

**KATHOLIEKE UNIVERSITEIT LEUVEN  
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**UNIVERSITE LIBRE DE BRUXELLES  
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FORMATION**

**RUIMTE VOOR EEN BELGISCH SOCIAAL BELEID  
POUR UNE INTEGRATION SOCIALE AU NIVEAU DE L'UNION  
EUROPEENNE. QUELLE PLACE POUR LA BELGIQUE ?**

**Summary Report**

**Recherche menée à la demande des Services Fédéraux pour les Affaires scientifiques  
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## **Introduction**

On the first of January 1995, a multidisciplinary research concerning the options for a Belgian social policy in the European context was set up by order of DWTC. The research is completed by a team of lawyers from the Katholieke Universiteit Leuven, and a team of sociologists from the Université Libre de Bruxelles.

The research project has been proceeding in two phases. In the first phase the adaptations that are necessary for the Belgian social security legislation in order to comply with the framework of binding European Community law, were scrutinised. The possibilities for Belgium to take position in an autonomously acting integrated Europe were researched. Initiated by the common note of the 29<sup>th</sup> of January 1998 of the scientific board, the opposite point of view was taken in the second phase of the research. From that moment onwards, the attention was focussed on what strategies Belgium can adopt in order to contribute to the improvement of the social dimension of the European Union.

## **1. Results achieved by the team of the Katholieke Universiteit Leuven**

### **The first phase**

The first phase of research resulted in a book called "Ruimte for a Belgian social policy in an integrated Europe (the legal dimension)". It consists of seven chapters, followed by a number of case-studies concerning the human resources management of multinationals, temporary employment abroad, self-employed construction workers and long-distance-work.

In the first part of the book, the material and personal scope of the free movement of persons and the limits thereof, were brought to the attention. During the last few years, the European Court of Justice and the EC legislator have made the personal scope burst out of its economically inspired frame. Not only employees and self-employed, but also other categories of persons that are not economic agents in the strict sense of the word are now able to appeal to (parts of) these rules. Nevertheless, the content of the rights that are assured to these categories differ. In consequence, it is still relevant for a migrating EU-citizen to prove to which category he belongs, in order to know the exact extent of his rights. Until further notice, these categories are the employees, the self-employed, the providers and receivers of services, students, persons who have stopped their professional activities and the residual category of 'other persons'. Due to institutional causes, the introduction of the concept of EU-citizenship by the Maastricht Treaty does not change this situation.

Secondly, the complexity of the co-ordination rules is discussed. Instead of exploring every single rule in detail, an outline was given of the main features and principles of co-ordination, in order to create a certain awareness of the problems that this complexity causes. Looking at the personal scope of the free movement of persons and the co-ordination rules solely, it is clear that they cover different categories of people. Moreover, the material scope of the co-ordination rules was revealed as becoming more uncertain every day. In order to develop an efficient Belgian social policy, one also has to take into account the basic principles of co-ordination that are used in EC law. Therefore, these principles were analytically explored, together with their application on the social risks that are covered by Regulation 1408/71.

In the third part, an overview is given of the obligations of Belgium under the law of nations concerning social security. Within the framework of the European Community, Belgium is firstly obliged to comply with the duties that follow from the EC Treaty itself. This is what is often referred to as primary EC law. Next to that, the secondary EC law is of no lesser importance to each of the Member States. The importance of this secondary EC law shows in particular with when looking at the issues of co-ordination and harmonisation. The legislation with regard to the co-ordination will be discussed extensively further on. With regard to harmonisation, the rules concerning the equality of men and women are by far the most important realisation. A survey was given of the efforts made by the European Community in this field, not neglecting the long transition periods and the large amount of exceptions that characterise these rules. Also the problems with regard to “indirect discrimination” were looked at closely.

For many years, Belgium has been a member of the International Labour Organisation. During this time, it participated in several conventions. In the text that resulted from the first phase of research, a classification is made of these conventions, according to whether they aim at co-ordination or at the introduction of minimum-standards of social protection. Especially with regard to the introduction of minimum-standards of social protection, there seem to be few problems for Belgium. Nevertheless, since the ILO conventions are inspired by the classic conception of social security, major reforms of the Belgian social security system could possibly cause problems.

Also in the context of the Council of Europe, it can be seen that Belgium has committed itself on the field of co-ordination as well as on the field of harmonisation. During the research, special attention was given to the European Code of 1964, April the 16<sup>th</sup>. Problems, similar to the ones regarding the ILO-conventions, occur here. The question whether the proposed Revisited Code deals with those problems in a sufficient way was dealt with too.

Finally, Belgium has engaged itself in several treaties that were concluded outside any international organisation. These treaties deal mainly with the principle of non-discrimination and the co-ordination of national social security systems. Nevertheless, there are a number of treaties that are not specifically dedicated to social security, but still have an impact. A survey of these treaties is included.

In the fourth part, the Belgian social security legislation is been put to the test of European competition legislation. Although this set of EC law is directly binding, it seems like it is not always taken in account. Two bottlenecks are mentioned: Belgian health care and supplementary insurance schemes.

The Belgian health care system is organised as a health care insurance: People are obliged to pay premiums to the insurer, which reimburses (a percentage of) the health care costs when they occur. Agreements are made between the providers of health care on the one hand, and the insurers on the other hand, in order to fix the amounts of money that are asked and reimbursed. The research proves that this practice possibly contravenes the rules with regard to competition. The majority of the health care providers affiliate with these agreements, so that competition with regard to prices is difficult. This enthusiasm is due to the fact that these health care providers are given an improved social insurance. Problems also occur with regard to the market of supplementary insurance schemes. For example with regard to health care, this market is dominated by the health care funds. These funds are bodies under private law who are responsible for the direct contact with the beneficiary but who are offering supplementary insurance schemes at the same time. They often make their membership (needed in order to comply with the obligatory insurance) dependent on the entry in (some of) the supplementary insurance schemes they offer. It is not clear whether this practice is contrary to the competition-legislation or not. Finally, attention is given to the *Maribel*-operation and the consequent cases before the European Court of Justice.

After having sketched the present rules concerning the posting of employees and self-employed persons, these rules were critically tested in the fifth part. This evaluation consisted of three tests. First the posting mechanism was confronted with the *lex loci laboris* principle. Next, the compliance with these rules in reality was checked. Finally, a closer look was taken at the use that is made of the posting mechanism. These tests revealed clearly that there is an urgent need of clarity with regard to posting, for it is the vagueness that causes a wide variation in the implementation by giving the national administrations (too much) freedom. Contrary to what is happening in reality, the posting mechanism was never meant to be used extensively. The regulation as it stands now, makes it possible to choose the competent Member-State *à la carte*, according to the construction that is set up. This undermines the *lex loci laboris* principle.

In the last but one part, the peculiarities of social security within the transport-sector caught our attention. In particular the situation of the internationally employed staff in the aviation and shipping sector were scrutinised. We have focussed our attention on the absence of a posting-scheme for persons working in the international transport-sector. Moreover, we have attempted to examine the possibilities to fill the gaps that can be found in the current social protection of the workforce in the transport-sector. Specifically the special designation rules for persons working in the international transport-sector, and the relation thereof to the *lex loci laboris* principle are discussed.

Last, the legal position of frontier workers is scrutinised. A frontier worker is any person that is living in one state while working in another. The legislation regarding frontier workers is very complex, not only due to its subject, but also due to its lack of consistency. The lack of consistency between the designation rules regarding social security and the designation rules regarding taxes is a good example of this complexity. This situation makes it difficult to find out precisely what restrictions Belgium has to take in to account when developing its social policy. Therefore, the techniques and instruments that are used in the field of social security were discussed, followed by the description of its fiscal counterpart. Each time, special attention was given to the definition of 'frontier worker', a concept that tends to differ according to the set of rules that is looked at.

### **The second phase**

The second phase of the research-project resulted in a text in which remarks and scenario's are explored that can possibly support an action from Belgium on the European level. The text consists of three parts concerning respectively European social federalism, European co-ordination law and the effect of European legislation with regard to competition on Belgian Health Care.

The present vagueness in the division of competencies causes stagnation in EU social legislation, for neither the European institutions or the Member States can be forced to take up responsibility. At the same time, the *euro-creep* phenomenon raises its ugly head. This term is used to refer to the gradual diminishing of national competencies in the field of social policy, due to the infiltration by EC law concerning the free movement of persons, goods, services and capital, and the rules concerning competition. In consequence, the only weapon for the Member-State to fight this creep is to give Europe the possibility to develop a social policy that can resist the economic logic of the legislation referred to. This situation is often called the

'social paradox'. In order to preserve their sovereignty in the social field, the Member States are obliged to give competencies to the European Community.

The concept of federalism can be used to develop a clear division of competencies. This pathway is walked on in the research. The means by which this result can be achieved can differ though. In the text, two possibilities are suggested. One possibility is to formulate a 'Code of conduct'. Because it is soft law, this code could be introduced within the near future. A higher degree of clarity could be achieved quickly in this way. Another possibility is to restructure the division of competencies, following the federal logic, by means of hard law. Although this has the advantage of making things clear more profoundly, the question on the political feasibility still stands.

The second part on European co-ordination law explores several scenarios by which it could be improved. The introduction includes a first and general proposal concerning the possibilities to simplify the set of co-ordination rules. Possible simplifications that are mentioned concern the legal basis, the basic principles, the personal and material scope and the financial aspect of the co-ordination. The following scenario's are developed:

- scenario 1: Introduction of a dual designation rule
- scenario 2: Posting as an exception to the dual designation rule
- scenario 3: Acquired rights regarding health care
- scenario 4: Extension of the personal scope to third-country nationals
- scenario 5: Extension of the scope to civil servants and to the specific schemes for these employees
- scenario 6: Abolition of the category of frontier workers
- scenario 7: Material scope of Regulation 1408/71: social assistance
- scenario 8: Financing social security: improving the co-ordination between social security legislation and tax law.

In the last chapter of the text that resulted from the second phase, attention was given to the proposals that could be done with regard to the relation between the Belgian health care system and European competition law. A close look at the rules concerning free competition makes clear there is some uncertainty about the legal position of the health care insurer. European law seems to have difficulties with legal bodies that are neither public bodies nor private bodies. This kind of in-betweens do often occur in the field of social security, especially if health care is concerned. The proposal in favour of a "European Health care fund" and the proposal in favour of a strict distinction between statutory and voluntary private insurance are being discussed. Moreover the forecast is given that free international

competition in practice will not necessarily cause major movements in the landscape of free health care insurance.

## **2. Results achieved by the team of the Université Libre de Bruxelles**

*Employment* was one of the themes chosen to address the future of social Belgium within Europe (volume III).

In the first part of this volume, we examine, through available statistical sources, if the creation and organisation of areas of free movement of people within the European Union have a concrete impact on the movement of labour. In other words, we looked at the migratory dynamics within the European Union. To do this we examined --for both Community and non-Community citizens-- the characteristics of the active population, employment and unemployment rates, overall job protection, and regional employment disparities.

We then investigated Community employment and social policies. This involved an analysis of the tools conferred to the Community authorities by the treaties, European employment strategy, and guidelines. Needless to say, the underlying question is: what we can expect specifically from the fight against unemployment and social integration.

We then examined the role of social dialogue at the European level in terms of employment and in combating unemployment, because there is potential for intervention by the social partners as regards the application of directives at the national level.

We end the first part of this volume with the concept of "transitional markets" as both a possible scenario for the future and as an alternative to activation policies that are too unfair to and blame the unemployed.

The second part of this volume refers to Belgium's socio-economic situation. We also look at the institutional context of changes in employment policies since the beginning of the 1990s, at both the federal and regional levels. The question of measures to activate social security benefits and social dialogue in Belgium is also addressed.

We also looked at *social exclusion* (volume IV) in our study of the future of social Belgium within Europe. Accordingly, the first part of this volume concerns Belgium's situation, while the second part contains a comparison of Belgium's situation with that of the other Member States of the European Union. We compare the various social policies and their respective effects.

We then assess European policy perspectives in this area and measure the chances for social integration at the European level.

Before addressing the subject of our study, we believe that it is important to examine the concept of "social exclusion" and its relevance within this study. As we noted, this is a new way of identifying the effects of the elimination of the society of salaried workers, rather than a true concept that can be used to define a subject being studied.

At the national level, based on quantitative criteria, several definitions of poverty are used, which makes comparisons difficult. For example, there is the legal threshold (on the basis of which the minimum is given), the threshold defined by the European Union on the basis of a fixed proportion (50%) of the average revenue of a Member State, the subjective threshold of poverty determined based on responses from a sample of households (Antwerp CPS-Ufsia), and a threshold defined on the basis of a fixed proportion (50% or 75%) of average revenue, which is used by a number of Belgian economists.

Revenue and its distribution are the key determinants of poverty. We based our work on a number of studies written by Belgian economists and addressed situations of poverty and inequality in Belgium, their variations, and the effects of social transfers, at least to the extent that we were able to grasp them.

We then looked at changes to unemployment insurance, in particular some of its effects in terms of exclusion. We also looked at the conditions for granting the minimum social security benefits, and based on a few quantitative data, we examined the problem of the beneficiaries' labour market (re)integration. This is the path preferred by lawmakers for their reintegration in their rights to social security benefits. From this point of view, the move of beneficiaries of the minimum social security benefits to ONEM services is seen as a "return to normalcy" for an underprivileged group.

In the second part of volume IV we examined poverty in the European Union's Member States, primarily based on statistical data collected by the Eurostat system, as well as data from the Community household panel.

It is not possible to examine poverty and social exclusion in the EU's Member States without referring to the profound changes of the social welfare systems.

We know that changes to social welfare have a particularly large impact on the weakest and increase the risks of insecurity. We paid special attention to the treatment given to social security beneficiaries (the unemployed and beneficiaries of various forms of social security

benefits). Given that unemployment and welfare are now managed based on market constraints, what can one expect as a solution to the problem of exclusion?

What are the Community contributions to social securities policies to combat exclusion? This section begins with an examination of the social welfare tools given to the Community authorities. We then summarise the contribution of the European Councils to social welfare from Essen (1994) until the Luxembourg Summit (1997). The implementation of the "modernisation of social welfare", decided in 1997 by the Commission, raises the question of what one can expect from efforts to combat unemployment and to promote social integration. Split between the goal of preserving a European model of social welfare that has demonstrated its worth and clear market pressures, the Community authorities find it difficult to go beyond analyses focused on "the search for work" by the unemployed, rather than concentrating on creating jobs. Yet, in view of the increasingly severe restructurings of social welfare systems, the social cost is very high. In other words, we can already say that the treatment given to the existence of a political counterweight to market demands is key to this issue. Questions are being raised, minds are being opened, and scenarios are being proposed that differ markedly from models that, in one way or other, are calling into question social welfare and its aims and subjecting them to the market's prevailing financial constraints. These proposals are included at the end of the text to illustrate possible scenarios.

The last volume contains the first period's work (volume V), which was carried out by the TEF-ULB team (1999). This work covered specific subjects: the mobility of executives and technicians within companies experiencing international growth and multinational firms in two activity sectors (the banking sector and the chemical sector), air transport, and attempts to transfer Sabena activity and flight crew staff, as well as the case of self-employed workers in the construction sector. The last case study contains observations on cross-border work and European integration and the network of cross-border Eures.

This document is organised into four chapters:

-first, based on different studies, the mobility of unskilled migrants is down sharply, even though the existence and the potential for greater migration of skilled and trained people should be growing. This explains our interest in the mobility of executives and technicians within companies experiencing international growth and at multinationals. The main purpose of this interest was to demonstrate, for the activity areas chosen (banking and chemicals), the existence of new forms of mobility within the context of the growth of the European Union and their impact on careers;

-secondly, the air transport sector is undergoing --and has undergone since the beginning of the 1980s-- significant changes in the European Union, in particular as a result of the total or partial privatisation of most airlines, and the total liberalisation and deregulation since 1 April 1997. These changes have led to market repositioning, which in turn have given rise to attempts to transfer activities and flight crew staff. After having described the context of this activity sector, we attempt to analyse Sabena's situation;

-third, the examination of the construction sector demonstrated the sector's specific characteristics and created a link with the issues raised by the coexistence within the Member States of legal but different legal situations (salaried workers and self-employed persons). These situations may raise problems in terms of the free movement of workers. In this connection, progress has been made in Community legislation that may resolve problematic situations and contribute to social dialogue in this specific context.

- four, the cross-border working phenomenon is one of the best examples of the progress being made in the process of European integration and labour mobility. However, based on the information that we collected, it is difficult to fully grasp these two phenomena. We have mentioned the following in this chapter: the phenomenon of cross-border work and European integration; the West Hainaut/Nord-Pas-de-Calais cross-border flows; the prospective of a trade union organisation as regards cross-border work between France in Belgium, and the case of cross-border Eures.

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