The European Union Rules on Social Security Coordination: Internal and External Aspects

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Introduction

The aim of this paper is to give the reader an overview of how the EU rules on social security coordination work. It will outline how the rules work within the block of 31 States (EU plus EFTA) to whom they apply. In addition, it will set out how the rules have gradually developed so that they can now have a limited external effect in the context of: third country national workers who have moved within the EU; Association agreements made between the EU and third countries; and bilateral agreements negotiated between EU Member States and third countries.

Background: 50 years of EU social security coordination rules

The first European social security coordination instruments were Regulations 3 and 4 of the European Coal and Steel Community. They came into force on 1st January 1959. One of the basic principles of the ECSC was the free movement of labour between the 6 member countries. The aim behind the social security coordination Regulations was to provide a guarantee of social protection for the coal and steel workers who moved across national boundaries.

Regulations 3 and 4 were replaced in 1972 by Regulation 1408/71 and its implementing Regulation 574/72, which applied the same principles of the original rules across the now much wider context of the then European Economic Community. The new Regulations were based on a provision in the EEC Treaty that supplemented the fundamental principle of free movement of workers. The Treaty set out explicitly that the coordination rules should provide for the aggregation of periods of insurance under different national systems.

The aim of the rules has therefore always been to an extent twofold. On the one hand they have an economic role: they facilitate the free movement of labour, by allowing it to move to where it is needed in the EU. On the other hand, they provide social protection as they protect acquired social insurance rights and guarantee social security rights to persons who move across national borders.

In 1994 Iceland, Norway and Liechtenstein agreed to apply the coordination Regulation on their territories within the context of the EEA Agreement. Switzerland agreed to apply the rules in 1999 on the basis of the EU-Swiss Agreement on Free Movement of Persons. This means that currently 31 European countries operate the EU coordination rules between themselves.
Regulations 1408/71 and 574/72 were subject to a range of amendments over the years. At the time of writing they have been the subject of over 300 interpretative judgments of the European Court of Justice. These judgments have in many cases extended and refined the principles contained in the Regulations, usually to the benefit of the protection of citizens’ rights.

On 1st May 2010 a new set of modernised EU Coordination Regulations – Regulations 883/04 and 987/09 on the coordination of social security systems - came into force. The basic principles of coordination contained in these new Regulations remain unchanged. The new Regulations focus in particular on improving procedures to ensure that the coordination principles can be applied for efficiently. An important element of this is the introduction of a new compulsory system of electronic exchange of social security information (to deal with matter such as the exchange of details on a person’s insurance or employment record.).

The Basic Principles of Social Security Coordination

The EU social security coordination rules function on the basis of 5 basic principles:

- Legislation of only 1 state applies at any one time;
- Aggregation of insurance periods acquired in different states;
- Export (in principle) of cash benefits when moving to another state;
- Equal treatment regardless of nationality; and
- Good administrative cooperation between institutions

Applicable Legislation

The rule that the legislation of only one state can apply at any one time can be compared to certain principles of private international law: the coordination regulations contain a system of rules that identify where a person is covered for the purposes of making social security contributions or which country’s system of social protection applies. The rules are based on the concept of lex loci laboris, namely that in principle the legislation of the state where a person works applies. There are a number of exceptions to this rule, in particular in the case where a company operating in one Member State posts a worker temporarily to work in another.
The modernised Regulations apply to nationals of EU Member States “who are or have been subject to the legislation of one or more Member States”. In contrast therefore to the older Regulations, persons who are not, or have not been, economically inactive can fall within the personal scope. The rules on applicable legislation therefore also play a significant roles in indicating whether a person is within the scope of the Regulations.

Aggregation of insurance periods

The principle of aggregation means that a worker can in effect “add together” his insurance record in different Member States in order to preserve his entitlement to benefits. This is particularly important in fields such as old-age pensions where some Member States may require, for example, 20 qualifying years. Aggregation means that the years worked in all EU countries have to be taken into account in assessing whether a qualifying period has been fulfilled.

Export of benefits

Another of the fundamental principles of coordination is that Member States are not permitted to make residence in their territory a condition for the receipt of cash benefits. This means countries are required to export old-age pensions to pensioners living in other EU countries. In the case of unemployment benefits there is however a limit on the duty on Member States to export such benefits to persons looking for work in other states: in principle unemployment benefit must be exported for 3 months, but a discretion exists to extend this for a period of up to 6 months. Not exported at all are the so-called non-contributory cash benefits which contain elements of both social assistance and social security benefits.

Equal Treatment regardless of nationality

The principle of equal treatment is one of the fundamentals of EU law. In the context of social security it means that all EU nationals should be accorded the same rights and be subjected to the same conditions as home state nationals. The Court of Justice has found that the principle applies to both direct and indirect discrimination.

Good administrative cooperation

Of course a system of rules applied to coordinate often very distinct national social security systems could not work if the national authorities and national institutions did not cooperate to facilitate and smoothen the application of the rules. The coordination regulations have always contained the principle that Member States should lend one another their good offices and act as if implementing their own legislation. Nowadays we talk more freely of the principle of "good cooperation". The modernised Regulations
have been strengthened in various respects to deepen this cooperation. The introduction of electronic data exchange is one element of this improved cooperation.

The Administrative Commission for the Coordination of Social Security Systems

The 1972 regulations provided for the setting up of a sui generis committee made up of 2 representatives from each Member State and with a secretariat run by the European Commission. The Administrative Commission currently meets in the region of 8 times a year, usually in sessions of 2 days in Brussels. Its role is to promote administrative cooperation. In particular, it:

- Deals with administrative questions and procedures relating to the application of the Regulations, promoting the exchange of best practices
- Provides authoritative interpretations of the Regulations by means of Decisions and Recommendations;
- Promotes the use of new technologies to the application of the rules; and
- Makes proposals to the EU Commission with a view to improving and modernising the Regulations.

In effect, much of the work towards employing new technologies to exchange social security information has been undertaken by a second body, the Technical Commission. In addition, there is a body known as the Audit Board attached to the Administrative Commission. Its role is to set out the methods for, and to deal with any issues arising as regards, the reimbursement of healthcare costs between Member States.

The Electronic Exchange of Social Security Information (EESSI) network

One of the significant changes brought about by the modernised coordination Regulations is the creation of the EESSI network and the requirement for all countries to exchange all social security information electronically by 1st May April 2012.

The EU Commission is responsible for putting in place an IT infrastructure that will act as a form of bridge to enable information from the national systems of social security to be exchanged securely. The EESSI project is a generally recognised to be currently one of the most significant pan-European IT projects. Central to the operation of the system is the creation of "EESSI Directory Services", which is in effect an electronic directory of all the social security institutions that operate within the coordination rules.
The Directory Services as the basis for the routing of messages within the EESSI system. It can also be consulted by institutions and, via a web interface, by the general public.

Work on the construction of the EESSI system is still ongoing. It is expected to be up and running by the end of 2010 and countries will have a transitional period running until 30th April 2012 to enable them to connect their national systems to the EESSI network.

How do the rules operate in relation to particular social protection risks?

This section of the paper sets out a short summary of how the coordination principles operate in four principal fields of the Regulation: as regards healthcare; unemployment; old-age pensions; and family benefits.

Healthcare

The principle of equal treatment means that a worker, working and living in another EU Member State, is entitled to join and benefit from the health system of the host state on the same basis as other nationals.

There are particular rules for pensioners living in other EU countries. They are also entitled to join and benefit from the health system of the host state on the same basis as other nationals. This means that, if the home state nationals have to make, for example, co-payments for the treatment they receive, then so too must the pensioner who has chosen to live there. The cost to the host State of the pensioners' healthcare is however borne by the “competent state”, that is, the state that is responsible for paying their old-age pension. In this case, the Regulations, supplemented by a decision of the Administrative Commission, set out the relevant reimbursement procedures.

One of the recent successes of the Regulations has been the creation of the European Health Insurance Card (EHIC). The card, currently a blue and white card the size of a credit card, proves the entitlement of the EU citizen to receive any necessary care that she may require whilst temporarily staying in another country. The concept of “necessary care” goes wider than merely emergency treatment: it is a medical concept that has to be judged according to the circumstances and the length of the person’s stay in that country. The cost of this necessary care is again to be accorded to the visitor on the same basis as is accorded to the state’s own nationals. Again, the Regulations, supplemented by a decision of the Administrative Commission, provide the relevant reimbursement procedures between Member States for the provision of treatment on the basis of the EHIC.
The coordination Regulations also allow citizens to receive hospital treatment in other states, if such treatment cannot be provided within a reasonable time by the home state (and where it is a treatment that is given by the home system).

**Unemployment**

Many national social security systems have qualifying periods (such as 2 years of employment or contributions) before a person can be entitled to an unemployment benefit when he loses his job. The principle of aggregation which underlies the EU coordination rules means that a person who may have worked for only a short period in one country before he loses his job is entitled to aggregate of periods of insurance, employment and self-employment in another country in order to meet the qualifying conditions for unemployment benefit.

A person who receives unemployment benefit in one country, but who wants to look for a job in another country, is entitled to export such this benefit to another state. The export, as already set out above is limited to 3 months, but a discretion exists to extend this for a period of up to 6 months. The unemployed person must register as a person looking for work in the host state and there are provisions by which the employment services in the host state may send information to the paying state to show the efforts the person is making to find employment.

There are also special provisions in the coordination regulations for unemployed frontier workers. They are, for example, entitled to register with the employment services of both countries in order to look for work (although not entitled to double payment of unemployment benefit!).

**Old-age pensions**

The EU system does not provide for a single EU old-age pension. There is no harmonisation of systems as such. Where a person has worked in several countries, she will receive a pension from each state where she has worked, calculated in relation to the period worked there. Where Member States have qualifying periods for their national pensions, the principle of aggregation means that those States have to take into account insurance periods in other countries in assessing whether the qualifying period has been met. In general terms, where a person has worked in Member State A for 10 years and Member State B for 30 years, each country must consider her entitlement to a pension on the basis of a record of 40 years of insurance. Each country calculates a “theoretical amount” based on the full employment record and then this amount is pro-rated in accordance with the record in that country: MS A would pay ¼ of its national pension and MS B ¾ of its national pension.
Overlapping periods of insurance are not taken into account. Therefore when an old-age pension is claimed (a person claims in the country where he resides), the countries have to embark on a full and detailed exchange of the employment and insurance history of the person concerned. It is in this context in particular where it is hoped that the new EESSI system will lead to a much quicker and efficient calculation of the citizen’s pension entitlements.

**Family Benefits**

Entitlement to family benefits rests fundamentally on the principle of equal treatment. A person residing in a state other than his home state is entitled to receive family benefits on the same terms as nationals of that state. This right extends to benefits in respect of family members, who in fact reside in another Member State.

There is a special provision for pensioners, where the state paying the pension is in fact responsible for the payment of family benefits.

The field of family benefits is different to other fields of the Regulation, in that it is possible for there to be entitlement to family benefits in more than one Member State. So, for example, a person working and living in the Netherlands will be entitled to Dutch family benefits for his family living in Austria. In Austria the family members will be entitled to family benefits on the basis of their residence there. It would not be fair for the benefits to be paid twice, but the Regulations provide a system whereby the persons concerned are entitled to the highest amount payable. The payment is divided between the Netherlands and Austria. Since the person works in the Netherlands, the Netherlands is primarily competent and pays the full amount of its benefit. Austria is secondarily competent on the basis of the family’s residence there. As the Austrian benefit is higher, they are obliged to pay a so-called “differential supplement”, which in effect tops up the Dutch benefit to the level of the Austrian benefit.

**The development of an “external dimension” to the EU rules**

*Social Security Coordination for nationals of third countries who move within the EU*

Until 1 June 2003, the EU coordination Regulation No 1408/71 applied to EU nationals, but only to limited categories of nationals of third countries, such as members of the family of EU nationals, stateless persons and refugees. There was no instrument of social security coordination that dealt with the position of all third country nationals in cross-border situations. On 1st June 2003 a new Regulation, Regulation 859/2003 entered into force and extended the scope of Regulation 1408/71 to third country
nationals moving within the EU.\(^1\) It is a brief but significant legal instrument, which in effect is a “bridge” that brings third country nationals within the personal scope of the coordination rules, without affecting the rules themselves. To be covered by this regulation two important conditions have to be fulfilled: (1) being legally resident in a Member State\(^2\); and (2) showing intra-Community movement (some sort of cross border element).

The effect of Regulation 859/03 is that third country nationals coming within its scope are able to benefit from the same coordination rights as EU nationals. This means, for example, that a Brazilian national, who has worked in both the UK and Portugal, can benefit from the aggregation provisions of the coordination rules at the time when his Portuguese and UK pensions are calculated. Each country will have to take into account his full record of contributions within the EU.

Regulation 859/2003 may also give the Brazilian national the right to have this pension exported to Brazil. This is because the extension of the equal treatment principle in Regulation 1408/71 means that Member States must grant nationals of third countries covered by the Regulation the same advantages that they guarantee to their own nationals, and to EU nationals and their family members. So where national legislation, taken on its own, or applied in accordance with a bilateral agreement, gives a right to export a pension to a third country, then this right should be accorded to the person who obtains rights by virtue of Regulation 859/2003. So if the UK, will pay the UK pension to UK nationals who are resident in Brazil, then it is obliged by virtue of Regulation 859/2003 to do the same under the same conditions for a Brazilian national who is within the scope of Regulation 859/03.

The extension of the Coordination Regulations to third country nationals also has some important consequences for the healthcare of third country nationals moving within the EU. If, for example, a Bolivian national, who works and is resident in Spain, wishes to visit her sister who lives in Belgium, then she will be entitled to necessary healthcare in Belgium on the basis of a European Health Insurance Card issued by Spain.

**Association Agreements between the EU and Third Countries**

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\(^1\) Note that Denmark does not participate in this Regulation due to its legal basis in what was Article 63(4) of the EU Treaty (now Article 72(b) TFEU.) Nor do the non-EU countries: Liechtenstein; Norway; Iceland; and Switzerland

\(^2\) Nationals of third countries who are legally resident on the territory of a Member state are the persons meeting the residence conditions laid down by the legislation of the Member state in which they are resident, and those who are authorized to reside there by virtue of a right arising from an act of Community law or an international obligation contracted by the Member state in question or by the European Community, in particular in the context of association agreements.
The EU has also concluded so-called “association agreements” (concerning trade and cooperation on wider issues) with a series of third countries, one aspect of which requires decisions on the coordination of social security to be taken by the relevant Association Council. The countries with whom such agreements currently exist are:

- Morocco;
- Tunisia;
- Algeria;
- Israel;
- Croatia;
- Former Yugoslav Republic of Macedonia (FYROM);
- Albania;
- Serbia
- San Marino\(^3\); and
- Turkey.

Only in the case of Turkey has a Decision to adopt social security rules been taken by the Association Council: Decision 3/80 on the Application of the Social Security Schemes of the Member States of the European Communities to Turkish workers and members of their families. However, for political reasons, this Decision has never been incorporated into Community las

The Court of Justice has nevertheless been called on to interpret Decision 3/80 on numerous occasions and has declared the equal treatment clause as directly applicable for Turkish nationals’ rights.

The proposed new Association Council Decisions on social security

In January 2010, the Spanish EU Presidency re-started the negotiations to adopt Association Council Decisions on the coordination of social security in respect of

\(^3\) This is in fact a Cooperation and Customs Agreement.
Morocco, Tunisia, Algeria, Israel, Croatia and FYROM. Negotiations in the EU Council’s Social Questions Working Group are still ongoing.

The proposed agreements focus on those social security provisions contained in the agreements with these countries which are not already covered by Regulation 859/2003. This concerns in particular the export of certain benefits to the associated country and the reciprocity clause with regard to EU workers and their family members residing in the associated country.

Other EU agreements containing provisions on the coordination of social security systems

Apart from the Association Agreements there exist a number of other agreements concluded by the EU and Third countries which contain provisions on the coordination of the social security systems. These are, for example, the Partnership Agreements with most of the former Soviet Union countries. The scope of these provisions is, however, very limited and only encourages Member States and the Third Country concerned to conclude bilateral agreements in this field.

Bilateral Agreements made between EU countries and Third Countries

Since social security is a policy area within the competence of the Member States, the EU has no influence on the negotiation of bilateral agreements concerning the coordination of social security between an EU Member States and third countries. Despite attempts by the Administrative Commission for Social Security Systems to compile a list of such bilateral agreements, there is so far no complete list available.

For the purposes of this meeting, the Spanish Presidency has prepared - on the basis of information made available by Member States - a list of existing bilateral agreements between certain Member States and third countries. Readers are referred to this Spanish Presidency document.

The Gottardo judgment

Relatively recent case-law of the Court of Justice has decided that Member States have to comply with principles of EU law in the application of bilateral conventions with third countries. According to the Court’s Gottardo judgment, when Member State A has concluded an agreement with a third country, nationals of Member state B or C having
completed periods of insurance in that third country, must be treated by Member state A in the same way as nationals of that Member State. This, the Court said, was an obligation resulting from the principle of equal treatment laid down in Article 39 EC (now Article 45 TFEU).

Following this judgment, the Administrative Commission on social security for migrant workers adopted Recommendation 22 recommending to Member States that new bilateral conventions concluded between a Member State and a third country should make specific reference to the principle of non-discrimination on the grounds of nationality against nationals of another Member State.

The Recommendation also recommends that Member States should inform the institutions of the third countries concerned about the implications of the Gottardo judgment. This is because virtually all bilateral agreements provide for entitlement to benefits and for aggregation of periods of insurance or residence completed in the countries having concluded the agreement. To this end, the institutions of each country need an exchange of information concerning the number of periods completed in the other country. If an agreement is restricted to nationals of the Contracting Parties, the Member State is, on the basis of the Gottardo judgment, obliged to treat nationals of other Member states who have been insured in the third country and in the Member state concerned, on the same footing. In order to comply with this obligation, they depend on the cooperation of the third country to supply the necessary information.

Conclusion

This paper has set out a summary of the most important aspects of EU social security coordination as it functions internally in respect of the 31 European countries that participate. In addition, the extent to which EU social security coordination can impact on nationals of third countries resident in the EU has been outlined. The final part of the picture is the Gottardo judgment, which makes clear that EU law also has an impact on bilateral agreements concluded between Member States and third countries.

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4 Judgment of 15 January 2002, Case C-55/00, Gottardo.