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Delegations will find attached document SWD(2016) 460 final PART 3/6.

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PART 3/6

**COMMISSION STAFF WORKING DOCUMENT**

**IMPACT ASSESSMENT**

**Initiative to partially revise Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems and its implementing Regulation (EC) No 987/2009**

*Accompanying the document*

**Proposal for a Regulation of the European Parliament and of the Council  
amending Regulation (EC) No 883/2004 on the coordination of social security systems  
and regulation (EC) No 987/2009 laying down the procedure for implementing  
Regulation (EC) No 883/2004**

**(text with relevance for the EEA and Switzerland)**

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**ANNEX VI: FRESSCO REPORT: EXPORT OF FAMILY BENEFITS**

This report was prepared in the framework of Contract No VC/2014/1011 “Network of Experts on intra-EU mobility – social security coordination and free movement of workers / Lot 1: Legal expertise in the field of social security coordination and free movement of workers”. This contract was awarded to FreSsco, a network of independent experts from 32 European countries coordinated by Ghent University.



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## Executive summary

The coordination of family benefits has become an issue of political interest in some Member States. It is argued that an unlimited export of these benefits granted to migrant workers whose children reside outside the Member State which has to grant benefits may not meet the policy aims behind these benefits. Therefore, the FreSsco team has been mandated to look into different options which could be a remedy for these political concerns.

The options we have chosen (based on the mandate and some also added by us) to evaluate their impact (always compared to the status quo) are the following ones:

- **Option 1:** Keeping the status quo.
- **Option 2:** Introducing an adjustment mechanism (which deviates from today's unlimited amounts of family benefits for children living outside the Member State concerned and adjusts the amount due to the different cost of living in the Member State of residence compared to the Member State which has to grant the benefit). As 'adjustment' is not a clear notion and as we had an extended exchange of ideas concerning the questions how such adjustments could work, what will be the outcome, and what legal obstacles could exist which hinder such adjustments, we have also elaborated on these questions in more detail. We have analysed the following three different sub-options:
  - **Sub-option 2a:** full upwards and downwards adjustment of the amounts.
  - **Sub-option 2b:** full upwards and downwards adjustment of the amounts but reimbursement of the amount of any upwards adjustments by the Member State of residence.
  - **Sub-option 2c:** only downwards adjustment.
- **Option 3:** reversing the order of priority, and always making the Member State of residence of the children the State competent by priority.

- **Sub-option 3a:** reversing only the order of priority without additional measures.
- **Sub-option 3b:** reversing the order of priority, and reimbursement by the Member State with primary competence under today's coordination of the amount it would have to grant today.
- **Sub-option 3c:** reversing the order of priority, and adjusting the amount of the Member State which has secondary competence to an amount according to the level of costs of living in the Member State of residence (when calculating a differential supplement).

For our evaluation of these six new options the following factors were considered:

- **Clarification:** where clarity and transparency are an issue.
- **Simplification:** is the solution simple or rather complex?
- **Protection of rights:** for this evaluation benchmark it is important whether the persons concerned are well protected, whether they lose rights but also how safe and quick the procedures are which have to be followed to get a benefit.
- **Administrative burden and implementation arrangements:** here the burden for administrations is scrutinised.
- **No risk of fraud and error:** options should also not be construed in such a way that the persons concerned try to achieve better results (e.g. higher benefits) by simulating facts which do not correspond to reality.
- **Potential financial implications:** behind this point the main question is hidden, as it seems that divergent points of view of Member States have been the incentive for this report; therefore, we refrained from really giving marks on this factor, but we only show the possible impact the option will have and leave it to the decision-makers to draw the conclusions from this;

The discussion within our small group of experts already showed how difficult it would be to achieve a solution to which everyone can agree (we quickly saw

that on some points we did not agree and, thus, this also had to be reflected in this report).

To help the reader more easily identify our conclusions concerning the different factors in relation to each option we used a system of marks where (+) means better than, (-) worse than and (≈) means nearly the same as the status quo, while (?) indicates that we give the results of our analysis whereas it will be a decision for the political decision-maker to make, as we cannot.

The following table presents the results of our evaluation.

	Clarification	Simplification	Rights	Admin. burden	Fraud	Financial implications
Option 2a	-	-	?	-	≈	?
Option 2b	-	-	?	-	≈	?
Option 2c	-	-	-	-	≈	?
Option 3a	+	?	+	+	+	?
Option 3b	+	-	+	-	+	≈
Option 3c	-	-	?	-	+	?

The analysis also showed that export is not the only problem. Thus, if a revision of the family benefits chapter is envisaged also all other problems and shortcomings existing today should be examined. If possible also additional options could be achieved at the same time with the provision of the export principle. From our point of view the problems which arise due to some of the horizontal problems are much more important and, maybe, should be solved with more energy of the legislature and urgency than the export question. We identified several issues, especially the following ones: the need for better definitions, a special coordination for child-raising benefits for persons in gainful employment (exclusive granting by the Member State which is competent for the person concerned) but also a clear rule on the question how many 'baskets of benefits' have to be made for the calculation of the differential supplement. Some of these horizontal issues are so interlinked with our main topic of export of family benefits that we had to recommend to take them also on board for the planned revision. As an example we want to mention that we have all been convinced that, even if an adjustment of family benefits is decided to be an interesting option, this cannot apply to contributory benefits (when only the payment of contributions opens entitlement to benefits) or to those with an income replacement function (e.g. some child-raising benefits).

Thus, our conclusion is that the examination of possibilities for a revision of the family benefits coordination rules is a valuable exercise which could improve the status quo. It should not be restricted only to the export question, but should also contain additional elements. Looking at the marks we have given to the different options it is clearly Sub-option 3a which seems to be the most suitable one for further analysis. Of course, also this option would be optimised by adding a special coordination e.g. for child-raising benefits. But it should never be forgotten that also this option would have negative aspects like e.g. a shift of the burden between the Member States, which has to be reflected upon when the political decision is taken.

## General remarks

### *1.1 Notions used throughout the text*

To ease the reading of the text some notions used throughout the text have to be defined:

‘**Regulation (EEC) No 1408/71**’ means Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, as amended;

‘**Regulation (EEC) No 574/72**’ means Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedures for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, as amended;

‘**Regulation (EC) No 883/2004**’ means Regulation (EC) No 883/2004 of the European Parliament and the Council of 24 April 2004 on the coordination of social security systems, as amended;

‘**Regulation (EC) No 987/2009**’ means Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, as amended;

‘**Regulation (EU) No 492/2011**’ means Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on the freedom of movement for workers within the Union;

‘**CJEU**’ means the Court of Justice of the European Union; rulings which dealt with Regulation (EEC) No 1408/71 are also mentioned in relation to Regulation (EC) No 883/2004 if from our point of view these rulings are still valid under the new Regulation (the relevant material content did not change);

‘**family benefit**’ means benefits in kind and in cash intended to meet family expenses (definition of Article 1(u)(i) of Regulation (EEC) No 1408/71 and Article 1(z) of Regulation (EC) No 883/2004);

‘**family allowance**’ means periodical cash benefits granted exclusively by reference to the number and, where appropriate, the age of the members of the family (definition of Article 1(u)(ii) of Regulation (EEC) No 1408/71);<sup>1</sup>

‘**member of the family**’ means – in accordance with Article 1(i) of Regulation (EC) No 883/2004 – any person defined or recognised as a member of the family or as a member of the household by the legislation under which benefits are provided; thus, it is a question of definition under the legislation which applies in the concrete case; if this legislation makes it necessary that the person concerned lives in the same household as the insured person or the pensioner, this condition has to be regarded as satisfied if the person in question is mainly dependent on the insured person or pensioner;

‘**export**’ is from a legal point of view misleading; in principle Regulation (EC) No 883/2004 obliges to grant the family benefits also for the children residing in another Member State; therefore, it depends mainly on the legislation of the Member State which has to grant the benefits to whom the benefits have to be granted; if they have to be granted directly to the children this indeed usually means export; if they have to be granted to one of the parents this is not export, but it is assumed that the person receiving the money spends it in favour of the children concerned; if this is not the case, Article 68a of

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<sup>1</sup> In MISSOC tables family allowances can usually be found under the heading ‘Classic child benefits’.



Regulation (EC) No 883/2004 safeguards that the benefit is transferred to the person who really maintains the children; this is only a clarification for the reader; we do not intend to change anything in this respect under our options and decided to use the word ‘export’ in a broader sense for all situations in which the children reside outside the Member State concerned;

‘**Member State with primary competence**’ means the Member State which has to grant its family benefits by priority (this Member State has to grant the full amount of the benefit under the legislation it applies). We will use this term throughout this report, also if we propose changing the rules of priority (for further details under today’s coordination please read chapter 3.1.2).

‘**Member State with secondary competence**’ means the Member State which only has to top up the family benefit of the Member State with primary competence in the event that the family benefits of this Member State with secondary competence are higher (differential supplement – see below).

‘**differential supplement**’ means the topping up of the family benefit of the Member State which has been declared primarily competent by the Member State which is secondarily competent to reach the amount of benefits in the latter Member State (which is only necessary if the latter amount is higher than the first one – today provided under Article 68(2) of Regulation (EC) No 883/2004);

The **different States** to which Regulation (EC) No 883/2004 applies have at certain points been abbreviated in the following way: Austria (**AT**); Belgium (**BE**); Bulgaria (**BG**); Switzerland (**CH**); Cyprus (**CY**); the Czech Republic (**CZ**); Germany (**DE**); Denmark (**DK**); Estonia (**EE**); Greece (**EL**); Spain (**ES**); Finland (**FI**); Liechtenstein (**FL**); France (**FR**); Hungary (**HU**); Croatia (**HR**); Ireland (**IE**); Iceland (**IS**); Italy (**IT**); Lithuania (**LT**); Latvia (**LV**); Luxemburg (**LU**); Malta (**MT**); the Netherlands (**NL**); Norway (**NO**); Poland

(**PL**); Portugal (**PT**), Romania (**RO**); Slovenia (**SI**); Sweden (**SE**); Slovakia (**SK**) and the United Kingdom (**UK**).

A **bibliography**, including selected literature on the coordination of family benefits for further reading, is attached as **Annex 3**.

## **1.2 Mapping**

We also want to already refer to the **mapping** which had to be done especially to reflect the specific impact of the proposed amendments (options) in the different Member States, but, also to map the current situation and the problems encountered. For this purpose questionnaires were sent to **FreSso national experts**. The countries were chosen according to substantive and geographic criteria. Care was taken to select countries that provide family benefits as income replacement benefits and those with no link to employment and paying of social security contributions, those with very diverse family benefits and those with more simple ones, countries from continental Europe, Eastern Europe and a Scandinavian country. Hence, the questionnaire was sent to (and the replies were received from) **Austria, Belgium, Bulgaria, the Czech Republic, Croatia, Luxembourg, Poland, Slovenia and Sweden**. It has to be mentioned also that the selected Member States have very different levels of cost of living standards. Starting with the Member State with the highest level,<sup>2</sup> **Sweden** is No 2, **Luxembourg** No 4, **Belgium** No 8, **Austria** No 10, **Slovenia** No 16, **the Czech Republic** No 22, **Croatia** No 23, **Poland** No 26 and **Bulgaria** No 28. Due to the very restricted time schedule for all three think tank reports (next to the present one also on special non-contributory cash benefits and unemployment benefits), all three questionnaires could not be sent to the same national experts (candidate countries for the analysis of family benefits could also be **DE, UK or FR**),

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<sup>2</sup> See chapter 5.

since this would clearly be overburdening for them. The results of the replies received have been incorporated into the report wherever best fitted. These parts are clearly distinguished in separate chapters.

Whenever we refer in this report to the special situation in one Member State, this is as a rule the outcome of the replies to the questionnaire (thus, the opinion of the FreSsco experts) and not of other (e.g. official) sources.

## Current situation and problems

### *1.3 Legal background – coordination of family benefits under today’s coordination rules*

#### *1.3.1 The coordination embedded in the general principles of the TFEU*

The substantive rules currently in force to coordinate family benefits in the EU are stipulated by Regulation (EC) No 883/2004, more precisely in its **Title III, Chapter 8**. Understandably the preamble of the said Regulation as well as Title I, which sets out general provisions, and Title II, which fixes the main principles for the determination of the applicable legislation, are extremely important, as well as implementation Regulation (EC) No 987/2009.

To better understand the idea of the coordination rules, it is useful to note that Regulation (EC) No 883/2004 was enacted under **the legal base of Articles 48 and 352 TFEU**. The former one obliges the EU institutions to adopt measures to secure the rights of migrant workers and their dependants in the field of social security, which are necessary to provide freedom of movement to workers. In other words one of the aims of the Regulation is “*to contribute to the establishment of the greatest possible freedom of movement for migrant workers*”, which is one of four fundamental freedoms of the EU, along with free movement of capital, goods and services.

It has to be mentioned that compared to the previous coordination Regulations, the current one is broader as it applies to all nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors (Recital No 7; Article 2).

Thus, it does not only cover economically active persons and their families, but everyone who has had some contact with the social security of several Member States. For persons who cannot be regarded as being active, the Regulation was adopted following the procedure in Article 352 TFEU. The broader personal scope is logical, taking into account the general trend to expand also the rights of non-active EU citizens (especially under the fundamental right to free movement for all Union citizens under Article 18 TFEU).

The Court of Justice of the European Union (CJEU) has consistently held that Article 48 TFEU provides for the coordination, not for the harmonisation, of the legislation of the Member States. The aim of coordination is to adjust social security schemes in relation to each other in order to regulate transnational questions, with the objective of protecting the social security position of migrants (or any other eligible persons according to the Regulation), by guaranteeing that persons do not lose their social security rights due to migration. At the same time the coordination rules have a neutral character, which means that in principle situations have to be accepted where, due to the change of applicable social security legislation, the migrant person may find him or herself in a less favourable situation deriving from the substantive law of the Member State where the person migrated to (as, for example, the substantive law, applicable according to coordination rules, provides for lower amounts of benefits). However, the situation could also be in favour of the migrant.

Before going more into detail of Regulation (EC) No 883/2004 it is also important to mention **Article 18 TFEU**, according to which, within the scope of application of the Treaties, any discrimination on grounds of nationality must be prohibited and Article 45 TFEU, which, in the context of free movement of workers prohibits any discrimination on grounds of the migrant worker's nationality.

The aim of all coordination rules, is, as previously said, to guarantee that a person, due to free movement, is not losing his or her social security rights. Looking at the preamble of the Regulation, especially recitals No 1, 7, 8, 13, and 17, and taking into account the legal base from the TFEU, it could be said that the Regulation concentrates on securing the social security rights of all EU citizens who have used their right to free movement and their family members, and not especially of economically active persons. But, arguments could also be found which support the idea that the Regulation still gives priority to economically active persons and their families, especially concerning family benefits, (see also recitals No 8 and 17 of the preamble) as the previous Regulations did. This question of the personal scope is important in defining whether the aim is to particularly guarantee the equal treatment of migrant workers and their rights in the Member State of activity or whether the aim is more general – to secure the social security rights of all persons who have used their right to move freely on whatever ground or have been in contact with that right through family members.

### *1.3.2 Specific rules on coordination of family benefits*

This part gives a short description of the main principles of coordination of family benefits. To guarantee persons' rights (also to family benefits), in **Title I** the Regulation provides for generally applicable principles, e.g. specific rules for aggregation of insurance etc, periods in different Member States, the assimilation of facts, the waiving of residence rules. The Regulation also enacts a general rule which should prevent overlapping of benefits (Article 10 and specific rules in Title III). All these general principles are well-known to the reader and seem unnecessary to be repeated at this occasion.

**Title II** of the Regulation determines which legislation is applicable to a person. As a general rule, the person covered by the Regulation should be

subjected to the legislation of a single Member State (Article 11(1)). Article 11(3) defines the general rules of applicable legislation: as in previous Regulations, the Member State in which the person concerned pursues his or her activity as an employed or self-employed person should be the (one and only) competent Member State in social security matters (see recital No 17 and Article 11(3)(a)) and that State should also apply the general principles mentioned above; in particular it should treat the person equally with its nationals (Articles 4 and 5). At the same time there are more and more rules in the Regulation which derogate from this general principle of competence of the Member State of gainful activity and which complement these rules, and also which regulate competence situations where a person is not economically active, but is still covered by the Regulation. This determination of the applicable legislation is of utmost importance for the coordination of family benefits as – on the one hand – only a Member State which is competent for one of the members of the family (including the one competent for a child) has the obligation to grant benefits under Regulation (EC) No 883/2004<sup>3</sup> and – on the other hand – every competent Member State is obliged to open entitlement to its family benefits for all family members, irrespective of whether they reside in the same or in another Member State (Article 67 of Regulation (EC) No 883/2004).

Without any additional rules this could lead to overcompensation if all Member States competent have to grant the full amount of their family benefits. Therefore, **Title III, Chapter 8** of Regulation (EC) No 883/2004 provides for priority rules which set up a hierarchy of competent Member States (especially Article 68). Only the Member State which has primary competence has to grant the full amount of its family benefits and any other competent Member States only have to grant a top-up in the event that the

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<sup>3</sup> To keep this part simple we do not want to refer to the specific solutions developed by the CJEU under the general principles of the TFEU in relation to Member States not competent for any member of the family which provide for entitlements under national legislation alone – e.g. the judgment in *Hudzinski and Wawrzyniak*, C-611/10 and C-612/10, EU:C:2012:339.

family benefits under the legislation of these Member States are higher than those of the Member State with primary competence. In a nutshell, this hierarchy could be described as follows: competence of a Member State due to work has priority over the competence of a Member State granting a pension,<sup>4</sup> which has priority over competence due to mere residence. The Regulation also contains special provisions for those cases in which more than one Member State at the same step of hierarchy is involved (e.g. two different Member States in which the parents exercise a gainful activity and thus are subject to the legislation of both Member States due to Article 11(3)(a) of Regulation (EC) No 883/2004). In these cases the residence of the child gives priority. Should no result be obtained thanks to this rule either (e.g. the child resides outside the two Member States in which the parents exercise a gainful activity) there are additional rules which determine the Member State which has to grant its family benefits by priority. As these are very rare cases we do not want to go into the details of these rules.

#### **1.4 Legal problems**

The rules on family benefits under Regulation (EC) No 883/2004 are one of today's most complex and disputed fields of coordination. Among the problems of a legal nature especially the following have to be mentioned:

- **Various and diverging types of family benefits in cash:** Taking into account the rulings of the CJEU, not only the traditional family allowances have to be regarded as family benefits. This includes also a bouquet of other benefits which do not have a lot of common elements, but, which have a general aim, which is (at least in part) the intention to meet family expenses: child-raising benefits which are usually meant to help the concrete person taking care of the child and

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<sup>4</sup> The case of pensioners is special as it is not the Member State competent for the pensioner under Title II of Regulation (EC) No 883/2004 (which would be, based on Article 11(3)(e), the Member State of residence) but the Member State which grants the pension; thus, the Regulation adds Member States which have to grant family benefits to those which are competent under its Title II.



which, therefore, replace income which cannot be received during the child-raising period;<sup>5</sup> tax benefits which are granted as a tax bonus;<sup>6</sup> an aid for child care at home if the public kindergartens are not used;<sup>7</sup> but also advances of maintenance payments<sup>8</sup> and childbirth and adoption allowances<sup>9</sup> (this last group had to be explicitly excluded from the definition of family benefit to safeguard that Regulation (EC) No 883/2004 does not apply to them – Article 1 (z)). This variety of benefits makes it difficult to know exactly which benefits have to be coordinated and which fall outside the material scope of the Regulation.

- **A transition from work-related concepts towards the inclusion of anybody covered by a social security scheme:** While Regulation (EC) No 883/2004 switched from covering (in principle) only gainfully active persons and their dependents (as has been the case with Regulation (EEC) No 1408/71) towards covering all persons subject to any social security scheme (Article 2), the coordination rules for family benefits still follow the old logic by giving priority to the situation of the gainfully active persons. This could cause some tension with the rights which every EU citizen derives from European citizenship (which rights have priority: those as a European citizen as an own right or those derived from another gainfully active person?). Without going further into that issue we recommend that this is an aspect which could also be further taken into account when thinking about concrete reforms of the coordination of these benefits.
- **The calculation of the differential supplement:** When the Member State which is not competent by priority has to top up the benefits of the Member State competent by priority many questions arise. The question if this top up has to be made for the total of all family benefits together or only per benefit

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<sup>5</sup> E.g. the judgment in *Hoever and Zachow*, C-245/94 and C-312/94, EU:C:1996:379; the judgment in *Kuusijärvi*, C-275/96, EU:C:1998:279; the judgment in *Weide*, C-153/03, EU:C:2005:428; the judgment in *Dodl and Oberhollenzer*, C-543/03, EU:C:2005:364; and most recently the judgment in *Wiering*, C-347/12, EU:C:2014:300.

<sup>6</sup> Judgment in *Lachheb*, C-177/12, EU:C:2013:689, concerning the aspects of tax benefits which are at the same time social security benefits; see B. Spiegel (ed.), K. Daxkobler, G. Strban & A.P. van der Mei, 'Analytical report 2014: The relationship between social security coordination and taxation law', FreSsco, European Commission, January 2015.

<sup>7</sup> Judgment in *Maaheimo*, C-333/00, EU:C:2002:641.

<sup>8</sup> Judgment in *Offermanns*, C-85/99, EU:C:2001:166, judgment in *Humer*, C-255/99, EU:C:2002:73, and judgment in *Effing*, C-302/02, EU:C:2005:36.

<sup>9</sup> If Luxemburg had not excluded this benefit explicitly it would have been covered by Regulation (EEC) No 1408/71; judgment in *Leclere and Deaconescu*, C-43/99, EU:C:2001:303.

category has been decided under Regulation (EEC) No 1408/71 by the CJEU in favour of the second option.<sup>10</sup> Although some doubt may arise whether this also applies for the application of Regulation (EC) No 883/2004, there are convincing arguments in that direction.<sup>11</sup> Another issue which is still not decided is whether this calculation has to be made per family or per child (which could also lead to totally different results, the latter one giving entitlement to higher benefits than the first one).

- **An unclear situation concerning benefits in kind:** The notion of family benefits also covers all benefits in kind. Despite that, Regulation (EC) No 883/2004 does not provide for clear rules (as are e.g. provided in the field of sickness benefits in kind<sup>12</sup>) on which Member State has to grant these benefits. Although concrete rulings of the CJEU are still missing,<sup>13</sup> it cannot be excluded that these benefits have to follow the general rules of coordination of family benefits including the obligation to grant them also for children residing outside the Member State concerned. Of course it is very difficult to imagine the export of e.g. free school books, free school milk or free travel from home to school to other Member States, but, would it not be possible that the CJEU, once asked, deducts from these rules an obligation to reimburse the expenses incurred outside the competent Member State?<sup>14</sup>
- **Which persons have to be regarded as members of the family:** Under the traditional family concept the question which persons can open entitlement to family benefits was not so difficult to answer (the parents and the children). Modern family situations have altered this dramatically. Today it is in some

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<sup>10</sup> Judgment in *Wiering* EU:C:2014:300.

<sup>11</sup> See also Y. Jorens & J. De Coninck, 'Reply to an ad hoc request for comparative analysis of national legislations. Family Benefits – Consequences of the Wiering judgment in C-347/12', FreSsco, European Commission, December 2014, 132 p.

<sup>12</sup> There is a whole Chapter 1 under Title III of Regulation (EC) No 883/2004 which deals with the various aspects of the granting of sickness benefits in kind. Most important is that there is no export of these benefits but an obligation of the Member State where the concrete treatment is effected to grant these benefits at the expense of the competent Member State.

<sup>13</sup> In the judgment in *Commission v Austria*, C-75/11, EU:C:2012:605, the CJEU did not have to answer the question whether the Austrian reduced costs for public transport have to be regarded as family benefits in kind under Regulation (EEC) No 1408/71.

<sup>14</sup> Following e.g. the reimbursement obligation developed by the CJEU in the cases on 'patient-mobility'; but of course, the cases we are confronted with are usually not cases on the freedom to provide services under Article 56 et seq TFEU. As this is not the main subject of this report we do not examine this question more in depth; for our purpose it is most important to mention it as a problem.

situations very complicated to decide which persons might be involved. The CJEU had to respect these new situations and declared also persons outside the actual family as persons who might open entitlement to family benefits, e.g. a divorced parent.<sup>15</sup> As a result, much more individuals could be concerned when calculating the amounts of family benefits. The definition of family member under Article 1(i) of Regulation (EC) No 883/2004 should be analysed if it really gives enough clarity concerning all persons who could fall under the notion of ‘family member’. Another issue is also if today’s definition covers in a sufficiently broad way all new forms of family which are recognised only under the legislation of some Member States (e.g. homosexual marriages).<sup>16</sup>

## 1.5 *Administrative problems*

### 1.5.1 *Results from the mapping exercise*

The **FreSsco national experts’** replies to the questionnaire showed some details concerning administrative difficulties. Certain administrative problems were reported by the majority of FreSsco national experts, arguing that the coordination regime for family benefits does not function perfectly in practice. Causes might lie for instance in the difficulty of comparing distinctive family benefits, not only due to diversity in the nature of these benefits, but also due to diversity of eligibility conditions for claiming them (e.g. in **LU**).

It seems that in **Austria** the principle that **the whole family must be considered** for the entitlement to family benefits leads to major administrative efforts for the competent institutions. They are obliged to identify all relevant facts regarding the mother, the father and the child. Also **Poland** reported

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<sup>15</sup> Judgment in *Slanina*, C-363/08, EU:C:2009:732; this ruling is understood in Austria as extending the notion of member of the family beyond the definition of Article 1(i) as also children who have not been dependent on the insured person came within the notion of member of the family .

<sup>16</sup> See also Y. Jorens, B. Spiegel, J.-C. Fillon & G. Strban Think Tank report 2013, ‘Key challenges for the social security coordination Regulations in the perspective of 2010’, Chapter 5.

problems regarding the classification of benefits and of a family (e.g. the legal situation of a step-parent). Similarly in **Bulgaria**, the reference to persons who have to be specified in part A of the E400 family benefit confirmation form creates certain difficulties. The form requires referral to a (former) spouse or other person/persons whose entitlement to family benefits in the country of residence of those family members should be verified. This allows referral of economically inactive persons (pensioners and even deceased relatives) and in that manner, to designate the other Member State as primarily competent (based on occupation). Moreover, in Bulgaria a large number of portable documents and certificates providing data only for family allowances for children in Bulgaria is being issued to individuals (by the Social Assistance Directorate at the Ministry of Labour and Social Policy). These do not provide information for occupation and activity in Bulgaria, and thus they cannot serve to determine the competent institution under the social security coordination rules.

All that may result in **rather long procedures**. Lengthy procedures were reported not only by **Austria**, but also by **Croatia** and **Slovenia**. In the latter it appears that the reason lies especially in complicated matters of coordination of family benefits and the important increase of coordination issues since Croatia's accession to the Union. In addition, only few experts are dealing with the coordination of family benefits, which may result in administrative decisions being issued only after a year from claiming the benefits (with an even longer tendency in the future). Moreover, certain procedures, like the one for the recovery of benefits, are as a rule not even instigated. Interestingly, in order to prevent fraud and abuse of family benefits, it is reported that **the Czech Republic** is currently starting negotiations with Slovakian partners on a possible future anti-fraud bilateral agreement. However, this procedure is only in a very beginning stage and no details on the future content of such an agreement are known yet.

So far, problems encountered and reported by the **Croatian** authorities relate also to **cooperation with the competent institutions of other Member States**. It seems that the main problem consists in obtaining the answer from another Member State, particularly where there is primary competence in another Member State on the basis of receipt of pension. The procedure is often long, without a reply from the Member State with primary competence. This results in the temporary granting of benefits by the Member State with secondary competence (i.e. **HR**), which could potentially lead to lengthy and complicated reimbursement procedures. Another problem in communication arises with the forwarding of applications for family benefits, which are deemed submitted in all Member States if they are submitted in one Member State (which is then liable to forward it, if the facts of the case so require). Practice shows that applications are either not forwarded at all, or are forwarded without response from the other Member State.

Administrative problems in the cross-border exchange of data were also reported by **Belgium** and **Bulgaria**. In **Bulgaria** it seems that the series **E400 forms** and the SEDs of the F-series are exchanged on paper by regular post. As a result, the information flow lingers and a risk of losing documents always exists. Introduction of upcoming electronic exchange should accelerate and facilitate the process of data exchange.

Reportedly, in **Sweden** there are problems concerning the **coordination of income-replacing parental benefits** (see 4.1.4 below).

Another problem was reported by **Austria** in relation to family benefits. Entitlement to family benefits often **effects inclusion into social insurance**, like health or pension insurance. This can cause problems if the person concerned is already insured because of the prolongation of employment, e.g. during maternity leave. In this case the question arises which Member State is competent to provide social insurance coverage? This is also due to the fact

that the material scope of Decision F1 of the Administrative Commission for the Coordination of Social Security Systems<sup>17</sup> is not clear enough regarding the applicable legislation.

Despite all the problems mentioned above, not many **national court cases** dealing with social security coordination of family benefits were reported. None or very few (non-recent) cases were reported by **Belgium, Bulgaria, the Czech Republic, Hungary, Luxembourg** (apart from two famous cases, i.e. *Lachheb*<sup>18</sup> and *Wiering*<sup>19</sup> – introducing insecurity for the **Luxembourg** institution CNPF<sup>20</sup>) and **Slovenia**.

It is in **Austria** that several court cases were reported. In 2014 and 2015 (until end March) Austrian higher courts had to decide 23 cases regarding the coordination of family allowance (*Familienbeihilfe*) and two cases regarding the coordination of childcare cash benefits (*Kinderbetreuungsgeld*) under Regulation (EC) No 883/2004 (or Regulation (EEC) No 1408/71, respectively).

In **Sweden** (apart from the *Kuusijärvi*<sup>21</sup> case, also mentioned below) courts had to deal with the question of the duration of export of residence-based family benefits, such as child allowance.<sup>22</sup> Sweden also reported a specific

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<sup>17</sup> Administrative Commission for the Coordination of Social Security Systems, Decision F1 of 12 June 2009 concerning the interpretation of Article 68 of Regulation (EC) No 883/2004 of the European Parliament and of the Council relating to priority rules in the event of overlapping of family benefits, OJ C 106, 24.04.2010, p. 11-12.

<sup>18</sup> Judgment in *Lachheb* EU:C:2013:689.

<sup>19</sup> Judgment in *Wiering* EU:C:2014:300.

<sup>20</sup> Caisse nationale des prestations familiales.

<sup>21</sup> Judgment in *Kuusijärvi* EU:C:1998:279.

<sup>22</sup> Reportedly, one case concerned a woman who had left Sweden for France. As long as she was a student there with Swedish study allowance, she was entitled to continued payments of child allowance. However, when her studies came to an end, the Social Insurance Agency claimed that she was no longer covered by Swedish legislation. The Administrative Court of Appeal found that the woman, due to a leave of absence from her Swedish employer, could not be regarded as having ceased all occupational activity in Sweden (compare with the *Kuusijärvi* case). The Social Insurance Agency appealed and claimed that the woman was no longer covered by any risk according to Swedish social security legislation, since a person during leave of absence is not covered by the Swedish work-based social security legislation (compare with the *Dodl/Oberhollenzer* cases). The case was not granted leave to appeal in the Supreme Administrative Court.

problem with regard to the case law on the deduction of days to be made when parental benefits have been paid out in other Member States.<sup>23</sup> The negative consequences for families with one frontier worker were also acknowledged in the Swedish media.

Several (administrative) court cases were also reported by **Poland** concerning overlapping of family benefits and the determination of the applicable legislation. Polish courts are of the opinion that the subject of comparison should be only the total amount of the benefit(s) granted, rather than the particular amounts of each type of benefits granted,<sup>24</sup> which seems to be in opposition to the CJEU judgment in *Wiering*.<sup>25</sup>

### 1.5.2 Short conclusions on the administrative problems

As shown by the mapping exercise, many technical and administrative problems occur in today's application of Title III, Chapter 8 of Regulation (EC) No 883/2004 (beside the legal problems). It is not the subject of this report to deal with all the different problems; only those relevant to export will be analysed if needed. Nevertheless, from our point of view especially the following problems can be summed up (some of them stemming from the FreSsco national experts, some added from our experiences and knowledge):

- problems identifying the Member State competent by priority;
- problems calculating the differential amount by the other Member States;

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<sup>23</sup> According to national legislation, Sweden is entitled to deduct days from the total of 480 Swedish days of benefits. However, to establish how many days have been taken out in another Member State may be problematic. The full Swedish parental benefit equals seven days of benefits a week. The Swedish Social Insurance Agency has taken the stance that, when transforming weeks taken out into days, a foreign week equals seven days, regardless of how many actual days the person has been granted in the other Member State during that week. In a situation where the mother worked in Denmark, for example, and had started the parental leave, the Swedish deduction led to situations where there were no days left for the father, working in Sweden, when he wanted to draw his parental benefit.

<sup>24</sup> Cf Naczelny Sąd Administracyjny, akt I OSK 295/11, I OSK 713/11.

<sup>25</sup> Judgment in *Wiering* EU:C:2014:300.

- very lengthy procedures which lead to situations in which the families concerned have to wait long before any benefit is paid;
- problems calculating provisional benefits;
- problems recovering overpayments.

## **1.6 Political problems**

### *1.6.1 General remarks*

On top of the legal and administrative problems, in recent years the coordination of family benefits also became the focus of political attention. Anecdotally, some stakeholders' main concern and point of criticism is that the family benefits which have to be granted for children residing outside the competent Member State have to be exported without any limitation, irrespective of the (economic) situation in these children's Member State of residence. Member States with relatively high amounts of family benefits could argue that this unlimited export is not fair, as it provides (in relation to the economic situation) much more money than the local families (without cross-border movement) get. Main purpose of the mandate for this report (which clearly mentions these concerns) is to look into various options for the export of family benefits which could solve the political problems. But, already at that occasion it has to be stressed that our group did not see today's situation of unrestricted export of family benefits in such a dramatic way; in public discussion only very few Member States raised this issue.

As any option which is different from the status quo will not be measured in relation to its impact on these political problems alone, but, also in relation to the legal and administrative problems described, we will also refer to them and have a look if these problems could also be solved or at least diminished. The



option which could best solve all three categories of problems would be the preferred one.

### 1.6.2 Results from the mapping exercise

Despite all the problems mentioned and also the rationale behind our mandate, hardly any **political debate** on coordination of family benefits was reported by the **FreSsco national experts**. It is considered that the coordination Regulations are a technical matter, giving rise to debates only between experts (e.g. CNPF in LU). For example, the *Wiering* case law<sup>26</sup> is of great importance for **Luxembourg**, but it seems too hard to explain it in detail to the public. Some public debate on family benefits was reported by **Slovenia** (following the adoption of the new family benefits act) and **Bulgaria** (on very low family benefits and their entitlement for the Roma population), but none on the coordination of family benefits. No public debate on coordination was also reported by **Belgium, Bulgaria, the Czech Republic and Slovenia**.

Conversely, there was some public debate in **Poland** on transfer of family benefits from other Member States, especially from the United Kingdom to Poland. This started when David Cameron, British Prime Minister, stated that he would try to renegotiate the UK's membership of the European Union to allow it to withhold child benefits for children living in other EU countries.<sup>27</sup> This became an international affair, and Polish foreign minister Radek Sikorski, talking about reciprocity, wrote on his official site: "*If Britain gets our taxpayers, shouldn't it also pay their benefits? Why should Polish*

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<sup>26</sup> Judgment in *Wiering* EU:C:2014:300.

<sup>27</sup> David Cameron said: "*It's a situation that I inherited ... I think it will take time because we either have to change it by getting agreement from other European countries – and there are other European countries who, like me, think it's wrong that someone from PL who comes here, who works hard, and I am absolutely all in favour of that, but I don't think we should be paying child benefit to their family back at home in Poland.*" R. Mason, 'Cameron to push for cap on European migrants in UK negotiations with EU', *The Guardian*, 5 January 2014, available at <http://www.theguardian.com/uk-news/2014/jan/05/cameron-cap-european-migrants-uk-negotiations-eu> (last accessed 17 March 2015).

*taxpayers subsidise British taxpayers' children?*<sup>28</sup> It has to be noted that in the United Kingdom child benefit claims under Regulation (EC) No 883/2004 in respect of children living in Poland are constantly decreasing.<sup>29</sup>

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<sup>28</sup> B. Waterfield, 'Poland attacks David Cameron plan to ban Polish and EU migrants from claiming child benefit', *The Telegraph*, 6 January 2014, available at <http://www.telegraph.co.uk/news/worldnews/europe/poland/10553020/Poland-attacks-David-Cameron-plan-to-ban-Polish-and-EU-migrants-from-claiming-child-benefit.html> (last accessed 17 March 2015). He argued that Polish people contributed about double the amount to the British economy than they withdrew in benefits. According to statistics, migrants from the Central and Eastern European Member States are much less likely to claim benefits than British nationals. The majority claim child benefits. In the long run the United Kingdom is receiving the fiscal contribution of migrants' work, without paying for the education and training that enables them to work.

<sup>29</sup> According to statistics, in 2009 there were 22,885 claims for 37,941 children in Poland. In 2013 there were 13,174 claims for 22,093 children of migrants from Poland. R. McInnes, 'Statistics on migrants and benefits', available at <http://www.parliament.uk/briefing-papers/SN06955/statistics-on-migrants-and-benefits> (last accessed 31 March 2015).

## **Horizontal options which are relevant for all options examined with regard to export**

Before going into the concrete options concerning the export of benefits, we want to mention some horizontal issues which emerge when problems in relation to the coordination are mentioned and, therefore, also have relevance for these options. We recommend also including these aspects in any attempt to change the existing system, as they could have significance for the impact assessment of the different options. After our examination of the different options we are convinced that these horizontal questions cannot be left aside by the policy-makers who have to take a decision on which option on export of benefits to follow.

Nevertheless, these additional options are not a must for the new coordination concerning export. They could help to avoid some additional problems, but, any export option would also perfectly work without them (maybe, with different pros and cons as a result of the impact assessment – which can be of great importance for the decision-makers). As this was not explicitly requested we have also abstained from making a detailed impact assessment of these additional options. Whenever important we will refer to them during the impact assessment of the export options. Taking into account the very restricted time available for any reform of the export provisions it would not be realistic to expect that all these additional options will be taken on board at this next occasion. Maybe, these ideas could be further discussed for a more profound revision of the coordination of family benefits in future.

## **1.7 The same coordination for all family benefits?**

### *1.7.1 General remarks concerning the variety of benefits*

Of course export today concerns all family benefits in the same way (letting aside the advances of maintenance payments and special childbirth and adoption allowances which are included in Annex I of Regulation (EC) No 883/2004). Nevertheless, it should be examined if the same coordination for all family benefits is really the perfect solution.

From a historical point of view (when Regulation (EEC) No 1408/71 was drafted) **family allowances** have been the main benefits provided for by the legislation of the Member States. Later on, the bouquet of family benefits as described above expanded and covered more and more different types of benefits. If export is considered the problem which stimulated this search for new options, we have to examine first if all the different groups of family benefits cause the same problems.

### *1.7.2 Results from the mapping exercise*

The diversity of political aims behind the different family benefits of the Member States also became very clear from the replies of the **FreSsco national experts**:

In general, the aim of social security systems is to provide income security in cases of lost (or reduced) income and in cases of additional costs (through a process of broader or narrower social solidarity). More precisely, the **primary goal** of family benefits may be deducted from the *actes préparatoires* (legislative material for the adoption of a new act). As a rule, it is to cover

(part of) additional costs a family has due to maintenance and education of a child or more children.

For instance, in **Austria** in the *preparatory documents*<sup>30</sup> for the adoption of the Families' Burden Compensation Act (*Familienlastenausgleichsgesetz/FLAG*)<sup>31</sup> regulating family allowance (*Familienbeihilfe*), it is mentioned that the social policy aim of the Families' Burden Compensation Act is to support families with children when the costs of maintenance and education of children impair the standard of living, especially if a family has more than one child. It has been ascertained that compensating the additional financial burden of families for housing, clothing and nutrition is crucial for the existence of the whole **Austrian** society. This compensation is to be conducted between those who carry that burden – also for the good of the whole society – and those who do not carry such burden and therefore benefit from the fact that others do.

In **Slovenia** the social policy aim of the parental care and family benefits scheme is expressed in the preparatory materials for the new ZSDP-1 (*Zakon o starševskem varstvu in družinskih prejemkih*, Parental Care and Family Benefits Act).<sup>32</sup> It is emphasised that family benefits are a link of the entire uniform family policy, which is exercised also via other policy areas. The ZSDP-1 is based on the social nature of the Slovenian state and the fact that the state cannot ignore the basic societal cell – the family.

The primary goal of family allowances to offset the costs of a family for raising children is reported also by every other Member State (covered by our questionnaire), i.e. **Belgium, the Czech Republic, Poland, Luxembourg**

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<sup>30</sup> RV 549 BlgNR 21.GP, 11.

<sup>31</sup> Federal Gazette Number 376/1967, latest version Number 53/2014

<sup>32</sup> Government of the RS, legislative proposal for the ZSDP-1, EVA 2013-2611-0042, 10.10.2013

(where family allowances are a personal right of the child),<sup>33</sup> **Sweden** (where family allowances should somewhat even out the differences between families with children and those without) and **Bulgaria** (benefits should support parents to raise a child in the family environment).

However, there are also **ancillary (secondary) aims**, like guaranteeing equal treatment of children (**BE**), or maximising the best interests of the child, increasing birth rates and nativity (**HR**), providing more gender equality, enabling workers with family responsibilities to balance between professional and family life (**SI**), or combating the decline in birth rates (**AT**). It is also important to note that family benefits should prevent or even alleviate poverty of children and their families (**BE, BG**). In **Bulgaria** it is discussed that instead of targeting poor people (especially Roma), family benefits should follow children in educational establishments, being dedicated to education and better health care to increase children's potential for future employment and social inclusion. Some initial conceptualisations have, however, become obsolete (e.g. family benefits as a wage supplement for workers with families in **BE**).

Taking all these primary and secondary aims into account, family benefits are **shaped quite distinctively** across Member States. Some amounts may depend on the number of children (e.g. in **SE**) and their age (e.g. in **AT, CZ, SI** for child benefits). Some may be income-related and some provided as a lump sum (e.g. in **LU**). Some may be income-tested or means-tested (**HR**, child allowance in **CZ**, guaranteed child benefit in **BE**, child benefit in **SI**, family allowances and supplements in **PL**). For some (permanent) residence may be required (e.g. in **AT, SI**). There may be special benefits (e.g. partial payment

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<sup>33</sup> Reportedly, since the beginning of the 21st Century, LU has adopted a new approach regarding welfare of children, based on the United Nations Convention on the rights of the child. Through reforms in fiscal matters – the abolition of income tax classes taking into account the presence of children in a household and the creation of a "child bonus" (2007) – and family benefits – the creation of a childcare voucher (2009), the abolition of family allowances for young people over 18 and the creation of a financial aid for young people in higher education (2010), the government recognised the child as an individual.

for lost income and childcare supplement in **SI**) or certain supplements for children with disabilities (e.g. in **BE**, **BG**, **PL**). Supplements may include additional amounts of certain family benefits for single parents (e.g. in **BE** where it is income-tested, **SI**) or for long-term unemployed, sick or incapacitated parents or those receiving an old-age or survivor's pension (e.g. the **BE** professional scheme), supplements for heating or electricity support (in **BG**), or within the housing benefit (in **SE**).

It should be emphasised that presenting all different features of all family benefits in all Member States is not the central focus of the present report. For this we refer to the annexes (country sheets) of the FreSsco report on the *Wiering* judgment<sup>34</sup> and the MISSOC comparative tables on family benefits.

However, it might be pertinent also for the present analysis whether the **amounts of family benefits (and their adjustment)** are linked to the (minimum or average) wage or social assistance or living costs in the Member State they are being provided. Linking family benefits to different factors might influence the possibility (or criteria) for their adjustment when exporting them to another Member State.

The amounts of some family benefits are not directly linked to any of the abovementioned factors. For instance, in **Austria**, there is no defined percentage of living costs or average income which should be covered by the benefit. The amount is not directly related to minimum income or the social assistance amount. However, family allowance is not deducted when calculating social assistance (*Bedarfsorientierte Mindestsicherung*) in comparison to e.g. cash childcare benefits. This is due to the fact that the latter are qualified as 'income', which reduces the amount of social assistance

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<sup>34</sup> Y. Jorens & J. De Coninck, 'Reply to an ad hoc request for comparative analysis of national legislations. Family Benefits – Consequences of the *Wiering* judgment in C-347/12', FreSsco, European Commission, December 2014, 132 p.

accordingly. In contrast, the amount of social assistance even increases (plus 18%) if the claimant has to care for a child receiving family allowance.

In **Belgium**, in neither scheme (i.e. the professional and residual one) is there a defined percentage of the average income or living costs that should be covered by the benefit. In principle, the amount is not tied to the minimum income or to amounts of social assistance. However, the guaranteed child benefit is granted only to persons who receive social assistance or have a low income (hence, an indirect link to social assistance does exist), and certain supplements are income-tested.

In **Bulgaria**, the amounts of family benefits are fixed annually by the State Budget Act for the respective year, which means they may differ from one year to another. Each family benefit or allowance type is a fixed sum and is not rate-related with living costs or average monthly or annual income. However, this does not apply to income-related family allowances.

In **the Czech Republic**, the amount of family allowances is not related to minimum income (reportedly, it used to be, but is not anymore), or to social assistance amounts. Interestingly, for Czech parental allowance, it is up to the parent who claims this benefit to choose how long he or she wants to stay at home with the child. The shorter the period, the higher the amount per month (within certain limits).

In **Croatia** benefits depend on monthly income per member of the household as put in relation to the State Budget Base of HRK 3,326 (€436) (the same base applied since 2002). Three income groups are eligible to receive the allowance: households who earn below 50% of the State Budget Base, those who earn below 33.66% of that base and those who earn below 16.33%. Those whose income exceeds 50% of this amount are not entitled. There are also additional supplements. The amount of the child allowance therefore depends directly on the amount of the State Budget Base, which is determined and laid



down each year, by the Act on the Implementation of the State Budget for the current year.

Also in **Luxembourg**, the effective costs of the presence of a child in a household have never been calculated. A universalist vision prevails, which means that all children have equal rights, that they have a right to family allowances of the same (lump sum) amount. It is not related to living costs, average income, minimum income or social assistant amounts.

This is similar to **Sweden**, where child allowances and special supplements within housing benefits are not related to the minimum income/social assistance. Still, there appear to be discussions in Sweden from time to time on whether child allowance should instead depend on the income level of the family. It is argued that in this case the costs for administrating the benefit would increase.

Also in **Poland** family benefits are not defined as a percentage of living costs, average remuneration or social assistance.

However, in **Slovenia** there seems to be a certain link to the minimum wage, e.g. parental allowance used to be determined as 55% of the minimum wage (and according to the new ZSDP-1 it is just set as a corresponding amount, no longer mentioning minimum wage as such). Also partial payments for lost income used to be equalled with (a proportional part or the entire) minimum wage (now the nominal amount is set, which corresponds to the minimum wage as it was set in the first half of 2010). Some benefits are targeted to those below 64 % of the average wage per family member (child benefit and large family supplement)

The most evident link to (former) income (wage) exists in income replacement child-raising schemes, e.g. the **Austrian** income replacement scheme of the

cash childcare benefits (*Kinderbetreuungsgeld*), or parental benefits in **Sweden**.

Some family benefits do have a link with the cost of living in the country, which is evident from the **adjustment** (indexation) rules. Some family benefits are adjusted by the rate of inflation (e.g. in **AT**),<sup>35</sup> some by the evolution in living costs (e.g. in **BE** or **SI**). It may also be that family benefit amounts are fixed amounts, which are, e.g. in **Luxembourg**, no longer adjusted to the evolution of living costs.

### *1.7.3 Benefits with the predominant aim to meet family expenses; questions of definition*

If the political decision behind a family benefit is (besides other policy aims like e.g. the promotion of families or the encouragement to have (more) children) to cover the additional expenses which are caused by the obligation to maintain children (e.g. additional or special nutrition, nappies, prams, school books etc.) it is arguable that this decision is usually only based on the situation in the Member State concerned. The costs of these goods there are the decisive factor. In an ideal transparent world national politics set a percentage of these additional costs which has to be covered by the family benefit. If this decision says e.g. that 20% of these additional costs has to be the amount of the family benefit, this decision is outbalanced if the children need these goods in another Member State where they live and this amount covers e.g. 100% or only 5% of these goods there. In these cases a political problem might arise. On the contrary, our mapping exercise (see 4.1.2 above) showed that national legislatures usually did not refer to a specific percentage of the living costs when a new family benefit was introduced, even if it is also

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<sup>35</sup> In Austria, for the years 2016-2017 the amount of the family allowance will be increased by 1.9 %. The same applies for the year 2018. That approximately corresponds to the calculated rate of inflation.

provided for that these benefits have to be adjusted in correspondence to the development of the costs of living in the Member State concerned. Important is also that it seems that no Member State has adjusted its family benefits to different costs of living inside the relevant territory.

For these benefits which include at least the classic family allowances, options could be considered which strive for a better way of achieving the political aims behind the benefit. These benefits will be the main focus of detailed options concerning the export of family benefits. Of course these options could also cover all other family benefits if no decision is taken to split the coordination for the different types of family benefits, but, we should never forget that especially these general benefits gave rise to the main problems with today's export obligations.

Past FreSsco work unveiled the complexity of the notion of family benefits especially if benefits are concerned which are at the same time social tax benefits (benefits granted under tax law which have the clear purpose to cover at least a part of the additional costs due to having children to maintain).<sup>36</sup> The perception from a national point of view of what constitutes a family benefit covered by Regulation (EC) No 883/2004 and which benefits fall outside its scope are very often more influenced by national systematics than European approaches (which should only look into the policy aim of a measure to establish the material scope of the Regulation). This situation has been aggravated by new types of benefits added by the CJEU which are not so evidently covered by the existing definition of family benefits as they cover also other purposes (e.g. helping the person taking care of a child to reconcile work and family life as is very often the case with child-raising benefits).

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<sup>36</sup> B. Spiegel, K. Daxkobler, G. Strban & A.P. van der Mei, 'Analytical report 2014: The relationship between social security coordination and taxation law', FreSsco, European Commission, January 2015.

Therefore, it could be good to start any work on new ways of coordination with a new definition of a family benefit. This would be recommendable even if no specific coordination is provided for specific benefits which are income-related (see 4.1.4 below). Such a new definition should draw a clear borderline in relation to social tax benefits which still remain outside the scope of coordination under the Regulation (if there are any) and should also cover all the other benefits (if no specific new coordination is provided for them).

**Proposal for an additional horizontal Option No 1**

The definition of family benefits should be adapted to avoid today's questions of interpretation and to draw a clear borderline in relation to benefits which should remain outside the coordination.

*1.7.4 Benefits which are employment-related*

1.7.4.1 Which benefits are special because they are employment-related?

Opposed to the classic family benefits there are benefits with quite different political aims. They want to replace income of the person who actually takes care of a child and for that reason interrupts or at least reduces a gainful activity. This is most evident if the amount of the benefit has a clear income replacement function, which means it is calculated as a percentage of the former earnings. But also benefits which have a lump sum nature could be added under this category as long as they are granted to persons exercising a gainful activity. It could be assumed that under today's coordination these

benefits give rise to some problems and it is not safeguarded that all Member States apply Regulation (EC) No 883/2004 in the same way.

#### 1.7.4.2 Results from the mapping exercise

The above has also been confirmed by the replies from the **FreSsco national experts**. They especially report the following points:

Problems were reported with the coordination of family benefits in relation to **Sweden**, in particular as regards the **parental benefit**. When Sweden joined the EU it was considered that the parental benefit – which is related to the income of the individual parent – was to be regarded as a maternity benefit. However, the CJEU classified the parental benefit as a family benefit in the *Kuusijärvi* case.<sup>37</sup> Reportedly, there have been many cases in national courts regarding parents moving during parental leave and the issue of their right to continued payments of benefits. The issue of non-actives moving to Sweden and claiming parental benefits has also come up in the courts. The Supreme Administrative Court referred such a case to the CJEU (*Bergström*).<sup>38</sup> In general, it is argued that the coordination of family benefits has been one of the main problematic issues when it comes to applying Regulation (EEC) No 1408/71 and (EC) No 883/2004 in Sweden.

There have also been some cases concerning the overlapping of benefits in Sweden. As mentioned, parental benefits compensate income loss, whereas ‘normal’ family benefits are related to costs in general for having a family. Since some other Member States do not classify their parental benefits as family benefits, Sweden has often been obliged to pay supplements for families residing in another State, while one of the parents is working in

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<sup>37</sup> Judgment in *Kuusijärvi* EU:C:1998:279.

<sup>38</sup> Judgment in *Bergström*, C-257/10, EU:C:2011:839.

Sweden. The Swedish Social Insurance Agency issued two reports on this issue, one in 2004 and one in 2006, to look into the cost for Sweden.

Also, the individual worker could be negatively affected by the fact that flat-rate benefits were put in the same benefit basket as the income-related parental benefit. The following example came up in the case law: a worker in Sweden whose family and working husband were in Denmark was taking out a few days of parental benefit a month (reportedly, in Sweden this is a common way of reducing working hours when having small children, since parental benefits may be spread out over several years; also when the child is sick parental benefits can be taken out). Denmark is then primarily responsible for family benefits. The Danish child allowance is higher than the Swedish one. When calculating the supplement for Sweden to pay out in this situation, the Swedish parental benefit was regarded as a family benefit, meaning that the few days of parental benefit ‘disappeared’ in relation to the higher Danish amount, despite covering income loss for the worker and not general costs for the family.

The problems related to overlapping of benefits have led to a special solution in the 2012 Nordic Convention (a multilateral convention based on Regulation (EC) No 883/2004 between **SE, DK, NO, FI** and **IS**), meaning that when calculating differential supplements for family benefits in accordance with Article 68(2) of the Regulation, benefits intended to compensate income loss for parents are not to be included.

As of September 2011, **Sweden** reportedly has taken the view that the parental benefit is to be regarded as a maternity/paternity benefit. This means that the Social Insurance Agency from this date on no longer includes parental benefits when calculating differential supplements (i.e. the same solution as in the Nordic Convention). The re-classification of parental benefits is, however, questionable. From our point of view it is difficult to justify such a fundamental change in interpretation taking into account that the general

principles of coordination and the definition of family benefits did not change when Regulation (EC) No 883/2004 was adopted.

The fact that the parental benefit could be exported to family members in other Member States with no individual income in Sweden – which was one of the consequences of the classification in *Kuusijärvi*<sup>39</sup> – has been considered quite odd. One problem that could occur was on which level the benefits had to be granted – the income level of the spouse working in Sweden or the basic level granted in Sweden to non-actives.

The above example shows the diversity of family benefits in general and specific features of employment-related benefits in particular.

#### 1.7.4.3 Proposal for a new way of coordination

From our point of view the negative consequences of coordinating a family benefit with an income replacement function can be best shown by way of an example:

***Example:***

*Member States A and B know a child-raising benefit for the person who interrupts the gainful activity and takes care of the child for one year after birth. The amount of the child-raising benefit is in Member State A 60% of the previous earnings; in Member State B it is 80%. In addition, Member State A knows a lump-sum benefit (fixed amount) for persons who were not gainfully active before they started taking care of a child.*

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<sup>39</sup> Judgment in *Kuusijärvi* EU:C:1998:279.

*In a family which resides in Member State A the father works in Member State A while the mother works as a frontier worker in Member State B. The mother draws child-raising leave after maternity leave and stays with the child at home.*

*Under today's coordination<sup>40</sup> Member State A has primary competence. Will it grant the child-raising benefit under its legislation by compensating 60% of the income of the mother (who has been subject to the legislation of Member State B and not of Member State A)?<sup>41</sup> In this case Member State B (secondarily competent) will have to grant a differential amount of 20% to reach the 80% provided under its legislation. Or will it, maybe, only grant the lump-sum amount for non-active persons in that Member State and will Member State B grant a differential supplement to reach the 80% provided under its legislation?*

From the point of view of the persons concerned this solution is not understood. In principle they would expect that the legislation of the Member State where they exercise their work has to grant these benefits. This is especially the case if there is no clear-cut borderline between the duration of the maternity (paternity) benefit which has to be coordinated under Title III, Chapter 1 of Regulation (EC) No 883/2004 and, thus, be granted from Member State B in our example, and the following child-raising benefit (sometimes the benefits even have the same amount).

To avoid problems of coordination of these types of family benefits it should be considered to draft a specific coordination which is not connected to the coordination of the remaining family benefits. One way could be to state explicitly that for these benefits the same coordination as for maternity or equivalent paternity benefits (Title III, Chapter 1 of the Regulation) should apply, as seems to be the practice already in some Member States. Thus, only the situation of the person concerned would be relevant and not the one of

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<sup>40</sup> Let us assume we apply the *Wiering* judgment and coordinate all child-raising benefits in one basket.

<sup>41</sup> From the judgment in *Bergström* EU:C:2011:839, it could be assumed that under Regulation (EC) No 883/2004 such an obligation exists.



other members of the family. It has to be admitted that such a radical change of today's coordination which is also a consequence of the clear rulings by the CJEU was not shared by all members of our group. Another way, more in line with the existing coordination, could be to provide under Title III, Chapter 8 of the Regulation specific rules for this kind of family benefits which strengthen the *lex loci laboris* principle of the person who wants to claim the benefit. To avoid overcompensation, only one parent should be entitled to claim such benefits for the family wherever the children reside. Should this recommendation (which is not the focus of this report and, therefore, will also not be elaborated in full detail) be chosen, all options which we will examine in relation to the export of benefits have to be read in such a sense that they do not cover these special child-raising benefits.

For this option we recommend that also the following elements should be further examined:

- **Definition:** It could be said that 'child-raising benefits linked to a gainful activity' are those which are provided under national legislation for persons who are in a gainful activity and who interrupt or reduce this activity with the (sole) purpose to raise a child.
- **Problems with benefits which have both functions, i.e. benefits for all residents + benefits for the gainfully active:** As an example the **Austrian** child-raising benefit could be mentioned, which consists in various lump sum options for all residents and an income replacement option for gainfully active persons. It has to be decided if only the income replacement option has to be coordinated under the new way of coordination or any of these options if the person is in a gainful employment (we favour the second alternative because this would give any person in gainful employment the option he or she also has under national legislation).
- But, it also has to be taken into account that this approach could **take away rights which exist under today's coordination**. If we imagine in our example that Member State B does not have any such child-raising benefits, whereas

Member State A does, there would be no entitlement. We think this is a consequence which has to be accepted, as it goes without saying that in this situation also e.g. cash sickness benefits would not have to be granted by Member State A if there is no entitlement to such benefits under the legislation of Member State B. Thus, this solution would correspond to coordination usually provided under the individualised approach towards benefits.

- Another issue which should be clarified in that context: for the coordination it should not matter if a family benefit is **financed by tax or contributions or if it is provided for all residents or only the gainfully active population**. Always the same coordination rules should apply with – in principle – the same results. Of course, entitlement in contribution-based systems could be seen as problematic when no contribution has been paid into the scheme of that Member State. This is an issue which is further discussed under 5.2 below.
- In this context we have noticed that under today’s coordination the **text of Article 68 of Regulation (EC) No 883/2004** is not as clear as it should be. The words “*rights available on the basis of an activity as an employed or self-employed person*” seem to mean that the person concerned is subject to the legislation of the Member State in question due to the exercise of an activity as an employed or self-employed person under Title II of the Regulation.<sup>42</sup> Yet, it could also mean that the scheme concerned is based on an activity as an employed or self-employed person (excluding residence-based schemes). If a reform of these provisions of the Regulation is undertaken, also this possibility of misunderstandings (which leads to totally different results of coordination) should be removed. Our discussion showed that also the last sentence of Article 68(2) is not clear and could be made more explicit.

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<sup>42</sup> Recital 35 of Regulation (EC) No 883/2004 is a strong indicator for that interpretation.

### **Proposal for an additional horizontal Option No 2**

We recommend to further analyse the coordination of child-raising benefits for gainfully active persons and to look for ways of coordination which could take better care of the peculiarities of these benefits compared to classic family benefits like e.g. family allowances.

### **Proposal for an additional horizontal Option No 3**

We recommend some clarification in Article 68 on the meaning of “*rights available on the basis of an activity as an employed or self-employed person*”.

#### *1.7.5 Benefits which have the function of special non-contributory cash benefits*

Up until now Annex X of Regulation (EC) No 883/2004 does not contain any benefits which are related to family benefits. If export is a problem for some Member States because the benefit is strictly limited to the special needs of the local population, it could be examined whether an entry of these rare groups of benefits (if they exist at all) into that annex is possible already under today’s criteria for special non-contributory cash benefits.<sup>43</sup> Or, it could be examined whether a revision of the criteria contained in Article 70(2) of the Regulation is advisable to cover also these family benefits. Thus, all the options discussed in relation to the export of benefits would not apply to these benefits, which could also ease the discussion. But, as this is a very radical and far-reaching approach which could have effect for other benefits, this recommendation is not supported by all members of our group.

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<sup>43</sup> This is a decision the EU legislature will have to take when such requests for inclusion of new benefits into Annex X of the Regulation are forwarded by a Member State; the moment a benefit is not special but a general social security benefit it can never be listed in that Annex (see also the judgment in *Hosse*, C-286/03, EU:C:2006:125).

#### **Proposal for an additional horizontal Option No 4**

We recommend an examination of the list of Annex X of Regulation (EC) No 883/2004 especially to cover also some family benefits which show the relevant elements.

#### *1.7.6 Advances of maintenance payments and childbirth and adoption allowances*

This is only to mention the problems with the existing exclusion of these benefits from the coordination under Regulation (EC) No 883/2004 the moment they are listed in Annex I. As we know, excluding benefits for which the CJEU decided that they are family benefits of the Regulation does not exclude that the TFEU or even Regulation (EU) No 492/2011 applies to these benefits.<sup>44</sup> When new ways of coordination of family benefits are considered also the special situation of these benefits should not be forgotten.

#### *1.7.7 Special new rules for benefits in kind*

As already said, the exact coordination of family benefits in kind is not clear under the existing coordination. A reform of this part of Regulation (EC) No 883/2004 should also be used to insert the necessary clarifications. From our point of view various options are at our disposal:

- The definition for family benefits could be changed and the application of the Regulation restricted to benefits in cash. This would not mean that benefits in

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<sup>44</sup> Judgment in *Hartmann*, C-212/05, EU:C:2007:437.

kind would no longer fall under EU law, but all the other relevant instruments, like e.g. Article 45 TFEU or Regulation (EU) No 492/2011 would apply.<sup>45</sup>

- If also family benefits in kind should remain covered by some provisions of Regulation (EC) No 883/2004 it has to be noted that under today's definition of benefits in kind (Article 1(va)) no reference is made to family benefits, which could be regarded as disturbing and should be clarified.
- It could be provided that family benefits in kind always have to be provided only by the children's Member State of residence (no export, but, of course aggregation of periods if needed and equal treatment); this is what seems to be today's practice by many Member States but without a clear legal basis.
- This last option could be complemented by a reimbursement provision (as today provided under the Regulation for sickness benefits in kind), thus making the provision quite complex, not changing anything for the beneficiaries concerned and – as not all Member States share the same concept of family benefits in kind – burdening some Member States with costs of family benefits much higher than under today's coordination.

**Proposal for an additional horizontal Option No 5**

A clearer rule concerning family benefits in kind should be introduced.

*1.7.8 Clustering of benefits for the purpose of calculating the differential supplement*

Of course, the consequences of the *Wiering* judgment are far from clear<sup>46</sup> and Member States are not sure about the importance of this judgment in all the

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<sup>45</sup> Judgment in *Commission v Austria* EU:C:2012:605.

different situations. Therefore, it is strongly recommended that the legislature intervenes and clearly defines the different baskets within which the comparison of benefits has to be made to calculate the differential supplements or if all the benefits should be taken together. This would be especially important if no special coordination for child-raising benefits is provided for (see 4.1.4). Our analysis of the different options will not deal with this issue; the reader has to imagine how complex the situation would become if the method of coordination were to be applied to different baskets by some Member States but only to one basket by others if a common approach could not be achieved.

This clarification would not only concern the calculation of the differential supplement but also other aspects like e.g. the obligation to reimburse half of the amount of the benefit(s) of the basket(s) concerned, granted under **Article 58 of Regulation (EC) No 987/2009**. In this context we have to mention that *per se* Article 58 of this Regulation is a provision which could also create a lot of problems. It is not always easy to identify the Member State with the “*highest level of benefits*”. How do you compare a lump sum benefit with a benefit paid every month during years? What is more important, that the benefit lasts longer or the amount granted? What happens when the family benefits are very different? We think that the problems identified up until now with the calculation of the differential amount apply also to the reimbursement under Article 58.

#### Proposal for an additional horizontal Option No 6

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<sup>46</sup> See also the FreSsco report by Y. Jorens & J. De Coninck, ‘Reply to an ad hoc request for comparative analysis of national legislations. Family Benefits – Consequences of the Wiering judgment in C-347/12’, FreSsco, European Commission, December 2014, 132 p.

A clear decision should be made if and, as the case may be, how many baskets of different types of family benefits have to be made for the calculation of the differential supplement and the reimbursement.

### **1.8 Who is a member of the family at the side of the ‘grown-ups’?**

As already shown many problems arise with regard to the question who is a member of the family, especially concerning the persons who could open entitlements. To avoid these problems and safeguard a more synchronised application of the family benefit coordination between different Member States, we recommend a more detailed definition than today’s. However, the legislature could even go further and decide – under a common European definition – e.g. whether the biological parent always has the stronger ties to a child and is thus entitled to open family benefits, even if the child already lives in a new family and e.g. the mother’s new partner maintains the child. Or, should it be *vice versa*: always the partners in whose household the children (irrespective of the biological father or mother) really live and are maintained. Maybe there are also other possibilities to clarify the situation. This would deviate from today’s principle under which it is always the task of national legislation to define which person has to be regarded as family member (letting aside the condition of the shared household<sup>47</sup>). This far-reaching approach was not supported by all of us.

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<sup>47</sup> Supplemented by the position of the CJEU e.g. in the judgment in *Slanina* EU:C:2009:732; which at least from the Austrian point of view added European elements to that national definition.

### **Proposal for an additional horizontal Option No 7**

It could be useful to specify or at least clarify who is a member of the family for the purpose of the coordination of family benefits.

#### **1.9 Also the child could open an entitlement under Regulation (EC) No 883/2004**

If we combine the new elements of Regulation (EC) No 883/2004 (the personal scope is no longer restricted to active persons and their members of the family but covers all persons who are or have been subject to the legislation of a Member State – Article 2) with the clarifications made by the CJEU under Regulation (EEC) No 1408/71 (it does not matter which family member opens entitlements under national legislation; in a cross-border situation all members of the family have to be treated as if they resided in the Member State concerned<sup>48</sup>) it could be discussed if children should always be (also) entitled or open entitlements (also) to family benefits under the legislation of their Member State of residence.<sup>49</sup> Thus, in a situation where a family resides in Member State A and the father works in Member State B while the mother works in Member State C this family opens entitlement to family benefits under the legislation of all three Member States. Therefore, already in a *Bosmann* scenario<sup>50</sup> (no entitlement to benefits in the Netherlands where the mother works and entitlement under national German legislation where the family, and thus also the child, lives) would Regulation (EC) No 883/2004 open entitlement to German family benefits.<sup>51</sup> As discussions within

<sup>48</sup> E.g. the judgment in *Dodl and Oberhollenzer* EU:C:2005:364.

<sup>49</sup> As they are subject to that legislation as inactive persons under Article 11(3)(e) of Regulation (EC) No 883/2004.

<sup>50</sup> Judgment in *Bosmann*, C-352/06, EU:C:2008:290.

<sup>51</sup> But, of course, this would neither solve situations as examined by the CJEU in *Hudzinski and Wawrzyniak* EU:C:2012:339, as in this case Germany was not competent under Regulation (EC) No 883/2004 for any member of the family (also the children resided outside Germany).



our team showed that this question is not that clear and that the effects of *Bosmann* under the Regulation seem to need further examination as well, the child's situation with regard to entitlement to family benefits in the Member State of residence if the parents exercise their gainful activities in another Member State could be fixed in a clearer way than today.

**Proposal for an additional horizontal Option No 8**

It should be clarified that also every child is covered by Regulation (EC) No 883/2004 as a non-active person and, thus, can open entitlement to family benefits in its own situation in the Member State of residence.

**1.10 Problems with the place of residence of a child**

Problems can also arise with the determination of the Member State of residence for the purpose of applying the adjustment (if we opt for this solution).<sup>52</sup>

It is not always easy to determine where a child resides in accordance with the Regulations. Verifying this can be more difficult, for example, if he or she does not attend school or, on the contrary, attends a boarding school. As is well known, the Member State of residence is where a person habitually

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<sup>52</sup> See for instance the judgment in *Maaheimo* EU:C:2002:641. Ms Maaheimo was a Finnish national, as were her husband and her children. Having obtained parental leave, she cared for her children at home. From 8 January 1998 she received the home child care allowance. During the period from 1 May 1998 to 30 April 1999, her husband worked in Germany as a posted employee. From 10 July 1998 to 31 March 1999 Ms Maaheimo and her children stayed with her husband in Germany. She claimed that her permanent domicile remained in Helsinki. During that period the whole family was subject to Finnish social security legislation. Finnish administration stopped paying this family benefit from 10 August 1998 on the ground that the children were not actually resident in Finland.

resides<sup>53</sup> or where the centre of his or her interests is located, and there is only one for the sake of coordination.<sup>54</sup> Following the precedent case law,<sup>55</sup> Article 11 of Regulation (EC) No 987/2009 provides for a non-exhaustive list of criteria based on relevant facts that should be used, with no clear order of precedence, in order to identify the residence (the centre of interests) in the event of disagreements between national institutions. As established by the CJEU, said criteria can also be considered relevant in case of disputes between an institution and the competent Member State.<sup>56</sup>

The criteria do not suit children much. On the one hand, the Article mentions the **duration and continuity of the presence**, this presence being independent from the administrative residence terms established in Directive 2004/38/EC.<sup>57</sup> Regarding this criterion it is reasonable to wonder whether social security systems can easily gather the relevant information involved and check the duration and frequency of stays, especially inside the Schengen Area.

Article 11 of Regulation (EC) No 987/2009 also refers to different factors regarding the **person's situation**. The first factor is linked with the *working status* that in the case of minors would often be out of the question. Secondly it refers to the *family status and family ties*. Thirdly, with regard to *students* the Regulation specifically establishes that “*the source of their income*” has to be taken into account (in our scenario this income would normally be the salary of the parent working in a Member State which under today's coordination is one of the Member States competent to grant family benefits). The last factors are *housing situation* and *tax residence*. This last criterion does not apply to non-active descendants either.

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<sup>53</sup> Article 1(j) of Regulation (EC) No 883/2004. Article 1(k), in turn, defines “*stay*” as temporary residence which does not necessarily mean of short duration (See the judgment in *I*, C-255/13, EU:C:2014:1291)

<sup>54</sup> Judgment in *Wencel*, C-589/10, EU:C:2013:303, paragraph 49.

<sup>55</sup> Mainly the judgment in *Swaddling*, C-90/97, EU:C:1999:96.

<sup>56</sup> See the judgment in *I* EU:C:2014:1291, paragraph 54.

<sup>57</sup> Reiterated by the CJEU in the judgment in *I* EU:C:2014:1291.

If the criteria mentioned are not definitive, the **person's intention**, specifically the reason to move in the first place, should be considered. It does not seem that the minor's intention could be relevant to determine their residence.

In sum, if the adjustment mechanisms were implemented, ad-hoc criteria should be provided to determine the children's Member State of residence.

**Proposal for an additional horizontal Option No 9**

It could be useful to also envisage a revision of Article 11 of Regulation (EC) No 987/2009 concerning the determination of the place where a child resides.

## **Horizontal principles which are relevant for the options concerning export of family benefits**

### ***1.11 What does ‘adjustment’ mean for the options concerning the export of family benefits?***

As some options focus on the adjustment of family benefits to the living standards in the children’s Member State of residence we have decided to dedicate a special horizontal chapter to this issue and to not include it in the description of these options only.

#### ***1.11.1 Why adjust family benefits?***

Already the definition of family benefits states that the main purpose of the benefit is to meet family expenses. As shown in chapter 4.1.3 these expenses can differ from one Member State to another. Thus, it could be argued that the social policy aim behind these benefits is no longer achieved. Adjusting the benefits to the level of the child’s Member State of residence seems to avoid an imbalance and to safeguard that the social policy aim of the benefit is still achieved. This method would affect only the Member States which are competent to grant family benefits where the child does not reside.

#### ***1.11.2 Which elements could be the base to determine the factor of adjustment?***

First of all we want to mention that the legal analysis of whether such adjustments are **possible from a legal point of view** is a tricky issue which merits a study on its own. Nevertheless, we have also spent some time on this

question. Interesting details which could help the decision-maker in this respect can be found in **Annex 2**.

The following elements could be used to set such adjustment. There are various figures which demonstrate economic differences between Member States, e.g. gross domestic product per capita, average income or the price of living costs. Therefore, if the adjustment of social security benefits is discussed it is relevant which social policy aim is pursued with the benefit. If its purpose is to cover the costs of persons rendering services (e.g. in case of some long-term care benefits) it would be advisable to link it to the relations of average income between two Member States. If the purchase of goods and services is more the centre of the social policy decision, then e.g. the comparative price levels calculated by Eurostat<sup>58</sup> could be a valid tool, as the different price levels in the Member States for specific goods are the base for the calculation of these factors. Of course it could be argued that the basket of goods taken for these general statistics is not specifically the one which children need, and it should be a more focussed basket of goods to calculate these factors (e.g. child nutrition, additional living expenses for households with more than two household members, nappies, prams, furniture for children and juveniles, school costs and school equipment etc). However, it would be quite complicated to get reliable data for such specific baskets and it could be assumed<sup>59</sup> that such data are not regularly updated. Therefore, we recommend relying on general data which are published and reliable, unless more specific data with the same quality exist.

The following table contains figures taken from Eurostat to demonstrate the functioning of these data. In the following paragraphs we will give some

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<sup>58</sup> <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tec00120&plugin=1> (last accessed 25 March 2015).

<sup>59</sup> As it was not our task to examine the available data sets, we restricted our work to those elements which were really necessary to better understand and evaluate the export options.

examples and explanations to better understand how these figures could be used.

Country	Factor	Country	Factor	Country	Factor
<b>EU-28</b>	100.00	<b>ES</b>	93.50	<b>NL</b>	111.10
<b>BE</b>	110.80	<b>FR</b>	109.80	<b>AT</b>	107.20
<b>BG</b>	49.00	<b>HR</b>	67.50	<b>PL</b>	55.80
<b>CZ</b>	68.70	<b>IT</b>	103.20	<b>PT</b>	81.30
<b>DK</b>	139.40	<b>CY</b>	91.40	<b>RO</b>	54.00
<b>DE</b>	102.30	<b>LV</b>	71.20	<b>SI</b>	83.10
<b>EE</b>	78.10	<b>LT</b>	63.50	<b>SK</b>	69.40
<b>IE</b>	120.00	<b>LU</b>	121.40	<b>FI</b>	123.10
<b>EL</b>	89.20	<b>HU</b>	59.70	<b>SE</b>	131.60
<b>ES</b>	93.50	<b>MT</b>	82.50	<b>UK</b>	114.60

These figures have to be understood in such a way that they always refer to the average of the EU-28 (therefore, the factor for this average is 100.00). Thus, to adjust an amount from one Member State to the level of another Member State the factors for both countries are relevant. If we assume that e.g. Denmark has

a family benefit of €100<sup>60</sup> and the child resides in Bulgaria, then the calculation would be:  $€100 : 139.40 \times 49.00 = €35.15$ . This has as a consequence that the same amount of family benefits of different Member States in the end differs if the children reside in the same Member State. So, if also the Czech Republic has a family benefit of €100 and the child resides in Bulgaria, this would lead to:  $€100 : 68.70 \times 49.00 = €71.32$ . This is also logical as the difference in living costs between Denmark and Bulgaria is higher than the one between the Czech Republic and Bulgaria. The €100 family benefit in the Czech Republic has a much higher value of purchasing power in that country than in Denmark. Therefore, also when exported for a child in Bulgaria it must have a higher value than the benefit of Denmark.

Of course this calculation method also works in the opposite sense. If we assume that Bulgaria has family benefits of €20 and the child resides in Denmark this would lead to:  $€20 : 49.00 \times 139.40 = €56.90$  and if the child resides in the Czech Republic:  $€20 : 49.00 \times 68.70 = €28.00$ . This adjustment would not only oblige Member States with comparatively low costs of living (e.g. those with an index below 100.00, thus below the average) to adjust their benefits by raising the national amounts, but in principle all Member States with the exception of the only one Member State with the highest index (DK); also the second one (SE) would have to raise its family benefit of an assumed €100 for a child resident in Denmark in the following way:  $€100 : 131.60 \times 139.40 = €105.90$ .

An important final issue to mention: these adjustments do not really reflect on the level of family benefits under the legislation of the child's Member State of residence. Depending on the social policy decisions of this Member State they could be higher or lower than the adjusted benefits of the exporting Member State. Thus, also an option which includes adjustments could, on the

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<sup>60</sup> We have deliberately not taken the actual figures of family benefits of the Member States chosen, but only fictitious amounts to better demonstrate the effects of adjustment. The reader can easily adapt these calculations to real live figures.

one side, safeguard much higher amounts than the local level and could, on the other side, be supplemented also by the obligation to grant differential supplements.

*1.11.3 Would adjustment be possible from an administrative and technical point of view?*

Of course, such an adjustment cannot react to all developments of living costs in the Member States concerned. Some clear rules within which periodicity such adjustments have to be revised are necessary. It would be strongly recommended, if such an option is chosen, to refer to already existing, well-known and without any doubt usable tables. The ones for the application of the EU Staff Regulations (which contain rules for adjustment of wages and also some social benefits for EU civil servants residing outside Belgium and Luxemburg – see also Annex 2) could e.g. be a good starting point,<sup>61</sup> as these are also published in the OJ, as there is always a clear indication for which period they have to be used etc.

*1.12 How to treat persons in a contributory scheme or in an employment-related scheme who are not in such a situation in the relevant Member State*

Another important question is how the Member State of residence has to provide benefits when no gainful activity is exercised there. No problems should exist in relation to residence-based benefits which are granted on a

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<sup>61</sup> Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (OJ 45, 14.6.1962, p. 1385, as amended); the last publication can be found for the period beginning with 1.7.2014 in OJ C 444, 12.12.2014, p. 10. For more details see Annex 2. Something which would have to be further analysed is e.g. the question whether or not the special indexes for special cities which are provided under the Staff Regulations (Bonn, Karlsruhe, Munich, Varese and Cultham) should be maintained for family benefits also under Regulation (EC) No 883/2004.



lump sum base to all residents. But, how is the situation in relation to other types of benefits which are more or less employment-related?

#### *1.12.1 Benefits which are contribution-based but open entitlement to all residents*

These benefits should also create no problems. If such benefits are financed from contributions e.g. from the employer, but any resident (including families without any gainful activities) is entitled to benefits (as e.g. in AT) already under national law entitlements are given. Thus, the Member State of residence will grant entitlement also if the only gainfully active parent works in another Member State.

#### *1.12.2 Benefits which are provided only for insured persons*

##### 1.12.2.1 General remarks

More problematic are benefits which are contribution-related or employment-related and for which entitlement is granted only to those persons who are insured or in the relevant employment. Does Regulation (EC) No 883/2004 open entitlement to such benefits if a gainful activity is only exercised in another Member State?

If the Regulation provides for competence of the Member State of residence, the existing rulings of the CJEU seem to speak in favour of this solution. From the *Bergström* judgment<sup>62</sup> it could be deduced that the ban on discrimination and, of course, also the assimilation of facts under Article 5 of the Regulation obliges the Member State of residence to take into account also employment (and the income received from such employment) in another Member State as

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<sup>62</sup> Judgment in *Bergström* EU:C:2011:278.

such employment in the child's Member State of residence.<sup>63</sup> As the situation of the whole family always has to be treated as if it were in the Member State of residence of the child,<sup>64</sup> it should also not matter that the person exercising such an employment is subject to the legislation of another Member State. Nevertheless, it has to be assumed that this is not always applied in a consistent way in all Member States. To avoid problems it could be interesting to exclude benefits which are employment-related like child-raising benefits from the general coordination and provide for the competence of only the Member State which is competent for the person taking care of the child (see 4.1.4).

Finally, it has to be mentioned that also if there is a condition of a special duration of periods of insurance to be entitled to a benefit, the Regulation could help, as the aggregation principle is applicable to family benefits (Article 6 of the Regulation).

#### 1.12.2.2 Results from the mapping exercise

Also the replies from **FreSsco national experts** show that benefits with an income replacement function are not always coordinated in a way as it might be necessary from e.g. the *Bergström* ruling.

For instance, in **Austria** entitlement to the income replacement scheme requires (among others) that the person concerned has been employed for a minimum period of six months before childbirth. Section 24(2) of the Child Care Cash Benefit Code (*Kinderbetreuungsgeldgesetz*) clarifies that 'employment' means "employment that is subject to Austrian social security

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<sup>63</sup> For family benefits there is no specific rule concerning the calculation of benefits which would allow a deviation from these principles as can be found e.g. in Article 21 of the Regulation for sickness or maternity benefits, which allows to take into account only income received in the relevant Member State and, thus, excludes the obligation to grant benefits with an income replacement function in cases in which no such income was received in that State.

<sup>64</sup> To be deduced from the judgment in *Dodl and Oberhollenzer* EU:C:2005:364.

insurance”. Thus, a person who resides in Austria but is working in another Member State and is therefore subject to the social security scheme of that Member State, is not entitled to income replacing cash childcare benefits in Austria, although Austria is competent to grant family benefits e.g. because the other parent works there. Austria would not take the income replacement scheme as the basis for the calculation of the differential amount, but exclusively the lump sum scheme (of the cash childcare benefits).<sup>65</sup> Similarly in **Belgium**, in order to qualify under the ‘professional’ scheme, work has to be carried out in Belgium.

Reportedly in **Sweden** the parental benefit was the only family benefit with an income replacement function. The Social Insurance Agency no longer considers it a family benefit (but a maternity benefit) and therefore it is not included when calculating the differential amount for family benefits.

In many Member States family benefits do not have an income replacement function. For those who have such function it could be assumed that they are sometimes coordinated under the maternity/paternity chapter of Regulation (EC) No 883/2004. An example could be the maternity benefit in **the Czech Republic**, or the maternity, paternity and parental benefits in **Slovenia**. **Bulgaria** stressed that family allowances differ from benefits under the Social Security Code and do not depend on personal contributions. Also in **Luxembourg** family benefits are only residence-based (and, therefore, no problems in that respect were reported).

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<sup>65</sup> Almost all Austrian family benefits are based on residence and not on employment. That applies especially to family allowance (*Familienbeihilfe*) as well as to cash childcare benefits (*Kinderbetreuungsgeld*). As regards the latter, however, the Austrian Child Care Cash Benefit Code (*Kinderbetreuungsgeldgesetz*) provides for two different schemes: a lump sum scheme and an income replacement scheme. Therefore, at least for the income replacement scheme employment is of relevance.

## Which options could be envisaged concerning the export of family benefits?

Before starting the analysis of the different concrete options dealing with the export of family benefits we have to make some general remarks:

For all options we have used **one standard example** to safeguard a better comparison of the effects of the different options. This standard example will be supplemented, if needed, by other examples to better demonstrate all different aspects of the option.

### **Standard example:**

We assume the following situation:

**Member State A:** amount of family benefits: €100; in case of adjustments due to different costs of living in Member State B: €80

**Member State B:** amount of family benefits: €50; in case of adjustment due to different costs of living in Member State A: €63 (exactly €62.5, which has been rounded up for easier reading)

This standard example is used in two different scenarios:

**Scenario 1:** cases where work is exercised only in Member State A while the residence of the family is in Member State B

**Scenario 2:** cases where work is exercised only in Member State B while the residence of the family is in Member State A

The numerical results of the different options, when applied to this standard example, have been made visible in graphs which form **Annex 1** of this report.

The options will be examined by ways of an **impact assessment**, which was made by using the following parameters.<sup>66</sup>

The different aspects analysed for each of these options were the following:

- **Clarification:** Here we looked into the question whether the option is clear, easy to understand and transparent. From our point of view, the most important question with regard to clarification is whether persons concerned know in advance and without problems what their rights (and obligations) are. Naturally the option should be clear for institutions as well. However, as institutions would be involved in any case, also in complex legal situations, this does not have that great a weight.
- **Simplification:** For this second aspect, we examined whether the solution is simple or complex. It was sometimes difficult to distinguish between this aspect and the first one, but also between this one and the administrative burden. Therefore, these three aspects have to be seen as related to each other. It also has to be mentioned that any new way of coordination – as simple as it might seem if used for the first time – would also cause problems during a period of transition from the existing coordination towards the new coordination. We have, however, no longer mentioned this in our analysis of the different options. So even if the transition might be complex, non-transparent and arduous for the institutions we have not changed our evaluation if the option itself – looked at in an abstract way – has to be regarded as positive compared to the status quo.
- **Protection of rights:** A very important issue is whether the rights of the person concerned are well protected. This means we had to check if really all benefits which can be claimed can be granted, or if the family loses entitlements. In addition, the question how easily and how quickly the persons can get the

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<sup>66</sup> We want to refer also to Y. Jorens, B. Spiegel, J.-C. Fillon & G. Strban, trESS Analytic Study 2012, 'Legal impact assessment for the revision of Regulation 883/2004 with regard to the coordination of long-term care benefits', which contains the same criteria for the impact assessment. We have, therefore, included the same description for the criteria into this report whenever possible and added a new one concerning the impact on migration.

benefits which are necessary to cover the costs related to having a family also plays a role. This evaluation was not clear in cases where political decisions need to be taken. Therefore, we abstained from evaluating, e.g. in case of adjustments, if this is better or worse concerning the protection of rights. Of course in case of downwards adjustments a person might lose benefits which he or she is entitled to today. The political question which we did not answer under this point is whether it is necessary to always maintain the status quo (only higher benefits can be considered a plus with regard to protection of rights) or if also a solution is good with regard to the protection of rights if less benefits are awarded which, however, better meet the social policy decisions of the Member State granting the benefit.

An issue which could also be discussed when talking about protection of rights is what the impact could be on the national system of a Member State as a whole (also in situations without cross-border elements). It could be argued that if a group of Member States has to grant, under one of our options, more or higher family benefits than under the status quo this could lead to the decision of the national legislature to reduce all family benefits to achieve the same result with regard to the costs of the system as before. If this were true, on the other hand, the group of Member States which have to grant in less cases or lower benefits could spend the money saved on increasing all family benefits and thus all persons receiving family benefits from these Member States could profit. As we have estimated that no option would result in such a significant impact on the budget of the national family benefits financing mechanisms, we will not mention this aspect in the context of the different options. Still, this could be an element which should not be forgotten when the political decision is taken.

- **Administrative burden and implementation arrangements:** Here we deal with the institutions. Is it easy to administer the option without large additional processes or do we have to set up new processes? Does it need additional flows of information and does information have to be exchanged regularly? Will institutions have to set up new implementing arrangements to put the coordination into practice? The mere fact that e.g. under EESSI new SEDs or

flows will become necessary does in itself not mean that an option adds to the administrative burden, because this will be a standard situation in the future if we change the existing ways of coordination.

- **No risk of fraud or abuse:** It also has to be examined if the option favours situations where the persons concerned could easily influence and manipulate their situation in such a way that they receive more benefits than they would otherwise be entitled to. We will also examine if the necessary checks are easy or not.
- **Potential financial implications:** This point as well is not easy to answer and evaluate. First, it was not the task of this report to go into data and analyse what exactly the additional amounts would be which Member States would have to pay or what the amounts would be which Member States would save under the various options compared to the status quo. Therefore, we will only outline whether groups of Member States would have to pay more or less from a general point of view. But, this does in itself not give a clue for the evaluation of the different options. Is a solution which is more costly (for some Member States) better or worse than the status quo? Taking this question into account, we have decided to extend the examination of the financial impact also to the question whether an option leads to a fairer distribution of costs compared to the status quo.

However, also the burden-sharing between the Member States involved is an issue which is very difficult to evaluate. The 'fair burden-sharing' between Member States largely depends on the system the Member States apply. As the political concerns of some Member States that they have to pay too high amounts of family benefits for children residing outside their countries were the main reason for the whole exercise, a shifting of burdens seems to be a solution for that problem. Therefore, it will remain a political decision which transfer of burdens makes the system more balanced and from a political point of view more acceptable for the large majority of the Member States. We will present the pros and cons for the different groups of Member States concerned, but abstain

from giving recommendations, as this will be something for which a political decision is necessary.

The results of our examination of the various aspects of the impact assessment have to be seen as the comparison with the status quo (therefore, the status quo, which remains an option, is neutral in that respect):

- (+) means better than the status quo;
- (-) means worse than the status quo;
- (≈) means (nearly) the same as the status quo;
- (?) means the decision has to be taken by the policy-makers.

### ***1.13 Option 1 – Status quo***

#### *1.13.1 Legal background and general remarks about Regulation (EC) No 883/2004*

To better understand any new option it is always necessary, first, to recall the existing rules applicable to family benefits. With regard to the existing coordination rules for family benefits we want to refer to 3 above. In this context we only want to recall some elements which are necessary for our evaluation of this option.

#### *1.13.2 Rules in the event of no overlap of entitlements*

The specific rules for family benefits do not change the general rules to determine the applicable legislation. This is still to be decided in accordance with Title II of Regulation (EC) No 883/2004, which means that the Member



State of employment or any other competent State according to Title II (the only exception are pensioners, as for these it might be another Member State than the one competent under Title II, if this other Member State grants a pension) should pay family benefits, which is also the case in situations where the family members of eligible persons reside in another country (see Title II and Article 67). In the following examples we will focus on active persons, their partners and their children and not deal with the specific situation of pensioners, as in practice they are not so significant.

Family benefits are intended to meet family expenses. In this respect the sole situation of the employed person is not the only relevant one (which is the case mostly with e.g. unemployment benefits). The situation of the family, especially of dependent children, is also relevant (see also 4.3 above). Despite the latter fact, the Member State of employment or any other Member State competent according to Title II is responsible to pay the family benefits at its rate even when the children are residing in another Member State (in case of overlap of benefits, see below). This means that the situation of the family of migrant workers (or other eligible persons) could be more advantageous compared to other families in the children's State of residence. If we consider that the aim of the Regulation is first and foremost to guarantee the equal treatment of migrant and domestic workers working in one country, and not so much to achieve the material equality of families, the provisions are rational. A strong argument to defend the status quo, especially in cases where the competent Member State is the State of employment, is that the person has also paid taxes and contributions there. Of course, paying e.g. tax is not such a strong argument if we think about situations in which tax has to be paid in a Member State other than the one which is competent under Title II of the Regulation.<sup>67</sup> Or would this mean that the Member State collecting the taxes and not the one competent under Title II has to grant tax-financed benefits?

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<sup>67</sup> See for such cases B. Spiegel, K. Daxkobler, G. Strban & A.P. van der Mei, 'Analytical report 2014: The relationship between social security coordination and taxation law', FreSsco, European Commission, January 2015.

This would be a totally new way of coordination which should be carefully examined.

### *1.13.3 Rules in the event of overlap*

As family benefits are granted mainly on behalf of dependent children, there are a great deal of cases in which family benefits overlap, for example as often both parents are eligible for benefits for the same child, but also the child itself could open entitlement to benefits in its Member State of residence. Article 68 of Regulation (EC) No 883/2004 tries to solve these questions.

The priority rules applicable depend on whether benefits are paid on a different basis – employment or residence – or on the same basis (see also 3.1.2 above; concerning possible problems of interpretation of that principle see also 4.1.4.3 above). In the first case Article 68(1)(a) of the Regulation is the applicable rule; in the latter case Article 68(1)(b). In both cases also Article 68(2) is relevant, as the Member State which does not have primary competence according to Article 68(1) may have to pay a differential supplement.

**Standard example:**

**Scenario 1:** Member State A (primary competence) grants €100, Member State B (secondary competence) does not grant a differential supplement

**Scenario 2:** Member State B (primary competence) grants €50, Member State A (secondary competence) grants as a differential supplement €50

**Additional example to highlight the effects of the status quo:**

*The family (mother, father, child) resides in Member State A, the father works in Member State A, the mother works as a frontier worker in Member State B; the amount of family benefits for a child is €120 in Member State A and €200 in Member State B.*

*Member State A (primary competence) has to grant €120; Member State B (secondary competence) grants a differential supplement of €80.*

*1.13.4 Advantages and constraints of the status quo*

For legal, administrative and political problems related to today's Regulation (EC) No 883/2004 with regard to export of family benefits and more general problems of coordination of family benefits see chapter 3 above.

Below, the pros and cons of the current system of coordination of family benefits are shortly presented. Reference is also made to chapters 3 and 4. In this chapter we will not give +/-/~/? marks, as the status quo is the situation against which the other solutions are evaluated, and it is hard and subjective to construct any ideal solution against which the status quo could itself be evaluated.

- **Clarification:** The current Regulation is more or less clear for the migrant workers. They usually get the family benefits in their Member State of employment at the rate of that State, despite their family residing in another Member State (this is a clear case when the other parent is non-active; less clear when both parents work, are posted etc – e.g. in cases where the priority of the States should be determined). The current option poses problems, but some of them are more general in nature. They arise more from the diverging nature of potential family benefits (what benefits exactly are family benefits that should be exported according to Articles 67 to 68) and from the question whether or not

the benefits should be divided into baskets, for example to decide whether there is overlap to calculate the differential supplement– see also 4.1 above. Therefore, taking all these elements together, it could be said that today's coordination is not as clear as it could be.

- **Simplification:** If there is overlap of benefits, the current Regulation is not very simple. See also chapter 3 for existing problems and chapter 4 on our proposals for horizontal solutions.
- **Protection of rights:** Currently the Regulation is built around the migrant worker/ person, not around the children. This is logical, as the background of the Regulation is the necessity and aim to protect migrant workers (see also 3.1.1 above under which TFEU Articles the Regulation is adopted). In principle the Regulation aims to guarantee that the migrant worker (as, still, often the State of employment is competent) is treated the same way as all other workers in that country – he or she receives the same benefits also for his or her children, despite the economic situation in the Member State where they reside. There is also an economic logic behind it, as the worker usually pays taxes and contributions in the State of employment. The question whether the current Regulation sufficiently protects the rights of children is not easy to answer. It depends among other things on whether the children are living in a country with higher living costs or not; whether they have the rights to some residence-based family benefits in the country of residence; and how family benefits in kind are treated in the Member States concerned. A negative aspect for children in the current system is that it may take quite a long time before the institutions involved may take the necessary decisions and they receive the full amount of benefits, especially in cases where the priority rules are not easy to decide.

In chapter 3.3 the question was analysed whether the current system is unfair to children, in the context that children whose parents are migrant workers may, in the context of unlimited export, get higher benefits than other children in the Member State where they reside. This could be a question of reverse discrimination of the children. At the same time, the discrimination could be justified with objective reasons (no comparable situations etc).

Another point where we have doubts if today's coordination sufficiently protects the rights of the persons concerned are child-raising benefits for employed persons (e.g. also with an income replacement function). This is an issue we have already dealt with under chapter 4.1.4.

- **Administrative burden and implementation arrangements:** As analysed in chapters 3.1 and 3.2, the current system entails administrative difficulties. At the same time, the system has been in operation for years and the routines are usually in place in the Member States. The difficulties in implementation do not lie in the fact that the benefits are not adjusted to the living standard of other Member States. They are caused by the existing general rules of the Regulation (e.g. Articles 10 and 68) and the interpretation given to them by the CJEU – which benefits should be considered as family benefits, how to calculate the differential supplement etc. See also chapter 4 for horizontal solutions.
- **No risk of fraud and abuse:** Every regulation runs the risk of being outsmarted. In the context of export of benefits it could happen in relation to children's eligibility to benefits, as the competent State cannot always easily and quickly verify the eligibility of children in another country. When the benefits are high in the children's country of residence, the family may first try to quickly get the benefits there, by denying the working activity of one parent in another Member State. In contrary cases it might be desirable to 'create' a gainful activity (e.g. a 'mini-job' or an activity which exists only on paper) in a Member State with high family benefits to receive these benefits for children living in another Member State (with not so high amounts of benefits). Also the concrete residence of children could be an issue when attempts are made to manipulate the entitlement to higher benefits. Therefore, it could be said that today's coordination is not very fraud-proof.
- **Potential financial implications:** Today's financial implications should be known to Member States. Is today's system fair with regard to the sharing of the burden between Member States? This is the main political question to be answered. It could be said that only if the Member State receiving contributions (and taxes) grants its full range of benefits this solution is fair. Others argue that when paying benefits which have the clear aim of covering additional costs of

children and these costs differ between Member States, only e.g. an adjustment of amounts can lead to fair results. Therefore, we abstain from answering the question whether today's coordination of family benefits is fair.

#### ***1.14 Option 2 – Adjustment of the amount of family benefits to the living standards in the Member State of residence of the child(ren)***

**A general description of all sub-options summarised in this Option 2:** Option 2 consists in maintaining the current principles, i.e. the so-called 'status quo' described in chapter 6.1, but adding a new rule affecting the calculation of the amount of the family benefits. This new rule would consist of the adjustment of the amount of the family benefit granted by each Member State to the living standards in the Member State where the child or children reside.<sup>68</sup> The adjustment procedures and its logic were described above in chapter 5.1.

It should be outlined that this adjustment would be linked to the different economic situation (cost of living) in the Member State involved and would not be affected by the level of protection in the said Member State, i.e. the amount of the family benefits. The living standard is expected to go hand in hand with the level of social protection, but this is not necessarily always the case.

The **top-up obligation** (differential supplement) envisaged in Article 68(2) of Regulation (EC) No 883/2004 would still exist under this option. The difference would be that the Member State of residence of the children (if it is the Member State with secondary competence) may have to pay a differential supplement if the amount of the family benefit in said Member State exceeds the **adjusted family benefit** paid by the Member State that is primarily competent. That supplement would logically be limited to the sum exceeded.

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<sup>68</sup> Hereinafter the chapter will refer to children in general, although the same would apply if there was a single child.

Taking into account the different levels of family benefits it could be assumed that such a top-up obligation would not occur very often.

As in the ‘status quo’, the Member State of employment would still be the one with primary competence.<sup>69</sup> Being the Member State of employment, i.e. the State receiving the contributions and the majority of the taxes paid by the migrant workers, it could be said that a certain economic logic is maintained. The adjustment procedure, however, may disrupt this logic as the analysis of the burden-sharing will show.

Once dealing with the idea of adjusting the amount of the family benefits to the living standards of the children’s Member State of residence, several possibilities arise and will therefore be analysed. The first possibility would be the **upwards and downwards adjustment (Sub-option 2a)**. Simply put, under this sub-option, if the children reside in a less expensive Member State, the benefit would be adjusted downwards, while if they reside in a more expensive Member State, the benefit would be adjusted upwards. Logically the Member State having to pay such adjusted benefits may not have a problem paying a smaller benefit, but may oppose the idea of paying a higher benefit than the one received by the children residing in its territory.

The second **Sub-option 2b**, a possible solution to this latter situation, would be the **reimbursement of the upwards adjustment by the children’s Member State of residence** (this sub-option was not included in our mandate but added by us to show also some alternatives). Under this sub-option the family benefits would be adjusted upwards and downwards as described in the previous paragraph. However, the competent Member State of employment (outside the Member State of residence of the children) would be reimbursed

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<sup>69</sup> Regarding the determination of the legislation applicable to the entitlement of family benefits, the general rules established in Title II of Regulation (EC) No 883/2004 would be applicable. Regarding active persons, *lex loci laboris* is the competence rule except e.g. in the case of posted workers (among others). In Title III, Chapter 8 there are no specific conflict rules; there are only priority rules in the event of overlapping. In Option 2 the status quo is kept unchanged.

by the children's Member State of residence, which would cover the difference between the original benefit and the one that was adjusted (upwards). The problem could be that said reimbursement may be linked to a benefit that is not envisaged by the social security legislation of the Member State where the children reside. Said Member State may again oppose the idea of paying part of a benefit that is not covered by its social security system.

Finally, the third sub-option would be **adjusting only downwards (Sub-option 2c)**. Under this sub-option, if the children reside in a comparatively less expensive Member State, the benefit paid by another Member State would be adjusted downwards, but if they reside in a more expensive Member State, they would receive the same family benefits as those residing in the Member State which has to grant these benefits.

Finally, an issue which will be very important for any new option is whether the **legal base of the TFEU** will allow this solution (**legal compatibility**) or whether it is endangered if it is contrary to one of the principles enshrined in the TFEU. Analysing this question for the adjustment of benefits would merit a study on its own and was also not covered by the mandate of our report. Nevertheless, we have made some preliminary remarks also on that aspect in Annex 2 of this report.

Something has to be recalled in this context: we think that any rule on adjustments cannot be applied also to benefits with an income replacement function. Therefore, all three sub-options would necessitate special rules (specific coordination – see 4.1.4 above – or at least exemption from the adjustment) for this category of benefits and, thus, should apply only to **traditional family benefits like family allowances**. When the adjustment mechanism is also applied to family benefits with an income replacement function (when the benefit is e.g. calculated as a specific percentage of previous earnings) we tend to give a (-) to all three sub-options with regard to



“protection of rights”, as rights acquired due to a gainful activity would be endangered. This would without any doubt also be contrary to the fundamental principles of the TFEU.

#### *1.14.1 Sub-option 2a – adjustment of the amount (no limits)*

**A short description of this sub-option:** This option would consist in maintaining the current rules of Regulation (EC) No 883/2004, but **adjusting upwards and downwards** the amount of the family benefit granted by any Member State for children residing in another Member State to the living standards in that Member State of residence of the children.

To put it simply, under this option, if the children reside in a comparatively less expensive Member State, the benefit would be adjusted downwards, while if they reside in a more expensive Member State, the benefit would be adjusted upwards.

**Standard example:**

**Scenario 1:** Member State A (primary competence) grants €80: Member State B (secondary competence) does not grant any differential supplement

**Scenario 2:** Member State B (primary competence) grants €63: Member State A (secondary competence) grants a differential supplement of €37

The upwards adjustment could have no effect for the children concerned in practice if the benefit has to be topped up by a differential supplement of the Member State of residence of the children and if said supplement exceeded the

amount of the adjustment already under the status quo. In such a case this option would result in a mere modification of the sharing of the burden between Member States in favour of the Member State of residence.

However, if the children's Member State of residence did not top up the benefit, the upwards adjustment would always result in an effective increment of the amount received by children residing in a Member State with a higher factor of adjustment.

**Additional examples to highlight the effects of this option:**

*Example 1*

*The father works in Member State C, the mother and 2 children reside in Member State D, and the mother does not work. The amount of a certain family benefit for 2 children is €200 in Member State C. There is no top-up (as the benefit in Member State D would amount to only €180). The factor of adjustment is 100 in Member State C to 120 in Member State D.*

*Member State C (primary competence) grants €240: Member State D (secondary competence) does not grant any differential supplement.*

*[Status quo: Member State C (primary competence) grants €200: Member State D (secondary competence) does not grant any differential supplement.]*

*Example 2*

*However, any adjustment of course also works in case of employment in two different Member States of the parents.*

*The father works in Member State C, the mother and 2 children reside in Member State D, and the mother works there. The amount of a certain family benefit for 2 children is €200 in Member State C. The amount of the family benefits in Member State D is €180). The factor of adjustment is 100 in Member State C to 120 in Member State D.*

*Member State D (primary competence) grants €180: Member State C (secondary competence) grants a differential supplement of €60 (the adjusted family benefits amount to €240).*

*[Status quo: Member State D (primary competence) grants €180: Member State C (secondary competence) grants a differential supplement of €20.]*

## **Evaluation of the option**

### **(-) Clarification**

This option is less clear or easy to understand than the status quo as far as it does not simplify the current procedures and involves an additional adjustment procedure. Thus, it requires an additional factor of adjustment that is not self-explanatory and therefore requires additional clarification. Furthermore, migrant workers would be less aware of their rights, as the amount of the family benefit received would suffer variations depending on various factors, such as macro-economic criteria or the country of residence of the children and it would be different from the one received by the sedentary workers around him or her.

### **(-) Simplification**

This option is more complex to apply as far as it imposes additional obligations for migrant workers, such as the obligation to state and eventually prove the Member State of residence of the children. Possible changes in the Member State of residence of the children would result in additional administrative obligations for the migrant worker and in changes in the amount of the benefit granted by one and the same Member State.

### **(?) Protection of rights**

The evaluation of how the protection of rights varies under this option is not easy and depends on the point of view envisaged. First of all the ‘value’ of this option largely depends on political points of view. If it is decided that an unrestricted export cannot be justified (and is not necessary from a legal point of view) than this option is best adapted to protect the rights, as children always receive the benefit which corresponds to their economic circumstances. If the decision is taken that the national amount of the competent Member State is a right which has been acquired by the migrant worker, then this option cannot protect these rights.

The **beneficiaries** whose children are residing in a Member State with a **higher factor of adjustment** would see how their rights are better protected as they may receive a higher benefit to cover their family expenses. On the other hand, the beneficiaries whose children are residing in a Member State with a **lower factor of adjustment** would see how the amount of their benefits is reduced. The processing times between the claim being filed and the benefit being received could be increased due to the verification of the residence, which might be more important, as it is decisive for the amount to be paid, in which Member State the children reside (which is not that important under the status quo from the point of view of the Member State of primary competence, as always the same amount is at stake, irrespective of whether the children reside e.g. in this or in any other Member State – of course, only if the first

Member State stays the one with primary competence also after any transfer of residence of the children).

From the perspective of the States, the **Member State with primary competence** could have the perception that they are protecting the rights of their beneficiaries as a whole in a more balanced way, as each of them would receive an amount that covers a similar percentage of the related costs. A problem could arise, however, when States receive active migrants from Member States with a higher factor of adjustment, as they would have to allocate a higher share of their social budget to cover the benefits of children residing abroad, which could result in a diminished overall protection. Nevertheless, it is true that this is not expected to be a very common situation.

From the point of view of the **Member State of residence** of the children, the perception would vary depending on whether it is a State with a high or a low factor of adjustment. In the first case, children would receive higher benefits from the Member State with primary competence, so they would be better protected. In the second case, children would receive lower benefits from the Member State with primary competence, they will be less protected and the State of residence may have to allocate additional funds to protect these children, for example topping up the benefits with a differential supplement to guarantee the level of protection which this Member State wants to grant to all children residing on its territory.

Therefore, it is difficult to determine whether this option provides a better or worse protection of the rights of beneficiaries as a whole. It is for the policy-maker to determine this in the light of the level of protection which each of the groups mentioned currently has.

#### **(-) Administrative burden and implementation arrangements**

This option would result in a certain increase of the administrative burden. It is true that the implementation of the option would require some preliminary work, especially to establish the factors of adjustment, determining how the residence of the children needs to be proven and to include the additional adjustments in the national procedures, taking into account there will be 32 adjustment indexes. The running cases would also need further administrative processes as e.g. the updating of the adjustment factors has to be made on a regular basis (even if national amounts do not change).

As to the prevention of fraud, linked with the determination of the children's Member State of residence, a certain increment of the administrative burden may also be supposed, but, this is expected to be minor.

#### **(≈) No risk of fraud or abuse**

Under this option, families could be tempted to declare that their children live in a Member State with a higher factor of adjustment (or even in the Member State with primary competence), as far as the amount of the benefits would depend on the children's place of residence. For the Member State with primary competence, the children's place of residence is usually more difficult to determine than e.g. the place of work, as has been stated above (see 4.4), so the risk of abuse could increase. Nevertheless, a change of residence from a Member State with low factors of adjustment to States with high factors may not be very usual in practice; changes in a child's residence without any previous link to that Member State are not easy to explain and, therefore, administrations should have some remedies to prove the contrary (e.g. if a family resides in **PL** and the father works in **DE**, it would not be very plausible if the children claim that they have moved to **DK**). However, it could encourage looking for constructions under which the child would be deemed residing in the Member State with primary competence and thus entitled to the full amount of the family benefit. Under today's coordination this is not an

issue as the amount is always the same, irrespective of whether the children reside in the Member State with primary competence or anywhere else.

On the other hand, this option does not prevent or diminish the current risk of abuse, as it does not provide any additional instruments preventing the fraudulent overlapping accumulation of benefits.

#### **(?) potential financial implications**

This option shifts the burden from the Member States with a higher factor of adjustment, i.e. those where income and costs are higher, to Member States with lower factors of adjustment. This is made worse due to the effect of the differential supplement.

If the Member State of residence (in case it is the Member State with secondary competence) has a lower factor of adjustment, the benefit paid by the Member State of primary competence would be adjusted downwards. Consequently, the top-up obligation for the Member State of residence could emerge, if its benefits are higher than the downwards adjusted benefits from the Member State with primary competence (which is not very likely to occur). On the other hand, if the Member State of residence has a higher factor of adjustment, probably a less common situation, the benefit paid by the Member State with primary competence would be adjusted upwards. Thus, if the Member State of residence tops up the benefit, the amount of the supplement would be reduced in a proportional way.

Taking into account that migration usually heads from Member States with lower living standards to those with higher standards, this option would probably shift the burden from the latter to the former. This could result in a certain disruption of the economic logic that assigns the obligation to pay the family benefits to the Member State receiving the contributions and taxes.

In sum, it is difficult to determine whether this modification of the burden-sharing is fairer or not and what the exact financial impact for every Member State would be. This should thus be decided by the policy-makers in the light of a broader analysis of the economic relationships between Member States.

#### *1.14.2 Sub-option 2b – adjustment of the amount (no limits) and reimbursement*

**A short description of this sub-option:** This option would consist in maintaining the current rules of Regulation (EC) No 883/2004 and adjusting upwards and downwards the amount of the family benefit granted by any other Member State to the living standards in the Member State of residence of the children, as in Sub-option 2a. Additionally, under this option the Member State of residence would **reimburse the upwards adjustment** to the other Member State(s), which might be (a) Member State(s) with primary or secondary competence.

In plain words, under this option, if the children reside in a less expensive Member State, the benefit would be adjusted downwards. If the children reside in a more expensive Member State, the benefit would be adjusted upwards. The difference between the national amount of the family benefit and the adjusted amount will be paid by the other Member State, but will be reimbursed to this State by the Member State of residence of the children.

**Standard example:**

**Scenario 1:** Member State A (primary competence) grants €80; Member State B (secondary competence) does not grant any differential supplement

**Scenario 2:** Member State B (primary competence) grants €63; Member State A (secondary



competence) grants a differential supplement of €37 and reimburses €13 to Member State B

The reimbursement of the adjustment could seem to have a certain parallelism with the payment of a differential supplement (top-up) by the Member State of residence of the children (if it is the one with secondary competence – envisaged in Article 68(2) of the Regulation) although they work differently. The adjustment and reimbursement results from the existence of a different economic situation (cost of living) in each Member State. The differential supplement, in turn, derives from a difference in the level of protection in each Member State, i.e. the Member State of residence of the children may have to top up the family benefit if the amount of the family benefit in said Member State is higher than the amount of the benefit in any Member State with primary competence, irrespective of the cost of living in each Member State.

**Additional example to highlight the effects of this option:**

*Example 1*

*The father works in Member State C, the mother and 2 children reside in Member State D, and the mother does not work. The amount of a certain family benefit for 2 children is €200 in Member State C. There is no top-up (as the benefit in Member State D would amount only to €180). The factor of adjustment is 100 in Member State C to 120 in Member State D.*

*Member State C (primary competence) grants €240: Member State D (secondary competence) does not grant any differential supplement but reimburses €40 to Member State C.*

*[Status quo: Member State C (primary competence) grants €200: Member State D (secondary competence) does not grant any differential supplement.]*

### *Example 2*

*The father works in Member State C, the mother and 2 children reside in Member State D, and the mother works there. The amount of a certain family benefit for 2 children is €200 in Member State C. The amount of the family benefits in Member State D is €180). The factor of adjustment is 100 in Member State C to 120 in Member State D.*

*Member State D (primary competence) grants €180; Member State C (secondary competence) grants a differential supplement of €60 (adjusted amount of the benefit: €240); Member State D reimburses €40 to Member State C.*

*Status quo: Member State D (primary competence) grants €180; Member State C (secondary competence) grants a differential supplement of €20.*

### **Evaluation of the option**

#### **(-) Clarification**

As with Sub-option 2a, and for the same reasons, this option is less clear or easy to understand than the status quo as far as it does not simplify the current procedures and involves an additional adjustment procedure.

#### **(-) Simplification**

As with Sub-option 2a, and for the same reasons, this option is more complex to apply. As for the reimbursement, it does not affect the beneficiaries, but only the institutions of the Member States involved.

### **(?) Protection of rights**

As with Sub-option 2a, the evaluation of how the protection of rights varies under this option is not simple and depends on the point of view envisaged. For the **beneficiaries**, the situation is identical to the one described under Sub-option 2a. Those with children residing in a Member State with a higher factor of adjustment could see their benefit increased, while those with children residing in a Member State with a lower factor of adjustment could see their benefit reduced.

So again it is difficult to determine whether this option offers a better or worse protection of the rights of beneficiaries as a whole. This is for the policy-makers to determine in the light of the level of protection which each of the groups mentioned currently has.

### **(-) Administrative burden and implementation arrangements**

This option would result in a significant increment of the administrative burden, as far as it involves reimbursement of the upwards adjustment of the family benefits and adjustments. As reimbursement of healthcare costs has shown, said procedures require a significant exchange of information, involve constant delays,<sup>70</sup> and result in an additional administrative burden. It is true that the existing reimbursement procedures for healthcare benefits in kind could be applied, but that may not be the case depending on the internal organisation of the national administrations. Of course, also for family benefits reimbursement is not totally new (cf Article 58 of Regulation (EC) No 987/2009), but, the existing reimbursement provision concerns only few cases, while this reimbursement would cover much more cases. Consequently, this option is even more complex than Sub-option 2a from an administrative point of view.

### **(≈) No risk of fraud or abuse**

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<sup>70</sup> See e.g. Decision S9 of 20 June 2013 concerning refund procedures for the implementation of Articles 35 and 41 of Regulation 883/2004, OJ C 279, 27.09.2013, p. 8.

As with Sub-option 2a, and for similar reasons, under this option the risk of abuse would increase although to a lesser extent. It is true that when the benefit is adjusted upwards, the Member State of residences would have to reimburse the difference and would therefore have an active role verifying the place of residence of the children. However, such verification would probably be less exhaustive when the benefit is adjusted downwards (the same as under Sub-option 2a).

As for the current risk of abuse, when the benefit is adjusted upwards the Member State of residence is expected to receive updated information regarding the benefits received by children residing in their territory (requests for reimbursement). As a result, the risk of fraudulent accumulation of benefits would decrease. However, when the benefits are adjusted downwards such prevention mechanism would not exist (therefore, also in this respect, in cases of downwards adjustments, the same as under Sub-option 2a).

### **(?) potential financial implications**

This option shifts the burden between Member States due to the effect of the differential supplement, but it does it in a less predictable way. As with Sub-option 2a, if the Member State of residence has a lower factor of adjustment, the benefit paid by any Member State competent which is not the Member State of residence of the children would be adjusted downwards; thus the top-up obligation for the Member State of residence might emerge.

If the Member State of residence **tops up the benefit** (as a Member State with secondary competence), it will pay a lower supplement as in the status quo, as the supplement would be reduced by the same amount, as the reimbursement will have to be paid in addition. So, in principle, the Member State of residence would end up paying the same amount as under the status quo (part of it as reimbursement, part of it as top-up). But, if the Member State of residence **does not top up the benefit**, it will result in a higher burden for the said Member State (as it has to grant reimbursement irrespective of any differential supplements). Furthermore, the Member State of residence will be in a situation where it is obliged to pay part of a benefit that is not envisaged by its social security system. That would be, on the one hand, an imposition of the Regulations difficult to justify in the light of the mere coordination of social security systems. However, this could, on the other hand, also be found under today's coordination of e.g. sickness benefits, where the competent Member State also has to

reimburse benefits in kind which are granted in another Member State and which are not provided under its legislation.

In any case, like Sub-option 2a, this option would bring a financial relief for the Member State with a higher factor of adjustment (as they could downgrade their family benefits for children living in Member States with lower factors of adjustment, while Member States with lower factors of adjustment would not see any change in their situation in cases where they have to grant benefits for children residing in Member States with higher factors of adjustment. However, they could be affected by the obligation to grant higher differential amounts (which is not very likely). This could result in a certain disruption of the economic logic that assigns the obligation to pay the family benefits to the Member State receiving the contributions and taxes.

In sum, it is difficult to determine whether this modification of the burden-sharing is fairer or not. Thus, this should be decided by the policy-makers in the light of a broader analysis of existing figures and economic relationships between Member States.

#### *1.14.3 Sub-option 2c – adjustment of the amount (limit national amount)*

**A short description of this sub-option:** This option would consist in maintaining the current rules of Regulation (EC) No 883/2004 and in **adjusting** the amount of the family benefit granted by any Member State other than the Member State of residence of the children to the living standards in the Member State of residence of the children, but **limited to the amount** provided by the social security system of the Member State having to grant the benefits. So, in practice, adjustment would only work **downwards** but not upwards.

Simply put, under this option, if the children reside in a less expensive Member State, the benefit would be adjusted downwards, while if the children reside in a more expensive Member State, the benefit would not be adjusted.

**Standard example:**

**Scenario 1:** Member State A (primary competence) grants €80; Member State B (secondary competence) does not grant any differential supplement

**Scenario 2:** Member State B (primary competence) grants €50; Member State A (secondary competence) grants a differential supplement of €50

If the benefit is topped up by the Member State of residence of the children, the supplement could neutralise the negative impact of the adjustment. However, if the Member State of residence of the children does not top up the benefit, this option would generate unbalanced results: it only reduces the amount received by children living in Member States with lower factors of adjustment without increasing the amount received by children living in Member States with a higher factor of adjustment.

**Additional examples to highlight the effects of this option:**

*Example 1:*

*The father works in Member State C, the mother and 2 children reside in Member State D, and the mother does not work. The amount of a certain family benefit for 2 children is €200 in Member State C; and €200 in Member State D. The factor of adjustment is 100 in Member State C to 120 in Member State D.*

*Member State C (primary competence) grants €200 (no upwards adjustment); Member State D (secondary competence) does not grant any differential supplement.*

*[Status quo: Member State C grants €200: Member State D does not grant any differential supplement.]*

*Example 2:*

*The father works in Member State E, the mother and a child reside in Member State F, and the mother does not work. The amount of a certain family benefit for one child is €100 in Member State E and €85 in Member State F. The factor of adjustment is 100 in Member State E to 80 in Member State F.*

*Member State E (primary competence) grants €80: Member State F (secondary competence) grants a differential supplement of €5.*

*[Status quo: Member State E grants €100: Member State F does not grant any differential supplement.]*

## **Evaluation of the option**

### **(-) Clarification**

As with Sub-option 2a, and for the same reasons, this option is less clear or easy to understand than the status quo as far as it does not simplify the current procedures and involves an additional adjustment procedure. In addition, it distinguishes between two groups of Member States – those with comparatively higher factors of adjustment (they can decrease their family benefits) and those with lower factors of adjustment (they can grant their national amounts). As this is not fixed and depends on every bilateral relation (for every Member State there is a different borderline in relation to which Member States the national amount has to be granted and where the

downwards adjustment has to start; this borderline could also change with the time) it is even more unclear than Sub-option 2a.

#### **(-) Simplification**

As with Sub-option 2a, and for the same reasons, this option is more complex to apply as far as it imposes additional obligations for migrant workers such as the obligation to state and eventually prove the Member State of residence of the children.

#### **(-) Protection of rights**

This option provides a worse protection of the rights of a certain group of beneficiaries, i.e. those residing in Member States with a lower factor of adjustment, while it does not improve the protection of the rights of beneficiaries residing in Member States with a higher factor of adjustment.

In sum, this is an asymmetrical solution that lacks consistency. The amount of the family benefits should be adjusted to the living standard always or never.

#### **(-) Administrative burden and implementation arrangements**

As with Sub-option 2a, and for the same reasons, this option would result in a certain increment of the administrative burden, due to the inclusion of the adjustment step in the national procedures and the need for additional prevention of fraud.

#### **(≈) No risk of fraud or abuse**

Comparable to Sub-option 2a, and for the same reasons, under this option the risk of abuse would increase. Of course, this option would no longer be an incentive to move the children to a Member State with a higher factor of adjustment, but it could still be an incentive to move from Member States with lower factors of adjustment to the Member State which is competent to grant the benefits. Therefore, this option does not prevent or



diminish the current risk of abuse, as it does not provide any additional instruments preventing the fraudulent accumulation of benefits.

### **(?) Potential financial implications**

This option could shift (again) the burden from Member States with a higher factor of adjustment to Member States with a lower factor of adjustment, in a similar way as with Sub-option 2a. Of course, this option differs from Sub-option 2a, as it takes away the obligation of Member States with lower factors of adjustment to make an upwards adjustment if the children reside in a Member State with higher adjustment factors.

If the Member State of residence has a lower factor of adjustment, the benefit paid by any other Member State would be adjusted downwards. The top-up obligation for the Member State of residence (if this is the Member State with secondary competence) is thus more likely to emerge. Consequently, today's situation would be distorted as it shifts some obligations from Member States with higher levels of costs of living towards Member States with lower levels.

#### ***1.15 Option 3 – reversed competence of the Member State of residence before the Member State of employment***

**General description of all sub-options summarised in this Option 3:** The child's Member State of residence always has competence by priority. Any other Member State involved could only be competent at a secondary level. Thus, these other Member States would only have to grant differential supplements (as Member States with secondary competence) if their family benefits are higher than those of the Member State of residence of the child.

Again various sub-options are possible. First **Sub-option 3a**: the differential supplements would have to be granted based on the unreduced national amount in the same way as differential supplements are calculated today. This is the main difference with **Sub-option 3c** (which was not contained in the mandate, but added by us for the sake of completeness), where only adjusted

amounts will be taken as the base for the calculation of the differential supplement. In between sits again **Sub-option 3b** (which has also been added by us), according to which no adjustment takes place, but, the benefits provided by the Member State of residence have to be reimbursed by any Member State with primary competence under today's coordination to safeguard the same burden-sharing between Member States as today. Of course there is also room for a **fourth sub-option** (adjustment + reimbursement). However, we have refrained from a detailed description of this sub-option as it seems to be too complex. Nevertheless, the other pros and cons for this additional fourth sub-option are comparable to the ones described in Sub-options 3a to 3c.

These options would mean a total change of today's cascade of competences of Article 68(1)(a) of Regulation (EC) No 883/2004 to determine the Member State with primary and secondary competence, as no longer 'gainful activity' but 'residence of the child' would be on top, followed by 'gainful activity' and 'receipt of a pension'. 'Residence' of any other person than the child as a last resort is not necessary from our point of view as it should not be the intention of this option to change today's Article 68(2), last sentence of the Regulation, under which a member of the family other than a child (e.g. a father) only residing in another Member State without being gainfully active there or receiving a pension cannot open entitlement to a differential supplement.<sup>71</sup>

To avoid any misunderstandings: this option only works properly if it is clear that the Member State(s) where the parents exercise a gainful activity pay their supplements (which could reach 100% of their national amounts in cases in which the Member State of residence of the child cannot grant any benefit under its legislation) also if the national legislation of these Member States of activity are residence-based schemes. Additional provisions to safeguard such

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<sup>71</sup> Concerning the necessity to clarify this sentence see also 4.1.4.3.

a common understanding would be advisable to avoid disadvantages for the persons concerned.

One issue which is very important with this option is whether or not **some of the horizontal options** are also taken on board. This concerns especially the question whether benefits which are employment-related are also covered by this option (also for these benefits it is always the child's Member State of residence which has to grant benefits with primary competence), or whether a special coordination is provided which would make this option easier to accept (our recommended option for these benefits can be found in 4.1.4 above). Also the additional clarifications we have made under chapter 5.2 above, e.g. concerning contribution-based benefits, are especially relevant for that option. Therefore, the impact assessment could show a different outcome depending on these horizontal decisions.

For these Options a special and separated coordination of family benefits with income replacement function (see under 4.1.4 above) could be advisable. This could safeguard that those family benefits which are clearly linked to a gainful activity of one parent exercised outside the Member State of residence of the children would still have to be granted by that Member State and not by the Member State of residence.

Concerning the legal framework (especially the **legal compatibility with the TFEU**) it has to be said that this solution should safeguard exactly the same amount for the beneficiaries. As today's solution never has been challenged by the CJEU it could be assumed that also this option would not raise any problems from the perspective of the total amount of the benefits granted. Of course it would shift the competences, thus it might happen that a person would lose immediate entitlement to high benefits by today's Member State with primary competence e.g. where one parent works and have to start with comparatively low benefits from the Member State of residence of the

children. But, we do not think that this could endanger the compliance with the TFEU as the same is valid also today if the Member State of residence of the children is the one with primary competence because one parent works there and a differential supplement has to be paid by another Member (e.g. where the other parent works). There are already measures provided to grant the differential supplement as quickly as possible. In case these measures are not yet sufficient it would be up to the Community legislator to look for further improvements.

*1.15.1 Sub-option 3a – reversed competence of the Member State of residence before the Member State(s) of employment, no adjustment, no reimbursement*

**A short description of this sub-option:** This sub-option declares the children's Member State of residence as the one with primary competence and any other Member States (e.g. those where the parents work) only competent to grant differential supplements as Member States with secondary competence, if the family benefits under that legislation are higher. The amounts of the family benefits taken into consideration are not adjusted.

**Standard example:**

**Scenario 1:** Member State B (primary competent) grants €50; Member State A (secondary competent) grants a differential supplement of €50

**Scenario 2:** Member State A (primary competent) grants €100, no differential supplement by Member State B (secondary competent)

**Additional examples to highlight the effects of this option:**

*Example 1:*

*The family (mother, father, 2 children) resides in Member State A, the mother does not work, and the father works as a frontier worker in Member State B; the amount of family benefits for 2 children is €150 in Member State A and €300 in Member State B.*

*Member State A (primary competence) has to grant its €150 immediately; Member State B (secondary competence) grants a differential supplement of €150.*

*[Status quo: Member State B (primary competence) has to grant its €300 immediately; no differential supplement by Member State A (secondary competence).]*

*Example 2:*

*The family (mother, father, 2 children) resides in Member State A, the mother works in Member State A, and the father works as a frontier worker in Member State B; the amount of family benefits for 2 children is €150 in Member State A and €300 in Member State B.*

*Member State A (primary competence) has to grant its €150 immediately; Member State B (secondary competence) grants a differential supplement of €150.*

*[Status quo: The same – Member State A (primary competence) has to grant its €150 immediately; Member State B (secondary competence) grants a differential supplement of €150.]*

*Example 3:*

*[This might be considered a not very realistic example; nevertheless, we want to mention it.] The family (mother, father, 2 children) resides in Member State C, the mother works as a frontier worker in Member State D, the father works as a seasonal worker in Member State E; the amount of family benefits for 2 children is €150 in Member State C, €300 in Member State D and €200 in Member State E.*

*Member State C (primary competence) has to grant its €150 immediately; Member State D (secondary competence) grants a differential supplement of €150, €75 being reimbursed to Member State D by Member State E (tertiary<sup>72</sup> competence).<sup>73</sup>*

*[Status quo: Member State D (primary competence) has to grant its €300 immediately, €150 being reimbursed by Member State E (secondary competence); no differential supplement by Member State C (tertiary competence).]*

#### **Evaluation of the option:**

##### **(+) Clarification**

As the Member State which is competent by priority is always the Member State of residence of the children, it is clear which Member State has to start granting its benefits. In case of residence-based family benefits this is the clearest situation possible, as all children entitled to benefits under national legislation will get these benefits under Regulation (EC) No 883/2004 as well. Many disputes which today's coordination could cause (if Member States do not agree on which Member State is the primarily competent one) could be

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<sup>72</sup> As also today there is a hierarchy between Member States which are competent due to the same element (more activities, more pensions), we think there are already today more than two competent Member States at stake; therefore, in this example we call Member State E the Member State with tertiary competence.

<sup>73</sup> If we keep Article 58 of Regulation (EC) No 987/2009 and extend it also to these cases.

avoided. Nevertheless, this option is not the optimum with regard to clarity as we still have more than one Member State which could be competent to grant benefits (which includes differential supplements). From this perspective, the competence of only one Member State to grant its family benefits could be regarded as the clearest option.

Anyhow, the advantages concerning clarity are very important. The Member State of residence of the children becomes the anchor for family benefits. Irrespective of where the parents work and how often they switch their workplace, the Member State of residence of the children always stays the one with primary competence and the children will continuously receive the same benefits. Only the differential supplement can change whenever a new activity is started by one parent in a new Member State.

### **(?) Simplification**

On the one hand this option could be regarded as simpler, as always the same Member State is the competent one, irrespective of the fact whether the parents work and in which Member State they work (it is always the same Member State which is the one with primary competence). This could lead to a (+). On the other hand, this option is as complex as the status quo, as differential supplements are still provided. The reverse order of priority does not change the overall systematic. So, from an abstract point of view this option could be regarded as neutral compared to the status quo. But, in practice this option could lead to much more cases with differential supplements than today (if we assume that in general the family benefits in Member States to which workers migrate are higher than in the Member State of residence of the children). From this perspective we would have to evaluate it with a (-). Thus, a (?) seems to be a fair value for this option.

### **(+) Protection of rights**

This option is much better than the status quo, as it will safeguard that all children immediately receive the benefits which are provided for children under the legislation of the Member State where they reside. It could be assumed that, consequently, families do not have to wait any longer for the final settlements of conflicts or rely on payment of provisional amounts of benefits.<sup>74</sup> Thus, the policy aims of the Member State of residence on how much money a family should receive which resides in its territory is fully achieved. In addition, higher amounts of benefits in other Member States (especially those where one or both parents work) are also not lost, as there would be a differential supplement from these Member States. The best results concerning the protection of rights would be achieved if employment-related benefits (e.g. child-raising benefits with an income replacement function) remain within the competence of the Member State which is competent for the person taking care of the child. If this was not the case and all family benefits were covered in the same way by this new coordination, we think that many positive elements which this option really has, would be taken away again.

Another important issue is that, when the Member State of residence always has to grant its benefits with primary competence, this takes away today's obligation of this Member State to grant provisional benefits in the event of dispute of competences (Article 60(4) of Regulation (EC) No 987/2009). Thus, as benefits are granted immediately, this definitively adds to legal certainty and the protection of the persons concerned. It also safeguards that not so many cases of recovery of overpayments will occur (which is often the case today when the final competence differs from the provisional competence and thus overpayments have to be recovered (Article 6(5) and Title IV, Chapter III of Regulation (EC) No 987/2009).

Finally, in this context it has to be mentioned that, as family benefits in the Member State of residence could usually be assumed as being lower than

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<sup>74</sup> Article 60(4) of Regulation (EC) No 987/2009.



those in a parent's Member State of work, this option could result in much more differential supplements than today. For these cases the procedures will take longer until they get the final amount of family benefits they are entitled to. This diminishes the (+).

#### **(+) Administrative burden and implementation arrangements**

No new administrative procedures have to be created, as the existing ones will work in the same way as today (sometimes only by exchanging the Member States' roles). However, the length of procedures will be considerably shortened and provisional competences and all the administrative problems related to this (including the recovery of overpayments) could be largely avoided. Institutions of the child's place of residence can treat all applications in the same way irrespective of the parents' place of work. Again, the fewer cases of overpayment and recovery of overpayments (see under protection of rights) have to be mentioned. The possible increase of cases in which differential supplements have to be paid is something which could add negative aspects to this option.

#### **(+) No risk of fraud or abuse**

The Member State of residence will check the family in the same way as any other family resident there. Usually checking and evaluating the situation is easier in the same Member State than abroad and also if all residents are subject to the same checking procedures. Problems of the status quo, where sometimes a work of a parent in another Member State has been dissimulated to immediately get the benefits from the Member State of residence would no longer be an issue, as the Member State of residence is the competent one in all cases.

#### **(?) Potential financial implications**

This option shifts the burden in cases of only one working parent abroad (in principle only in these cases) from the Member State of work to the Member State of residence. It is difficult to decide whether this is fairer or not – this remains a political decision balancing the pros and cons mentioned below (this might also depend on the schemes involved). In case of a residence-based scheme in the Member State of residence this could be regarded as fairer, as already without the Regulation all residents would be entitled to the benefits. This would change if the Member State of residence has a contributory scheme and, thus, has to grant also benefits for persons not contributing to the scheme (if we assume that this is the consequence of this option, which has to be clarified anyhow – see also 4.1.4 and 5.2 above<sup>75</sup>). Member States of residence could see too much burden on their shoulders (they will have to grant more family benefits than today) taking into account that a parent works and pays tax and/or contributions in another Member State, while this other Member State only has to grant a differential supplement. Therefore, we have to stress that, compared to the status quo, this solution will lead to savings of the Member State of gainful activity at the cost of the children's Member States of residence. From the point of view of the Member States of employment this could be seen the other way around (the higher family benefits are only planned for the children resident on their territory and, therefore, it is only fair that they do not have to export the whole amount but only have to grant a differential supplement).

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<sup>75</sup> This shows, again, how many questions have to be solved before a reform of the family benefit coordination chapter can be regarded as finished in a satisfactory way. We want to recall the following issue: if the Member State of residence has a contributory family benefits scheme (only active persons who contribute are entitled to benefits), does the competence of this Member State mean that also a person gainfully active in another Member State and, thus, not contributing to that scheme can open entitlement to such benefits if the children reside there or is this not the case? In the latter case this would not change today's situation in which the Member State outside the Member State of residence of the children where the parent works has to grant its family benefits. And, it could be said that also this new coordination does not safeguard that the Member State of residence of the children grants all the benefits which it would have to in purely internal situations. Member States with only residence-based schemes could say that such an outcome has to be regarded as not balanced.

It could be assumed that this option is more valued by the Member States of work of migrant workers than those where the family resides (Member States from which the migrant worker came). Maybe the remaining unrestricted export obligation (which can result in sometimes considerable differential supplements by these Member States of work) could be an argument which convinces also these Member States of residence?

*1.15.2 Sub-option 3b – reversed competence of the Member State of residence before the Member State of employment + reimbursement*

**A short description of this sub-option:** This sub-option is very similar to Sub-option 3a (therefore, unless otherwise stated the remarks under Sub-option 3a apply to this sub-option as well). It declares again the children's Member State of residence as the one with primary competence and any other Member State (e.g. those where the parents work) only competent to grant differential supplements (secondary competence), if the family benefits under that legislation are higher. The amounts of the family benefits taken into consideration are not adjusted. The only difference is that the Member State which would have primary competence under today's coordination would have to reimburse the Member State of residence with an amount which corresponds to its obligation today. Thus, this option would combine the advantages for the persons concerned (immediate entitlement to the benefits provided under the legislation of the Member State of residence) with the well-known burden-sharing of today's coordination.

**Standard example:**

**Scenario 1:** Member State B (primary competence) grants €50; Member State A (secondary competence) grants a differential supplement of €50 and reimburses the €50 granted by Member State B

**Scenario 2:** Member State A (primary competence) grants €100, no differential supplement by Member State B (secondary competence), but, reimbursement to Member State A of €50

**Additional examples to highlight the effects of this option:**

*Example 1:*

*The family (mother, father, 2 children) resides in Member State A, the mother does not work, and the father works as a frontier worker in Member State B; the amount of family benefits for 2 children is €150 in Member State A and €300 in Member State B.*

*Member State A (primary competence) has to grant its €150 immediately; Member State B (secondary competence) grants a differential supplement of €150 and reimburses €150 to Member State A.*

*[Status quo: Member State B (primary competence) has to grant its €300 immediately; no differential supplement by Member State A (secondary competence)].*

*Example 2:*

*The family (mother, father, 2 children) resides in Member State A, the mother works in Member State A, and the father works as a frontier worker in Member State B; the amount of family benefits for 2 children is €150 in Member State A and €300 in Member State B.*

*Member State A (primary competence) has to grant its €150 immediately; Member State B (secondary competence) grants a differential supplement of €150.*

*[Status quo: The same – Member State A (primary competence) has to grant its €150 immediately; Member State B (secondary competence) grants a differential supplement of €150.]*

*Example 3:*

*[This might be seen as a not very realistic example; nevertheless, we want to mention it.] The family (mother, father, 2 children) resides in Member State C, the mother works as a frontier worker in Member State D, and the father works as a seasonal worker in Member State E; the amount of family benefits for 2 children is €150 in Member State C, €300 in Member State D and €200 in Member State E.*

*Member State C (primary competence) has to grant its €150 immediately; Member State D (secondary competence) grants a differential supplement of €150 and reimburses the €150 to Member State C, €150 being reimbursed to Member State D by Member State E (tertiary competence).<sup>76</sup>*

*[Status quo: Member State D (primary competence) has to grant its €300 immediately, €150 being reimbursed by Member State E (secondary competence); no differential supplement by Member State C (tertiary competence)].*

#### **Evaluation of the option:**

#### **(+) Clarification**

For the persons concerned the same advantages as under Sub-option 3a apply. Nevertheless, for the institutions it is less clear, as additional reimbursement is included. This is an issue which we have not dealt with under clarification, but under administrative burden.

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<sup>76</sup> If we keep Article 58 of (EC) No Regulation 987/2009 and extend it to these cases.

### **(-) Simplification**

This option is more complex as the reimbursement is added to the obligation to grant differential supplements.

### **(+) Protection of rights**

For the persons concerned this option is as positive as Sub-option 3a.

### **(-) Administrative burden and implementation arrangements**

As an obligation of reimbursement is added, this sub-option is more complex than the status quo. The points mentioned in relation to Sub-option 2b apply to this sub-option as well.

### **(+) No risk of fraud or abuse**

The same arguments as under Sub-option 3a apply, but, it might be assumed that this sub-option is even more fraud-proof than Sub-option 3a, as also the Member State of employment which has to reimburse will check the case (even if no differential supplement has to be paid).

### **(≈) potential financial implications**

For this option we can clearly indicate the effects on fair burden-sharing, as it will lead to exactly the same results as the status quo.

#### *1.15.3 Sub-option 3c – reversed competence of the Member State of residence before the Member State of employment + adjustment*

**A short description of this sub-option:** This sub-option is, again, very similar to Sub-option 3a (therefore, unless otherwise stated the remarks under Sub-option 3a apply also to this sub-option). It declares again the children's

Member State of residence as the one with primary competence and any other Member State (e.g. those where the parents work) only competent to grant differential supplements, if the family benefits under that legislation are higher. Different from Sub-option 3a the amounts of the family benefits taken into consideration have to be adjusted. Reimbursement, as contained in Sub-option 3b, is not part of this sub-option, as it would make it even more complex.

**Standard example:**

**Scenario 1:** Member State B (primary competence) grants €50; Member State A (secondary competence) grants a differential supplement of €30

**Scenario 2:** Member State A (primary competence) grants €100, no differential supplement by Member State B (secondary competence)

**Additional examples to highlight the effects of this option:**

*Example 1:*

*The family (mother, father, 2 children) resides in Member State A, the mother does not work, and the father works as a frontier worker in Member State B; the amount of family benefits for 2 children is €150 in Member State A and €300 in Member State B; due to adjustment this amount would be reduced to €200 (the factor of adjustment is 100 in Member State A to 150 in Member State B).*

*Member State A (primary competence) has to grant its €150 immediately; Member State B (secondary competence) grants a differential supplement of €50.*

*[Status quo: Member State B (primary competence) has to grant its €300 immediately; no differential supplement by Member State A (secondary competence)].*

*Example 2:*

*The family (mother, father, 2 children) resides in Member State A, the mother works in Member State A, and the father works as a frontier worker in Member State B; the amount of family benefits for 2 children is €150 in Member State A and €300 in Member State B; due to adjustment this amount would be reduced to €200 (the factor of adjustment is 100 in Member State A to 150 in Member State B).*

*Member State A (primary competence) has to grant its €150 immediately; Member State B (secondary competence) grants a differential supplement of €50.*

*[Status quo: Member State A (primary competence) has to grant its €150 immediately; Member State B (secondary competence) grants a differential supplement of €150.]*

*Example 3:*

*[This might be considered a not very realistic example; nevertheless, we want to mention it.] The family (mother, father, 2 children) resides in Member State C, the mother works as a frontier worker in Member State D, and the father works as a seasonal worker in Member State E; the amount of family benefits for 2 children is €150 in Member State C, €300 in Member State D; due to adjustment this amount would be reduced to €200; and €200 in Member State E; due to adjustment this amount would be reduced to €120 (the factor of adjustment is 100 in Member State C to 150 in Member State D and 166 in Member State E).*



*Member State C (primary competence) has to grant its €150 immediately; Member State D (secondary competence) grants a differential supplement of €50, €25 being reimbursed to Member State D by Member State E (tertiary competence).<sup>77</sup>*

*[Status quo: Member State D (primary competence) has to grant immediately its €300, €150 being reimbursed by Member State E (secondary competence); no differential supplement by Member State C (tertiary competence)].*

#### **Evaluation of the option:**

##### **(-) Clarification**

It would be easier for the persons concerned, as they would in all cases be entitled to the family benefits of the Member State of residence. Compared to Sub-options 3a and 3b, this sub-option would not be so clear, as adjustments have to be made. This sub-option is close to Sub-option 2a. As the disadvantages seem to be stronger than the advantages it could be said that this option is worse than the status quo.

##### **(-) Simplification**

Adding adjustments to the coordination always makes it more complex.

##### **(?) Protection of rights**

Again, as an adjustment is involved, this is a question of political decision. The arguments mentioned e.g. under Sub-option 2a also apply to this sub-option.

##### **(-) Administrative burden and implementation arrangements**

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<sup>77</sup> If we keep Article 58 of (EC) No Regulation 987/2009 and extend it also to these cases.

As an obligation of adjustment is added, this sub-option is more complex than the status quo. The points mentioned in relation to Sub-option 2a apply to this sub-option as well.

**(+) No risk of fraud or abuse**

The same arguments as under Sub-option 3a apply.

**(?) Potential financial implications**

Here, again, we are confronted with a necessary political decision. This sub-option could be seen by some Member States as one of the best, as the Member State of residence has to grant all its benefits by priority, and if another Member State has to grant differential supplements these supplements can be adjusted to the costs of living in the Member State of residence. But, Member States which are in favour of an unrestricted export of all family benefits as it happens today will oppose this sub-option, maybe even violently, as it does not only give the Member State of residence primary competence, but might also reduce benefits exported into these Member States. From this perspective, this option appears much worse than Sub-option 3a.

## Conclusions

Having analysed the existing coordination of family benefits and possible options to modify the current system we came to the following conclusions.

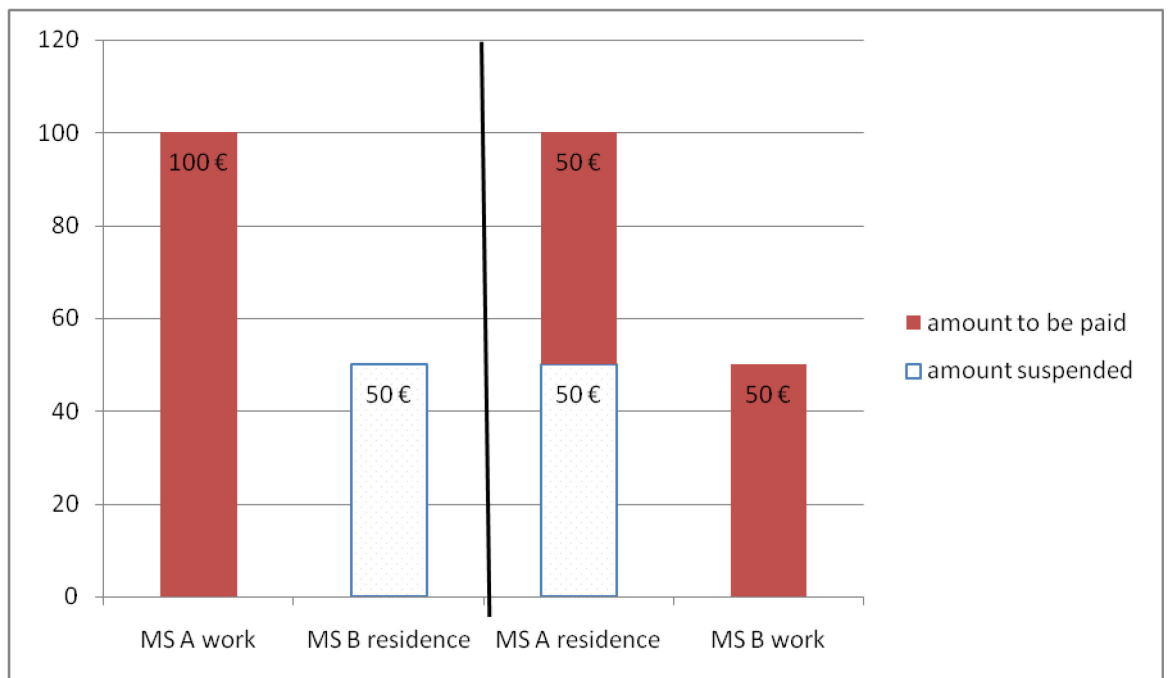
1. The existing coordination of family benefits is complex, covers a great variety of different types of benefits and has become the subject of political debate in recent times.
2. If the existing coordination is perceived as not being fair, this is a political statement. Therefore, also the search for a 'fairer' distribution of the burden depends on a political decision we cannot make. Nevertheless, from our experts' point of view some recommendations can be made irrespective of the political decision to be taken.
3. A re-examination of the existing coordination rules is advisable.
4. Export (understood as a Member State's obligation to grant family benefits also to the children residing in another Member State) is the main focus of the debate. Nevertheless, also other elements should not be forgotten. Some of these horizontal questions and problems could be regarded as more important and more burning issues than export.
5. Therefore, when discussing a reform of the coordination of family benefits we propose also clarifications ancillary to the export issue, like e.g. new or improved definitions, but also a special coordination for benefits which show a strong link to gainful activities, e.g. child-raising benefits for persons in employment. Only if these issues are solved in a satisfactory way, the options proposed for export could be a realistic alternative to the status quo.
6. Mapping has shown – at the level of FreSsco national experts – some support and advancement of legal arguments in favour of adjusting family benefits to the living costs of the country where the children reside, especially from some higher income Member States. Conversely, some lower income Member States were advancing arguments against such adjustment. It could be assumed that this will also be the official position of the Member States concerned.

Whichever solution will be further discussed, its pros and cons should be well evaluated and an EU-wide socially just solution should be adopted.

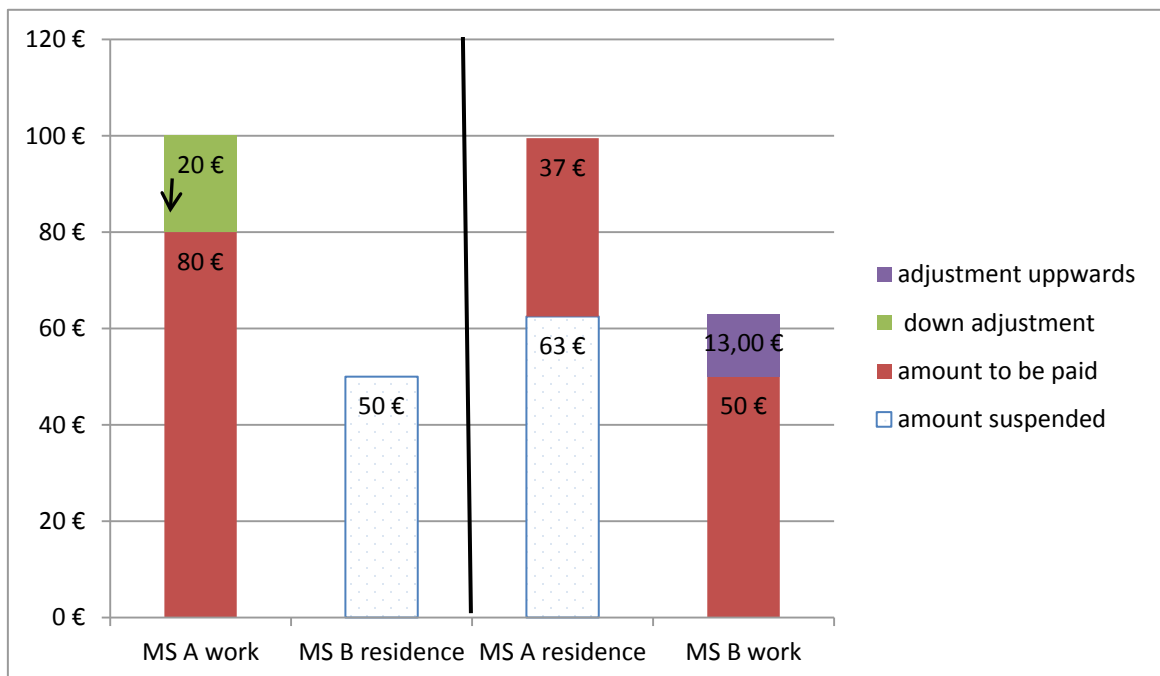
7. If there is really a political will to change the existing mechanism of export of family benefits, we think that the option which only reverses the competences from the Member State of employment towards the child's Member State of residence is a solution much easier to achieve and would also not take away any benefits granted today. Under this option, families would immediately receive the family benefits of the Member State of residence of the child (thus it can be assumed that from the perspective of the persons concerned it can be an improvement compared to the status quo). But, we have to note that this option cannot be presented as the only positive one. As it shifts the burden of the benefits from the Member State receiving the contributions and normally the taxes to the Member State of residence of the children, the fairness of this option can be disputed. It would most probably also result in more differential supplements than today and thus add administrative burden for the institutions. Anyhow, if an option is further examined to modify the existing coordination, we recommend analysing this option, as it contains the most positive elements of the options examined compared to the status quo.

## Annex 1 – Overview of the effects of the different options

### Option 1 (status quo)

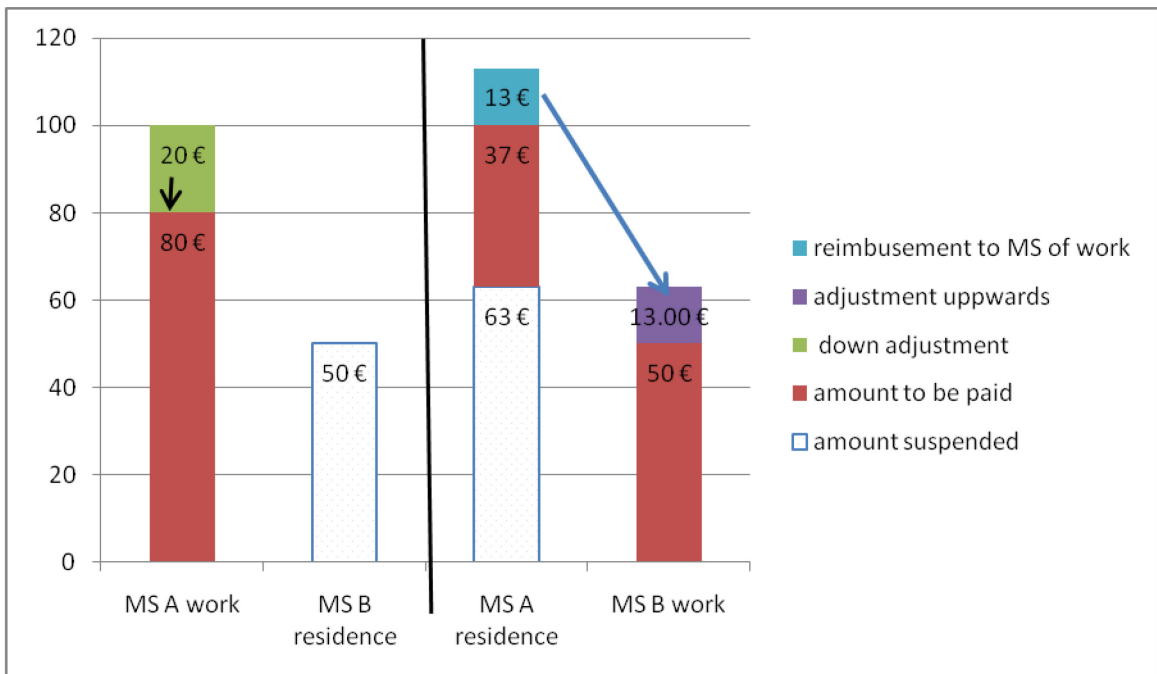


### Option 2a (adjustment of the amounts, no limits)

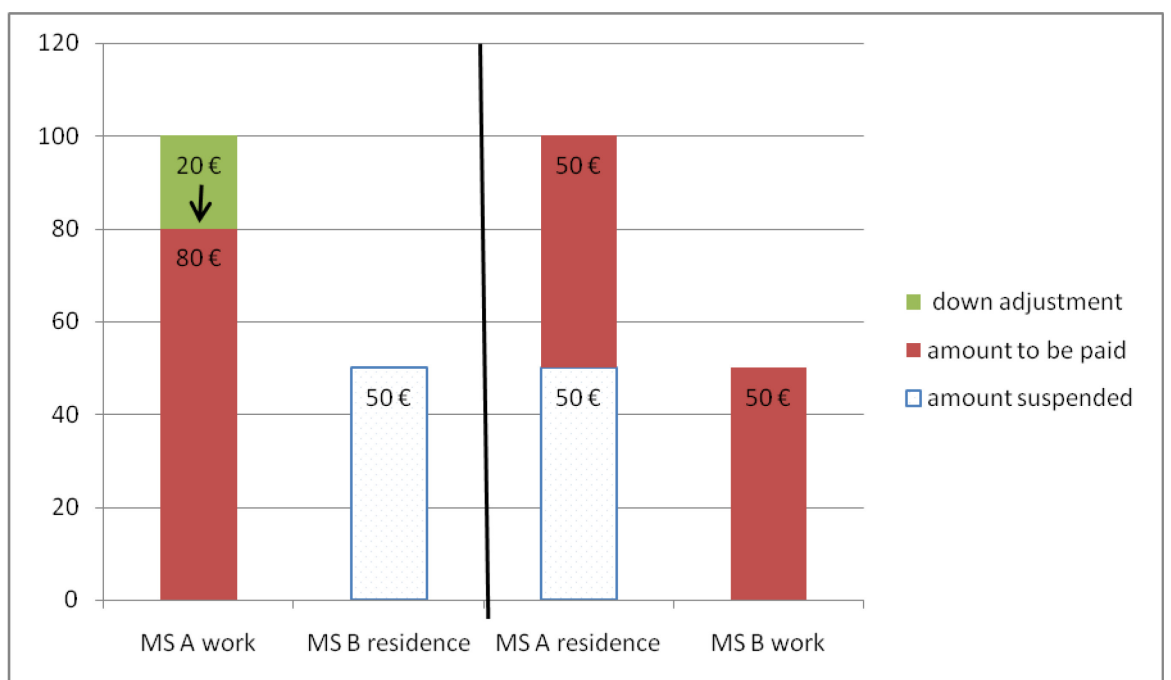


### Option 2b (adjustment and reimbursement of difference)

[As the decision towards the person concerned must show the whole suspended amount, the amount of the reimbursement has to be added to the total amount to show the real effects for the Member State of residence.]

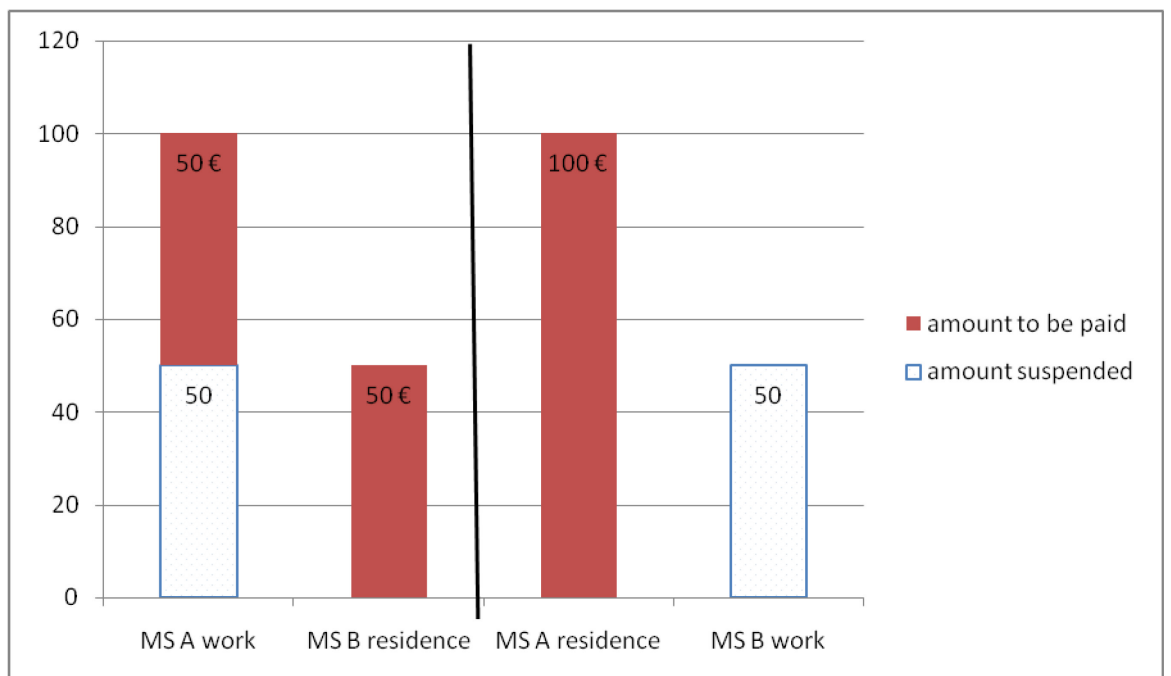


**Option 2c (adjustment + limit national amount)**



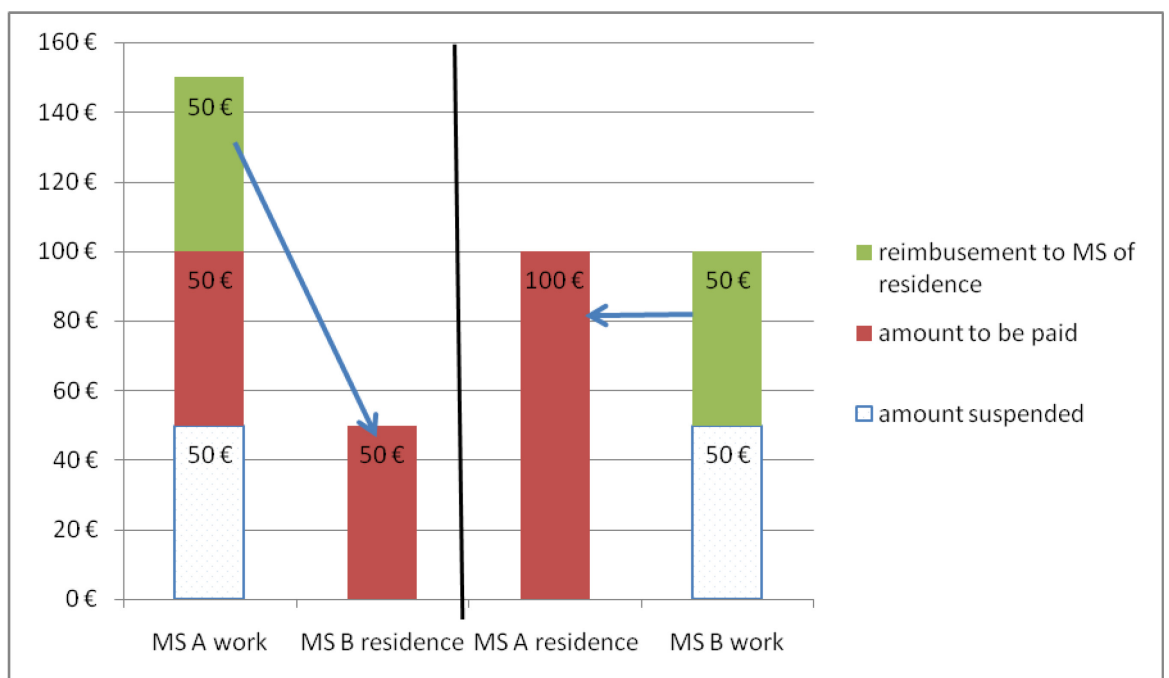


**Option 3a (reverse competence, no adjustment, no reimbursement)**

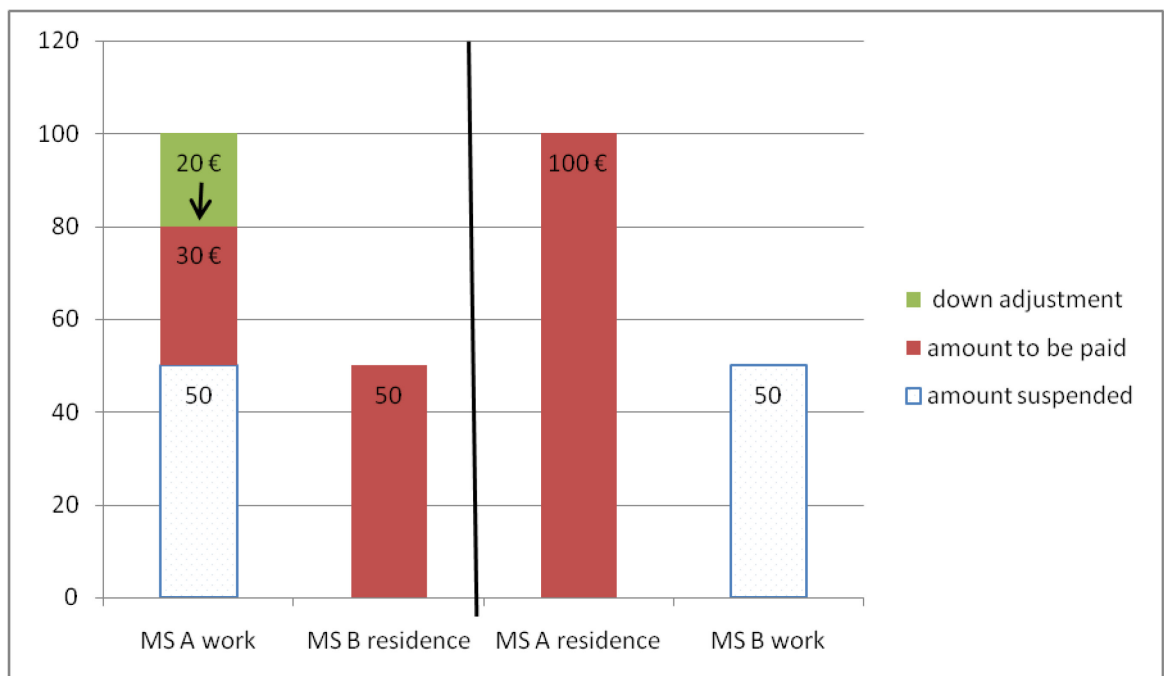


### Option 3b (reverse competence + reimbursement)

[As the decision towards the person concerned must show the whole suspended amount, the amount of the reimbursement has to be added to the total amount to show the real effects for the Member State of work.]



### Option 3c (reverse competence + adjustment)



### Annex 2 – Elements for analysing the legal possibilities to adjust the amount of family benefits to the living costs

Although the examination of a legal base for any adjustment (see 5.1 and Option 2) was not an explicit part of the mandate for this report, we have, nevertheless, collected some ideas, elements and background information to feed this examination.

### *Results from the mapping exercise*

First, it was interesting to explore how such adjustments would have to be regarded from a national perspective.

From the replies of the **FreSsco national experts** it seems that the introduction of a new coordination rule, stating that family benefits have to be adjusted according to the living costs of the Member State where the children reside, is not completely unambiguous from the viewpoint of **national law**. The main concern is the principle of equality, but it also depends on what is being compared (who is taken as a reference group, and who as comparative group).

Such new coordination rule might be in line with the **constitutional values** of some Member States. Reportedly, Article 7 of the **Austrian** Federal Constitution (*Bundesverfassungsgesetz*, B-VG) imposes equal treatment on the legislature. This means that not only persons in the same situation must be treated equally, but also that distinctive situations must be treated differently. Such a different situation may also be effectuated by different living costs in respect to family benefits which are aimed at compensating the financial burden of childcare. Thus, such a new principle would be in line with Article 7 B-VG, provided that the different living costs can be determined effectively.

A similar estimate is made for e.g. **Polish**, **Swedish**, **Luxembourg** and **Belgian** constitutions. It seems that the **Polish** constitution entails only general principles. Also in **Sweden**, there are no constitutional principles to prevent the adjustment of family benefits. For **Luxembourg** it is argued that, a priori, there would be no conflict with constitutional or general principles of Luxembourg law, since family benefits are already considered as personal rights of the children. Moreover, the adjustment of family benefits to the living standard in another Member State is also unlikely to raise constitutional issues in **Belgium**. Certain traces of a benefit adjustment approach can already be

found in bilateral agreements of Belgium with Turkey, Morocco and Tunisia, in which specific, lower amounts are exported instead of the normal sums that would be due in Belgium. However, one may wonder whether it would exceed the tasks of coordination, especially where it results in the amount of the Belgian benefit being raised above the level that would be due in Belgium.

The argument of equal treatment may also go in another direction, arguing that adjusting family benefits might be against the equality principle. For instance, if **the Czech Republic** would have to pay a higher or lower amount of family benefits to children abroad only on the ground e.g. that the parents moved with the child to another Member State, this might breach the equality of children living in the Czech Republic and abroad, if the Czech Republic would remain the competent State. Obstacles for adjusting family benefits and possible breach of the equality principle were also advanced by e.g. the **Bulgarian** expert, arguing that adjustment might be against the Bulgarian Constitution and also Article 4 of Regulation (EC) No 883/2004 itself. In the **Slovenian** constitution unequal treatment based on any personal circumstance (which might include the place of residence of children) is as a rule prohibited, unless it could be proven that formally unequal treatment and positive measures are required to guarantee substantive (material) equality (although reducing family benefits might be difficult to perceive as a positive measure).

For the **legislative acts**, it is argued that national law would either have to be modified (since no adjustment is provided for, e.g. in **AT**; there is also no parallel to it in **BE**, **HR** or **SI** law), or the (accordingly modified) coordination Regulation would have to be directly applicable. However, in some Member States there seem to be specific conditions. For instance in **Luxembourg**, the *Caisse nationale des prestations familiales* (CNPF) would be in favour of such reform under one precise condition: the coordination Regulation has to be changed in accordance with the coordination provisions regarding unemployment benefits. For example, a Polish institution would pay family

benefits according to the living costs in Poland to the children of a parent working in Luxembourg and the CNPF would have to pay the differential amount. In this case, the CNPF might agree with this change, if the costs could be reimbursed by the CNPF to the Polish institution in other words, if it would not have to pay the differential amount directly to the parent/child residing in Poland. The financial channels would have to be changed from the parent/child to the institution (these suggestions are very similar to the ones we have further elaborated under Options 2 and 3).

What appears equally important as pure national law is the **purpose** (the philosophy) of family benefits in the Member States (which are 'behind' legal rules). It is argued that the adjustment of family benefits according to the living costs of the individual family is quite odd from a **Swedish** point of view, since family benefits according to national legislation are flat-rate and only vary with the number of children. A similar argument was advanced e.g. by **Slovenia**, where certain family benefits are (indirectly) linked to the minimum or average wage in the country. Adjusting them according to the living costs in another Member State might distort this balance. Also in **Poland** there is no criterion of the cost of living to determine family benefits.

The **Croatian** Act on Child Allowance would have to be amended accordingly, but such an amendment could be contrary to the national situation. The calculation of the State Budget Base (see 4.1.2) would also have to follow the costs of living and be adjusted accordingly. Although the living costs have increased in Croatia in the last decade, the State Budget Base, which is the base for calculation of many other benefits (not only within the family benefits system) has not been changed since 2002. The latest available Household Income Survey of 2011, published by the Croatian Bureau of Statistics, for example shows a dramatic increase in the percentage of households which have a lower income than the living costs (70% of households, in comparison with 40% of households in the previous year).

However, there are no plans to recalculate and adjust the amount of the State Budget Base. An obligation to perform adjustments at European level could result in pressure also for the purely national cases.

This is even more the case with income-related family benefits. It is argued that adjustment of family benefits, whether an increase or a decrease, would sit uneasily with the contributory nature of the ‘professional’ benefit in **Belgium**, since it would loosen the nexus between the amount of the benefit received and the amount of the contributions paid (for this reasoning we also refer to 5.2.).

From this point of view the current coordination regime is perceived as socially just, since it is in the first place established to enable economic mobility within the EU. In a Member State with primary competence, (unadjusted) contributions and taxes are paid, from which also family benefits are being financed. In addition, it is argued that living costs may also be distinct within one Member State (e.g. in the capital city, compared to other towns and rural areas), but this has no influence on the level of family benefits. The same principle might be applied also Union-wide.

This leads us to another interesting aspect. Imagine a Member State has already today in its **national legislation a rule which stipulates such adjustments** (e.g. higher family benefits in the big cities or in regions with higher living costs than in the rest of the country). Would this Member State be entitled to apply this national rule already today (under the current wording of Regulation (EC) No 883/2004) and reduce or increase its family benefits for children residing in another Member State, or would it be obliged to grant the amount of the region where the migrant worker actually works on its territory also for children resident in another Member State? The existing court rulings are not at all clear. While the EFTA Court seems to favour the first approach,<sup>78</sup>

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<sup>78</sup> Case E-3/05, *EFTA Surveillance Authority v The Kingdom of Norway* (concerning the Finnmark supplement).

the Court of Justice of the European Union (CJEU) seems to support the latter one.<sup>79</sup> This is also an aspect which would merit further examination.

*Would such adjustments be possible from our point of view?*

#### *Introductory remarks*

First of all, we have to mention that we all considered it very important that this analysis was done and that all the pros and cons were very carefully examined. We have to admit that we do not see this question completely in the same way. While some of us were convinced that an adjustment of family benefits would be in contradiction to the fundamental principles of the TFEU, others thought that it could be justified and thus not be that problematic. The following part has to be read bearing these divergent opinions of the authors in mind.

*Would it be legally possible to adjust family benefits to the costs of living?*

It should be examined if such adjustments (which lead to reduced or increased amounts of benefits depending on the Member States involved) are in conformity with the general principles of the TFEU (e.g. equal treatment of migrant workers under Article 45, the export obligation under Article 48, but also the core principles of coordination enshrined in Regulation (EC) No 883/2004 itself, e.g. neutrality, assimilation of facts, equal treatment and exportability). Of course, this is a question which has to be examined very carefully and does not lie within our mandate. Nevertheless, if the TFEU does not allow such measures under any circumstances this would – without any doubt – also influence the impact assessment.

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<sup>79</sup> Judgment in *Gouvernement de la Communauté française and Gouvernement Wallon*, C-212/06, EU:C:2008:178 (concerning the Flemish care insurance).



Any modification of the Regulations which goes for an adjustment of family benefits requires a careful review. The following considerations could be taken into account when analysing them as far as the adjustment procedures could affect the coordination especially concerning the **neutrality principle**, the general **assimilation of facts** principle, the **equality of treatment** principle and the principle **of exportability** of the acquired rights.

#### *Neutrality principle*

As is well-known, the TFEU provides for the coordination, not the harmonisation, of the legislation of the Member States, with regard to differences between the Member States' social security systems and, consequently, between the rights of persons working in the different Member States. It follows that those substantive and procedural differences between the Member States' social security systems, and hence between the rights of the persons working in the Member States, are unaffected by the Treaty.<sup>80</sup>

The coordination Regulation, with regard to family benefits, has so far identified the applicable social security legislation and granted migrants the right to obtain a certain benefit as established in said national social security legislation. Under the scenarios envisaged here, the Regulation would go a step further by introducing an adjustment of the amount of the benefit established by the national legislation. Even if the substance of the national legislation remains unchanged, its result would be distorted.

As the CJEU has said, the objective of the free movement of workers within the EU is facilitated if conditions of employment (including social security rules), are as similar as possible in the various Member States. However, this objective is imperilled and made more difficult to realise if unnecessary differences in the social security rules are introduced by the Regulations.

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<sup>80</sup> Judgment in *Lenoir*, C-313/86, EU:C:1988:452, paragraph 13 and judgment in *Hervein and Lorthiois*, C-393/99 and C-394/99, EU:C:2002:182, paragraph 51.

According to the Treaty, the EU legislature must refrain from adding to the disparities which already stem from the absence of harmonisation of national legislations (due to the famous *Pinna* case).<sup>81</sup> It would be important to determine whether or not the adjustment procedures constitute such an unnecessary disparity. However, of course *Pinna* concerned a situation in which all Member States applied one coordination, while France was allowed, pursuant to the Regulation, to apply a different coordination. Therefore, it has to be examined if the *Pinna* obstacle would also apply to a rule under which all Member States have to adjust their benefits in the same way.

The Regulation's **conflict rules** have an indirect effect, as they only determine the national legislation applicable.<sup>82</sup> Under this law, the protection of the migrant (*lex loci laboris* in our case) can be more or less advantageous to the interests of the migrant.

Under the applicable law, the Regulations guarantee, on the one hand, that the migrant is **treated equally** with the nationals assured under this legislation (we will return to this point later on), and on the other hand, that he or she does **not lose any of the nationals' benefits** that he or she has been entitled to if the Regulations had not been applied. This is the so-called *Petroni* principle, establishing that the Regulations cannot freely limit benefits received in the light of the national legislation alone.<sup>83</sup> In fact, according to Articles 45 and 48 TFEU, which constitute the basis of the coordination, "*limitation may be imposed on migrant workers to balance the social security advantages which they derive from the Community regulations and which they could not obtain*

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<sup>81</sup> Judgment in *Pinna v Caisse d'allocations familiales de la Savoie*, C-41/84, EU:C:1986:1, paragraph 21.

<sup>82</sup> Judgment in *Hervein and Lorthiois* EU:C:2002:182, paragraph 53.

<sup>83</sup> Judgment in *Petroni*, C-24/75, EU:C:1975:129. On the application of this principle on the differential supplement of family benefits, see the judgment in *Dammer*, C-168/88, not available, paragraph 21. The same principle is also followed in the judgment in *Bosmann* EU:C:2008:290, paragraph 30, for letting a Member State which lacks competence retain (under some conditions) the possibility of granting family benefits (voluntarily?) if there are specific and particularly close connecting factors between the territory of that State and the situation at issue. This possibility disappears when there are not enough connecting factors (see the judgment in *B.*, C-394/13, EU:C:2014:2199).

*without them*”, but the Regulations may not withdraw or reduce the social security advantages that derive from the legislation of a single Member State.<sup>84</sup>

Therefore, it could be said that the adjustment procedure could only be applied if the right to the family benefit was opened by the Regulations only (no entitlement under national law alone), i.e. by applying the aggregation of periods or the assimilation of facts mechanisms (e.g. concerning the residence of the child) envisaged by the Regulations. If the right was recognised by mere application of the national social security legislation, the entitlement would be considered autonomous from and intangible for the Regulations. This important limitation for the EU legislature, defending the intangibility of autonomous ‘national benefits’, is a hermeneutical principle applied repeatedly by the CJEU since 1975 in the *Petroni* case.

#### *General assimilation of facts principle*

This principle envisaged under Article 5(b) of Regulation (EC) No 883/2004 should also be considered. Children living in a different Member State have to be treated as if they were residing in the competent Member State with regard to the acquisition of the right to a benefit and the calculation of the amount of the benefit. There is even a specific and a partly reiterative ad-hoc rule regarding family benefits under Article 67 of the Regulation.<sup>85</sup>

Establishing an adjustment procedure for the calculation of the amount of the benefit of the children living abroad could be in contradiction with the assimilation principle. In fact, the adjustment would result in an unequal treatment of a certain group of migrants, i.e. those leaving their children in

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<sup>84</sup> Judgment in *Jerzak*, C-279/82, EU:C:1983:228, paragraphs 11 and 12.

<sup>85</sup> The aim of this rule, envisaged in the precedent Regulation, was to prevent Member States from making entitlement to, and the amount of, family benefits dependent on residence of the worker's family members in the Member State providing the benefits, so that EU workers are not deterred from exercising their right to freedom of movement (see, in particular, the judgment in *Merino García v Bundesanstalt für Arbeit*, C-266/95, EU:C:1997:292, paragraph 28).

their home Member State. But, of course, the whole Article 5 of the Regulation is under the condition “*unless otherwise provided in the Regulation*”, and thus, the EU legislature could in theory deviate from these principles. This unequal treatment of children depending on their place of residence could be considered an indirect discrimination unless there would be a reasonable and objective justification for this measure and a reasonable proportionality between the means employed and that legitimate aim which is sought to be realised.

#### *Equality of treatment principle*

Finally, the principle of **equal treatment** could be affected especially when considering downwards adjustment. Under such circumstances, the migrant worker would not enjoy the same benefits as the sedentary workers, something that may contravene Article 4 of Regulation (EC) No 883/2004. Furthermore, the level of protection will depend on the living standards of the Member State where his or her children live. With regard to family benefits, there would be no equality of treatment between migrant workers and domestic workers. From this point of view, it can be argued that the employed person concerned would be impeded in his or her right to free movement.

From another perspective it could be argued that, if the purpose of the family benefit is to meet family expenses, children are protected to the level established by the competent Member State’s social security system as far as a similar rate of their family expenses is being covered. Following this argument, the principle of equal treatment would be broken in our Sub-option 2c only when the upwards adjustment is not applied. But even if we admit that under the current Regulation there is a certain overprotection of children living abroad compared to children living in the competent Member State, this would not be breaking the equality principle, as the Regulations may provide a more

favourable treatment of migrant workers compared to sedentary workers, as stated by the CJEU.<sup>86</sup>

The adjustment procedure under this option could remind one of the *Pinna I* case. Although the situation was slightly similar (a worker insured in France whose children were residing in another Member State received a different benefit from the workers whose children were residing in France), the provision included in the Regulation was fairly different. It established that, as the competent Member State, France could pay the family benefits granted by the Member State of residences of the children instead of the family benefits they granted to children residing in France. The CJEU considered this provision illegal because it gave rise to an indirect discrimination on grounds of nationality, as the unjustified provision denied the right to obtain French family benefits to a group of workers that consisted mainly of migrants. The CJEU stated that the right to freedom of movement was at stake if the migrant worker received less than the national workers just because his or her spouse and children remained in the Member State of origin.

Unlike *Pinna I*, our Option 2 proposes the adjustment of the family benefits provided by the competent Member State to the living standards of the Member State of residence of the children, not the substitution of those benefits for the ones provided by the Member State of residence of the children. It could be argued that all children entitled to benefits in a certain Member State will receive a benefit covering the same rate of their protected needs, irrespective of their place of residence, at least under the first Sub-options 2a and 2b analysed. For Sub-option 2c this argument could not be used.

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<sup>86</sup> Judgment in *Movrin*, C-73/99, EU:C:2000:369, paragraph 51: “That consequence would result not from the interpretation of Community law but from the system at present in force, which, in the absence of a common social security scheme, is based on a simple coordination of national legislative systems which have not been harmonised (see, in particular, Case 27/71 *Keller v Caisse Régionale d'Assurance Vieillesse des Travailleurs Salariés de Strasbourg* [1971] ECR 885, paragraph 13, and Case 22/77 *Fonds National de Retraite des Ouvriers Mineurs v Mura* [1977] ECR I699, paragraph 10)”.

Finally, the references to the first recital of Regulation (EC) No 883/2004<sup>87</sup> by the CJEU<sup>88</sup> should be taken into account. The CJEU stated that migrant workers leave their countries to **improve their living standard**; not to maintain it.

#### *Exportability of the acquired rights principle*

As is well-known, Article 48 TFEU on the minimum content of the coordination Regulations mentions only two principles: aggregation and exportability of the acquired rights. Article 7 of Regulation (EC) No 883/2004 developing the exportability principle establishes that “*Unless otherwise provided for by this Regulation, **cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his/her family reside in a Member State other than that in which the institution responsible for providing benefits is situated.***”

Even if family benefits are, in this case, not subjected to a real exportation, and exceptions to this exportation principle have been accepted in relation to other types of benefits, this provision should also be considered when determining the viability of adjusting the family benefits on the basis of the fact that the members of the family reside in another Member State.

From our point of view it goes without saying that any benefits which are based on contributions where the amount of the benefit also reflects the duration of the payment and the amount of these contributions (classic example: pensions) have to be exported without any restriction. If benefits are

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<sup>87</sup> “The rules for coordination of national social security systems fall within the framework of free movement of persons and should contribute towards **improving their standard of living and conditions of employment**”.

<sup>88</sup> See e.g. the judgment in *Hudzinski and Wawrzyniak* EU:C:2012:339, paragraph 47; and the judgment in *Bosmann* EU:C:2008:290, paragraph 30.

lump sums or specific amounts to cover special needs inside the Member State concerned, the CJEU has already accepted export restrictions for special non-contributory cash benefits (no export at all).<sup>89</sup> Would it be the same if we introduced an export restriction for family benefits (by adjusting them to the local living costs)? Of course, these benefits cannot be considered as being ‘special’. Consequently, the arguments which speak in favour of non-export of special non-contributory cash benefits as a rule cannot be used in relation to non-contributory family benefits. So, other arguments must be used to justify such a deviation from today’s principles. Anyhow, such a solution would only be justifiable in relation to benefits which are not income-related like e.g. the child-raising benefits with an income replacement function (see 4.1.4). **Therefore, from our point of view any adjustment option would need a special coordination for these benefits to stay in conformity with the TFEU.**

Finally, the **case law of the Strasbourg ECHR** on benefits considered as *private property* could merit mentioning (e.g. case 9134/06, *Efe against Austria*, which seems to indicate that the ECHR allows different treatment concerning the amount of family benefits for children inside and outside a State, but, of course, taking into account the much more developed principles in the EU we are convinced that this cannot be transposed 1:1 also in the EU; thus, also this judgment cannot be used as an argument to justify the adjustment approach under the Regulation).

#### *Some final additional remarks*

We have also found some additional hints which we would like to mention:

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<sup>89</sup> Judgment in *Snares*, C-20/96, EU:C:1997:518.

- In one case, Advocate General Kokott already pleaded for an adjustment of a benefit by taking into account the different living costs to avoid results which are embarrassing from the exporting Member State's point of view.<sup>90</sup>
- Just for consideration of the decision-makers we also would like to mention the way the remuneration of EU civil servants is adjusted in case of service outside Belgium and Luxemburg. Due to the EU Staff Regulations<sup>91</sup> also in these cases an adjustment to the different living costs has to be made (Article 64 of the Staff Regulations – of course, this concerns only the salary<sup>92</sup>). The same adjustment seems to be applicable also to the family allowances paid under the Staff Regulations (Article 67(4)<sup>93</sup>). The relevant tables are published on a yearly basis in the Official Journal.<sup>94</sup> These indexes slightly differ from the Eurostat indexes mentioned in chapter 5.1 as not the EU-28 are the factor 100 from which all calculations have to start, but the situation in Belgium and Luxemburg. Therefore, the figures indicated for the different Member States cannot be the same as the ones from Eurostat. As such an adjustment has already been done for decades for EU civil servants,<sup>95</sup> this seems to be, from our point of view, an interesting model which could also be used if the decision is taken to make an adjustment also of family benefits granted under Regulation (EC) No 883/2004. Of course, it should be further examined if these rules for EU civil servants can give any answer concerning a valid legal base to introduce such measures for migrant workers between Member States.

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<sup>90</sup> Opinion of the Advocate General in *Hosse*, C-286/03, EU:C:2005:621, paragraph 109.

<sup>91</sup> Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (OJ 45, 14.6.1962, p. 1385, as amended).

<sup>92</sup> It seems to be a common feature of many remuneration systems that they adjust at least some parts of the salary to local costs; this could be found e.g. also for diplomats or other civil servants, but also for employees of private employers who post them abroad. It seems that the general non-discrimination principle which, of course, covers also the remuneration does not create any problems in this respect.

<sup>93</sup> But we have to be careful! Interestingly this adjustment only applies if the allowance is directly paid to a person other than the official to whom the custody of the child is entrusted.

<sup>94</sup> For the period beginning with 1.7.2014: OJ C 444, 12.12.2014, p. 10.

<sup>95</sup> Taking into account the mandate of this report we have not further examined whether this scheme for EU civil servants has already been disputed or even analysed by the CJEU.



Taking into account all these different aspects we think that, after this short examination which really did not go into depth, it seems that such an adjustment should be further analysed.

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**ANNEX VII: FRESSCO REPORT: UNEMPLOYMENT BENEFITS**



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## **Executive summary**

On the agenda of this report are reform proposals in the area of Chapter 6 of Regulation (EC) No 883/2004, which coordinates unemployment benefits. The focus is on the principle of aggregation and the calculation of unemployment benefits as they are laid down in Article 61 and Article 62 of Regulation (EC) No 883/2004. Should these provisions be preserved in their present state (Option 1)? Or are changes desired or necessary as envisaged in the presentations of Option 2 and Option 3? To be able to assess these Options, an analysis must be carried out.

Together with the principle of export of benefits, the principle of aggregation forms the backbone of the system of coordination of social security, which was enacted in 1958 in Article 51 of the EEC Treaty and which is now to be found in Article 48 TFEU. The principle of aggregation was conceived as a remedy to what is usually called the principle of territoriality, which is a characteristic of nearly all social security systems of the Member States. These systems show a clear tendency toward making entitlement to benefits dependent on territorial requirements. As a result, a benefit is very often granted on condition that the claimant has completed periods of insurance or employment in the territory of the granting Member State, periods completed elsewhere not being taken into account. The principle of aggregation helps to overcome this restriction and renders periods completed in another Member State equivalent. They are not equal, but of equal value in terms of relevance for entitlement to benefits.

Through this mechanism the principle of aggregation makes an important contribution to the freedom of movement of persons. With a view to Article 48 TFEU (and its precursor provisions) the Court of Justice of the European Union (CJEU) considers the purpose of the aggregation principle to ensure that exercising the right to freedom of movement, conferred by the Treaty, does not deprive a worker of social security advantages to which he or she would have been entitled if he or she had spent his or her working life in only one Member State. Otherwise, this might discourage EU workers from exercising the right to freedom of movement and would therefore constitute an obstacle to that freedom.

From the beginning, Regulation (EEC) No 3/58, and later on, Regulation (EEC) No 1408/71 implemented the principle of aggregation through numerous provisions in different chapters. Regulation (EC) No 883/2004 did away with this approach and formed the principle and its essence in the general rule in Article 6 of Regulation (EC) No 883/2004. With Decision H6 of the Administrative Commission the principle of aggregation additionally gained in substance and precision giving good guidance to its application. Article 6 of Regulation (EC) No 883/2004, however, leaves room for derogating provisions (“unless otherwise provided for”). Article 61(1) of Regulation 883/2004 is in line with the exceptional clause in its Article 6. It does not abrogate the principle, but modifies it. It restricts unconditional application of the principle to periods of insurance, whereas periods of (self-)employment are not taken into account unless they would have been considered periods of insurance, had they been completed in accordance with the applicable legislation. A further restriction is laid down in Article 61(2) of Regulation (EC) No 883/2004. The relevant periods must have been completed most recently in accordance with the legislation on which the claimant bases his or her claim. This exception does not apply to persons in terms of Article 65(5)(a) of Regulation (EC) No 883/2004.

The reason for the divergent application of the aggregation principle required by Article 61(1) of Regulation (EC) No 883/2004 (and which was also required by Regulation (EEC) No 3/58 and Regulation 1408/71) is usually seen in the diversity of the unemployment benefit schemes available in the Member States. Some of them are based on periods of insurance for entitlement, others prefer periods of employment to become entitled to unemployment benefits.

Whereas Article 61 of Regulation (EC) No 883/2004 gives guidance on the application of the aggregation principle when the competent institution has to ascertain whether there is a right to an unemployment benefit, Article 62 deals with the quantitative dimension of the benefit, the level of the benefit. Unemployment cash benefits are overwhelmingly income-related in the Member States' legislations. They are intended to replace income lost through unemployment. As a result the level of the benefit is a statutorily fixed portion of the preceding income. This line of thought is in tune with the view held consistently by the CJEU, who associates a benefit with the risk of unemployment if it is to replace a salary lost as a result of unemployment and is therefore intended for the upkeep of the unemployed worker.

Most Member States calculate the benefit on the basis of income earned during shorter or longer periods of reference preceding the unemployment. Coordination law has to give an answer to this question in cases in which income preceding the occurrence of unemployment was earned in different Member States. The answer given in Article 62(1) of Regulation (EC) No 883/2004 opts for the exclusive account of salary or professional income received by the person concerned in respect of his or her last activity as an employed or self-employed person under this legislation. The CJEU interpreted Article 62(1) of Regulation (EC) No 883/2004, and the preceding provision in Article 68(1) of Regulation (EC) No 1408/71, to the effect that the previous wage or salary which normally constitutes the basis of calculation

is the wage or salary received in the last employment of the worker. In this way mobility of workers is not impeded.

Article 62(2) of Regulation (EC) No 883/2004 takes account of the reference periods widely provided for in national legislation. In this event, too, the basic calculation principle of this Article applies. In contrast to Article 62(1) and (2) of Regulation (EC) No 883/2004, Article 62(3) provides a different mode of calculation for frontier and similar workers (Article 65(5)(a) of Regulation (EC) No 883/2004). Following the *Fellinger* case, Regulation (EC) No 883/2004 requires the competent institution of the Member State of residence to take into account the salary or professional income received by the person concerned in the Member State to whose legislation he or she was subject during the last period of (self-)employment.

**Option 1** is intended to keep to the *status quo*, as described above.

In the outline of the mandate reference is made to the one-day rule according to which aggregation is possible if there is any insurance in the new Member State, irrespective of the length of the insurance. Whether this interpretation is the right one is a moot point.

With regard to Article 61(1) of Regulation (EC) No 883/2004 (and to every other provision of EU law) a uniform interpretation has to be achieved. Perhaps there is a uniform interpretation of Article 61 of Regulation (EC) No 883/2004 by Member States in theory, but there is no uniform application of the one-day rule in its practical implementation. Some Member States require longer periods to be completed under their legislation before the aggregation mechanism is activated. And this is certainly a drawback of the present state of law. Perhaps the different application of Article 61 of Regulation (EC) No 883/2004 does not result from the wording, but from the outcome of the application of the one-day rule which may be seen as undesired. For example, one Member State's reply to the FreSsco questionnaire stated that a one-day

insurance/employment period completed is often treated by the competent institutions of this State as a deceitful/abusive action. Generally speaking and judging by the replies to the questionnaire, the picture of application of the aggregation principle is not uniform. A Member State reported the adoption of a one-week rule due to the fact that in this Member State relevant periods are not expressed in days but in weeks. The rejection of the one-day clause is also motivated by the lack of guarantee that the person concerned is integrated into the labour market of this State. This thus pleads in defence of a solution similar to what Option 2 has in mind. In addition, it is reported that local institutions follow different approaches in their decision-making. As a result, uniform application of the law is not secured, which could be a reason to consider a revision of the wording to respond to the Member States' interests or to address their concerns.

An important topic in the examination of Article 61 of Regulation (EC) No 883/2004 and its one-day interpretation is integration into the national labour market and financial implications. Nobody would say that a one-day employment is sufficient integration. However, one could argue that other short-term benefits (e.g. sickness benefits) are treated likewise offering protection on a one-day basis.

It cannot be ruled out that Article 61 of Regulation 883/2004, in its interpretation of applying the aggregation mechanism even after one day, may tempt people to benefit from it in a fraudulent way. A typical example could be when a person induces or connives with an employer to establish an employment relation which in reality is disguised employment. Other examples could be added, in particular against the background of Article 64 of Regulation (EC) No 883/2004.

Despite these critical arguments against and the evident drawbacks of Article 61 of Regulation (EC) No 883/2004, the defenders of the present state of law

may put forward good reasons. The question may be raised as to whether a change of this Article would also entail a divergence from the application of aggregation rules for other benefits. In addition, the fact that everything lies in the hands of the competent State of the last employment is an advantage since it offers legal certainty. Administrative procedures need not be altered and no transitional provision is needed. Against the integration argument it may be said that the goal of unemployment benefits is not only income replacement but also support for job searching. As a result, if the final decision were the choice of Option 1, to enhance a uniform application of the aggregation principle, a decision by the Administrative Commission could be made which renders the one-day rule obligatory.

The amendments under **Option 2** keep the principle of aggregation intact, but they aim at a postponed application of the aggregation. One month or three months of insurance or (self-)employment would have to be completed before aggregation can be applied.

Since these proposals interfere with the principle of aggregation, the examination of their compatibility with primary law, in particular with Article 48 and Article 45 TFEU, is of the utmost importance. As was already underscored above, the principle of aggregation is one of the central pillars of social security coordination. This was the reason why it was enshrined in the EEC Treaty in 1958.

Article 48 TFEU is placed within the legal framework of the free movement of workers provisions. Free movement of workers is a fundamental right. It protects every European citizen willing to go to and stay in another Member State for work and he or she must not be discriminated against. Compliance with the provisions on free movement of workers is binding not only on Member States but also on all EU institutions. In particular, secondary

legislation has to be in accordance with the wording and purpose of Article 45 et seq TFEU.

Against this background the amendments envisaged have to be examined since they would constitute a change of the reach of the principle of aggregation in Article 61 of Regulation (EC) No 883/2004. Following the scheme which the CJEU has developed in its case law concerning the testing of compatibility of secondary law with primary law, the first step is to define the scope of the Treaty provision and then to see whether the derived law interferes with it. If there is interference, a second step has to be taken and possible justification sought.

The principle of aggregation as it is laid down in Article 48(a) TFEU is designed to abolish as far as possible the territorial limitations of the domestic social security schemes. Without guaranteeing aggregation the access to and the amount of benefits the person has worked for could be lost.

As far as the equality of treatment principle pursuant to Article 45 TFEU is concerned, the CJEU emphasised its importance in the arena of social security coordination very early in its case law. With reference to the *Pinna* case, the CJEU ruled that the adoption of rules which provide for unequal treatment among citizens is not permitted. Equality of treatment prohibits all covert forms of discrimination which, by applying other distinguishing criteria, in fact achieve the same result.

If Option 2 is implemented, migrant workers who become unemployed will have to accept a qualifying period the completion of which is necessary to acquire the protection through the application of aggregation of periods. As a result the amendments envisaged represent a restriction to the free movement of workers.

This brings the analysis and the compatibility examination to its second step, i.e. the search for the existence of justifying reasons. It has to be considered that the law-giving bodies of the EU may choose the most appropriate measures for attaining the objective of Article 48 TFEU and therefore dispose of a wide discretion. This includes the possibility to depart from coordination mechanisms designed by this provision.

Since there are no written reasons to justify restrictions with regard to Article 48 TFEU, only overriding reasons or mandatory requirements may justify restrictions. Case law specific to this problem in the area of social security is rare. Most of the judgments delivered by the CJEU concern discrimination resulting from national law. But it is possible to indirectly draw lessons from such cases. Below, the criteria mentioned in the mandate will be picked up and subjected to scrutiny from the viewpoint of justification.

The aspect of fighting fraud and abuse is certainly of great weight. Nevertheless, it has to be said that a good reason alone is not sufficient for justification. The CJEU sets great store on the proportionality principle. Is it really justified to partially dispense with aggregation (which is the case with stating a qualifying period) and punish unemployed people for the unwanted behaviour of a probably small group of claimants? Doubts may be cast on this. The same is true of the argument of lacking integration into the competent Member State's labour market. Even if integration is still weak due to the short length of gainful activity, does this really justify the suspension of the principle of aggregation?

A serious argument refers to the protection of the stability of national social security systems. That one Member State even after one day of employment has to bear the whole burden of unemployment benefits can be considered as inappropriate. However, under the proportionality test we might ask whether the solution to this problem should lie on the shoulders of the unemployed, or



is there a way out through the introduction of a reimbursement scheme (see below).

Aspects of simplification and clarification alone are certainly no justifying reason. On the contrary, the realisation of the amendments would require additional rules concerning which State should be competent during the course of the qualifying period.

Weighing the arguments above it seems doubtful whether the CJEU would consider the new law to be in conformity with Article 48 and 45 TFEU. As a consequence additional measures have to be taken into consideration.

The envisaged amendments under Option 2 require an answer to the question which Member State should substitute the State of last employment if the minimum threshold is not met. Without a workable solution to this problem a violation of Article 48 TFEU would occur. Several alternatives can be taken into consideration, all of which have significant drawbacks.

Clarity alone could not justify substantial amendments which significantly change the legal position of large groups of migrant workers to their detriment. If the one-day rule should no longer be accepted, the present law could be modified in the sense of the amendment. But perhaps an interpretation in a decision by the Administrative Commission expressing the will behind the amendments could be sufficient. From the point of view of simplification the new law would certainly not be recommendable, since extensive amendments to other provisions, e.g. Article 64, 65 and 65a of Regulation (EC) No 883/2004 could be required.

The most serious doubts have to be put forward as far as protection of rights is concerned. As was mentioned above, the referral of the unemployed person to a Member State other than that of the last professional activity due to the introduction of a threshold may be a significant disadvantage for this person.

In many cases it could be incompatible with the current life situation and the personal goals of the person concerned. To remedy these disadvantages an altered scheme of this presently laid down in Article 64 Regulation (EC) No 883/2004 would be needed.

The enormous amount of problems as to the competence of Member States in the wake of the new law weigh heavily also under the aspect of administrative burden and implementation arrangements. A new procedure would have to be established, including the use of new forms and SEDs.

The threshold of one month or three months could reduce cases of fraud and abuse, a period of three months even more than a period of one month. Still, one cannot rule out that bogus employment would also occur, lasting either one month or three months.

From the angle of financial implications, it has already been said that the new law, with its shift of costs from the Member State of the last professional activity to another Member State, might only partially lead to a cost-effective solution. In addition, costs may be incurred by the unemployed persons due to their change of residence which would possibly be necessary.

Against this background of significant problems resulting from the enactment of the amendments under Option 2, the preservation of the present scheme in Article 61 of Regulation (EC) No 883/2004 could be preferable to the amendments envisaged. Alternatively, a new reimbursement scheme could be installed. To implement such a new reimbursement scheme the existing scheme in Article 65(6) to (8) of Regulation (EC) No 883/2004 could serve as a template.

**Option 3** aims at a change of Article 62 of Regulation (EC) No 883/2004 by introducing a new model for the calculation of unemployment benefits. This calculation will also be based on the salaries earned in the previous Member

State(s). Here again the assessment must be undertaken using the criteria and the objectives contained in the mandate. In particular, concerning Option 3 the mandate requires scrutiny of whether the calculation of the amount of the unemployment benefit on very short periods of employment may lead to arbitrary results.

The function of unemployment cash benefits under national law is replacement of the income lost through unemployment. This is why unemployment benefits are income-related and why income preceding the unemployment is the calculation basis. The same is true of unemployment cash benefits on the coordination level. This is confirmed by the consistent case law of the CJEU. As far as the income is concerned upon which the calculation is based, Member States usually lay down reference periods (following the information in the mandate, on average 12 months). Article 62(2) of Regulation (EC) No 883/2004 indirectly confirms the relevance of reference periods. At any rate, Article 62(1) and (2) state that income earned exclusively in the territory of the person's last (self-)employment has to be taken into account. A derogation from these rules applies for persons in terms of Article 65(5)(a) of Regulation (EC) No 883/2004 (Article 62(3) of Regulation (EC) No 883/2004). Both amendments under Option 3 favour a change of the basic rule in Article 62(1) and (2) in cases in which the period of (self-)employment of the claimant was very short (less than one month/three months). In this event the income basis is extended to (self-)employment in the previous Member State(s).

The new law would not pose problems from the viewpoint of clarification and simplification. A different judgment has to be made when the problem of the administrative burden and implementation arrangements has to be assessed. Taking into account income received in the previous Member State presupposes reliable information from the competent institutions in this State. As a consequence, an exchange of relevant data has to take place. Compared

to the present law a further administrative step is necessary. This additional administrative burden could be relieved if use were made of the information channel which is currently used in cases concerning frontier and similar workers according to Article 62(3) of Regulation (EC) No 883/2004. The implementing rule in Article 54(2) of Regulation (EC) No 987/2009 could be extended to cases under the new law. Otherwise the competent institution would apply its law and the income communicated would be fitted into its calculation scheme.

An argument against the introduction of the new mode of calculation could be that it delays the award of the unemployment benefit. However, if this problem arises the benefit could be granted on a provisional basis according to Article 7 of Regulation (EC) No 987/2009. As far as the implementation of the new scheme is concerned the wording of Article 62(1) and (2) of Regulation (EC) No 883/2004 has to be altered correspondingly and jointly with the mentioned extension of Article 54(2) of Regulation (EC) No 987/2009.

Perhaps the most central aspect of the change of law is the protection of rights, since this is what coordination of social security aims at. Is the application of the present scheme with its exclusive reference to the income earned in the last professional activity to the advantage or to the detriment of the unemployed person? It depends on the level of income at the time of the occurrence of unemployment compared to that of the previous State. That the person concerned is better off when his or her recent income is higher is certainly acceptable if he or she was insured under the applicable scheme for a reasonable time. But how to judge if this was not so?

In legal doctrine, the fact that the present scheme is built on chance is seen by authors as a wrong legal policy. Many an author goes a step further and asserts that indirect discrimination and as a result a violation of Article 45/48 TFEU takes place in cases in which the migrant worker takes up a lower paid

employment and becomes unemployed after a very short time. The former income will not be taken into account, which may lead to the person concerned being treated worse than a person who has completed his or her periods of insurance in one and the same country.

Another weighty problem might be seen in terms of justice and fairness. As was said and shown above, Member States' legislations overwhelmingly adopt calculation schemes which form the benefit level according to a longer insurance record. In this way one could say that this method does justice both to the unemployed person and to the granting institution which administers the financial resources and has to use them economically in the interest of all the contributing workers affiliated to the scheme. We are confronted here with the problem related to one of the objectives stated in the mandate, i.e. the objective as to ensure that the financial burden for paying unemployment benefits does not arise in situations where mobile EU workers have not yet made a significant contribution to the scheme of the new Member State. However, this objective is not achieved under the current law in cases where migrant workers with a low level of income in the previous Member State benefit from the high level in the new Member State, even after very short periods of (self-)employment (in the extreme case one day).

The aspect of fraud and abuse has already been touched upon above and the mode of calculation may have a rather modest impact upon fraudulent behaviour. Yet one aspect seems to be important at this point. The problem of moral hazard has long since been discussed in theory and policy of unemployment insurance. It is requested that unemployment insurance has to be shaped in such a way that it does not allow people to stay unemployed instead of taking up employment even if the income is lower. The present law of Article 62 of Regulation (EC) No 883/2004 could favour such undesired behaviour.

Many an argument discussed above with regard to the protection of rights may again be put forward here. The nucleus of the problem refers to the question whether enjoying the full benefit level, despite only a short time of employment and as a consequence few contributions to a scheme plus weak integration into the scheme, is in harmony with the sound financing of unemployment insurance. It is hard to find an answer in the affirmative.

## **Introduction**

### ***1 The principle of aggregation of periods (Article 61 of Regulation (EC) No 883/2004)***

#### *1.1 The principle under primary law*

The principle of aggregation of periods is one of the leading pillars of coordination and therefore was already enshrined in (now) Article 48 TFEU. The principle has to be seen against the background of the division of competence between EU law and national law. It is consistent case law of the Court of Justice of the European Union (CJEU) that EU law does not detract from the powers of Member States to organize their social security systems.<sup>96</sup> This is the consequence of Article 48 TFEU providing for the coordination, not the harmonisation of the Member States' legislations.<sup>97</sup> This means that periods qualifying for the acquisition, retention, duration or recovery of a right to benefits are defined by the law of the Member States. From the beginning the CJEU has underscored this empowerment of Member States and it is now consistent CJEU case law that it is up to the Member States to provide for

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<sup>96</sup> This basic statement was for the first time pronounced in the judgment in *Duphar*, C-238/82, EU:C:1984:45, paragraph 16. See for a recent case the judgment in *Salgado Gonzalez*, C-282/11, EU:C:2013:86, paragraph 35.

<sup>97</sup> This is one of the statements which emerge in many judgments by the CJEU, see for example recently the judgment in *Jeltes*, C-443/13, EU:C:2013:224, paragraph 43.

relevant periods and its premises. It has stated that Regulation (EEC) No 1408/71 (and the same is true of Regulation (EC) No 883/2004) does not determine the conditions governing the constitution of periods of employment or insurance. Those conditions, as is apparent from Article 1(r) of that Regulation (now Article 1(t) of Regulation (EC) No 883/2004), are defined by the Member State's legislation under which the periods in question are completed.<sup>98</sup>

Domestic law traditionally follows the principle of territoriality.<sup>99</sup> And at this point the coordination principles come into operation. In essence, the principle of aggregation aims at overcoming the principle of territoriality as far as periods under domestic law are concerned. From a legal point of view this extension of territoriality takes place through a specific legal technique: equivalence. The aggregation of periods renders periods completed under different systems of social security equivalent. They are not equal, but of equal value in terms of relevance for entitlement to benefits. Therefore, it has quite rightly been said that the aggregation of periods completed under different types of social security is not a sinecure.<sup>100</sup> In other words, a process of assimilation is often needed to offer the possibility of aggregation.

The aggregation of periods is, if its conditions are met, a way for a migrant worker to retain the rights acquired under a legislation which is different from the one presently applicable. This happens because the aggregation mechanism leads to a unification of migrant workers' professional career.<sup>101</sup> It is based on the irrefutable presumption that the claimant of benefits has to be

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<sup>98</sup> Judgment in *Schmitt*, C-29/88, EU:C:1989:61, paragraph 15; judgment in *Alonso*, C-306/03, EU:C:2005:44, paragraph 30. Emphasis is laid on this legal position also in doctrine: see for example N. Guastavino (ed.), F. Basurko & M. Boto, *Lecciones de derecho social de la Unión Europea*, Tirant lo Blanch, Valencia, 2012, p. 208; S. van Raepenbusch, *La sécurité sociale des personnes qui circulent à l'intérieur de la Communauté Économique Européenne*, Story Scientia, Brussels, 1991, p. 198.

<sup>99</sup> See for this F. Pennings, *European social security law*, Intersentia, Antwerp, 2010 (5<sup>th</sup> edition), p. 9 et seq.

<sup>100</sup> F. Pennings, *European social security law*, *ibid*, p. 10.

<sup>101</sup> Cf P. Mavridis, *La sécurité sociale à l'épreuve de l'intégration européenne*, Bruylant, Brussels, 2003, p. 501.

treated as if he or she had always and continuously performed his or her work under the social security system of that Member State from which he or she claims benefits.<sup>102</sup>

Against this background we can formulate the rationale of the aggregation principle and we can rely for this on the case law of the CJEU. With a view to Article 48 TFEU (and the precursor provision) the case law conceives the purpose of the aggregation principle to ensure that exercising the right to freedom of movement, conferred by the Treaty, does not deprive a worker of social security advantages to which he or she would have been entitled if he or she had spent his or her working life in only one Member State. Such a consequence might discourage community workers from exercising the right to freedom of movement and would therefore constitute an obstacle to that freedom.<sup>103</sup> With this statement the CJEU confers in respect of the aggregation principle what has to be observed as a general rule: all the provisions of the regulations must be interpreted in the light of Article 48 TFEU. The aim must be to remove all barriers in the sphere of social security which impede a generally free movement of workers.<sup>104</sup>

## 1.2 *The codification of the aggregation principle in Article 6 of Regulation (EC) No 883/2004*

Regulation (EEC) No 1408/71 renounced a general rule on aggregation of periods. It preferred to lay down specific rules in different sections of the Regulation. By contrast, Regulation (EC) No 883/2004 opted for a general rule in Article 6. It was intended in this provision to do away with the numerous aggregation rules contained in various sections of the Regulation and to create

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<sup>102</sup> M. Fuchs, Introduction, in M. Fuchs (ed.), *Europäisches Sozialrecht*, Nomos, Baden-Baden, 2013 (6th edition).

<sup>103</sup> Judgment in *Alonso* EU:C:2005:44, paragraph 29 with reference to the former judgment in *Moscato*, C-481/93, EU:C:1995:44, paragraph 28.

<sup>104</sup> R. Cornelissen, '50 years of European social security coordination', in (2009) *European Journal of Social Security*, 9 (15).



a unitary and comprehensive regulation for all cases in which aggregation is needed.<sup>105</sup> From Recital 12 and 13 of the Preamble we can gather that the principle of aggregation serves the aim to retain the rights and the advantages acquired and in the course of being acquired by persons moving within the Community and their dependants. The mechanism of aggregation secures the acquisition and retention of the right to benefits and makes the *calculation of the amount of benefits* possible.<sup>106</sup>

The principle of aggregation has been concretised by the Administrative Commission in Decision H6. This Decision partly relies on the case law of the CJEU, but goes a step further. Firstly it requires to take into account all periods for the relevant contingency completed under the legislation of another Member State by applying the principle of aggregation. Obviously, relevant periods are very often not identical with regard to their elements. Nevertheless, point 2 of the Decision requires that periods communicated by other Member States must be aggregated without questioning their quality. However, point 3 acknowledges the Member States' jurisdiction to determine their other conditions for granting social security benefits taking into account Article 5 of Regulation (EC) No 883/2004. This is a clear reference to the case law of the CJEU.<sup>107</sup>

Article 6 of Regulation (EC) No 883/2004 shows that this principle is not of an exclusive nature. It opens up for other provisions which deviate from what is stated in Article 6 (“*unless otherwise provided for by this Regulation*”). Article 61 is one of the rare specific rules of Regulation (EC) No 883/2004

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<sup>105</sup> B. Spiegel, in B. Spiegel (ed.), *Zwischenstaatliches Sozialversicherungsrecht*, Manz-Verlag, Vienna, 2012, Article 6(2) of Regulation (EC) No 883/2004.

<sup>106</sup> Emphasis by M. Fuchs. I emphasise this aspect because it could have a direct impact on our discussion of the calculation of benefits under Article 62 of Regulation (EC) No 883/2004.

<sup>107</sup> Reported above.

which derogate from what is required under Article 6 of Regulation (EC) No 883/2004.<sup>108</sup>

### 1.3 *Aggregation of periods under Article 61 – the exception to the rule*

#### 1.3.1 The main contents of Article 61 of Regulation (EC) No 883/2004

Article 61(1) of Regulation (EC) No 883/2004 does not do away with the principle of aggregation of periods. However, compared to Article 6 of Regulation (EC) No 883/2004 it restricts the reach of the principle. This restriction is of a two-fold nature: firstly, periods taken into consideration are only periods of insurance or (self-)employment. Secondly, periods of (self-)employment have a lesser value than periods of insurance (61(1), second paragraph).

Why is it that Article 61 of Regulation (EC) No 883/2004 partly derogates from an unfettered application of the aggregation principle in the sense of Article 6 of Regulation (EC) No 883/2004? The distinction between insurance periods and periods of employment was already made in Article 33(1) and (2) of Regulation (EEC) No 3/58. Regulation (EEC) No 1408/71 has continued this distinction between insurance periods and periods of employment.<sup>109</sup> Article 61 of Regulation (EC) No 883/2004 is likewise based upon this distinction. For an explanation of the necessity of the distinction, reference is usually made to the diversity of existing unemployment benefit schemes, which are based either on periods of insurance or periods of employment.<sup>110</sup>

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<sup>108</sup> With regard to pre-retirement benefits, Article 6 will not apply (Article 66 of Regulation (EC) No 883/2004).

<sup>109</sup> Article 67 of Regulation (EC) No 1408/71.

<sup>110</sup> P. Watson, *Social Security Law of the European Communities*, Mansell Publ., London, 1980, 229 et seq; E. Eichenhofer, *Sozialrecht der Europäischen Union*, Beck, Munich, 2013 (5<sup>th</sup> edition), p. 248; M. Fuchs in M. Fuchs (ed.), *Europäisches Sozialrecht*, Nomos, Baden-Baden, 2013 (6<sup>th</sup> edition), Article 61(1) of Regulation (EC) No 883/2004. For more detailed information about the different approaches see U. Rönnsberg, *Die gemeinschaftsrechtliche Koordinierung von Leistungen bei Arbeitslosigkeit*, Centaurus, Herbolzheim, 2006, p. 22 et seq.

#### 1.4 *The functioning of the aggregation of periods under Article 61(1) of Regulation (EC) No 883/2004*

Due to the wording of Article 61(1) of Regulation (EC) No 883/2004 three variants can be discerned and have to be treated accordingly in what follows.

##### 1.4.1 The competent State and the other Member State follow the insurance approach.

If the law on unemployment benefits in both Member States in question pursues the insurance model, i.e. benefits are dependent on the completion of insurance periods, the aggregation of periods completed in both Member States is obvious. Periods of insurance have to be taken into account also if the law of the competent Member State is based on periods of employment.<sup>111</sup> The competent Member State has no power or discretion to qualify a period of insurance completed and communicated by the authorities of the other Member State.

##### 1.4.2 The competent Member State follows the insurance approach. The other Member State builds upon periods of employment.

In this case Article 61(1), second paragraph is applicable. If the aggregation of periods principle is to apply, the periods of employment in the other Member State have to be periods of insurance under the legislation of the competent Member State. This provision has been criticised because it could deprive the migrant worker of her or his protection against the risk of unemployment, a protection which she or he has possibly earned due to contributions to the

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<sup>111</sup> Judgment in *Frangiamore*, C-126/77, EU:C:1978:64. See for a detailed analysis S. van Raepenbusch, *La sécurité sociale des personnes qui circulent à l'intérieur de la Communauté Économique Européenne*, Story-Scientia, Brussels, 1991, p. 458 et seq.

unemployment system in her or his country on the basis of an employment relationship which is not acknowledged in the competent Member State.<sup>112</sup>

In the *Warmerdam-Steggerda* case<sup>113</sup> the question was raised whether the aggregation of periods of employment completed in another Member State presupposes that such periods should be regarded as periods of insurance for the same branch of social security by the legislation under which they were completed. The CJEU denies the existence of such a condition. It suffices that the period of employment is considered as a period of insurance according to the applicable law.

1.4.3 The competent Member State and the other Member State take into account periods of employment.

This case has not been subject of controversy so far. And it seems to be obvious that aggregation has to take place. The reason for it can be taken from Article 6 of Regulation (EC) No 883/2004 or Article 61(1) of Regulation (EC) No 883/2004. Article 6 clearly states the necessity of aggregation, because Article 61(1) does not “*provide otherwise*”.

1.5 *Requirement for the application of the aggregation principle (Article 61(2) of Regulation (EC) No 883/2004)*

Article 61(2) of Regulation (EC) No 883/2004 is sometimes wrongly understood as a conflict-of-law rule. However, the applicability of the legislation for the award of unemployment benefits has to be determined by Article 11 to 16 of Regulation (EC) No 883/2004. This was clearly stated by

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<sup>112</sup> S. Van Raepenbusch, *La sécurité sociale des personnes qui circulent à l'intérieur de la Communauté Économique Européenne*, Story-Scientia, Brussels, 1991.

<sup>113</sup> Judgment in *Warmerdam-Steggerda*, C-388/87, EU:C:1989:196.

the judgment in *Adanez-Vega*.<sup>114</sup> With the exception of frontier workers Article 61(2) of Regulation (EC) No 883/2004 requires the aggregation of periods on condition that the person concerned has “*the most recently completed*” periods in accordance with the legislation under which the benefits are claimed. The objective of this provision is – following the reasoning by the CJEU – to encourage the search for work in the Member State in which the person concerned last paid contributions to the unemployment scheme and to make that State bear the burden of providing the unemployment benefit.<sup>115</sup> This requirement is met if, regardless of the lapse of time between the completion of the last period of insurance and the application for the benefit, no other period of insurance was completed in another Member State in the interim.<sup>116</sup>

The requirement under Article 61(2) of Regulation (EC) No 883/2004 is cogent and, as a consequence, does not preclude a Member State from refusing to grant a worker unemployment benefits if the worker has not most recently completed periods of insurance or employment in that Member State.<sup>117</sup> Article 61(2) of Regulation (EC) No 883/2004 is in tune with Article 48 TFEU.<sup>118</sup>

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<sup>114</sup> Judgment in *Adanez-Vega*, C-372/02, EU:C:2004:705. In this judgment the CJEU presented a clear-cut scheme how to operate this determination; see paragraph 17 et seq of the judgment.

<sup>115</sup> See the judgment in *Gray v Adjudication Officer*, C-62/91, EU:C:1992:177, paragraph 12.

<sup>116</sup> Judgment in *Adanez-Vega* EU:C:2004:705, paragraph 52.

<sup>117</sup> Judgment in *Van Noorden*, C-272/90, EU:C:1991:219. However, it is not compatible with Article 45(2) TFEU and Article 4 of Regulation (EC) No 883/2004 if a Member State of residence denies unemployment benefits to a national of another Member State on the ground that, on the date when the benefit claim was submitted, the person concerned had not completed a specified period of employment in that Member State of residence, whereas there is no such requirement for nationals of that Member State. See the judgment in *Chateignier*, C-346/05, EU:C:2006:711.

<sup>118</sup> See the judgment in *Commission v Belgium*, C-62/92, EU:C:1992:177, paragraph 12.

## **2 Calculation of benefits (Article 62 of Regulation (EC) No 883/2004)**

### **2.1 The basic principle (62(1))**

Unemployment benefits in cash are typical income replacement benefits. This is why Member States usually shape these benefits with reference to income lost through unemployment. If income was earned in different Member States during periods preceding the unemployment, an answer has to be given by coordination law which income should be the relevant income for the calculation of an unemployment benefit. In principle this answer is offered by Article 62(1) of Regulation (EC) No 883/2004, where the competent institution is required to take into account exclusively the salary or professional income received by the person concerned in respect of her or his last activity as an employed or self-employed person under this legislation.

The CJEU has remarked on this provision referring to the Preamble that in order to secure the mobility of labour under improved conditions, the Regulation seeks to ensure the worker without employment the unemployment benefit provided for by the legislation of the Member State to which he or she was last subject. And it goes on interpreting Article 68(1) of Regulation (EC) No 1408/71 (now Article 62(1) of Regulation (EC) No 883/2004) in such a way that the previous wage or salary which normally constitutes the basis of calculation of unemployment benefits is the wage or salary received from the last employment of the worker. In such a manner the unemployment benefit is regarded as not to impede the mobility of workers and to that end seek to ensure that the persons concerned receive benefits which take account as far as possible of the conditions of employment, and in particular of the

remuneration, which they enjoyed under the legislation of the Member State of last employment.<sup>119</sup>

Regulation (EC) No 883/2004 has not taken up the provision in Article 68(1), second sentence of Regulation (EC) No 1408/71, pursuant to which a four-week clause has to be observed. If the worker had his or her last employment in the territory of the competent institution for less than four weeks, the benefit has to be calculated on the basis of the normal wage or salary in the place where the unemployed person was residing or staying corresponding to an employment equivalent or similar to his or her last employment in the territory of another Member State.

## 2.2 *Reference periods*

Member States' unemployment benefit schemes very often refer to specific reference periods when the income for the calculation of benefits is to be established. Article 62(2) states that in this event, too, the basic principle laid down in 62(1) has to be applied.

## 2.3 *The special case of frontier workers (62(3))*

Regulation (EC) No 1408/71 did not contain a provision on the calculation of benefits concerning frontier workers. In a preliminary ruling the CJEU decided that the competent institution of the Member State of residence must take into account the wage or salary received by the worker in the last employment held by him or her in the Member State in which he or she was engaged immediately prior to his or her becoming unemployed. This CJEU case law

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<sup>119</sup> Judgment in *Fellinger*, C-67/79, EU:C:1980:59, paragraph 7.

was adopted in Article 62(3) of Regulation (EC) No 883/2004.<sup>120</sup> For unemployed persons to whom Article 65(5)(a) is applicable, the institution of the place of residence must, pursuant to Regulation (EC) No 987/2009, take into account the salary or professional income received by the person concerned in the Member State to whose legislation he or she was subject during the last period of (self-)employment.

The Member States' legislations very often provide for a ceiling within the framework of calculating both contributions and benefits, whereby contributions are levied from the income that is taken into consideration up to the assessment ceiling for contributions. This is also decisive for the income used to assess the benefit. In the *Grisvard and Kreitz*<sup>121</sup> case the CJEU referred to Article 71(1)(a(ii) and (b(ii) of Regulation (EC) No 1408/71 and held that frontier workers who are wholly unemployed must receive benefits in accordance with the legislation of the Member State in the territory of which they reside as though they had been subject to that legislation while last employed. The legislation of the Member State of residence alone has to be applied and not, therefore, the legislation of the State of employment, including any rules it lays down on ceilings.<sup>122</sup> As the contents of Article 65(5) correspond with the former provisions of Article 71, existing case law can also claim validity under the new legislation.<sup>123</sup>

## Option 1

**Option 1 – *status quo*:** “one-day rule”: aggregation is possible, if there is any insurance in the new Member State, irrespective of the length of the insurance.

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<sup>120</sup> See also in this respect R. Cornelissen, ‘The new EU Coordination System for Workers who Become Unemployed’, (2007) *European Journal of Social Security*, 187, 198 et seq.

<sup>121</sup> Judgment in *Grisvard and Kreitz*, C-201/91, EU:C:1992:368.

<sup>122</sup> Judgment in *Grisvard and Kreitz* EU:C:1992:368, paragraph 16.

<sup>123</sup> Likewise R. Cornelissen, ‘The new EU Coordination System for Workers who Become Unemployed’, *ibid*, p. 199 et seq.



The unemployment benefit is only calculated on the basis of the salary earned in the State of last activity.

## ***1 The structure and the contents of Article 61 of Regulation (EC) No 883/2004***

### *1.1 General consideration*

Taking into account that the general content of Article 61 was placed under close scrutiny in the preceding paragraphs, here Option 1 will be examined, pointing out pros and contras. This Option entails the maintenance of this provision with the current wording, without the introduction of any change. Moreover, it is necessary to check out some aspects of this provision that could be considered as controversial. Finally, a possible solution will be provided for the best and a uniform application of this Article.

On the other hand, it has to be stressed that Option 1 not only deals with Article 61, but also with Article 62, the calculation of benefits. In that regard, in this part all the references will be made to Article 61, leaving the analysis of Article 62 for Option 3.

Article 61 of Regulation (EC) No 883/2004 establishes a special rule for the aggregation of periods of insurance or (self-)employment, which derogates from the general rule of Article 6. However, it can be considered that the basic principles of Article 6 are maintained in Article 61 with some particularities. In fact, what Article 6 and Article 61 demand as a prerequisite for the activation of the aggregation principle, is that the person concerned who claims benefits has a link with the competent State – usually through the completion of – at least – one day of insurance or (self-)employment in the said Member State.

## 1.2 Drawbacks of the current provisions

### 1.2.1 In the search for the uniform interpretation of Article 61

The need for a uniform interpretation of all EU law and, in this case, of Article 61 of Regulation (EC) No 883/2004 is a “must” as the Court of Justice of the European Union (CJEU) often reminds. Indeed, one of the principles of the EU and a prerequisite or condition for its survival and for its development is the uniform application of its law by all Member States.

The CJEU, referring to the said uniform application, determined in *Rheinmühlen-Düsseldorf*<sup>124</sup> in a very clear way that this “*is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community*” and that it “*aims to avoid divergences in the interpretation of Community law. [...] Consequently any gap in the system so organized could undermine the effectiveness of the provisions of the Treaty and of the secondary Community.*”

In theory, there is probably a unanimous interpretation of Article 61. Unfortunately, this unanimity is not reflected in its practical application. Indeed, the “one-day rule” is not followed by all Member States that require, for some cases, longer periods completed under their legislation to activate the aggregation mechanism. As a consequence, the mandatory uniform application of the law is not achieved.

Maybe the problem of the different application of Article 61 does not emanate from the wording of the provision, but from the undesirable and unwanted results of the one-day clause. Some Member States do not consider it appropriate that with a single day of insurance or (self-)employment a Member

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<sup>124</sup> Judgment in *Rheinmühlen-Düsseldorf*, C-166-73, EU:C:1974:3.

State has to aggregate periods of other Member States and bear the costs of the whole unemployment benefits. In this regard the answer of one Member State to the questionnaire of FreSsco is very enlightening (*“However, a one-day insurance/employment period completed in our Member State is often treated by the X institution as a deceitful/abusive action, targeting at the granting of the unemployment benefit. Thus, a period longer than one day, completed to our Member State, is mostly required”*).

On the other hand it has to be pointed out that it is possible, for some Member States, to start the aggregation mechanism with some (few) hours of work and not with a complete working day. This fraction of a day could be rounded up and be considered as one day. More problematic is the practice followed by other Member States which do not apply the one-day rule, but the one-week rule, because their periods of insurance or (self-)employment are expressed not in days but in weeks (*“the Member State X would not therefore aggregate insurance from another Member State until the minimum period of insurance of one week had been completed i.e. ‘registered’ on the system”*).

In an indirect way, this position of rejection responds to the idea that the one-day clause does not guarantee the integration of the person concerned in the labour market of the competent State and defends – with its practical and not harmonised application of Article 61 – the “more-days clause” or, in other words, Option 2 of this report.

Indeed, from one reply received to the questionnaire, it can be concluded that the requirement of more than one day to start with the aggregation mechanism is not only a rare, atypical practice or an exception, but a frequent and common exercise (*“However, since no domestic rule expressly consolidates the ‘one-day rule’, local unemployment institutions may alternately decide that one day is not sufficient for the purpose of aggregation. A uniform application in X of ‘the one-day rule’ is therefore not guaranteed.”*).

Conversely, in theory, the zero-day rule to activate the aggregation mechanism could be envisaged for those Member States which do not require that the claimant of benefits, under their legislations, had completed a specified period of employment in that Member State. In that regard it seems that neither Regulation (EC) No 883/2004<sup>125</sup> nor the CJEU<sup>126</sup> have validated this thesis. In consequence, this possibility will not be dealt with here.

### 1.2.2 Simplification and clarity

This report does not pretend to go into the considerations and the reasons why some Member States do not apply the one-day clause and require more days of insurance or (self-)employment to start the aggregation mechanism. In fact, one of the advantages of Article 61 in comparison with Article 6 is precisely that “*theoretically*” it offers a clear rule for the activation of the aggregation mechanism, which makes a uniform application of the provision possible. Indeed, Member States where the person concerned claims benefits have to look if, under their legislation, periods of insurance or (self-)employment were most recently completed and if the nature of these periods fills the requirements of their applicable legislation. If the answer is yes, they start the aggregation mechanism.

It has to be said that the practical implementation of this mechanism can be complicated taking into account in particular some rulings<sup>127</sup> of the CJEU. However, this problem does not concern the purpose of this report.

In principle, no major difficulties appear for the designation of the competent State, according to Article 61 of Regulation (EC) No 883/2004. The real problem comes later when the competent State applies Article 61. At that point, the “one-day rule” or the “more-days rule” play a role, depending on the

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<sup>125</sup> See Recitals 10, 11 and 12 of Regulation (EC) No 883/2004.

<sup>126</sup> Judgment in *Chateignier* EU:C:2006:711.

<sup>127</sup> Judgment in *Warmerdam-Steggerda* EU:C:1989:196.

different interpretation or practical application of Article 61(2). Unfortunately, maybe the wording of this provision opens up possibilities of different interpretations or, some Member States intentionally do not apply the content of this provision because they do not agree with it. This means that one of the pros of the current provision, its clarity, is lost and the uniform application of the law, as required by the CJEU, not achieved. Perhaps a revision is needed to match Member States' interests or address their concerns.

### 1.2.3 Integration in the national labour market and financial implications

On the other side, and going deeply into the content, sense and logic of the current Article 61, it has to be questioned whether with only one day of insurance or (self-)employment the person concerned is integrated in the labour market of the Member State where benefits are claimed or, in other words, if this rule contributes to the labour integration or if the opposite is true. Indeed it can be argued that with respect to other short-term benefits (e.g. sickness benefits) also the one-day rule is applied. However, unemployment benefits are much linked and dependent on the labour market and the integration in this market plays a very important role taking into account the nature and goal of these benefits and the different active and passive measures.

Moreover, and stressing the importance of the integration factor, it does not seem appropriate that one Member State is obliged to bear all the costs of the unemployment benefits when the person concerned only completed very short periods (one day is enough) of insurance or (self-)employment under the legislation of this Member State, due to the fact that all periods completed in other Member States have to be taken into account as a result of the aggregation mechanism.

Precisely to avoid or reduce these drawbacks, a kind of sharing of cost was established in Article 65 (unemployed persons who resided in a Member State

other than the competent State). Accordingly, reimbursements between Member States were introduced.

The aim of these reimbursements was to compensate the Member State of residence which has to provide benefits in accordance with its legislation “*as if the person concerned had been subject to that legislation during his last activity as an employed or self-employed person*”.

The logic of Article 65 was clear. The Member State of residence where possibly no periods of insurance or (self-)employment were completed cannot be the only State responsible to bear all the costs.

The reimbursements, between Member States, usually follow a very complicated procedure and for this reason legislatures have always been very reluctant to introduce such instruments, although, at least from the perspective of proportionality, it does not look inappropriate.

Some defenders of the current provision could argue that the situation of Article 65 cannot be compared with the situation of Article 61. In fact, it can be imagined that a frontier worker, for instance, has completed no period (zero-day rule) of insurance or (self-)employment in the Member State of residence, and that this Member State will be considered as the competent Member State and has to provide benefits for a long period. It is reasonable, accordingly, that this Member State receives, as compensation, reimbursement up to five months of the cost of the benefits paid. In the same way, it can also be envisaged that under Article 61 a Member State may be competent as a result of a single day of insurance or (self-)employment. In this regard the difference of the zero-day and one-day rule is very small. Then again, the difference of cost (five months reimbursement/nothing) can be enormous.

It can be agreed that the situations of Article 61 and 65 are totally dissimilar. However, the rationale underlying Article 65 is to avoid that a Member State

has to bear a disproportional cost related to the periods completed under its legislation. Unfortunately, this proportionality principle does not appear in the current wording of Article 61, taking into account that it is possible that with one single day of insurance or (self-)employment a Member State is obliged, based on the aggregation mechanism, to provide benefits 6, 12, 18, or 24 months or longer. For this reason the critics of the wording of the current Article 61 are, in some cases, easy to understand. And the voices that call for some restrictions and limits on the aggregation (periods of one or three months completed in the Member State where the benefits are claimed) may to some extent be considered justified and reasonable.

#### 1.2.4 Fraud and abuse

It has to be analysed whether the current Article 61 might foster fraud and abuse. In fact, beside health tourism, social tourism, and poverty tourism also unemployment tourism may be anticipated and, if possible, prevented. Indeed, under the current provision, a single day of employment suffices to be subject to the social security system of the Member State of employment. This could increase the temptation/attraction for nationals of another Member State to seek employment for a few days with a fraudulent intention. For example, the person concerned may induce or agree with an employer to establish an employment relation in a way that in reality is a form of disguised employment. After a dismissal, Article 61 will be applicable and the aggregation mechanism activated, with the possible consequence of many months of unemployment benefits. Moreover, the joint application of Article 61 and Article 62 (calculation of benefits) may as a result entail a pull factor for what is called “unemployment tourism” in particular in the direction of Member States with a high level of wages and protection, undermining the sense of the unemployment benefits coordination provisions.

From a quite different perspective, the current wording of Article 61 may also increase the risk of fraud distorting the correct meaning of the restrictions on the export of benefits of Article 64 of the Regulation. An example could be the best way to describe this problem which may affect in particular but not only the Member States of origin of the unemployment claimants. A national of State A who has been working X years in State B becomes unemployed and decides to return to his or her State of origin. The person concerned knows that the export of benefits is limited to three months (six months exceptionally in some Member States) and that he or she has to be registered as a person seeking work with the employment services of the competent Member State for at least four weeks. To overcome these restrictions, he or she immediately returns to the country of origin. There, this person may, as explained in the precedent paragraph, establish an artificial work relationship and provoke a simulated dismissal. As a consequence, Article 61 will be applicable and the aggregation mechanism activated with possibly many months of unemployment benefits provided by State A.

This problem is well-known by some Member States, as reflected in a reply to the FreSsco questionnaire (*“A representative from the X Unemployment Service reports that they tend to review all possible simulation of professional relationships (fraud) including also those related with the application of the aggregation after a very short period of insurance in X. Simulation, however, is almost impossible to prove in most cases, especially when the person is hired via a temporary employment agency [...].”* “According to [the] Department of Coordination of Social Security Systems in the Ministry of Labour and Social Policy of X Member State, it is estimated that over 90% from 1517 cases in 2013 were from its own citizens.” “Therefore I believe that a significant percentage of them are expected to be Nationals from X Member State that want to come back to this Member State after a period abroad.”).



### 1.3 *Advantages of the current provision*

It can be considered, after reading the precedent paragraphs, that this report makes a plea in favour of the modification of Article 61. In part this is true and in part it is not. Or, as Voltaire said, “the better is the enemy of the good”.

It is true that the current wording of Article 61 has declared enemies but also good friends, the latter being those who consider that any changes introduced in this provision will imply more drawbacks than advantages. In fact, the defenders of the *status quo* estimate that the one-day rule is the common principle and practice, applicable for other benefits (except pensions). They believe that any restriction to the aggregation mechanism for unemployment benefits could entail a kind of time bomb that could undermine the root and pillar of the coordination system.

The arguments put forward by the defenders of maintaining Article 61 as it is now, without any change, are solid. In fact for migrant workers it is a very appropriate solution, taking into account that the Member State where the last employment was carried out will always be the competent State. Actually, this solution offers a legal certainty that perhaps will not be offered by other alternatives.

Also for the competent institutions an unchanged Article 61 implies advantages. For instance, the administrative procedures as they are now may continue. Moreover, no transitional provision will be needed.

Concerning fraud and abuse we do not seem to be confronted with a problem of great magnitude. In fact, Member States have their own legislative instruments to fight disguised employment and simulated lay-offs. Moreover, as the European Commission (EC) admits, “*EU citizens do not use welfare benefits more intensively than the host country’s nationals*”.

A similar opinion is shared by the experts<sup>128</sup> of the *University College London (UCL)*. They declared that “[t]here are claims that immigrants from Europe take advantage of the social security system. But, despite the controversy surrounding this issue, evidence for how much immigrants take out of and contribute to the public purse is surprisingly sparse. Our new research published by the *Royal Economic Society in the Economic Journal* aims to fill this void. Our findings show that European immigrants have paid more in taxes than they received in benefits, helping to relieve the fiscal burden and contributing to the financing of public services”.

Consequently it appears that fraud and abuse have more a political dimension than a real dimension.

On the other hand, the argument of the need of integration in the labour market of the competent State is not quite consistent. Indeed, the goal of unemployment benefits is not only to replace income but also to facilitate the search for a new job. For this reason, benefits and job search are linked and any separation or distribution of competences between Member States can have, in principle, negative consequences for the employment of this person. In fact, the current provision follows the idea that the unemployed person has to make him or herself available in the Member State that offers the most favourable conditions to find new employment.

#### 1.4 *An alternative proposal for amendment*

In case the final decision about Article 61 would be the election of Option 1, i.e. the maintenance of the current text, it could be appropriate to look for a uniform application of this provision, avoiding misunderstandings or different

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<sup>128</sup> C. Dustman & T. Frattini, ‘Yes, EU immigrants do have a positive impact on public finances’, *The New Statesman*, 5 November 2014.

interpretations. For this purpose, the best solution would be the adoption of a Decision by the Administrative Commission establishing with clarity the “one-day rule” for the activation of the aggregation mechanism and eliminating other alternatives, in particular the “more-than-one-day rule”.

## **Option 2**

**Option 2: a threshold** is applied for the aggregation of periods of insurance or (self-)employment fulfilled in another Member State.

**Sub-option 2a: One month** of insurance or (self-)employment needs to be completed before aggregation can be applied.

**Sub-option 2b: three months** of insurance or (self-)employment needs to be completed before aggregation can be applied.

The principle of aggregation has a specific aim. It protects migrants from disadvantages that could be provoked by movements from one Member State to another. This aim is expressively assigned in Article 48 TFEU (see above Introduction, 1). Option 2 derogates from this principle. The idea produced by the European Commission (EC) is to introduce a “threshold” (one could also call it a “qualifying” or “waiting” period). During a certain period of time (one or three months), the aggregation principle would not apply and, as a consequence, the person concerned would not be able to bring into account periods accomplished under the legislation of the previous Member State. Given the fundamental character of the aggregation principle on the one hand and the sharpness of the proposal on the other hand, we can note that Option 2, as such (without any protecting rules), is not compatible with superior EU law, especially with the Treaties. There is some relevant case law of the Court of

Justice of the European Union (CJEU)<sup>129</sup> as well as doctrine<sup>130</sup> about the question (see Introduction, 1). In order to avoid a violation of primary law, additional rules should be adopted concerning the situation during the proposed qualifying (or waiting) period and connected questions (return of contributions if the waiting period is not fulfilled and if no benefits have been paid, access to other benefits and employment services etc). The report therefore includes considerations how to organise a lawful treatment of the person concerned and formulates some draft rules (see Option 2, 2).

### **1 The compatibility of Option 2 with higher ranked EU Law**

The first part of the present report (see Introduction) explains the functioning of the aggregation principle. Option 2, however, calls for some additional remarks, because it is focused on persons who are pursuing a professional activity. It sets up a rule which covers workers. It is therefore more difficult to justify a restriction, especially by referring to the integration argument, because working and contributing to the social security system does represent a good way to integrate into the local job market.

The following shortly recalls the legal effect of the rights granted by the Treaty (1.1), summarises the obligations of the EU legislature in terms of coordination (1.2), explains why the draft rule deviates from essential coordination rules required by the Treaty (1.3) and finally looks at the justifying reasons mentioned in the mandate (1.4).

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<sup>129</sup> Judgment in *Vougioukas*, C-443/93, EU:C:1995:394, paragraph 30. Also see Opinion of the Court 1/91, EU:C:1991:490: “*EEC Treaty, albeit concluded in the form of an international agreement, nonetheless constitutes the constitutional charter of a Community based on the rule of law.*”)

<sup>130</sup> U. Becker, in J. Schwarze (ed.), *EU-Kommentar*, Nomos, Baden-Baden, 2012 (3rd edition), Article 48 AEUV/3.

### 1.1 *Free movement of workers and entitlements associated to the right of free movement*

Free movement of workers is a fundamental principle of European law<sup>131</sup> and has the function of a fundamental right.<sup>132</sup> It provides a legally protected position to every European citizen willing to work and stay in a Member State.<sup>133</sup> The relevant rules (especially Article 45 TFEU) are directly applicable,<sup>134</sup> prevail over contrary national law<sup>135</sup> and can establish a claim of compensation if violated.<sup>136</sup> In respect of Option 2, it should be recalled that the right of free movement is binding not only for the Member States but also for all EU institutions.<sup>137</sup>

### 1.2 *Obligations of the EU legislature in terms of social protection*

The EU legislature is required to set up a system to enable workers to overcome obstacles with which they might be confronted in national social security rules.<sup>138</sup> It is also obliged to omit measures which introduce additional obstacles to the free movement of workers, such as rules which allow the Member States to discriminate against EU citizens.<sup>139</sup> This follows from Article 45 TFEU combined with Article 48 TFEU.<sup>140</sup> It hence could be held that the legislature does not fully discharge its obligations under Article 45 and Article 48 TFEU if Option 2, without alternatives, were adopted.

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<sup>131</sup> Judgment in *Watson and Belmann*, C-118/75, EU:C:1976:106, paragraph 16.

<sup>132</sup> Judgment in *Heylens*, C-222/86, EU:C:1987:442.

<sup>133</sup> Judgment in *Ugliola*, C-15/69, EU:C:1969:46.

<sup>134</sup> Judgment in *Van Duyn*, C-41/74, EU:C:1974:133.

<sup>135</sup> Judgment in *Watson and Belmann* EU:C:1976:106.

<sup>136</sup> Judgment in *Larsy*, C-118/00, EU:C:2001:368.

<sup>137</sup> Also see Article 15(2) of the EU Charter of Fundamental Rights, which guarantees that “every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State”, and which is binding for the EU.

<sup>138</sup> Judgment in *Vougioukas* EU:C:1995:394, paragraph 30.

<sup>139</sup> Judgment in *Pinna v Caisse d'allocations familiales de la Savoie*, C-41/84, EU:C:1986:1, paragraph 24.

<sup>140</sup> U. Becker, in J. Schwarze (ed.), *EU-Kommentar*, Nomos, Baden-Baden, 2012 (3rd edition), Article 48 AEUV/3.

### 1.2.1 Aggregation of periods

The aggregation principle is expressively mentioned in Article 48 TFEU. It therefore appears to be part of the coordination principles the Treaty assumes to be important. The other coordination rules, like the designation of the law applicable, rules opening the access to cross-border health care, the cooperation between national social security institutions, are not. Article 48 TFEU focuses on two instruments: the aggregation of periods and the exportation of benefits. Those principles are “*intended to ensure that workers do not lose, as a result of their exercising the right to freedom of movement, social security advantages granted to them by the legislation of a Member State*”.<sup>141</sup> They are designed to abolish “*as far as possible the territorial limitations*” of the domestic social security schemes.<sup>142</sup> The principle is fundamental because without aggregation the access to and the amount of benefits the person has already worked for could be lost.<sup>143</sup> It is necessary in order to undertake a useful implementation of Article 48 TFEU. Hence aggregation of periods belongs to the measures the legislature is required to set up.<sup>144</sup> Consequently, the CJEU has held that Article 48 TFEU does not only provide the competence to adopt legal acts. Article 48 TFEU also contains a mandate the legislature has to observe.<sup>145</sup> This follows from Article 45 TFEU, which is the ‘*raison d’être*’ of Article 48 TFEU: as the CJEU has pointed out several times “*the establishment of as complete freedom of movement for workers as possible, which forms part of the foundations of the Community, constitutes the ultimate objective of Article 51 of the EEC Treaty and thereby conditions the exercise of the power which it confers upon the Council.*”<sup>146</sup>

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<sup>141</sup> Judgment in *Drake*, C-12/93, EU:C:1994:336, paragraph 22.

<sup>142</sup> Judgment in *Singer*, C-44/65, EU:C:1965:122, p. 971.

<sup>143</sup> U. Becker, in J. Schwarze (ed.), *EU-Kommentar*, Nomos, Baden-Baden, 2012 (3rd edition), Article 48 AEUV/1.

<sup>144</sup> Judgment in *Vougioukas* EU:C:1995:394, paragraph 30.

<sup>145</sup> Judgment in *Pinna v Caisse d'allocations familiales de la Savoie* EU:C:1986:1, paragraph 24.

<sup>146</sup> Judgment in *Khalil*, C-95/99, EU:C:2001:532, see also the judgment in *Singer* EU:C:1965:122.

### 1.2.2 Equality of treatment

Equality of treatment is anchored in Article 20 of the EU Charter of Fundamental Rights and all measures taken by the EU have to conform to this right.<sup>147</sup> This is also true for Article 45(2) TFEU, which prohibits “*any discrimination based on nationality*”. Article 4 of Regulation (EC) No 883/2004 applies the principle to social security. The formulation used by this Article (“*unless otherwise provided for by this Regulation*”) suggests that waivers could be allowed by the legislature. According to the CJEU, however, coordination must secure the equal treatment laid down by Article 45 TFEU<sup>148</sup> and must not add to the disparities caused by national legislation.<sup>149</sup> As stated by the CJEU in the *Pinna I* case concerning a French family allowance, EU institutions are not permitted to adopt rules which provide unequal treatment among citizens; such rules are void as contrary to the Treaties, especially in respect to Article 45 TFEU mentioned above. Equality of treatment also “*prohibits (...) all covert forms of discrimination which, by applying other distinguishing criteria, in fact achieve the same result*”.<sup>150</sup> This was the case in the *Pinna* judgment mentioned above.

### 1.3 Derogation from the above-noted principles

According to Option 2, people who move their work from one Member State to another have to wait one or three months before the aggregation principle applies. Therefore, the proposal restricts free movement of workers. The aggregation principle (1.3.1) is affected, since the draft says to not apply it.

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<sup>147</sup> Judgment in *Razzouk v Commission*, C-117/82, EU:C:1984:116; judgment in *P - Lindorfer v Council*, C-227/04, EU:C:2007:490; judgment in *Koninklijke Scholten-Honig NV and Others v Hoofdprodukschaap voor Akkerbouwprodukten*, C-125/77, EU:C:1978:187.

<sup>148</sup> Judgment in *Pinna v Caisse d'allocations familiales de la Savoie* EU:C:1986:1, paragraph 24.

<sup>149</sup> Judgment in *Pinna v Caisse d'allocations familiales de la Savoie* EU:C:1986:1, paragraph 22.

<sup>150</sup> Judgment in *Pinna v Caisse d'allocations familiales de la Savoie* EU:C:1986:1, paragraph 23.

The principle of equality of treatment is also concerned because it potentially allows Member States to treat foreign workers differently (1.3.2).

### 1.3.1 Aggregation of periods

Option 2 deviates from a rule prescribed by the Treaty. Article 48 TFEU clearly shows that the aggregation rule is one of the principles that allows workers to move freely within the European Union. The solution suggested under Option 2, however, does exactly the opposite. Whereas the Treaty says “do aggregate”, Option 2 says “do not aggregate”. Therefore, the result of Option 2 does not correspond with the aims pursued by the Treaty. The proposed change would create obstacles to the free movement of workers, because for the moment, the national legislation is not harmonised. Member States are fully allowed to define all kinds of qualifying periods. Without aggregation of periods, migrant workers would not get the protection necessary to encourage free movement.

### 1.3.2 Equality of treatment

The draft rule of Option 2 does not expressly refer to the nationality of workers. Therefore, it does not constitute an overt discrimination. But it allows Member States to not take into account periods accomplished under the legislation of another Member State.<sup>151</sup> This type of disguised or hidden discrimination can be avoided by aggregation of periods. Option 2, instead, opens the door to such treatments. There is some case law concerning similar rules which might be interesting to mention.

In the *Roviello* case, the CJEU declared void a rule adopted by the Council in 1983. The rule in question did not itself lay down any formal difference in treatment between nationals and European citizens, but it allowed a Member

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<sup>151</sup> R. Langer, in M. Fuchs (ed.), *Europäisches Sozialrecht*, Nomos, Baden-Baden, 2013 (6th edition), Article 48 AEUV/18.



State to do so<sup>152</sup>; it was “*not of such a nature as to guarantee the equal treatment [...] and therefore [had] no place in the coordination of national law*”.<sup>153</sup> According to the CJEU, such provisions are liable to have an effect on foreigners more often than on nationals and include the risk of placing them at a particular disadvantage. The same is true for Option 2 as well, because the waiting period will typically apply to migrants; it is evident, moreover, that it reduces the rights of those migrants because unemployment benefits might be refused to them. It is therefore plausible to affirm that Option 2 is not compatible with the principle of equal treatment.

Option 2 is also problematic in terms of mutuality, because the migrant worker is not protected by the system of the receiving Member State although it is likely that the worker will have to pay social security contributions there. In several judgments the CJEU has held that an unlawful disadvantage occurs if EU citizens, other than nationals, must pay higher contributions than usual without being entitled to additional benefits<sup>154</sup> or if they are subject to social contributions “*on which there is no return*”.<sup>155</sup>

## 1.4 *Justifying reasons*

### 1.4.1 “threshold”

The EU legislature may choose the most appropriate measures to attain the objective of Article 48 TFEU and therefore disposes of a “*wide discretion*”.<sup>156</sup>

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<sup>152</sup> According to this rule only the occupation periods insured in Germany were taken into account in determining entitlement to an occupational invalidity pension.

<sup>153</sup> Judgment in *Roviello*, C-20/85, EU:C:1988:283.

<sup>154</sup> Judgment in *Terhoeve*, C-18/95, EU:C:1999:22, paragraph 18.

<sup>155</sup> See, to that effect, the judgment in *Hervein and Others*, C-393/99 and C-394/99, EU:C:2002:182, paragraph 51; judgment in *Piatkowski*, C-493/04, EU:C:2006:167, paragraph 34; judgment in *van Delft and Others*, C-345/09, EU:C:2011:57, paragraph 100 and 101; and the judgment in *da Silva Martins*, C-388/09, EU:C:2011:439, paragraph 72 and 73.

<sup>156</sup> Judgment in *Vougioukas* EU:C:1995:394, paragraph 35.

This includes the right to formulate formal conditions, like the obligation to register as a jobseeker at the employment services of the competent Member State (Article 64(1) of Regulation (EC) No 883/2004).<sup>157</sup> Furthermore, material conditions may be set, for instance the necessity of having the most recently completed period in the competent Member State (Article 61(2) of Regulation (EC) No 883/2004).<sup>158</sup> And finally, it also includes the possibility to depart from the coordination mechanisms designed by this provision.<sup>159</sup> As a consequence, exceptions or restrictions provided by EU coordination law may be regarded as valid even if they do not furnish the whole protection assigned by Article 48 TFEU.<sup>160</sup>

This leads to the questions whether deviations from fundamental principles must be justified by overriding reasons and how those reasons are to be examined. They are not completely solved yet. The case law concerning restrictions and exemptions decided by the EU legislature is relatively rare. Some decisions do not discuss justifying reasons as such. In the *Pinna* case, the CJEU does not examine the existence of justifying reasons at all.<sup>161</sup> The *Testa* judgment concerning the three-month limitation to exportation of unemployment benefits does not mention justifying reasons either; it only explains that the rule is reasonable, because it confers the possibility to seek employment outside the competent Member State.<sup>162</sup> In the *Gray* case, the CJEU notes that the “*Council considered it necessary*” to attach conditions to the entitlement to unemployment benefits (the obligation to register and the necessity to have the most recent period in the competent Member State); the CJEU also explains that people should be encouraged to seek work in the Member State in which they were last employed and that the latter should have

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<sup>157</sup> Judgment in *Gray v Adjudication Officer* EU:C:1992:177, paragraph 11 and 12.

<sup>158</sup> Judgment in *Testa*, C-41/79, 121/79 and 796/79, EU:C:1980:163, paragraph 14; judgment in *Gray v Adjudication Officer* EU:C:1992:177.

<sup>159</sup> Judgment in *Vougioukas* EU:C:1995:394, paragraph 35.

<sup>160</sup> Judgment in *Vougioukas* EU:C:1995:394, paragraph 35.

<sup>161</sup> Judgment in *Pinna v Caisse d'allocations familiales de la Savoie*, EU:C:1986:1.

<sup>162</sup> Judgment in *Testa* EU:C:1980:163, paragraph 14.

the financial burden of providing the unemployment benefits.<sup>163</sup> Technical difficulties due to profound differences between Member State law were discussed but denied in the *Vougioukas* case.<sup>164</sup> In the *Snares* case the CJEU accepted the argument that special non-contributory benefits are closely linked with the social environment and therefore justify the condition of residence introduced by the EU legislature in 1992.<sup>165</sup> This case law at least answers the first question. It shows that deviations need to be justified by some reasons and, evidently, that a reason must outweigh the rights conferred by Article 45 TFEU. This approach is consistent with the rule of law laid down in Article 2 TEU.

The second question could be answered in the light of the *Gray* judgment mentioned above, in which the CJEU held that the Treaty does not prohibit the Community legislature from attaching conditions to the rights granted by Article 45. In the *Gray* case the CJEU identified and approved the intention of the legislature to encourage persons to seek work in the Member State they were last employed. Therefore, the restriction is considered as valid. As Advocate General Tesouro pointed out in this case, the idea of Article 61(2) Regulation (EC) No 883/2004 is to “*avoid the exportation of unemployment*”.<sup>166</sup> This aim does not exactly correspond to the problem focused on by Option 2. Option 2 wants to avoid abuse and excessive financial burden for the Member States, especially the Member State where the worker has lost his or her last job. This motivation is different from the one protected by the CJEU in the *Gray* case, even if the rule proposed might have a similar impact on the European job market. For this reason we do not think that the argumentation used in the *Gray* case may be transposed on Option 2.

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<sup>163</sup> judgment in *Gray v Adjudication Officer* EU:C:1992:177.

<sup>164</sup> Judgment in *Vougioukas* EU:C:1995:394, paragraph 32.

<sup>165</sup> Judgment in *Snares*, C-20/96, EU:C:1997:518, paragraph 42.

<sup>166</sup> Opinion of the Advocate General in *Gray*, C-62/91, EU:C:1992:18, paragraph 5.

Furthermore, the case law related to deviations set up by the EU legislature does mention justifying reasons such as technical difficulties of coordination or the financial burden due to the exportation of benefits. However, they do not go much further, for instance explaining that the reasons put forward must be rational and that every restrictive measure has to respect the principle of proportionality; those arguments are proper to the case law related to measures taken by the Member States.<sup>167</sup> However, they should also govern the use of competence by the Union, as Article 5(1) TEU stipulates. The necessity to have the most recent period in the competent Member State, as examined in the *Gray* case, has an effect on the aggregation principle because the jobseeker cannot ask for aggregation before having worked at least one day in the receiving Member State. But this rule is less severe than Option 2, which applies to people who have already worked in this State. Option 2 goes a step further than the existent law. It refuses aggregation to workers who already have found a job in another Member State and thus have established a link to the legal system of this Member State; those workers may not apply for benefits in the former Member State any longer. The existent law might be considered sufficient to protect the Member States' financial interests.

As far as we know, the arguments mentioned by the EC (mandate, p. 2, p. 3: clarification, simplification, risk of fraud and abuse, uneven financial burden for Member States) have not yet been subject to CJEU decisions concerning the validity of EU coordination law. In any case, arguments which allow to justify a restriction of the fundamental right of free movement of workers have to be solid. They are typically related to important interests such as inner security, public health and hospital planning.<sup>168</sup> This follows from the case law related to the internal market in general because the necessity of rational and proportionate justifying reasons are relevant for all the freedoms granted by

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<sup>167</sup> Judgment in *Stewart*, C-503/09, EU:C:2011:500, paragraph 107.

<sup>168</sup> Judgment in *Watts*, C-372/04, EU:C:2006:325; this example falls within the scope of the freedom of services, but similar justifying reasons related to health care also appear in the field of social coordination under Regulation (EC) No 883/2004; see e.g. the judgment in *Elchinov*, C-173/09, EU:C:2010:581, paragraph 44 and 51.

the Treaty, especially for free movement of goods, free movement of persons (movement of workers and right of establishment) and freedom of services.<sup>169</sup> In the field of unemployment benefits or benefits which are similar to the latter, the CJEU has held that conditions such as a residence requirement have to be proportionate.<sup>170</sup> It should also be noted that most of the case law about the question how to justify discriminating rules concern national law. Restrictions can be justified, under EU law, “*if [they are] based on objective considerations independent of the nationality of the persons concerned and (are) proportionate to the legitimate objective of the national provisions.*”<sup>171</sup> The rule must be “*appropriate for securing the attainment of the objective pursued*” and it must not “*go beyond what is necessary in order to attain it.*”<sup>172</sup> Usually, the CJEU takes into account the particular national rules and circumstances. In the *Stewart* case, for instance, the CJEU had to consider the situation of a British subject to whom a disability allowance was refused, for the sole reason that she was not present in Great Britain on the date on which she claimed the allowance.<sup>173</sup> The CJEU held that this restriction could not be described as appropriate; it neither ensured a genuine link between the claimant and Great Britain nor was it necessary to preserve the financial balance of the British social security system.<sup>174</sup> In other words, the amendment proposal would have to explain why, in certain Member States, the waiting period is necessary. It would also be necessary to define under which conditions or in which kind of situation a waiting period would not apply (e.g. to persons who had already worked in the receiving Member State in former times and have contributed to the social security system of the State).

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<sup>169</sup> R. Bieber & F. Maiani, *Précis de droit européen*, Bern, 2011 (2<sup>nd</sup> edition), p. 191.

<sup>170</sup> Judgment in *Petersen*, C-228/07, EU:C:2008:494, paragraph 61.

<sup>171</sup> Judgment in *De Cuyper*, C-406/04, EU:C:2006:491, paragraph 40. See also the judgment in *Sotgiu*, C-152/73, EU:C:1974:13, paragraph 4.

<sup>172</sup> Judgment in *De Cuyper* EU:C:2006:491, paragraph 42.

<sup>173</sup> Judgment in *Stewart*, C-503/09, EU:C:2011:500.

<sup>174</sup> Judgment in *Stewart* EU:C:2011:500, paragraph 108. See also the judgment in *Petersen*, C-228/07, EU:C:2008:494.

#### 1.4.2 Justifying reasons such as mentioned in the mandate

The mandate also explains that the current rules bear the risk of fraud or abuse because people can claim benefits just after arriving in another Member State (p. 2 of the mandate). According to the EC, Option 2 would limit this risk, since the person would have to wait a certain period of time before he or she could ask for aggregation. In the field of social security, the CJEU has not yet discussed the risk of fraud and abuse as a justifying reason. This might be due to the fact that parts of the case law mentioned above go back to the 1970s and 1980s. Today, the Treaties include a chapter about Area of Freedom, Security and Justice, wherein the Union is to prevent and combat crime (Article 67(3) TFEU); the European Anti-Fraud Office investigates fraud against the EU budget. Therefore, it seems plausible that the EU is also concerned about fraud and abuse directed against its members. As recently pointed out by the EC, EU law contains “*a range of robust safeguards to help Member States to fight abuse and fraud*”<sup>175</sup>. In the field of social security coordination, the Treaty does not expressly mention rules fighting fraud and abuse, but neither does it prohibit such rules (Article 48 TFEU). Hence, the risk of fraud and abuse may be taken into account by the EU legislature while adopting coordination rules. It could even constitute a justifying reason for exemptions and deviations from the principles mentioned in Article 48 TFEU. The question, however, if Option 2 is justified by this argument needs some additional clarifications. It should first be verified if the fear about possible abuse is based on objective facts. The statistics seem to indicate the opposite: “*EU citizens do not use welfare benefits more intensively than the host country’s nationals*”.<sup>176</sup> Furthermore, it should be asked if the simple risk of abuse is sufficient. Would it not be more appropriate and proportional to figure out a rule which sanctions abuse committed by persons instead of choosing a measure of general

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<sup>175</sup> COM(2013) 837 final, Free Movement of EU citizens and their families: Five actions to make a difference, p. 7.

<sup>176</sup> COM(2013) 837 final, Free Movement of EU citizens and their families: Five actions to make a difference, p. 4, referring to data collected by the Commission.

prevention? Such measures are not allowed when adopted by the Member States and, consequently, should not be used by the EU legislature either.<sup>177</sup>

Moreover, the waiting period could help to make sure that the migrant worker is fully integrated in the job market before getting unemployment benefits. But the integration argument (p. 1 of the mandate) is problematic if we consider the relevant Treaty provisions and the settled case law of the CJEU. The Member States may indeed adopt rules which require the migrant to show a certain degree of integration; the CJEU uses the expression “*degree of connection to society*” and admits that “*the aim of solidarity may constitute an objective consideration of public interest.*”<sup>178</sup> Conditions of territory, however, usually fail to comply with the principle of proportionality; they are not an appropriate means by which to obtain the objective of solidarity if the person who has his or her residence in another Member State is in fact as well integrated as a resident.<sup>179</sup> Several CJEU decisions did not even evoke the possibility that the refusal to take into account external events might be justified; the CJEU found a violation of EU law without discussing any overriding consideration.<sup>180</sup> In the *Mulders* case, the CJEU held that a Member State cannot preclude, as a period of insurance, an entire period during which contributions were paid for the sole reason that the person concerned did not reside in that Member State during this period.<sup>181</sup> It should also be noted that the recent case law concerning persons who move into another Member State without the intention to work, cannot be applied to the present situation.<sup>182</sup> The draft amendment concerns migrant workers, which means persons who intend to accomplish a gainful activity and therefore contribute to the national economy of the receiving Member State. This is an important factor proving

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<sup>177</sup> COM(2013) 837 final, Free Movement of EU citizens and their families: Five actions to make a difference, p. 8, concerning Member State actions.

<sup>178</sup> Judgment in *Tas-Hagen*, C-192/05, EU:C:2006:676, paragraph 35 and 36.

<sup>179</sup> Judgment in *Tas-Hagen* EU:C:2006:676, paragraph 37 and 38.

<sup>180</sup> Judgment in *Elsen*, C-135/99, EU:C:2000:647; judgment in *Klöppel*, C-507/06, EU:C:2008:110.

<sup>181</sup> Judgment in *Mulders*, C-548/11, EU:C:2013:249, paragraph 47.

<sup>182</sup> Judgment in *Dano*, C-333/13, EU:C:2014:2358.

integration. In the case mentioned above it was completely absent; the applicants did not have any economic activity, nor did they look for such an activity.<sup>183</sup>

The waiting period might be desired by some Member States, especially by Member States with a high level of EU immigration. The mandate (p. 2) mentions the financial burden put on the shoulders of those Member States and hence refers to another important principle of the EU. The Treaties indeed contain several provisions which refer to economic difficulties the Member States have to face. Beside rules concerning the economic and social cohesion (Article 162 and 174 TFEU), competition rules<sup>184</sup> and the chapter concerning the Monetary Union (Article 140 TFEU) take into account the financial and economic power of the Member States. All Member States of the Eurozone have to guarantee financial stability and must not overload their budget. Therefore, it is plausible to defend that solidarity and the limits inherent to the latter require a measure such as Option 2. But the proposal then raises the question how to cover the person during the qualifying period and which Member State should reasonably have the financial burden (see 2 below).

This also answers the question if Option 2 could be justified by the simplification argument (p. 2 of the mandate). We do not think so. If the aim is to adopt simple coordination rules, the legislature should choose a system in which the worker is clearly subject to the law of one Member State. Option 2, however, requires the adoption of additional rules about access to benefits during the waiting period (see 2 hereafter: a paragraph added to Article 61 of Regulation (EC) No 883/2004 provides exportation of unemployment benefits from the previous Member State). The system does not become easier this way. Moreover, by abandoning the one-day rule, the draft introduces the

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<sup>183</sup> Judgment in *Dano* EU:C:2014:2358, paragraph 39.

<sup>184</sup> Judgment in *Kingdom of the Netherlands v Commission*, C-28/66, EU:C:1968:5.



necessity to calculate terms and periods. Such calculations do not promise any simplification.

A last reason mentioned is to ensure uniform application of the rules on aggregation of periods by all Member States (p. 2 of the mandate). This aim, however, can already be attained by a correct application of the existing law. The mapping, which is attached to this report shows that most of the questioned Member States apply the one-day rule (e.g. Germany, the Netherlands). If other Member States might not do so, they would deviate from a uniform rule and therefore violate EU law.

### 1.5 *Intermediate result*

Option 2 is not, as such, compatible with Articles 45 and 48 TFEU. By deviating from the aggregation principle it does the opposite of what is prescribed in Article 48 TFEU. It allows Member States to refuse unemployment benefits if the person concerned has less than three months (or one month) of a working period under domestic law. The motivating reasons are not solid enough to justify the restriction entailed. Even if the rule were qualified valid, a person could claim aggregation directly on the ground of Article 45 TFEU.<sup>185</sup> The provisions would also have to be interpreted restrictively<sup>186</sup> and in the light of this Article.<sup>187</sup> The additional rules proposed hereafter (see 2) take into account this aspect.

An amendment of Regulation (EC) No 883/2004 which introduces a waiting period must guarantee that the free movement of workers would not be restricted. Therefore, the following part outlines additional provisions in order to enhance Option 2 (see 2). The proposal contains rules about the protection

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<sup>185</sup> Judgment in *Vougioukas* EU:C:1995:394, paragraph 36 and 44.

<sup>186</sup> Judgment in *Jauch*, C-215/99, EU:C:2001:139.

<sup>187</sup> Judgment in *Elsen* EU:C:2000:647.

the migrant worker gets during his or her waiting period. Those rules indicate the Member State competent to pay benefits. The new system should also be proportionate (Article 5(4) TFEU). Introducing a waiting period might be considered as such since it does not totally exclude aggregation but provides a temporary limitation; a waiting period of one month rather than three months might suffice (for more details see the draft provision in the following part of this report, 2).

## **2 Evaluation of Option 2**

### **2.1 Which Member State could be competent to aggregate if the minimum period in the last Member State of employment is not fulfilled?**

There can be no doubt that currently the focus of the rules to coordinate unemployment benefits lies predominantly on the migrant workers' interests, providing the most favourable conditions for finding new employment. The financial concerns of the institutions are being taken into account to a much lesser extent. At least this is the case while the unemployed person is available to the employment services of the State that pays the benefits. The proposals by the EC in Option 2 would shift the focus significantly to the institutions' interests by ensuring that the financial burden for paying unemployment benefits does not arise in situations where mobile EU workers have not yet made a significant contribution to the scheme of the new Member State. However, this would only be the case with regard to certain groups of migrant workers, while the coordination provisions for migrant workers falling under Article 65 would remain unchanged, unless wider amendments to Regulation (EC) No 883/2004 are implemented.

Option 2 would mean that migrant workers would not be entitled to benefits in the last Member State of employment if aggregation with periods concluded in

other Member States would be necessary in order to fulfil the waiting period of this Member State. As shown in the mapping at the end of this report, this would concern 7,188 persons in only six selected Member States in a period of one year (2013, respectively 2014). If the Regulation were not to provide for another Member State to apply aggregation in such cases, this would lead to the situation that the migrant workers concerned would be entitled to benefits in no Member State at all, unless entitlement would be opened purely under the national legislation of a Member State. This would undoubtedly form an obstacle to the free movement of workers and – as shown above – would most probably be incompatible with the Treaty.

We therefore hold the view that a different Member State would have to substitute the last State of employment and apply the aggregation rule under Article 61 if the minimum threshold is not fulfilled. It would be most likely a violation of primary law to stipulate that periods completed by the person concerned would be aggregated in no Member State at all. Which institution could be obliged to apply the aggregation provision and pay the unemployment benefit instead of the last Member State of employment if the minimum period of insurance or (self-)employment was not completed in the competent Member State?

2.1.1 The second to last Member State of employment without requiring any minimum period of insurance or (self-)employment in this State

*Example: A worker resides and works in Member State A for five years. Afterwards he or she works in Member State B for three weeks. Then he or she moves his or her residence to Member State C and takes up employment there, but is dismissed after only two weeks.*

Referring to the second to last Member State of employment without any condition for the person concerned of having completed there the same

minimum period of one or three months would be unreasonable. If the institutions' interests are relevant, why should the second to last Member State be less protected against claims of persons with only short careers than the last Member State?

2.1.2 The Member State of employment where the minimum period of one or three months of insurance or (self-)employment was lastly fulfilled

*Example: A worker resides and works in Member State A for five years. Afterwards he or she works in Member State B for three weeks. Then he or she moves his or her residence to Member State C and takes up employment there but is dismissed after only two weeks. The unemployed person must make him or herself available to the employment services of Member State A, the institution of which provides the benefits.*

This option would pursue the objective to make a Member State pay the benefits where the unemployed had completed periods for a relevant time span. However, this could lead to situations where it would be quite difficult for the unemployed person to register as a person seeking work with the employment services of that Member State; to be subject to the control procedure organised there; and to adhere to the conditions laid down under the legislation of that Member State. As the CJEU pointed out, “*the circumstances which must exist for the condition as to availability to be satisfied cannot have the direct or indirect effect of requiring the person concerned to change his [or her] residence.*”<sup>188</sup> Particularly in cases where the person concerned has moved his or her place of residence to the last Member State of employment, further amendments to the Regulation would be required to avoid impairments of the unemployed person's situation that would raise huge legal concerns with regard to violation of the Treaty.

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<sup>188</sup> Judgment in *Naruschawicus*, C-308/94, EU:C:1996:28, paragraph 26.

What further amendments could be necessary will be analysed under 2.2.3 (see 2.2.3).

#### 2.1.3 The Member State of residence

This option can only apply to persons falling under Article 65 of Regulation (EC) No 883/2004 who in principle have the right to make themselves available in the Member State of last employment. It would be the most reasonable solution for this group of persons, as the Regulation is built on the assumption that the Member State of residence provides the most favourable conditions for finding new employment and because this is the alternative offered to them already under the current legal framework.

#### 2.1.4 The previous State of residence

This option could apply to workers who worked and resided in the same Member State when they became unemployed, but have fallen under Article 65 of Regulation (EC) No 883/2004 before.

*Example: A worker resides in Member A and works as a frontier worker in Member State B for five years. He or she terminates his or her employment in Member State B and moves his or her residence to Member State C. He or she is employed there for only three weeks and is then dismissed by his or her employer.*

As the minimum insurance period in Member State C is not fulfilled, this Member State is not competent to apply the aggregation provision and provide benefits. At first sight it would appear reasonable to impose this obligation on Member State B instead, because this is the second to last Member State of employment and the worker has paid contributions for five years to the scheme of that State. However, at that time he or she was a frontier worker. If

he or she would have become unemployed while residing in Member State A, his or her Member State of residence would have provided the benefits and Member State B would have provided reimbursement under Article 65(6) only. It seems doubtful whether the obligation to provide benefits can be imposed on Member State B now. It would seem more in line with the current structure of the Regulation that the previous Member State of residence A had to substitute the last Member State of employment C. If so, then the second to last Member State of employment B would have to provide reimbursement to Member State C under Article 65(6).

## 2.2 *Identification and assessment of how the proposed options and sub-options presented by the EC would respond to certain criteria (social, economic and political pros and cons)*

### 2.2.1 Clarification

As pointed out in the mandate only “*most Member States apply the ‘aggregation rule’ after one day of insurance*”. It follows that some Member States interpret Article 61(2) in a way that also longer periods can be required in order to trigger aggregation if this finds a reasoning in the national legislation applied.

The provision in its current version speaks about “periods” of insurance and (self-)employment, terms that can be considered not fully clear and subject to different interpretations if in national legislation a “period” is a longer period than one day (e.g. one week). Against this backdrop the legal situation could be clarified by explicitly stipulating in Article 61(2) that one or three months of insurance or (self-)employment are required in the last Member State of employment in order to impose on this State the obligation to apply the aggregation provision.

However, the same clarity could be achieved by amending Article 61(2) without changing its substance. What should be relevant is the political intention of the legislature to apply a minimum threshold of one day, of 30 days or of 90 days. If the intention is clear it is up to the legal technique of the legislature to reflect this in a proper wording. Also the Administrative Commission could make this clarification in a decision, as proposed for Option 1, notwithstanding the non-binding effect of such decisions. The aim of clarity alone cannot justify substantial amendments that significantly change the legal position of large groups of migrant workers to their detriment.

### 2.2.2 Simplification

Providing for a minimum threshold of one or three months instead of one day in order to apply aggregation under Article 61 of the Regulation would be neutral under the aspect of simplification when focusing on Article 61 only.

However, we have shown that inserting a minimum threshold into the aggregation provision would most likely require extensive amendments of other provisions as well, particularly of Article 64, 65 and 65a. Also the procedures would be more complicated by involving at least one more Member States that would have to substitute the obligations of the last Member State of employment.

We come to the conclusion that neither the Regulation nor the procedures would be simpler if Sub-options 2a or 2b were implemented.

### 2.2.3 Protection of rights

Within the current legal framework the one-day rule in the aggregation provision under Article 61(2) applies to unemployed persons who make themselves available in the Member State of last employment, i.e. to persons

who during their last employment resided in the competent Member State and to persons other than frontier workers who fall under Article 65 and make themselves available in the competent Member State. By introducing a minimum threshold of one or three months for applying aggregation under Article 61, a significant number of persons would not be entitled to benefits in the last Member State of employment and thus lose a right which is currently awarded to them.

This loss of right in the last Member State of employment could be mitigated by awarding a new right in another Member State. As regards persons other than frontier workers who fall under Article 65 it was proposed that they should be referred to their Member State of residence when not fulfilling the minimum period of insurance or (self-)employment. Compared to the *status quo* this would be a clear loss of rights as these persons would lose their right of option. Nevertheless, this loss of right would seem to be acceptable as the right of option is a privilege within Regulation (EC) No 883/2004 and imposing on them the obligation to make themselves available in their Member State of residence complies with the general rule for frontier workers.

For unemployed persons other than frontier workers several alternative models were discussed under point 2.1. Requiring a minimum period of insurance or (self-)employment in their Member State of last employment which is also their Member State of residence would deprive these persons of their right to make themselves primarily available to the employment services in this State (which is both their Member State of last employment and their Member State of residence). This would be a clear change of concept of Chapter 6 because currently another Member State only comes into play when the export rule under Article 64 applies.

The obligation to make oneself available in a third Member State, be it a previous Member State of employment or the (previous) Member State of



residence, can be to the detriment of the unemployed person, as in many circumstances this obligation cannot be fulfilled without transferring the place of residence or habitual stay to this Member State.

*Example: A mother resides and works in Member State A for two years. She moves her residence with her family to Member State B, her State of origin, and takes up employment there but is dismissed by her employer after only three weeks. If Member State A, as second to last State of employment, is competent for the person she can either make use of an amended export provision (see below) and receive benefits for up to three (six) months, or she would have to go back to Member State A and reside or habitually stay there again by perhaps leaving her family behind.*

Implementing Sub-options 2a and 2b would raise significant concerns with regard to the protection of rights of the unemployed and to their legal certainty, if no additional amendments to the Regulation would be implemented.

Adopting provisions that the last Member State of employment is not competent and substituted by another Member State, if a minimum period of insurance or (self-)employment was not completed, could put unemployed persons in a difficult or maybe even desperate position if no accompanying amendments to the Regulation were implemented. In many cases going back to a previous State of employment or residence will be incompatible with the current life situation and the personal goals of the person concerned. As pointed out, the CJEU has held that the circumstances which must exist for the condition as to availability to be satisfied cannot have the direct or indirect effect of requiring the person concerned to change his or her residence.<sup>189</sup> It follows that certain accompanying amendments would be absolutely necessary to avoid violations of the freedom of movement of workers.

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<sup>189</sup> Judgment in *Naruschawicus* EU:C:1996:28, paragraph 26.

The situation could be mitigated if the person concerned was enabled to seek work in his or her Member State of residence while receiving benefits in cash from the competent Member State under Article 64 of the Regulation. However Article 64 stipulates quite harsh conditions and limits to allow an unemployed person to seek work in a Member State that is not competent while retaining entitlement to unemployment benefits. Particularly it requires that before his or her departure, the unemployed person must have registered as a person seeking work with the employment services of the competent Member State and have remained available there for at least four weeks after becoming unemployed.

First of all the unemployed person should not be forced to go back to the competent Member State to register with the employment services in that State. He or she should have the possibility to register with the employment services of the Member State of residence and submit a claim to benefits there, being subject to the control procedure organised there, and adhere to the conditions laid down under the legislation of that Member State. The institution must forward the registration and claim to the institution of the competent Member State. The date of registration with the employment services in the Member State of residence must apply in the institution of the competent Member State.

Secondly, the unemployed person must not be committed to being available to the employment services of the competent Member State for at least four weeks after becoming unemployed. This deviation from the general rule is already laid down in Article 65a(3) for former self-employed frontier workers who make themselves available in their Member State of residence only.<sup>190</sup> The situation of these persons is to a certain extent comparable with the situations discussed in this report.

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<sup>190</sup> And where the Member State of last employment is competent under Article 65a(1).

A minimum threshold to apply aggregation by the last Member State of employment and to determine a previous Member State as competent can create situations where the unemployed person cannot go to the competent Member State in order to seek work without completely changing his or her current life situation. We therefore suggest that the competent institution may extend the export period up to the end of the period of entitlement to benefits as already provided for under Article 65a(3), last sentence, or up to six months without discretion. It should even be discussed that the unemployed person is granted a right to that extension of the export period.

#### 2.2.4 Administrative burden and implementation arrangements

Only implementing a minimum threshold of one or three months for applying aggregation would not create any additional burden or require new implementing arrangements. One could even say that the administrative burden for the institution in the last Member State of employment would be reduced, because a significant number of applications for benefits could be rejected.

However, as was shown, applying a threshold in the aggregation provision would not make the legal situation simpler if another Member State would have to take over the obligations of the last Member State of employment. This would necessitate the development of a new procedure which could cause administrative costs for the institutions involved to be higher than under the current legal framework. The Administrative Commission would have to develop new forms and SEDs. It goes without saying that identifying the competent Member States and handling all necessary formalities would require a quick procedure, as the unemployed person must know within hours or days the competent Member State.

*Example: After an amendment, Regulation (EC) No 883/2004 stipulates that a threshold of three months applies in Article 61(2) and imposes on the Member State where the minimum threshold of three months of insurance or (self-)employment was lastly completed to take over the obligations of the last Member State of employment. A person works and resides in Member State A for three years. He or she moves his or her residence to Member State B and works there for two months. Then he or she moves his or her residence to Member State C and is dismissed after only two months of employment.*

*Member State C knows that it is not obliged to apply aggregation and provide unemployment benefits. However, it cannot simply reject an application by the person concerned but must support him or her to find the competent Member State. In our example information exchanges between the unemployed person and Member State C and between Member States A, B and C seem to be necessary before the unemployed person can be definitely referred to the employment services of Member State A.*

#### 2.2.5 No risk of fraud and abuse

Reducing the risk of fraud and abuse is one of the central tasks of applying a threshold for aggregating periods of insurance or (self-)employment. The terms “fraud and abuse” must be restricted to cases of bogus employment only.

*Example 1: A worker resides and works in Member State A for two years. He or she is dismissed by this employer and moves his or her residence back to Member State B. The unemployment benefit paid by Member State A would be exported for three months only. In order to circumvent this limited period of entitlement, the unemployed person agrees with a friendly entrepreneur in Member State B to take up bogus employment and be dismissed after one week.*

*Example 2: As above, but the worker takes up employment in Member State B without fraudulent agreement with the employer, but with the intention to terminate the employment by his or her own choice after only one week in order to receive unemployment benefits from Member State B.*

Within the current legal framework Member State B would have to pay unemployment benefits by aggregating periods completed in other Member States and as long as provided for by national legislation. If a minimum threshold would apply in Article 61(2) of the Regulation, Member State B would not apply aggregation and the unemployed person would probably fall under the competence of Member State A again if the legislature amended the Regulation accordingly.

Cases of short-term employment without a bogus nature cannot be described as fraud and abuse. If in the example above the worker takes up normal employment and is dismissed after one week for whatever reason this would oblige the institution in the last Member State of employment to pay benefits to a person who had contributed to the scheme for a very short time only, but this is not a fraudulent or abusive situation.

Undoubtedly a threshold of one month or three months could reduce cases of fraud and abuse, as it would make it more difficult to create fraudulent and abusive situations for a longer period; a period of three months more than a period of one month.

It is doubtful whether the changes would be significant. Why should the unemployed person and the employer in Example 1 not agree on bogus employment of one month or three months? Why should the unemployed person in Example 2 not terminate the employment by his or her own decision after one month or three months?

It seems that the consequences of a threshold would be much bigger with regard to normal cases of short-term employment. This will be discussed under the next point.

#### 2.2.6 Potential financial implications

Applying a threshold of one or three months in Article 61(2) would release the competent Member State from the obligation of providing benefits to unemployed persons after very short periods of employment. This would correspond to the financial interests of paying benefits only to persons who have contributed for a relevant period to the scheme concerned. It would have a positive impact on the finances of the last Member State of employment. It goes without saying that the positive financial impacts for the last Member State of employment would be much more significant when applying a three-month threshold. On the other hand, it should not be forgotten that – when not abolishing the one-day-rule under the current legal framework – in the longer term the competent Member State of last employment (usually the place of current residence) is likely to benefit from the jobseeker's future employment through future insurance contributions and associated contributions to the competent Member State's economy. Particularly in times of demographic changes any loss of human resources may be regrettable.

Furthermore, we have explained that the obligation to provide benefits of the last Member State of employment should be substituted by a different Member State. Therefore, the savings for the last Member State of employment by not paying benefits for persons who did not complete the minimum period of insurance or (self-)employment under its legislation could – at least partly – be compensated in other cases where it must take over payment obligations for persons where it was not the last Member State of employment but for example the second to last Member State of employment.

Another financial concern could be that imposing on an unemployed person the obligation to make him or herself available to the employment services of a Member State other than the last Member State of employment could mean that this person must move his or her place of residence or habitual stay to another Member State in order to fulfil the requirements of the national legislation of that State. Of course a move of residence or stay gives rise to costs and it could be argued that the Member State where the unemployed person must make him or herself available would have to reimburse these costs, at least to a certain extent.

However, if a one-month threshold is applied, it is questionable if this quite severe measure would be appropriate, given the many concerns and detriments for the unemployed persons, because the difference in periods of contributing to the unemployment scheme of the last Member State of employment would in most cases amount to only a few days or weeks.

### *2.3 Alternative proposal*

In order to reduce the financial burden for the Member State of last employment where not at least one month or three months of insurance or (self-)employment were completed, a new reimbursement mechanism could be installed. Analogous to Article 65(6) to (8) of Regulation (EC) No 883/2004, the benefits provided by the institution of the place of last employment should continue to be at its own expense. However, the competent institution of the Member State where the person concerned lastly completed at least one month or three months of insurance or (self-)employment should reimburse to the institution of the place of last employment the full amount of the benefits provided by the latter institution during the first three months. The amount of the reimbursement during this period may not be higher than the amount

payable, in the case of unemployment, under the legislation of the debtor Member State.

As elaborated above, introducing a minimum period of insurance or (self-)employment for aggregation under Article 61 of the Regulation could impair the position of unemployed migrant workers to find new employment. To avoid this and at the same time take into account the just financial interests of the institutions, a new reimbursement mechanism could shift the financial burden at least partly to a Member State where relevant contributions have been paid, while safeguarding the right of unemployed persons as they are currently provided. This proposal follows the model of Article 65(6) to (8) of the Regulation, which is the method currently applied in Chapter 6 of the Regulation to reconcile the interests of both the unemployed persons and of the institutions. The obligation of the Member State of residence to provide benefits to frontier workers, although the Member State of last employment received the contributions, seems to be comparable with the obligation of the Member State of last employment to pay benefits to migrant workers after a very short period of employment. Why should the solution not be the same one? Problems of interpretation that were posed by Article 65 should be avoided. In particular it should be clarified, that reimbursement is only due if the person concerned was entitled to benefits in the debtor State.<sup>191</sup> In principle a new reimbursement mechanism should follow the same criteria as applied in Article 65(6) to (8) in order to facilitate administration by the institutions.

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<sup>191</sup> We refer to the discussion about Decision U4 and the position of one Member State not to apply this decision.



#### 2.4 *Concerns about unequal treatment of workers within Chapter 6 of Regulation (EC) No 883/2004*

Regulation (EC) No 883/2004 currently builds on the assumption that the Member State of residence provides for the most favourable conditions to find new employment. Although this is explicitly laid down only for persons falling under Article 65(2), first sentence, it must be noted that other migrant workers not falling under Article 65, who must make themselves available in the competent Member State, by definition usually also reside in this State. The analysis of these basic principles of the Regulation reveals that the implementation of a minimum threshold to apply the aggregation rule under Article 61 of the Regulation could give rise to concerns as regards equal treatment of different groups of workers. As the one-day rule in Article 61(2) applies “*except in the cases referred to in Article 65(5)(a)*”, this minimum threshold would not apply to workers falling under Article 65(2) of the Regulation.

*Example: Mr X and Mr Y both move their residence from Member State A to Member State B. Mr X works for an employer in Member State B. Mr Y works for an employer in Member State C and goes back to his home in Member State B every day. After two and a half months both workers are dismissed by their employers. Under the current legal framework both workers would be entitled to benefits in Member State B, because the competent institution in this Member State would take into account their periods of insurance or (self-)employment completed in other Member States. If Option 2b were adopted, Mr X would not be entitled to benefits in Member State B because – as he did not complete the minimum period of three months under the national legislation of this Member State – the institution would not aggregate. Mr Y, however, would still be entitled to benefits in Member State B, because Mr Y falls under Article 65 of the Regulation and the institution in Member State B would take into account his periods completed in other Member States. Mr X*

*would be denied aggregation although he has completed two and a half months of insurance under the legislation of Member State B. Mr Y could rely on aggregation although he has completed no period in Member State B at all.*

Furthermore it must be noted that under Article 65(6) of Regulation (EC) No 833/2004 the competent institution of the Member State to whose legislation the person concerned was last subject must reimburse to the institution of the place of residence the full amount of the benefits provided by the latter institution during the first three months after only one day of insurance in that State.

The 2012 trESS Think Tank Report on the coordination of unemployment benefits<sup>192</sup> proposed that the competence to provide unemployment benefits should be exclusively with the institutions of the State of last (self-)employment. By introducing a minimum threshold to apply the aggregation principle under Article 61 of the Regulation this proposal could find new support, because equal treatment of frontier workers and non-frontier workers within the legal framework of the Regulation could be achieved.

	Clarification	Simplification	Rights	Administr. burden	Fraud and abuse	Financial implications
Option 2a/b	+	≈	-	-	+	?

<sup>192</sup> C. G. de Cortázar (ed.), E. Rentola (ed.), M. Fuchs & S. Klosse, trESS Think Tank Report 2012 ‘Coordination of unemployment benefits’.

### Option 3

**Option 3:** instead of introducing a minimum period for aggregation, only the **calculation** of unemployment benefits changes: i.e. in case of short employment in the new Member State, the calculation will also be **based on the salaries earned** in the previous Member State(s).

**Sub-option 3a:** the salary earned in the previous Member State is also **taken into account** for the calculation of the unemployment benefit by the competent Member State, if less than **one month of insurance or (self-)employment** is completed.

**Sub-option 3b:** the salary earned in the previous Member State is also **taken into account** for the calculation of the unemployment benefit by the competent Member State, if less than **three months of insurance or (self-)employment** are completed.

#### *1 Unemployment benefits – legislation in the Member States*

If we are to give answers to the questions under Option 3, we have to begin with a short analysis of how unemployment benefits are shaped and conceived in the Member States as far as calculation of benefits is concerned. From the legislation studied it clearly appears that unemployment benefits are conceived mainly as income replacement benefits. The unemployed person has lost his or her income which regularly is the basis for his or her living expenses. The unemployment benefit compensates the loss of this financial basis. To serve this purpose the unemployment benefit has to be shaped correspondingly. As a consequence, the manner in which the calculation of benefits is carried out is of the utmost importance.

Apart from a system in which only a flat rate is paid, two conceptions are available. The first one takes into account the income earned at the moment when the employment relationship ended. In other words, the income received most recently is the most important factor of calculation which mainly determines the level of the unemployment benefit.<sup>193</sup>

The second approach relies for the calculation of the benefit on income earned during a longer period which precedes the occurrence of unemployment (income earned during a reference period).

The first approach is very rarely taken.<sup>194</sup> Most other countries prefer reference periods, ranging from three months to twelve months, and in very few cases up to 24 months.<sup>195</sup>

The first approach is to the advantage of the unemployed person if he or she had a higher income when he or she became unemployed compared to his or her income in the past. But, of course, if the reverse true, the method is to his or her disadvantage. To put it simple, the method builds on chance.

The second approach, however, extends the account of earnings to a longer period and, as a consequence, the determination of the relevant income is done on a basis less dependent on chance. It strikes a balance between periods of low and high levels of income and creates an average income.

Experience from some Member States shows that the second approach is mainly chosen. According to the mandate the amount of the unemployment benefit depends on average earnings gained during a certain preceding period (normally 12 months).

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<sup>193</sup> Other factors like the length of the employment relationship or the members of the family may play a role.

<sup>194</sup> The Netherlands take the last daily wage into account. Belgium refers to the average salary earned in the last position. See European Commission, Paper on Automatic Stabilisers, Brussels, 04 October 2013, p. 36.

<sup>195</sup> See European Commission, Paper on Automatic Stabilisers, Brussels, 04 October 2013, p. 36.

## 2 *Calculation of unemployment benefits under coordination law*

In principle, coordination of unemployment benefits has to serve the same purpose as does national legislation. But in contrast to what is needed in the national arena, coordination has to deal with the transnational dimension. Coordination has to offer solutions for the situation in which the unemployed person has earned income in different Member States.

However, the main purpose of unemployment benefits, i.e. to secure the financial basis of the person concerned, is no different from what is required by national unemployment benefit schemes. To facilitate income replacement is therefore the main aim which Article 62 is indebted to.<sup>196</sup>

Article 62 of Regulation (EC) No 883/2004 requires the calculation of benefits on the basis of the amount of the salary in the State of last employment (Article 62(1)). Article 62(2) requires the same mode of calculation if the legislation of a Member State provides for a reference period. A different rule applies for persons covered by Article 65(5)(a) of the Regulation. The institution of the place of residence takes into account the income received in the Member State of last activity.

## 3 *The perspective of Option 3*

### 3.1 *Sub-options 3a and 3b*

Both sub-options derogate from what is now established in Article 62(1) and (2) of Regulation (EC) No 883/2004, insofar as they require taking into account also salary earned in a previous Member State. This renders them

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<sup>196</sup> This is also the conception of unemployment cash benefits by the consistent case law of the CJEU; see for example the judgment in *Knoch*, C-102/91, EU:C:1992:303, paragraph 44; the judgment in *Meints*, C-57/96, EU:C:1997:564, paragraph 27.

similar to what applies for workers in the terms of Article 65(5)(a). In principle, Sub-options 3a and 3b are identical, but they differ in respect of the time span which renders the extension to salaries received in a previous Member State necessary.

### *3.2 Assessment of Sub-options 3a and 3b*

According to point 5) of the mandate, the analytical report is required to identify how the proposed options and sub-options would respond to the criteria specifically listed. In addition, under its heading “Considered amendments” the mandate makes it very clear that basing the calculation of the amount of the unemployment benefit on very short periods of employment may lead to arbitrary results. Against this background the assessment of Sub-option 3a and 3b will be made.

#### *3.2.1 Clarification/Simplification*

From the clarification and simplification point of view the envisaged amendment is not much different from the existing calculation rule. The new rule would not create many difficulties of interpretation. Besides the income earned in the competent State income received in the previous State has to be taken into account pursuant to the rules of the competent institution. This is an operation which for other cases is provided for in Article 5(a) of Regulation (EC) No 883/2004. For this reason, the amendment envisaged is clear and simple.

#### *3.2.2 Administrative burden and implementation arrangements*

##### **1.15.3.1.1 Exchange of information**

The present mode of calculation in Article 62(1) of Regulation (EC) No 883/2004 is simple and easy to apply from the administrative viewpoint. The competent institution can exclusively rely on the income earned in its country and the data are available. In contrast to this, calculation under the envisaged amendment has to be extended. Earnings received in the previous Member State have to be put into the calculation. To get the income data needed for calculation the competent institution has to address the institution of the previous Member State and information has to be forwarded from the latter to the former.

As a consequence and compared to the administrative burden under the current law, a second administrative step has to be taken, which thus increases the burden of the handling of cases. This additional activity is certainly a disadvantage of the amendment. However, the additional burden could be facilitated if use were made of the information channel which serves for cases for which Article 62(3) of the Regulation applies. To get the data about the income earned in the previous State, the implementing rule in Article 54(2) of Regulation (EC) No 987/2009 could be extended to the situation under the amendment. Another or additional way could be the use of current forms for aggregation of periods including the data on income.

Apart from taking into account income earned in the previous Member State the competent institution applies its legislation. Particular rules existing in the previous Member State must not be applied. In particular ceilings provided for in the legislation of the previous Member State may not be taken into account by the competent institution.<sup>197</sup>

#### **1.15.3.1.2 Effects on the length of the awarding process**

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<sup>197</sup> See the judgment in *Grisvard and Kreitz* EU:C:1992:368.

A critical point of the amendment envisaged could be that it increases the length of the awarding of the benefit. Whether this would really be the case, is an open question, since the institutions are familiar with this situation, as it is identical or similar to what the calculation of the unemployment benefit requires from them in application of Article 62(3) of Regulation (EC) No 883/2004. But even if a certain delay occurred, the unemployment benefit could in favour of the claimant be awarded on a provisional basis according to what is laid down in Article 7 of Regulation (EC) No 987/2009.

#### **1.15.3.1.3 Implementing arrangements**

The realisation of the amendments under Options 3a and 3b would need a change of the wording in Article 61(1) of Regulation (EC) No 883/2004 in order to take into account income received in the previous Member State. The following sentence could be added to Article 61(1): “If insurance or (self-)employment completed in the competent Member State was less than one month/three months, salary earned in the previous Member State is also taken into account as if it had been earned in the competent Member State.

It has already been said (see above ‘Exchange of information’) that an extension of the duty resulting from Article 54(2) of Regulation (EC) No 987/2009 would be reasonable to conform with the requirements under the new mode of calculation.

#### **3.2.3 Protection of rights**

As every provision of Regulation (EC) No 883/2004, the provisions in Chapter 6, too, have to be guided by the wording, spirit and purpose of Article 48 TFEU. In the *Fellinger* case, in which it had to be decided which income is relevant for frontier workers, the CJEU also made an important statement about the general rule in Article 68(1) of Regulation (EC) No 1408/71 (now



Article 62(1) of Regulation (EC) No 883/2004<sup>198</sup> and held that the previous wage or salary which normally constitutes the basis of calculation of unemployment benefits is the wage or salary received from the last employment of the worker. In such a manner unemployment benefits are regarded as not to impede the mobility of workers and to that end seek to ensure that the persons concerned receive benefits which take account as far as possible of the conditions of employment, and in particular of remuneration, which they enjoyed under the legislation of the Member State of last employment.<sup>199</sup>

Nevertheless, we should keep in mind that the CJEU made a short hint at exceptional cases where the general rule alone was not fully appropriate. Obviously the CJEU referred to the then existing provision in Article 68(1), second sentence, of Regulation (EC) No 1408/71, which required that if the person concerned had been in his or her last employment in that territory for less than four weeks, the benefits had to be calculated on the basis of the normal wage or salary corresponding in the place where the unemployed person is residing or staying to an equivalent or similar employment to his or her last employment in the territory of another Member State. This provision was not taken up by Regulation (EC) No 883/2004, and we think with good reason, because its application was burdensome and lacked certainty of law. Nevertheless, this abrogated provision contains a grain of salt of sound reason which may be useful to take into consideration with regard to the amendment discussed here. It is a strong argument to say that the exclusive calculation on the basis of the income from the last (self-)employment is not quite adequate if the time of employment completed in the competent Member State is very short. Sub-option 3a expresses this line of thought.

#### **1.15.3.1.4 Advantages and disadvantages of the current calculation scheme**

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<sup>198</sup> Judgment in *Fellinger* EU:C:1980:59, paragraph 7.

<sup>199</sup> Judgment in *Fellinger* EU:C:1980:59, paragraph 7.

The current scheme puts exclusive emphasis on the income earned in the Member State of (self-)employment. Income received elsewhere is irrelevant. This provision favours unemployed persons who earn a higher income in this Member State compared to that acquired in the previous State. And it disadvantages persons in an inverse income situation. As said above, Article 62 of Regulation (EC) No 883/2004 makes the benefit level dependent on chance.

This seems to be acceptable if the person concerned has completed a significant time in the Member State of (self-)employment. But is this solution acceptable if the period completed is very short, in the extreme case one day? The envisaged amendment seems to state it is not. To give an answer to this problem one has to check relevant criteria, whereby the yardstick is the protection of rights.

#### **1.15.3.1.5 Equality of treatment/indirect discrimination**

In legal doctrine doubts have been cast upon the compatibility of Article 62(1) of Regulation (EC) No 883/2004 with provisions on the free movement of workers in view of the disadvantage for a worker who moves from a high-income country to a low-income country and becomes unemployed. Calculation of his or her unemployment benefit is done on her or his low wages in her or his country of employment. There are authors who criticise Article 62(1) of Regulation (EC) No 883/2004, saying that it is a wrong legal policy provision, but leaving it open to question whether the provision is a violation of Article 45 or 48 TFEU.<sup>200</sup> Yet many an author goes a step further. With reference to the aforementioned situation (movement from a high-wage country to a low-wage country) the argument of indirect discrimination is formulated. An author in the leading Austrian commentary on social security coordination discusses just this situation characterised by low wages for a very

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<sup>200</sup> See for this opinion R. Waltermann, 'Arbeitslosigkeit', in (2006) *Europäisches Arbeits- und Sozialrecht* 2, 9140, paragraph 25.

short period in his or her Member State of last employment in contrast to a higher income in the previous State and concludes the following<sup>201</sup>: “*In this way the person concerned can be treated worse than a person who has completed his or her periods of insurance and as a consequence his or her income basis in one and the same country. Article 62 may consequently lead to an indirect discrimination of migrant workers.*”<sup>202</sup>

#### **1.15.3.1.6 Justice and fairness**

Against the current provision in Article 62 of Regulation (EC) No 883/2004 we may also formulate doubts under the aspects of fairness and justice. It seems to be not quite fair or just if, in some cases, a person without having paid a reasonable amount of contributions and consequently being only weakly integrated<sup>203</sup> into the unemployment scheme is treated on an equal footing with other insured persons who have been living and working in this Member State for a longer time.

As was shown above (see above, 1) national unemployment benefit systems usually provide for statutory reference periods. From this we may derive that it is widely held that a sound system of defining the level of unemployment benefits should take into account a longer stretch of time to guarantee a level of benefits which corresponds to and is in line with contributions to an unemployment benefit scheme. In this way the level of benefits is defined not dependent on a very short income situation which by chance may favour or disadvantage the unemployed person, but based on the preceding income situation which compensates for possible lows and highs of earnings. The current law is not in line with the ideas behind statutory reference periods in

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<sup>201</sup> E. Felten, in B. Spiegel (ed.), *Zwischenstaatliches Sozialversicherungsrecht*, Manz, Wien, 2012, Article 62(1).

<sup>202</sup> Translation by Maximilian Fuchs.

<sup>203</sup> It has to be reminded that the CJEU in its consistent case law has held that with regard to unemployment benefits a real link of the person claiming the unemployment benefit and the labour market is an important element. See the judgments in *D’Hoop*, C-224/98, EU:C:2002:432; *Ioannidis*, C-258/04, EU:C:2005:559; *Vatsouras and Koupatantze*, C-22/08, EU:C:2009:344.

national legislation, since even with the existence of such reference periods there is a gap in logic between national legislation and the mode of calculation in Article 62 of Regulation (EC) No 883/2004, since Article 62(2) requires the application of the calculation scheme of 62(1). If the period of income earned in the Member State of last (self-)employment is very short, the aim which national statutory reference periods wish to achieve is impeded.

*Example: A worker W has worked in Member State B for five months, earning a monthly salary of € 2,000. After that she takes up employment in Member State A where he or she draws a monthly salary of € 3,000. After two weeks he or she becomes unemployed. The reference period in this Member State's legislation is six months.*

On the basis of the present rule in Article 62(1) and (2) of Regulation (EC) No 883/2004 the reference period has to be respected, but the income to be used as calculation basis is exclusively that of the Member State A. In other words the reference period under national law loses its inherent logic, the logic requiring that income earned over a time span of six months has to be taken into account in order to establish a balanced and rational calculation basis. On the other hand, under the present law the momentary income at the time of becoming unemployed exclusively prevails. With good reason one can call this result, relying on the wording of the mandate, arbitrary. The dissatisfaction with this discrepancy between coordination law and domestic law could possibly be the reason why some Member States' institutions do not comply with Article 62 of Regulation (EC) No 883/2004. The competent institution in the case reported by the German expert (see below, 'Mapping') applied national rules for short-term (self-)employment against the clear wording of Article 62 of the Regulation. In addition, Article 62(1) could be a barrier to access to unemployment benefits. The calculation model reported for the Contribution-based Jobseekers' Allowance in the UK (see below, 'Mapping') provides for a 26-week minimum limit for national insurance

contributions which the claimant must have paid during a fixed period before the occurrence of unemployment in order to become entitled to the allowance. For the worker in the example above, leaving out income in Member State B seems to deprive him or her of the allowance. Against this background sub-option 3a and to a higher degree Sub-option 3b further the protection of rights in a more balanced way than the present provision of Article 62 of Regulation (EC) No 883/2004.

It cannot be denied that the new law could be to the detriment of those migrant workers who in their new employment receive a higher income compared to the income earned in the previous Member State. As a consequence the level of the unemployment benefit could be significantly lower. However, this is in line with the logic of the new mode of calculation: balancing the income fluctuations. Moreover, it is not against what is required by Article 45 and Article 48 TFEU. It is consistent case law of the CJEU that “*Treaty rules on freedom of movement cannot guarantee to an insured person that a move to another Member State will be neutral as regards social security. In view of the disparities existing between the schemes and legislation of the Member States in this field, such a move may, depending on the case, be more or less financially advantageous or disadvantageous for the person concerned.*”<sup>204</sup> To argue that a migrant worker having worked for a very short period in a Member State should be treated in the same way, if it is about calculation of benefits, as persons who have worked in this Member State for a longer period and have paid contributions to the unemployment benefit scheme correspondingly, is difficult to justify.

#### 3.2.4 No risk of fraud and abuse

We have already discussed this topic above under Option 1 and 2. A few observations may be added. In some countries there is an ongoing discussion

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<sup>204</sup> See for this the recent judgment in *Jeltes* EU:C:2013:224, paragraph 44.

about fraud and abuse of social rights with regard to immigrants, in particular those from low-income countries. A less critical argument is called social or benefit tourism. On second thoughts the arguments do not hold water.<sup>205</sup> Free movement of workers is an essential principle of market economies. The right to free movement realises what economists call efficient allocation of resources. This economic thinking was already present in the Spaak Report.<sup>206</sup> The Spaak Report envisaged, by means of eliminating obstacles to the free movement of factors of production, that labour movements were stimulated from Member States of low productivity to industrial regions and sectors where productivity and demand for labour were highest.<sup>207</sup> Consequently, the EEC Treaty enshrined the freedom of movement of workers as a fundamental right. This fundamental right is secured by guaranteeing free access to employment and a ban on discrimination. This right is furthermore flanked by social security coordination, which extends freedom of movement and equal treatment to the arena of social security.

Therefore, the exercise of these rights can never represent abuse or fraud. To speak about fraud and abuse is justified only for a quite different behaviour that takes place. For example, it is well known that a – fortunately only very small – portion of immigrants falsifies documents or violates their duties of information in order to become entitled to social security benefits from the host State. To prevent this or fight against this is an affair of criminal law and of the law enforcement authorities. It cannot be entrusted to coordination law.

We think that from the angle of abuse and fraud the mode of calculation of benefits used under the regime of coordination presumably plays a minor part. But it should be remembered that in the economic theory on unemployment

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<sup>205</sup> Cf M. Fuchs, 'Freizügiger Sozialtourismus?', (2014) *ZESAR*, 103 et seq.

<sup>206</sup> 'Rapport des Chefs de Délégation au Ministre des Affaires Étrangères', 1956.

<sup>207</sup> Cf S. O'Leary, 'Free movement of persons and services', in P. Craig & G. De Búrca (ed.), *The Evolution of EU Law*, Oxford University Press, Oxford, 2011 (2<sup>nd</sup> edition), 499 (503).

insurance the problem of moral hazard plays a role.<sup>208</sup> Reference is made to the behaviour of unemployed persons who might be tempted to stay unemployed and receive the unemployment benefit instead of taking up a job even if the income is lower. As a consequence, it is requested that unemployment insurance is shaped in a way that avoids incentives which could contribute to such behaviour.

*Example: A person, after working in a low-wage country, has got a well-paid job in another Member State and becomes unemployed after less than a month. Although he or she could get a job in the former Member State, he or she is not inclined to take up employment there due to the high level of the unemployment benefit (compared to the salary to be expected) acquired after a very short time of employment and based on the exclusive relevance of income earned in this country of employment.*

The current law may favour to behave in this way.<sup>209</sup> The envisaged amendment of the calculation model could possibly be a disincentive to prefer unemployment to entrance into the labour market in a low-wage country, since the unemployment benefit would be significantly lower due to the taking into account of the former income in this country.

### 3.2.5 Potential financial implications

As far as financial implications are concerned the current law shows a clear tendency to put a financial burden on the Member State of (self-)employment. This risk allocation is totally justified as long as the competent institution has received a sufficient amount of contributions by the now unemployed person.

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<sup>208</sup> R. Chetty, 'Moral hazard vs. liquidity and optimal unemployment insurance', in (2008) *Journal of Political Economy*, 116 (2), p. 173-234.

<sup>209</sup> See for this argument also E. Felten, in B. Spiegel (ed.), *Zwischenstaatliches Sozialversicherungsrecht*, Manz, Wien, 2012, Article 62(1), who writes that Article 62(1) has effects restricting freedom of movement, "when persons, who despite menacing unemployment rather accept the loss of employment instead of taking up lower-paid employment in another EU country, in order to avoid a lower benefit level in the case of later unemployment" (translation by M. Fuchs).

But here again justification is doubtful if only a short time of employment has created the right to an unemployment benefit.

If we assume migration from low to high-wage countries as the typical case, the latter are disadvantaged since they have to shoulder the expenses for unemployment benefits on the basis of their wage levels without getting corresponding contributions if the period of (self-)employment is short. Compared to this situation a one or three-month clause decreases this disparity, since wages earned prior to the employment in the competent Member State have to be taken into account. Certainly in cases of migration from a high-wage country to a low-wage country the inverse is the case. Apart from the fact that this is the statistically rarer situation in labour migration, we would value the protection of rights higher than the financial interests of the institutions affected. The reason is that the unemployed persons deserve the protection, since they have earned this protection through their contributions. We should not forget that critics of the amendments might use the financial argument with reference to the numerous immigrants who after a certain amount of time return to their country of origin. In this respect it has to be considered that the Member State of origin does not apply aggregation if claims are made, since Article 61(2) of Regulation (EC) No 883/2004 precludes it. And, obviously the institution of the Member State of origin benefits from the one-month/three-month rule.

The mandate requires answers to how the envisaged amendments under Option 3 respond to the specified criteria. Therefore, the foregoing analysis laid emphasis on elaborating the cons and pros which can be identified vis-à-vis the current law and its prospective changes, and its effects on the parties involved: the unemployed persons and the institutions which administer the award of unemployment benefits. However, persons not unemployed but in work and financing the benefits must not be forgotten. National unemployment schemes need to be shaped in a way that they obey sound



economic requirements. A balance has to be found between the interests which result from the need of protection, the economic use of financial resources and a smooth administrative operation. Since secondary law has to be in accordance with primary law, questions of compatibility with Article 48 TFEU had to be raised.

Is a change of the current law recommendable? It depends. It depends on the preferences of the reader, observer and, needless to say, of the decision-making bodies. It is quite possible that who studies the presentation of the cons and pros is in favour of the *status quo* as laid down in Article 62 of Regulation (EC) No 883/2004. Its simplicity and its easy administration may convince him or her, putting less weight on aspects of fairness and justice or compatibility problems. Then again other experts may consider administrative problems to be rather easily solved, thinking that the increase in administrative burden is slight and the experience with the same administrative practice which applies for frontier workers will help to manage the handling of cases. They might see clear advantages with regard to the protection of the unemployed and a better realisation of the aims, which are inherent to national unemployment benefit schemes, on the coordination level. It has to be reminded that the mandate formulates as one of the objectives to ensure that the financial burden for paying unemployment benefits does not arise in situations where mobile EU workers have not yet made a significant contribution to the scheme of the new Member State. As was shown above, the present law does not live up to this aim in cases of migration from low to high income countries if the person concerned becomes unemployed after a very short time of (self-)employment. Moreover, Article 62(1) of Regulation (EC) No 883/2004 requires to exclusively base the calculation on the income of the Member State of last employment, even when the income period is very short, in the extreme event only one day. It follows that the risk of what the mandate describes as arbitrary results when the calculation of the amount of the benefit

is based on very short periods of employment, can materialise. Further weighing strategies could be continued.

	Clarification	Simplification	Rights	Administr. burden	Fraud and abuse	Financial implications
Option 3a/b	≈	≈	+	≈	+	+

## Conclusion

In our report we have outlined the pros and cons with regard to Options 1, 2 and 3 as they were formulated and explained in the mandate. The Executive Summary contains an abridgment of the arguments we considered decisive for the assessment of the different options.

In a nutshell, the report can be summarised as follows:

To decide in favour of Option 1 would mean the preservation of the legal *status quo* as it is laid down in Article 61(1) of Regulation (EC) No 883/2004. For a number of reasons, the mandatory uniform application of Article 61 of Regulation (EC) No 883/2004 in the Member States is not achieved. Several disadvantages may be stated of the present legal situation (weak integration of the unemployed person into the labour market of the new Member State, the financial burden for this State for lack of significant contributions to its unemployment benefit scheme) due to the fact that even a one-day employment is sufficient to enjoy the benefits with application of the aggregation principle. On the other hand, Article 61 of Regulation (EC) No 883/2004 is easy to apply and offers legal certainty and in particular substantially protects the rights of unemployed persons. And, for the increased

financial burden of the State of last employment a remedy could be the introduction of a reimbursement scheme whereby the one contained in Article 65 of Regulation (EC) No 883/2004 could serve as a template.

Option 2 contains the introduction of a qualifying period (one month/three months) the completion of which is necessary for the application of the principle of aggregation. With a view to Article 48 and Article 45 TFEU and the corresponding case law of the CJEU, serious doubts may be cast on the solutions proposed under Option 2. As a consequence, to avoid the risk of violation of primary law, protection of the unemployed persons has to be secured through the substitution of the State of last employment by a different Member State. Our analysis shows that all solutions for the definition of the “right” State have significant drawbacks. The assessment of Option 2 puts emphasis on the disadvantages with regard to nearly all the criteria which the mandate considers as relevant. The release of the financial burden of the Member State of last employment, the most important advantage resulting from Option 2, could be realised on another route which would at the same time avoid the disadvantages mentioned before. A reimbursement scheme as proposed above could offer the necessary compensation.

In cases of short employment in the new Member State, instead of a minimum period for aggregation, Option 3 wishes calculation to also be based on the salaries earned in the previous Member State(s). Its simple application and administration speaks in favour of the present calculation model in Article 62 of Regulation (EC) No 883/2004, since there is no need to seek information about the income in the previous State. The main dilemma of the present calculation scheme is the fact that it is based on chance. It is in favour of migrant workers coming from low-wage to high-wage employment and is to the detriment in the inverse case. The financial burden of the Member States concerned increases or decreases correspondingly. The balancing effect which is achieved in most Member States which provide for reference periods is not

achieved at the coordination level. Therefore, in legal doctrine many an author considers Article 62 of Regulation (EC) No 883/2004 as wrong legal policy and it is argued that indirect discrimination in terms of free movement of workers may take place. The mandate, especially the objective described under (2), intends that the financial burden to pay unemployment benefits does not arise in situations where mobile EU workers have not yet made a significant contribution to the unemployment scheme of the new Member State. Under the present law, this aim is hard to achieve in many cases.

## Mapping

According to point 6 of the mandate a mapping has to be included of the specific impact of the proposed amendments in eight to ten Member States with the highest number/share of EU emigrants and immigrants. Information was gathered from **France, Germany, Italy, the Netherlands, Poland, Romania, Spain** and the **United Kingdom**.

In principle most of these Member States apply the one-day rule. However, in **France** there is no specific national law or administrative circular which takes a precise position on the “one-day rule”. Circular Unédic 2010-23 of 17 December 2010 only provides that “*the latest period of employed activity must have been completed in France*”. In practice, central social security authorities as well as the French central unemployment institution (*Unédic*) consider that a literal interpretation of Article 61 should prevail. This means that aggregation may start after one day of work in France or even less (in some cases, aggregation has seemingly been implemented for migrants who had worked a few hours under a so-called ‘*chèque emploi service*’, a simplified system of salary payment). However, the French national expert pointed out that since no domestic rule expressly consolidates the one-day rule, local unemployment institutions may alternately decide that one day is not sufficient

for the purpose of aggregation. A uniform application in France of the one-day rule is therefore not guaranteed.

If the State of last employment is **Greece**, the competent institution, where the application is submitted, is obliged to take into consideration the periods of insurance and employment completed in another Member State. However, according to the Greek national expert, a one-day insurance/employment period completed in Greece is often treated by the Greek institution as a deceitful/abusive action, targeting at the granting of the unemployment benefit. Thus, a period longer than one day, completed in Greece, is mostly required. However, while periods of very short work in a Member State can give rise to further examination by the institutions, we believe that the automatic assumption that most cases concerned are about deceitful or abusive action seems to be problematic and a thorough examination on a case-by-case basis is required.

The **United Kingdom** works in qualifying weeks. So for example to meet the first contribution condition for Contribution-based Jobseeker's Allowance (JSA(C)) a claimant must have paid, or have been treated as having paid, national insurance contributions for at least 26 (weeks) times the Lower Earnings Limit (LEL) for that tax year. The United Kingdom does not aggregate insurance from another Member State until the minimum period of insurance of one week in the United Kingdom has been completed, i.e. 'registered' on the system.

Although we cannot provide data for **Finland** and **Denmark**, it should be noted that these two Member States have introduced a specific waiting period for the purpose of aggregating periods of unemployment insurance in their respective national legislations.

Section 9 of Chapter 5 of the **Finnish Unemployment Security Act 1290/2002** reads as follows (translation):

*“Insurance and employment periods completed in another State*

*If periods of insurance or employment completed in another State must be included in the previous employment requirement under a social security agreement concluded by Finland or the provisions of the Social Security Regulation or the Basic Regulation, these periods shall only be taken into account if the person concerned has pursued an activity as an employed person in Finland for at least four weeks or as a self-employed person for at least four months immediately before becoming unemployed.”*

§2 of the **Danish Ordinance No 490 of 30 May 2012** on the Danish unemployment insurance provides that if a person who has not been a member of a Danish unemployment insurance fund within the last five years, but has been insured in another Member State, this person’s periods of insurance completed in another Member State will be taken into account only under the following conditions:

Firstly, the person must apply in writing for membership of a Danish unemployment insurance fund within eight weeks after he or she ceased to be covered by the other Member State's unemployment insurance scheme.

Secondly, within this eight-week period the person must have taken up employment or self-employment in Denmark.

Thirdly, prior to unemployment the person must have worked continuously on a full-time basis, i.e. for at least 296 working hours in the past 12 weeks or three months, or, for partially employed persons, 148 working hours in the past 12 weeks or three months. In the case of self-employment, the equivalent condition is eight full weeks within a period of 12 weeks or three months prior to the unemployment.

It is a huge concern how migrant workers could cope with a situation where they are denied aggregation and benefits in the last Member State of employment if a threshold of one or three months was implemented. In Finland and Denmark this situation can already occur because of their national legislations. If relevant data were available, one could analyse how the persons concerned in these two Member States cope with the situation.

As for the numbers of cases concerned **France** provided data for the year 2014, the other Member States for 2013. **Germany** and **Italy** did not provide data. The Italian national expert explained that INPS is not able to detect in detail the required information, nor to give an estimate of such data, since there is currently no EU-wide system and information exchanges are still paper-based, not having implemented the Electronic Exchange of Social Security Information (EESSI) procedure. The difference in numbers between **France** and other Member States, particularly the **United Kingdom**, is remarkable.

Periods in last State of employment	FR	NL	PL	ES	RO	PL
1 day	n.a.	n.a.	n.a.	n.a.	n.a.	
1 day to 1 month	3,784	26	115	1,195	2	
1 month to 3 months	1,220	27	265	534	2	
3 months or more	2,571	107	682	742	8	
Total	7,575	160	1,062	2,471	12	

**Poland** was also able to provide data of rejected claims in 2013: 1,062 benefits faced 454 negative decisions. On the basis of up to one month insurance in Poland, 49 claims were rejected (115 benefits awarded); on the basis of more than one and less than three months of insurance in Poland, 113 claims were rejected (265 benefits awarded). The data do not show the reasons for the rejections.

The Department for Work and Pensions of the **United Kingdom** stated in a note accompanying the provided figures that these cases represent a small subset of job-seeking EEA migrants in the United Kingdom. In the same period around 90,000 JSA income-based (listed as a special non-contributory



benefit in Regulation (EC) No 883/2004) claims were made by EEA migrants. In addition, 3,594 migrants used the Regulation to import their unemployment benefit into the United Kingdom. In isolation therefore the data provided does not serve to fully illustrate the United Kingdom's concerns with the social security coordination Regulations in this area or more widely.

A particular interest was in the share of nationals of the Member State concerned who claimed unemployment benefits after very short periods of work in the last Member State of employment. There is the assumption that nationals of the receiving State could use the one-day rule when going back to their Member State of origin in order to circumvent the limited export period under Article 64 of the Regulation. Only one Member State could give precise data on the share of nationals in the figures above. In **Romania** factually all of the migrant workers concerned were Romanian citizens. In **Poland** the share is estimated to amount to 90%. As for **Spain** it was not possible to obtain a breakdown by nationality of the persons concerned and there is no information in order to make a reliable estimation of the percentage of Spanish nationals among them. However, the national expert pointed out that it is logical to think that the persons concerned probably have a strong link with Spain as far as they want to receive an unemployment benefit in Spain. It can be assumed that they have information regarding the amount of these benefits and their length. Therefore, the expert believes that a significant percentage of them are expected to be Spanish nationals that want to come back to Spain after a period abroad.

The **German** national experts reported a case which shows that the competent institution did not take into account income pursuant to Article 62 of Regulation (EC) No 883/2004, since the income received by the Belgian frontier worker in Germany was earned within less than 150 days. According to German law, in these cases a fictitious income forms the basis for calculation. The *Landessozialgericht* of the Land Nordrhein-Westfalen held

that the arguments against the current law in Article 62 of Regulation (EC) No 883/2004 cannot justify the non-application of Article 62 in view of the clear wording. The *Bundessozialgericht* confirmed the judgment (its reasons are not yet published).

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**ANNEX VIII: FRESCO REPORT: SPECIAL NON-  
CONTRIBUTORY BENEFITS**

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## Introduction

Within the framework of the FreSsco project, the European Commission mandated an Ad Hoc Analytical Study Group of FreSsco experts to provide a legal analysis in order to assess the impact of possible amendments to the EU social security coordination rules which would clarify its relationship with Directive 2004/38/EC as regards economically inactive persons.

Since the coming into force in 2010 of the modernised social security coordination Regulations, i.e. Regulations (EC) No 883/2004 (BR) and (EC) No 987/2009 (IR), there has been both political and legal debate about the rights of migrant EU citizens who are not economically active. Several Member States have raised concerns about the possible abuse of the right of free movement of workers.

Against this backdrop, requests for preliminary rulings were submitted by national courts to the Court of Justice of the European Union (CJEU) aimed at interpreting current EU law, notably the relationship between Regulation (EC) No 883/2004 and Directive 2004/38/EC, with regard to access of inactive migrants to welfare benefits of the Member States.

Following the two recent rulings in cases *Brey*<sup>210</sup> and *Dano*,<sup>211</sup> the CJEU clarified that in the case of economically inactive EU mobile citizens, the income-related special non-contributory cash benefits falling under the scope of Regulation (EC) No 883/2004 are to be treated as social assistance within the meaning of Directive 2004/38/EC. This means that they do not need to be

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<sup>210</sup> Judgment in *Brey*, C-140/12, EU:C:2013:565.

<sup>211</sup> Judgment in *Dano*, C-333/13, EU:C:2014:2358.

paid during the first three months of residence, and thereafter only if the recipient has a legal right of residence in the host Member State.

In view of these judgments, the European Commission (EC) considers it may be necessary to amend the social security coordination rules, to take into account the direction taken by the CJEU. The aim of the possible amendment is to ensure the uniform application of these judgments in the Member States and to provide more legal clarity for EU citizens, the Member States and their social security institutions.

The FreSsco network was asked to perform a legal analysis of possible amendments of Regulation (EC) No 883/2004 following judgments of the CJEU in the *Brey* and *Dano* cases. The objective of the report is thus to analyse the three possible amendments proposed by the EC:

- **Option 1:** *Status quo*: direct application of the case law of the CJEU in *Brey* and *Dano*, allowing for derogations from the equal treatment principle as regards persons who do not have a legal right of residence, or have resided for less than three months in the host State.
- **Option 2:** amendment of Regulation (EC) No 883/2004 to take into account the case law of the CJEU.
  - **Sub-option 2a:** limitation of the equal treatment principle for income-related special non-contributory cash benefits, under Regulation (EC) No 883/2004 by referring to the provisions of Directive 2004/38/EC.
  - **Sub-option 2b:** removal of the income-related special non-contributory cash benefits from the material scope of Regulation (EC) No 883/2004. The equal treatment principle and other provisions from the Regulation no longer apply.

## Executive summary

In the *Brey* and *Dano* rulings, the Court of Justice of the European Union (CJEU) clarified that in the case of economically inactive EU mobile citizens, the income-related special non-contributory cash benefits (SNCBs) falling under the scope of Regulation (EC) No 883/2004 are to be treated as social assistance within the meaning of Directive 2004/38/EC (Residence Directive). As a consequence thereof, the FreSsco network was asked to perform a legal analysis of possible amendments of Regulation (EC) No 883/2004 following judgments of the CJEU in the *Brey* and *Dano* cases. The objective of the report is thus to analyse the three possible amendments proposed by the EC:

- **Option 1:** *Status quo*: direct application of the case law of the CJEU in *Brey* and *Dano*, allowing for derogations from the equal treatment principle as regards persons who do not have a legal right of residence, or have resided for less than three months in the host State.
- **Option 2:** amendment of Regulation (EC) No 883/2004 to take into account the case law of the CJEU.
  - **Sub-option 2a:** limitation of the equal treatment principle for income-related SNCBs, under Regulation (EC) No 883/2004 by referring to the provisions of Directive 2004/38/EC.
  - **Sub-option 2b:** removal of the income-related SNCBs from the material scope of Regulation (EC) No 883/2004. The equal treatment principle and other provisions from the Regulation no longer apply.

The purpose of the report is to identify and assess how the proposed options respond to the following criteria:

- clarification;
- simplification;
- protection of rights;

- administrative burden and implementation arrangements;
- risk of fraud and abuse;
- potential financial implications.

The differences between the three proposed options appear to be narrow. Whereas Option 1 (legislative status quo) entails that access to social assistance is subject to a condition of legal residence in the host Member State such as defined by the recent case law of the CJEU, Option 2a aims at reaching an equivalent effect with the transposition of the CJEU case law into Regulation (EC) No 883/2004 (limitation of the principle of equality of treatment for SNCBs). Option 2b would have a broader impact: by deleting the category of SNCBs, ‘mixed benefits’ may no longer take advantage of any of the coordination principles.

The assessment of these three options takes into account the fact that it is still unclear how the *Dano/Brey* cases are to be interpreted. How will the CJEU analyse further claims to SNCBs by jobseekers, former workers, family members or workers with low income? May the existence of a ‘genuine link’ between the claimant and the Member State where the claim is made support the right to social assistance and how would this link be assessed? How will the requirement of ‘financial solidarity’ impact the access to social assistance? No response is available yet.

Even if the objective of unifying the regime of social assistance for migrants into one single instrument could improve clarity and simplicity, the complex and unstable legal context makes it necessary to highlight the drawbacks of the European Commission proposals. The rapporteurs also kept in mind the objective to preserve the coherence of coordination rules and to protect the social rights of mobile citizens within the European Union.

1. The deletion of SNCBs as a distinct legal category (Option 2b) would have consequences going far beyond the CJEU case law. It would raise the cost of administering SNCBs, decrease legal certainty and threaten the protection of the rights of migrants and hinder the fight against fraud, abuse and error. In particular, it will not answer the question of how to treat Union citizens' entitlement to SNCBs in future cases, leaving these types of social benefits without any specific regulation somewhere between the rules of Directive 2004/38/EC, Regulation (EC) No 883/2004 and EU primary law.

2. The limitation of the principle of equality of treatment for SNCBs (Option 2a) would raise the delicate question how to concretely insert Article 24 of the Residence Directive into the coordination regime. A thorough analysis shows that none of the sub-options envisaged for the insertion of Article 24 are satisfactory. The fact that the CJEU case law is not stable yet makes it even less reasonable to set rules aiming to limit the equal treatment principle for SNCBs. The amendment of the coordination Regulations would in any case undermine the historical compromise of Regulation (EEC) No 1247/92 on SNCBs.

3. The proposal to retain the status quo (Option 1) would give the CJEU time to refine its case law. In this respect, this option could be a reasonable choice. Nevertheless, it also has many drawbacks. Member States' discretion to grant entitlement to SNCBs would be considerable, a situation which would be ill-adapted for migrant situations. Some Member States could take advantage of this possibility to exclude non-active Union citizens from access to SNCBs. Many deprived migrants might find themselves without social assistance. There could be a flow of cases before courts concerning the interpretation in concrete cases of the Residence Directive (in connection with coordination rules) and of Treaty provisions. Without EU guidance, national welfare institutions may go through a period of turbulence. Option 1 is not supposed to be a long-term option. The CJEU case law should be considered as a work in

progress. A wait-and-see position should be appropriate for the next few years by analogy with what happened with the patient mobility case law. Later, legislative action should be taken at its best on the basis of a matured case law.

A common consequence of the three propositions is that protection of citizens' rights would be in danger. Administrative burden would also increase. There would be no guarantee that the overall expenses of social assistance by EU countries in favour of migrants would diminish. As far as fraud and abuse are concerned, the risk of double payment in the Options 1 and 2a) seems to be largely reduced by the Regulation even if undue payments could increase for practical reasons. On balance, Option 2b would hinder the fight against fraud, abuse and error more than facilitate it. The coherence and the rationale of the coordination rules would be undermined.

The discussion within our small group of experts showed how difficult it would be to achieve a solution to which everyone could entirely agree. The report is the result of a compromise on some points, but the main legal analysis, arguments and outcomes are supported by the entire group. To help the reader more easily identify our conclusions concerning the different factors in relation to each option we used a system of marks where (++) means 'very positive', (+) means 'positive', (=) means neutral, (-) means 'negative', (--) means 'very negative', and (?) means 'unclear'. The following table presents the results of our evaluation of the three options.

	Clarification	Simplification	Rights	Admin. burden	Fraud & abuse	Financial impact
Option 1	-	-	-	-	=	?



Option 2a	-	--	--	-	=	?
Option 2b	--	--	--	--	-	?

In conformity with the mandate, three categories of alternative proposals are made in the report with the objective to promote a balanced relationship between both instruments, taking into account the free movement of Union citizens and the principle of proportionality:

1. If the option of a status quo (Option 1) was further explored, some initiatives would need to be taken to clarify the relationship between Regulation (EC) No 883/2004 and Directive 2004/38/EC, for instance by drafting guidelines. The main goal of such guidelines would be to strike a correct balance between the equal treatment provision of Regulation (EC) No 883/2004 and legal residence requirements for non-active persons.
2. If an explicit integration of the relevant articles of Directive 2004/38/EC into the SNCB title of Regulation (EC) No 883/2004 were to remain on the agenda, it would be possible to translate the residence requirements of Directive 2004/38/EC explicitly into the text of Regulation (EC) No 883/2004 through an ‘Option 4’ which would connect the social assistance rights to the length of stay.
3. Instead of adapting Regulation (EC) No 883/2004, it would be conceivable to protect its coherence. A first option would be to remove all doubts about the relationship between Regulation (EC) No 883/2004 and Directive 2004/38/EC by defining a status of *lex specialis* for the coordination Regulation. A second option would be to provide a definition of social assistance in Directive

2004/38/EC that would not encompass SNCBs included in Annex X of Regulation (EC) No 883/2004.

## 1 Legal background

### 1.1 Rules applicable before special non-contributory cash benefits (SNCBs)

With regard to the material scope of the coordination rules, ancient Regulation (EEC) No 3/58 and Regulation (EEC) No 1408/71 (in its initial version of 1971) made a basic distinction between social security and social assistance. Whereas the old regulations applied to all social security schemes, they did not cover social and medical assistance.

In several cases brought before the Court of Justice of the European Union (CJEU) in the 1970s and 1980s, the delineation between the fields of social security and social assistance was discussed by individuals and national institutions. Supporting a dynamic interpretation of the field of application of social security coordination rules, the CJEU ruled that the concept of social security should be interpreted broadly. The reasoning was especially adapted to hybrid/mixed benefits, which have simultaneous ties with social security and social assistance. In *Frilli*<sup>212</sup> for instance, the CJEU ruled that “*Although it may seem desirable, from the point of view of applying the regulation, to establish a clear distinction between legislative schemes which come within social security and those which come within assistance, it is possible that certain laws, because of the classes of persons to which they apply, their objectives, and the detailed rules for their application, may simultaneously contain elements belonging to both the categories mentioned and thus defy any general classification*”.

The attraction of benefits aiming to guarantee a subsistence level in the area of social security was explained in the same case by the fact that they confer on recipients a “*legally defined position giving them the right to a benefit which is*

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<sup>212</sup> Judgment in *Frilli*, C-1/72, EU:C:1972:56.

*analogous to a social security benefit*". Mixed benefits have "a double function; it consists on the one hand in guaranteeing a subsistence level to persons wholly outside the social security system, and on the other hand in providing an income supplement for persons in receipt of inadequate social security benefits". The CJEU concluded in *Frilli* that these benefits come within the field of social security "covered by Article 51 of the Treaty and within the regulations adopted in application of that article".

This reasoning was repeated on many occasions about invalidity,<sup>213</sup> disability<sup>214</sup> or old-age<sup>215</sup> benefits. The term 'benefits' was also understood in the widest possible sense as referring to all benefits including all fractions thereof, chargeable to public funds, increments, revaluation allowances or supplementary allowances.<sup>216</sup> Provided that they were awarded on the grounds of legally defined criteria, all benefits connected to a social security risk falling within the scope of the regulations were covered by coordination rules irrespective of the fact that they were classified as 'social assistance' under national law.<sup>217</sup>

Most welfare benefits therefore fell in the field of application of the coordination Regulations. The principles of equality of treatment, of aggregation and of export of benefits were entirely applicable. A migrant could not be denied a mixed benefit in a Member State where he or she was actually residing for the sole reason that he was not a national of that Member State. A person could not be precluded from acquiring or retaining entitlement to such benefits on the sole ground that he or she did not reside within the

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<sup>213</sup> Judgment in *Biason*, C-24/74, EU:C:1974:99.

<sup>214</sup> Judgment in *Stanton Newton*, C-356/89, EU:C:1991:265.

<sup>215</sup> Judgment in *Giletti*, C-379, 380, 381/85 and 93/86, EU:C:1987:98.

<sup>216</sup> E.g. the judgment in *Biason* EU:C:1974:99, paragraph 14.

<sup>217</sup> E.g. the judgment in *Giletti* EU:C:1987:98, paragraph 10.

territory of the Member State in which the institution responsible for payment was situated.<sup>218</sup>

Nevertheless, the expansion of the case law was not limitless. First, discretionary benefits and general minimum income remained excluded from the scope of coordination rules. Second, in *Stanton Newton*<sup>219</sup> the CJEU made a subtle distinction based on the status of the migrant worker. It ruled that “*legislative provisions of a Member State cannot be regarded as falling within the field of social security within the meaning of Article 51 of the Treaty and Regulation 1408/71 in the case of persons who have been subject as employed or self-employed persons exclusively to the legislation of other Member States*”. Otherwise, “*the stability of the system instituted by national legislation [...] could be seriously affected*”. The limit fixed in *Stanton Newton*, not far from the modern concept of ‘genuine link’, was justified by the fact that the provisions of Regulation (EC) No 1408/71 “*cannot be interpreted in such a way as to upset the system instituted by national legislation*”.

## **1.2 The concept of SNCBs and the rationale of Regulation (EEC) No 1247/92**

The CJEU was aware of the problems deriving from its case law on national social protection schemes. It however considered that “*these difficulties, taken as a whole, can only be resolved within the context of a legislative action taken by the Community.*”<sup>220</sup>

It took years for Member States to amend Regulation (EEC) No 1408/71. The initial proposal from the European Commission was issued in 1985<sup>221</sup> whilst

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<sup>218</sup> Judgment in *Giletti* EU:C:1987:98, paragraph 17; judgment in *Biason* EU:C:1974:99, paragraph 22.

<sup>219</sup> Judgment in *Stanton Newton* EU:C:1991:265.

<sup>220</sup> Judgment in *Frilli* EU:C:1972:56, paragraph 21.

<sup>221</sup> COM (85) 396 final, OJ C 240, 21.09.1985, p. 6-8.

the vote of the Council occurred only seven years later. Regulation (EEC) No 1247/92 of 30 April 1992 instituted the category of “special non-contributory cash benefits” with the design to impose specific rules for benefits which fall simultaneously within the categories of social security and social assistance.

Regulation (EEC) No 1247/92 was based on a compromise. One major advantage for migrant people deriving from case law was abolished: mixed benefits were no longer exportable. To make up for this important restriction to the free movement of workers, Regulation (EEC) No 1247/92 reinforced the principle of equality of treatment. Not only the condition of nationality was inapplicable, but all forms of indirect discrimination were eliminated through the principles of aggregation and assimilation.<sup>222</sup> Also, the restriction designed by the CJEU in *Stanton Newton* was removed: benefit entitlement was no longer conditional on the claimant having previously been subject to the social security legislation of the State in which he or she applied for the benefit, whereas this was the case prior to the entry into force of Regulation (EEC) No 1247/92.<sup>223</sup>

In *Dano*, the CJEU takes good note of this legislative compromise: “*The specific provision which the EU legislature thus inserted into Regulation 1408/71 by means of Regulation No 1247/92 is thus characterised by non*

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<sup>222</sup> See Article 10(a) of Regulation (EEC) No 1408/71 (amended): the institution of a Member State under whose legislation entitlement to SNCBs is subject to the completion of periods of employment, self-employment or residence shall regard, to the extent necessary, periods of employment, self-employment or residence completed in the territory of any other Member State as periods completed in the territory of the first Member State. Also, where entitlement to an SNCB granted in the form of a supplement is subject, under the legislation of a Member State, to receipt of a social security benefit and no such benefit is due under that legislation, any corresponding benefit granted under the legislation of any other Member State shall be treated as a benefit granted under the legislation of the first Member State for the purposes of entitlement to the supplement.

<sup>223</sup> Judgment in *Snares*, C-20/96, EU:C:1997:518, paragraph 50.

*exportability of special non-contributory cash benefits as the counterpart of equal treatment in the State of residence.*<sup>224</sup>

The rationale of Regulation (EEC) No 1247/92 has been well explained by the CJEU. The system established “contains coordination rules whose very purpose, as is clear from the sixth recital in the preamble to Regulation No 1247/92, is to protect the interests of migrant workers in accordance with the provisions of Article 51 of the Treaty.”<sup>225</sup> Discussing Article 70(4) of Regulation (EC) No 883/2004, which introduces the principle of the *lex loci domicilii* for SNCBs, the CJEU indicates that “that provision is intended not only to prevent the concurrent application of a number of national legislative systems and the complications which might ensue, but also to ensure that persons covered by Regulation 883/2004 are not left without social security cover because there is no legislation which is applicable to them.”<sup>226</sup> In *Snares*, the CJEU ruled that Regulation (EEC) No 1247/92 was compatible with Article 51 of the EEC Treaty (now 48 TFEU) even if the application of the specific coordination rules on SNCBs “could have the effect of diminishing the means of the person concerned”. The transfer of SNCBs was anyway immediate: the loss of SNCBs in the former State of habitual residence was immediately compensated in the new State of habitual residence.

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<sup>224</sup> Judgment in *Dano* EU:C:2014:2358, paragraph 54.

<sup>225</sup> Judgment in *Snares* EU:C:1997:518, paragraph 48.

<sup>226</sup> Judgment in *Brey* EU:C:2013:565, paragraph 50.

### **1.3 *SNCBs regime: What would have been Mr Brey and Ms Dano’s rights under the exclusive application of Regulation (EC) No 883/2004?***

#### *1.3.1 Regime*

Regulation (EC) No 883/2004 consolidates the category of SNCBs. It contains a precise definition of SNCBs such as set out in Regulation (EC) No 647/2005 of 13 April 2005 amending Regulation (EEC) No 1408/71. If it does not cover social and medical assistance, “[t]his Regulation shall also apply to the special non-contributory cash benefits covered by Article 70” (Article 3(5)). SNCBs are defined as “benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement, has characteristics both of the social security legislation referred to in Article 3(1) and of social assistance” (Article 70(1) BR).

Modernised rules of coordination state that SNCBs can either provide “supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 3(1), and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned” or “solely specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned” (Article 70(2)(a) BR).

One additional condition is inspired by the case law of the CJEU: the financing of SNCBs derives “exclusively [...] from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary. However, benefits provided to supplement a contributory benefit shall not be considered to be contributory benefits for this reason alone” (Article 70(2)(b) BR).



Benefits meeting the regulation criteria and listed in Annex X follow the rules applicable to SNCBs. Both conditions are cumulative. It implies that benefits which are not listed in Annex X or which would be removed from Annex X by ruling of the CJEU<sup>227</sup> are subject to standard rules of coordination and in particular to the principle of export.<sup>228</sup>

If all conditions for belonging to the SNCB category are satisfied and if the claimant falls within the personal scope of Regulation (EC) No 883/2004, SNCBs are provided exclusively in the Member State where the persons concerned reside, in accordance with its legislation, and are provided by and at the expense of the institution of the place of residence (Article 70(4) BR). The principle of waiving residence rules does not apply (Article 70(3) BR). If Regulation (EC) No 883/2004 no longer explicitly provides that the principles of aggregation and assimilation apply to SNCBs, this is still the case since Article 5 and 6 BR apply to SNCBs which are in the scope of the Regulation.<sup>229</sup>

### 1.3.2 *Mr Brey and Ms Dano's status under Regulation (EC) No 883/2004*

In the past, access to SNCBs was analysed by the CJEU exclusively under coordination rules. If we disregard requirements from Directive 2004/38/EC, what would have been the status of Mr Brey and Ms Dano vis-à-vis benefits claimed in Austria and in Germany on the grounds of Regulation (EC) No 883/2004 only?

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<sup>227</sup> The list of SNCBs in Annex has been reshaped by Regulation (EC) No 647/2005 to take account of CJEU case law (see e.g. the judgment in *Commission v Parliament*, C-299/05, EU:C:2007:608). The list of Annex X of Regulation (EC) No 883/2004 is directly inspired by this case law.

<sup>228</sup> Unless they would fall exclusively within the scope of 'social assistance': in this case, coordination rules do not apply.

<sup>229</sup> See also the judgment in *Dano* EU:C:2014:2358, paragraph 49 and paragraph 53.

In the case of Mr Brey, the Austrian *Pensionsversicherungsanstalt* refused to grant him the compensatory supplement (*Ausgleichzulage*) provided for in Austrian legislation to augment his German retirement pension. Based on the concept of residence defined in the *Swaddling* case dealing with an SNCB,<sup>230</sup> it is likely that Mr Brey was habitually residing in Austria where he had the centre of his interests. The length of residence in the Member State in which payment of the benefit is sought cannot be regarded as an intrinsic element of the concept of residence.<sup>231</sup> Thus, since the *Ausgleichzulage* is listed in Annex X and follows the conditions to be categorised as an SNCB, it would have been granted to Mr Brey since he received only a low (German) old-age pension. This outcome would not have been reversed by the fact that Mr Brey had not been previously subject to Austrian social security. Indeed, the CJEU made clear that benefit entitlement is no longer conditional on the claimant having previously been subject to the social security legislation of the State in which he or she applies for the benefit.<sup>232</sup>

In the case of Ms Dano, the Jobcenter Leipzig refused to grant her a benefit envisaged by German legislation, i.e. the subsistence benefit (*Regelleistung/Grundsicherung für Arbeitsuchende*). Again, since this benefit is listed in Annex X and meets the other SNCB regulations requirements to be classified as such, Ms Dano, who was a habitual resident in Germany under criteria set out in the *Swaddling* case, would have been granted the said benefit (also for the reason that, as said above, benefit entitlement is not conditional on the claimant having previously been subject to the social security legislation of the State in which he applies for the benefit).

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<sup>230</sup> Judgment in *Swaddling*, C-90/97, EU:C:1999:96.

<sup>231</sup> Judgment in *Swaddling* EU:C:1999:96, paragraph 30.

<sup>232</sup> Judgment in *Snares* EU:C:1997:518, paragraph 50.

#### **1.4 *The interplay between Regulation (EC) No 883/2004 and Directive 2004/38/EC: introductory elements***

Already in *Snares*, the CJEU touched upon the question of interactions between the predecessors of Regulation (EC) No 883/2004 and Directive 2004/38/EC. A person like Mr Snares, who ceased occupational activity and moved from the UK to Spain, may not have been in receipt of benefits of an amount sufficient to avoid becoming a burden on the social security system of Spain during his period of residence there.

How should the Regulation and the Directive interact? Neither the Regulation nor the Directive determine their mutual coordination. The Directive does not refer to the Regulation, nor vice versa. The interplay between both legal instruments leaves room for interpretation and makes a solution difficult. From an institutional point of view, there is no formal hierarchy between a regulation and a directive. Since both instruments were voted the same day (29 April 2004), anteriority may not be a relevant criterion to set. The principle *Lex specialis derogat legi generali* does not seem relevant either to design rules of interaction between both texts. Both legal instruments, however, are different in their legal character. This matters for solving the conflict between concurring legislative acts. The Regulation creates immediate and direct individual rights; the Directive, however, is addressed to the Member States and makes them create domestic legislation in line with the EU Directive's standard. Therefore, both instruments have a different legal impact: the Regulation creates rights or duties, whereas the Directive empowers the Member States to take legislative action in the future. It raises the question to what extent provisions of a directive should/can be incorporated into a regulation.

The three propositions made by the European Commission have a common denominator inspired by the recent case law of the CJEU: they acknowledge that the application of Regulation (EC) No 883/2004 is without prejudice to

requirements of Directive 2004/38/EC. This would be the result of the following CJEU assertion: “*The benefits [...] which constitute ‘special non-contributory cash benefits’ within the meaning of Article 70(2) of the regulation, are, under Article 70(4), to be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. It follows that there is nothing to prevent the grant of such benefits to Union citizens who are not economically active from being made subject to the requirement that those citizens fulfil the conditions for obtaining a right of residence under Directive 2004/38/EC in the host Member State*”<sup>233</sup>. The CJEU also ruled in the same spirit that it “*has consistently held that there is nothing to prevent, in principle, the granting of social security benefits to Union citizens who are not economically active being made conditional upon those citizens meeting the necessary requirements for obtaining a legal right of residence in the host Member State.*”<sup>234</sup>

The *Brey* and *Dano* case law has therefore addressed the relationship between the two regimes and opted for a priority of the residence approach over the coordination approach. Regarding this shift, it might nevertheless be worth recalling that the CJEU has expressed the view that applying the Residence Directive should not result in a step back from the *acquis*.<sup>235</sup>

Guided by the mandate,<sup>236</sup> by recent cases *Brey* and *Dano* and within the context of the more global question of access to social benefits<sup>237</sup> in the State

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<sup>233</sup> Judgment in *Dano* EU:C:2014:2358, paragraph 83.

<sup>234</sup> Judgment in *Brey* EU:C:2013:565, paragraph 44.

<sup>235</sup> Judgment in *Metock*, C-127/08, EU:C:2008:449, paragraph 59; judgment in *Lassal*, C-162/09, EU:C:2010:592, paragraph 30. See, however, the judgment in *Brey* EU:C:2013:565, paragraph 53.

<sup>236</sup> Which indicates that “*the aim of the possible amendment is to ensure the uniform application of these judgments in the Member States and to provide more legal clarity for EU citizens, the Member States and their social security institutions*”.

<sup>237</sup> The expression ‘social benefit’ used in this report has not been defined in EU legislation or in CJEU case law and is thus not an EU law concept unlike social assistance within the meaning of Article 24(2) of Directive 2004/38/EC or ‘social advantages’ within the meaning of Article 7(2) of Regulation (EU) No 492/2011. ‘Social benefit’ refers to all advantages falling under the Union citizens’ claim to non-discrimination (Articles 18/21 TFEU; Article 24(1), first sentence of

of residence by economically inactive Union citizens, the report will take on board leading principles of the free movement of Union citizens and workers (and matching case law), social security coordination principles set out in the Treaty and the rationale of Regulation (EC) No 883/2004, in particular of SNCBs. The report will focus exclusively on income-related SNCBs, leaving aside SNCBs the aim of which is the protection for the disabled (see Article 70(2)(a)(ii)). Such benefits are indeed not targeted by the recent rulings of the CJEU.

The report will thus proceed to an analysis of the status quo (part 2), of a limitation of the equal treatment principle for income-related SNCBs, under Regulation (EC) No 883/2004, by referring to the provisions of Directive 2004/38/EC (part 3), and of the removal of the income-related SNCBs from the material scope of Regulation (EC) No 883/2004 (part 4). Since case law of the CJEU is not stable yet,<sup>238</sup> the report will suggest alternative amendments to the European Commission propositions (part 5) before reaching final conclusions (part 6).

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Directive 2004/38/EC). It extends to all kinds of (social and other) advantages (in a wide sense) granted by national law. Thus, the concept of 'social benefit' is broader than the term 'social assistance' used in Article 24(2) of Directive 2004/38/EC such as interpreted in *Dano*.

<sup>238</sup> See, for instance, the opinion of the Advocate General in *Alimanovic* EU:C:2015:210.

## 2 Option 1: status quo: direct application of the case law

### 2.1 *Legal analysis of the proposal*

Option 1 sticks to the status quo by proposing a direct application of the *Brey* and *Dano* case law. As a starting point, these two rulings by the Court of Justice of the European Union (CJEU) will be presented (see 2.1.1). Next, the question will be discussed under which circumstances economically inactive Union citizens may claim access to income-related special non-contributory cash benefits (SNCBs) following this case law (see 2.1.2).

#### 2.1.1 *Background: the cases Brey and Dano*

##### 2.1.1.1 Brey (19 September 2013)

#### **a) *Facts and preliminary questions (paragraph 16 et seq)***

On 19 September 2013, the CJEU ruled on a request for a preliminary ruling from the Austrian Supreme Court (*Oberster Gerichtshof*). This case concerned two German nationals, Mr Brey and his wife, who moved to Austria in March 2011 and whose income at this time solely consisted of Mr Brey's invalidity pension (€ 862.74 per month and before tax) and a care allowance (€ 225 per month). Shortly after entry, Mr Brey applied at the responsible Austrian authority for a compensatory supplement. Though Mr Brey and his wife were granted an EEA citizen registration certificate, the application for the compensatory supplement was refused on the grounds that his low retirement pension did not suffice to establish lawful residence in Austria which requires having sufficient resources.

After a successful action of Mr Brey against this refusal, the Austrian authority brought an appeal against the judgment before the Austrian Supreme Court. This Court decided to refer the case to the CJEU and raised the question, as reformulated by the CJEU,

*“whether EU law – in particular, Directive 2004/38/EC – should be interpreted as precluding national legislation [...] which does not allow the grant of a benefit, such as the compensatory supplement [...], to a national of another Member State who is not economically active, on the grounds that, despite having been issued with a certificate of residence, he does not meet the necessary requirements for obtaining the legal right to reside on the territory of the first Member State for a period of longer than three months, since such a right of residence is conditional upon that national having sufficient resources not to apply for the benefit.” (paragraph 32)*

#### **b) Judgment of the CJEU**

First, the CJEU (again) confirmed that the Austrian compensatory supplement at issue in this case constitutes an SNCB within the meaning of Articles 3(3) and 70 BR and therefore falls within the scope of the coordination regime (paragraph 33 et seq). Next, the CJEU considered a solution based uniquely on the coordination regime which was proposed by the European Commission (EC). According to the latter, SNCBs have to be provided in the Member State of habitual residence (Articles 1(j), 70(4) BR) and the introduction of any further criteria applied uniquely to EU foreigners – like a criterion of legal residence – constitutes a violation of the non-discrimination principle enshrined in Article 4 BR (paragraph 37).

The CJEU, however, rejected this reasoning by limiting the scope of the coordination regime: Article 70(4) BR “sets out a ‘conflict rule’” determining the Member State responsible for granting SNCBs, but does not lay down

criteria for entitlement to SNCBs which has to be determined by national legislation (paragraph 37 without dealing with the applicability of Article 4 BR, however).

Yet, the Member States do not enjoy unlimited discretion in this regard: the CJEU stressed that the criteria stipulated in national legislation have to comply with EU law. It then considered whether the requirement of sufficient resources for legal residence and entitlement to the benefit at issue is in line with the right of all Union citizens to free movement (Article 21 TFEU) and to non-discrimination (Article 18 TFEU), as notably concretised by Directive 2004/38/EC. In view of the economic criteria on which a right of residence for economically inactive persons depends according to Article 7(1)(b) of Directive 2004/38/EC, the CJEU in principle answered this question affirmatively. However, it also drew attention to the fact that these criteria must, being restrictions of the general right to free movement of all Union citizens (Article 21 TFEU), in view of the status of Union citizenship and in line with Article 14(3) of Directive 2004/38/EC, not be applied without a proportionality assessment in each individual case (paragraph 44 et seq):

*“[T]he fact that a national of another Member State who is not economically active may be eligible, in light of his low pension, to receive that benefit could be an indication that that national does not have sufficient resources to avoid becoming an unreasonable burden on the social assistance system of the host Member State for the purposes of Article 7(1)(b) of Directive 2004/38/EC [...] However, the competent national authorities cannot draw such conclusions without first carrying out an overall assessment of the specific burden which granting that benefit would place on the national social assistance system as a whole, by reference to the personal circumstances characterising the individual situation of the person concerned.” (paragraph 63 et seq)*



Regarding the relevance of the coordination regime in this respect, the CJEU stressed that the Austrian SNCB at issue qualifies as social assistance within the meaning of Directive 2004/38/EC and thus must not be left out, as the EC submitted in view of SNCBs in general (paragraph 48), when assessing whether a person has become a burden on the national social assistance scheme (paragraph 47 et seq).

In conclusion, the CJEU held

*“that EU law – in particular, as it results from Article 7(1)(b), Article 8(4) and Article 24(1) and (2) of Directive 2004/38/EC – must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, even as regards the period following the first three months of residence, automatically – whatever the circumstances – bars the grant of a benefit, such as the compensatory supplement provided for in Paragraph 292(1) of the ASVG, to a national of another Member State who is not economically active, on the grounds that, despite having been issued with a certificate of residence, he does not meet the necessary requirements for obtaining the legal right to reside on the territory of the first Member State for a period of longer than three months, since obtaining that right of residence is conditional upon that national having sufficient resources not to apply for the benefit.” (paragraph 80)*

2.1.1.2 Dano (11 November 2014)

**a) Facts and preliminary questions (paragraph 35 et seq)**

The *Dano* case handed down on 11 November 2014 concerned two Romanian nationals, Ms Dano and her minor son, both habitually residing in Germany. They live with the sister of Ms Dano who supports them financially. In addition, Ms Dano receives a child benefit of € 184 per month as well as an

advance on maintenance payments of € 133 per month, both financed by German public funds. Ms Dano has never worked in Germany nor did she move to Germany in order to seek employment. Still, German authorities granted her an unlimited certificate of free movement for EU nationals. In 2011 and again in 2012, Ms Dano applied for the basic provision for jobseekers (*Arbeitslosengeld II*), but the competent authority each time rejected her claim. Ms Dano's challenge of the last decision was also dismissed by the court. Subsequently, she brought another action before the social court of first instance in Leipzig, which referred the case to the CJEU and raised the question whether it is in line with EU coordination (Article 4 BR) and free movement law (Articles 18/21 TFEU; Article 24 of Directive 2004/38/EC) to exclude economically inactive Union citizens from access to SNCBs.

#### **b) Judgment of the CJEU**

The CJEU first stressed that SNCBs fall within the scope of Article 4 BR (paragraph 55). Furthermore, it underlined that entitlement to the benefit in question has to be assessed in view of the principle of non-discrimination (Article 18 TFEU), which is given a specific expression in both Article 24 of Directive 2004/38/EC as well as in Article 4 BR. Regarding the former, even if SNCBs fall under the broad concept of social assistance used in Article 24(2) of Directive 2004/38/EC (paragraph 63), this exclusion does not apply *in casu* due to the specific circumstances of the case (residence in Germany for more than three months, but without seeking employment or being willing to work). Hence, only Article 24(1) of Directive 2004/38/EC applies, meaning that

*“a Union citizen can claim equal treatment with nationals of the host Member State only if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38/EC.” (paragraph 69)*

According to Article 7(1)(b) economically inactive persons (like Ms Dano) must have sufficient resources and a comprehensive sickness insurance. Hence, the CJEU concluded, without referring to the relativisation of these criteria in its established case law (*Baumbast*,<sup>239</sup> *Grzelczyk*,<sup>240</sup> *Brey*), that

*“[a] Member State must [...] have the possibility, pursuant to Article 7 of Directive 2004/38/EC, of refusing to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State’s social assistance although they do not have sufficient resources to claim a right of residence.” (paragraph 78)*

Finally, regarding Article 4 BR,

*“[t]he same conclusion must be reached [...] The benefits at issue in the main proceedings, which constitute ‘special non-contributory cash benefits’ within the meaning of Article 70(2) of the regulation, are, under Article 70(4), to be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. It follows that there is nothing to prevent the grant of such benefits to Union citizens who are not economically active from being made subject to the requirement that those citizens fulfil the conditions for obtaining a right of residence under Directive 2004/38/EC in the host Member State.” (paragraph 83)*

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<sup>239</sup> Judgment in *Baumbast*, C-413/99, EU:C:2002:493.

<sup>240</sup> Judgment in *Grzelczyk*, C-184/99, EU:C:2001:458.

### 2.1.2 Access to SNCBs under EU law<sup>241</sup>

Summing up, both *Brey* and *Dano* concern the access of economically inactive persons to income-related SNCBs. Notably, *Dano* declares the equality of treatment rule of Article 4 BR applicable to SNCBs (paragraph 46 et seq). This provision stipulates:

*“Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.”*

However, this rule is not interpreted, as advocated by some,<sup>242</sup> as a claim to equal treatment irrespective of legal residence in the host Member State. Rather, it is interpreted in line with the rules applicable to the access of economically inactive Union citizens to social benefits in Member States other than their country of origin, notably Article 24 of Directive 2004/38/EC (paragraph 82 et seq). Hence, the decisive question for access to SNCBs is whether a person enjoys a right of residence in the host Member State according to Residence Directive 2004/38/EC.<sup>243</sup> This development might be

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<sup>241</sup> Cf on this F. Wollenschläger, 'Keine Sozialleistungen für nichterwerbstätige Unionsbürger? Zur begrenzten Tragweite des Urteils des EuGH in der Rs. *Dano* vom 11.11.2014', (2014) *NVwZ*, 1628. Cf further D. Thym, 'The elusive limits of solidarity: Residence rights of and social benefits for economically inactive Union citizens', (2015) *CML Rev* 52, 17; H. Verschuere, 'Preventing "benefit tourism" in the EU: A narrow or broad interpretation of the possibilities offered by the CJEU in *Dano*?', (2015) *CML Rev* 52, 363; F. Wollenschläger, 'A new Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for shifting the Economic Paradigm of European Integration', (2011) *ELJ* 17, 1.

<sup>242</sup> Cf e.g. Commission, the judgment in *Brey* EU:C:2013:565, paragraph 37; this approach was also followed in German case law, cf only LSG (Social Court of Second Instance) Bayern of 27 May 2014, L 16 AS 344/14 B ER, paragraph 23 et seq.

<sup>243</sup> According to the CJEU's case law, even a right of residence based uniquely on national law may be sufficient for a claim to equal treatment, cf the judgment in *Sala*, C-85/96, EU:C:1998:217, paragraph 60 et seq; judgment in *Trojani*, C-456/02, EU:C:2004:488, paragraph 37 et seq.

termed a shift from a coordination approach to a residence approach regarding access to SNCBs.

Thus, to answer the initial question of access of economically inactive persons to income-related SNCBs, the well-established case law of the CJEU, beginning with its ruling in the *Sala* case of 12 May 1998,<sup>244</sup> as well as the respective provisions of the Residence Directive have to be presented. They confirm a (limited) claim of economically inactive persons to such SNCBs in the host Member State (see 2.1.2.1). It is important to stress that this finding has not been contradicted by the CJEU's ruling in the *Dano* case, although the latter might be open to a different reading (see 2.1.2.2). Finally, it is also very important to stress that *Brey* and *Dano* do not provide the complete picture. After all, these rulings do not concern first-time jobseekers, family members, persons with a permanent residence right, former workers retaining their status of worker or workers with low income, to all of whom specific rules apply which should also be presented (see 2.1.2.3).

#### 2.1.2.1 Access of economically inactive persons to income-related SNCBs

Even if Directive 2004/38/EC requires sufficient (own) resources to profit from a right of residence as an economically inactive person in the host Member State, a Union citizen who becomes dependent on SNCBs may under certain circumstances retain his or her right of residence (a) and enjoy access to social benefits, including SNCBs, in the host Member State (b).

##### **a) *The right of residence of economically inactive Union citizens***

Generally speaking, the right of residence of economically inactive Union citizens (not belonging to one of the groups being discussed below in 2.1.2.3) for a period of residence of more than three months depends on the fulfilment

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<sup>244</sup> Judgment in *Sala* EU:C:1998:217.

of certain economic criteria. In this respect, Article 7(1)(b) of Directive 2004/38/EC stipulates that:

*“[a]ll Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they [...] have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State.”*

However, these economic criteria must not be applied literally.<sup>245</sup> Already in its judgment in the *Baumbast* case, the CJEU relativised these conditions by applying the principle of proportionality to them. For, following the introduction of Union citizenship, they constitute a limitation to the right of free movement of all Union citizens guaranteed by EU primary law (Article 21 TFEU). Hence, the fact that a sickness insurance, other than required by secondary law, does not cover all possible risks, does not justify denying a right of residence.<sup>246</sup> The same is true, according to the judgment in the *Grzelczyk* case, with regard to the temporary reliance of a student on social assistance.<sup>247</sup> Confirming this line of case law, in its judgment in the *Brey* case of September 2013 the CJEU concluded:

*“Lastly, it should be borne in mind that, since the right to freedom of movement is – as a fundamental principle of EU law – the general rule, the conditions laid down in Article 7(1)(b) of Directive 2004/38/EC must be*

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<sup>245</sup> Cf in more detail F. Wollenschläger, ‘A new Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for shifting the Economic Paradigm of European Integration’, (2011) ELJ 17(1), 15 et seq.

<sup>246</sup> Judgment in *Baumbast* EU:C:2002:493, paragraph 90 et seq. Cf further the judgment in *Brey* EU:C:2013:565, paragraph 70, and, with a different conclusion, the judgment in *Trojani* EU:C:2004:488, paragraph 34 et seq.

<sup>247</sup> Judgment in *Grzelczyk* EU:C:2001:458, paragraph 37 et seq; in regard to the methodical difference with the judgment in *Baumbast* EU:C:2002:493, cf F. Wollenschläger, *Grundfreiheit ohne Markt*, Mohr Siebeck, Tübingen, 2007, p. 171 et seq.

*construed narrowly [...] and in compliance with the limits imposed by EU law and the principle of proportionality [...] In addition, the margin for manoeuvre which the Member States are recognised as having must not be used by them in a manner which would compromise attainment of the objective of Directive 2004/38/EC, which is, inter alia, to facilitate and strengthen the exercise of Union citizens' primary right to move and reside freely within the territory of the Member States, and the practical effectiveness of that directive.” (paragraph 70 et seq)*

Article 14(3) of Directive 2004/38/EC has codified the *Baumbast* and *Grzelczyk* case law. According to this provision “(a)n expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.” Moreover, following the CJEU's understanding in *Brey*, even Article 7(1)(b) of Directive 2004/38/EC itself qualifies the criterion of sufficient resources by adding “not to become a burden on the social assistance system of the host Member State during their period of residence”.<sup>248</sup>

Recital 16 of the same Directive specifies the proportionality test:

*“As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as*

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<sup>248</sup> Judgment in *Brey* EU:C:2013:565, paragraph 63, 72, 77.

*defined by the Court of Justice save on grounds of public policy or public security.”*

In its judgment in the *Brey* case, the CJEU interpreted Article 7(1)(b) of Directive 2004/38/EC in line with these limitations. The latter provision implies that

*“[b]y making the right of residence for a period of longer than three months conditional upon the person concerned not becoming an ‘unreasonable’ burden on the social assistance ‘system’ of the host Member State, Article 7(1)(b) of Directive 2004/38/EC, interpreted in the light of recital 10 to that directive, [...] that the competent national authorities have the power to assess, taking into account a range of factors in the light of the principle of proportionality, whether the grant of a social security benefit could place a burden on that Member State’s social assistance system as a whole. Directive 2004/38/EC thus recognises a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary”. (paragraph 72)*

Finally, from a general point of view, the interpretation of the economic residence criteria as conditions of the right to free movement should be questioned. For reasons of legal certainty it should at least be considered interpreting these criteria as a mere justification to end the right of residence, but not as conditions on which the existence of the right of residence depends – similar to the understanding of the *ordre public* exception, which permits restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health (Article 27 of Directive 2004/38/EC).<sup>249</sup> This interpretation would, moreover, seem more convincing

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<sup>249</sup> Cf for more details F. Wollenschläger, *Grundfreiheit ohne Markt*, Mohr Siebeck, Tübingen, 2007, p. 180 et seq, 187 et seq; further C. Schönberger, ‘Die Unionsbürgerschaft als



than applying the general non-discrimination principle also in cases of a residence only based on national law.<sup>250</sup>

#### **b) Access of economically inactive Union citizens to social benefits**

In its case law, the CJEU has not only relativised the economic conditions of residence for economically inactive Union citizens. Rather, it has also acknowledged a (limited) entitlement to social benefits, including SNCBs, based on the principle of non-discrimination enshrined in EU primary law (Articles 18/21 TFEU) and EU secondary law (Article 24(1), first sentence of Directive 2004/38/EC).<sup>251</sup> The latter reads:

*“Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty.”*

According to the CJEU’s case law (*Baumbast*, *Grzelczyk*, *Brey*), a Union citizen may rely on the non-discrimination principle<sup>252</sup> to compensate the situation where she or he does not have sufficient resources or a

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Sozialbürgerschaft. Aufenthaltsrecht und soziale Gleichbehandlung von Unionsbürgern im Regelungssystem der Unionsbürgerrichtlinie’, (2006) *ZAR*, 228; K. Strick, ‘Ansprüche alter und neuer Unionsbürger auf Sozialhilfe und Arbeitslosengeld II’, (2005) *NJW*, 2183, footnote 15. Disagreeing D. Thym, ‘Sozialleistungen für und Aufenthalt von nichterwerbstätigen Unionsbürgern’, (2014) *NZS*, 81, 86 et seq; with qualifications in view of the right of permanent residence, judgment in *Ziolkowski et al*, C-424/10 and C-425/10, EU:C:2011:866, paragraph 36 et seq.

<sup>250</sup> Judgment in *Sala* EU:C:1998:217, paragraph 60 et seq; judgment in *Trojani* EU:C:2004:488, paragraph 37 et seq; disagreeing F. Wollenschläger, *Grundfreiheit ohne Markt*, Mohr Siebeck, Tübingen, 2007, p. 217 et seq; cf also D. Thym, op cit, (2014) *NZS*, 81, 89 et seq.

<sup>251</sup> Cf for more details F. Wollenschläger, ‘A new Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for shifting the Economic Paradigm of European Integration’, (2011) *ELJ* 17(1), 20 et seq; idem, in A. Hatje & P.-C. Müller-Graff (eds), *Enzyklopädie Europarecht*, volume 1, Nomos, Baden-Baden, 2014, paragraph 8/138 et seq; idem, *Grundfreiheit ohne Markt*, Mohr Siebeck, Tübingen, 2007, p. 197 et seq.

<sup>252</sup> Article 18 TFEU; Article 24(1), sentence 1 of Directive 2004/38/EC.

comprehensive sickness insurance. One condition is required, though: under the circumstances of the individual case, refusing a right of residence would be disproportionate in view of the legitimate objective behind the economic residence conditions to avoid Union citizens becoming an unreasonable burden on the social assistance system of the host Member State.<sup>253</sup>

This interpretation in favour of equality of treatment is reinforced by the fact that Article 24(2) of Directive 2004/38/EC excludes equal access to social assistance “*only during the first three months of residence*”, but not until a Union citizen has acquired a permanent right of residence (which is usually the case after a period of residence of five years<sup>254</sup>). It would mean, *a contrario*, that equality of treatment may be the rule after the first three months of residence. This corresponds to the approach of the Union legislature: in the initial proposal of the Directive the European Commission formulated an exclusion until having acquired a right of permanent residence. Subsequently, however, this exclusion was modified during the legislative process in favour of the current rule (exclusion only for the first three months of residence) in order to take account of the CJEU’s judgment in the *Grzelczyk* case.<sup>255</sup> In its judgment in the *Brey* case, other than in the *Dano* case, the CJEU referred to this provision as well as to Article 14(3) of Directive 2004/38/EC (paragraph 70).

However, being able to invoke the principle of non-discrimination does not mean that an economically inactive Union citizen may (like nationals and economically active Union citizens) claim SNCBs from the very first day after having entered the host Member State and under all circumstances. Already

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<sup>253</sup> Cf above 2.1.2.1, a) The right of residence of economically inactive Union citizens.

<sup>254</sup> Cf Article 16 et seq of Directive 2004/38/EC.

<sup>255</sup> Cf Article 21(2) – first draft of the Directive, COM (2001) 257 final, OJ C 270E, 5.9.2001, p. 150, and the reasons for the modification, COM (2003) 199 final, OJ C 76, 25.04.2004, p. 13. Cf for more details F. Wollenschläger, *Grundfreiheit ohne Markt*, Mohr Siebeck, Tübingen, 2007, p. 275 et seq.

Article 24(2) of Directive 2004/38/EC explicitly excludes, as just mentioned, equal access to social assistance during the first three months of residence. Furthermore, the CJEU made the claim dependent on an assessment of the duration of residence,<sup>256</sup> the personal situation of the claimant,<sup>257</sup> her or his integration into the host Member State,<sup>258</sup> the nature of the benefit in question<sup>259</sup> and the consequences for the national social system.<sup>260</sup> <sup>261</sup> Hence, only (but at least) “*a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States*” (cf e.g. *Brey*, paragraph 72) has been acknowledged. Whereas the *Dano* judgment does not mention this principle,<sup>262</sup> the CJEU has been more explicit in its ruling in the *Brey* case:

*“In the light of all of the foregoing, the answer to the question referred is that EU law [...] must be interpreted as precluding national legislation [...] which, even as regards the period following the first three months of residence, automatically – whatever the circumstances – bars the grant of a benefit, such as the compensatory supplement provided for in Paragraph 292(1) of the ASVG, to a national of another Member State who is not economically active, on the grounds that, despite having been issued with a certificate of residence,*

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<sup>256</sup> Judgment in *Bidar*, C-209/03, EU:C:2005:169; judgment in *Förster*, C-158/07, EU:C:2008:630; judgment in *Gottwald*, C-103/08, EU:C:2009:597.

<sup>257</sup> Judgment in *Brey* EU:C:2013:565, paragraph 64, 69.

<sup>258</sup> Judgment in *Bidar* EU:C:2005:169, paragraph 57 et seq; judgment in *Förster* EU:C:2008:630, paragraph 49 et seq.

<sup>259</sup> Judgment in *Collins*, C-138/02, EU:C:2004:172; judgment in *Ioannidis*, C-258/04, EU:C:2005:559; judgment in *Commission v Austria*, C-75/11, EU:C:2012:605, paragraph 63 et seq.

<sup>260</sup> Judgment in *Bidar* EU:C:2005:169; judgment in *Förster* EU:C:2008:630; judgment in *Brey* EU:C:2013:565.

<sup>261</sup> Cf on the concept of a gradual integration of Union citizens in the host Member State C. Schönberger, *Unionsbürger*, Mohr Siebeck, Tübingen, 2005, p. 407 et seq; D. Thym, ‘Sozialleistungen für und Aufenthalt von nichterwerbstätigen Unionsbürgern’, (2014) *NZS*, 81, 87 et seq; F. Wollenschläger, *Grundfreiheit ohne Markt*, Mohr Siebeck, Tübingen, 2007, p. 253 et seq.

<sup>262</sup> Unlike Advocate General Wathelet in his opinion to this case (Opinion of Advocate General Wathelet in *Dano* EU:C:2014:341, paragraph 127).

*he does not meet the necessary requirements for obtaining the legal right to reside on the territory of the first Member State for a period of longer than three months, since obtaining that right of residence is conditional upon that national having sufficient resources not to apply for the benefit.” (paragraph 80)*

The *Grzelczyk* case constitutes one further example of this approach for a limited, albeit not absolute claim to equal access to social benefits.<sup>263</sup>

Finally, it should be noted that important questions have been left open by the CJEU’s case law. It remains to be determined whether a Member State may only rely on the justification of protecting the national social assistance system when “*the grant of a social security benefit could place a burden on that Member State’s social assistance system as a whole*”,<sup>264</sup> which is a very strict test. Or, may unreasonableness also be assessed in view of the individual claimant? For this the judgment in the *Dano* case might be an authority.<sup>265</sup> A further crucial issue is whether a Member State may lay down general rules for

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<sup>263</sup> Judgment in *Grzelczyk* EU:C:2001:458, paragraph 27 et seq.

<sup>264</sup> Judgment in *Brey* EU:C:2013:565, paragraph 72. Cf also the judgment in *Bidar* EU:C:2005:169, paragraph 56, which might read slightly less strict: “*On this point, it must be observed that, although the Member States must, in the organisation and application of their social assistance systems, show a certain degree of financial solidarity with nationals of other Member States (see Grzelczyk, paragraph 44), it is permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State*”.

<sup>265</sup> Cf the judgment in *Dano* EU:C:2014:2358, paragraph 74: “*To accept that persons who do not have a right of residence under Directive 2004/38 may claim entitlement to social benefits under the same conditions as those applicable to nationals of the host Member State would run counter to an objective of the directive, set out in recital 10 in its preamble, namely preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State.*” Cf also D. Thym, ‘The elusive limits of solidarity: Residence rights of and social benefits for economically inactive Union citizens’, (2015) *CML Rev* 52, 17, 27 et seq.

access to benefits (which facilitates administrative practice) or whether an individual assessment on a case-by-case basis is required.<sup>266</sup>

#### 2.1.2.2 Dano: a reversal of the CJEU's case law?

In *Dano*, the CJEU rejected a claim for income-related SNCBs by an economically inactive Union citizen who did not have sufficient resources to finance her living in the host Member State. Does this mean that the former case law with its limited claim to SNCBs for this category of persons, which has just been discussed, has been overruled? This is not the case, for the CJEU's ruling in *Dano* may be interpreted in two opposite ways. Not only may it be considered a reversal of the CJEU's former case law on Union citizenship granting economically inactive Union citizens a limited access to social assistance in the host Member State. It may also, in view of the particular facts of the case (Ms Dano did not intend to seek a job in Germany, but solely moved there in order to gain access to social benefits), be interpreted in line with the former CJEU case law.<sup>267</sup>

Some authors argue that with its clear rejection of Ms Dano's claim for entitlement to social assistance in Germany, the CJEU sets a "*prominent counterpoint to the expansive reading of Union citizenship in earlier case law*".<sup>268</sup> Understood as a reaction to anti-European developments within the

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<sup>266</sup> Cf for the former solution the opinion of Advocate General Wathelet in *Dano* EU:C:2014:341, paragraph 132: "I also note that the Court has held, admittedly in a different context, that 'generally speaking, it cannot be insisted that a measure [...] should involve an individual examination of each particular case [...], since the management of the regime concerned must remain technically and economically viable'; cf also the judgment in *Förster* EU:C:2008:630. Emphasising the need for a case-by-case assessment: judgment in *Prete*, C-367/11, EU:C:2012:668, paragraph 51. Cf further D. Thym, 'Sozialleistungen für und Aufenthalt von nichterwerbstätigen Unionsbürgern', (2014) *NZS*, 81, 85 et seq.

<sup>267</sup> Similarly H. Verschuere, 'Preventing "Benefit tourism" in the EU: a narrow or broad interpretation of the possibilities offered by the ECJ in *Dano*', (2015) *CML Rev* 52, 363, 370 et seq.

<sup>268</sup> D. Thym, *VerfBlog* 2014/11/12, <http://www.verfassungsblog.de/en/eu-freizuegigkeit-als-rechtliche-konstruktion-nicht-als-soziale-imaginatio/#.VSS78I5OKt8> (7 April 2015).

Union in general and to the criticism in view of the CJEU allegedly promoting “social tourism” in particular and therefore as a probably wise decision from a political point of view,<sup>269</sup> the ruling of the CJEU may be interpreted as generally excluding economically inactive persons from social assistance in the host Member State, without assessing their individual background or motivation for moving on a case-by-case basis. The general wording of paragraph 2 of the CJEU’s *dictum* may support such a broad interpretation.<sup>270</sup> It reads:

*“Article 24(1) of Directive 2004/38/EC [...] must be interpreted as not precluding legislation of a Member State under which nationals of other Member States are excluded from entitlement to certain ‘special non-contributory cash benefits’ within the meaning of Article 70(2) of Regulation No 883/2004, although those benefits are granted to nationals of the host Member State who are in the same situation, in so far as those nationals of other Member States do not have a right of residence under Directive 2004/38/EC in the host Member State.”*

Additionally, any reference to the principle of proportionality is lacking and one may instead read the introduction of a “*right-to-reside-under-Directive 2004/38/EC-test*” into the ruling.<sup>271</sup> To complete the picture, the opinion of Advocate General Wathelet in the *Alimanovic* case follows the same lines and does not mention the CJEU’s former case law, including *Brey*, when discussing the situation of “*a national of a Member State who moves to the territory of another Member State and stays there for less than three months,*

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<sup>269</sup> In this regard cf H. Verschuere, ‘Preventing “Benefit tourism” in the EU: a narrow or broad interpretation of the possibilities offered by the ECJ in *Dano*’, (2015) *CML Rev* 52, 363, 363 et seq; D. Thym, (2015) *CML Rev* 52, 17, 20 et seq.

<sup>270</sup> Cf H. Verschuere, *op cit*, (2015) *CML Rev* 52, 363, 377.

<sup>271</sup> Cf H. Verschuere, *op cit*, (2015) *CML Rev* 52, 363, 378.

*or for more than three months but without pursuing the aim of seeking employment there”*.<sup>272</sup>

Nonetheless, such an understanding of *Dano* as overruling the former case law of the CJEU on Union citizenship is questioned by the fact that the judgment does not mention the CJEU’s former case law on Union citizenship with a single word, in particular its rulings in the cases *Baumbast*,<sup>273</sup> *Grzelczyk*<sup>274</sup> and *Brey*.<sup>275</sup> In these cases, the CJEU relativised the economic conditions of residence for economically inactive Union citizens moving from one Member state to another and also (in *Grzelczyk* and *Brey*) granted Union citizens limited access to social assistance in the host Member State even if not fulfilling the economic residence criteria.<sup>276</sup> Moreover, the *Dano* case is based on a very specific factual background. The CJEU explicitly underlines in its findings that Ms Dano is not only an economically inactive person, but also moved to Germany solely in order to gain access to social benefits (paragraph 66 et seq and 78 – emphasis added):

*“It is apparent from the documents before the Court that Ms Dano has been residing in Germany for more than three months, that she is not seeking employment and that she did not enter Germany in order to work. She therefore does not fall within the scope ratione personae of Article 24(2) of Directive 2004/38/EC. In those circumstances, it must be established whether Article 24(1) of Directive 2004/38/EC and Article 4 of Regulation No 883/2004 preclude refusal to grant social benefits in a situation such as that at issue in the main proceedings [...].*

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<sup>272</sup> **Opinion of Advocate General Wathelet in *Alimanovic*, C-67/14, EU:C:2015:210, paragraph 88 et seq.**

<sup>273</sup> **Judgment in *Baumbast* EU:C:2002:493.**

<sup>274</sup> **Judgment in *Grzelczyk* EU:C:2001:458.**

<sup>275</sup> **Judgment in *Brey* EU:C:2013:565.**

<sup>276</sup> **Cf in detail above, 2.1.2.1 a) The right of residence of economically inactive Union citizens.**

*A Member State must therefore have the possibility, pursuant to Article 7 of Directive 2004/38/EC, of refusing to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State's social assistance although they do not have sufficient resources to claim a right of residence.”*

Against this background, it is perfectly in line with the (former) CJEU's case law to deny access to the SNCB at issue, since such an exclusion does not seem disproportionate in view of the facts of the case.<sup>277</sup> For these reasons, a narrow interpretation seems to be favourable.<sup>278</sup>

#### 2.1.2.3 SNCBs for jobseekers, family members, persons with a permanent resident right, former workers retaining their status as workers and workers with low income

As a last and very important point, it should be emphasised that, irrespective of its wide or narrow interpretation, the judgment in the *Dano* case as well as the *Brey* case do not cover all situations in which access to SNCBs (of economically inactive persons) is at issue. Rather, specific rules apply to jobseekers (1), family members (2), persons with a permanent resident right (3), (former) workers (4) or workers with low income (5).

##### **a) SNCBs for jobseekers**

Since Ms Dano had not entered Germany in order to seek employment and the judgment consequently did not address this situation (cf paragraph 66), it has

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<sup>277</sup> Cf F. Wollenschläger, 'Keine Sozialleistungen für nichterwerbstätige Unionsbürger? Zur begrenzten Tragweite des Urteils des EuGH in der Rs. Dano vom 11.11.2014', (2014) *NVwZ*, 1628, 1630.

<sup>278</sup> Similarly H. Verschueren, *op cit*, (2015) *CML Rev* 52, 363; F. Wollenschläger, *op cit*, (2014) *NVwZ*, 1628, 1630.



remained unclear whether and to what extent jobseekers are entitled to equal access to SNCBs (including the German SNCB at issue in the *Dano* case).

Residence Directive 2004/38/EC grants jobseekers an (unconditional) right of residence even for periods of residence exceeding three months “*as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged*” (Article 14(4)(b)). However, this privileged situation vis-à-vis other economically inactive persons (whose right of residence depends on the economic criteria stipulated by Article 7(1)(b) of Directive 2004/38/EC) goes hand in hand with an exclusion from entitlement to social assistance in the host Member State (cf Article 24(2)) of Residence Directive 2004/38/EC).

In *Dano*, the CJEU confirmed that this exclusion also applies to SNCBs. For, the concept of social assistance “*refers to all assistance schemes established by the public authorities, whether at national, regional or local level, to which recourse may be had by an individual who does not have resources sufficient to meet his own basic needs and those of his family and who by reason of that fact may, during his period of residence, become a burden on the public finances of the host Member State which could have consequences for the overall level of assistance which may be granted by that State*” (paragraph 63; also *Brey*, paragraph 61 *et seq.*).

However, this does not mean that jobseekers may be totally excluded from entitlement to SNCBs. First, in its *Collins* case law, the CJEU acknowledged that,

“*[i]n view of the establishment of citizenship of the Union and the interpretation in the case-law of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of [Article 45 para. 2 TFEU] – which expresses the fundamental principle of equal treatment, guaranteed by [Article 18 TFEU] – a benefit of a financial*

*nature intended to facilitate access to employment in the labour market of a Member State.*<sup>279</sup>

Nonetheless, the Member States may define conditions for entitlement such as an appropriate minimum period of residence, if these conditions are applied to ensure that “*a genuine link exists between the person seeking work and the employment market of that State*”.<sup>280</sup> The CJEU’s findings in *Collins* do not allow for a substantial residence requirement. In fact, a period of residence must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State (paragraph 63).

Moreover, the *Prete* case has even extended the aspects to be taken into account when assessing the genuine link to the labour market of the host Member State:

*“The existence of close ties, in particular of a personal nature, with the host Member State where the claimant has, following her marriage with a national of that Member state, settled and now habitually resides are such as to contribute to the appearance of a lasting connection between the claimant and the Member State in which she has newly established herself, including with the labour market of the latter”.*<sup>281</sup>

It is obvious that this case law does not justify a total exclusion of jobseekers from social benefits as provided for in Article 24(2) of Directive

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<sup>279</sup> Judgment in *Collins* EU:C:2004:172, paragraph 63; cf further the judgment in *Vatsouras and Koupatantze*, C-22/08 and 23/08, EU:C:2009:344; judgment in *Prete* EU:C:2012:668, paragraph 51.

<sup>280</sup> Judgment in *Collins* EU:C:2004:172, paragraph 69; cf the judgment in *Vatsouras and Koupatantze* EU:C:2009:344, paragraph 38; judgment in *Prete* EU:C:2012:668, paragraph 32 et seq.

<sup>281</sup> Judgment in *Prete* EU:C:2012:668, paragraph 50.

2004/38/EC.<sup>282</sup> Consequently, in *Vatsouras*, the CJEU did not apply this exclusion to such benefits covered by Article 45(2) TFEU:

*“Benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting ‘social assistance’ within the meaning of Article 24(2) of Directive 2004/38/EC.”*<sup>283</sup>

This reasoning partially conflicts with *Dano*, i.e. if an SNCB is also qualified as a ‘Collins benefit’, for *Dano* has generally applied Article 24(2) of Directive 2004/38/EC to SNCBs. In this case, in view of the primacy of EU primary law over secondary law, the exclusion may only apply to the extent covered by the *Collins* case law.<sup>284</sup>

Even if an SNCB granted to jobseekers does not qualify as a ‘Collins benefit’ and thus only Articles 18/21 TFEU apply, it is questionable whether a complete exclusion of jobseekers is in line with these provisions of EU primary law. After all, if economically inactive persons may claim a limited access to SNCBs in the host Member State,<sup>285</sup> such a reasoning might all the more apply to jobseekers in view of their Janus-faced status as potential market actors.<sup>286</sup> Consequently, in *Vatsouras*, the CJEU held that “[i]n any

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<sup>282</sup> Cf only LSG (Social Court of Second Instance) Nordrhein-Westfalen of 12 March 2014, L 7 AS 106/14 B ER; T. Kingreen, ‘Migration und Sozialleistungen - Rechtliche Anmerkungen zu einem bayerischen Aufreger’, (2014) *BayVBl*, 289, 294. Disagreeing, LSG Bayern, (2014) *NZS*, 308. Cf for more details and from a comparative perspective F. Wollenschläger & J. Ricketts, ‘Jobseekers’ Residence Rights and Access to Social Benefits: EU Law and its Implementation in the Member States’, (2014) *FMW – Online Journal on Free Movement of Workers within the European Union* 7, p. 8, <http://ec.europa.eu/social/main.jsp?catId=737&langId=en&pubId=7690&type=1&furtherPubs=yes> (8 April 2015).

<sup>283</sup> Judgment in *Vatsouras and Koupatantze* EU:C:2009:344, paragraph 45.

<sup>284</sup> Cf also the opinion of Advocate General Wathelet in *Alimanovic* EU:C:2015:210, paragraph 112 et seq.

<sup>285</sup> Cf above, 2.1.2.1 b) Access of economically inactive Union citizens to social benefits.

<sup>286</sup> Cf F. Wollenschläger & J. Ricketts, op cit, (2014) *FMW – Online Journal on Free Movement of Workers within the European Union* 7, p. 8 et seq, <http://ec.europa.eu/social/main.jsp?catId=737&langId=en&pubId=7690&type=1&furtherPubs=yes> (8 April 2015).

*event, the derogation provided for in Article 24(2) of Directive 2004/38/EC must be interpreted in accordance with Article 39(2) EC [=Article 45(2) TFEU].”<sup>287</sup>*

However, Advocate General Wathelet has, in his opinion in the *Alimanovic* case (paragraph 98), excluded first-time jobseekers from access to social assistance (which seems questionable for the reasons just mentioned). He states

*“[t]hat exclusion is consistent, not only with the wording of Article 24(2) of Directive 2004/38/EC, in that it authorises the Member States to refuse, beyond the period of the first three months of residence, to grant social assistance to the nationals of other Member States who have entered the territory of the host Member State to seek employment, but also with the objective difference – established in the case-law of the Court and, inter alia, in Article 7(2) of Regulation No 492/2011 – between the situation of nationals seeking their first job in the territory of the host Member State and that of those who have already entered the [labour] market.”*

#### **b) SNCBs for family members**

Generally speaking, the residence right of family members of economically inactive Union citizens depends on the aforementioned economic criteria unless they enjoy an (unconditional) right of residence as economically active Union citizens themselves. Article 24(1), sentence 2 of Directive 2004/38/EC extends the claim for non-discrimination to family members of Union citizens. Hence, the same rules as discussed above apply.

One important exception has to be noted, though. Following the CJEU’s case law, Article 10 of Regulation (EU) No 492/2011 implies an unconditional

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<sup>287</sup> Judgment in *Vatsouras and Koupatantze* EU:C:2009:344, paragraph 44.

right of residence for children of EU workers attending general educational courses in the host Member State (irrespective of the right of residence of their parents). This right has also been extended to the parent who is acting as primary carer,<sup>288</sup> at least until the child reaches the age of majority or is still in need of the presence of that parent in order to complete education.<sup>289</sup> Since these persons enjoy a right of residence, they are also able to rely on the non-discrimination principle in order to gain access to social benefits, including SNCBs, be it on the basis of Article 24 of Directive 2004/38/EC (even if their residence right is derived from a provision of Regulation (EU) No 492/2011 and not directly from Article 24(1) of the Residence Directive), Article 4 BR, Article 7(2) of Regulation (EU) No 492/2011, Article 45(2) TFEU or Article 18 TFEU.<sup>290</sup>

### **c) SNCBs for persons with a permanent residence right**

Pursuant to Article 16(1), sentence 1 of Directive 2004/38/EC, persons “*who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there*”. The right of permanent residence does not depend on economic criteria; moreover, access to social assistance and SNCBs has to be granted according to Article 24 of Directive 2004/38/EC.

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<sup>288</sup> Judgment in *Baumbast* EU:C:2002:493, paragraph 63, 68 et seq; further the judgment in *Ibrahim*, C-310/08, EU:C:2010:80, paragraph 32 et seq and judgment in *Teixeira*, C-480/08, EU:C:2010:83, paragraph 43 et seq. Cf in detail F. Wollenschläger, ‘Aktuelle Fragen der EU-Personenfreizügigkeit’, in A. Achermann, M. Caroni, A. Epiney, W. Kälin, M. S. Nguyen & P. Uebersax (eds), *Jahrbuch für Migrationsrecht 2009/2010*, Stämpfli, Bern, 2010, p. 3, 20 et seq.

<sup>289</sup> Judgment in *Teixeira* EU:C:2010:83, paragraph 76 et seq.

<sup>290</sup> Cf in this respect H. Verschueren, op cit, (2015) *CML Rev* 52, 363, 376.

#### **d) SNCBs for former workers retaining their status of workers**

Union workers within the meaning of Article 45 TFEU enjoy a comprehensive and absolute claim to equal treatment with national workers regarding access to social benefits (cf Article 7(2) of Regulation (EC) No 492/2011, Article 45(2) TFEU). In particular, no residence requirement may be justified.<sup>291</sup> It should be added, though, that with regard to frontier workers, in its recent case law, the CJEU has accepted the requirement of a “*sufficient link of integration with the society of that State*”.<sup>292</sup>

In view of access to SNCBs, it has to be highlighted that, under certain circumstances, a former worker retains her or his status of worker. The conditions are listed in Article 7(3) of Directive 2004/38/EC and relate to certain cases of temporary unability to work, involuntary unemployment and vocational training. According to the case law of the CJEU these reasons are not exhaustive. Hence, (appropriate) maternity leave does not lead to a loss of

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<sup>291</sup> Cf e.g. the judgment in *Hoeckx*, C-249/83, EU:C:1985:139, paragraph 23 et seq; judgment in *Commission v Luxembourg*, C-299/01, EU:C:2002:394, paragraph 12, 14; judgment in *Frascoigna*, C-157/84, EU:C:1985:243, paragraph 24; judgment in *Commission v Belgium*, C-326/90, EU:C:1992:419. Disagreeing e.g. J. Steiner, ‘The right to welfare: equality and equity under Community law’, (1985) *EL Rev* 10, 21, 41. Cf on this issue F. Wollenschläger, *Grundfreiheit ohne Markt*, Mohr Siebeck, Tübingen, 2007, p. 38 et seq; idem, op cit, (2011) *ELJ* 17, 1, 6.

<sup>292</sup> Cf the judgment in *Giersch*, C-20/12, EU:C:2013:411, paragraph 63 (return to State after studies (paragraph 79) or parent has worked in the State for a certain minimum period of time (paragraph 78, 80)); judgment in *Krier*, C-379/11, EU:C:2012:798, paragraph 53 (participation in the employment market and therefore contribution to the financing of social security (paragraph 53)); judgment in *Commission v the Netherlands*, C-524/09, EU:C:2012:346, paragraph 64 (participation in the employment market and therefore contribution to the financing of social security (paragraph 66)); judgment in *Geven*, C-213/05, EU:C:2007:438, paragraph 26 (substantial occupation (paragraph 26, 29)); judgment in *Hartmann*, C-212/05, EU:C:2007:437, paragraph 35 et seq (substantial contribution to the national labour market (paragraph 36)). Cf further the judgment in *Hendrix*, C-287/05, EU:C:2007:494, paragraph 57 et seq.

the status of worker.<sup>293</sup> Moreover, the application of Article 7(3) of Directive 2004/38/EC raises further questions beyond the scope of this analysis.<sup>294</sup>

Finally, in his opinion in the *Alimanovic* case, Advocate General Wathelet (paragraph 97 et seq) argued in favour of an entitlement of former workers seeking a new job to SNCBs (under certain circumstances), even if not fulfilling the criteria of Article 7(3) of Directive 2004/38/EC, if “*the existence of a genuine link with the host Member State*” may be established:

*“In that regard, in addition to matters that can be inferred from family circumstances (such as the children’s education), the fact that the person concerned has, for a reasonable period, in fact genuinely sought work is a factor capable of demonstrating the existence of that link with the host Member State. Having worked in the past, or even the fact of having found a new job after applying for the grant of social assistance, ought also to be taken into account in that connection.”*

#### **e) Social assistance for workers with low income**

It should be mentioned that the concept of worker in EU law is broad, so that also persons with low income or working only for a few hours per week may qualify as workers as long as the employment is “effective and genuine”.<sup>295</sup> The CJEU confirmed the status of worker for interns,<sup>296</sup> part-time employees working three to 14 hours per week<sup>297</sup> as well as employees with such a low

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<sup>293</sup> Judgment in *Saint Prix*, C-507/12, EU:C:2014:2007, paragraph 27 et seq.

<sup>294</sup> Cf S. Mantu, ‘Analytical Note on the Retention of EU worker status – Article 7(3)(b) of Directive 2004/38’, available at <http://ec.europa.eu/social/main.jsp?catId=475&langId=en&moreDocuments=yes> (8 April 2015).

<sup>295</sup> See, inter alia, the judgment in *Kempf*, C-139/85, EU:C:1986:223, paragraph 14.

<sup>296</sup> Judgment in *URSSAF*, C-27/91, EU:C:1991:441, paragraph 8; judgment in *Bernini*, C-3/90, EU:C:1992:89, paragraph 15 et seq.

<sup>297</sup> Judgment in *Geven* EU:C:2007:438, paragraph 17; judgment in *Kempf* EU:C:1986:223, paragraph 11 et seq; judgment in *Nolte*, C-317/93, EU:C:1995:438, paragraph 19.

income that they have to rely on social assistance.<sup>298</sup> Again, persons qualified as workers according to this case law enjoy a comprehensive and absolute claim to equal treatment regarding access to social benefits.<sup>299</sup>

### 2.1.3 Conclusion

The case law of the CJEU, in particular *Brey* and *Dano*, shows that rules of access by economically inactive Union citizens to social benefits are far from clear. Not only can several categories of inactive migrants be identified, but the CJEU rulings themselves are subject to various interpretations. Even if the approach of a limited claim to social benefits definitely prevails, the nature of the limits is still largely unknown.

## 2.2 Assessment of the proposal (pros/cons)

When looking to the impacts of the *status quo* proposal from a legal and practical angle, the evaluation is ambiguous.

### 2.2.1 Clarification

The *status quo* leaves open a series of fundamental questions. What should be the status of jobseekers, of workers with low income, of family members, of former workers retaining their status of workers? How to deal with persons who have a genuine link with the Member State where they claim social assistance? Do some differences have to be made between social assistance benefits according to their objectives or nature? Furthermore, the concrete

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<sup>298</sup> Judgment in *Levin*, C-53/81, EU:C:1982:105, paragraph 11 et seq; judgment in *Kempf* EU:C:1986:223, paragraph 13 et seq; judgment in *Nolte* EU:C:1995:438, paragraph 19; judgment in *Mattern*, C-10/05, EU:C:2006:220, paragraph 22.

<sup>299</sup> Cf above, 2.1.2.3 d) SNCBs for former workers retaining their status of workers.



application of the test of proportionality is another source of uncertainty. It is indeed unclear under which circumstances a Member State can deny a social assistance payment because of an unreasonable burden on its financial system.<sup>300</sup> In the *Brey/Dano* judgments, the CJEU underlined that the exemption from the equal treatment principle enshrined in Article 24(1) of Directive 2004/38/EC and Article 4 BR needs a clear and substantial justification by the specific circumstances of the given case. This case-by-case reasoning makes it difficult to identify a well-established general rule.

The case law emphasises<sup>301</sup> the right of the Member States to opt out from the equal treatment principle but also from the principles of EU coordination law. In the *Sala*<sup>302</sup> judgment, the CJEU held that it is not forbidden for the Member States to reduce the access to welfare benefits. But if this is done, it should be figured out on a clear and explicit legal basis, not through uncodified case law.

This possibility to give less credit to the principle of equality of treatment set out in Article 4 BR will have a great impact on the Member States, as they have a broad and diverging understanding of social assistance (see 2.3 below). The latter concept is not restricted to means-tested benefits for needy persons, but it refers to a great variety of tax-financed social benefits, e.g. with regard to assisting persons with special needs due to sickness, unemployment or low income, persons of young or old age, with disabilities or an extraordinary burden to be borne (e.g. single parents, caretakers) or with regard to safeguarding the mobility of the persons entitled or other cases of elementary

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<sup>300</sup> Judgment in *Brey* EU:C:2013:565; H. Verschuere, 'Free Movement or benefit tourism: The Unreasonable Burden of Brey', (2014) *European Journal of Migration and Law* 16, 147-179, 170 et seq.

<sup>301</sup> Judgment in *Brey* EU:C:2013:565; H. Verschuere, op cit, (2014) *European Journal of Migration and Law* 16, 147-179, 160 et seq; H. Verschuere, 'Preventing "benefit tourism" in the EU: A narrow and a broad interpretation of the possibilities offered by the CJEU in Dano?', (2015) *Common Market Law Review* 52, 363-390, 370 et seq.

<sup>302</sup> Judgment in *Sala* EU:C:1998:217.

need. The material scope of the exemption is therefore vast and broad, but is defined by each Member State.

A further difficulty results from the various Member States' laws which define the conditions for benefit entitlement (see 2.3 below). The entitlement may not only depend on nationality, but also on minimum waiting periods. Member States do not necessarily have a coherent system to identify entitlement to social assistance. Among the national legislations a great variety of rules may be found. Further differences can be observed as to the formal requirements which are to be fulfilled when applying for benefits: registration, an examination of a person's employability, or the test whether a person has her or his habitual residence in a given Member State. There are many different criteria to determine a person's habitual residence. Therefore, when one compares the legislations of the Member States there is no common rule under which circumstances a social assistance benefit matures.

### 2.2.2 *Simplification*

The modernised EU coordination legislation originated in the EU's 'SLIM' initiative<sup>303</sup>: Simpler Legislation for the Internal Market. To set 'simple' rules means to design legislation that is easy to be understood by the persons addressed and clear to apply by the administrations of the Member States. Simplification of law is important to create a law which becomes relevant in social reality.

Under the auspices of simplification of coordination law, Option 1 is problematic. First, if abstaining from codifying case law may be seen as a way to avoid more complex rules in the coordination Regulations, the *status quo*

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<sup>303</sup> **Simpler legislation for the internal market (SLIM): a pilot project. Communication from the Commission to the Council and the European Parliament. COM (96) 204 final, 8 May 1996.**

will leave unanswered many questions about the interpretation of *Brey/Dano* (see 2.2.1 above). Second, the *status quo* would make the situation of non-active persons very complex with regard to social security coordination rules. In the *Pinna I* judgment<sup>304</sup> the CJEU held that it is not permissible for EU law to increase the disparities that stem from the absence of harmonisation of national legislation. That would be the indirect consequence of the *status quo*.

### 2.2.3 Protection of rights

The overall target of coordination rules is to protect migrants from any loss of social security protection whilst using the fundamental freedom of EU law.<sup>305</sup> For all persons covered by a national social security system, these rules avoid both a double coverage in two Member States' systems and the lack of coverage.<sup>306</sup> If different Member states define the personal scope of their social security systems differently, these objectives are in danger. In further judgments, as to the BR the CJEU held that it has “*not only to prevent the simultaneous application of a number of national legislative systems and the complications which might ensue, but also to ensure that the persons covered by Regulation No 1408/71 are not left without social security cover because*

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<sup>304</sup> Judgment in *Pinna v Caisse d'allocations familiales de la Savoie*, C-41/84, EU:C:1986:1,1.

<sup>305</sup> Judgment in *Van der Veen*, C-100/63, EU:C:1964:65; judgment in *Ciechelsky*, C-1/67, EU:C:1967:27; judgment in *Segers*, C-79/85, EU:C:1986:308; W. Brechmann, in C. Calliess & M. Ruffert, *EUV/AEUV*, Beck, München, 2011, Article 48 AEUV Rn. 14 et seq; R. Langer, in M. Fuchs, *Europäisches Sozialrecht*, Beck, München, 2013 (6th edition), Article 48 AEUV Rn. 6 et seq.

<sup>306</sup> Judgment in *Van der Vecht*, C-19/67, EU:C:1967:49; judgment in *Perenboom*, C-102/76, EU:C:1977:71; judgment in *Kuijpers*, C-276/81, EU:C:1982:317; judgment in *Ten Holder*, C-302/84, EU:C:1986:242; judgment in *De Paep*, C-196/90, EU:C:1991:381; judgment in *Sehrer*, C-302/98, EU:C:2000:322; judgment in *Commission v Germany*, C-68/99, EU:C:2001:137; S. Devetzi, *Die Kollisionsnormen des Europäischen Sozialrechts*, Duncker & Humblot, Berlin, 2000, 39 et seq; F. Pennings, *Introduction to European Social Security Law*, Kluwer Law International, The Hague, 1998 (2<sup>nd</sup> edition), 71 et seq.

*there is no legislation which is applicable to them.*”<sup>307</sup> The *status quo* might, however, have this effect if a person applies in the Member State of her or his residence for a social benefit which is to be qualified as an SNCB under the BR, but does not fulfil the criteria for this social assistance benefit in the legislation of the competent State.

Option 1 encourages a limitation of migrants’ access to social benefits. A needy migrant, who entered a Member State as an unself-sufficient person, may not be entitled to social assistance benefits from her or his State of residence and will neither qualify – due to the lack of legal residence – for the social assistance benefits from his or her previous State of residence. This person is likely to be deprived of social protection completely.

The *Brey/Dano* case law leads to distinctions between the coordination of SNCBs at EU level on one side and social assistance payments by countries at national level on the other side. Both types of benefits become a matter of shared responsibility for the EU and the Member States. This is new, but not unique. Under EU law a principle of ‘more favourable treatment’ between EU law and the Member States’ domestic rules is acknowledged. In the past, in particular in the *Bosmann*<sup>308</sup> and *Hudzinski*<sup>309</sup> cases, the CJEU set rules where social security coordination is built upon a European and a Member States level. When a Member State’s law gives more rights to the beneficiary than the EU rule, the CJEU held that EU law should not hinder more preferential entitlements to family benefits. The recent *Franzen* case confirmed this methodology.<sup>310</sup> This way to cope with competing legislations from different sources is, however, not translated into the *Brey* and *Dano* cases. If Member

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<sup>307</sup> Judgment in *Kits van Heijningen*, C-2/89, EU:C:1990:183, paragraph 12; judgment in *De Paep* EU:C:1991:381, paragraph 18.

<sup>308</sup> Judgment in *Bosmann*, C-352/06, EU:C:2008:290.

<sup>309</sup> Judgment in *Hudzinski*, C-611/10, EU:C:2012:339.

<sup>310</sup> Judgment in *Franzen*, C-382/13, EU:C:2015:261.

States' social assistance laws differ as to the nationality of the applicant, whereas EU law does not, the outcome is detrimental to the beneficiary.

The consequence of the *Brey* and *Dano* case law will be to restrict social assistance rights by the mere fact that the Member State of residence is changed. In this respect, the proposal does not contribute to widening the social protective function of the EU law.

#### *2.2.4 Administrative burden and implementation arrangements*

The *Brey* and *Dano* cases will increase the burden for national administrations. The assessment of 'legal residence' will need to be carried out in a reliable manner by a public body. Additionally, some Member States (see 2.3 below) may impose further tests to be applied by the administrations as to the employability, substantive work or successful search for work. Social administrations, which have to decide on social assistance benefits, will have to control many facts and situations occurring within the competent Member State. Distinctions will have to be made at national level between social assistance benefits, between claimants (jobseekers, workers with low income etc); the concept of 'financial solidarity' will have to be implemented; and the 'genuine link' principle needs to be concretised. Uncodified case law will make the missions of national welfare institutions hugely complex.

For instance, the assessment as to what degree a social benefit would constitute an unreasonable burden for a Member State's welfare administration is hard to make. How should this requirement be tested? Does the individual case count or is the trend in general the decisive indicator? Which are the determining factors to identify such a burden? Which burden qualifies as unbearable (see 2.1 above)? All these criteria are vague, contingent and depend on a variety of facts which also undergo changes over time. For both the administration and the judiciary this seems to be difficult to deal with.

Option 1 will increase administrative procedures, bureaucratisation of mobility and will also make fundamental freedoms more difficult to be utilised.

#### 2.2.5 *Avoiding the risk of fraud and abuse*

The debate on poverty migration within Europe is driven by the concern of a fraudulent creation of social entitlements by making use of the fundamental freedoms of EU law.<sup>311</sup> Following the economic theory on the 'welfare magnet',<sup>312</sup> a generous welfare system attracts migration of poor and welfare-dependent persons.

Notably the *Dano* case can at first glance be seen as an easy way to control fraud and abuse. Limits set by the CJEU should save countries from paying undue social assistance benefits. In the public debate the exemption of social assistance from the equal treatment clause is connected with the combat against fraud and abuse.

Does Option 1 entail risks of double payment? The *Dano* case does not modify the principle in accordance with which the Member State in which the person does not habitually reside (be it the home State or the host State) is in general free from "SNCB burden". In sum, the State of habitual residence is competent; any other State can refuse benefits on the ground that it is not competent. Therefore, the risk of double payment seems to be largely reduced by Regulation (EC) No 883/2004.

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<sup>311</sup> K. Hailbronner, 'Die Unionsbürgerschaft und das Ende rationaler Jurisprudenz durch den EuGH?', (2004) *NJW*, 2185.

<sup>312</sup> C. Grulielli & J. Wanba. 'Welfare Migration', in A. F. Constant & K. F. Zimmermann (eds), *International Handbook on the Economics of Migration*, Edward Elgar, Cheltenham/Northampton, 2013, 489; G. J. Borgas, 'Immigration and Welfare Magnet', (1999) *Journal of Labor Economics* 17, 607-613; J. K. Brueckner, 'Welfare Reform and race to the Bottom: Theory and Evidence', (2000) *Southern Economic Journal* 66(3), p. 505-525; E. Eichenhofer & C. Abig, *Zugang zu Steuerfinanzierten Sozialleistungen nach dem Staatsangehörigkeitsprinzip?*, LIT, Münster, 2004.

This said, in a dual system, in which both the Regulation and Residence Directive 2004/38/EC would apply, the risk of double payment could increase for practical reasons. Entitlement to social assistance would largely depend on national rules, in a context of evolving CJEU case law. However, since Option 1 does not include a coordination rule, but simply integrates persons into the solidarity system of the host Member State without addressing the issue of the fate of claims in the country of origin, this may lead to double payments. In borderline cases, in which it is unclear whether or not a person is entitled to minimum income support, the indicators for a genuine link to the competent State will depend on a huge variety of indicators – related to residence and labour market integration – which are difficult to assess, potentially giving leeway to abuse. Because of the legal uncertainties surrounding the interrelation between the Regulation and the Directive, it would become unclear and dubious how to implement the law, both for administrations and courts. This uncertainty could also affect the lacking coordination between the Member States – especially between those who have to manage social assistance benefits for beneficiaries leaving this Member State, and those who have to decide which persons qualify for a social benefit because she or he has established a genuine link in the Member State of residence. It might occur that one Member State continues paying benefits to a beneficiary living outside that Member State and who can successfully apply for benefits in the Member State to which he or she has moved and where he or she tries to establish a genuine link. This creates a category of people “sitting on two stools”. In addition, where a document on the legal residence is issued by the administrations, it can be unclear on which facts such a residence is certified. Quite often the certificate is issued on the basis of the intention to take residence in the Member State, without further proof of whether the residence is actually taken. This practice jeopardises the reliability of the certificates. It also endangers the risk of double payments by both the out and the ingoing Member States as residence can be established easily and formally.

### *2.2.6 Potential financial implications*

The financial impact of the option is hard to assess. The first impression is that it might be possible to think that the overall amount of social assistance benefits paid will be lower in the EU area. However, since each EU Member State will define its own system of entitlement to social assistance, it is likely that the new case law will mainly shift the distribution of the financial burden between EU Member States: those with generous rules of entitlement or loose rules of control may have to pay more benefits.

As mentioned above, fraud may include situations where a migrant might simultaneously receive social assistance in two Member States.

### *2.3 A mapping of the impact in the Member States*

In the Member States examined, the right to social assistance depends on and definitely requires the applicant's permanent stay within the territory of the Member State. This form of stay is conceived as habitual residence, which depends on a permanent residence in a given State. This condition for entitlement to a social assistance benefit in all Member States is compatible with the conditions under which persons are entitled to an SNCB in the context of Regulation (EC) No 883/2004 (Article 11 of Regulation (EC) No 987/2009 (IR)).

In some Member States, like **Cyprus**, the notion of habitual residence is unknown, but the concept is applied in the context of defining a permanent stay. In the **United Kingdom**, the habitual residence test applies to many non-contributory benefits – above all also to EEA jobseekers. Exempted from the test, however, are EEA workers or self-employed persons (which have to do genuine and effective work) and their family members, if they are workers, self-employed, jobseekers, pensioners or self-sufficient, and, finally, persons



who were in the past employed in the United Kingdom, and are temporarily ill, in vocational training, disabled or old.

To test whether a person has her or his habitual residence in a given Member State, a wide range of circumstances is taken into account in national legislation. A person's centre of interest is identified by criteria like the duration of stay, the employment, the living conditions and the relation to family members and further indicators that the person belongs to a given State socially. In **Hungary** the test is based upon the accommodation, the employment and the ability to guarantee the subsistence of the applicant and her or his family. In **Ireland** similar criteria apply, such as the length and continuity of stay, the nature of employment, the centre of interest and future intentions as to the change of permanent stay. In **Germany** a cumulative analysis of various indicators and in **the Netherlands** a global test apply as to a person's genuine link to the labour market and the society of the Member State. These criteria widely correspond with the rules established by Article 11 IR, which stipulates the same criteria than the habitual residence test under domestic law.

The legal concept of social assistance is broad and not to be restricted to means-tested benefits for needy persons. It also includes non-contributory social benefits to assist persons with special needs due to sickness, unemployment (**AT, DE, IE, IT, LV, and UK**), low income (**AT, DE, NL and UK**), their young (**NL**) or old age (**AT, DE, HU, IE, IT, LV, UK**), a disability (**AT, DE, HU, IE, IT, LV and UK**) or an extraordinary burden to be borne – e.g. for single parents (**IE and IT**), caretakers (**LV, LT**) – due to the mobility of the persons entitled (**UH, LT**), housing costs (**UK**) or other cases of elementary need (**IE, UK**).

In addition, **Austria, Cyprus, Germany, Hungary, Italy, Ireland, Latvia, Lithuania** and **the Netherlands** demand from the beneficiaries to have their

legal residence within this Member State. For the **United Kingdom** this condition has to be fulfilled for child benefits, and by jobseekers with regard to entitlements for a means-tested universal benefit, including child and housing benefits. Further conditions for benefits are residence in accordance with the Member States' laws on migration. In some Member States the requirements for a legal residence depend on a minimum period of previous residence, e.g. a minimum period of permanent stay of 20 years (for those under the age of 40 years) or 35 years (for those over the age of 18 years) in the Member State (**CY**); or 60 months and within this period a permanent residence in this State for at least 12 months (**LV**) before the benefit may be requested. In **Austria** the law on EU migration and EU migrants explicitly forbids to take residence without having sufficient resources to safeguard the migrant's subsistence or for purposes other than to take up employment. In this context, the concept of and, hence, the minimum requirements for an adequate employment are formally characterised by law. The right to residence can be temporarily restricted. In the **United Kingdom** this can be done for jobseekers after six months of inefficient search, a lack of linguistic abilities or substantial work.

In the context of the right to social assistance this means that the residence taken must be lawful under the Member State's law on the migration of EU citizens. In addition, there may be formal requirements such as having a personal number for identification, an explicit residence permit issued by the competent Member State (**AT, CY, HU, IE, IT, LV**) or a medical document concerning a person's employability (**LV, UK**). This law has to be in line with the requirements established by Directive 2004/38/EC. The interplay between the factual and the legal concept of residence is, however, not in all Member States clear and settled (e.g. **DE**).

A further fundamental distinction is made by the Member States with regard to the nationality of the beneficiaries. In some of the Member States, the social

minimum protection for jobseekers is excluded for EU migrants. For them, if they come to the Member State where they take their habitual residence, an additional restriction is provided for. This can be based on a further period of up to three months as a jobseeker after the establishment (AT) in the labour market of the Member State of residence or of the beneficiary's nationality.

The decision on the beneficiary's right is singled out as to the specific circumstances of the individual case, insofar as the habitual and legal residence test is concerned. Further tests of the individual situation apply as to the fact and duration of an applicant's degree of labour market integration. In many countries the *Brey* and *Dano* judgments raised great public and academic attention and led to doubts within the administration and judiciary. Much concern was expressed regarding how to assess whether a social benefit could turn into an unreasonable burden for a Member State.

#### **2.4 General evaluation of Option 1**

Retaining the *status quo* will leave the legal development open for further case law. In this respect, this is an acceptable proposition, given that the *Brey* and *Dano* rulings are far from covering all concrete situations. Risks of fraud and abuse are probably limited. Nevertheless, Option 1 raises problems outside and inside the coordination rules.

The *status quo* means that Member States may differentiate between their nationals and non-nationals with regard to access to social assistance. The treatment of poor people vis-à-vis social assistance will vary widely according to the country of residence. National rules are likely to become more and more restrictive, with all the usual problems when conflicting national laws apply to transnational situations. Many poor migrants will find themselves without social assistance. Still, there would be no guarantee that EU countries' overall

expenditure on social assistance will diminish: migrants may simply shift from one Member State to another and double payment situations could increase.

The *status quo* allows an exemption from key principles of EU social security coordination law. How will case law interact with rules on SNCBs? With regard to this question, various practices might occur between countries and within countries. This case law affects the internal coherence of the coordination rules in general and of SNCBs in particular. It will also be the source of practical problems for national and local social security institutions having to deal with several sources of law for the determination of social assistance rights claimed by non-active migrants: to what extent coordination rules will have to be left unapplied or adapted is not easy to determine.

Negative effects of Option 1 may, however, be the necessary counterpart if the legislature wants to wait until case law stabilises. In particular, the statuses of jobseekers, former workers, frontier workers, workers with low income and family members need to be clarified. The CJEU also needs to be more specific about the proportionality test concerning the ‘financial burden’ and how the principle of ‘financial solidarity’ impacts access to social assistance in concrete cases, in order to guarantee a uniform application and therefore legal certainty within the Union.

Option 1 is, however, not supposed to be a long-term option. Option 1 leaves room for further step-by-step developments in the case law of the CJEU, yet it results in legal uncertainty and leaves many questions open. Moreover, the ability of case law to lay down general rules going beyond specific cases is very limited. Furthermore, fundamental political issues are involved (the degree of social solidarity owed to economically inactive EU citizens) which, in view of democratic legitimation, should be addressed by the Union legislature. The CJEU case law should be considered as a work in progress with an unforeseeable future. Under these circumstances a wait-and-see

position should be appropriate for the next few years. Later, legislative action should be taken at its best on the basis of a matured case law, in which the growing pains have been removed.

### **3 Option 2a: limitation of the equal treatment principle set out in Article 4 BR for special non-contributory cash benefits (SNCBs)**

#### ***3.1 Legal analysis of the proposal***

##### *3.1.1 Incorporation of Article 24(2) of Directive 2004/38/EC into Regulation (EC) No 883/2004*

The codification of Article 24(2) of Directive 2004/38/EC into Regulation (EC) No 883/2004 (BR) could make sense. Let us recall that this provision states that “*the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families*”.

Option 2a intends to incorporate rules on social assistance for migrants which the case law of the Court of Justice of the European Union (CJEU) regards as being intertwined. This option would, therefore, create symmetric rules in the freedom of movement law and the social security coordination.

Deviation from the equal treatment principle set out in Article 4 BR is legally possible. Such a revision could close the gap between the CJEU case law and Article 4 BR. Exemptions from the equal treatment principle would be explicitly stipulated in the BR. The key problem is to determine the best legal way to implement Option 2a.

### 3.1.2 Possible legislative solutions

The emergence of SNCBs was an outcome of the case law of the CJEU. It provided for a new, distinct and special system of social security coordination for mixed benefits. This system is built on special principles and establishes coordination principles on its own.<sup>313</sup> It is based on three interrelated principles: the applicable law is the law of the claimant's country of residence, the non-discrimination of persons as to their nationality and, finally, the non-exportability of the benefits applies.<sup>314</sup> This special coordination regime was built separate from the general coordination system, but at the same time took on board some of its principles. Such principles would be substantially affected by Option 2a.

First, the meaning of residence would not be the one found in Article 11 of Regulation (EC) No 987/2009. Residence is conceived as a factual concept. In the context of Directive 2004/38/EC, however, it is defined as a legal concept.<sup>315</sup> Second, the principle of equal treatment of persons, irrespective of their nationality, would be exposed to a profound change: differences between nationals and non-nationals would be permitted. The proposal would not only modify, but deeply alter the current system of coordination of SNCBs.

With regard to the incorporation of Article 24(2) of Directive 2004/38/EC into the BR, it should be noted that the Directive is not primarily about setting standards of social security coordination. It gives Member States the right to establish their own rules of social assistance entitlement. If Article 24(2) was incorporated into the BR, this rule would change its function from an option for the Member States to a necessity at EU law level.

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<sup>313</sup> See 1 above

<sup>314</sup> See 1 above, H. Verschuere, 'Free Movement or Benefit Tourism: The Unreasonable Burden of Brey', (2014) *The European Journal of Migration and Law* 16, 169 et seq.

<sup>315</sup> See 1 above; and this despite the case law does not require the Member States to restrict the social assistance benefits to a legal residence.

On the basis of these preliminary remarks, it appears that Article 24(2) could be inserted into the BR in different ways:

- A first solution could be to introduce this provision as a general rule of coordination in Article 4 BR.
- A second solution could be to create a specific exemption in the context of Article 70 BR.
- A third solution could be to introduce Article 24(2) as part of Article 3(5) BR.
- Finally it could be examined to find an appropriate solution on the basis of the ‘genuine link’ concept in the context of Article 11(3) BR.

Each sub-option needs to be evaluated.

#### 3.1.2.1 Article 24(2) of Directive 2004/38/EC as an exemption of Article 4 BR?

Article 4 BR provides that “[a]ll persons shall enjoy the same rights and be subject to the same obligations under the legislation of any Member State as the nationals thereof”, “unless otherwise provided for” by the BR. Therefore, such an exemption could be made.

This sub-option would, however, be problematic, not only because it would go against Recital (5) BR, which declares that “it is necessary, within the framework of such coordination, to guarantee within the Community equality of treatment under the different national legislation for the person concerned”.

Sub-option a would indeed put too great an emphasis on social assistance. This branch of social protection is important, but – both from the social and the economic view – less important than the social security risk related branches. Article 4 BR applies to all rules of coordination and all social security benefits. The new exemption would set a false accent on benefits which are not at the heart of the coordination system.



Furthermore, in the Member States' law, the distinction based on nationality is just one factor to exclude migrants from social assistance. There are other factors, above all the lawful residence and labour market/society integration. Bearing those criteria in mind, it would not be sufficient to adapt the equality treatment principle to codify the CJEU case law.

It is therefore not recommended to incorporate Article 24(2) of Residence Directive 2004/38/EC into Article 4 BR.

### 3.1.2.2 Article 24(2) of Directive 2004/38/EC as an exemption of Article 70 BR?

Article 24(2) of the Residence Directive relates to social assistance as do the provisions on SNCBs. Since Article 70 BR refers to social assistance specifically, it would seem the appropriate place to integrate an additional provision on social assistance benefits. SNCBs have a hybrid character: they are part of both social security and social assistance legislation. The integration of rules into Article 70 BR could be done even if social assistance benefits as such are not listed as SNCBs and do not follow the general rules established by Article 70 BR. Therefore, a provision on social assistance could find its place in Article 70 BR.

There is, however, a problem to underline: social assistance payments may not necessarily be SNCBs, nor are SNCBs necessarily social assistance benefits.<sup>316</sup> A first difficulty would be to make a distinction between the two categories of benefits. This distinction should be added to the definition of SNCBs given by Article 70(2)2 BR. A second and major difficulty derives from the fact that if Article 24(2) was taken as a rule to abandon the principles established for SNCBs by Article 70(2) BR (entitlement based on residence, non-exportation and equal treatment of all EU nationals), internal coherence of the legal system of SNCBs would be affected in two respects. First, it would

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<sup>316</sup> Cf however the judgment in *Dano* EU:C:2014:2358, paragraph 63.

introduce a different notion of residence (legal *versus* factual). Second, the equal treatment clause – decisive for the SNCBs – would be left out for social assistance payments. Only the non-exportation clause would apply to both categories of benefits. The integration of derogatory residence/equal treatment rules into Article 70 BR would establish a deep contrast within the provision itself. It is difficult to imagine that opposing imperatives would apply within the same Article aiming to coordinate social benefits of a similar character and both with a social assistance dimension.

Despite the fact that *Brey* and *Dano* emphasise that SNCBs fall under the meaning of ‘social assistance’ in Article 24(2) of Directive 2004/38/EC, it should not be recommended to incorporate this provision in Article 70 BR. The concepts of ‘social assistance’ and ‘SNCB’ differ; the first is broader than the latter. Article 3(5) BR excludes social assistance from the substantive scope of application of the BR: why should it become a concept within the BR? Additionally, Article 24(2) of Directive 2004/38/EC does not primarily concern coordination in the EU context, but non-coordination of benefits rights on the basis of Member States’ prerogatives. Finally, Article 24(2) of Directive 2004/38/EC allows distinctions for social benefits – above all nationality and lawful residence – which are unlawful under the BR. Therefore, to incorporate Article 24(2) of Directive 2004/38/EC would establish a profound contradiction between on the one hand the special coordination law – EU rules for SNCBs – and on the other hand the integration of a provision which allows the Member States to abandon the leading principles of the BR – and this in respect of ‘social assistance’ benefits which are in general and in substance completely excluded from the BR.

Our conclusion is that it is not recommended that Article 24(2) of Directive 2004/38/EC is integrated into Article 70 BR.

### 3.1.2.3 Article 24(2) of Directive 2004/38/EC as part of Article 3(5) BR

Article 24(2) of the Residence Directive could be integrated into the BR as a part of Article 3(5) BR. Pursuant to this provision, social and medical assistance benefits are excluded from EU coordination.

This solution would concur with the intention of Article 24(2) since it enables the Member States to establish rules about the transnational dimensions of their social assistance legislation without any EU law interference. This insertion would create coherence within EU coordination law.

Still, there is a first hindrance which makes this proposal problematic. It would revitalise the question whether the complete exclusion of a very broad range of social benefits (providing minimum means of existence from EU coordination) could be justified if they are at the same time regarded as social security benefits due to their characteristic as SNCBs. In this respect, the question arises whether the case law, which emphasises the double characteristic of these benefits as both SNCBs in the meaning of the BR and as social assistance benefits in the meaning of Directive 2004/38/EC could be compatible with such legislation. Article 3(3) BR identifies SNCBs as a category of social security benefits. As long as this rule exists, it would be inconsistent with the EU rules to exclude social assistance benefits from the material scope of the coordination if they are at the same time qualified as SNCBs. The contradiction between the EU rules and the Member States' rules on social assistance benefits would be kept.

If Article 24(2) was integrated into Article 3(5) BR, this would also overrule the previous and constant case law of the CJEU as to which social assistance benefits with minimum protection characteristic should be conceived as social security benefits under the concept of SNCBs. This reasoning and ruling of the CJEU historically led to the incorporation of SNCBs into the BR.

Finally, the rationale of Article 24(2) is not the exclusion of certain categories of social benefits from the coordination regime. Its main intention is to exclude persons from entitlement to social benefits because they are not adequately integrated into the society of a Member State. This problem relates to the question which persons are covered under the BR by the legislation of a Member State, but it does not primarily relate to the question which subject matters should be conceived as part of EU coordination law.

Therefore, this option should also be disregarded.

#### 3.1.2.4 Solution on the basis of the ‘genuine link’ concept in the context of Article 11(3) BR

Whereas Article 11(3)(a) to (e) BR sets rules of conflict of law, Article 24(2) of the Residence Directive enables Member States to exclude persons from their social assistance legislation by rules they can establish. Therefore, could Article 24(2) be integrated in the form of a negative clause to the existing rules of conflict of law set out in Article 11(3)(a) to (e) BR?

Article 11(3)(e) BR could provide an exemption. Thus, according to rules of conflict of law a competent Member State could exclude migrants from social assistance – even if the benefits concerned are income-related SNCBs – if these migrants have neither a legal residence, nor a link to the labour market, nor the nationality of the competent State. In this proposal the other main rules on the coordination of SNCBs – in particular the ones examined (Articles 4, 70, 3(5) BR) – could be kept unchanged.

This solution would also coincide with the CJEU case law where a genuine link between the applicant and the Member State more or less overtly assumes

a key role.<sup>317</sup> In this approach, it could be provided that social assistance benefits to which non-active persons are in principle entitled due to their residence in the competent Member State, can be restricted by the Member States' legislation to migrants who have a legal residence, who have the nationality of the competent State and who are integrated into the labour market of this State.

This approach could combine the provisions on the freedom of movement with the social legislation in such a manner that the exclusion of unself-sufficient migrants, as in the cases *Dano* and *Brey*, could be adequately dealt with within the BR rules. The BR indeed translates the concept of a genuine link in Article 11(3)(a) and (e) BR into specific ties: the workplace for the workers' protection, the legal seat for the self-employed persons' protection and, finally, the residence as the key connecting factor for non-working persons.

This new provision could be enacted in Article 11 in conjunction with section (3)(e) and could be expressed in the following words: "*The Member States – competent on the basis of Article 11(3)(e) BR because of a residence in this State, may exclude persons from social assistance benefits who are neither nationals nor a legal resident nor integrated into the labour market of the Member State as a worker, self-employed person, jobseeker or family member.*"

### 3.2 Assessment of the proposal (pros/cons)

When considering the four legislative alternatives reflected upon in the previous parts, the first three turn out not to adequately express the intention of Article 24(2) of the Residence Directive. Only Sub-option d is worth being

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<sup>317</sup> This was the main argument in the opinion of Advocate General Wathelet in the currently pending case *Alimanovic*, delivered on 26 March 2015 (Opinion in *Alimanovic*, C-67/14, EU:C:2015:210).

explored. Therefore, this option alone will be assessed. The outcome of the evaluation is ambiguous.

### *3.2.1 Clarification*

The proposal to introduce a negative clause in the provisions of the BR on applicable law might be regarded as unusual. One might argue that the integration of negative clauses in order to determine the applicable law would lead to a paradox. It may also affect the coherence of the system of rules of conflict of law.

Such a negative clause would need to be supplemented by an additional legal provision to allow the Member States to deny access to social assistance benefits on the basis of and in line with CJEU case law.

However, important problems of implementation would remain in practice and would have to be dealt with by each Member State separately. What is social assistance? What is legal residence? Who would be considered integrated into the labour market?

### *3.2.2 Simplification*

The introduction of a negative clause of conflict of law would be a way to better coordinate the CJEU's rulings on social assistance and the functioning of income-related SNCBs. In this respect, it should bring simplification.

However, the integration of the provision into the BR would increase the complexity of the rules incorporated therein. It would also enhance the difficulties mentioned in how to interpret the conditions under which the exclusive rule applies with regard to Article 24(2).

### *3.2.3 Protection of rights*

The proposal does not concern opening access to social rights or safeguarding social rights in transnational contexts, but restricts entitlement to social assistance to those who are not regarded as part of a Member State's society. Therefore, this proposal is problematic with regard to Recital 1 BR, which states that "*[t]he rules for coordination of national social security systems fall within the framework of the free movement of persons and should contribute towards improving their standard of living and conditions of employment.*"

### *3.2.4 Administrative burden and implementation arrangements*

The same problems as described in Option 1 would be observed. The proposal would not reduce the complex assessments and evaluations to be performed.

### *3.2.5 Avoiding the risk of fraud and abuse*

Since entitlement to social assistance will depend on national rules in a context of unstable CJEU case law, there could be an increased risk of social tourism – non-active migrants moving to countries where entitlement conditions are the easiest to comply with or where administrative control is loose. More generally, the risk of fraud may increase since the assessment of the residence condition will be based on factual and unclear elements. The assessment of Option 1 in terms of fraud and abuse is largely transposable to Option 2a.

### *3.2.6 Potential financial implications*

The same observation made for the previous option applies to this option.

### 3.3 *A mapping of the impact in the Member States*

The concept of legal residence differs between Member States. Some Member States demand a minimum period of previous residence. In **Cyprus**, legal residence depends on a permanent stay of 20 or 35 years. In **Latvia** residence is required of 60 months and within this period of permanent residence at least 12 months, before a person is entitled. Some Member States explicitly forbid to take residence without having sufficient resources to safeguard the migrant's subsistence or for purposes other than to take up employment (**AT, DE, HU, LV, LT, UK**). Consequently, the concept of and, hence, the minimum requirements for an adequate employment characterised by national law might vary.

Further complications result from distinctions made concerning the beneficiaries' nationality (**AT, CY, HU, IE, IT, LV**) or an additional restriction for a further period of up to three months for jobseekers after the establishment in the labour market of the Member State of residence (**AT**). This entails deviations from EU law by conflicting Member States' law. The same is true for criteria according to which the benefits are accessible. As in the **United Kingdom**, a complex test is to be applied to determine whether a person has his or her habitual residence in a Member State or is substantially employed, active as a jobseeker or has the prospect of being considered as employable.

The different Member States have enacted various criteria to define the circumstances: identifications by means of an explicit residence permit issued by the competent State (**AT, CY, HU, IE, IT, LV**) or a medical document concerning a person's employability (**Latvia, UK**), which are to be fulfilled both in substance and in the procedure for a social assistance benefit.

Therefore, even if it could be feasible to define on EU level and within the BR criteria for social assistance benefits on the basis of the two cases, it would



remain an open question how to cope with the on-going differences between the EU rules and the Member States' divergent and non-concurring laws on social assistance.

#### **3.4 *General evaluation of Option 2a***

It appears that it is very difficult to transpose the limitation of the equal treatment principle for income-related SNCBs into the coordination Regulations.

The analyses of four sub-propositions show that there is a great risk that the overall coherence of the SNCB system is undermined and that legal inconsistencies are generated within the coordination Regulations. In this regard, the last sub-proposition (the insertion of a negative rule of conflict) might be the only one without such effect, even if its complexity and the consequences it would have on the system of rules of conflict of law raise questions about its relevance.

In any case, since the equality of treatment is only one side of the question, a modification of the coordination rules dealing exclusively with this matter would not be sufficient to clarify rules applicable to social assistance.

## **4 Option 2b: Removal of the special non-contributory cash benefits (SNCBs) from the material scope of Regulation (EC) No 883/2004**

### ***4.1 Legal analysis of the proposal***

#### *4.1.1 Introduction*

Option 2b consists in the removal of the income-related SNCBs from the scope of Regulation (EC) No 883/2004 (BR). The CJEU included hybrid benefits in the scope of the Regulation, against the wishes of the Council. Two decades later the Council responded by devising the special system for SNCBs. As that system has now been destabilised by the CJEU, it is understandable that the option of removing the SNCBs from the scope of the Regulation holds some appeal. Option 2b would have the effect of subjecting all ‘social assistance’ within the meaning of Directive 2004/38/EC to a common legal regime: it would be governed by national law, Directive 2004/38/EC and the TFEU.

This section determines the impact of Option 2b on citizens and administrations. It identifies the provisions of the Regulation that are relevant to SNCBs and that would no longer govern SNCBs under Option 2b. Furthermore, it analyses the consequences of this change. Essentially, this section concludes that:

- Option 2b would replace Article 70 BR as far as income-related SNCBs are concerned and Article 6 BR with a difficult, case-by-case appraisal of whether a claimant has sufficient links with a Member State to claim its ex-SNCBs;
- the repeal of the provisions of the BR on equal treatment and assimilation is largely neutral, as the same rights and duties derive from the TFEU and Directive 2004/38/EC;

- Option 2b would complicate the cooperation and communication between social security institutions.

Overall, it seems that the attractiveness of Option 2b does not resist closer examination.

As a preliminary point, it needs to be specified that Option 2b is not relevant to persons who lack a right to reside. Such persons can be excluded from income-related SNCBs in the circumstances described under Option 1. Whether or not SNCBs are still covered by the Regulation has no influence on their legal position. In other terms, since Ms Dano and her son could not derive any protection from the Regulation, the inapplicability thereof would not in the slightest affect their rights.

The Regulation is however relevant to persons who have a right to reside in the State where they claim SNCBs. This concerns, inter alia, the nationals of that State and persons holding the status of long-term resident under Article 16 of Directive 2004/38/EC. Under national and international law,<sup>318</sup> the nationals of a State have a right to reside on its territory. For instance, while Irish nationals automatically satisfy the right-to-reside condition in Ireland, they may fail to actually qualify for SNCBs on other grounds. The Regulation might assist such citizens in claiming income-related SNCBs. The same is true for the categories of migrant citizens against whom right-to-reside conditions may not be enforced. Finally, Member States are free to set right-to-reside requirements or not. Where a State does not require the applicant for certain SNCBs to have a right to reside, persons, even where they do not have such a right, might derive protection from the Regulation. These three categories cannot be (or are not) denied benefits on the basis of *Dano*; they may therefore find the Regulation helpful in claiming benefits. The removal of income-

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<sup>318</sup> E.g. the judgment in *McCarthy*, C-434/09, EU:C:2011:277, paragraph 29 and cases cited.

related SNCBs from the scope of the Regulation is liable to have an impact on their legal position.

#### 4.1.2 Towards a case-by-case assessment of the real link

Under the current coordination framework, SNCBs are served in one Member State only, *i.e.* the State in which a person habitually resides.<sup>319</sup> If the institutions of different Member States hold different views on the location of a person's habitual residence, they must reach an agreement under Article 11 of Regulation (EC) No 987/2009 (IR). That provision demands “*an overall assessment of all available information relating to relevant facts*”. Its first paragraph contains a non-exhaustive list of indicators.<sup>320</sup> Article 11(2) IR provides that, in the event that the institutions fail to reach an agreement, the person's intention, as apparent from the circumstances, is decisive. Persons have one – and only one – place of habitual residence. In *Wencel*, the CJEU held that a person cannot have *more than one* habitual centre of interests.<sup>321</sup> It is generally accepted that everyone must have *one* place of habitual residence,<sup>322</sup> which may be located outside the EU.<sup>323</sup> As a result, every citizen who lives in a Member State can claim benefits in that Member State –

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<sup>319</sup> Article 1(j) BR and Article 70 BR.

<sup>320</sup> *I.e.* the duration and continuity of presence on the territory of the Member States concerned; the nature and the specific characteristics of any activity pursued, in particular the place where such activity is habitually pursued, the stability of the activity, and the duration of any work contract; his or her family status and family ties; the exercise of any non-remunerated activity; in the case of students, the source of their income; his or her housing situation, in particular how permanent it is; the Member State in which the person is deemed to reside for taxation purposes. There is no order of preference between those indicators (judgment in *I v Health Service Executive*, C-255/13, EU:C:2014:1291, paragraph 46).

<sup>321</sup> Judgment in *Wencel*, C-589/10, EU:C:2013:303, paragraph 48, paragraph 51.

<sup>322</sup> Cf Article 11 IR.

<sup>323</sup> European Commission, *Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland*, 2013, p. 42-43. Consider e.g. the situation of the claimant in the judgment in *Collins* EU:C:2004:172.

and nowhere else.<sup>324</sup> Of course, right-to-reside conditions and other requirements may prevent a migrant from effectively enjoying SNCBs in the competent Member State.

Option 2b removes this guarantee of one single competent State. In some situations, a person may be able to claim benefits in more than one State. For instance, the national of a Member State may be deemed resident for the purposes of national law eight weeks after returning there. At that point, he or she might still be considered as resident in the State which he or she just left, and in which he or she worked and lived for several years. As a result, he or she would unduly cumulate similar benefits from each State. Obviously, Member States may enact anti-overlapping rules, but they might not be aware of the fact that similar benefits are awarded abroad.

Conversely, a citizen might fall between two stools, if he or she is not considered resident in any Member State and therefore receives no SNCBs at all. At first sight, it seems that Option 2b would enable a Member State to refuse SNCBs to persons who do have a right to reside, on the grounds that they have not lived in its territory long enough, that they are not domiciled there, etc. For instance, could a Member State require two years of prior residence?

The TFEU and Directive 2004/38/EC raise a number of important limits to Member States' ability to restrict the access to their income-related SNCBs. Residence requirements are intrinsically liable to negatively affect migrant citizens more than sedentary, national citizens. Therefore, they amount to indirect discrimination (when applied to foreign nationals) or to a non-discriminatory restriction of free movement rights (when enforced by a State against its own nationals). According to the CJEU, it is legitimate for a

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<sup>324</sup> The CJEU ruled that a worker could access an SNCB in his or her Member State of work in which he or she no longer lived, given that he or she had maintained all of his or her economic and social links to that State (judgment in *Hendrix* EU:C:2007:494).

Member State to grant benefits such as SNCBs only to persons who have established “*a certain degree of integration into the society of that State.*”<sup>325</sup> The CJEU furthermore accepts that residence in that State during “*a certain length of time*” demonstrates such integration for economically inactive citizens.<sup>326</sup> Yet, it insists that the condition must be proportionate. It is settled case law that “*a condition of residence may be disproportionate if it is too exclusive in nature because it favours an element which is not necessarily representative of the real and effective degree of connection and excludes all other representative elements.*”<sup>327</sup> The CJEU accepts that the following factors might indicate the existence of a genuine link: (stable) residence,<sup>328</sup> connections to a social security system,<sup>329</sup> family circumstances,<sup>330</sup> language skills,<sup>331</sup> nationality,<sup>332</sup> work,<sup>333</sup> work-seeking<sup>334</sup> etc.<sup>335</sup>

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<sup>325</sup> Judgment in *Bidar* EU:C:2005:169, paragraph 57.

<sup>326</sup> E.g. the judgment in *Bidar* EU:C:2005:169, paragraph 59; judgment in *Collins* EU:C:2004:172, paragraph 72; judgment in *Prinz and Seeberger*, C-523/11 and C-585/11, EU:C:2013:524, paragraph 38.

<sup>327</sup> Judgment in *Giersch* EU:C:2013:411, paragraph 72 and case law cited.

<sup>328</sup> E.g. the judgment in *Collins* EU:C:2004:172, paragraph 72; judgment in *Stewart*, C-503/09, EU:C:2011:500, paragraph 101; judgment in *Prinz and Seeberger* EU:C:2013:524, paragraph 38.

<sup>329</sup> E.g. the judgment in *Stewart* EU:C:2011:500, paragraph 97-99; judgment in *Commission v Germany*, C-269/07, EU:C:2009:527, paragraph 60.

<sup>330</sup> E.g. the judgment in *Thiele Meneses*, C-220/12, EU:C:2013:683, paragraph 38; judgment in *Martens*, C-359/13, EU:C:2015:118, paragraph 41.

<sup>331</sup> E.g. the judgment in *Prinz and Seeberger* EU:C:2013:524, paragraph 38; judgment in *Thiele Meneses* EU:C:2013:683, paragraph 38; judgment in *Martens* EU:C:2015:118, paragraph 41.

<sup>332</sup> *Ibid.*

<sup>333</sup> E.g. the judgment in *Hendrix* EU:C:2007:494, paragraph 57-58; judgment in *Commission v the Netherlands* EU:C:2012:346, paragraph 65; judgment in *Krier* EU:C:2012:798, paragraph 53; judgment in *Giersch* EU:C:2013:411, paragraph 63. The CJEU listed the former employment of the father of a dependent and economically inactive citizen as an indicator of her integration in the judgment in *Stewart* EU:C:2011:500, paragraph 100, and the judgment in *Martens* EU:C:2015:118, paragraph 41, paragraph 44.

<sup>334</sup> E.g. the judgment in *Collins* EU:C:2004:172, paragraph 70, paragraph 72; the judgment in *Vatsouras and Koupatantze* EU:C:2009:344, paragraph 39.

<sup>335</sup> The open-ended nature is emphasised in the cases mentioned in footnote 331. This does not mean that the Member States always have to take account of all social ties (see e.g. the judgment in *Förster* EU:C:2008:630; the judgment in *Geven* EU:C:2007:438).

Member States who wish to introduce additional requirements must therefore tread cautiously. They are free to require that the recipients of their benefits demonstrate a real link. To that end, they may set residence-related conditions or other territorial conditions. However, they must ascertain, in each individual case, that these conditions do not go further than strictly necessary. In particular, they must accept that a multitude of elements can prove the existence of a link. This real link test is neither particularly clear, nor easy to administer. It would however become standard practice if Option 2b were chosen. Any attempt to specifically limit the rights of (lawfully residing) migrant citizens to ex-income-related SNCBs would amount to restriction of their free movement rights, which needs due justification; the real link is virtually the only successful justification ground.

The *Stewart* case provides a topical example.<sup>336</sup> It concerned the UK short-term incapacity benefit in youth, a non-contributory benefit providing persons aged 16 to 25 who have a long-term disability with the necessary means to meet their needs. As will be demonstrated below, this benefit fulfilled all the conditions for being considered as an SNCB, except that the UK did not list it in Annex IIa. Ms Stewart was a British national suffering from Down's syndrome. She moved to Spain with her parents age ten. Her mother claimed the UK short-term incapacity benefit in youth on her behalf when she became 16. The claim failed because Ms Stewart resided abroad. UK law required the young invalid person to have been present in the UK for a period of at least 26 weeks in the 52 weeks immediately preceding the date of the application and to be present there on that date. The UK argued that the past presence requirement was proportionate, as it was short. It had to be satisfied only on the date of the claim and there simply were no other alternatives to determine the existence of a genuine link. The CJEU conceded that the existence of such a link can be proven by a stay for a reasonable period in the UK. Yet, the 26

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<sup>336</sup> Judgment in *Stewart* EU:C:2011:500.

weeks requirement was too exclusive. It excluded other elements that may demonstrate a real connection, such as the relationship between the claimant and the social security system (Ms Stewart was already entitled to the UK disability living allowance, and was credited with UK national insurance contributions); the claimant's family circumstances (her parents received UK pensions, and her father had worked in the UK); and the fact that the claimant, a UK national, had lived in the UK. According to the CJEU, these elements suffice to demonstrate the existence of a genuine and sufficient connection between Ms Stewart and the UK. The requirement of past presence was thus disproportionate and contrary to Article 21(1) TFEU. On the same grounds, the CJEU decided that the financial balance of the British schemes was not endangered, and that the condition of presence on the date on which the claim is made was disproportionate. In sum, an economically inactive person could not be required to reside in the UK when claiming a benefit that closely resembles SNCBs, because she had sufficiently strong attachments with the UK.

The same scenario risks unfolding for ex income-related SNCBs under Option 2b. Currently, SNCBs are conditional upon habitual and, where applicable, lawful residence. Option 2b seems to enable Member States to require more than just habitual and lawful residence. They could demand stronger attachments to their society, for instance durational residence. However, the TFEU could oppose the additional requirements of links, as soon as they are not strictly necessary. What is necessary is hard to predict, but it seems clear that rules that attach importance only to one single indicator (or just a very few indicators) are very vulnerable to a challenge under EU law. In answer to our earlier question, a Member State requiring citizens who have a right to reside to have lived on its territory during a number of years would most probably run counter EU law.



#### 4.1.3 *The principle of equal treatment (Article 4 BR)*

Article 4 BR is a specific expression of the principle of non-discrimination laid down in Article 18 TFEU,<sup>337</sup> Article 45(2) TFEU, Article 49 TFEU and Article 56 TFEU. In *Dano* the CJEU entirely aligned Article 4 BR to Article 24 of Directive 2004/38/EC.<sup>338</sup>

Option 2b would make little difference when compared to the current state of affairs. Persons lacking a right to reside have no right to equal treatment under either Article 4 BR or any other provisions mentioned above. Persons possessing a right to reside would be able to claim equal treatment under Article 24 of Directive 2004/38/EC and/or the aforementioned provision of the TFEU, even if they could no longer rely on Article 4 BR because Option 2b was enacted. As illustrated above, the principle of equal treatment and the prohibition on restrictions of free movement allow a citizen who has a sufficiently close connection to a Member State to challenge territorial conditions laid down in its legislation.

#### 4.1.4 *The principle of equal treatment of facts (Article 5 BR)*

Article 5 BR lays down the principle of equal treatment of benefits, income, facts or events.<sup>339</sup> It essentially provides that, where the legislation of the competent Member State attaches legal effects to the occurrence of certain facts or events, that State must take account of equivalent facts or events taking place in another Member State as though they had taken place on its own territory (Article 5(b) BR). Article 5(a) sets out a similar rule: the receipt of social security benefits and other income in another Member State must be

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<sup>337</sup> Judgment in *Dano* EU:C:2014:2358, paragraph 61.

<sup>338</sup> *idem*, paragraph 60 *et seq.*

<sup>339</sup> See further N. Rennuy, 'Assimilation, territoriality and reverse discrimination', (2011) *European Journal of Social Law*, 289.

equated to the receipt of domestic benefits or income. Article 5 can be both beneficial and detrimental to citizens – we examine both situations in turn.

Article 5 BR allows the eligibility conditions to be satisfied in another Member State. That provision then benefits the migrant. For instance, SNCBs are regularly granted in the form of a supplement; their payment is often conditional upon receipt of national social security benefits. Article 5(a) BR (previously Article 10(3) of Regulation (EEC) No 1408/71) provides that equivalent foreign benefits should be treated as national benefits. Consider a French SNCB which, by hypothesis, is only granted as a supplement to a French old-age pension. If a French institution wanted to refuse a person receiving a Spanish pension that SNCB, it would either have to demonstrate that the Spanish pension is not equivalent to the French pension,<sup>340</sup> or that its refusal is necessary to safeguard a legitimate interest.

Option 2b would not change this state of affairs. It is settled case law that, insofar as it is beneficial to migrants, the equal treatment of facts is required by the free movement rights laid down in the Treaty<sup>341</sup> and/or Directive 2004/38/EC.<sup>342</sup> A refusal to assimilate foreign facts amounts to indirect discrimination or to a restriction to free movement, as it only affects migrants. If the facts are equivalent, a refusal must be justified by demonstrating the legitimacy of the objective pursued and the suitability and necessity of the means deployed. The outcome of the French case would be identical.

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<sup>340</sup> Cf the judgment in *Larcher*, C-523/13, EU:C:2014:2458.

<sup>341</sup> E.g. the judgment in *Roviello v Landesversicherungsanstalt Schwaben*, C-20/85, EU:C:1988:283 (Article 48 and Article 51 EEC Treaty); judgment in *O'Flynn v Adjudication Officer*, C-237/94, EU:C:1996:206 (Article 7(2) of Regulation (EEC) No 1612/68); judgment in *Elsen v Bundesversicherungsanstalt für Angestellte*, C-135/99, EU:C:2000:647 (Article 18 EC, Article 39 EC and Article 42 EC); judgment in *Kauer*, C-28/00, EU:C:2002:82 (Article 18 EC, Article 39 EC and Article 43 EC); judgment in *Duchon*, C-290/00, EU:C:2002:234 (Article 39(2) EC and Article 42 EC); judgment in *D'Hoop*, C-224/98, EU:C:2002:432 (the provisions on EU citizenship).

<sup>342</sup> E.g. the judgment in *Commission v Austria* EU:C:2012:605 (Article 18, 20 and 21 TFEU and Article 24 of Directive 2004/38).

Article 5 BR can also be relied upon to the detriment of migrants, where disentitling conditions are satisfied in another Member State. For instance, many SNCBs are means-tested or income-tested. Article 5(a) BR equates foreign income and means to domestic income and means. Whether the personal or familial income of the applicant reaches the upper limit for the grant of SNCBs is then determined by reference to the income he or she earns in all the Member States. The same applies to rules precluding the overlapping of SNCBs with other social benefits. Member States must however be careful to avoid creating an unjustified non-discriminatory obstacle to the free movement of persons.<sup>343</sup>

Assimilation detrimental to migrants could still be performed if Option 2b were implemented. The CJEU held that Article 18 and 45 TFEU “*do not prohibit — though they do not require — the treatment by the institutions of Member States of corresponding facts occurring in another Member State as equivalent to facts which, if they occur on the national territory, constitute a ground for the loss or suspension of the right to cash benefits*”.<sup>344</sup> Accordingly, the UK was free to deprive a prisoner of social security protection, even though he served his sentence in Ireland instead of the UK.

In sum, the disappearance of Article 5 BR for SNCBs would not significantly affect the substance of the rights and duties of individuals and administrations.

#### 4.1.5 *The principle of aggregation (Article 6 BR)*

The so-called principle of aggregation laid down in Article 6 BR provides that, where the legislation of the competent Member State (“MS<sub>1</sub>”) provides that the acquisition or retention of benefits is conditional upon the completion of

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<sup>343</sup> Judgment in *Somova*, C-103/13, EU:C:2014:2334.

<sup>344</sup> Judgment in *Kenny*, C-1/78, EU:C:1978:140.

periods of insurance, employment, self-employment or residence, the competent institution must take into account periods of insurance, employment, self-employment or residence completed under the legislation of another Member State (“MS<sub>2</sub>”), as if they were completed under its own legislation. Whether periods were validly completed under the legislation of MS<sub>2</sub> is determined by that State’s institutions, which communicate their decision to MS<sub>1</sub>. For instance, in order to qualify for the Cypriot social pension, currently an SNCB, a person must have lawfully stayed in Cyprus for 20 years since reaching the age of 40, or for 35 years since reaching the age of 18. A person who now lives in Cyprus, but previously lived in another Member State, is entitled to the Cypriot pension after aggregation. The Cypriot authorities do not need to check whether the applicant actually lived abroad; they can simply ask the institutions of the Member State in question to make the necessary verifications.

Would the situation be any different under Option 2b? The CJEU has ruled on the question whether a Member State should aggregate in circumstances where Regulation (EEC) No 1408/71 does not apply. In one case, it held that periods completed in Germany that are comparable to those required by Greek legislation should be aggregated on the basis of Article 48 and 51 of the EEC Treaty (now Article 45 and 48 TFEU) for the purpose of determining the acquisition of a Greek old-age pension.<sup>345</sup> The discrimination arose because *“the problem of recognition of periods completed in other Member States of the Community confronts only workers who have exercised their right to freedom of movement.”*<sup>346</sup> In cases on economically inactive citizens, the CJEU tends to waive durational residence requirements as soon as they exceed what is necessary to establish the existence of a sufficient connection with the

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<sup>345</sup> Judgment in *Vougioukas v Idryma Koinonikon Asfalisseon*, C-443/93, EU:C:1995:394.

<sup>346</sup> Judgment in *Vougioukas v Idryma Koinonikon Asfalisseon* EU:C:1995:394, paragraph 41. In other cases, the CJEU found that periods of employment should be aggregated so as to determine *the amount* of a parental benefit (C judgment in *Rockler*, C-137/04, EU:C:2006:106; judgment in *Öberg*, C-185/04, EU:C:2006:107).

society of the State whose benefits are claimed. Therefore, it seems that the disappearance of Article 6 BR would not entail the end of all duties to aggregate. Should MS<sub>1</sub> wish to refuse to aggregate periods, it should either demonstrate that the periods at issue are not equivalent to the periods required under its legislation, or that the applicant has no genuine connection to its society. Both entail an individual and labour-intensive assessment of the facts of the case, which is unnecessary under Article 6 BR.

Article 6 brings about a certain administrative convenience, which would come to an end under Option 2b. The institutions of MS<sub>1</sub> (Cyprus, in our example) would have to determine whether periods of insurance, (self-)employment or residence were validly completed under the legislation of MS<sub>2</sub> – a law with which they are unfamiliar. They could no longer request MS<sub>2</sub> to apply its own legislation.

#### *4.1.6 Agencies (Title IV BR)*

The fourth title of the BR lays down the rules concerning different agencies. By extracting SNCBs from their field of action, Option 2b would deprive the Member States and the European Commission of:

- the forum that is the Administrative Commission, which facilitates cooperation;
- the technical assistance provided by the Technical Commission;
- the data of the Audit Board;
- the counsel of the Advisory Committee.

These are useful fora for monitoring, managing and possibly improving the provision of SNCBs.

#### 4.1.7 Administrative cooperation (Title V BR)

Article 76 BR lays down duties of administrative cooperation, which are flanked by Article 77 BR in respect of data protection<sup>347</sup> and refined, with respect to fraud and error specifically, by Decision H5 of the Administrative Commission.<sup>348</sup> These guarantees are crucial for the verification of facts which materialised in another Member State, and thus for the prevention of fraud and error. For instance, given the objective of SNCBs to guarantee a certain minimum standard of living, foreign income, means and benefits are routinely taken into account in order to determine whether a person qualifies. Likewise, the amount of SNCBs may depend on the circumstances of family members who live or work abroad. The Member State awarding SNCBs would struggle to control such conditions without assistance from other Member States.

Option 2b would deprive the Member States of the possibility to claim administrative cooperation in order to verify whether the conditions for receiving SNCBs are fulfilled. The TFEU does not endow social security institutions with a right to administrative cooperation.<sup>349</sup> Accordingly, a State seeking to check whether a person receives a pension from another Member State or earns a salary there, would be entirely dependent on the goodwill of the latter State.

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<sup>347</sup> See Article 2 to 5 IR.

<sup>348</sup> Decision No H5 of 18 March 2010 concerning cooperation on combating fraud and error within the framework of Council Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009, OJ C 149, 8.6.2010, p. 5–7.

<sup>349</sup> Article 4(3) TEU states that the Member States shall “assist each other in carrying out tasks which flow from the Treaties” and “shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.” This provision is limited to actions necessary for the compliance with EU primary or secondary law and the pursuit of EU objectives. Whether a Member State would be able to invoke it in order to request another Member State’s assistance in preventing fraud and error against its own legislation – a purely national objective, if SNCBs were removed from the scope of the BR – may be seriously doubted.

Electronic exchange of data, when implemented, should greatly facilitate the flows of information and contribute to reducing error and fraud (Article 78 BR). This useful instrument for the national institutions would be inaccessible if Option 2b were put into effect.

The recovery of benefits that were erroneously paid may, by virtue of Article 84 BR, be effected in other Member States. Enforceable judicial and administrative decisions are in principle to be recognised and enforced upon request by the competent State.<sup>350</sup> If Option 2b were chosen, the institutions of the Member States may expect more difficulties to recover SNCBs that were wrongly paid.

#### 4.1.8 *The complete irrelevance of Regulation (EC) No 883/2004?*

Contrary to what can be expected, the disappearance of the category of income-related SNCBs might not remove all the benefits which are now considered as SNCBs from the scope of the Regulation. Indeed, much in line with its early case law in which it emphasised that hybrid benefits have features of both social assistance and social security,<sup>351</sup> the CJEU might categorise certain ex-SNCBs as social security benefits. A recent sign in that direction is the 2011 *Stewart* case.<sup>352</sup> This would have far-reaching consequences, as those benefits would in principle be governed by the provisions of the Regulation for ‘classic’ social security risks.

In *Stewart*, the CJEU qualified the UK short-term incapacity benefit in youth as an invalidity benefit within the meaning of Regulation (EEC) No 1408/71. The sole condition for that characterisation was that, at the moment of the application, it was clear that the claimant had a permanent or long-term

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<sup>350</sup> More specific rules are laid down in Article 71 to 85 IR.

<sup>351</sup> E.g. the judgment in *Frilli* EU:C:1972:56, paragraph 13.

<sup>352</sup> Judgment in *Stewart* EU:C:2011:500.

disability. The benefit in question is a non-contributory, non-means-tested weekly payment which provides persons aged 16 to 25, who are incapable of work due to sickness or disability, with the financial means to meet their needs. It does not seek to replace lost wages; on the contrary, it is open to those who have never worked. The short-term incapacity benefit in youth expires after one year, at which point it is replaced by the long-term incapacity benefit, which can be drawn until retirement age. The main eligibility conditions are a person's age, his or her unfitness for work and his or her residence and presence in Great Britain. Whilst the CJEU did not examine the question from that angle, it seems that the UK short-term incapacity benefit in youth is an SNCB in all but in name. It is both 'special' and 'non-contributory' in the light of the case law of the CJEU. It is very similar to the Dutch benefit for young persons who are already suffering from total or partial long-term incapacity for work before joining the labour market. In *Kersbergen-Lap*, the CJEU decided that this Dutch benefit, which was not means-tested, was both special and non-contributory.<sup>353</sup> The UK short-term incapacity benefit is blatantly intended to provide "*solely specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned*", as stated in Article 70(2)(a)(ii) of Regulation (EC) No 883/2004. Only the fact that the UK did not list it in Annex IIa of Regulation (EEC) No 1408/71 stood in the way of its qualification as an SNCB. Yet, the CJEU, after a lengthy examination (paragraph 29-54), considered it as an invalidity benefit.

If a benefit that meets all the substantial criteria for being listed as an SNCB is qualified as social security, could the same not be true in respect of a benefit that used to be an SNCB, before Option 2b was enacted? There is a risk that some former SNCBs would be requalified by the CJEU as 'social security' within the meaning of Regulation (EC) No 883/2004. In theory, they would

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<sup>353</sup> Judgment in *Kersbergen-Lap and Dams-Schipper*, C-154/05, EU:C:2006:449.



then be covered by all the provisions of that Regulation, including the provision on export. In *Stewart*, the residence condition was waived on the basis of that provision. It is however more likely that the CJEU would retain the non-export rule, given that it accepts that “*the grant of benefits closely linked with the social environment may be made subject to a condition of residence*”.<sup>354</sup> Even then, if certain former SNCBs were considered as social security, this would largely undermine Option 2b. An interpretation of former SNCBs as classic social security might be unlikely, but it certainly is possible.

#### 4.1.9 Overview

	Option 1	Option 2b
<b>Legal framework</b>	Regulation (EC) No 883/2004; Directive 2004/38/EC; TFEU	Directive 2004/38/EC; TFEU
<b>Decisive element for attribution of responsibility</b>	genuine link test / habitual residence	National law, which sets <i>inter alia</i> conditions of residence / real link
<b>How many Member States are responsible?</b>	In principle, only one  Exceptions: <i>Bosmann</i> , <i>Hendrix</i> , <i>Hudzinski</i> and <i>Wawrzyniak</i>	None, one, or more than one
<b>Equal treatment</b>	Article 4 of Regulation (EC) No 883/2004	Article 24 of Directive 2004/38/EC and TFEU are functionally equivalent to

<sup>354</sup> E.g. the judgment in *Snares* EU:C:1997:518, paragraph 42. The CJEU has been seen to bend the rules of the Regulations in order to avoid disrupting minimum subsistence benefits (judgment in *Office National des Pensions v Levatino*, C-65/92, EU:C:1993:149).

		Article 4 of Regulation (EC) No 883/2004
<b>Assimilation of facts</b>	Article 5 of Regulation (EC) No 883/2004 (+ genuine link test?)	Article 24 of Directive 2004/38/EC and TFEU could be considered to be functionally equivalent to Article 5 of Regulation (EC) No 883/2004 (the genuine link test would be applicable)
<b>Aggregation of periods</b>	Article 6 of Regulation (EC) No 883/2004 (+ genuine link test?)	Article 24 of Directive 2004/38/EC and TFEU could entail a duty of aggregation; non-aggregation would be based on objective difference or be objectively and proportionately justified (e.g. the genuine link test). Competent Member State may have to apply foreign legislation.
<b>Administrative cooperation</b>	Duties of administrative cooperation	Goodwill of requested Member State
	In future, electronic exchange of data	No electronic exchange of data
	Recovery of benefits	No procedure on recovery

## 4.2 *Assessment of the proposal*

### 4.2.1 *Clarification*

Under the current state of affairs, the provision of SNCBs is regulated by the Regulation. The provisions of the TFEU are only relevant in exceptional

circumstances.<sup>355</sup> Option 2b accords decisive importance to the open-ended prohibitions on discrimination and on non-discriminatory obstacles of the TFEU. For instance, the definition of ‘habitual residence’ and the procedure to reconcile conflicting views is lost. This may in turn lead to a lack of social protection, where no Member State deems the person concerned to reside on its territory; or to an excess thereof, in the less likely event that more than one Member State should consider the person resident. The strength of the real link that may be required is to be determined in the light of the TFEU. It is clear that “*the proof required to demonstrate the genuine link must not be too exclusive in nature or unduly favour one element which is not necessarily representative of the real and effective degree of connection between the claimant and this Member State, to the exclusion of all other representative elements*”.<sup>356</sup> This requirement of individualised assessment is labour-intensive, unpredictable and complex. The requisite type of link depends on the constitutive elements of the benefit, including its nature and purpose.<sup>357</sup> Despite more than a decade of intense litigation on the cross-border access to study grants from the perspective of the real link, the permissible degree of integration is still unclear. The development of a reasonably operational notion of a real link for SNCBs – a group of benefits that is less homogenous than study grants – is bound to be challenging.

The functions of Article 4, Article 5 and Article 6 BR could be taken over by the TFEU and Directive 2004/38/EC. Yet, this would come at a price in terms of visibility and clarity. Article 6 BR is an absolute rule, with no derogations. By contrast, *prima facie* restrictions of free movement can be objectively justified. Moreover, Article 6 BR dispenses Member States from the complex tasks of ascertaining whether periods were validly completed under foreign

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<sup>355</sup> E.g. the judgment in *Hendrix* EU:C:2007:494.

<sup>356</sup> Judgment in *Prinz and Seeberger* EU:C:2013:524, paragraph 37 and cited case law.

<sup>357</sup> Judgment in *Commission v Austria* EU:C:2012:605, paragraph 63.

law, and of determining whether these foreign periods are equivalent to the required periods.

Finally, the risk of a qualification of former SNCBs as normal ‘social security’ cannot be excluded.

#### *4.2.2 Simplification*

For the reasons mentioned under 4.2.1, Option 2b would not entail a simplification of the legal framework.

#### *4.2.3 Protection of rights*

The Regulation is relevant to persons in possession of a right to reside and to persons lacking a right to reside, claiming SNCBs in a Member State that does not or may not make their payment conditional upon lawful residence. Option 2b would be detrimental to the protection of their rights. It might allow Member States to raise the level of connection required for the eligibility for SNCBs. Even where the TFEU is functionally equivalent to provisions of the Regulations, the loss in visibility might engender an enforcement deficit, where European rights translate less well into national practices. The loss in clarity and the complications in administrative cooperation are liable to result in unpredictability and to cause delays. Besides, migrants would lose procedural rights, such as the right to the provisional grant of benefits (Article 6 IR).

#### 4.2.4 *Administrative burden and implementation arrangements*

Option 2b would significantly raise the burden resting on the institutions administering SCNBs. As indicated above, the individual assessment that regularly replaces the mechanic application of the provisions of the Regulations is costly to the Member States. The refusal of SNCBs on territorial grounds is liable to raise an obstacle to free movement. Such restriction can be justified by positively demonstrating that, on the facts of the case, the measure is proportionate to the objective of ensuring a sufficient degree of integration (or by arguing that, *in casu*, the facts occurring abroad are not equivalent to the required facts). The institutions would lose the ability to claim the cooperation of their counterparts in other Member States. This significantly complicates the operation of SNCBs when certain relevant facts materialise abroad. For instance, where the overlap of SNCBs with certain foreign benefits is forbidden, administrations may struggle to obtain the necessary information. They would be deprived of the procedures to recover benefits unduly paid and, in future, of the advantages of the EESSI system. Besides, the Member States would lose the assistance of the four agencies.

#### 4.2.5 *Avoiding the risk of fraud and abuse*

Cross-border fraud, abuse and error is largely attributed to deficiencies in cooperation and in flows of information across borders. Imperfect though it may be in its implementation, the BR lays down an obligatory mechanism for administrative cooperation, upon which a Decision of the Administrative Commission builds further.<sup>358</sup> Once operational, the electronic exchange of data will further the fight against fraud, abuse and error.

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<sup>358</sup> Decision No H5 of 18 March 2010 concerning cooperation on combating fraud and error within the framework of Council Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009, OJ C 149, 8.6.2010, p. 5-7.

Whereas it is generally recommended to enhance cross-border cooperation and communication in order to tackle fraud and error,<sup>359</sup> Option 2b could have the opposite effect. If implemented, Member States would have to rely on bilateral agreements, memorandums of understanding or cooperation on other levels. Such a bilateral network cannot approximate the current framework in terms of scope (many Member States will not be mutually bound) or strength. Moreover, this might induce Member States to increasingly rely on privacy and data protection as reasons to refuse to share data.

An argument could be made that vague rules are inherently more difficult to circumvent than clear ones. Consequently, it may be inferred that the very opacity which Option 2b entails would in itself hinder fraud and abuse. In our view the promotion of vague legislation to prevent fraud and abuse is not convincing. It could be objected that the current notion of habitual residence resists circumvention if properly applied. In order to qualify for an income-related SNCB in a Member State, a citizen must have his or her habitual centre of interests there, as determined on the basis of a multitude of indicia (Article 11 IR). This centre of gravity test essentially prevents persons from claiming such benefits in a Member State without relocating their entire life there. Furthermore, it must be borne in mind that vagueness affects not only persons with fraudulent intent, but also all *bona fide* claimants.

Option 2b may enable Member States to exclude more persons from SNCBs. This could be framed as an increased leeway to ban “welfare tourists”. To do so in compliance with the TFEU, a State would however have to demonstrate either that the person in question, despite lawfully residing on its territory, lacks a sufficient link; or that the claim is abusive or fraudulent. Under the current framework, the Regulations “*cannot be relied on for the purposes of*

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<sup>359</sup> 4<sup>th</sup> recital in the preamble to Decision H5, *ibid*; Y. Jorens, D. Gillis and I. Plasschaert, *Fraud and Error in the Field of Social Security Coordination, Network Statistics FMSSFE*, European Commission, 2014, unpublished report.

*abuse or fraud*'.<sup>360</sup> Persons who have their habitual centre of interests in a Member State within the meaning of the Regulations are very likely to have a genuine link with that State. These two elements reduce the added value of Option 2b in the prevention of fraud and abuse in comparison with the current framework, which does contain adequate guarantees regarding real links and abuse.

On balance, Option 2b would hinder the fight against fraud, abuse and error more than facilitate it.

#### 4.2.6 *Potential financial implications*

Member States may make some financial gains by excluding migrants who are not affected by *Dano*. For instance, whereas *Dano* does not affect the rights of German citizens to German SNCBs, under Option 2b Germany might find it easier to disallow their claims. This financial gain is however mitigated by increased costs in handling cases. If Option 2b were put into effect, Member States wishing to reject applications for their SNCBs would need to perform an individualised assessment. Moreover, difficulties in cross-border communication, an increased risk of fraud and error and a complication in the recovery of benefits wrongly paid might add to the operational costs.

### 4.3 *A mapping of the impact in the Member States*

Option 2b has a very diverse effect on citizens and Member States. The focus of this section lies on the notion of *habitual* residence, as issues pertaining to *legal* residence have been studied in the context of Options 1 and 2a. The following is an overview of the concept of residence as *currently* required by the laws of a number of Member States.

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<sup>360</sup> E.g. the judgment in *Brennet v Paletta*, C-206/94, EU:C:1996:182, paragraph 24.

According to **Dutch** legislation, a person ‘resides’ in the Netherlands when he or she has a durable relationship of a personal nature with the Netherlands. This is determined on the basis of a number of factors such as the work and living circumstances, family relationships, the place where the children attend education, political or cultural activities, durable housing, finances, registration at the population register and possession of a residence permit for a short or longer period of time. It is not necessary for the relationship with the Netherlands to be stronger than the relationship with another State. In **Germany**, habitual residence is not defined; rather, it must be interpreted with regard to the specific benefit and its aims. Generally speaking, the circumstances must indicate that the stay is not temporary. **Latvia** requires the applicants of certain SNCBs (i) to be permanently resident on its territory, (ii) to have lived there for five years in total, and (iii) to have lived there continuously during the year preceding the application. **Italy** requires ‘real and habitual residence’, which it interprets in line with Article 11 IR. **Finland** also uses a concept of residence that is very close to that of Article 11 IR; in the event of divergence the European definition displaces the Finnish definition. In **Lithuania**, a person must be registered in the Resident’s Registry. Likewise, **Hungary** requires the place of habitual residence to be registered. Hungary essentially incorporates the criteria set in Article 11 IR. Under **Irish** legislation, habitual residence is understood as incorporating both a significant period of past residence and the intention to remain in Ireland for the foreseeable future. The main (but non-exhaustive) indicators are the length and continuity of residence in Ireland or in any other particular country; the length and purpose of any absence from Ireland; the nature and pattern of employment; the applicant's main centre of interest; the future intention of the applicant concerned as it appears from all the circumstances. **Cyprus** requires applicants to reside on its territory for at least 12 consecutive months in order to qualify for two of its SNCBs.



It is a matter of speculation how Member States may react to the enactment of Option 2b. Yet, this short overview demonstrates that the definition laid down in Article 11 IR is not adopted in all Member States. This increases the likelihood of divergent views on the location of a person's habitual residence, rendering the reconciliation procedure more important.

#### **4.4 General evaluation of Option 2b**

It should be underlined at the outset that the *Brey* and *Dano* rulings in no way require the removal of SNCBs from the scope of the Regulation. They merely enable Member States to set a requirement of lawful residence, which affects only certain categories of applicants. For instance, the nationals of a Member State always have a right to reside on their territory.

The recommendation would be not to propose Option 2b. Removal does not answer the question of how to handle entitlement to SNCBs in future; without any regulation they would be somewhere between Directive, Regulation and primary law. The removal of SNCBs from the scope of the Regulation would be detrimental to both citizens and administrations. It would raise the cost of administering SNCBs, decrease legal certainty and the protection of migrants' rights, disincentivise mobility and, on balance, hinder the fight against fraud, abuse and error. The assessment is negative from every angle. Moreover, all provisions relevant to SNCBs have an added value for citizens and administrations. The repeal of any provision would thus be ill-advised.

## 5 Additional proposals

All three proposals of the European Commission (EC) clearly choose an adaptation of the social security coordination rules related to income-related special non-contributory cash benefits (SNCBs) in order to align them with the requirements of legal residence as laid down in Directive 2004/38/EC. The first opts for a *status quo*, allowing for derogations from the equal treatment principle in line with the decisions in these cases. The other two proposals relate to a limitation and, even further stretched, a removal of the equal treatment principle in the SNCB coordination rules.

However, as is clear from our above legal assessments, we are of the opinion that the current state of the case law should not be regarded as ‘stable’. The analytical reading of both *Brey* and *Dano* as such already reveals pending questions in the CJEU’s approach towards the limitation of the equal treatment principle based on legal residence requirements. Whereas the CJEU puts emphasis on a proportionality test in the *Brey* case, this test is absent in the *Dano* case. Although this can very likely be explained by the specific circumstances of each case, it should be stressed that this is still uncertain and that the above assessment makes clear that many other questions are pending.

The most pressing question at this stage, in our view preventing to depart from the *Brey/Dano* case law as a basis for law-making, is whether the *Dano* judgment should be interpreted narrowly or broadly.<sup>361</sup> From a purely legal perspective, it has been defended that the *Dano* judgment should be construed narrowly. As the CJEU’s decision relates to the limitation of a fundamental principle of EU law, it is to be narrowly interpreted. In this sense, it should be clear that the limitation of the equal treatment principle with regard to SNCBs can only be understood with full respect of the fundamental principle of free

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<sup>361</sup> See 2.1 above.

movement of EU citizens and, even more important in view of the *Dano* judgment, the general principle of proportionality.

However, the present assessment shows that the current proposals as put forward by the EC do not take into account the principle of proportionality upon integrating the recent case law in Regulation (EC) No 883/2004. While Option 1 leaves the current state of EU law ‘as is’, this leaves room for a broad interpretation of the *Dano* judgment, excluding a proportionality test and a potential breach of the fundamental freedoms. It is apparent that in the current political climate, several Member States could take advantage of this possibility to illegitimately exclude non-active Union citizens from access to SNCBs. Option 2a merely proposes a referral to the provisions of Directive 2004/38/EC, which could also trigger a rigid ‘2004/38/EC-residence-test’ in the SNCB chapter of Regulation (EC) No 883/2004, i.e. excluding entitlement to SNCBs if there is no legal residence in line with the provisions of Directive 2004/38/EC. Option 2b even removes equal treatment with regard to SNCB entitlement.

In view of the above, it appears that the current proposals are only translating the impact of Directive 2004/38/EC on the coordination system for SNCBs in Regulation (EC) No 883/2004 as if clear priorities are set after the *Brey/Dano* judgments. In our view, this is not the case. In the *Brey/Dano* case law, the CJEU has applied the provisions of both instruments to the specific circumstances of each case, taking into account the specific argumentation of all parties involved. After only two decisions, no definitive rules of priority can be deduced. Only upon a clear intervention from the legislature, the relationship between both instruments can be definitively settled. As the instruments at stake do not refer to each other in their current versions, the CJEU can only apply the relevant provisions next to each other.

In other words, a proposal from the EC should not necessarily go in the direction in which the CJEU *prima facie* seems to be pointing in its recent case law, integrating legal residence requirements in the social security coordination system. The main purpose of a legislative intervention should rather be to settle the relationship between both instruments, taking into account the free movement of Union citizens and the principle of proportionality. The integration of the latter into the current proposals could be considered a key issue to safeguard the protection of social rights for mobile citizens within the European Union.

In the light of the above and as explained in the impact assessments, both Option 1 and 2a do not sufficiently guarantee an adequate level of protection of citizens' rights when moving within the EU and should be further accommodated to safeguard full respect of the principle of free movement of EU citizens and the principle of proportionality. Next to this, it should be stressed that the European legislature can also opt for a clear-cut safeguard of the coordination principles from the impact of the residence requirements resulting from Directive 2004/38/EC. However, first of all, it should be considered whether the current state of EU law actually requires change in order to meet concerns related to the relationship between legal residence and equal treatment.

### **5.1 A 'status quo' from the perspective of Regulation (EC) No 883/2004**

Before embarking on the possible adaptation of the current proposals or exploring new proposals, it is useful to reflect on the current state of EU law in order to assess whether the alleged problems of benefit tourism have to be solved by new legislation. On the one hand, this implies an assessment of the *Brey/Dano* case law and the Member States' response to benefit tourism by stressing the importance of legal residence within the meaning of Directive 2004/38/EC when considering access to social benefits. On the other hand, this

also requires an accurate view on the current state of EU law with regard to equal treatment of mobile non-active EU citizens, considering the relevant secondary legislation and CJEU case law.<sup>362</sup>

It is essential to highlight the responses that are already laid down in the current system of social security coordination, notably in the coordination system for SNCBs. The Member States' main aim is to prevent non-active persons lacking a genuine link with the host Member State from having access to social benefits. One has to wonder whether the current SNCB regime does not already address these concerns. Indeed, it could be argued that the current SNCB regime – as it stands now – already ensures the existence of a genuine link between the claimant of such a benefit and the host Member State.

With regard to SNCBs, it was already analysed above that the European legislature and the CJEU both accepted the (factual) habitual residence condition of Regulation (EC) No 883/2004 as creating a sufficiently genuine link between the claimant and the host Member State for the entitlement to such mixed benefits. This was a crucial element of the balance achieved after the neutralisation of the export principle for these specific benefits.

In the light of the aforementioned case law, it should however be emphasised that this notion in Regulation (EC) No 883/2004 also seems to fit perfectly into the main tendency of the CJEU case law concerning the requirement of a certain degree of integration. The variety of elements that has to be taken into account to establish whether a person has his or her habitual centre of interest in a Member State indeed appears to be in harmony with the case law concerning the 'genuine link'.

This variety of factors was introduced by the CJEU's interpretation of the residence concept in Regulation (EEC) No 1408/71 and has now been codified

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<sup>362</sup> See 2.1 above.

in a further elaborated form in Article 11 of Regulation (EC) No 987/2009. According to this Article, in the event of a difference of views between the institutions of two or more Member States, an overall assessment of all available information relating to the relevant facts should be performed in order to determine a person's centre of interest. The duration and continuity of presence on the territory is one element in this assessment, but cannot be more decisive than other relevant elements. This evaluation based on all the relevant individual circumstances of the case aligns with the way the CJEU has interpreted the establishment of a certain degree of integration between a claimant of certain social benefits and the granting Member State.

The case law of the CJEU has proven that EU law is sensitive to the Member States' desire of the establishment of a genuine link between a person claiming residence-based non-contributory benefits and the Member State granting the benefit. The residence concept of Regulation (EC) No 883/2004 also seems to meet these aspirations, both formally and substantially. It could thus be observed that the current residence concept of Regulation (EC) No 883/2004 might already contain the necessary safeguards to avoid benefit tourism, i.e. non-active citizens moving to another Member State with the sole purpose of obtaining social benefits without any genuine link with that State.

## **5.2 Integrating proportionality in the current proposals**

### *5.2.1 Status quo and proportionality*

If the option of a *status quo* would be further explored, it is crucial that further initiatives are taken at the European level to clarify the relationship between Regulation (EC) No 883/2004 and Directive 2004/38/EC. This could be done by providing further guidance to the Member States on how to apply the *Brey/Dano* case law in practice, i.e. when dealing with claims for SNCBs by

non-active EU citizens. Logically, such administrative guidelines should serve the competent authorities of the Member States to have a clear view on how and to which extent requirements of legal residence can impact their decisions with regard to entitlement to SNCBs if the Member State concerned is to be regarded as the Member State of residence in line with Article 11 of Regulation (EC) No 987/2009.

The main goal of these guidelines would be to strike a correct balance between the equal treatment provision of Regulation (EC) No 883/2004 and legal residence requirements for non-active persons. In this regard, the Member States should have a clear view on how to integrate the principle of proportionality. This would require further investigation into which criteria have to be taken into account. But, it is clear that – by analogy with the proportionality criteria of Directive 2004/38/EC – such assessment should take into account the duration of the residence, the personal circumstances of the individual and the amount of aid granted in order to assess whether the individual has become an unreasonable burden on the competent State's social assistance system.

#### *5.2.2 Referring to Directive 2004/38/EC and proportionality*

A mere referral to Directive 2004/38/EC would have the same result as choosing a *status quo*. Therefore, it would be our recommendation to also draft clear guidelines (as described above) for the Member States on how to apply both instruments together, with full respect for the principle of free movement of Union citizens and according to the principle of proportionality.

Alternatively, rather than a mere referral to Directive 2004/38/EC, it might provide more clarity and legal certainty if the relevant articles restricting equal access to social assistance in Directive 2004/38/EC were to be translated and

integrated into the SNCB title.<sup>363</sup> It can also be observed that the mere reference to the Directive will not be sufficiently transparent, neither for social security institutions nor for EU citizens. A mere reference requires a thorough knowledge of both systems and, in lack thereof, could lead to wrong application and loss of rights for citizens. In that regard, it might be better to translate the residence requirements of Directive 2004/38/EC explicitly into the text of Regulation (EC) No 883/2004.

The provisions on entitlement to SNCBs could be aligned with the provisions on equal treatment with regard to social assistance of Article 24 of Directive 2004/38/EC as follows:

- First three months: no entitlement to SNCBs without any assessment of legal residence;
- Between three months and five years: for entitlement to SNCBs, the competent authority can make an assessment of the legal residence taking into account the duration of the residence, the personal circumstances of the individual and the amount of aid granted in order to assess whether the individual has become an unreasonable burden on the competent State's social assistance system;
- Five years: full entitlement to SNCBs without any assessment.

For the first three months, it seems acceptable from a legal point of view that a claim can be rejected without a proportionality test. If the individual concerned already claims SNCBs almost immediately after arrival in the host Member State, he or she can be deemed to move to that Member State for the sole purpose of obtaining the SNCB concerned. This approach seems to be in line with the *Dano* case law.

However, even in the first three months of residence the proportionality principle should not be overlooked. The choice for a uniform and dominant

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<sup>363</sup> On the other hand, this would also require a clear view on how both instruments would further interact in order to avoid another layer of complexity in the relationship.



residence duration requirement of three months without the possibility to demonstrate that the person already has a genuine link with the host Member State, would ignore this fundamental principle of Union law. An overall assessment of all the facts of the individual case should still be required in order to possibly overrule the waiting period. It could for instance be clarified that, during the first three months of residence within the meaning of Directive 2004/38/EC, a person is not considered resident yet in the host Member State within the meaning of Regulation (EC) No 883/2004, “*unless this person can prove the opposite*”.<sup>364</sup> This last addition – which opens the possibility to provide proof of a genuine link with the host Member State – is important, given the need to take into account the principle of proportionality when restricting the free movement of Unions citizens, as already described above.

Next to this, it has to be recalled that the introduction of a three-month waiting period for SNCBs breaks the balance that was struck by the SNCB chapter and should be compensated to prevent mobile EU citizens from falling between two stools, contrary to the goals of Article 48 TFEU. If such a waiting period were introduced, the persons concerned should be considered as having kept their residence in the Member State of origin during this first period. The latter would thus still be the competent State as to the entitlement to SNCBs. If this necessary corollary of postponing the establishment of residence in a Member State was omitted, such a new regime for SNCBs could fall foul of the fundamental right to free movement as guaranteed by the Treaties and of the main aim of social security coordination.

An alternative option would be to seek a better sharing of the burden amongst the Member States. Such burden-sharing could be accomplished by retaining the responsibility for these persons in the Member State of origin via cost

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<sup>364</sup> See the judgment in *Swaddling* EU:C:1999:96: an individual in the specific circumstances of Mr Swaddling should not be confronted with a waiting period of eight weeks.

compensation between the Member States concerned. The latter would then still be financially responsible for the first three months. During this period, the institutions of the host Member State would consequently provide the SNCBs in accordance with its legislation on behalf of the institution of the Member State of origin, which would be obliged to fully reimburse the costs incurred by the host Member State.

Between three months and five years, the claimant is building up integration within the Member State concerned and has the opportunity to create a 'genuine link' or 'certain degree of integration' as has been constructed in EU citizenship case law. It will depend on the concrete circumstances of each case whether there is sufficient integration. Therefore, a proportionality test is indispensable, as the mere claim of an SNCB cannot result in an automatic expulsion and, logically, neither in an automatic refusal of the grant of the benefit concerned which could lead to expulsion. In our view, consideration 16 of the preamble provides inspiration for the proportionality test which has to be integrated. As to the 'personal circumstances', further guidance is probably needed. The explicit reference to a proportionality test should make it abundantly clear that each case has to be assessed on its merits and that an automatic refusal is prohibited.

It goes without saying that after five years<sup>365</sup> the claimant is entitled to full equal treatment with regard to SNCBs.

The abovementioned adaptations to the current proposals from the EC can be regarded as a mitigation of the effect which the integration of a hard '2004/38/EC-residence-test', following a broad *Dano* interpretation, would have on the social protection of mobile EU citizens. It would guarantee that the proportionality principle is respected upon integration of legal residence requirements for access to SNCBs. However, nothing excludes that the

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<sup>365</sup> To be determined whether this should be a period of lawful and uninterrupted residence.

relationship between the instruments concerned would be settled more drastically.

### **5.3 *Safeguarding SNCB coordination from residence requirements in Directive 2004/38/EC***

It has to be reiterated that the current proposals presented by the EC are only pointing in the direction of integrating the requirement for legal residence stemming from Directive 2004/38/EC into the EU social security coordination system of Regulation (EC) No 883/2004. The proposals thereby depart from the idea that the CJEU has had its final say on the relationship between both instruments.

It cannot be denied that the CJEU has clearly stated that nothing prevents that the requirements of the Directive have to be taken into account when applying Regulation (EC) No 883/2004. From a legal-technical point of view, this is absolutely correct and cannot be countered. Indeed, no provision is provided for in either instrument to arrange the relationship between them. However, the lack of such provision also means that, in principle, nothing prevents a conclusion in the other direction, i.e. that the coordination rules of the Regulation have to be taken into account when applying Directive 2004/38/EC. More precisely, the latter should not touch upon the coordination system which is aimed at preserving entitlement to social security benefits in the light of the free movement of Union citizens within the European Union. In that regard, it should be kept in mind that the European legislature can still provide for a clear provision on the relationship between Directive 2004/38/EC and Regulation (EC) No 883/2004.

It might be useful to take a step back and assess the historical background of the issue at stake. The requirement of sufficient resources and health coverage as conditions for legal residence were conditions in the former residence

directives,<sup>366</sup> repealed by Directive 2004/38/EC, as well. The same goes for the SNCB chapter in the old Regulation (EC) No 1408/71. They functioned next to each other and there was no apparent friction. Clearly, it was obvious that the entitlement to SNCBs had to be decided on in the framework of the coordination Regulations and the residence directives did not intrude into the coordination system, which was and is based on a system of factual residence. This previous cohabitation of legal residence with respect to entitlement to social security benefits of a mixed nature could be consolidated. It worked well until the political climate changed and some Member States decided to link both instruments.

A first option would be to remove all doubts on the relationship between Regulation (EC) No 883/2004 and Directive 2004/38/EC by accepting a status of ‘lex specialis’ for the coordination Regulation. This would explicitly affirm the current state of EU law and the normal application of Regulation (EC) No 883/2004. *In concreto*, this could be effectuated by inserting a safeguarding clause in Directive 2004/38/EC, confirming that the Directive does not affect the coordination rules of Regulation (EC) No 883/2004. Inspiration for such a clause could be found in Article 36(2) of Regulation 492/2011, which provides for the following clause in its final provisions: “*This Regulation shall not affect measures taken in accordance with Article 48 of the Treaty on the Functioning of the European Union*”.

In the same line of reasoning, a definition of social assistance could be provided for in Directive 2004/38/EC as not encompassing SNCBs that were included in Annex X of Regulation (EC) No 883/2004. This could be done in a general way, by equating “*social assistance within the meaning of Directive 2004/38/EC*” with “*social assistance within the meaning of Regulation (EC) No 883/2004*”. However, taking into account the *Brey* judgment, the

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<sup>366</sup> Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

legislature could also choose to integrate the CJEU's definition of social assistance, excluding SNCBs listed in Annex X:

*“Social assistance within the meaning of this Directive is all assistance introduced by the public authorities, whether at national, regional or local level, that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a burden on the public finances of the host Member State during his period of residence which could have consequences for the overall level of assistance which may be granted by that State. Social security benefits as defined in Article 3 of Regulation (EC) No 883/2004 are not social assistance within the meaning of this Directive.”<sup>367</sup>*

#### **5.4 Introducing a ‘fraud and abuse of rights’ in Regulation (EC) No 883/2004**

The analysis of the *Dano* judgment appears to reveal that the CJEU mainly aims to tackle ‘benefit tourism’, i.e. moving to another Member State solely to benefit from the welfare system of the host Member State. In that regard, it could be observed that it would suffice to introduce an explicit coordination rule tackling fraud and abuse of rights by claimants. Such clause could be incorporated in the SNCB chapter, but could also be a general provision on fraud and abuse in the coordination Regulations.

It is acknowledged that one has to be very careful with the use of these concepts in EU law, as they have traditionally been interpreted very narrowly by the CJEU. There is no abuse when EU citizens and their family members obtain a right of residence under Union law in a Member State other than that of the EU citizen's nationality, as they are benefiting from an advantage inherent in the exercise of the right of free movement protected

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<sup>367</sup> **The EC's task of thoroughly verifying whether a benefit is to be regarded as an SNCB or as social assistance would become all the more important.**

by the Treaty,<sup>368</sup> regardless of the purpose of their move to that State.<sup>369</sup> However, both the CJEU and the EC define abuse as “*an artificial conduct entered into solely with the purpose of obtaining the right of free movement and residence*”.<sup>370</sup> A residence which in actual fact is a “*fake residence*” (cf the problems mentioned with regard to “*addresses of convenience*”) would fall under such a concept of abuse. This of course cannot create rights under EU law.

It is however also apparent that in *Dano* the CJEU has further elaborated the concept of abuse of EU law and has allowed that “*the purposes of the move*” are taken into account by the host Member State. This can be regarded as a green light to integrate a fraud and abuse article in Regulation (EC) No 883/2004.

Article 35 of Directive 2004/38/EC could be a guiding article for this purpose, as it provides that Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. An “*address of convenience*” or a “*shift of residence with the sole purpose of obtaining social benefits*” could be treated in the same way and could consequently lead to the refusal, termination or withdrawal of the right to reside in a host Member State. A similar provision could be incorporated in Regulation (EC) No 883/2004.

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<sup>368</sup> Judgment in *Centros*, C-212/97, EU:C:1999:126, paragraph 27 and the judgment in *Commission v Austria* EU:C:2012:605, paragraph 67-68.

<sup>369</sup> Judgment in *Akrich*, C-109/01, EU:C:2003:491, paragraph 55 and judgment in *Jia*, C-1/05, EU:C:2007:1, paragraph 31.

<sup>370</sup> One should keep in mind that, when the freedom of movement was extended from the economically active to the economically non-active population in the context of Union citizenship, there was a political agreement that freedom of movement should not be extended to economically non-active persons who take the freedom of movement as a means to get the highest possible social benefit. The idea was to deprive those citizens of the right to free movement, if they intended to change residence driven by the mere motive to get more social benefits.

## 6 Conclusion

### 6.1 *General evaluation of the proposals*

The propositions made by the European Commission (EC) have a common denominator: they acknowledge that special non-contributory cash benefits (SNCBs) do not need to be paid during the first three months of residence and thereafter only if the recipient has a lawful right of residence according to the economic criteria set out in Directive 2004/38/EC in the host Member State (which have been interpreted restrictively by the Court of Justice of the European Union (CJEU)).

The authors of this report need to underline that key questions about the meaning of the CJEU's case law remain unresolved. Is the CJEU's case law, notably as a consequence of the *Dano* judgment, to be interpreted broadly (general exclusion of economically inactive persons from social assistance in the host Member State, without any individual assessment) or narrowly (denial of access to social assistance when it is not disproportionate in view of the facts of the case)? How will the CJEU analyse claims of SNCBs by jobseekers, former workers, family members or workers with low income? In some cases, may the existence of a 'genuine link' with the country in which the claim is made justify entitlement to social assistance and how would this link be assessed in accordance with EU primary law? How will the requirement of 'financial solidarity' impact access to social assistance? It is hard to anticipate responses which partly depend on how Treaty principles will be applied by the CJEU.

In the light of these remarks, differences between the three options are narrow. Whereas Option 1 (*status quo*) entails that access to social assistance is subject to a condition of legal residence in the host Member State such as defined by

the recent case law of the CJEU, Option 2a aims at reaching an equivalent effect with the transposition of the CJEU case law into Regulation (EC) No 883/2004 (limitation of the principle of equality of treatment for SNCBs). Option 2b would have a broader impact: by deleting the category of SNCBs, ‘mixed benefits’ may no longer take advantage of any of the coordination principles.

Even if the objective of unifying the regime of social assistance for migrants into one single instrument could improve clarity and simplicity, the complex and unstable legal context makes it necessary to highlight the drawbacks of the EC’s proposals.

Option 2b appears to be the most problematic one. The removal of SNCBs from the scope of Regulation (EC) No 883/2004 would be detrimental to both citizens and administrations. It would raise the cost of administering SNCBs, decrease legal certainty, endanger the protection of migrants’ rights, and hinder the fight against fraud, abuse and error. Above all, the *Brey* and *Dano* rulings in no way require the removal of SNCBs from the scope of the coordination Regulation.

Option 2a would raise beforehand the delicate question how to concretely insert Article 24 of Residence Directive 2004/38/EC into the coordination Regulation. It appears indeed that it is very difficult to transpose the limitation of the equal treatment principle into the coordination Regulation. The analysis carried out shows that there is a great risk of undermining the overall coherence of the SNCB system and of generating legal inconsistencies within the coordination Regulation. The fact that the CJEU case law is not stable yet makes it even less reasonable to set rules aiming to limit the equal treatment principle for SNCBs. In addition, is it consistent to combine two instruments which have very different institutional features? The amendment of the



coordination Regulation would affect the historical compromise of Regulation (EEC) No 1247/92 on SNCBs.

The proposal to retain the *status quo* (Option 1) would give the CJEU time to refine its case law. In this respect, this could be a reasonable choice given that *Brey* and *Dano* are far from covering all concrete situations. Nevertheless, Option 1 has many disadvantages. The *status quo* means that Member States may differentiate between their nationals and non-nationals with regard to access to social assistance. The treatment of poor people vis-à-vis social assistance will vary widely according to the country of residence. National rules are likely to be more and more restrictive with all the usual problems when conflicting national laws apply to transnational situations. Many poor migrants will find themselves without social assistance. There would be no guarantee that the overall expenditure by EU countries on social assistance would diminish: they may simply move from certain countries to others. There would be a flow of cases on the interpretation of Directive 2004/38/EC, whereas the implementation of the coordination Regulations as far as SNCBs are concerned would become more complex. Negative effects of Option 1 may, however, be the necessary counterpart if the legislature decides to wait until case law stabilises. Let us recall that for cross-border care, Directive 2011/24/EU of 9 March 2011 was published more than 10 years after the first *Kohll* and *Decker* cases. Option 1 is not supposed to be a long-term option. The CJEU case law should be considered as a work in progress. A wait-and-see position should be appropriate for the next few years. Later, legislative action should be taken at its best on the basis of a matured case law.

A common consequence of the three propositions is that protection of rights would be in danger. Inactive citizens will be deterred from exercising their right to mobility within the EU, not only because they will not know in advance their social assistance rights in the host Member State, but also because they may find themselves in situations where they have no entitlement

to social assistance in any of the Member States they have a connection with. Some Member States may even take advantage of the new legal system to raise the level of integration required for the eligibility for social assistance. This evolution could lead to violations of the Charter of Fundamental Rights of the EU and other international instruments such as the European Social Charter.

Administrative burden would increase under all three options. The concept of lawful residence will become central with a great risk of divergent concepts within the Member States. Should the concept of 'genuine link' continue to apply, it will be subject to recurrent problems of interpretation/evaluation. More generally, national institutions will have to permanently adjust to further rulings of the CJEU, which will be a source of unwanted administrative burden. In order to coordinate their actions, national administrations may be inclined to negotiate bilateral agreements, generating extra work for unsatisfactory results since they would be limited to signatories.

Concerning risks of fraud and abuse, the assessment of the three options is not simple. For Options 1 and 2a, the *Dano* case does not modify the principle in accordance with which the Member State in which the person does not habitually reside is in general free from "SNCB burden". Therefore, the risk of double payment seems to be largely reduced by Regulation (EC) No 883/2004. This said, in a dual system in which both the Regulation and Residence Directive 2004/38/EC would apply, the risk of double payment could increase for practical reasons. On balance, Option 2b would hinder the fight against fraud, abuse and error more than facilitate it.

As far as financial implications are concerned, savings made by some Member States thanks to stricter rules on access to social assistance would probably be compensated by extra administrative costs and new forms of fraud due to a

lack of administrative cooperation. A precise financial analysis is at this stage impossible to carry out.

## **6.2 *Alternative/adapted proposals***

All three proposals of the EC opt for an adaptation of the social security coordination rules related to SNCBs in order to align them with the requirements of legal residence as laid down in Directive 2004/38/EC. Alternative/adapted options are worth being explored. They aim to settle a balanced relationship between the Residence Directive and the coordination Regulations. The alternative propositions aim to preserve the coherence of coordination rules and to protect the social rights of mobile citizens within the European Union.

Three types of actions are envisaged.

If the option of a *status quo* (Option 1) was further explored, some initiatives would need to be taken at the European level to clarify the relationship between Regulation (EC) No 883/2004 and Directive 2004/38/EC. The main goal of these guidelines would be to strike a correct balance between the equal treatment provision of Regulation (EC) No 883/2004 and legal residence requirements for non-active persons.

If an explicit integration of the relevant articles of Directive 2004/38/EC into the SNCB title of Regulation (EC) No 883/2004 would remain on the agenda, it would be possible to translate the residence requirements of Directive 2004/38/EC explicitly into the text of Regulation (EC) No 883/2004 through an 'Option 4'. This option would connect the social assistance rights to the length of stay: first three months, between three months and five years/acquisition of permanent right of residence, over five years.

Alternatively, it could be sufficient to insert an explicit rule into the coordination Regulations tackling fraud and abuse of rights by claimants.

Instead of adapting Regulation (EC) No 883/2004, it would be conceivable to preserve its coherence. A first option would be to remove all doubts on the relationship between Regulation (EC) No 883/2004 and Directive 2004/38/EC by defining a status of '*lex specialis*' for the coordination Regulation. Even if it could raise difficulties since both regimes would apply with potentially different results, a second option would be to provide a definition of social assistance in Directive 2004/38/EC that would not encompass SNCBs included in Annex X of Regulation (EC) No 883/2004.

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**ANNEX IX: HIVA KU LEUVEN: ADDITIONAL ANALYSIS FOR  
THE PARTIAL REVISION OF THE PROVISION OF THE  
COORDINATION OF SOCIAL SECURITY SYSTEMS IN  
REGULATION (EC) NO 883/2004**

**ADDITIONAL ANALYSIS FOR THE PARTIAL  
REVISION OF THE  
PROVISION ON THE COORDINATION OF  
SOCIAL SECURITY SYSTEMS IN REGULATION  
(EC) NO 883/2004**

**Prof. dr. Jozef Pacolet & Frederic De Wispelaere**

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# Introduction

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The purpose of this report is to provide further support to the Commission in drafting the Impact Assessment report for the revision of Regulations (EC) No 883/2004 and (EC) No 987/2009.<sup>371</sup> In preparation of this impact assessment a study has been made by a team of Deloitte Consulting and HIVA - Catholic University of Leuven under contract VC/2012/0949 'Study for and impact assessment for revision of Regulations (EC) No 883/2004 and (EC) No 987/2009' (hereafter the study).

The study provides among others socio-economic data and indicators to evaluate the mobility trends of the insured persons and their family members, as well as the related costs for the Members States' social security schemes.

The aim of this report is to provide further support to the Commission services to integrate directly the relevant data and statistics in the analytical part of the Impact Assessment report. This report provides a clear answer 'on what is the nature and scale of the problem, how is it evolving and who is most affected by it?' As well for the baseline scenario of the present situation, its further development, and the potential impact of the alternative options, this is documented in quantitative terms. Those quantitative pictures reveal size and scope of the problem, the baseline scenario and the impact and changes from the baseline scenario for several options.

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# 1 | Data collection, limitations and applied methodology

## 1.1 Data collection

Within the ‘Study for an impact assessment for revision of Regulations (EC) Nos 883/2004 and 987/2009’<sup>372</sup> it was the ambition to collect in 14 Member States administrative data on the coordination rules of LTC and unemployment benefits. This questionnaire referred explicitly to the old E-forms, the current Portable Documents and Structured Electronic Documents (SED) in order to obtain a well understanding of the data needs. Although those 14 Member States cover the complete range of welfare state regimes, this administrative data collection, in terms of involved Member States and in terms of available data, was too narrow to assess in detail the baseline scenarios and the different proposed options.

To obtain a more detailed quantitative view on the baseline scenario and the different options, mainly data from the EU Labour Force Survey (LFS)<sup>373</sup> and the EC 2012 Ageing Report was exploited. The LFS is the main source of information with regard to the labour market situation and labour market trends in the European Union. The main advantage of this survey is the data availability for all EU-Member States. The EC 2012 Ageing Report contains state of the art information on the coverage of social protection schemes and its budgetary cost in all EU countries including projections for the future presents projections.

## 1.2 Limitations

Regulation (EC) No 883/2004 is applicable to countries of the European Economic Area (EEA) and Switzerland. However, calculations have been made for only 27 Member States.

## 1.3 Applied methodology

Both figures below provide a first overview of the applied methodology to estimate/calculate the budgetary impact of the baseline scenario and the different options. It was the ambition to collect in 14 Member States administrative data from the competent institutions. Afterwards, the results would have been extrapolated to the EEA countries and Switzerland. Although those 14 Member States cover the complete range of welfare state regimes, this administrative data collection, in terms of involved Member States and in terms of available data, was too narrow to assess in detail the baseline scenarios and the different proposed options. As result, mainly data from the LFS, the

<sup>372</sup> Regulation (EC) No 883 of the European Parliament and of the Council of 24 April 2004 on the coordination of social security systems. Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004

<sup>373</sup> Council Regulation (EC) No. 577/98 of 9 March 1998 on the organisation of a labour force sample survey in the Community.

Ageing Report and the Audit Board Report was exploited to estimate the number of involved persons and the budgetary impact.

### 1.3.1 Unemployment benefits

Based on Labour force Survey (LFS) data, an estimation of the number of **cross-border workers** could be made (based on the question *‘What is the name and address of the local unit of the enterprise where you work?’* and variables ‘COUNTRYW’ (country of place of work) and ‘COUNTRY’ (country of residence) in the database). In the further analysis we considered all **workers who work in another country than the country of residence as cross-border workers. Workers who work in a neighbouring country are considered as frontier workers.** This is different from the legal definition.

National unemployment rates were applied to the number of cross-border workers to estimate the number of **unemployed cross-border workers**.<sup>374</sup> The national unemployment rates of 2010 (from 20 to 64 years) defined in the 2012 Ageing Report were used. **The unemployment rates of the country of employment and not of the country of residence have been applied** on the number of cross-border workers calculated by way of the LFS.

In order to **estimate the budgetary impact** of the baseline scenario, the estimated number of unemployed cross-border workers (based on the LFS and the unemployment rates of the 2012 Ageing Report) is multiplied by the annual unemployment benefit per unemployed person (unemployment benefit spending in 2010 prices / (labour force \* unemployment rate)) (data from the 2012 Ageing Report). This yearly expenditure assumes that the unemployed person did not find a job during the first year of unemployment. However, a more ‘realistic’ calculation of the yearly expenditure is taken up in this report by taking into account **the annual average duration of the payment of the unemployment benefit**.<sup>375</sup> However, also the amount of the **reimbursement claim** should be taken into account. The analysis assumes 3 months of claims (minimum scenario) where a distinction should be made between the claim made by the country of residence and the actual payment by the country of last activity.

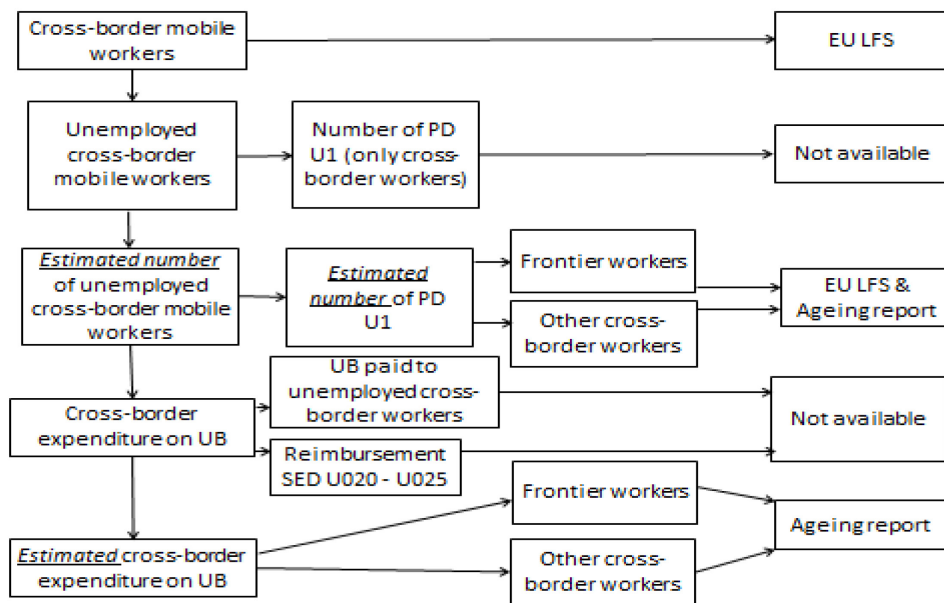
Under current rules unemployed frontier workers must claim unemployment benefits in the country of residence while unemployed other cross-border workers can choose to claim unemployment benefits in the country of last employment or in the country of residence. Due to the fact other cross-border workers can choose (between the country of last activity or the country of residence), an assumption has to be made about how many of them return to the country of residence and how many stay in the country of last activity. We assume that the unemployed persons will choose for the country which is paying the highest unemployment benefit.

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<sup>374</sup> In order to support the use of national unemployment rates for cross-border workers, DG EMPL confirmed, on the basis of Eurostat EU-LFS data, that the overall characteristics of cross-border workers seem quite close to the average national workers (people working in the same country than their country of residence). No large differences in terms of highest level of education or age, two important factors when it comes to unemployment, appear.

<sup>375</sup> Calculations are based on the duration of the unemployment (which can be calculated with LFS data). If the duration of unemployment < 1 month, we assume a payment of the UB of 0.5 months; Between 1-2 months of unemployment = 1.5 months UB paid; Between 3-5 months of unemployment = 4 months UB paid; Between 6 and 11 months of unemployment = 8.5 months UB paid; 12 months and longer of unemployment = 12 months UB paid. This cut-off period of 12 months stems from the fact that the expenditure is calculated for only one year. It should be noted that the duration in unemployment may be underestimated since it is measured at a certain moment in time (e.g. he/she may still remain unemployed), see Employment in Europe 2008, chapter 2 and Employment and Social developments in Europe Review 2012, chapter 1.

Figure 1.1 Applied methodology – Unemployment benefits



Source HIVA KU Leuven

### 1.3.2 LTC

[The fact there is no specific coordination regime and a common definition, difficulties appeared during the data collection on LTC. Member States do not explicit collect data on LTC and have not a common understanding of LTC benefits. At the moment, administrative data on LTC are only available in specific forms dealing with the coordination rules of the sickness chapter.](#)

The number of those insured for health care living in another country than the competent country – which sometimes includes long-term care or to which LTC-insurance is closely linked – can be calculated based on the number of PD S1 - or E106 forms (insured person), E109 forms (family member of insured person) and E121 forms (pensioner and family member of pensioner). **The number of PD S1** was estimated by the sum of 3 categories:

- Cross-border workers (and their family members);
- Retired former cross-border workers (and their family members);
- Other mobile pensioners (and their family members).

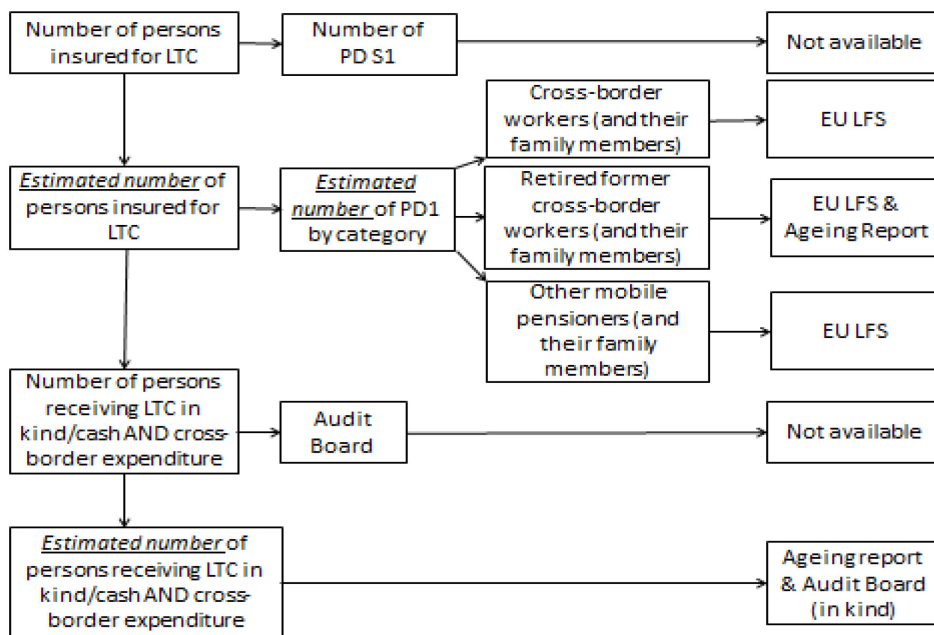
First, by way of the LFS, the number of cross-border workers were estimated. Second, we assumed in the calculation model that 20% of the cross-border workers will have an insured family member. Third, to estimate the total number of retired former cross-border workers, we applied the percentage of cross-border workers on the labour market to the number of pensioners in 2010 (figure from 2012 Aging Report- variable ‘Pensioners aged 65+’) and this by individual (former) working Member State. Fourth, an estimation of the number of migrant pensioners was calculated by using the LFS (= selection of ‘retired persons aged older than 60 at arrival’ of which country of

birth= EU27 and country of residence=EU27). Final, we assume in the calculation model that 25% of the pensioners will have also an insured family member. The sum of all these categories results in an estimate of the number of PD S1.

As next step we have estimated **the cross-border expenditure** on health care and long-term care based on figures from the 2012 Ageing Report (variables ‘Health care spending in 2010 prices per person’, ‘Population (million)’ and ‘Long-term care spending in 2010 prices (in billion Euros)’).

We calculated our estimates on average benefits for the total of the insured population. It is as mobile citizens (workers, pensioners, their family members) are using this system of LTC as if they were nationals. This involves a ‘potential’ overestimation of the number of users of cross-border LTC benefits and the related expenditure due to fact some MS consider their LTC benefit as not exportable. At the same time these estimates assume a complete ‘take-up’ of rights by mobile citizens which will not be the case in the baseline scenario. A distinction could be made between LTC benefits in kind, LTC benefits in cash and informal LTC by more detailed data from DG ECFIN.

Figure 1.2 Applied methodology - LTC



Source HIVA KU Leuven

## 2 | Analysis and results

### 2.1 Unemployment benefits

In the **baseline scenario**, frontier workers (people who work in one country and live in another, and return home daily or at least once a week) who become wholly unemployed must apply for unemployment benefits in their country of residence. Cross-border workers, other than frontier workers, may apply for unemployment benefits and register with the employment service in either the country of last activity or the country of residence (*right of choice*). The country of last activity will reimburse the institution of the country of residence an amount of the benefits provided to the returned frontier workers and other cross-border workers by the latter institution during the first three or five months.

**Option 2** implies that frontier workers also have the choice between applying for unemployment benefits and registering with the employment services either in the country of last activity or in the country of residence (*all cross-border workers have a right of choice*).

In **option 3**, the unemployed person should claim unemployment benefits and register with the employment services in the country of last activity. Reimbursement claims are no longer necessary.

**Table 2.1** Applicable rules baseline scenario and different options

	Option 1: Baseline scenario	Option 2: Right of choice	Option 3: Country of last activity
<b>Country of last activity</b>			
Other cross-border workers	UB paid to other cross-border workers when highest UB in country of last activity (rational decision)	UB paid to other cross-border workers when highest UB in country of last activity (rational decision)	UB paid to other cross-border workers
Frontier workers		UB paid to frontier workers when highest UB in country of last activity (rational decision)	UB paid to frontier workers
Reimbursement	Reimbursement claim paid of 3 or 5 months to country of residence	Reimbursement claim paid of 3 or 5 months to country of residence	No reimbursement
<b>Country of residence</b>			
Other cross-border workers	UB paid to other cross-border workers when highest UB in country of residence (rational decision)	UB paid to other cross-border workers when highest UB in country of residence (rational decision)	*
Frontier workers	UB paid to frontier workers	UB paid to frontier workers when highest UB in country of residence (rational decision)	*
Reimbursement	Reimbursement claim received of 3 or 5 months from country of last activity	Reimbursement claim received of 3 or 5 months from country of last activity	

\* A PD U1 could be issued by the country of residence to prove (self-)employed or insured periods in the country of residence to open unemployment rights in the country of last activity.

Source HIVA KU Leuven based on information from DG EMPL

Table 2.2 provides an overview of the figures we have used to estimate the number of unemployed cross-border workers and the cross-border expenditure related to unemployment benefits. The table shows that on average 1 million cross-border workers are employed in the EU27, of which on average 701.000 frontier workers are employed in a neighbouring country. For the first the MS is the country of last activity and competent country, for the latter the MS is the country of residence. The number of incoming and outgoing cross-border workers will differ between Member States. The total budgetary impact of the coordination regulation is the combination of both situations. E.g. Belgium employs 62 thousand incoming cross-border workers (of which 50 thousand incoming frontier workers) while 97 thousand cross-border workers live in Belgium but work in another country (= ‘outgoing cross-border workers’) (of which 93 thousand outgoing frontier workers). National unemployment rates were applied to the number of cross-border workers to estimate the number of unemployed cross-border workers. This results in an estimate of 73.7 thousand unemployed cross-border workers of which 45.2 thousand frontier workers. The annual unemployment benefit per unemployed person was taken to estimate the cross-border expenditure.

**Table 2.2 UB: Main parameters for estimating the baseline scenario and the different options**

Country	Average 2010 and 2011				2010	Average 2010 and 2011				2010
	Incoming Cross- border workers (in .000)	Of which: Incoming frontier workers (in .000)	Outgoing cross- border workers (in .000)	Of which: Outgoing frontier workers (in 000)		Unemployment rate (20-64)	Incoming <b>unemployed</b> Cross-border workers (in .000)	Of which: Incoming unemployed frontier workers (in .000)	Outgoing <b>unemployed</b> cross-border workers (in .000)	
BE	62	50	97	93	8,0%	4,9	4,0	5,1	4,7	19.116
BG	2	0	21	6	10,2%	0,2	0,0	2,2	0,8	454
CZ	61	60	24	17	7,1%	4,4	4,3	1,8	1,2	1.386
DK	35	29	4	3	6,9%	2,4	2,0	0,3	0,2	9.400
DE	186	142	165	141	7,1%	13,2	10,1	9,6	6,9	8.919
EE	1	1	18	15	16,7%	0,1	0,1	1,4	1,2	729
IE	17	8	10	9	13,2%	2,3	1,1	0,7	0,6	14.970
GR	12	6	0	0	12,5%	1,5	0,8	0,0	0,0	2.164
ES	40	10	23	6	19,5%	7,9	1,9	1,8	0,5	4.735
FR	47	30	160	150	9,0%	4,3	2,7	10,5	9,7	12.577
IT	76	5	24	7	8,1%	6,1	0,4	2,1	0,6	5.815
CY	4	0	0	0	6,4%	0,2	0,0	0,0	0,0	3.282
LV	0	0	7	1	18,4%	0,1	0,1	0,6	0,1	590
LT	0	0	2	0	17,8%	0,1	0,0	0,2	0,0	401
LU	130	129	3	2	4,3%	5,6	5,5	0,2	0,2	25.048
HU	14	12	53	23	11,1%	1,5	1,3	3,4	1,1	833
MT	1	0	1	0	6,0%	0,0	0,0	0,1	0,0	2.204
NL	110	82	21	20	4,0%	4,4	3,3	1,6	1,5	28.769
AT	101	94	32	29	4,2%	4,2	4,0	2,5	2,2	12.715
PL	8	6	92	50	9,6%	0,7	0,6	6,3	3,6	397
PT	5	2	11	6	11,1%	0,5	0,2	1,6	1,2	3.628
RO	4	0	88	0	7,3%	0,3	0,0	8,6	0,0	803
SI	1	1	9	7	7,2%	0,1	0,1	0,5	0,4	1.537
SK	6	6	117	84	13,9%	0,9	0,8	8,3	5,7	405
FI	20	16	2	1	7,7%	1,5	1,2	0,1	0,1	14.892
SE	12	3	29	23	7,3%	0,9	0,2	2,1	1,6	5.978
UK	78	9	20	8	6,9%	5,4	0,6	2,1	1,1	2.219
EU-27	1.032	701	1.032	701	10,5%	73,7	45,2	73,7	45,2	6.073

\* The annual unemployment benefit per unemployed person= unemployment benefit spending in 2010 prices / unemployed persons (20-64)

Source LFS and 2012 Ageing Report

Reimbursement claims can be made by the country of residence to the country of last activity for fully unemployed frontier workers but also for other cross-border workers who have decided to register with the competent institution in their country of residence. The country of last activity shall reimburse the unemployed benefits provided in the country of residence during the first three months or five months (when the unemployed person during the preceding 24 months, completed at least 12 months of (self)employment in the country of last activity). However, the amount of reimbursement by the country of last activity to the country of residence cannot be higher than the amount payable under the legislation of the country of last activity (see art. 65, 6 Regulation (EC) No. 883/2004). This specific rule implies for the baseline scenario that the reimbursement will be 27% lower than the possible actual claim. The % difference between claim and actual payment will be influenced by the amount of the unemployment benefit paid in the country of last activity compared to this in the country of residence (last column of table 2.3). E.g. claims made to Poland (lowest estimated annual expenditure UB per person) will imply a high % difference (95%) with the actual payment while claims made to the Netherlands (highest estimated annual expenditure UB per person) will imply no % difference with the actual payment.



**Table 2.3 UB: estimated reimbursement claims and impact of maximum reimbursement country of last activity (baseline scenario)**

Country of last activity	Amount of the claims received as debtor (in .000 €)		Amount of the claims paid as debtor (in .000 €)		% difference amount claim received vs. paid	Annual expenditure UB per person (in €)
	Cross-border workers (in .000 €)	Of which: frontier workers (in .000 €)	Cross-border workers (in .000 €)	Of which: frontier workers (in .000 €)		
BE	15.200	15.200	13.533	13.533	-11%	19.116
BG	441	0	20	0	-95%	454
CZ	1.278	1.215	526	519	-59%	1.386
DK	3.428	3.342	3.395	3.342	-1%	9.400
DE	25.390	25.256	15.024	14.944	-41%	8.919
EE	115	62	19	14	-84%	729
IE	684	600	664	600	-3%	14.970
GR	1.037	88	329	88	-68%	2.164
ES	7.627	3.148	4.108	1.871	-46%	4.735
FR	8.659	8.568	6.483	6.395	-25%	12.577
IT	1.466	803	732	406	-50%	5.815
CY	37	0	7	0	-82%	3.282
LV	26	11	10	9	-62%	590
LT	34	5	5	4	-85%	401
LU	18.804	18.804	18.804	18.804	0%	25.048
HU	797	336	190	145	-76%	833
MT	75	0	23	0	-69%	2.204
NL	10.969	10.969	10.969	10.969	0%	28.769
AT	4.102	4.020	4.062	4.020	-1%	12.715
PL	1.574	1.201	73	58	-95%	397
PT	648	238	293	182	-55%	3.628
RO	557	5	54	5	-90%	803
SI	174	174	26	26	-85%	1.537
SK	932	899	87	82	-91%	405
FI	438	323	399	323	-9%	14.892
SE	1.316	536	771	283	-41%	5.978
UK	6.678	2.283	1.514	338	-77%	2.219
EU-27	112.488	98.088	82.122	76.961	-27%	

Source Estimate based on data LFS and 2012 Ageing Report

Tables 2.4 to 2.8 assume for the calculation of the ‘annual expenditure of UB’ that the unemployed person did not find a job during the first year of unemployment. However, a more ‘realistic’ estimate of the yearly expenditure is taken up in this report by taking into account the annual average duration of the payment of the unemployment benefit. For that reason, we discuss only tables 2.9 to 2.15. Tables 2.4 and 2.8 describe in more detail the calculations made in the [‘Study for and impact assessment for revision of Regulations \(EC\) No 883/2004 and \(EC\) No 987/2009’](#). For that reason, we keep them in this additional analysis. These tables were also presented in the [AC Working Party of 10 October 2013](#).

**Table 2.4 UB: estimated expenditure UB incoming cross-border workers becoming unemployed, baseline scenario, breakdown by country of last activity and country of residence and impact of reimbursement**

<b>Option 1: No policy change (Baseline scenario):</b> Frontier workers return; other cross-border workers take a rational decision (= highest UB)									
Country of employment	Incoming unemployed crossborder workers		Expenditure			Cost without reimbursement		Cost with reimbursement	
	Number of unemployed incoming cross-border workers (in .000)	Of which incoming unemployed frontier workers (in .000)	Estimated annual expenditure UB paid by the country of residence (in .000 €)	Estimated annual expenditure UB paid by the country of last activity (in .000 €)	Reimbursement country of last activity (3 months) (in .000 €)	% share of cost country of residence	% share of cost country of last activity	% share of cost country of residence	% share of cost country of last activity
BE	4,9	4,0	60.800	17.621	13.533	78%	22%	66%	34%
BG	0,2	0,0	1.764	0	20	100%	0%	99%	1%
CZ	4,4	4,3	5.111	68	526	99%	1%	90%	10%
DK	2,4	2,0	13.711	3.628	3.395	79%	21%	66%	34%
DE	13,2	10,1	101.560	27.711	15.024	79%	21%	70%	30%
EE	0,1	0,1	462	10	19	98%	2%	94%	6%
IE	2,3	1,1	2.735	17.817	664	13%	87%	13%	87%
GR	1,5	0,8	4.149	508	329	89%	11%	83%	17%
ES	7,9	1,9	30.508	19.401	4.108	61%	39%	56%	44%
FR	4,3	2,7	34.635	19.539	6.483	64%	36%	57%	43%
IT	6,1	0,4	5.865	32.046	732	15%	85%	15%	85%
CY	0,2	0,0	148	721	7	17%	83%	17%	83%
LV	0,1	0,1	105	6	10	94%	6%	87%	13%
LT	0,1	0,0	138	0	5	100%	0%	96%	4%
LU	5,6	5,5	75.216	1.323	18.804	98%	2%	79%	21%
HU	1,5	1,3	3.187	9	190	100%	0%	94%	6%
MT	0,0	0,0	300	12	23	96%	4%	89%	11%
NL	4,4	3,3	43.877	31.923	10.969	58%	42%	51%	49%
AT	4,2	4,0	16.410	3.292	4.062	83%	17%	69%	31%
PL	0,7	0,6	6.294	0	73	100%	0%	99%	1%
PT	0,5	0,2	2.592	652	293	80%	20%	73%	27%
RO	0,3	0,0	2.228	2	54	100%	0%	98%	2%
SI	0,1	0,1	697	52	26	93%	7%	90%	10%
SK	0,9	0,8	3.729	0	87	100%	0%	98%	2%
FI	1,5	1,2	1.751	3.981	399	31%	69%	29%	71%
SE	0,9	0,2	5.265	2.361	771	69%	31%	63%	37%
UK	5,4	0,6	26.713	5.828	1.514	82%	18%	78%	22%
EU-27	73,7	45,2	449.952	188.512	82.122	70%	30%	62%	38%

\* Only the annual expenditure is taken into account while there will possibly be a shift of the social security system from the country of last activity to the country of residence

**Source** Estimate based on data LFS and 2012 Ageing Report

**Table 2.5 UB: estimated budgetary impact baseline scenario and options, in € .000**

	<b>Option 1: No policy change (Baseline scenario):</b> Frontier workers return; other cross-border workers take a rational decision (= highest UB)					<b>Option 2: Right of choice:</b> cross-border workers take a rational decision (= highest amount)					<b>Option 3: UB provided by the country of last activity</b>				
	Annual expenditure UB in own country (in € .000)	Actual claims paid to country of residence (3 months) (in € .000)	Actual claims received from country of last activity (3 months) (in € .000)	Total expenditure (in € .000)	%	Annual expenditure UB in own country (in € .000)	Actual claims paid to country of residence (3 months) (in € .000)	Actual claims received from country of last activity (3 months) (in € .000)	Total expenditure (in € .000)	%	Annual expenditure UB in own country (in € .000)	Actual claims paid to country of residence (3 months) (in € .000)	Actual claims received from country of last activity (3 months) (in € .000)	Total expenditure (in € .000)	%
BE	114.301	13.533	19.727	108.107	100%	119.326	5.077	8.935	115.467	107%	94.166	0	0	94.166	87%
BG	354	20	88	286	100%	0	221	0	221	77%	82	0	0	82	29%
CZ	1.736	526	334	1.928	100%	6.012	848	117	6.743	350%	6.045	0	0	6.045	313%
DK	6.368	3.395	450	9.313	100%	25.257	43	599	24.701	265%	22.728	0	0	22.728	244%
DE	112.967	15.024	16.167	111.825	100%	91.243	24.804	4.864	111.183	99%	117.867	0	0	117.867	105%
EE	894	19	219	694	100%	106	78	10	174	25%	96	0	0	96	14%
IE	28.156	664	455	28.365	100%	44.358	42	2.434	41.966	148%	34.274	0	0	34.274	121%
GR	508	329	0	837	100%	2.177	475	0	2.651	317%	3.142	0	0	3.142	375%
ES	25.118	4.108	949	28.277	100%	29.223	4.287	629	32.882	116%	37.178	0	0	37.178	131%
FR	148.335	6.483	26.361	128.457	100%	94.861	6.226	13.574	87.513	68%	53.527	0	0	53.527	42%
IT	40.718	732	1.444	40.006	100%	38.633	1.068	711	38.990	97%	35.719	0	0	35.719	89%
CY	721	7	0	727	100%	721	19	0	739	102%	748	0	0	748	103%
LV	81	10	16	75	100%	42	18	6	55	73%	48	0	0	48	64%
LT	6	5	1	9	100%	7	18	0	25	272%	20	0	0	20	217%
LU	6.747	18.804	637	24.914	100%	145.470	0	1.233	144.237	579%	140.046	0	0	140.046	562%
HU	928	190	208	910	100%	1.235	435	44	1.625	179%	1.285	0	0	1.285	141%
MT	16	23	0	39	100%	16	38	0	53	136%	105	0	0	105	269%
NL	78.376	10.969	5.167	84.179	100%	172.848	0	11.199	161.649	192%	126.395	0	0	126.395	150%
AT	34.366	4.062	4.253	34.175	100%	84.772	41	7.381	77.433	227%	53.868	0	0	53.868	158%
PL	1.416	73	354	1.136	100%	0	1.387	0	1.387	122%	293	0	0	293	26%
PT	5.139	293	1.111	4.321	100%	738	443	11	1.170	27%	1.825	0	0	1.825	42%
RO	41	54	10	85	100%	8	280	0	288	338%	219	0	0	219	258%
SI	719	26	154	591	100%	133	173	9	297	50%	162	0	0	162	27%
SK	2.307	87	577	1.818	100%	42	908	3	948	52%	350	0	0	350	19%
FI	5.739	399	161	5.977	100%	24.057	57	369	23.746	397%	22.604	0	0	22.604	378%
SE	14.116	771	2.663	12.224	100%	4.409	926	256	5.079	42%	5.444	0	0	5.444	45%
UK	8.290	1.514	615	9.189	100%	5.888	4.481	8	10.362	113%	11.885	0	0	11.885	129%
EU-27	638.464	82.122	82.122	638.464	100%	891.583	52.391	52.391	891.583	140%	770.121	0	0	770.121	121%

\* The annual expenditure (12 months) is estimated without taking into account national legislation and as such the possible limitation in time of the payment of UB.

**Source** Estimate based on data LFS and 2012 Ageing Report

**Table 2.6 UB: comparison of options between MS, estimated budgetary impact option 1 (100%) compared to other options**

	Option 1: No policy change (Baseline scenario)	Option 2: Right of choice	Option 3: UB provided by the country of last activity
BE	100%	107%	87%
BG	100%	77%	29%
CZ	100%	350%	313%
DK	100%	265%	244%
DE	100%	99%	105%
EE	100%	25%	14%
IE	100%	148%	121%
GR	100%	317%	375%
ES	100%	116%	131%
FR	100%	68%	42%
IT	100%	97%	89%
CY	100%	102%	103%
LV	100%	73%	64%
LT	100%	272%	217%
LU	100%	579%	562%
HU	100%	179%	141%
MT	100%	136%	269%
NL	100%	192%	150%
AT	100%	227%	158%
PL	100%	122%	26%
PT	100%	27%	42%
RO	100%	338%	258%
SI	100%	50%	27%
SK	100%	52%	19%
FI	100%	397%	378%
SE	100%	42%	45%
UK	100%	113%	129%
EU-27	100%	140%	121%
Lowest impact	15	3	9
Highest impact	9	12	6

\* Green: lowest budgetary impact; Red: highest budgetary impact

Source Estimate based on data LFS and 2012 Ageing Report

**Table 2.7 UB: comparison of options between MS, estimated lowest and highest budgetary impact**

	<i>Lowest budgetary impact</i>			<i>Highest budgetary impact</i>			
	Option 1: No policy change (Baseline scenario)	Option 2: Right of choice	Option 3: UB provided by the country of last activity	Option 1: No policy change (Baseline scenario)	Option 2: Right of choice	Option 3: UB provided by the country of last activity	
BE			X		X		BE
BG			X	X			BG
CZ	X				X		CZ
DK	X				X		DK
DE		X				X	DE
EE			X	X			EE
IE	X				X		IE
GR	X					X	GR
ES	X					X	ES
FR			X	X			FR
IT			X	X			IT
CY	X					X	CY
LV			X	X			LV
LT	X				X		LT
LU	X				X		LU
HU	X				X		HU
MT	X					X	MT
NL	X				X		NL
AT	X				X		AT
PL			X		X		PL
PT		X		X			PT
RO	X				X		RO
SI			X	X			SI
SK			X	X			SK
FI	X				X		FI
SE		X		X			SE
UK	X					X	UK
EU-27	15	3	9	9	12	6	EU-27

Source Estimate based on data LFS and 2012 Ageing Report

**Table 2.8 UB: impact estimated cross-border expenditure\* on total expenditure UB\*\*, by option**

	Total expenditure UB in 2010 - cash benefits (in Million €)	Estimated cross-border expenditure: <b>Baseline scenario</b> (in Million €)	% impact <b>baseline scenario</b> on total expenditure	Estimated cross-border expenditure ( <b>Option 2: Right of choice</b> ) (in Million €)	% impact <b>option 2</b> on total expenditure	Estimated cross-border expenditure ( <b>Option 3: Country of last activity</b> ) (in Million €)	% impact <b>option 3</b> on total expenditure
BE	13.297	108	0,8%	115	0,9%	94	0,7%
BG	202	0	0,1%	0	0,1%	0	0,0%
CZ	1.196	2	0,2%	7	0,6%	6	0,5%
DK	5.293	9	0,2%	25	0,5%	23	0,4%
DE	40.564	112	0,3%	111	0,3%	118	0,3%
EE	88	1	0,8%	0	0,2%	0	0,1%
IE	5.188	28	0,5%	42	0,8%	34	0,7%
GR	2.146	1	0,0%	3	0,1%	3	0,1%
ES	34.773	28	0,1%	33	0,1%	37	0,1%
FR	39.331	128	0,3%	88	0,2%	54	0,1%
IT	12.958	40	0,3%	39	0,3%	36	0,3%
CY	184	1	0,4%	1	0,4%	1	0,4%
LV	190	0	0,0%	0	0,0%	0	0,0%
LT	192	0	0,0%	0	0,0%	0	0,0%
LU	489	25	5,1%	144	29,5%	140	28,7%
HU	796	1	0,1%	2	0,2%	1	0,2%
MT	27	0	0,1%	0	0,2%	0	0,4%
NL	9.230	84	0,9%	162	1,8%	126	1,4%
AT	3.621	34	0,9%	77	2,1%	54	1,5%
PL	1.392	1	0,1%	1	0,1%	0	0,0%
PT	2.487	4	0,2%	1	0,0%	2	0,1%
RO	693	0	0,0%	0	0,0%	0	0,0%
SI	206	1	0,3%	0	0,1%	0	0,1%
SK	594	2	0,3%	1	0,2%	0	0,1%
FI	3.840	6	0,2%	24	0,6%	23	0,6%
SE	3.756	12	0,3%	5	0,1%	5	0,1%
UK	9.387	9	0,1%	10	0,1%	12	0,1%
EU-27	192.121	638	0,3%	892	0,5%	770	0,4%

\* Total cross-border expenditure: without taking into account the UB paid to unemployed EU migrant workers.

\*\* Total expenditure UB: ESSPROS data

Source Estimate based on data LFS and 2012 Ageing Report

Table 2.9 provides an overview of the applied methodology to estimate the ‘annual expenditure of UB based on the annual average duration of the payment of the UB’. On average 7.5 months (EU-27) the UB was paid to unemployed persons (calculated for the total year)<sup>376</sup>. The ‘annual expenditure of UB based on the average duration payment UB’ was estimated by multiplying the monthly expenditure (Annual expenditure UB in own country / 12) with the duration of the payment of the UB. This delivers a more ‘realistic’ view on the annual expenditure.

Tables 2.10 to 2.12 compare the budgetary impact of the different options. The calculation of the total expenditure takes not only the expenditure of the UB into account but also the amount of the claims received (as country of residence = creditor) and the amount of the claims paid (as country of last activity = debtor). These assumptions result in a total expenditure of € 378 Million for the baseline scenario, € 502 Million for option 2 (*right of choice*) and € 437 Million for option 3 (*provided by the country of last activity*). Both new options are more expensive than the baseline scenario. The expenditure increases with 33% in option 2 compared to the baseline scenario and increases with 16% in option 3. The budgetary impact differs between Member States. For 16 Member States the baseline scenario has the lowest budgetary impact (CZ, DK, DE, IE, GR, ES, CY, LT, LU, HU, MT, NL, AT, RO, FI, UK). Option 2 has only for 1 Member State the lowest budgetary impact (PT) while option 3 is least expensive for 10 Member States (BE, BG, EE, FR, IT, LV, PL, SI, SK,

<sup>376</sup> Calculations are based on LFS data. If the duration of unemployment < 1 month, we assume a payment of the UB of 0,5 months; Between 1-2 months of unemployment = 1,5 months UB paid; Between 3-5 months of unemployment = 4 months UB paid; Between 6 and 11 months of unemployment = 8,5 months UB paid; 12 months and longer of unemployment = 12 months UB paid.



SE). Option 2 is for 16 Member States the most expensive option (BE, BG, CZ, DK, DE, IE, CY, LT, LU, HU, NL, AT, PL, RO, FI, UK). For 8 Member States the baseline scenario is the most expensive option (EE, FR, IT, LV, PT, SI, SK, SE) and for 3 Member states this will be option 3 (GR, ES, MT).

Table 2.9 UB: Annual average duration of payment UB and impact on annual expenditure UB

Country	Annual average duration of payment UB (in months)	<b>Option 1: No policy change (Baseline scenario):</b> Frontier workers return; other cross-border workers take a rational decision (= highest UB)		<b>Option 2: Right of choice:</b> cross-border workers take a rational decision (= highest UB)		<b>Option 3: UB provided by the country of last activity</b>	
		Annual expenditure UB in own country (in € .000)	Annual expenditure UB based on average duration payment UB (in € .000)	Annual expenditure UB in own country (in € .000)	Annual expenditure UB based on average duration payment UB (in € .000)	Annual expenditure UB in own country (in € .000)	Annual expenditure UB based on average duration payment UB (in € .000)
BE	7,4	114.301	70.891	119.326	74.007	94.166	58.403
BG	8,7	354	256	0	0	82	59
CZ	7,6	1.736	1.097	6.012	3.798	6.045	3.819
DK	5,7	6.368	3.029	25.257	12.014	22.728	10.811
DE	7,3	112.967	69.040	91.243	55.763	117.867	72.034
EE	8,2	894	609	106	73	96	65
IE	9,1	28.156	21.239	44.358	33.461	34.274	25.854
GR	9,0	508	381	2.177	1.632	3.142	2.356
ES	7,6	25.118	15.919	29.223	18.520	37.178	23.563
FR	7,0	148.335	86.602	94.861	55.382	53.527	31.250
IT	8,4	40.718	28.531	38.633	27.070	35.719	25.028
CY	6,5	721	391	721	391	748	405
LV	8,2	81	55	42	29	48	33
LT	8,2	6	4	7	5	20	14
LU	6,2	6.747	3.510	145.470	75.684	140.046	72.862
HU	8,0	928	615	1.235	819	1.285	852
MT	7,8	16	10	16	10	105	68
NL	6,3	78.376	41.060	172.848	90.552	126.395	66.216
AT	5,4	34.366	15.426	84.772	38.052	53.868	24.180
PL	7,4	1.416	872	0	0	293	181
PT	8,1	5.139	3.457	738	497	1.825	1.228
RO	7,4	41	26	8	5	219	136
SI	7,9	719	475	133	88	162	107
SK	9,8	2.307	1.880	42	35	350	285
FI	4,6	5.739	2.206	24.057	9.246	22.604	8.687
SE	4,8	14.116	5.651	4.409	1.765	5.444	2.179
UK	6,6	8.290	4.529	5.888	3.217	11.885	6.492
EU-27	7,5	638.464	377.761	891.583	502.113	770.121	437.167

\* Based on Eurostat - LFS indicator: 'Unemployment by sex, age and duration of unemployment'. Duration of unemployment < 1 month = 0,5 months UB paid; Between 1-2 months of unemployment = 1,5 months UB paid; Between 3-5 months of unemployment = 4 months UB paid; Between 6 and 11 months of unemployment = 8,5 months UB paid; 12 months and longer of unemployment = 12 months UB paid.  
**Source** Estimate based on data LFS and 2012 Ageing Report

**Table 2.10 UB: estimated budgetary impact baseline scenario and options, in € .000 (corrected by Annual average duration of payment UB)**

	<b>Option 1: No policy change (Baseline scenario):</b> Frontier workers return; other cross-border workers take a rational decision (= highest UB)					<b>Option 2: Right of choice:</b> cross-border workers take a rational decision (= highest amount)					<b>Option 3: UB provided by the country of last activity</b>				
	Annual expenditure UB based on average duration payment UB (in € .000)	Actual claims paid to country of residence (3 months) (in € .000)	Actual claims received from country of last activity (3 months) (in € .000)	Total expenditure (in € .000)	%	Annual expenditure UB based on average duration payment UB (in € .000)	Actual claims paid to country of residence (3 months) (in € .000)	Actual claims received from country of last activity (3 months) (in € .000)	Total expenditure (in € .000)	%	Annual expenditure UB based on average duration payment UB (in € .000)	Actual claims paid to country of residence (3 months) (in € .000)	Actual claims received from country of last activity (3 months) (in € .000)	Total expenditure (in € .000)	%
BE	70.891	13.533	19.727	64.697	100%	74.007	5.077	8.935	70.149	108%	58.403	0	0	58.403	90%
BG	256	20	88	188	100%	0	221	0	221	117%	59	0	0	59	31%
CZ	1.097	526	334	1.289	100%	3.798	848	117	4.529	351%	3.819	0	0	3.819	296%
DK	3.029	3.395	450	5.974	100%	12.014	43	599	11.458	192%	10.811	0	0	10.811	181%
DE	69.040	15.024	16.167	67.897	100%	55.763	24.804	4.864	75.703	111%	72.034	0	0	72.034	106%
EE	609	19	219	409	100%	73	78	10	140	34%	65	0	0	65	16%
IE	21.239	664	455	21.448	100%	33.461	42	2.434	31.069	145%	25.854	0	0	25.854	121%
GR	381	329	0	710	100%	1.632	475	0	2.107	297%	2.356	0	0	2.356	332%
ES	15.919	4.108	949	19.078	100%	18.520	4.287	629	22.179	116%	23.563	0	0	23.563	124%
FR	86.602	6.483	26.361	66.724	100%	55.382	6.226	13.574	48.035	72%	31.250	0	0	31.250	47%
IT	28.531	732	1.444	27.819	100%	27.070	1.068	711	27.427	99%	25.028	0	0	25.028	90%
CY	391	7	0	397	100%	391	19	0	409	103%	405	0	0	405	102%
LV	55	10	16	49	100%	29	18	6	41	84%	33	0	0	33	67%
LT	4	5	1	7	100%	5	18	0	23	306%	14	0	0	14	183%
LU	3.510	18.804	637	21.677	100%	75.684	0	1.233	74.451	343%	72.862	0	0	72.862	336%
HU	615	190	208	597	100%	819	435	44	1.209	203%	852	0	0	852	143%
MT	10	23	0	33	100%	10	38	0	47	142%	68	0	0	68	205%
NL	41.060	10.969	5.167	46.862	100%	90.552	0	11.199	79.353	169%	66.216	0	0	66.216	141%
AT	15.426	4.062	4.253	15.235	100%	38.052	41	7.381	30.713	202%	24.180	0	0	24.180	159%
PL	872	73	354	592	100%	0	1.387	0	1.387	234%	181	0	0	181	31%
PT	3.457	293	1.111	2.639	100%	497	443	11	929	35%	1.228	0	0	1.228	47%
RO	26	54	10	69	100%	5	280	0	285	411%	136	0	0	136	196%
SI	475	26	154	347	100%	88	173	9	252	73%	107	0	0	107	31%
SK	1.880	87	577	1.391	100%	35	908	3	940	68%	285	0	0	285	20%
FI	2.206	399	161	2.444	100%	9.246	57	369	8.935	366%	8.687	0	0	8.687	356%
SE	5.651	771	2.663	3.759	100%	1.765	926	256	2.435	65%	2.179	0	0	2.179	58%
UK	4.529	1.514	615	5.427	100%	3.217	4.481	8	7.690	142%	6.492	0	0	6.492	120%
EU-27	377.761	82.122	82.122	377.761	100%	502.113	52.391	52.391	502.113	133%	437.167	0	0	437.167	116%

\* Based on Eurostat - LFS indicator: 'Unemployment by sex, age and duration of unemployment'. Duration of unemployment < 1 month = 0,5 months UB paid; Between 1-2 months of unemployment = 1,5 months UB paid; Between 3-5 months of unemployment = 4 months UB paid; Between 6 and 11 months of unemployment = 8,5 months UB paid; 12 months and longer of unemployment = 12 months UB paid.  
Source Estimate based on data LFS and 2012 Ageing Report

**Table 2.11 UB: comparison of options between MS, estimated budgetary impact option 1 (100%) compared to other options (corrected by Annual average duration of payment UB)**

	Option 1: No policy change (Baseline scenario)	Option 2: Right of choice	Option 3: UB provided by the country of last activity
BE	100%	108%	90%
BG	100%	117%	31%
CZ	100%	351%	296%
DK	100%	192%	181%
DE	100%	111%	106%
EE	100%	34%	16%
IE	100%	145%	121%
GR	100%	297%	332%
ES	100%	116%	124%
FR	100%	72%	47%
IT	100%	99%	90%
CY	100%	103%	102%
LV	100%	84%	67%
LT	100%	306%	183%
LU	100%	343%	336%
HU	100%	203%	143%
MT	100%	142%	205%
NL	100%	169%	141%
AT	100%	202%	159%
PL	100%	234%	31%
PT	100%	35%	47%
RO	100%	411%	196%
SI	100%	73%	31%
SK	100%	68%	20%
FI	100%	366%	356%
SE	100%	65%	58%
UK	100%	142%	120%
EU-27	100%	133%	116%
Lowest impact	16	1	10
Highest impact	8	16	3

Source Estimate based on data LFS and 2012 Ageing Report

**Table 2.12 UB: comparison of options between MS, estimated lowest and highest budgetary impact (corrected by Annual average duration of payment UB)**

	Lowest budgetary impact			Highest budgetary impact			
	Option 1: No policy change (Baseline scenario)	Option 2: Right of choice	Option 3: UB provided by the country of last activity	Option 1: No policy change (Baseline scenario)	Option 2: Right of choice	Option 3: UB provided by the country of last activity	
BE			X		X		BE
BG			X		X		BG
CZ	X				X		CZ
DK	X				X		DK
DE	X				X		DE
EE			X	X			EE
IE	X				X		IE
GR	X					X	GR
ES	X					X	ES
FR			X	X			FR
IT			X	X			IT
CY	X				X		CY
LV			X	X			LV
LT	X				X		LT
LU	X				X		LU
HU	X				X		HU
MT	X					X	MT
NL	X				X		NL
AT	X				X		AT
PL			X		X		PL
PT		X		X			PT
RO	X				X		RO
SI			X	X			SI
SK			X	X			SK
FI	X				X		FI
SE			X	X			SE
UK	X				X		UK
EU-27	16	1	10	8	16	3	EU-27

Source Estimate based on data LFS and 2012 Ageing Report

The budgetary impact of cross-border expenditure related to UB is ‘marginal’ compared to the total national expenditure. It is only 0.2% of the total EU-27 spending on unemployment benefits in the baseline scenario. But also the 2 other options will have a limited impact on the total budget. Only for Luxembourg we observe a high impact of the cross-border spending on the total national budget (4.4% of total expenditure). The budgetary impact increases considerably in option 2 (15.2% of total expenditure) and in option 3 (14.9% of total expenditure).

**Table 2.13 UB: impact estimated cross-border expenditure\* on total expenditure UB\*\*, by option (corrected by Annual average duration of payment UB)**

	Total expenditure UB in 2010 - cash benefits (in Million €)	Estimated cross-border expenditure: <b>Baseline scenario</b> (in Million €)	% impact <b>baseline scenario</b> on total expenditure	Estimated cross-border expenditure ( <b>Option 2: Right of choice</b> ) (in Million €)	% impact <b>option 2</b> on total expenditure	Estimated cross-border expenditure ( <b>Option 3: Country of last activity</b> ) (in Million €)	% impact <b>option 3</b> on total expenditure
BE	13.297	65	0,5%	70	0,5%	58	0,4%
BG	202	0	0,1%	0	0,1%	0	0,0%
CZ	1.196	1	0,1%	5	0,4%	4	0,3%
DK	5.293	6	0,1%	11	0,2%	11	0,2%
DE	40.564	68	0,2%	76	0,2%	72	0,2%
EE	88	0	0,5%	0	0,2%	0	0,1%
IE	5.188	21	0,4%	31	0,6%	26	0,5%
GR	2.146	1	0,0%	2	0,1%	2	0,1%
ES	34.773	19	0,1%	22	0,1%	24	0,1%
FR	39.331	67	0,2%	48	0,1%	31	0,1%
IT	12.958	28	0,2%	27	0,2%	25	0,2%
CY	184	0	0,2%	0	0,2%	0	0,2%
LV	190	0	0,0%	0	0,0%	0	0,0%
LT	192	0	0,0%	0	0,0%	0	0,0%
LU	489	22	4,4%	74	15,2%	73	14,9%
HU	796	1	0,1%	1	0,2%	1	0,1%
MT	27	0	0,1%	0	0,2%	0	0,2%
NL	9.230	47	0,5%	79	0,9%	66	0,7%
AT	3.621	15	0,4%	31	0,8%	24	0,7%
PL	1.392	1	0,0%	1	0,1%	0	0,0%
PT	2.487	3	0,1%	1	0,0%	1	0,0%
RO	693	0	0,0%	0	0,0%	0	0,0%
SI	206	0	0,2%	0	0,1%	0	0,1%
SK	594	1	0,2%	1	0,2%	0	0,0%
FI	3.840	2	0,1%	9	0,2%	9	0,2%
SE	3.756	4	0,1%	2	0,1%	2	0,1%
UK	9.387	5	0,1%	8	0,1%	6	0,1%
EU-27	192.121	378	0,2%	502	0,3%	437	0,2%

\* Total cross-border expenditure: without taking into account the UB paid to unemployed EU migrant workers.

\*\* Total expenditure UB: ESSPROS data

Source Estimate based on data LFS and 2012 Ageing Report

Table 2.14 presents the distribution of the cost taking into consideration the current rules. We have made our calculations from the perspective of incoming cross-border workers who become unemployed. The estimated 45 thousand incoming frontier workers who became unemployed have to return to their country of residence while the ‘other unemployed cross-border workers’ (about 28 thousand persons) have a right of choice. We assume that this group will take choose for the country with highest UB. The baseline scenario (taking into account the assumptions we had to made) implies that the country of last activity will pay 30% of the total expenditure (only for ‘other unemployed cross-border workers’ who choose for the country of last activity) and the country of residence 70% of the total expenditure (for the unemployed frontier workers and the ‘other unemployed cross-border workers’ who choose to return). These current rules imply that a Member State with a very high number of incoming frontier workers only has to pay a small part of the cost. E.g. almost all unemployed cross-border workers in Luxembourg could be considered as ‘unemployed frontier workers’ which imply that Luxembourg is only paying 1% of the total expenditure of UB paid to former cross-border workers employed in Luxembourg. However, this disproportion is corrected by a reimbursement procedure (the country of last activity shall reimburse the unemployed benefits provided in the country of residence during the first three months or five months). We assume in the calculation model a reimbursement of 3 months. This reimbursement procedure makes the distribution of the cost ‘more fair’. Now, the county of last activity will pay 43% of the cost (or an increase with 13 % points). E.g. Luxembourg will pay no longer 1% of the cost but 30%. At the same time, this reimbursement procedure is an incentive for

the country of residence to keep the duration of unemployment below the reimbursement period (of 3 or 5 months).

The current rules assume that the amount of reimbursement cannot be higher than the amount payable under the legislation of the country of last activity (see art. 65, 6 Regulation (EC) No. 883/2004). This specific rule implies that in many cases the reimbursement by the country of last activity will be lower than the actual claim of the country of residence (see also Table 2.3). Table 2.15 summarizes the distribution of the cost by assuming that the amount of reimbursement is equal to the actual claim made by the country of residence. So the reimbursement procedure is no longer taking into account the amount of the unemployment benefit in the country of last activity but the amount of the unemployment benefit in the country of residence (= actual claim). The reimbursement based on the UB of the country of residence has a positive impact on the distribution of the cost. 46% of the cost will be paid by the country of last activity (which is an increase with 3% points compared to the calculations made in Table 2.14).



**Table 2.14 UB: estimated expenditure UB incoming cross-border workers becoming unemployed, baseline scenario, breakdown by country of last activity and country of residence and impact of reimbursement (corrected by Annual average duration of payment UB)**

<b>Option 1: No policy change (Baseline scenario): Frontier workers return; other cross-border workers take a rational decision (= highest UB)</b>									
Country of employment	Incoming unemployed crossborder workers		Expenditure			Cost without reimbursement		Cost with reimbursement	
	Number of unemployed incoming cross-border workers (in .000)	Of which incoming unemployed frontier workers (in .000)	Estimated annual expenditure UB based on average duration payment UB paid by the country of residence (in .000 €)	Estimated annual expenditure UB based on average duration payment UB paid by the country of last activity (in .000 €)	Reimbursement country of last activity (3 months) (in .000 €)	% share of cost country of residence	% share of cost country of last activity	% share of cost country of residence	% share of cost country of last activity
BE	4,9	4,0	34.334	10.929	13.533	76%	24%	58%	42%
BG	0,2	0,0	1.052	0	20	100%	0%	98%	2%
CZ	4,4	4,3	3.327	43	526	99%	1%	85%	15%
DK	2,4	2,0	6.410	1.726	3.395	79%	21%	56%	44%
DE	13,2	10,1	55.161	16.936	15.024	77%	23%	63%	37%
EE	0,1	0,1	203	7	19	97%	3%	89%	11%
IE	2,3	1,1	1.516	13.440	664	10%	90%	10%	90%
GR	1,5	0,8	2.613	381	329	87%	13%	79%	21%
ES	7,9	1,9	18.472	12.296	4.108	60%	40%	53%	47%
FR	4,3	2,7	21.483	11.407	6.483	65%	35%	55%	45%
IT	6,1	0,4	3.250	22.455	732	13%	87%	12%	88%
CY	0,2	0,0	92	391	7	19%	81%	19%	81%
LV	0,1	0,1	62	4	10	93%	7%	81%	19%
LT	0,1	0,0	71	0	5	100%	0%	93%	7%
LU	5,6	5,5	45.350	688	18.804	99%	1%	70%	30%
HU	1,5	1,3	1.911	6	190	100%	0%	91%	9%
MT	0,0	0,0	167	8	23	95%	5%	84%	16%
NL	4,4	3,3	27.063	16.724	10.969	62%	38%	49%	51%
AT	4,2	4,0	10.184	1.478	4.062	87%	13%	65%	35%
PL	0,7	0,6	3.797	0	73	100%	0%	98%	2%
PT	0,5	0,2	1.572	439	293	78%	22%	68%	32%
RO	0,3	0,0	1.304	1	54	100%	0%	96%	4%
SI	0,1	0,1	343	34	26	91%	9%	85%	15%
SK	0,9	0,8	1.814	0	87	100%	0%	95%	5%
FI	1,5	1,2	1.019	1.530	399	40%	60%	35%	65%
SE	0,9	0,2	2.811	945	771	75%	25%	62%	38%
UK	5,4	0,6	17.332	3.183	1.514	84%	16%	79%	21%
EU-27	73,7	45,2	262.713	115.053	82.122	70%	30%	57%	43%

\* Only the annual expenditure of UB is taken into account while there will possibly be a shift of the social security system from the country of last activity to the country of residence. **Source** Estimate based on data LFS and 2012 Ageing Report

**Table 2.15 UB: estimated expenditure UB incoming cross-border workers becoming unemployed, baseline scenario, breakdown by country of last activity and country of residence and impact of reimbursement (corrected by Annual average duration of payment UB)**

<b>Option 1: No policy change (Baseline scenario):</b> Frontier workers return; other cross-border workers take a rational decision (= highest UB)										
Country of employment	Incoming unemployed crossborder workers		Expenditure			Cost without reimbursement		Cost with reimbursement		
	Number of unemployed incoming cross-border workers (in .000)	Of which incoming unemployed frontier workers (in .000)	Estimated annual expenditure UB based on average duration payment UB paid by the country of residence (in .000 €)	Estimated annual expenditure UB based on average duration payment UB paid by the country of last activity (in .000 €)	Actual claim by country of residence (3 months) (in .000 €)	% share of cost country of residence	% share of cost country of last activity	% share of cost country of residence	% share of cost country of last activity	
BE	4,9	4,0	34.334	10.929	24.170	76%	24%	49%	51%	
BG	0,2	0,0	1.052	0	88	100%	0%	92%	8%	
CZ	4,4	4,3	3.327	43	417	99%	1%	88%	12%	
DK	2,4	2,0	6.410	1.726	685	79%	21%	73%	27%	
DE	13,2	10,1	55.161	16.936	21.314	77%	23%	59%	41%	
EE	0,1	0,1	203	7	221	97%	3%	47%	53%	
IE	2,3	1,1	1.516	13.440	2.585	10%	90%	9%	91%	
GR	1,5	0,8	2.613	381	0	87%	13%	87%	13%	
ES	7,9	1,9	18.472	12.296	1.429	60%	40%	57%	43%	
FR	4,3	2,7	21.483	11.407	32.199	65%	35%	33%	67%	
IT	6,1	0,4	3.250	22.455	2.168	13%	87%	12%	88%	
CY	0,2	0,0	92	391	0	19%	81%	19%	81%	
LV	0,1	0,1	62	4	19	93%	7%	73%	27%	
LT	0,1	0,0	71	0	1	100%	0%	98%	2%	
LU	5,6	5,5	45.350	688	1.356	99%	1%	96%	4%	
HU	1,5	1,3	1.911	6	230	100%	0%	89%	11%	
MT	0,0	0,0	167	8	1	95%	5%	95%	5%	
NL	4,4	3,3	27.063	16.724	11.613	62%	38%	49%	51%	
AT	4,2	4,0	10.184	1.478	7.768	87%	13%	52%	48%	
PL	0,7	0,6	3.797	0	354	100%	0%	91%	9%	
PT	0,5	0,2	1.572	439	1.122	78%	22%	50%	50%	
RO	0,3	0,0	1.304	1	10	100%	0%	99%	1%	
SI	0,1	0,1	343	34	167	91%	9%	63%	37%	
SK	0,9	0,8	1.814	0	577	100%	0%	76%	24%	
FI	1,5	1,2	1.019	1.530	440	40%	60%	34%	66%	
SE	0,9	0,2	2.811	945	2.939	75%	25%	42%	58%	
UK	5,4	0,6	17.332	3.183	616	84%	16%	82%	18%	
EU-27	73,7	45,2	262.713	115.053	112.488	70%	30%	54%	46%	

\* Only the annual expenditure of UB is taken into account while there will possibly be a shift of the social security system from the country of last activity to the country of residence. **Source** Estimate based on data LFS and 2012 Ageing Report

Unemployed workers have a limited possibility of export of unemployment benefits for 3 months, with a possible extension to 6 months (when he/she looks for work in another Member State). It is the competent institution of the Member State paying the unemployment benefits that may extend this period to 6 months.

Table 2.16 tackles the impact of the current rules by describing in detail the situation of the 'Belgian' unemployed persons who have looked for a job abroad (based on administrative data). In 2011, Belgium paid to 1 081 unemployed jobseekers at least 1 month an unemployment benefit during their period of export. Only 57 jobseekers received longer than 3 months an unemployment benefit. So, for this group we can assume they have received a prolongation of export. It implies that only 5.3% of the jobseekers who looked for a job abroad asked and received a prolongation. 481 of the 1 081 jobseekers were after their period of export no longer registered with the Belgian competent institution. It supposes a 'success rate' (% jobseekers abroad who have find a job) of 44%.<sup>377</sup> At the same time we observe that the 'success rate' will be higher for the group which received a prolongation of export (success rate of 53% or 30 out of 57 persons). However, this should be considered as a broad definition of the 'success rate'. The fact the unemployed person is no longer registered with the Belgian competent institution might be for different reasons: they have found work in the country of export, they have found work in Belgium, or they moved to another country.

**Table 2.16 Impact of prolongation period on finding a job abroad (success rate\*), Belgian case, 2011**

Country of export	Received at least 1 month an 'export benefit' (A)	Received longer than 3 months an 'export benefit' (B)	Theoretical prolongation (B/A)	Not longer registered after period of export (for total group) (C)	Success rate total group (C/A)	Not longer registered after period of export (for group which received longer than 3 months an 'export benefit') (D)	Success rate group longer than 3 months (D/B)	Success rate group lower than 3 months (C-D)/(A-B)
BE								
BG	1	0	0,0%	0	0%	0	0%	0%
CZ	4	1	25,0%	3	75%	1	100%	67%
DK	6	0	0,0%	2	33%	0		33%
DE	57	6	10,5%	31	54%	5	83%	51%
EE	1	0	0,0%	0	0%	0		0%
IE	9	0	0,0%	7	78%	0		78%
GR	10	0	0,0%	7	70%	0		70%
ES	183	10	5,5%	66	36%	3	30%	36%
FR	501	26	5,2%	232	46%	13	50%	46%
IT	51	1	2,0%	23	45%	1	100%	44%
CY	2	0	0,0%	0	0%	0		0%
LV	1	0	0,0%	0	0%	0		0%
LT	1	0	0,0%	0	0%	0		0%
LU	19	0	0,0%	7	37%	0		37%
HU	2	0	0,0%	0	0%	0		0%
MT	1	0	0,0%	0	0%	0		0%
NL	76	5	6,6%	39	51%	4	80%	49%
AT	19	2	10,5%	7	37%	1	50%	35%
PL	17	0	0,0%	6	35%	0		35%
PT	29	2	6,9%	13	45%	0	0%	48%
RO	2	0	0,0%	0	0%	0		0%
SI	3	1	33,3%	2	67%	1	100%	50%
SK	2	0	0,0%	0	0%	0		0%
FI	7	0	0,0%	3	43%	0		43%
SE	17	2	11,8%	8	47%	1	50%	47%
UK	60	1	1,7%	25	42%	0	0%	42%
EU27	1.081	57	5,3%	481	44%	30	53%	44%

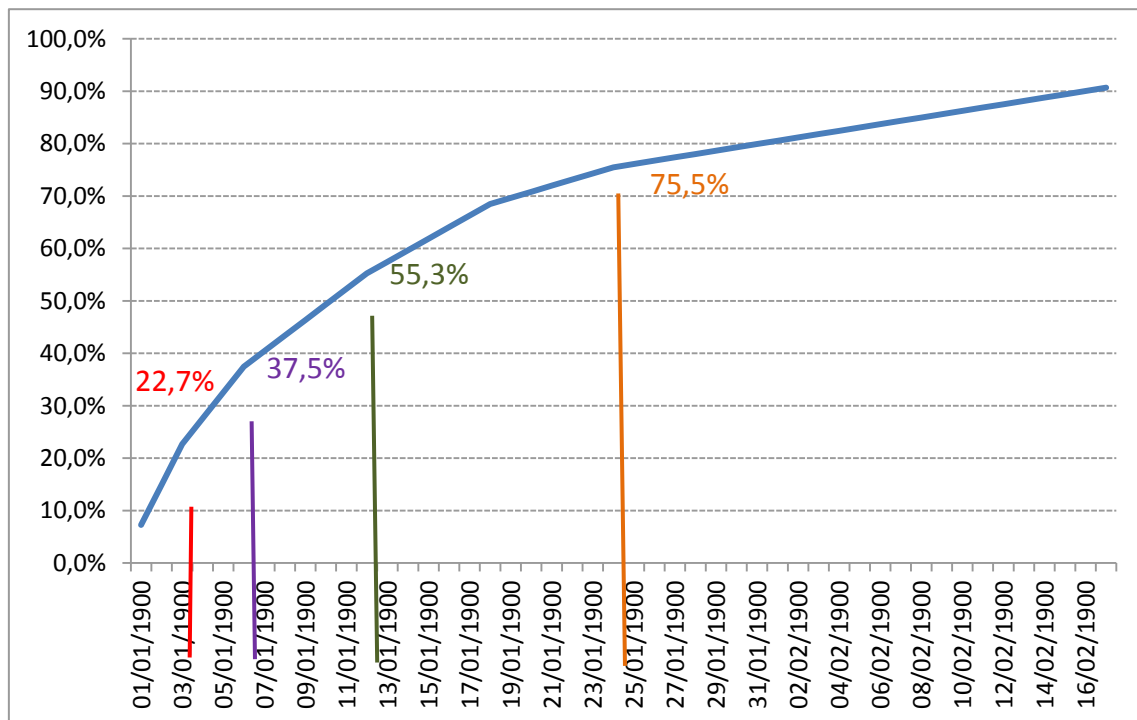
\* Broad definition of success rate: no longer registered in database.

Source Estimate based on data LFS and 2012 Ageing Report

<sup>377</sup> The success rates for Poland and Sweden are 10% and 12%. For the incoming jobseekers in the Netherlands a success rate of 22.8% was obtained (based on administrative data).

Eurostat provides an overview of the distribution of the unemployed according to the duration spent in unemployment based (on LFS data) (see Figure 2.1). However, this period is measured at a certain moment which implies a possible underestimation of the duration of unemployment. The period to find a job abroad within 3 months can be considered as a very short period observing an average duration of unemployment of 15 months. Also, only 55% of the unemployed persons are unemployed for less than one year.<sup>378</sup> The cumulative figures can be considered as a proxy of an ‘exit rate’ which is seen as increasing with almost 15% points between 2 observed periods (less than 3 months = 22.7% and less than 6 months = 37.5%).<sup>379</sup> But of course the composition of the group of jobseekers looking for a job abroad may (totally) differ from the general group of unemployed persons we have describe in Figure 2.1.

**Figure 2.1** Distribution of unemployed according to duration in unemployment (in months), aged 15 to 64 years, 2012, EU-28



\* Duration of unemployment is the duration of the search for employment or the length of the period since leaving last job (measured at a certain moment which implies a possible underestimation of the average duration of unemployment).

Source Eurostat (indicator: ‘Unemployment by sex, age and duration of unemployment’)

## 2.2 Long-term care benefits

<sup>378</sup> On the basis of the methodology developed in ESDE review 2012 ( chapter 1, section 1.3.2), the persistence rate in unemployment for persons (aged 15-64, EU-28) unemployed less than one year can be estimated for 2011-12 to be around 39%. In other words, 39% of those unemployed less than one year in 2011 were still unemployed one year later. However, due to the methodology used, this does not imply that all the remaining 61% (the ‘exit rate’) have necessarily found a job as they could have become inactive (or be again short-term unemployed after a spell in employment).

<sup>379</sup> On the basis of the methodology developed in ESDE review 2012 ( chapter 1, section 1.3.2), the exit rate of unemployment for persons (aged 15-64, EU-28) unemployed less than three months can be estimated for 2012 to be around 35% - while for persons unemployed less than 6 months, it would be between 52 and 55%. It means that there would be a gain around 17-21 % points in exit rate between 3 and 6 months of time in unemployment. It is to be noted that the gain in exit rate for persons unemployed between 6 months and one year is much lower (around 6 to 9 % points, i.e.: the difference between 61% mentioned in previous footnote and 52-55%).

The number of PD S1 (persons who are insured for health care living in another country than the competent country) was estimated by the sum of 3 categories: incoming cross-border workers (and their family members), retired cross-border workers (and their family members) and migrant pensioners (and their family members). By counting these different categories together, we estimated a total number of about 2 million insured persons living in another Member State than the competent Member State. Some 60% is determined by the present cross-border workers which imply some 40% is related to mobile pensioners or retired cross-border workers. Most PD S1 certificates were issued by Germany (18.6% of total), UK (11% of total) and Luxembourg (10.5% of total) while most of the PD S1 certificates were received by France (15.7% of total) and Germany (13.8%).

**Table 2.17 LTC: Estimated number of PD S1 issued and received, by category, in .000**

	Competent country					Residing country				
	Incoming cross-border workers + 20% family members (in .000)	Retired cross-border workers only worked abroad + 25% family members (in .000)	Migrant pensioners + 25% family members (in .000)	Total number of PD S1 issued (in .000)	Share of total insured persons (in %)	Outgoing cross-border workers + 20% family members (in .000)	Retired cross-border workers only worked abroad + 25% family members (in .000)	Migrant pensioners + 25% family members (in .000)	Total number of PD S1 issued (in .000)	Share of total insured persons (in %)
BE	74	35	5	113	5,7%	116	41	68	225	11,4%
BG	2	1	1	4	0,2%	25	11	0	37	1,9%
CZ	74	25	2	101	5,1%	29	12	2	43	2,2%
DK	42	14	1	57	2,9%	5	2	3	10	0,5%
DE	223	101	44	368	18,6%	198	75	0	273	13,8%
EE	1	0	0	2	0,1%	22	9	0	30	1,5%
IE	21	6	1	29	1,4%	12	5	7	24	1,2%
GR	14	7	1	23	1,1%	0	0	2	2	0,1%
ES	48	18	4	71	3,6%	27	11	77	115	5,8%
FR	57	27	19	102	5,2%	192	77	43	311	15,7%
IT	91	50	27	167	8,5%	29	13	5	47	2,4%
CY	4	1	0	5	0,3%	0	0	5	5	0,3%
LV	1	0	0	1	0,0%	8	3	0	12	0,6%
LT	0	0	0	1	0,0%	2	1	0	3	0,2%
LU	156	50	1	207	10,5%	3	1	2	7	0,3%
HU	17	8	3	28	1,4%	64	28	0	92	4,7%
MT	1	0	0	1	0,1%	1	0	1	2	0,1%
NL	132	43	28	203	10,2%	26	12	2	39	2,0%
AT	121	55	1	177	8,9%	39	17	11	66	3,4%
PL	9	3	4	17	0,8%	110	45	1	156	7,9%
PT	5	2	2	10	0,5%	13	5	2	20	1,0%
RO	4	2	0	6	0,3%	105	52	0	158	8,0%
SI	2	1	0	3	0,1%	10	5	0	16	0,8%
SK	7	2	2	11	0,6%	141	55	0	196	9,9%
FI	24	9	0	33	1,7%	2	1	1	4	0,2%
SE	15	6	2	23	1,2%	35	12	6	53	2,7%
UK	93	36	88	218	11,0%	24	9	0	34	1,7%
EU-27	1.239	503	238	1.980	100,0%	1.239	503	238	1.980	100,0%

Source Estimate based on data LFS and 2012 Ageing Report

Based on the estimated number of PD S1 (Table 2.17), we have estimated the potential users of LTC. A distinction should be made between LTC benefits in cash and LTC benefits in kind. This is not only an important distinction in the LTC itself, but also in the coordination regulation. We apply on this total PD S1 the same percentages of use of LTC in cash or in kind as is the case in the total population of the EU 27. This is acceptable since the structure of this 'S1 population' is similar to the total population including active persons, retired persons and their family members. Those percentages of users are derived from the Ageing report 2012 (additional data was delivered by DG ECFIN, necessarily for making a distinction between LTC in kind, LTC in cash and informal LTC). For the baseline scenario we estimate that some 48 thousand mobile citizens are using LTC in kind and 45 thousand mobile citizens LTC in cash. The number of users will be multiplied by the average amount per dependent person using LTC in kind or in cash to obtain the cross-border expenditure related to LTC.

**Table 2.18 LTC: Estimated number of users baseline scenario, in .000**

	In kind		In cash		Total	
	Country of residence (in .000)	Competent country (in .000)	Country of residence (in .000)	Competent country (in .000)	Country of residence (in .000)	Competent country (in .000)
AT	2,2	3,5	1,0	9,0	3,1	12,5
BE	12,9	2,9	4,2	2,8	17,1	5,7
BG	0,2	0,1	0,8	0,0	1,0	0,2
CY	0,0	0,1	0,1	0,0	0,1	0,1
CZ	0,9	1,5	1,0	2,4	1,9	3,9
DE	7,4	8,5	7,4	4,6	14,8	13,2
DK	0,4	2,2	0,2	1,3	0,6	3,5
EE	0,4	0,0	1,4	0,0	1,9	0,1
ES	1,7	1,4	2,7	0,7	4,3	2,1
FI	0,1	0,6	0,1	1,8	0,2	2,4
FR	6,9	3,3	4,6	2,5	11,5	5,8
GR	0,1	0,3	0,0	0,6	0,1	0,9
HU	1,4	0,5	2,9	0,7	4,3	1,2
IE	0,4	0,5	0,6	0,7	1,0	1,2
IT	0,8	3,5	1,0	4,9	1,8	8,4
LT	0,2	0,0	0,1	0,0	0,2	0,0
LU	0,1	6,9	0,1	0,9	0,3	7,7
LV	0,1	0,0	0,3	0,0	0,4	0,0
MT	0,1	0,0	0,1	0,0	0,1	0,1
NL	2,3	6,7	0,7	5,0	3,0	11,8
PL	0,7	0,5	3,1	0,7	3,8	1,2
PT	0,3	0,2	0,3	0,1	0,6	0,3
RO	2,3	0,1	3,9	0,1	6,1	0,2
SE	2,6	0,5	1,3	0,6	3,8	1,1
SI	0,3	0,1	0,6	0,1	0,9	0,1
SK	2,8	0,2	5,8	0,1	8,6	0,4
UK	0,7	3,9	0,8	5,4	1,4	9,3
EU-27	48,2	48,2	45,0	45,0	93,2	93,2

Source Estimate based on data LFS and 2012 Ageing Report

In the baseline scenario (current rules) LTC benefits *in kind* are provided according to the legislation of the Member State of residence (if they exist) and reimbursed by the competent Member State while LTC benefits *in cash* (if they exist) are provided and paid by the competent Member State. In Option 3.1, the Member State of residence shall provide LTC benefits (in cash and in kind) on the basis of its legislation and reimbursed by the competent Member State (with or without a supplement from the competent Member State if benefits in the Member State of residence are at a lower level). In Table 2.19 we assume that there is no supplement paid by the competent Member State. Finally, in Option 3.2 the competent Member State shall provide LTC care benefits to insured persons residing abroad (export).

Tables 2.19 to 2.22 compare the budgetary impact of the different options. For all options a distinction is made between LTC benefits in kind and in cash. This results in a total expenditure of € 995 Million for the baseline scenario, € 810 Million for option 3.1 (*provided by the Member State of residence without a supplement*) and € 1 277 Million for option 3.2 (*provided by the competent country*). Compared to the baseline scenario, option 3.1 is less expensive (a decrease of 19% of the expenditure). In option 3.1 the LTC benefit in cash is also provided by the country of residence and no longer by the competent country. It implies a considerably decrease of the budget which is needed to finance the cross-border use of LTC benefits in cash (from € 376 Million to € 191 Million or a decrease of 49%). Option 3.2 is more expensive compared to the baseline scenario (an increase of 28% of the expenditure). The higher expenditure is influenced by the fact that the

competent Member State will provide the LTC benefits in kind and no longer the country of residence. Because of this, the budget needed to finance the cross-border use of LTC benefits in kind increases with 46% (from € 618 Million to € 900 Million). The budgetary impact differs considerably between Member States. We do not observe a consistent ‘best option’ for all EU-27 Member States. For 6 Member States the baseline scenario has the lowest budgetary impact (BE, IE, FR, LT, LU, SE). Option 3.1 has for 8 Member State the lowest budgetary impact (CZ, DK, GR, IT, NL, AT, FI, UK) while option 3.2 is least expensive for 13 Member States (BG, DE, EE, ES, CY, LV, HU, MT, PL, PT, RO, SI, SK). However, option 3.2 is also for 12 Member States the most expensive option (BE, DK, IE, GR, FR, IT, LU, NL, AT, FI, SE, UK). For 5 Member States the baseline scenario is the most expensive option (CZ, DE, EE, CY, HU) and for 10 Member states this will be option 3.1 (BG, ES, LV, LT, MT, PL, PT, RO, SI, SK, FI).



Table 2.19 LTC: estimated budgetary impact baseline scenario and options, in €.000

Debtor	Option 1: No policy change (Baseline scenario)				Option 3.1: LTC provided by the MS of residence (without supplement)				Option 3.2: LTC provided by the competent MS				
	In kind (in €.000)	In cash (in €.000)	Total (in €.000)	%	In kind (in €.000)	In cash (in €.000)	Total (in €.000)	% difference option 1	In kind (in €.000)	In cash (in €.000)	Total (in €.000)	% difference option 1	% difference option 3.1
BE	58.064	16.538	74.602	100%	58.064	16.865	74.929	100%	69.829	16.538	86.368	116%	115%
BG	1.574	64	1.638	100%	1.574	897	2.470	151%	36	64	100	6%	4%
CZ	6.179	7.434	13.613	100%	6.179	2.651	8.831	65%	3.927	7.434	11.361	83%	129%
DK	54.521	49.202	103.723	100%	54.521	4.189	58.710	57%	59.331	49.202	108.533	105%	185%
DE	120.077	52.782	172.860	100%	120.077	50.201	170.278	99%	114.948	52.782	167.730	97%	99%
EE	715	54	769	100%	715	52	767	100%	33	54	87	11%	11%
IE	7.479	0	7.479	100%	7.479	2.684	10.163	136%	10.889	0	10.889	146%	107%
EL	3.732	1.607	5.339	100%	3.732	1.415	5.147	96%	4.638	1.607	6.245	117%	121%
ES	13.938	2.292	16.230	100%	13.938	4.408	18.346	113%	11.133	2.292	13.425	83%	73%
FR	37.403	10.440	47.843	100%	37.403	11.955	49.358	103%	55.885	10.440	66.325	139%	134%
IT	25.015	36.973	61.988	100%	25.015	6.437	31.452	51%	45.141	36.973	82.114	132%	261%
CY	263	181	444	100%	263	118	381	86%	12	181	193	43%	51%
LV	53	8	61	100%	53	28	81	134%	35	8	43	71%	53%
LT	60	17	77	100%	60	36	96	124%	74	17	91	118%	95%
LU	104.120	15.256	119.377	100%	104.120	25.372	129.493	108%	150.866	15.256	166.122	139%	128%
HU	3.383	1.586	4.969	100%	3.383	1.206	4.589	92%	711	1.586	2.297	46%	50%
MT	638	0	638	100%	638	189	827	130%	129	0	129	20%	16%
NL	73.246	93.099	166.346	100%	73.246	23.346	96.592	58%	182.590	93.099	275.690	166%	285%
AT	26.614	49.760	76.374	100%	26.614	14.090	40.705	53%	47.961	49.760	97.721	128%	240%
PL	7.341	571	7.913	100%	7.341	2.671	10.013	127%	556	571	1.127	14%	11%
PT	2.671	0	2.671	100%	2.671	516	3.187	119%	476	0	476	18%	15%
RO	1.979	4	1.983	100%	1.979	1.188	3.167	160%	228	4	231	12%	7%
SI	572	304	876	100%	572	555	1.127	129%	516	304	819	94%	73%
SK	1.270	75	1.345	100%	1.270	1.504	2.773	206%	330	75	405	30%	15%
FI	4.421	3.460	7.881	100%	4.421	1.458	5.879	75%	24.556	3.460	28.017	355%	477%
SE	7.948	1.360	9.308	100%	7.948	4.144	12.092	130%	31.618	1.360	32.978	354%	273%
UK	55.003	33.314	88.317	100%	55.003	13.681	68.685	78%	83.879	33.314	117.193	133%	171%
EU27	618.281	376.381	994.662	100%	618.281	191.857	810.137	81%	900.327	376.381	1.276.709	128%	158%

**Source** Estimate based on data LFS and 2012 Ageing Report

**Table 2.20 LTC: comparison of options between MS, estimated budgetary impact option 1 (100%) compared to other options, breakdown by type of LTC-benefit**

Debtor country	Option 1: No policy change (Baseline scenario)			Option 3.1: LTC provided by the MS of residence (without supplement)			Option 3.2: LTC provided by the competent MS		
	In kind	In cash	Total	In kind	In cash	Total	In kind	In cash	Total
BE	100%	100%	100%	100%	102%	100%	120%	100%	116%
BG	100%	100%	100%	100%	1401%	151%	2%	100%	6%
CZ	100%	100%	100%	100%	36%	65%	64%	100%	83%
DK	100%	100%	100%	100%	9%	57%	109%	100%	105%
DE	100%	100%	100%	100%	95%	99%	96%	100%	97%
EE	100%	100%	100%	100%	96%	100%	5%	100%	11%
IE	100%		100%	100%		136%	146%		146%
EL	100%	100%	100%	100%	88%	96%	124%	100%	117%
ES	100%	100%	100%	100%	192%	113%	80%	100%	83%
FR	100%	100%	100%	100%	115%	103%	149%	100%	139%
IT	100%	100%	100%	100%	17%	51%	180%	100%	132%
CY	100%	100%	100%	100%	65%	86%	5%	100%	43%
LV	100%	100%	100%	100%	367%	134%	67%	100%	71%
LT	100%	100%	100%	100%	209%	124%	123%	100%	118%
LU	100%	100%	100%	100%	166%	108%	145%	100%	139%
HU	100%	100%	100%	100%	76%	92%	21%	100%	46%
MT	100%		100%	100%		130%	20%		20%
NL	100%	100%	100%	100%	25%	58%	249%	100%	166%
AT	100%	100%	100%	100%	28%	53%	180%	100%	128%
PL	100%	100%	100%	100%	468%	127%	8%	100%	14%
PT	100%		100%	100%		119%	18%		18%
RO	100%	100%	100%	100%	32385%	160%	11%	100%	12%
SI	100%	100%	100%	100%	183%	129%	90%	100%	94%
SK	100%	100%	100%	100%	2004%	206%	26%	100%	30%
FI	100%	100%	100%	100%	42%	75%	555%	100%	355%
SE	100%	100%	100%	100%	305%	130%	398%	100%	354%
UK	100%	100%	100%	100%	41%	78%	152%	100%	133%
EU27	100%	100%	100%	100%	51%	81%	146%	100%	128%

\* In option 3.1 LTC benefits in cash are provided by the MS of residence. This will cause an important budgetary increase for some competent MS without or with few national social rights related to LTC benefits in cash (e.g. RO, SK, BG ...). This explains the high percentages of these MS.

Source Estimate based on data LFS and 2012 Ageing Report

**Table 2.21 LTC: comparison of options between MS, estimated budgetary impact option 1 (100%) compared to other options**

Debtor country	Option 1: No policy change (Baseline scenario)	Option 3.1: LTC provided by the MS of residence (without supplement)	Option 3.2: LTC provided by the competent MS
BE	100%	100%	116%
BG	100%	151%	6%
CZ	100%	65%	83%
DK	100%	57%	105%
DE	100%	99%	97%
EE	100%	100%	11%
IE	100%	136%	146%
EL	100%	96%	117%
ES	100%	113%	83%
FR	100%	103%	139%
IT	100%	51%	132%
CY	100%	86%	43%
LV	100%	134%	71%
LT	100%	124%	118%
LU	100%	108%	139%
HU	100%	92%	46%
MT	100%	130%	20%
NL	100%	58%	166%
AT	100%	53%	128%
PL	100%	127%	14%
PT	100%	119%	18%
RO	100%	160%	12%
SI	100%	129%	94%
SK	100%	206%	30%
FI	100%	75%	355%
SE	100%	130%	354%
UK	100%	78%	133%
EU27	100%	81%	128%
Lowest impact	6	8	13
Highest impact	5	10	12

Source Estimate based on data LFS and 2012 Ageing Report

**Table 2.22 LTC: comparison of options between MS, estimated lowest and highest budgetary impact**

Debtor	Lowest budgetary impact			Highest budgetary impact			Debtor
	Option 1: No policy change (Baseline scenario)	Option 3.1: LTC provided by the MS of residence (without supplement)	Option 3.2: LTC provided by the competent MS	Option 1: No policy change (Baseline scenario)	Option 3.1: LTC provided by the MS of residence (without supplement)	Option 3.2: LTC provided by the competent MS	
BE	X					X	BE
BG			X		X		BG
CZ		X		X			CZ
DK		X				X	DK
DE			X	X			DE
EE			X	X			EE
IE	X					X	IE
GR		X				X	GR
ES			X		X		ES
FR	X					X	FR
IT		X				X	IT
CY			X	X			CY
LV			X		X		LV
LT	X				X		LT
LU	X					X	LU
HU			X	X			HU
MT			X		X		MT
NL		X				X	NL
AT		X				X	AT
PL			X		X		PL
PT			X		X		PT
RO			X		X		RO
SI			X		X		SI
SK			X		X		SK
FI		X				X	FI
SE	X					X	SE
UK		X				X	UK
EU-27	6	8	13	5	10	12	EU-27

Source Estimate based on data LFS and 2012 Ageing Report

The budgetary impact of cross-border expenditure related to LTC is only a fraction of the total national expenditure. It is 0.4% of the total EU-27 spending on LTC in the baseline scenario. Even option 3.2 (which is the most expensive option) has only an impact of 0.6% on the total LTC budget. Again, we observe the highest budgetary impact in Luxembourg (29.4% of total expenditure). The budgetary impact increases considerably in option 3.2 (40.9% of total expenditure) and less in option 3.1 (31.9% of total expenditure).

**Table 2.23 LTC: impact estimated cross-border expenditure on total expenditure LTC\*, by option**

	Total expenditure LTC in 2010 (in Million €)	Estimated cross-border expenditure LTC: <b>Baseline scenario</b> (in Million €)	% impact <b>baseline scenario</b> on total expenditure	Estimated cross-border expenditure LTC <b>(Option 3.1: Provided by country of residence)</b> (in € Millions)	% impact <b>option 3.1</b> on total expenditure	Estimated cross-border expenditure LTC <b>(Option 3.2: Provided by competent country)</b> (in € Millions)	% impact <b>option 3.2</b> on total expenditure
BE	8.271	75	0,9%	75	0,9%	86	1,0%
BG	169	2	1,0%	2	1,5%	0	0,1%
CZ	1.179	14	1,2%	9	0,7%	11	1,0%
DK	10.559	104	1,0%	59	0,6%	109	1,0%
DE	35.776	173	0,5%	170	0,5%	168	0,5%
EE	77	1	1,0%	1	1,0%	0	0,1%
IE	1.705	7	0,4%	10	0,6%	11	0,6%
GR	3.123	5	0,2%	5	0,2%	6	0,2%
ES	8.703	16	0,2%	18	0,2%	13	0,2%
FR	42.065	48	0,1%	49	0,1%	66	0,2%
IT	29.526	62	0,2%	31	0,1%	82	0,3%
CY	29	0	1,6%	0	1,3%	0	0,7%
LV	121	0	0,1%	0	0,1%	0	0,0%
LT	335	0	0,0%	0	0,0%	0	0,0%
LU	406	119	29,4%	129	31,9%	166	40,9%
HU	824	5	0,6%	5	0,6%	2	0,3%
MT	41	1	1,6%	1	2,0%	0	0,3%
NL	22.577	166	0,7%	97	0,4%	276	1,2%
AT	4.638	76	1,6%	41	0,9%	98	2,1%
PL	2.579	8	0,3%	10	0,4%	1	0,0%
PT	532	3	0,5%	3	0,6%	0	0,1%
RO	762	2	0,3%	3	0,4%	0	0,0%
SI	516	1	0,2%	1	0,2%	1	0,2%
SK	181	1	0,7%	3	1,5%	0	0,2%
FI	4.529	8	0,2%	6	0,1%	28	0,6%
SE	13.425	9	0,1%	12	0,1%	33	0,2%
UK	33.461	88	0,3%	69	0,2%	117	0,4%
EU-27	226.107	995	0,4%	810	0,4%	1.277	0,6%

\* Total expenditure LTC: data 2012 Ageing Report

Source Estimate based on data LFS and 2012 Ageing Report

In Table 2.19 three different options were compared with each other. However, option 3.1 (*provided by the Member State of residence*) assumes that no supplement was paid by the competent Member State. In Table 2.20 we have estimated the cost when this supplement would be added to option 3.1. The amount of the supplement was estimated by subtracting option 3.2 (*provided by the competent Member State*) from option 3.1 (*provided by the Member State of residence without supplement*). If the difference is negative, no supplement will be paid. In total an additional supplement of € 520 Million has to be paid by the competent Member States. This increases the budget of option 3.1 (we call it option 3.1bis (*provided by the Member State of residence with supplement*)) to a total amount of € 1 330 Million. The budget needed for option 3.1bis (with supplement) increases with 34% compared to the baseline scenario. The total expenditure estimated for this option is even higher than for option 3.2 (*provided by the competent Member State*).

Table 2.24 LTC: estimated budgetary impact of paying a SUPPLEMENT (option 3.1 - with and without supplement), in € .000

Debtor	Option 3.1: LTC provided by the MS of residence (without supplement)			Supplement			Option 3.1bis: LTC provided by the MS of residence (with supplement)			
	In kind (in € .000)	In cash (in € .000)	Total (in € .000)	For LTC in kind (in € .000)	For LTC in cash (in € .000)	Total (in € .000)	In kind (in € .000)	In cash (in € .000)	Total (in € .000)	%-difference option 3.1
BE	58.064	16.865	74.929	11.765	0	11.765	69.829	16.865	86.694	116%
BG	1.574	897	2.470	0	0	0	1.574	897	2.470	100%
CZ	6.179	2.651	8.831	0	4.782	4.782	6.179	7.434	13.613	154%
DK	54.521	4.189	58.710	4.810	45.013	49.823	59.331	49.202	108.533	185%
DE	120.077	50.201	170.278	0	2.582	2.582	120.077	52.782	172.860	102%
EE	715	52	767	0	2	2	715	54	769	100%
IE	7.479	2.684	10.163	3.409	0	3.409	10.889	2.684	13.572	134%
EL	3.732	1.415	5.147	906	192	1.098	4.638	1.607	6.245	121%
ES	13.938	4.408	18.346	0	0	0	13.938	4.408	18.346	100%
FR	37.403	11.955	49.358	18.482	0	18.482	55.885	11.955	67.840	137%
IT	25.015	6.437	31.452	20.126	30.536	50.662	45.141	36.973	82.114	261%
CY	263	118	381	0	64	64	263	181	444	117%
LV	53	28	81	0	0	0	53	28	81	100%
LT	60	36	96	14	0	14	74	36	110	114%
LU	104.120	25.372	129.493	46.746	0	46.746	150.866	25.372	176.239	136%
HU	3.383	1.206	4.589	0	380	380	3.383	1.586	4.969	108%
MT	638	189	827	0	0	0	638	189	827	100%
NL	73.246	23.346	96.592	109.344	69.754	179.098	182.590	93.099	275.690	285%
AT	26.614	14.090	40.705	21.347	35.670	57.017	47.961	49.760	97.721	240%
PL	7.341	2.671	10.013	0	0	0	7.341	2.671	10.013	100%
PT	2.671	516	3.187	0	0	0	2.671	516	3.187	100%
RO	1.979	1.188	3.167	0	0	0	1.979	1.188	3.167	100%
SI	572	555	1.127	0	0	0	572	555	1.127	100%
SK	1.270	1.504	2.773	0	0	0	1.270	1.504	2.773	100%
FI	4.421	1.458	5.879	20.135	2.002	22.138	24.556	3.460	28.017	477%
SE	7.948	4.144	12.092	23.670	0	23.670	31.618	4.144	35.762	296%
UK	55.003	13.681	68.685	28.876	19.632	48.508	83.879	33.314	117.193	171%
EU27	618.281	191.857	810.137	309.630	210.609	520.240	927.911	402.466	1.330.377	164%

\* The budget needed for option 3.1bis (with supplement) increases with 34% compared to the baseline scenario.

Source Estimate based on data LFS and 2012 Ageing Report



# **ANNEX X: HIVA REPORT UNEMPLOYMENT BENEFITS 2013**



### 2.3 *Synoptic overview*

Table 2.25 Synoptic overview of the scope of the cross border use of unemployment benefits and LTC benefits

Indicator	Year	Unit	Amount	Type variable
<b>Coordination of unemployment benefits</b>				
<b>Cross-border workers within EU-27</b>	2010-2011	in thousand	1.032,0	stock
of which <b>frontier workers</b>	2010-2011	in thousand	701,0	stock
<b>Migrant workers</b> (from 15 to 64 years, within EU 27)***	2011	in thousand	1.017,0	yearly flow
<b>Posted workers</b> (PD A1 issued)	2011	in thousand	1.508	yearly issued
Estimated number of <b>unemployed cross-border workers</b>	2010-2011	in thousand	73,7	stock
as share of total unemployment		in %	0,35%	
of which frontier workers	2010-2011	in thousand	45,2	stock
<b>Unemployed recent migrant workers</b>	2011	in thousand	94,8	stock
Estimated number of <b>proven period of insurance</b> PD U1	2010	in thousand	341,2	stock
as share of total unemployment	2010	in %	1,60%	
Estimated number of <b>exported unemployment benefit</b> PD U2	2011	in thousand	23,7	stock
as share of total unemployment		in %	0,11%	

ANNEX X ANALYSIS OF THE CHARACTERISTICS AND THE DURATION OF EMPLOYED ACTIVITY BY CROSS-BORDER AND FRONTIER WORKERS FOR THE PURPOSES OF COORDINATING UNEMPLOYMENT BENEFITS

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Coordination of long-term care benefits				
<b>Migrated pensioners***</b>	2011	in thousand	44,1	yearly flow
<b>Total estimated number of persons insured for LTC (PD S1)</b>	2010-2011	in thousand	1.980,0	stock
as % of total population EU 27		in %	0,4%	
Of which:				
cross border workers and family members	2010-2011	in thousand	1.239,0	stock
retired cross border workers and family members	2010-2011	in thousand	503,0	stock
mobile pensioners and family members	2010-2011	in thousand	238,0	stock
Estimate of <b>mobile persons obtaining LTC</b>	2010-2011	in thousand	93	stock
<b>Outstanding reimbursement claims</b> for health, Audit Board	2011	millions €	3.607,3	stock
<b>Reimbursement claims</b> for health, Audit board	2011	millions €	3.590,9	flow
Estimated reimbursement <b>claims for LTC benefits in kind</b> on figures Audit Board	2011	millions €	592,0	flow
Estimated <b>health expenditures for mobile citizens</b> on LFS and Ageing Report *	2010	millions €	3.167,4	flow
Estimated reimbursement claims for benefits in kind for mobile citizens based on LFS and Ageing Report	2010	millions €	618,3	flow
Estimated <b>LTC benefits in cash</b> for mobile citizens based on LFS and Ageing Report	2010	millions €	376,4	flow

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Total estimated <b>expenditure LTC for mobile citizens</b> based on LFS and Ageing Report	2010	millions €	994,7	flow
as % of total LTC spending		in %	0,4%	
as % of GDP		in %	0,008%	

\* Figure calculated in the interim report

\*\* Figures described in detail in several chapters of this report

\*\*\* No data for BE, BG, HU, MT, NL, PL and RO

## **ANALYSIS OF THE CHARACTERISTICS AND THE DURATION OF EMPLOYED ACTIVITY BY CROSS-BORDER AND FRONTIER WORKERS FOR THE PURPOSES OF COORDINATING UNEMPLOYMENT BENEFITS**

**Prof. dr. Jozef Pacolet & Frederic De Wispelaere**

ANNEX X ANALYSIS OF THE CHARACTERISTICS AND THE DURATION OF EMPLOYED  
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# Introduction

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The purpose of the report is to provide the Commission with a statistical data analysis that will give insight of the characteristics of the work pattern of frontier and cross-border workers and the duration that cross-border and frontier workers on average spend in their current job. This report shows how the policy option (option 4) differs from the baseline scenario and the other options.

A new 'conflict rule' will be introduced according to which:

- A person receives the unemployment benefits in the country of residence, except:

- When the last 12 months of employment have been completed in another Member State. In that case, the country of last activity will become competent. It is not necessary that the person has continuously worked for 12 months in the other Member State without interruption or that he has worked there up to the date when he starts to receive unemployment benefits, but only that he has accumulated 12 months of employment before unemployment (e.g. with period of sickness) without having been employed anywhere else during this period.

There will be no reimbursement mechanism for the country of residence (we assume that the person has in the past paid contributions into that scheme).



## Applied methodology

Based on Labour force Survey (LFS) data, an estimation of the number of **cross-border workers** could be made (based on the question *What is the name and address of the local unit of the enterprise where you work?* and variables 'COUNTRYW' (country of place of work) and 'COUNTRY' (country of residence) in the database). In the further analysis we considered all **workers who work in another country than the country of residence as cross-border workers. Workers who work in a neighbouring country are considered as frontier workers.** This is different from the legal definition.

For the new introduced option 4 a breakdown by the period of employment of the cross-border worker had to be made. The breakdown is extracted from the LFS variable 'STARTIME' (Time since person started to work).

Some limitations of the use of this indicator need to be taken into account.<sup>380</sup> There is a risk of underestimation of the duration as the indicator used is a measure of the employment spell in-progress (e.g.: not finished, as the person is 'not yet' unemployed). E.g.: people having currently worked 6 months may keep the same job still for few months/years/decades. However, on the other side, there is a risk of overestimation as it can be measured only for employed persons – and that there is therefore an over-representation of people with long job tenure. E.g.: people having become unemployed recently after having worked few months are not accounted for (same holds for those having recently lost their job after 10 years but they are less numerous).

Still, the ideal would be to know how much time unemployed previously cross-border workers have worked in the country of last activity. However, the employment history of currently unemployed persons is not available in any EU-LFS variable.

National unemployment rates were applied to the number of cross-border workers to estimate the number of **unemployed cross-border workers**. The national unemployment rates<sup>381</sup> of 2010 (from 20 to 64 years) defined in the 2012 Ageing Report were used. **The unemployment rates of the country of employment and not of the country of residence have been applied** on the number of cross-border workers calculated by way of the LFS.

In order to **estimate the budgetary impact** of the baseline scenario and the different options, the estimated number of unemployed cross-border workers (based on the LFS and the unemployment rates of the 2012 Ageing Report) is multiplied by the annual unemployment benefit per unemployed person (unemployment benefit spending in 2010 prices / (labour force \* unemployment rate)) (data from the 2012 Ageing Report). This yearly expenditure assumes that the unemployed person did not find a job during the first year of unemployment. However, a more 'realistic' calculation of the yearly expenditure is calculated by taking into account the **annual average duration of the payment of the unemployment benefit**.<sup>382</sup>

<sup>380</sup> Input received from DG EMPL, based on Employment in Europe 2009, chapter 2 and Employment and Social Developments in Europe Review 2012, chapter 1.

<sup>381</sup> In order to support the use of national unemployment rates for cross-border workers, DG EMPL confirmed, on the basis of Eurostat EU-LFS data, that the overall characteristics of cross-border workers seem quite close to the average national workers (people working in the same country than their country of residence). No large differences in terms of highest level of education or age, two important factors when it comes to unemployment, appear.

<sup>382</sup> Calculations are based on the duration of the unemployment (which can be calculated with LFS data). If the duration of unemployment < 1 month, we assume a payment of the UB of 0.5 months; Between 1-2 months of unemployment = 1.5 months UB paid; Between 3-5 months of unemployment = 4 months UB paid; Between 6 and 11 months of unemployment = 8.5 months UB paid; 12 months and longer of unemployment = 12 months UB paid. Based on LFS data we obtained an average duration of unemployment of 15 months. However, this average duration is measured at a certain moment which implies a possible underestimation of the duration of the unemployment (e.g. he/she may still remain

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unemployed). However, the expenditure is calculated for only one year. This explains the cut-off at 12 months. This will result in an annual average duration of payment of the unemployment of 7.5 months.

## Analysis and results

### 1.19 Unemployment benefits

In the **baseline scenario**, frontier workers (people who work in one country and live in another, and return home daily or at least once a week) who become wholly unemployed must apply for unemployment benefits in their country of residence. Cross-border workers, other than frontier workers, may apply for unemployment benefits and register with the employment service in either the country of last activity or the country of residence (*right of choice*). The country of last activity will reimburse the institution of the country of residence an amount of the benefits provided to the returned frontier workers and other cross-border workers by the latter institution during the first three or five months.

**Option 2** implies that frontier workers also have the choice between applying for unemployment benefits and registering with the employment services either in the country of last activity or in the country of residence (*all cross-border workers have a right of choice*).

In **option 3**, the unemployed person should claim unemployment benefits and register with the employment services in the country of last activity. Reimbursement claims are no longer necessary.

In **new option 4**, the country of last activity will pay the unemployment benefit of unemployed former cross-border workers employed longer than 12 months in this country while the country of residence will pay the unemployment benefit of unemployed former cross-border workers employed no longer than 12 months in the country of last activity. No reimbursement mechanism is foreseen in this option.

**Table 2.1 UB: Applicable rules baseline scenario and different options**

	Option 1: Baseline scenario	Option 2: Right of choice	Option 3: Country of last activity	Option 4: cut-off by period of employment
<b>Country of last activity</b>				
Other cross-border workers	UB paid to other cross-border workers when highest UB in country of last activity (rational decision)	UB paid to other cross-border workers when highest UB in country of last activity (rational decision)	UB paid to other cross-border workers	UB paid to cross-border workers longer than 12 months employed in the country of last activity
Frontier workers		UB paid to frontier workers when highest UB in country of last activity (rational decision)	UB paid to frontier workers	
Reimbursement	Reimbursement claim paid of 3 or 5 months to country of residence	Reimbursement claim paid of 3 or 5 months to country of residence	No reimbursement	
<b>Country of residence</b>				
Other cross-border workers	UB paid to other cross-border workers when highest UB in country of residence (rational decision)	UB paid to other cross-border workers when highest UB in country of residence (rational decision)	*	UB paid to cross-border workers no longer than 12 months employed in the country of last activity
Frontier workers	UB paid to frontier workers	UB paid to frontier workers when highest UB in country of residence (rational decision)	*	
Reimbursement	Reimbursement claim received of 3 or 5 months from country of last activity	Reimbursement claim received of 3 or 5 months from country of last activity		

\* A PD U1 could be issued by the country of residence to prove (self-)employed or insured periods in the country of residence to open unemployment rights in the country of last activity.

Source HIVA KU Leuven based on information from DG EMPL

On average (2010 and 2011) 256.8 thousand cross-border workers (or 25% of the total number of cross-border workers) are currently no longer than 12 months employed in their country of employment compared to 775.5 thousand cross-border workers (or 75% of the total number of cross-border workers) who are currently longer than 12 months employed in the country of employment (Table 2.2). However, ‘the connection’ to the labour market of cross-border workers will differ between Member States. E.g. currently 86% of the incoming cross-border workers in Luxembourg are longer than 12 months employed in this country. It proves a ‘genuine link’ of most of the cross-border workers. At the same time this ‘genuine link’ will cause a budgetary cost. National unemployment rates were applied to the number of cross-border workers to estimate the number of unemployed cross-border workers. This results in an estimated number of 53.8 thousand unemployed former cross-border workers longer than 12 months employed in the country of last activity and 19.9 thousand unemployed former cross-border workers no longer than 12 months employed.

The breakdown by period of employment will influence the budgetary cost for the country of last activity and the country of residence (Table 2.3). A country will pay the unemployment benefit for the unemployed former incoming cross-border workers who were longer than 12 months employed (or 53.8 thousand persons) and for the unemployed former outgoing cross-border workers who were no longer than 12 months employed (or 19.9 thousand persons). E.g. Luxembourg will pay for 4.8 thousand unemployed former incoming cross-border workers (or 86% of the incoming

cross-border workers) and for 0.1 thousand unemployed former outgoing cross-border workers (or 24% of the outgoing cross-border workers) an unemployment benefit.

The budgetary cost (table 2.3) is estimated at € 87.9 million for the unemployed former outgoing cross-border workers and at € 590.7 for the unemployed former incoming cross-border workers. It results in a total expenditure of € 678.6 Million. However, this will be the estimated expenditure assuming that all unemployed persons did not find a job during the first year of unemployment. A more 'realistic' estimate of the yearly expenditure is calculated by also taking into account the annual average duration of the payment of the unemployment benefit. On average 7.5 months (EU-27) the UB was paid to unemployed persons (calculated for the total year)<sup>383</sup>. It results in a total estimated budgetary cost of € 384 Million.

Tables 2.4 to 2.6 compare the budgetary impact of the different options. The calculation of the total expenditure takes not only the expenditure of the UB into account but also the amount of the claims received of the reimbursement procedure (as country of residence = creditor) and the amount of the claims paid of the reimbursement procedure (as country of last activity = debtor). It results in a total expenditure of € 378 Million for the baseline scenario, € 502 Million for option 2 (right of choice), € 437 Million for option 3 (provided by the country of last activity) and € 384 Million for option 4 (cut-off of 12 months). All three options are more expensive than the baseline scenario. The expenditure increases with 33% in option 2 compared to the baseline scenario, with 16% in option 3 and only with 2% in option 4.

The budgetary impact differs between Member States. On 12 Member States the baseline scenario has the lowest budgetary impact (CZ, DK, IE, GR, LT, LU, HU, MT, NL, AT, RO, FI). Option 2 has only on 1 Member State the lowest budgetary impact (PT) while option 3 is least expensive for 8 Member States (BG, EE, FR, LV, PL, SI, SK, SE). Finally, option 4 has to lowest budgetary impact on 6 Member States (BE, DE, ES, IT, CY, UK).

Option 2 is for 12 Member States the most expensive option (BE, CZ, DK, DE, IE, CY, LU, NL, AT, PL, FI, UK). For 7 Member States the baseline scenario is the most expensive option (EE, FR, IT, PT, SI, SK, SE) and for 5 Member states this will be option 4 (BG, LV, LT, HU, RO). Finally, option 3 will has to highest budgetary impact on 3 Member States (GR, ES, MT).

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<sup>383</sup> Calculations are based on LFS data. If the duration of unemployment < 1 month, we assume a payment of the UB of 0,5 months; Between 1-2 months of unemployment = 1,5 months UB paid; Between 3-5 months of unemployment = 4 months UB paid; Between 6 and 11 months of unemployment = 8,5 months UB paid; 12 months and longer of unemployment = 12 months UB paid.



**Table 2.2 UB: Main parameters for estimating option 4**

Country	Average 2010 and 2011								2010	Average 2010 and 2011			
	Incoming Cross-border workers longer than 12 months employed (in .000)	% of incoming cross-border workers	Incoming Cross-border workers not longer than 12 months employed (in .000)	% of incoming cross-border workers	Outgoing Cross-border workers longer than 12 months employed (in .000)	% of outgoing cross-border workers	Outgoing Cross-border workers not longer than 12 months employed (in .000)	% of outgoing cross-border workers		Unemployment rate (20-64) country of employment	Incoming unemployed Cross-border workers longer than 12 months employed (in .000)	Incoming unemployed Cross-border workers not longer than 12 months employed (in .000)	Outgoing unemployed Cross-border workers longer than 12 months employed (in .000)
BE	47,2	77%	14,4	23%	85,6	89%	11,0	11%	8,0%	3,8	1,1	4,5	0,6
BG	1,8	100%	0,0	0%	9,6	45%	11,5	55%	10,2%	0,2	0,0	1,0	1,2
CZ	52,2	85%	9,2	15%	19,5	81%	4,6	19%	7,1%	3,7	0,7	1,5	0,4
DK	27,4	78%	7,6	22%	2,8	64%	1,6	36%	6,9%	1,9	0,5	0,2	0,1
DE	140,9	76%	45,2	24%	134,3	81%	31,1	19%	7,1%	10,0	3,2	7,7	1,9
EE	0,6	74%	0,2	26%	11,9	66%	6,2	34%	16,7%	0,1	0,0	1,0	0,5
IE	14,2	82%	3,1	18%	8,5	85%	1,5	15%	13,2%	1,9	0,4	0,6	0,1
GR	5,7	49%	5,9	51%	0,0		0,0		12,5%	0,7	0,7	0,0	0,0
ES	24,7	61%	15,5	39%	13,0	58%	9,5	42%	19,5%	4,8	3,0	1,0	0,8
FR	33,8	71%	13,5	29%	132,0	83%	27,7	17%	9,0%	3,0	1,2	8,6	1,9
IT	37,1	49%	38,7	51%	17,8	73%	6,6	27%	8,1%	3,0	3,1	1,5	0,6
CY	2,9	81%	0,7	19%	0,0		0,0		6,4%	0,2	0,0	0,0	0,0
LV	0,4	85%	0,1	15%	3,2	46%	3,7	54%	18,4%	0,1	0,0	0,3	0,3
LT	0,1	52%	0,1	48%	1,1	57%	0,8	43%	17,8%	0,0	0,0	0,1	0,1
LU	111,2	86%	18,8	14%	2,1	76%	0,7	24%	4,3%	4,8	0,8	0,2	0,1
HU	12,0	86%	1,9	14%	38,8	73%	14,6	27%	11,1%	1,3	0,2	2,5	0,9
MT	0,2	20%	0,6	80%	0,6	70%	0,3	30%	6,0%	0,0	0,0	0,0	0,0
NL	91,8	84%	18,1	16%	19,1	90%	2,1	10%	4,0%	3,7	0,7	1,5	0,2
AT	77,0	76%	23,9	24%	27,6	86%	4,5	14%	4,2%	3,2	1,0	2,1	0,4
PL	6,5	85%	1,2	15%	63,1	69%	28,6	31%	9,6%	0,6	0,1	4,3	1,9
PT	2,9	64%	1,6	36%	6,5	62%	4,0	38%	11,1%	0,3	0,2	1,1	0,5
RO	3,2	86%	0,5	14%	34,0	39%	53,8	61%	7,3%	0,2	0,0	3,4	5,1
SI	1,4	93%	0,1	7%	6,9	80%	1,7	20%	7,2%	0,1	0,0	0,4	0,1
SK	5,3	85%	1,0	15%	100,1	86%	17,0	14%	13,9%	0,7	0,1	7,1	1,2
FI	13,8	70%	5,9	30%	1,1	65%	0,6	35%	7,7%	1,1	0,5	0,1	0,1
SE	8,7	70%	3,8	30%	20,8	72%	8,2	28%	7,3%	0,6	0,3	1,5	0,6
UK	52,6	68%	25,0	32%	15,3	75%	5,0	25%	6,9%	3,6	1,7	1,6	0,5
EU-27	775,5	75%	256,8	25%	775,5	75%	256,8	25%	10,5%	53,8	19,9	53,8	19,9

Source LFS and 2012 Ageing Report

CHAPTER 0 Analysis and results

**Table 2.3 UB: estimated expenditure UB option 4 (corrected by Annual average duration of payment UB)**

	Number of involved unemployed cross-border workers		Budgetary impact				
	Incoming <b>unemployed</b> Cross-border workers <b>longer than 12 months</b> employed (in .000)	Outgoing <b>unemployed</b> Cross-border workers <b>not longer than 12 months</b> employed (in .000)	UB paid for <b>incoming cross-border workers</b> employed longer than 12 months (in € .000)	UB paid for <b>outgoing cross-border workers</b> employed not longer than 12 months (in € .000)	Annual expenditure UB (in € .000)	Annual average duration of payment UB (in months)	Annual expenditure UB based on average duration payment UB (in € .000)
BE	3,8	0,6	72.217	10.972	83.190	7,4	51.300
BG	0,2	1,2	82	552	634	8,7	460
CZ	3,7	0,4	5.141	486	5.627	7,6	3.564
DK	1,9	0,1	17.790	1.147	18.937	5,7	8.995
DE	10,0	1,9	89.245	17.327	106.572	7,3	64.832
EE	0,1	0,5	71	349	419	8,2	286
IE	1,9	0,1	28.062	1.555	29.617	9,1	22.460
GR	0,7	0,0	1.539	0	1.539	9,0	1.154
ES	4,8	0,8	22.823	3.747	26.570	7,6	16.827
FR	3,0	1,9	38.239	23.915	62.154	7,0	36.256
IT	3,0	0,6	17.472	3.385	20.857	8,4	14.600
CY	0,2	0,0	602	0	602	6,5	326
LV	0,1	0,3	41	171	211	8,2	144
LT	0,0	0,1	11	24	35	8,2	24
LU	4,8	0,1	119.795	1.286	121.081	6,2	62.559
HU	1,3	0,9	1.108	763	1.870	8,0	1.247
MT	0,0	0,0	21	41	62	7,8	40
NL	3,7	0,2	105.588	4.729	110.317	6,3	57.916
AT	3,2	0,4	41.104	4.542	45.647	5,4	20.541
PL	0,6	1,9	249	770	1.019	7,4	628
PT	0,3	0,5	1.163	1.767	2.930	8,1	1.978
RO	0,2	5,1	188	4.121	4.309	7,4	2.657
SI	0,1	0,1	150	154	304	7,9	200
SK	0,7	1,2	296	467	763	9,8	623
FI	1,1	0,1	15.827	813	16.640	4,6	6.379
SE	0,6	0,6	3.797	3.713	7.510	4,8	3.004
UK	3,6	0,5	8.050	1.115	9.165	6,6	5.041
EU-27	53,8	19,9	590.671	87.911	678.581	7,5	384.042

\* Only the annual expenditure of UB is taken into account while there will possibly be a shift of the social security system from the country of last activity to the country of residence

Source Estimate based on data LFS and 2012 Ageing Report

**Table 2.4 UB: estimated budgetary impact baseline scenario and options, in € .000 (corrected by Annual average duration of payment UB)**

	<b>Option 1: No policy change (Baseline scenario):</b> Frontier workers return; other cross-border workers take a rational decision (= highest UB)					<b>Option 2: Right of choice:</b> cross-border workers take a rational decision (= highest amount)					<b>Option 3: UB provided by the country of last activity</b>					<b>Option 4: 'cut-off' of 12 months</b>	
	Annual expenditure UB based on average duration payment UB (in € .000)	Actual claims paid to country of residence (3 months) (in € .000)	Actual claims received from country of last activity (3 months) (in € .000)	Total expenditure (in € .000)	%	Annual expenditure UB based on average duration payment UB (in € .000)	Actual claims paid to country of residence (3 months) (in € .000)	Actual claims received from country of last activity (3 months) (in € .000)	Total expenditure (in € .000)	%	Annual expenditure UB based on average duration payment UB (in € .000)	Actual claims paid to country of residence (3 months) (in € .000)	Actual claims received from country of last activity (3 months) (in € .000)	Total expenditure (in € .000)	%	Annual expenditure UB based on average duration payment UB (in € .000)	%
BE	70.891	13.533	19.727	64.697	100%	74.007	5.077	8.935	70.149	108%	58.403	0	0	58.403	90%	51.300	79%
BG	256	20	88	188	100%	0	221	0	221	117%	59	0	0	59	31%	460	244%
CZ	1.097	526	334	1.289	100%	3.798	848	117	4.529	351%	3.819	0	0	3.819	296%	3.564	277%
DK	3.029	3.395	450	5.974	100%	12.014	43	599	11.458	192%	10.811	0	0	10.811	181%	8.955	151%
DE	69.040	15.024	16.167	67.897	100%	55.763	24.804	4.864	75.703	111%	72.034	0	0	72.034	106%	64.832	95%
EE	609	19	219	409	100%	73	78	10	140	34%	65	0	0	65	16%	286	70%
IE	21.239	664	455	21.448	100%	33.461	42	2.434	31.069	145%	25.854	0	0	25.854	121%	22.460	105%
GR	381	329	0	710	100%	1.632	475	0	2.107	297%	2.356	0	0	2.356	332%	1.154	163%
ES	15.919	4.108	949	19.078	100%	18.520	4.287	629	22.179	116%	23.563	0	0	23.563	124%	16.827	88%
FR	86.602	6.483	26.361	66.724	100%	55.382	6.226	13.574	48.035	72%	31.250	0	0	31.250	47%	36.256	54%
IT	28.531	732	1.444	27.819	100%	27.070	1.068	711	27.427	99%	25.028	0	0	25.028	90%	14.600	52%
CY	391	7	0	397	100%	391	19	0	409	103%	405	0	0	405	102%	326	82%
LV	55	10	16	49	100%	29	18	6	41	84%	33	0	0	33	67%	144	295%
LT	4	5	1	7	100%	5	18	0	23	306%	14	0	0	14	183%	24	319%
LU	3.510	18.804	637	21.677	100%	75.684	0	1.233	74.451	343%	72.862	0	0	72.862	336%	62.559	289%
HU	615	190	208	597	100%	819	435	44	1.209	203%	852	0	0	852	143%	1.247	209%
MT	10	23	0	33	100%	10	38	0	47	142%	68	0	0	68	205%	40	121%
NL	41.060	10.969	5.167	46.862	100%	90.552	0	11.199	79.353	169%	66.216	0	0	66.216	141%	57.916	124%
AT	15.426	4.062	4.253	15.235	100%	38.052	41	7.381	30.713	202%	24.180	0	0	24.180	159%	20.541	135%
PL	872	73	354	592	100%	0	1.387	0	1.387	234%	181	0	0	181	31%	628	106%
PT	3.457	293	1.111	2.639	100%	497	443	11	929	35%	1.228	0	0	1.228	47%	1.978	75%
RO	26	54	10	69	100%	5	280	0	285	411%	136	0	0	136	196%	2.657	3828%
SI	475	26	154	347	100%	88	173	9	252	73%	107	0	0	107	31%	200	58%
SK	1.880	87	577	1.391	100%	35	908	3	940	68%	285	0	0	285	20%	623	45%
FI	2.206	399	161	2.444	100%	9.246	57	369	8.935	366%	8.687	0	0	8.687	356%	6.379	261%
SE	5.651	771	2.663	3.759	100%	1.765	926	256	2.435	65%	2.179	0	0	2.179	58%	3.004	80%
UK	4.529	1.514	615	5.427	100%	3.217	4.481	8	7.690	142%	6.492	0	0	6.492	120%	5.041	93%
EU-27	377.761	82.122	82.122	377.761	100%	502.113	52.391	52.391	502.113	133%	437.167	0	0	437.167	116%	384.042	102%

\* The annual expenditure (12 months) is estimated without taking into account national legislation and as such the possible limitation in time of the payment of UB.

**Source** Estimate based on data LFS and 2012 Ageing Report

**Table 2.5 UB: comparison of options between MS, estimated budgetary impact option 1 (100%) compared to other options (corrected by Annual average duration of payment UB)**

	Option 1: No policy change (Baseline scenario)	Option 2: Right of choice	Option 3: UB provided by the country of last activity	Option 4: 'cut-off' of 12 months
BE	100%	108%	90%	79%
BG	100%	117%	31%	244%
CZ	100%	351%	296%	277%
DK	100%	192%	181%	151%
DE	100%	111%	106%	95%
EE	100%	34%	16%	70%
IE	100%	145%	121%	105%
GR	100%	297%	332%	163%
ES	100%	116%	124%	88%
FR	100%	72%	47%	54%
IT	100%	99%	90%	52%
CY	100%	103%	102%	82%
LV	100%	84%	67%	295%
LT	100%	306%	183%	319%
LU	100%	343%	336%	289%
HU	100%	203%	143%	209%
MT	100%	142%	205%	121%
NL	100%	169%	141%	124%
AT	100%	202%	159%	135%
PL	100%	234%	31%	106%
PT	100%	35%	47%	75%
RO	100%	411%	196%	3828%
SI	100%	73%	31%	58%
SK	100%	68%	20%	45%
FI	100%	366%	356%	261%
SE	100%	65%	58%	80%
UK	100%	142%	120%	93%
EU-27	100%	133%	116%	102%
Lowest impact	12	1	8	6
Highest impact	7	12	3	5

\* Green: lowest budgetary impact; Red: highest budgetary impact

Source Estimate based on data LFS and 2012 Ageing Report

**Table 2.6 UB: comparison of options between MS, estimated lowest and highest budgetary impact (corrected by Annual average duration of payment UB)**

	Lowest budgetary impact				Highest budgetary impact				
	Option 1: No policy change (Baseline scenario)	Option 2: Right of choice	Option 3: UB provided by the country of last activity	Option 4: 'cut-off' of 12 months	Option 1: No policy change (Baseline scenario)	Option 2: Right of choice	Option 3: UB provided by the country of last activity	Option 4: 'cut-off' of 12 months	
BE				X		X			BE
BG			X					X	BG
CZ	X					X			CZ
DK	X					X			DK
DE				X		X			DE
EE			X		X				EE
IE	X					X			IE
GR	X						X		GR
ES				X			X		ES
FR			X		X				FR
IT				X	X				IT
CY				X		X			CY
LV			X					X	LV
LT	X							X	LT
LU	X					X			LU
HU	X							X	HU
MT	X						X		MT
NL	X					X			NL
AT	X					X			AT
PL			X			X			PL
PT		X			X				PT
RO	X							X	RO
SI			X		X				SI
SK			X		X				SK
FI	X					X			FI
SE			X		X				SE
UK				X		X			UK
EU-27	12	1	8	6	7	12	3	5	EU-27

Source Estimate based on data LFS and 2012 Ageing Report

Table 2.7 presents the distribution of the cost taking into account the applicable rules for option 4. We have made our calculations from the perspective of incoming cross-border workers who become unemployed. The estimated 53.8 thousand unemployed former incoming cross-border workers who were no longer than 12 months employed in the country of last activity will receive an unemployment benefit from their country of residence while the other 19.9 thousand unemployed former incoming cross-border worker who were longer than 12 months employed in the country of last activity will receive an unemployment benefit from the country of last activity.

It implies (taking into account the assumptions we had to made) that the country of last activity will pay 88% of the total expenditure and the country of residence 12% of the total expenditure. The distribution of the cost is mainly influenced by the fact 75% of the cross-border workers are longer than 12 months employed. However, also the amount of the unemployment benefit and the period of unemployment will influence the budgetary cost. Again, differences between Member States appear.

Table 2.8 presents the distribution of the cost taking into account the current rules in the baseline scenario. The baseline scenario (also taking into account the assumptions we had to made) implies that the country of last activity will pay 30% of the total expenditure (only for 'other unemployed cross-border workers' who choose for the country of last activity) and the country of residence 70% of the total expenditure (for the unemployed frontier workers and the 'other unemployed cross-border workers' who choose to return). However, this disproportion is corrected by a reimbursement procedure. Now, the county of last activity will pay 43% of the cost and the country of residence 57%.

Comparing the distribution of the cost for option 4 to the baseline scenario (after reimbursement), a much higher share of the cost is paid by the country of last activity (88% compared to 43%). Only Italy is confronted with a lower share of cost in option 4 (85%) compared to the baseline scenario (88%). For that reason, option 4 can be considered as 'more fair' compared to the baseline scenario.





**Table 2.7 UB: estimated expenditure UB incoming cross-border workers becoming unemployed, option 4, breakdown by country of last activity and country of residence (corrected by Annual average duration of payment UB)**

Country of last activity	Incoming unemployed crossborder workers		Expenditure		Share of cost	
	Number of unemployed incoming cross-border workers <b>not longer</b> than 12 months employed (in .000)	Number of unemployed incoming cross-border workers <b>longer</b> than 12 months employed (in .000)	Estimated annual expenditure UB <b>by country of residence</b> based on average duration payment UB (in .000 €)	Estimated annual expenditure UB <b>by country of last activity</b> UB based on average duration payment UB (in .000 €)	% share of cost <b>country of residence</b>	% share of cost <b>country of last activity</b>
BE	3,8	1,1	7.033	44.534	14%	86%
BG	0,2	0,0	0	59	0%	100%
CZ	3,7	0,7	352	3.256	10%	90%
DK	1,9	0,5	1.357	8.450	14%	86%
DE	10,0	3,2	7.252	54.291	12%	88%
EE	0,1	0,0	43	48	47%	53%
IE	1,9	0,4	960	21.280	4%	96%
GR	0,7	0,7	819	1.154	42%	58%
ES	4,8	3,0	6.766	14.454	32%	68%
FR	3,0	1,2	4.110	22.306	16%	84%
IT	3,0	3,1	2.096	12.231	15%	85%
CY	0,2	0,0	34	326	9%	91%
LV	0,1	0,0	5	28	14%	86%
LT	0,0	0,0	12	7	62%	38%
LU	4,8	0,8	6.432	61.894	9%	91%
HU	1,3	0,2	368	738	33%	67%
MT	0,0	0,0	97	14	87%	13%
NL	3,7	0,7	3.496	55.434	6%	94%
AT	3,2	1,0	2.846	18.497	13%	87%
PL	0,6	0,1	578	153	79%	21%
PT	0,3	0,2	297	785	27%	73%
RO	0,2	0,0	213	116	65%	35%
SI	0,1	0,0	3	99	3%	97%
SK	0,7	0,1	202	242	46%	54%
FI	1,1	0,5	444	6.067	7%	93%
SE	0,6	0,3	665	1.519	30%	70%
UK	3,6	1,7	5.152	4.427	13%	87%
EU-27	53,8	19,9	51.631	369.169	12%	88%

\* Only the annual expenditure of UB is taken into account while there will possibly be a shift of the social security system from the country of last activity to the country of residence

**Source** Estimate based on data LFS and 2012 Ageing Report

**Table 2.8 UB: estimated expenditure UB incoming cross-border workers becoming unemployed, baseline scenario, breakdown by country of last activity and country of residence and impact of reimbursement (corrected by Annual average duration of payment UB)**

<b>Option 1: No policy change (Baseline scenario):</b> Frontier workers return; other cross-border workers take a rational decision (= highest UB)											
Country of employment	Incoming unemployed crossborder workers		Expenditure			Cost without reimbursement		Cost with reimbursement			
	Number of unemployed incoming cross-border workers (in .000)	Of which incoming unemployed frontier workers (in .000)	Estimated annual expenditure UB based on average duration payment UB paid by the country of residence (in .000 €)	Estimated annual expenditure UB based on average duration payment UB paid by the country of last activity (in .000 €)	Reimbursement country of last activity (3 months) (in .000 €)	% share of cost country of residence	% share of cost country of last activity	% share of cost country of residence	% share of cost country of last activity		
BE	4,9	4,0	34.334	10.929	13.533	76%	24%	58%	42%		
BG	0,2	0,0	1.052	0	20	100%	0%	98%	2%		
CZ	4,4	4,3	3.327	43	526	99%	1%	85%	15%		
DK	2,4	2,0	6.410	1.726	3.395	79%	21%	56%	44%		
DE	13,2	10,1	55.161	16.936	15.024	77%	23%	63%	37%		
EE	0,1	0,1	203	7	19	97%	3%	89%	11%		
IE	2,3	1,1	1.516	13.440	664	10%	90%	10%	90%		
GR	1,5	0,8	2.613	381	329	87%	13%	79%	21%		
ES	7,9	1,9	18.472	12.296	4.108	60%	40%	53%	47%		
FR	4,3	2,7	21.483	11.407	6.483	65%	35%	55%	45%		
IT	6,1	0,4	3.250	22.455	732	13%	87%	12%	88%		
CY	0,2	0,0	92	391	7	19%	81%	19%	81%		
LV	0,1	0,1	62	4	10	93%	7%	81%	19%		
LT	0,1	0,0	71	0	5	100%	0%	93%	7%		
LU	5,6	5,5	45.350	688	18.804	99%	1%	70%	30%		
HU	1,5	1,3	1.911	6	190	100%	0%	91%	9%		
MT	0,0	0,0	167	8	23	95%	5%	84%	16%		
NL	4,4	3,3	27.063	16.724	10.969	62%	38%	49%	51%		
AT	4,2	4,0	10.184	1.478	4.062	87%	13%	65%	35%		
PL	0,7	0,6	3.797	0	73	100%	0%	98%	2%		
PT	0,5	0,2	1.572	439	293	78%	22%	68%	32%		
RO	0,3	0,0	1.304	1	54	100%	0%	96%	4%		
SI	0,1	0,1	343	34	26	91%	9%	85%	15%		
SK	0,9	0,8	1.814	0	87	100%	0%	95%	5%		
FI	1,5	1,2	1.019	1.530	399	40%	60%	35%	65%		
SE	0,9	0,2	2.811	945	771	75%	25%	62%	38%		
UK	5,4	0,6	17.332	3.183	1.514	84%	16%	79%	21%		
EU-27	73,7	45,2	262.713	115.053	82.122	70%	30%	57%	43%		

\* Only the annual expenditure of UB is taken into account while there will possibly be a shift of the social security system from the country of last activity to the country of residence

Source Estimate based on data LFS and 2012 Ageing Report



In table 2.9. the administrative burden of this new option is estimated based on the same assumptions used for the estimation of the baseline scenario and the other options.<sup>384</sup> However, the correction of the yearly expenditure by taking into account the annual average duration of the payment of the UB will imply a higher administrative cost as % of total expenditure for the baseline scenario and the other options. In the baseline scenario the total administrative cost is estimated at € 8.2 million of which 64% could be allocated to the country of residence. The share of the total administrative burden in the total budget is some 2.2%. A right of choice will decrease the administrative cost to 59% of the baseline scenario. The share of the administrative cost in the total budget is 1%. The lowest administrative cost is estimated for the option where the country of last activity is providing the unemployment benefit. The administrative cost is further reduced to 36% of the baseline scenario. The share of the administrative cost in the total budget is 0.7% for this option. For the new option it was already estimated that 53.8 thousand unemployed cross-border workers will receive an unemployment benefit from the country of last activity while 19.9 thousand unemployed cross-border workers will receive the benefit from their country of residence. Also, there will be no reimbursement procedure. This will imply an important shift of the administrative burden to the country of last activity compared to the baseline scenario. 39% of the administrative cost (estimated at € 4.2 million) could be allocated to the country of residence (compared to 64% in the baseline scenario). The administrative cost will decrease to 51% of the baseline scenario. . The share of the administrative cost in the total budget is 1.1%.

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For a more detailed description of the methodology, see Deloitte Consulting (2013), *Study for the impact assessment for revision of Regulations (EC) Nos 883/2004 and 987/2009*.

Table 2.9 UB: Estimated administrative burden (corrected by Annual average duration of payment UB)

	Country of residence		Country of last activity	
	Direct paying	Reimbursement	Direct paying	Reimbursement
	Administrative unit cost			
Control unemployed	€ 40,0		€ 40,0	
U1	€ 42,8			€ 20,0
Reimbursement		€ 20,0		€ 20,0
Total administrative unit cost - UB Residence	€ 82,8	€ 20,0		€ 40,0
Total administrative unit cost - UB Last activity			€ 40,0	
	Administrative cost			
	Baseline scenario2: Frontier workers return; other cross-border workers rational decision (=highest amount UB)			
UB Residence	€ 4.258.153	€ 1.028.539	€ 0	€ 2.057.079
UB Last activity	€ 0	€ 0	€ 889.488	€ 0
Administrative cost	€ 5.286.692		€ 2.946.567	
Grand total	€ 8.233.259			
% cost country of residence in total administrative cost	64%			
Grand total annual expenditure UB (in millions)	€ 378			
Administrative cost as % of budgetary cost	2,2%			
Estimated reimbursement (in millions)	€ 82			
	Option B2: right of choice: rational decision (=highest amount UB)			
UB Residence	€ 1.530.093	€ 369.588	€ 0	€ 739.175
UB Last activity	€ 0	€ 0	€ 2.207.391	€ 0
Administrative cost	€ 1.899.681		€ 2.946.567	
Grand total	€ 4.846.248			
As % of baseline scenario	59%			
% cost country of residence in total administrative cost	39%			
Grand total annual expenditure UB (in millions)	€ 502			
Administrative cost as % of budgetary cost	1,0%			
Estimated reimbursement (in millions)	€ 52			
	Option C: UB provided by the country of last activity			
UB Residence	€ 0	€ 0	€ 0	€ 0
UB Last activity	€ 0	€ 0	€ 2.946.567	€ 0
Administrative cost	€ 0		€ 2.946.567	
Grand total	€ 2.946.567			
As % of baseline scenario	36%			
% cost country of residence in total administrative cost	0%			
Grand total annual expenditure UB (in millions)	€ 437			
Administrative cost as % of budgetary cost	0,7%			
Estimated reimbursement (in millions)	€ 0			
	Option D: cutt-off of 12 months			
UB Residence	€ 1.647.720			
UB Last activity			€ 2.152.000	€ 398.000
Administrative cost	€ 1.647.720		€ 2.550.000	
Grand total	€ 4.197.720			
As % of baseline scenario	51%			
% cost country of residence in total administrative cost	39%			
Grand total annual expenditure UB (in millions)	€ 384			
Administrative cost as % of budgetary cost	1,1%			
Estimated reimbursement (in millions)	€ 0			

Source Estimate based on data LFS and 2012 Ageing Report

