age pension in the Netherlands for the years that they were engaged in minor employment in Germany. The Dutch institutions based their refusal on the fact that during these periods they were, in accordance with Regulation 1408/71, subject to German and thus not to Dutch legislation. The final result of taking up a mini-job in Germany was that the persons concerned were not protected in the family benefits and old-age branches in any Member State. It seems obvious that this result was incompatible with the objectives pursued by Articles 45-48 TFEU, but the question

64. C-95/18 and C-96/18, Giesen and Franzen.
65. C-2/89, Kits van Heijningen, EU:C:1990:183.
66. Article 13(1) Regulation 1408/71. The wording of Article 11(1) Regulation 883/2004 is identical.
67. C-352/06, Bosmann, EU:C:2008:290, C-611/10 and C-612/10, Hudzinski and Wawrzyniak, EU:C:2012:339.
68. Annex I, E ('Germany') Regulation 1408/71.

was – and is – how to avoid such an outcome. In 2013 the Dutch court requested a preliminary decision[69] from the CJEU on the compatibility of the application of the Dutch legislation with Union law. The Advocate-General in that case[70] doubted whether it would be possible to solve the problem on the basis of the rules of Regulation 1408/71. He proposed that the application of the legislation of the State of employment, provided for by Regulation 1408/71, should be suspended if the application of that legislation does not lead to any social security protection concerning family benefits or old-age. During this period of suspension, the persons concerned should be subject to the legislation of the State of residence. In practical terms the Advocate General suggested that during the aforementioned period of suspension the persons concerned would be subject to the legislation of two Member States at the same time: the State of residence for those branches for which the State of employment does not offer any protection and the State of employment for those branches for which it does offer sufficient protection (such as accidents at work). Obviously, this suggestion raises questions about legal certainty and predictability of the coordination rules.

In its judgment[71] the CJEU did not follow the opinion of the Advocate General. Instead, the CJEU referred to the Bosmann judgment and repeated that a Member State which is not the competent one by virtue of the Regulation nevertheless has the power to grant benefits to its residents. However, this judgment was based on a misunderstanding of Dutch legislation. In fact, Dutch law did not empower the Dutch institutions to grant benefits to the persons concerned.[72] This has resulted in a further – currently pending – referral of the Dutch court to the CJEU.

In her conclusions on this new case,[73] Advocate-General Sharpston raises an interesting point,[74] namely that the rules of Regulation 883/2004 determining the applicable social security legislation are not only intended to protect mobile workers, but also to share the financial burden between the Member States fairly. A person working in Germany, even on the basis of a mini-job, is subject to German legislation (*lex loci laboris*). During this period the Netherlands, as the non-competent Member State, cannot levy contributions. Thus, the persons concerned do not contribute to the Dutch social security system. However, according to the Advocate-General the Dutch legislature has gone beyond what is necessary to attain the legitimate goal of protecting the financial equilibrium of its social security scheme by excluding everybody who is subject to the legislation of another Member State. They could have made an exception for people working in another Member State on the basis of marginal employment, opening up the possibility for a voluntary insurance – and voluntary payment of contributions – for such persons.

The Court's judgment of 19 September 2019 is surprising, to say the least. The Court repeats its well-known case-law that primary law can provide no guarantee to a worker

69. C-382/13, Franzen.
70. Conclusions of Advocate General Szpunar, EU:C:2014:2190 para 88-93.
71. C-382/13, Franzen, EU:C:2015:261.
72. At least not for periods completed after 1 January 1989.
73. Which concerns the same people as in the previous case.
74. Conclusions of Advocate General Sharpston of 26 March 2019, EU:C:2019:252, para 41-45.

that moving to a Member State other than his Member State of origin will be neutral in terms of social security. Given the disparities between Member States' social security schemes and legislation, such a move might be advantageous or perhaps disadvantageous for the person concerned. Article 48 TFEU only foresees the coordination and not the harmonisation of Member States' social security systems. It cannot be interpreted as obliging a non-competent Member State to grant social security benefits to its residents working in an employed capacity in another Member State. Otherwise, both the coordination system and the equilibrium established by the TFEU could be questioned. In fact, such an obligation could ultimately lead to situations where only the legislation of the Member State with the most favourable social security system would be applied. In practical terms, this judgment means that persons residing in the Netherlands who had taken up a mini-job in Germany after 1 January 1989 were not entitled to family benefits and did not accrue pension rights in any Member State. According to the Court, this outcome is not incompatible with the objectives pursued by Articles 45-48 TFEU.

This judgment should be an incentive for the legislature to re-examine the rules determining the applicable legislation. *Is it really logical that a person who works only to a marginal extent in another Member State is subject to the social security legislation of that Member State?*

2.5.2. Intra-EU posting

As said before, for economically active people, the main rule is the *lex loci laboris*: a person is subject to the legislation of the Member State where he or she works. This rule is based on the idea that a migrant worker should have the same rights as a host state national. This rule seeks to prevent unfair competition between employers using migrant workers in a Member State and those only using non-migrant workers. The difference in social protection levels between Member States following the 2004, 2007 and 2013 enlargements has further strengthened this objective.

Nonetheless, from 1959 onwards, the year Regulation 3 entered into force, the law of the country of work did not apply in the event of a worker being sent by his employer for a short period to another Member State to work there on the latter's behalf. It would indeed be a severe burden on workers, employers and social security institutions if the worker were required to be insured under the social security system of every Member State to which he was posted in the course of his employment, even if such postings were of very short duration. Such workers continue therefore to be subject to the legislation of the sending State. However, postings are subject to a number of strict conditions[75] to prevent their use in cases for which they are not intended.

From the very beginning, the CJEU has taken not only the interests of the worker into account but also those of the employer and the social security institutions. Initially, the CJEU underlined simplification as an objective of the posting provision. However,

75. Articles 12 Regulation 883/2004 and 14 Regulation 987/2009, further elaborated in Decision A2 of the Administrative Commission, OJ C 106 of 24 April 2010.

in its 2000 *Fitzwilliam* judgment,[76] the CJEU ruled that the purpose of the posting provisions is 'in particular, to promote freedom to provide services for the benefit of undertakings which avail themselves of it by sending workers to Member States other than that in which they are established'. The objective of simplification is mentioned only in second place.

Posting is a very sensitive issue. For some Member States, in particular the 'new' Member States from Eastern Europe, a further tightening of the existing conditions could lead to protection of the labour market of the host state. However, in several of the 'old' Member States, such as Belgium, the Netherlands, Germany and France, intra-EU posting is increasingly seen as a Trojan horse since it could lead to unfair competition and to downward pressure on the level of social protection in the host state. In view of the political sensitivity, figures on the characteristics, size and impact of posting are therefore very useful. While evidence reveals that the number of posted workers and their share in total EU employment remains marginal (De Wispelaere and Pacolet 2018a),[77] it is striking how often this phenomenon occurs in the construction sector. For instance, roughly one out of every three persons employed in the Belgian construction sector is a posted worker.[78] In relative terms, some 5% of the total Slovenian labour force, but even six out of ten employed persons in the Slovenian construction sector, are posted to another Member State. The level of posting from Poland is substantial in absolute terms, but much less so in relative terms.[79] Figures also counter the common perception that intra-EU posting is really only used for low-skilled posted workers moving from low-wage to high-wage Member States, as most posted workers come from an EU-15 country and four out of every ten postings take place between high-wage Member States (De Wispelaere and Pacolet 2018a). Despite these figures, which give a more nuanced picture of posting, the phenomenon will probably continue to be a divisive issue in the EU.

Proof that the legislation of the sending state is applicable is provided by a certificate (Portable Document A1) issued by the competent institution of the Member State whose legislation is applicable. CJEU case law[80] has ruled that such a document is binding for all other institutions of the Member States concerned. This means that whenever the decision of the issuing institution is contested by the institution of the place where the work is actually carried out, a (retroactive) change of the applicable legislation is not possible without the consent of the issuing institution to withdraw or to invalidate the A1 Document in question.

The CJEU based its case law on the principle of cooperation in good faith laid down in Article 4(3) TEU. On the one hand, this principle requires the issuing institution to carry out a proper assessment of the facts and to (re)examine whether all conditions for

76. C-202/97, EU:C:2000:75, repeated in C-404/98, Plum, EU:C:2000:607.
77. In 2017, an equivalent of 0.4% of EU employment could be related to intra-EU posting.
78. However, this figure is an overestimation because the unit of measurement of the numerator (the number of posted workers over a year) is not the same as the unit of measurement of the denominator (the number of persons employed at a certain moment in the year).
79. 'Only' some 0.7% of the Polish employed population was sent abroad in 2017.
80. C-148/97, *Banks*, EU:C:2000:169 en C-2/05, *Herbosch Kiere*, EU:C:2006:69.

posting are fulfilled. On the other hand, the A1 Document establishes a presumption that the worker is properly affiliated to the social security system of the sending Member State. It is, therefore, binding on both the competent institution and the judiciary[81] of the Member State in which that person actually works, even in the case of a manifest error of assessment of the posting conditions.[82] In the case of a dispute arising between the competent institutions of the Member States involved they must contact each other.[83] However, the institution of the host State cannot unilaterally make the workers concerned subject to its own social security legislation.[84]

The dialogue procedure must be followed, even if the institution of the Member State where the work is carried out produces evidence collected in the course of a judicial investigation and supporting the conclusion that the A1 Document was fraudulently obtained or relied on. It is only when the issuing institution fails to take such evidence into consideration for the purpose of reviewing the grounds for the issue of that document that a court of the Member State where the work is carried out may disregard that document. This was decided by the CJEU in its famous *Altun* judgment,[85] which stresses that the principle of prohibition of fraud and abuse of rights is a general principle of EU law which individuals must comply with. However, the CJEU clarified that only a national court, not a social security institution, may disregard the document concerned. In such cases, obviously the right to a fair trial must be guaranteed. A national court is only allowed to disregard such a document in cases of fraud or abuse of rights. Findings of fraud are to be based on evidence that satisfies both an objective and a subjective factor. The objective factor is the fact that the posting conditions are not met. The subjective factor corresponds to the intention of the parties concerned to evade or circumvent the posting conditions with a view to obtaining the advantage attached to it (e.g. paying lower social security contributions). In practice it will not always be easy to produce evidence supporting the subjective factor, indispensable to conclude the finding of fraud.

The European Commission (2016a) proposal to modify the Coordination Regulations contains a series of provisions aimed at fighting fraud and abuse as well as at strengthening the verification of the social security status of posted workers. As said before, it is unclear at the moment what the final outcome of the negotiations on this proposal will be.

Conclusions

The European coordination system as it currently stands was built upon the pillars created 60 years ago by Regulation 3. Improved and reinforced over the years, these pillars remain to this day. Rennuy even argues that the Regulation 'weaves a seamless

81. C-2/05, *Herbosch Kiere*, EU:C:2006:69.
82. C-620/15, *Rosa Flusschiff*, EU:C:2017:309.
83. In the framework of the dialogue and conciliation procedure within the meaning of Article 5 Regulation 987/2009.
84. C-356/15, *Commission versus Belgium*, EU:C:2018:555.
85. C-359/16, EU:C:2018:63.

web of social protection: wherever they find themselves, migrants have uninterrupted access to many social benefits' (2017: 248). The initial concept was to avoid workers being penalized for exercising their right to freedom of movement. The system as it now stands reflects the transformation of the European Economic Community, with its economic focus, to the political European Union, serving the interests and well-being of all its citizens, regardless of whether they are engaged in economic activities. The 236 million European Health Insurance Cards (EHICs) circulating today illustrate that the current Coordination Regulations are of importance for all EU citizens when they move between Member States, be it for work or for private reasons. One could even argue that there are two well-known European symbols: the EURO and the EHIC. The first of these is a visual symbol of the European Monetary Union, the latter of a 'European Social Union' (see also Ferrera 2018).

However, we cannot turn a blind eye to some deficiencies in social protection coordination. For example, Article 64 Regulation 883/2004 limits the export period of the unemployment benefit for people looking for a job in another Member State in principle to three months, though allowing Member States to extend this period by another three months. As a result, mobile unemployed persons are treated differently by different Member States. Another example is the imprecise wording of Article 61(2) Regulation 883/2004, leading to a divergent implementation of the aggregation provision for entitlement to unemployment benefits in the EU. Furthermore, despite the good social protection guaranteed by the Coordination Regulations, many mobile persons in practice do not take up their social rights (Fingarova 2019). In this context, there is still room for improvement in the provision of information on the social rights of mobile persons, as such lack of knowledge can act as a major barrier.

The legislator also needs to become more aware of the financial implications of certain provisions, primarily on Member States but also on individuals and companies. We should not forget that Article 48 TFEU itself, as worded after the Lisbon Treaty, attaches importance to the issue of potential financial implications of the Coordination Regulations. In this context, it is important to ensure that concerns about 'welfare tourism' and 'social dumping' are based on facts and figures and not on myths.[86] This is the only way possible to respond to the controversies and challenges defined above. Both the Commission's impact assessment and its proposal to revise the Regulation clearly show that it is aware of this, with both focusing more on the budgetary impact of the Coordination Regulations and proposing amendments supported by the available data.

The coordination system has also to adapt to all kinds of developments in order to keep up with the times. Two points are of particular importance here.

86. Article 91 Regulation 987/2009 is one of the 'hidden' improvements of the current Implementing Regulation in comparison with the past. It requires the competent authorities to compile statistics on the application of the Coordination Regulations and to forward them to the Administrative Commission. The reports on the various statistical data certainly help to assess the functioning of the current Regulations and to underpin proposals for possible improvements (see De Wispelaere and Pacolet 2018b).

First, changes in the nature of the labour market have an impact on the rules determining the applicable social security legislation. It is time for the legislature to reflect on an adaptation of the conflict of law rules laid down in the Coordination Regulations. Moreover, with new work forms becoming increasingly virtual (such as telework), an adaptation of the meaning of 'workplace' is needed. In addition, the borderline between the *lex loci laboris* and Article 13 (people who normally work in two or more Member States) is not very clear. The March 2019 provisional agreement between Council and Parliament on the 2016 Commission proposal to modify the Coordination Regulations contains several elements which are an improvement compared to the current text of the Regulations. While it clarifies and strengthens the conditions which must be fulfilled in order to invoke Article 12 (posted workers[87]), it does not clarify the borderline between the *lex loci laboris* and Article 13.

Second, the Coordination Regulations have not kept pace with the introduction of new forms of social security in Member States. While several new kinds of benefits, such as parental benefits and long-term care allowances have been brought into the material scope of the Coordination Regulations, this is not due to a dynamic legislature but to a dynamic CJEU. Parental benefits are to be treated as 'family benefits' and long-term care allowances as 'sickness benefits' for the purposes of the Coordination Regulations. This is, however, not an ideal situation. It follows from later case law that treating parental benefits in the same way as traditional family benefits and treating long-term care allowances in the same way as traditional sickness benefits could, for the application of other provisions of the Regulations, lead to negative consequences for the persons involved.

Fortunately, the legislature is now intervening. In its 2016 proposal to modify the Coordination Regulations, the Commission proposed to adapt the list of Article 3 determining the material scope of Regulation 883/2004 to include long-term care benefits, providing a definition of 'long-term care benefits' and creating a specific chapter for such in Title III, with the intention of providing greater legal certainty to the growing number of citizens in our ageing societies reliant on long-term care. In the March 2019 provisional agreement on this proposal, the Council and Parliament did away with the creation of a specific chapter on 'long-term care benefits' in Title III of Regulation 883/2004, as proposed by the Commission, instead providing for the insertion and modification of several provisions in chapter 1 of Title III which is renamed 'sickness, long-term care, maternity and equivalent paternity benefits' in order to clarify where mobile persons can claim long-term care benefits.

As to parental benefits, the March 2019 provisional agreement, generally following the 2016 Commission proposal, provides for the insertion of several provisions in the chapter 'family benefits' of Regulation 883/2004 aimed at taking into account the special nature of parental benefits. It distinguishes between family benefits in cash intended to replace income not earned due to child-raising (parental benefits) and all other family benefits. Parental benefits cannot be treated in the same way as traditional

87. The provisional agreement aims at replacing the words 'posted' and 'posted workers' with 'sent' and 'sent workers'.

family benefits for the calculation of the differential supplement to the family of a mobile person.[88] Parental benefits are granted solely to persons subject to the legislation of the competent Member State, without any derived rights. As a result, it will no longer be possible for the spouse of a person working in one Member State and living with his family in another one to be entitled to receive a parental benefit from the first State.

The 2016 Commission proposal to revise the coordination rules illustrates that the impact of the Coordination Regulations is regularly monitored in order to ensure that they meet current requirements. The March 2019 provisional agreement is a step in the right direction. However, it is unclear at the moment what the final outcome of the negotiations on the Commission proposal will be. Whatever the outcome, it will only be an episode in the 60-year-long history of adaptations of the Coordination Regulations to keep up with the times.

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88. Where, during the same period and for the same family members, family benefits are provided for under the legislation of more than one Member State (e.g. mother resides with the children in Member State A and father works in Member State B), very detailed priority rules apply laid down in Article 68 Regulation 883/2004. Family benefits are provided by the Member State designated as having priority. However, the other Member State has to provide a differential supplement if the amount provided for by the legislation of the latter Member State exceeds the amount due by the Member State designated as having priority.

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