

**A better Coordination of the Social Security Schemes
- Phase 1 (2000-2001) : Preparatory Study**

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1. Introduction

Our society is characterised by growing internationalisation and more specifically Europeanisation. An important factor in this context is the free movement of persons, one of the fundamental objectives of the European Union.

To guarantee this free movement, Regulations Nos 1408/71 and 574/72 were implemented, which also aim at coordinating the social security regulations of migrant persons. These Regulations do not intend to establish one European social statute for migrant workers. Their purpose is “restricted” to the coordination of the different systems in the Member States.

It is often said that Regulation 1408/71, which is now almost 45 years old (its precursor, Regulation No. 3, dates back to 1958), is too technical, complicated and difficult to understand.

Although some points may be debatable, it is important to remember that the Regulation was only intended to coordinate, and leaves national legislations intact. This means that the Member States still remain responsible for the development, structure and organisation of their national social security legislations.

However, a marked evolution has taken place during the last decade, raising the question whether this Regulation is still sufficiently adapted to the present situation.

Firstly, the nature of migration has undergone some important changes. In the beginning of the European Union, mainly unqualified workers moved around the Community, whereas today, such migrations are much more common for the highly educated.

Secondly, there is a growing tendency to work abroad for short periods of time. Instead of migrating to another country with the purpose of settling there permanently, people now move for a few years and go back to their country of origin at a later stage. Very few jobs are guaranteed for life. The ‘flexible’ labour market’ has seen an increase in part-time work, fixed-term contracts, self-employment, etc.

With the creation of European citizenship and the establishment of the free movement of persons, migration is no longer confined to workers or the self-employed. As a result, the Regulations affect not only working people, but any EU national who moves within the European Union.

National legislations have also changed and adapted to this social evolution. Examples in this respect are different measures taken during the recession (for example, early retirement and other employment measures), measures to

promote the integration of family and work (parental leave, career breaks) and policies dealing with changing social risks (long-term care insurance).

Increasingly, the question is being raised whether the Regulation is still up to the task of dealing with new developments and to what extent it should be modified. Furthermore, in addition to simplifying the Regulation we could consider modernising it.

Various initiatives have been taken in this respect. In 1998, the European Commission submitted a proposal for simplifying the Regulation. At the summit of 8 December 2001, under the Belgian presidency, parameters were accepted comprising clear priorities and principles, which create the political framework from which the Council and the European Parliament can decide on concrete reforms at a later stage. In the current project special attention has been paid to such initiatives for reforming the Regulation.

2. The research's objective

This report aims to form the basis for advanced research in order to provide the government and the social security institutions with useful information and advice on the possible interplay between national social security law, fiscal law, European law and cross-border consequences. The Belgian Government faces many challenges as a result of new and recent trends in social security (co-ordination) and related domains, both at the European level and individual Member State level (especially of our neighbouring countries). Moreover, it is obvious that the implementation of new relevant legislations in Belgium have international implications.

3. Structure of the report

The research project aims to give an accurate account of the problems that could arise when implementing and interpreting Regulation 1408/71. Apart from an in-depth analysis of the relevant literature and jurisprudence, various institutions dealing with the implementation of the European coordination regulations were contacted for more information. From these sources a whole series of problems can be identified.

Apart from general problems resulting from the complexity of the European coordination Regulations, such as for example problems in the field of coordination and cooperation between the Member States or institutions and the lack of flexibility when applying the provisions on specific situations for migrant workers, problems can be divided into four main categories.

A. Applicable legislation

The first category deals with problems concerning the applicable legislation according to Regulation 1408/71 or the jurisprudence based on the Regulation. Although the Regulation provides for clear rules in this respect, in practice it is not always clear where contributions or premiums have to be paid or benefits have to be applied for. Problems arise especially with people who are no longer active, in the case of posting or in situations where activities are performed in two or more Member States. Unemployed frontier workers encounter particular problems in this respect.

B. Fair division of the cost of benefits

A second general category of problems encountered, results from the application of the provisions which have to guarantee a fair division of the costs between the Member States. Here we can refer to, for example, the pro-rata calculation of incapacity for work benefits and related problems concerning the settlement of the right to benefits. Matters relating to control, such as for example the question of where to hold the medical examination of beneficiaries who reside in a state other than the competent state, can cause problems. Furthermore, specific provisions for frontier workers lead to different rules, if the frontier worker is unemployed or incapable of working. Another question that can be mentioned here, relates to the accumulation of similar benefits. A frontier worker who has been insured for many years, is entitled, in his country of residence, if he is incapable of work, to incapacity for work benefits at the charge of the competent state. In contrast, a frontier worker who has been insured in the country of employment receives unemployment benefits at the charge of the country of residence, even if no contributions have ever been paid, either in the country of work, or in the country of residence.

C. New social security schemes

A third category of problems is related to the creation of new schemes in the different Member States and the consequences for social security coordination. One major problem is whether these new forms of social security fall under the material field of application of Regulation No. 1408/71. In particular, difficulties arise with respect to the division between social security, social assistance and special non-contributory benefits and the consequences this division has on the possible exportability of these modern social security schemes. Other problems mentioned here, deal with the trend of privatising social security and the role of competition law.

D. The limits of Regulation 1408/71

Finally, the fourth category aims to provide a better insight into the problems that can arise as a result of the limits of Regulation 1408/71. Certain forms of social security, such as for example benefits for reintegration and supplementary extra-legal social security benefits, are (not yet) covered by the Regulation. Also, the lack of coordination between social security schemes and tax regimes can be mentioned here. Apart from problems which could arise as a result of the fiscalisation of social security regulations, modifications in contribution levels compensated by tax exemptions could also lead to difficulties.

4. Structure of the report

4.1 Category I: Problems with respect to applicable legislation

Chapter 2 of Regulation 1408/71 describes a whole series of provisions indicating the legislation to which a migrant person is subject. Although this chapter deals with a list of rules, it turns out that it is not always clear when a certain rule is applicable. This report gives a, overview of various problems.

To begin with, there is the problem of post-active people. The question here is when do people who are no longer employed, cease to be subject to the legislation of the country of work. This is especially important in situations where post-active people no longer reside in the country of work. Post-active people who are no longer insured in the country of work, and according to Article 13(2) (a to e) are not subject to the legislation of another Member State, are according to Article 13(2)(f) subject to the legislation of the country of residence. This could imply that social security benefits of the country of work can no longer be claimed, because the persons involved are no longer insured there. In principle, according to Article 13(2)(f) of Regulation 1408/71 and Article 10(b) of Regulation 574/72, the Member States could determine for themselves when precisely this is the case.

In practice, this Regulation could lead to problems. For example, the Dutch Access to Social Insurance(Additional Categories of Persons)Decree 1999, KB 746, provides that people who receive long-term Dutch benefits and no longer reside in the Netherlands, are no longer insured under Dutch general insurance. Frontier workers who are incapable of work no longer build up pension rights, neither for themselves, nor for their spouse or children. They continue to build up pension rights only if they (i.e. persons insured under Dutch law relating to insurance against incapacity for work and those who have retired early) remain insured under Dutch Health Insurance, after moving abroad. If this is not the case, they are no longer insured under the *AWBZ* (general law on specific sickness costs) and other general insurance. However, under certain conditions

voluntary insurance can be continued for Dutch *AWBZ*, old-age insurance (*AOW*) or *Anw* (Dutch legislation for dependent people).

Problems could arise when this group of post-active people reside in Belgium and decide to become affiliated to the Belgian health insurance scheme. In principle, this should be possible if they are “enrolled in the National Register of natural persons” (the so-called residential system). However, people who are or may be entitled to medical treatment according to foreign provisions, cannot enrol in the National Register of natural persons. This implies that post-active people can become affiliated to Belgian health insurance only if they are not obligatorily insured with the Dutch *AWBZ*, and do not satisfy the conditions for voluntary continuation of this insurance.

The report also examines if the above mentioned problem complies with European legislation, and more specifically with the Court’s ruling in the *Elsen* case. On the basis of this judgment, it could be argued that people who were compulsory insured under Dutch social insurance immediately prior to their incapacity for work, should continue to fall under the Dutch social security system, even if they are going to reside in another Member State. This assumption clearly limits the scope of the formerly mentioned Royal Decree. Indeed, these provisions should be applicable only for people who become incapable of work during a period of unemployment.

In the framework of applicable legislation, problems could also arise in the case of posting. Posting concerns situations where a worker or self-employed person is going to work, in principle for one year, in another Member State to perform work for the undertaking to which he is normally attached. In short, the posted person remains subject to the legislation of the posting country and therefore does not have to pay any contributions in the host country.

The latter especially could turn out to be a thorn in the flesh of the host country’s social security institutions. In practice, most problems result from the question whether the conditions for posting have been fulfilled and, consequently, whether the posting provisions are applied properly. This also involves problems relating to the condition that all persons have to be “normally attached” to the posting company and/or to the condition that the work to be performed in the hosting country is on behalf of and for the posting company. Furthermore, it is not always clear if a specific period has to lie between two postings, or how to establish if a worker is posted to replace another worker and the requirements that can be imposed on the posted worker (e.g. with regard to the duration of his employment with the posting company) and the posting company, respectively (for example with regard to the relationship between the scope of the activities to be performed in the worker’s own state and the other Member State). Another discussion is the significance of a given posting declaration (E101 form) and the question to what extent such a declaration is binding for the hosting country.

Various questions also arise with regard to the differences in consecutive postings (Article 14(1)) and normal employment in the territory of different Member States (Article 14(2)(b)). Belgian's competent authorities refuse to issue a E101-form when a frontier worker had been posted to his country of residence for a short period. In this case the frontier worker indeed falls under the social security legislation of his country of residence. The posting regulation, however, is applicable to this frontier worker's colleague, who is residing in the state where he is working and who is temporarily posted to the country of residence of the frontier worker.

The report also examines how the courts dealt with these problems in practice. Special attention has been paid to the implementation of posting Directive 96/71 and its application in Belgium.

Another part deals with various problems that present themselves when activities are performed in the territory of two or more Member States. Especially frontier workers might perform activities in the territory of three states. In this case, the Regulation stipulates that a person is subject to the legislation of his country of residence, if activities are also partly performed in the territory of the country of residence. In practice, this frequently leads to abuse. As long as there are different social security contributions, it is interesting to "shop around" to avoid the general rules of the applicable legislation. Special attention is paid to the question: "What is to be understood as part of activities or what should be the scope of such activities in order for the legislation of the country of residence to be applicable?" This leads to the fundamental question whether this limited employment in the country of residence leads to insurance or not. Obviously, it is not acceptable for someone to be subject to the country of residence pursuant to the Regulation, but fail to be insured because the employment was too limited. We will also describe how Belgium and the Netherlands have resolved this problem.

Although the Regulation foresees the principle of unity of legislation, so that only one legislation is applicable, it has provided an exception to this principle. More specifically, people who are employed in the territory of a Member State and perform self-employed activities in the territory of another Member State, can in certain circumstances be subject to the legislation of both states. Examples of applicable cases with regard to Belgium are further described in the report.

Specific problems can also arise in the case of unemployment with regard to the applicable legislation and the question of where benefits have to be requested and contributions have to be paid. This is an important issue for frontier workers especially. Regulation 1408/71 has specific legal provisions for unemployed frontier workers. Distinction is made between totally unemployed frontier workers and frontier workers who have become partially unemployed or due to unforeseen circumstances. In the first case, the unemployed person falls under the legislation of the country of residence, whereas in the second case, the

competent state is the country of employment. It is assumed that an unemployed frontier worker is more likely to find a job in his country of residence, because he has stronger ties with that country. The report indicates that this specific provision causes many problems. It is, for example, unclear what is meant by total and partial unemployment. In Belgium, the term partial temporary unemployment is applied in cases where a worker with a valid employment contract becomes unemployed. Total unemployment is applied in cases where the employment contract has been terminated. This sometimes leads to discussion, for example in cases where Dutch procedures with regard to the termination of the employment contract are applicable. There is a similar lack of clarity in situations where a person is partially incapable of work according to Dutch standards and for this reason receives a partial WAO-benefit. This benefit is often supplemented with a partial unemployment benefit. On top of that, Belgian legislation distinguishes between totally unemployed persons, partially unemployed persons and partially unemployed persons who maintain their rights as totally unemployed persons. This could cause problems, because other Member States do not necessarily make such a distinction. Very specific problems could occur when a totally unemployed person who has the right to total unemployment benefits in Belgium migrates to another Member State to seek work and finds a part-time job. Problems could also occur when someone from the Netherlands or France comes to Belgium and starts working part-time.

With regard to the interpretation of the concepts total or partial unemployment it is important to know if a person still has ties to the country of employment. As long as such a connection exists, the country of employment should be regarded as the competent state, which implies that the person involved should also try to claim unemployment benefits there. If the frontier worker does not have any ties with the country of employment, he should be regarded as totally unemployed, and in such cases the country of residence is the competent state. Another problem is the correlation between partial unemployment benefits and partial employment in a state other than the country of residence. This raises the issue of applicable legislation. In this case the Administrative Commission recommended that a person should be subject to the legislation of the country of residence, both with regard to the payable premiums or contributions on the earned income as well as for the apportioned benefits. This recommendation therefore deviates from the main rule which provides that a person is supposed to be subject to the legislation of the country of employment. Belgium has concluded such an agreement on the basis of Article 17 of Regulation 1408/71 with Luxembourg, France and Germany, to ensure that partially employed people continue to fall under the social security system of the Member State where they reside. However, a similar agreement has not been concluded with the Netherlands.

Totally unemployed frontier workers receive their unemployment benefits according to the legislation of the country of residence. It is noteworthy, however, to mention the *Miethe* case of the Court of Justice. In this case the Court

introduced a derogation in situations where the Regulation's provisions lead to unsatisfactory, if not completely contradictory results. There are indeed frontier workers who have closer business and personal relationships with the country of employment, so that reintegration in the country of employment has by definition a greater chance of success than in the country of residence. For these (a-typical) frontier workers the rule is that the country of employment is regarded as the competent state, in which unemployment benefits can be claimed. The Dutch authorities believe that the mere fact that a person meets the Miethe-criterion means that unemployment benefits should be claimed in the country of employment. This interpretation of the Miethe judgment does not seem to correspond to what the Court originally intended. The Miethe regulation is by definition designed to compensate the a-typical frontier worker. It is not an invitation for the executing authorities to pass any claims for unemployment benefits to the competent authorities in the country of work on the assumption that availability for the labour market in the country of residence would not be realistic.

The report also analyses whether it would be preferable to maintain the country of employment for a frontier worker's right to employment benefits rather than the country of residence. Apart from removing the problematic distinction between temporary/partial and definite/total unemployment, it has various other advantages as well. One result of this option is that benefits are paid in the state that also deducts premiums. This prevents the payment of high, respectively low premiums for low, respectively high benefits. The principle of country of employment also justifies the fact that frontier workers are in most cases frontier residents who have moved to the "new country of residence" without having worked or being insured there. It also removes the problems faced by frontier workers in flexible and temporary employment. Alternating periods of employment and inactivity no longer lead to continuing changes between the applicable social security legislation and/or fiscal regulations. This principle furthermore guarantees that, in the case of cumulation of incapacity for work benefits and unemployment benefits, the benefits are better geared to one another than it is nowadays the case. This also applies to possible extra-legal supplementary benefits and redemption sums at dismissal, Belgian early retirement benefits as well as benefits for career breaks, especially if these are linked to unemployment benefits. Finally, application of the principle of country of employment also prevent frontier workers falling between two stools as a result of definition differences between national unemployment regulations. It also promotes the connection between labour law, and more specifically dismissal law, and the right to unemployment benefits.

4.2 Category II: Problems with respect to fair division of costs of benefits

In the case of (long-term) incapacity for work/invalidity benefits two specific problems can be distinguished. The first problem is closely related to the objective of a fair division of the cost of benefits between the Member States; the

second problem deals with control aspects in situations where benefit for (long-term) incapacity for work or invalidity has been exported to another country and obtained outside the competent state. In both cases the problem is whether a person (still) fulfils the conditions for the right to benefits, and, linked to that, the determination of this right.

In the first situation, problems can arise when a person has been insured under a scheme which is based on the duration of insurance. In such cases, the division of costs between the Member States is dealt with by the pro rata mechanism, as explained in Article 46 of Regulation 1408/71. If someone was insured in two systems which are based on materialisation of the risk, the solution is quite simple: the person concerned receives benefits only in the state where he is insured at the moment the risk occurred. Although this system is clear and therefore attractive, it is not the case when dealing with a fair division of the cost of benefits between the Member States. The problem is that a person becomes subject to the incapacity for work regulations in the country where the disability occurs, even if the person concerned has hardly worked or paid contributions there. If someone was insured under a system which was based on the length of insurance, the benefits will be awarded according to the rules of the different states the worker was subject to in proportion to the period insured under each national system.

Other problems can be observed in the case of (long-term) invalidity. Someone who lives in Belgium and works in the Netherlands will have the right to Dutch incapacity for work benefits (WAO), if he becomes incapable of work in the Netherlands. However, problems arise if this person decides to live outside the Netherlands. Although Dutch incapacity for work benefit (WAO) has to be exported pursuant to Article 10(1) of Regulation 1408/71, so that this benefit also has to be paid outside the Netherlands, the right to incapacity for work benefits will in principle end after five years. In the case of a permanent invalidity, a new claim for incapacity for work benefit will have to be submitted before the end of this five-year period, and the degree of incapacity will also have to be established again. The fundamental question is knowing which institution will be responsible for this re-examination: the competent institution in the new state of residence or the competent institution in the former state of employment that pays the benefits. Although it would be very practical for the person concerned if this re-examination could be performed in the state of residence, the competent authorities, who ultimately pay the benefit, would lose their "power" in this field. A consistent application of this rule means that the competent institutions in the state of former employment will have to follow and accept their colleagues' judgment in the country of residence. If not, this favourable rule for the person concerned would make no sense.

The fundamental problem is which state has to establish the right to benefit of a person who receives an incapacity for work benefit in one state, when it is paid by another Member State. The principle is clear to a certain extent. In the first

place it will be the institutions in the state of residence or stay of the person concerned that will carry out the control. Complementary control in the competent state is possible, but only under strict conditions. The person concerned should have the possibility to travel without any danger for his health and the competent institution will have to bear the costs of this additional examination. It only concerns an additional examination, implying that the first medical examination should take place in the country of residence or stay. The person concerned may reject his right to be examined firstly in the state of residence. This rule leads to many problems. Extra problems could arise due to the fact that this rule concerning control is primarily related to matters of a medical nature. However, in different countries medical capacity is examined in terms of the labour market as well. It is clear that the latter is a very difficult task for the competent institutions in the country of residence or stay.

Many problems are also encountered in the case of the accumulation of benefits of a different nature. For a long time, the accumulation of a Belgian and Dutch old-age pension has been problematic. Due to the fact that in the Netherlands each of the two spouses acquires a personal right to a separate old-age pension, Belgian old-age pensions, which had been awarded at the household rate, were converted to a pension at the single rate, at the moment when the spouse of a pensioner reaches the age of 65 years and therefore receives a personal pension. According to Belgian law, the conditions for receiving a pension at the household rate were no longer fulfilled. For the persons concerned, strict application of this rule meant that the family's income, which consisted of a Belgian and Dutch old-age pension, dropped. This raised the question whether the decrease in income, resulting from the difference between national rules which are not as such contrary to European law, can nevertheless be contested with regard to the impediment that the application of this rule can cause for free movement (Articles 39 and 42 of EU Treaty). It took more than 15 years before this question was answered.

In the Engelbrecht case the Court concluded that, if necessary, the National Court should not apply any national provisions if their application would lead to conflicts between national and Community law. This judgment implies that Member States, on the basis of Community law, could be forced, under certain circumstances, to put aside national legislations in favour of migrant workers. This may imply that two regimes have to be applied: on the one hand the national regime for nationals who did not use the right to free movement; on the other hand the Community regime for certain categories of migrant workers to guarantee that they do not encounter any problems when exercising their right to free movement.

Another matter that causes many problems is the right to cross-border medical benefits. EC Regulation 1408/71 sets out a couple of cases where persons are entitled to cross-border health care. Three specific situations are envisaged, in the first place a situation where someone, whether or not as frontier worker, lives

and works in different states (Articles 19 and 20 of Regulation 1408/71); a situation where someone temporarily resides in another Member State in a condition that requires immediate treatment (Article 22(1)(a) of Regulation 1408/71); and finally, situations where a person goes deliberately to another state for medical treatment, for example because that particular treatment cannot be given in time in his own country (Article 22(1) under c of Regulation 1408/71). Apart from these rules, the Regulation 1408/71 foresees particular rules for frontier workers.

The report gives an overview of the practical problems the institutions encounter in this respect. However, the competence of the Member States to make the reimbursement of benefits subject to authorisation by the insured person's social security institution was a point of discussion in some recent cases before the Court of Justice. The main question was whether the provisions of the free movement of goods and services as set out in the EC Treaty precludes the application of these authorisation rules. In the famous Kohll and Decker cases the Court of Justice was of the opinion that this was indeed the case. However, measures which limit free movement can in some cases not be prohibited, when grounds for justifying for such elimination could be found, such as for example guaranteeing the financial equilibrium of the social security system, ensuring a balanced medical service accessible to everyone and the protection of health. In Geraets-Smits and Peerbooms, the Court accepts such limits in the case of intramural (hospital) care. Without any doubt these cases mean a fundamental breakthrough in the right to free movement for patients. As a result of these cases, many Member States will have to adapt their procedures dealing with cross-medical health care. They will also have to define their insurance packages on the basis of objective, non-discriminatory criteria which are known in advance. In addition, Member States are obliged to draw up a procedural system which is easily accessible and capable of ensuring that the request for authorisation will be dealt with objectively and impartially within a reasonable time and refusals to grant authorisation must also be challengeable in judicial or quasi-judicial proceedings. The report investigates in detail the consequences these important cases have for the situation in Belgium in relation with its neighbouring countries, in terms of the development of the health care system, the prior-authorisation rule and the reimbursement of costs.

4.3 Category III: Problems with respect to new forms of social security

The relation between (less classical) social security risks and the EU regulations has caused many problems. First of all, the report looks at some European problems resulting from the economic crisis, increasing unemployment rates and the different measures the Member States have taken to tackle these problems. Many of these measures taken by national Member States to combat unemployment are not available to foreigners or could not be claimed by frontier workers.

Secondly, the report considers new forms of social security. Increasingly, national legislations introduce complex benefits, existing of cash benefits, benefits in kind and services. Such complex benefits are typical for health insurance, rehabilitation, vocational training, as well as long-term care insurance and social assistance aimed at integrating persons in the labour market. Can such new forms of social security be qualified as social security benefits and therefore fall under the material field of application of Regulation 1408/71 ? In many cases these benefits are related to social assistance, because they are means-tested or are paid from the general budget. A fundamental question is knowing whether the social assistance nature of these benefits prevails, and as such will not fall under the material field of application of Regulation 1408/71 (Article 4(4)) or that, notwithstanding the mixed character of the benefit, a link still exists with one of the risks enumerated under Article 4(1) and as such these benefits could be considered as a social security benefit. The answer to that question is of the utmost importance, in particular when investigating the possibility of exporting this benefit to another Member State. The report further examines in detail the situation of Flemish long-term care insurance, the Dutch law concerning *persoonsgebonden budgetten* (client-linked budgets) and Belgian provisions governing bankruptcy insurance for the self-employed. The report clarifies that Flemish long-term care insurance law and Dutch *persoonsgebonden* budgets do not comply with European Community law and that both benefits should be exported abroad.

The next question deals with the distinction between social security benefits and special non-contributory (mixed) benefits. According to Article 4(2)(a) of Regulation 1408/71, special non-contributory benefits fall within the material scope of the Regulation. In other words, benefits awarded under a system of law which differs from Article 4(1) and which do not fall under Article 4(4) of Regulation 1408/71. These are benefits paid from the general budget, where personal need is to a certain degree important and the person concerned has a legally defined position. When introducing this article, the intention was not to extend the Regulation's material field of application, but rather to exclude this category of benefits from the obligation to export them to another Member State. In principle, Member States can determine whether benefits belong to this category by listing them in Annex II a of Regulation 1408/71. Benefits mentioned in this annex can only be obtained in the Member State itself and cannot be exported. A fundamental question here is whether the criteria of Article 4(2)(a) are fulfilled. If these criteria are not fulfilled, these benefits will in principle fall under Article 4(1), which implies that they have to be exported.

It is not easy to establish whether benefits are of a mixed nature. Some indications were given in a resolution of the Administrative Commission. The criteria proposed by the Administrative Commission have become important, especially in view of the Court of Justice's ruling in the cases Jauch and Leclere. When analysing the case law of the Court it seems that the Court gives a very

broad meaning to benefits awarded on the basis of contributions – even an indirect link appears to be sufficient – and that many benefits which at first sight are not based on premiums or contributions, have to be considered as contributory benefits. Consequently, many benefits which were considered as special non-contributory benefits, and therefore do not have to be exported, can no longer be mentioned in Annex II a of Regulation 1408/71, and will have to be exported. The report indicates that Dutch legislation on incapacity for work for young handicapped people (WAJONG) and French benefits from the Fond National de Solidarité (today FSV) will have to be exported. The report will also examine the new German legislation on the reform of statutory provisions for old age and the introduction of capital-based old-age pensions.

In a next part of the report special attention is paid to new forms of social security resulting from the fact that public law claims on social security benefits are replaced by claims on the basis of private law. A typical example is the replacement of social security benefits by the employer's obligation to assume certain risks mentioned in Article 4(1) of Regulation 1408/71. Practice shows that such a replacement often concentrates on sickness insurance. The project examines certain questions in this respect. Can the employer be obliged to pay wages when the employed person is residing in another country? Does the statutory payment of wages by the employer extend across national borders? And, if so, do the same measures of control apply? How should this problem be tackled when Belgium labour law applies to the labour contract of a Belgian employee working in the Netherlands? Does the employee fall between two stools because the continued payment of wages according to Belgian law ends after a couple of weeks? In addition, the report explores the fundamental conflict between labour law and social security law. This is the case in particular when an employee falls under Dutch social security law on the basis of the Regulation, but is subject to Belgian labour law pursuant to the European Convention on the law applicable to contractual obligations. In this respect we could say that an impasse is created when this employee becomes ill. According to Dutch law, this employee is not entitled to sickness benefits because it conflicts with the employer's obligation to continue to pay wages. However, as Belgian labour law is applicable, it is not certain whether the employee can claim continued payment of wages from his employer. Indeed, according to Belgian law, an employer is only obliged to do so for a couple of weeks. If the sickness continues there is a risk that the employee will fall between two stools because he cannot claim sickness benefits on the basis of the Belgian sickness and invalidity insurance. According to the provisions of Regulation 1408/71, this employee falls under Dutch social security law. The employee is not in a position to appeal as in such circumstances the employer is obliged to continue to pay wages. The project investigates in particular the mutual relation between EU Regulation 1408/71 and the European Convention on the law applicable to contractual obligations.

In a next part we take a closer look at the influence of competition law resulting from privatisation. Increased privatisation of parts of public social security has

lead to some specific complications. In most cases it caused by the urge to decrease appeals to the social security system. Privatisation grants private organisations access to the public social security market. As this leads to growing competition, the system will make public organisations more efficient and execute social security regulations more effectively. Private access to the public social security market automatically implies that account has be taken of competition law. This again leads to several questions. There is for example the question if, and if so, to what extent, it is possible to regard organisers of social security regulations as companies. Another question is to what extent can rural and/or regional agreements with private organisations on the nature, range or cost of certain insurance, in other words, agreements that impose the acceptance of certain groups of insured people, be permitted in light of competition law ? What happens when organisers consolidate and form monopolies ?

The tension created by privatisation between economic and social objectives has resulted in a number of Court rulings. A number of criteria can be distilled to indicate how and where, depending on circumstances, the line should be drawn between the social objectives of social security and the economic objectives of the right to competition. When answering this question, we have examined if it is possible to regard the organisers of social security regulations as companies.

4.4 Category IV: Problems with respect to the limits of Regulation 1408/71

A first problem in this respect are the supplementary social security regulations. EC Regulation 1408/71 is in principle limited to the legal systems of social security which fall within its material field of application. Theoretically speaking, supplementary social security regulations based on, for example, collective labour agreements or private insurance fall beyond the scope of application of Regulation 1408/71. A number of problems can be encountered when the scope of application of Regulation 1408/71 is limited to legal systems of social security. The fact that supplementary social security regulations are not included in the material field of application of Regulation 1408/71 indeed implies that these forms of supplementary security are not exportable and for this reason cannot be received in another Member State. The report describes the problems that can arise in the framework of German 'Riester annuity (pension)' and various benefits granted at early retirement and the *Fonds Voorheffing Pensioenverzekering*.

In a next part the relation between family allowances and the European Coordination Law will be explored. Two special cases can be mentioned in this respect. Firstly, it can be remarked that most family allowances are nowadays financed by taxes. Secondly, most family allowances are not linked to the industrial relation or employment. Some Member States have even replaced family allowances with new schemes which do not fall under the Regulation's field of application. A typical example is the Dutch *studiefinancieringsuitkering*

(study finance). The report clearly describes its resulting problems to cross-border movement.

In the last part, we take a closer look at the tension between social security and taxation. Taxation should be linked more closely to social law, particularly in cases of cross-border employment. It seems that many countries now tend to take account of a person's social situation in tax law, or even replace certain social benefits with tax benefits, which immediately raises the question if these benefits resulting from tax law fall under the field of application of Regulation 1408/71 and if other European legal provisions apply to such benefits as well. Lack of alignment between rules concerning the applicable legislation and the payment of premiums and taxes, can cause various problems during cross-border movement. These problems result from the fact that Article 13(2)a of Regulation 1408/71 in principle links insurance, and consequently also the duty to pay premiums, to the country of employment. Problems arise because most states apply different tax regimes to non-residents. A person residing in a Member State which is not the state of employment may therefore have to pay higher taxes compared to someone who is living in the state of employment, because he/she cannot appeal to certain fiscal deductions granted to residents, or because certain fiscal advantages which residents enjoy due to their family situation, do not apply to them.

Finally, we also have to mention a new trend: the increasing fiscalisation of social security regulations. It is for example not always clear if certain levies should be regarded as a kind of premium, or as taxation, especially when it aims to finance social security. Consequently, people who live and work in different Member States may have to pay twice, i.e. a premium levy in the country of employment and a taxation levy in the country of residence, when the taxation levy is meant to finance the social security regulation in the country of residence. This indeed implies that above mentioned regulations have been financed twice. The question is how to resolve this situation. Typical examples are Belgium recession tax (*crisisbelasting*) or the French *Contribution Social Généralisée* and the *Contribution au Remboursement de la Dette Sociale*. The report closely looks into a number of those problems.

5. General Conclusions

The present report examined the practical application and implementation problems of EC Regulations 1408/71 and 574/72 in Belgium, with special emphasis on the relation with the neighbouring countries Germany, France and mainly the Netherlands.

Generally speaking, it can be concluded that the Regulations work well. Nevertheless, one could ask whether these Regulations are still adapted to modifications in migration patterns as well as to new evolutions and trends in the

different national legislations. Is the call for reform and simplification of the EU Regulation justified ? How far should one go? Should the Regulation be merely cleaned up or should its basic principles have to be changed fundamentally ?

In our opinion some general remarks can be concluded from our research. It is often felt that the Regulation sometimes gives the impression of being a patchwork of many stipulations which are not necessarily consistent.

Which general conclusions can be drawn ?

a) A first important remark is that EU Regulation 1408/71 itself is no longer sufficient to clearly illustrate the social security elements of cross-border movement. The time that the EU Regulation was the one and only source, is over. Indeed, today there are 4 different sources that deal with European social security matters.

- firstly we have the traditional EU Regulations 1408/71 and 574/72;
- secondly, there is Regulation 1612/68 with regard to the free movement of workers. For some time now there has been case law on the relation between Regulation 1408/71 and 574/52, especially with regard to the material field of application. After the Meints case, the Court of Justice opened new possibilities. With this case the Court decided that this Regulation forbids a Member State from making the payment of a social advantage subject to residence in its territory. This is a major, albeit not final, step. Export also seems to be possible.

The relation between Regulation 1408/71 and Regulation 1612/68 has to be examined further. What happens when a social advantage in the country of residence and in the country of employment coincide ? Which benefits/advantages can be exported ? What is the position of family members when a frontier worker becomes unemployed or accepts activities in the country of residence or dies, if they are already enjoying social advantages from the country of employment ?

- Thirdly, we have the fundamental freedoms, such as the free movement of services and the free movement of goods, which caused a lot of excitement in the field of cross-border health care. Many people had not expected much in this area. These rulings have clearly demonstrated that these freedoms can have an important impact on the organisation and structure of national social security schemes and be a source of new rights;
- Finally, there is also the principle of European Citizenship. It can be concluded from recent judgments of the Court of Justice that the principle of European Citizenship can play an important role when social rights are awarded.

Building on the Martinez Sala case, the Court of Justice decided in the Grzelczyk case that anyone who has used the right to move and reside freely within the territory of the Member States (Article 8A, now 18 EC), falls within

the field of application of the prohibition to discriminate against a person on the grounds of nationality (Article 6, now 12 EC). These cases have clearly shown that the principle of European Citizenship should be separated from performing economic activities and that this Citizenship also entitles rights to persons who are not active in economic terms.

The Court also discusses the consequences this could have on possible restrictions with regard to the right to residence for this category of citizens. The Court indicates that these restrictions should be very strictly interpreted. Only in very specific situations, in which it can be argued that the persons involved have no real grounds to appeal to the (financial) solidarity of the citizens of the receiving state, can the right to residence and to equal treatment be limited.

b) A second important remark resulting from the discussion of implementation problems is that the Regulation seems to be characterised by a certain amount of inconsistency.

In the first place, the Regulations still contain different categories of people to which different rights apply. An example could be the difference between individual and derived rights, or workers and frontier workers. Frontier workers still have a separate regulation for health care and unemployment benefits. But why? The judgment of the Court with regard to cross-border health care made it clear that there is only a small difference between frontier and non-frontier workers. Is there a need for specific stipulations for frontier workers? Is their situation so special that a separate regulation is required? They do have another problem. What is the specific surplus value of these provisions?

In the second place, there seems to be an important inconsistency between the different risks and their applicable rules. Whereas in health care the option is made for a far-reaching integration in the country of residence, there is hardly any integration in the case of unemployment (apart from the vocational training). The export of unemployment benefits is very limited (until 3 months) and on top of that, the unemployment benefits for frontier workers are completely at the charge of the country of residence, even though no contributions have ever been paid there. Can this separate regulation which deviates from the general principle of the country of employment be justified? One of the arguments for limiting the export of unemployment benefits, is that it is very difficult to monitor or control the unemployed person. Whereas control by the country of residence is accepted in the case of sickness, it is regarded as impossible with regard to unemployment benefits. In health care, cross-border care is increasing, rights are being attuned to this fact and the necessary structures are being put in place. At the same time there is the wish to develop a European labour market policy, although it still seems to be very difficult to obtain cross-border rights.

Why should there be such differences ? Are there reasonable grounds for maintaining differences in the system depending on which social risk is involved ?

Thirdly, the report indicated that there is a growing tendency to limit the export of new risks and new benefits that have recently been developed. Annex II a of Regulation 1408/71 plays an important role in this matter, although the Court had some objections against including too many benefits in this Annex. In this respect there is a need to further investigate the internal relation between social security benefits, the special non-contributory benefits of Annex II a of Regulation 1408/71 and social advantages according to Article 7, part 2 of Regulation 1612/68 (especially since this Regulation also allows export).

c) A third remark to be made is that the implementation problems of the Regulations have resulted in the development of several bilateral initiatives in the field of transnational cooperation, to improve implementation. An example is the payment of medical costs. The development of cross-border health care further strengthens this tendency towards bilateral cooperation. Although these bilateral initiatives have facilitated some of the implementation problems, there are still many obstacles. From a scientific point of view it would be interesting to chart these developments, assess their problem-solving value and see if recommendations can be distilled to modify the Regulations' provisions.

In conclusion with we can postulate that the very elimination of these obstacles and impediments could be an important factor in further simplifying the Regulation. It should no longer be characterised by a patchwork of specific regulations for different categories of persons, where different principles are applied to different risks. Rationalisation could therefore lead to a simplification and modernisation of the Regulation.