Experts' Workshop on Social Security of Visual Artists in Europe

Internationale Gesellschaft der Bildenden Künste (IGBK) in cooperation with the European Commission Representation in Germany

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SOCIAL SECURITY WHILE MOBILE

'Social Security of Visual Artists in Europe' An IGBK workshop

REQUIREMENTS OF VISUAL ARTISTS WORKING ACROSS BORDERS

In December 2009 the Internationale Gesellschaft der Bildenden Künste (IGBK) organized a panel of experts in Linz who addressed the mobility of visual artists in Europe, discussing existing barriers to mobility and the question of how cross-border work may be simplified for visual artists. The discussions were divided into four thematic blocks: taxation and customs, visa regulations, information and advisory services, and supporting schemes.

The IGBK introduced at the EU level the resulting list of recommendations into the OMC (open method of coordination) work group regarding mobility of artists and cultural professionals. In its final report in June 2010, the OMC work group emphasized that the issue of coordination of social legislation needs to be increasingly addressed in the future.

THE EXPERT WORKSHOP IN BERLIN

Because of its complexity, the issue of social security had been deliberately excluded from the event in Linz. The 'Social Security of Visual Artists in Europe' expert workshop explicitly devoted itself to the subject. In cooperation with the European Commission representation in Berlin, the IGBK hosted the workshop on November 16 and 17, 2010. The event focused on social security in Europe as well as the coordination of existing European legislations and social insurance systems.

Representatives of the European Commission, artists' associations, ministries, and social security institutions from eight European countries were invited to Berlin. The workshop was chaired by Richard Poláček (Practics / On the Move).

In light of the experiences of visual artists themselves, the transparency and practicality of the EU provision and resulting regulations were of particular interest.

The exchange focused on the following questions:
How is the flow of information organized concerning the possibilities of social security and existing EU regulations for visual artists in various countries? Does an effective information policy exist? Have the current EU regulations and recent changes been sufficiently implemented? Are they sufficiently known and do they meet the requirements of the artists at all?

Representing the European Commission, Vit Holubec (Directorate General for Employment, Social Affairs and Equal Opportunities, Department of Coordination of Social Security Systems and Free Movement of Workers) and Anna Geukens (Directorate General for Education and Culture, Department of Culture Policy, Diversity and Intercultural Dialog) presented the modernized coordination practices of social security in the EU as well as the strategies and key aspects developed in the context of the European agenda for culture.

The discussion among representatives of artists' associations, national ministries, and social security institutions which followed the presentations of Holubec and Geukens revealed a certain discrepancy between theory and practice and between current legal provisions and their lack of implementation. For example, when a French artist seeks medical assistance while working in Germany his European health insurance card may not be accepted at a doctor's office despite EU requirements.

Since May 2010 a modernized system of coordination has applied to all EU citizens who are members of a state health insurance, independent of their employment status, ostensibly rendering guaranteed unobstructed freedom of movement within the European Union. The new system of coordination is supposed to improve the collaboration between the still very differently organized social security institutions in Europe. This includes the gradual introduction of a system for electronic data exchange. The most important innovation in terms of the mobility of cultural workers is that, whether self-deployed or dispatched by an employer, artists can work in another EU country for up to 24 months while maintaining their respective national insurance coverage.

CUSTOMIZED INFORMATION FOR EUROPE-WIDE MOBILITY

During the Berlin expert workshop, it became clear that lack of information regarding social security issues poses an obstacle to the mobility of visual artists. Many artists are not sufficiently familiar with the EU regulations and the functioning of the coordination processes. Existing online information sites are usually too general to be really helpful. Therefore, national websites and information systems are required which present the EU regulations in a manner specifically tailored to the needs of artists.

Artists' associations are also often not sufficiently informed about EU regulations and not sensitized to the accompanying issues. This means that in the web of EU regulations and their national implementations, the artists' organizations are not (yet) satisfactorily fulfilling their role as mediators between artists and authorities/institutions such as health insurance companies.

Likewise, the identified lack of information applies to national authorities and social security institutions concerned with the implementation of the regulations.

They must be reliably and effectively supplied with all essential information about the innovations and with instructions for the implementation of the provisions into national law.

As early as 2009, trESS (network for training and reporting on European Social Security) asserted in a report that the dissemination of information is one of the most critical challenges. The information, seminars and consulting services devoted to European social security coordination offered free of charge by the trESS network (www.tress-network.org) are helpful to the institutions concerned with this issue at a national level.

ARTISTS' SOCIAL LEGISLATION AND COORDINATION

The publication presented by the IGBK contains extended versions of conference papers by Carroll Haak (empirical researcher / German pension insurance fund) and Bernd Schulte (trESS network / up to May 2011 Max Planck Institute for Foreign and International Social Law, Munich). The contributions are concerned with artists' social legislation in selected European countries as well as with the framework conditions and the practice of coordination.

In her study, Carroll Haak outlines the basic principles of social insurance coordination in Europe, the principle of (self-)secondment which also applies to visual artists, and the simplified administrative action of the EU. Central to her contribution are the special schemes of social security for artists in Europe. The German, French, Dutch, Austrian, and Croatian systems are described in detail.

In his text 'Law and practice of European social security coordination', Bernd Schulte, the national trESS expert for the Federal Republic of Germany, focuses on the principle of free movement of workers in the EU, the available expertise in the field of social legislation, and the existing EU coordination directives and their implementation.

ENABLING CULTURAL DIVERSITY

Mobility, international exchange, cross-border support of artists: the offers that have always proven useful in this context are those which are practically and precisely targeted to the requirements of artists, such as the EU-funded 'Practics' (www.practics.org) advisory bodies providing customized support to mobile artists and cultural workers. The further support and Europe-wide expansion of these facilities (four so far in Wales, Spain, Belgium, and the Netherlands) are therefore useful and desirable.

The 'artist mobility' online handbook of the IGBK and the German National Committee of the International Theatre Institute funded by the German Federal Government Commissioner for Culture and Media which will be completed by

the end of 2012 should also be mentioned in this context. The offer will initially provide practical information to mobile visual and performing artists about taxation, visas, funding, and social security. The target group is not only internationally active artists living in Germany but also foreign artists who want to produce and collaborate in Germany.

In the context of the Berlin expert workshop, the services of the Austrian Social Insurance Institution for Trade and Industry (SVA) starting in 2011 are also worth mentioning. These offers for artists relate to all matters of social security.

The career centers established by some European universities and the collaboration of the universities with the social insurance institutions also play important roles in the mobility of artists.

Practical information and consultation are crucial issues but not sufficient if the European Union is perceived as a 'learning community.' It is also important to systematically identify the obstacles and existing best practice examples and to use the insights to encourage cross-border cultural and artistic diversity in Europe. The systematic data collections are also central to political argumentation. This monitoring is an important basis for artists' organizations such as the IGBK for representing the interests of their members with vigor and specialist expertise.

: Dr. Carroll Haak

Social security and mobility of artists in Europe

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DR. CARROLL HAAK *is a political scientist and works for the German Federal Pension Insurance. From 1998 to 2007 she was a research associate at the Wissenschaftszentrum Berlin für Sozialforschung. She focused on the empirical analysis of work and living conditions of musicians, performing artists and fine artists. She is specialized in the field of research and advising in the area of cultural labour markets and social security.*

1. INTRODUCTION

Careers of visual artists are often more erratic and unpredictable than those of other groups of artists. This is due to a lack of continuity in this profession that can also be characterized by radical, short-term changes in an artist's career. A single unexpected event might lead to a variety of professional opportunities for visual artists. Visual artists are faced with the challenge of combining their artistic work with marketing strategies to minimize their economic and social risk. Artists are often forced to exploit these opportunities not only at a national level but also at an international level.

In recent decades, the specific characteristics of artists' labor markets as well as insufficient social security for artistic professions have become the focus of social policy in various countries. Some countries recognized the need for measures to improve social security for artists, and to integrate them into social security systems during periods of economic activity and inactivity. The concepts range from integration of artists into the existing security systems to special arrangements outside regular social security schemes.

In recent decades the European community has responded to the increasing mobility of labor forces within the European Union with removal of legal and administrative obstacles for the coordination of social security systems. Collective legislation and associated administrative procedures were developed that regulate the social insurance status abroad of workers within the European Union. Even self-employed artists can benefit from this policy.

Based on the assumption that international mobility is a prerequisite for the economic success of artistic employment, this contribution outlines national solutions for the social security of visual artists in Europe. In an additional step, the instruments for coordinating social security within the European Union are presented. The focus is on applying EU law to the mobility of self-employed artists.

2. SPECIAL SOCIAL SECURITY SCHEMES FOR VISUAL ARTISTS IN EUROPE

2.1 Germany: special scheme for all self-employed artists

Social security in Germany is primarily focused on employees. There are, however, special schemes for specific groups of the self-employed, who are either insured within the scope of general social insurance or through independent occupational pension schemes (Betzelt and Fachinger 2004: 325). The *Künstersozialkasse* (Artists' Social Security Insurance) is a special case in the German welfare state and is intended to allow freelance artists and publicists access to social security systems while, just like employees, they have to pay only half the social security contributions. In recent years, artistic work has increasingly taken place within the realm of self-employment, meaning that a growing number of artists and publicists are covered by the Artists' Social Security Insurance.

THE ARTISTS' SOCIAL SECURITY INSURANCE

The Artists' Social Security Insurance is affiliated with the *Unfallkasse des Bundes* (statutory accident insurance fund; § 37 KSVG, Social Security Insurance for Artists Act; Finke 1996: 12–14) and is part of social security, although it differs from it due to the specific type of funding (Bundesregierung 2000: 29). The Artists' Social Security Insurance decides on compulsory coverage of artists and publicists and collects the insurance premiums. Prerequisite for this is that an artist's or publicist's activity is carried out commercially and not only temporarily. The statutory pension insurance and the statutory health insurances are provided by standard pension and health insurance carriers. The income threshold for pension contributions in 2010 is 66,000 euro in the old federal states and 55,800 euro per year in the new federal states (Deutsche Rentenversicherung Bund 2010a).

According to the Social Security Insurance for Artists Act, career entrants enjoy special protection. Even if they do not achieve the required minimum income (3,900 euro/year as of November 2010), they are covered by statutory pension, health and nursing insurance (Künstlersozialkasse 2011). The first three years from the start of self-employed artistic or publicistic activity are considered as a start-up period (the first five years in case the activity started before June 30, 2001). According to the Social Security Insurance for Artists Act, the time can be interrupted by childrearing periods, military or alternative civilian service or by temporary employment. These will not count against the start-up period. The contributions of career entrants with incomes below the minimum working salary are calculated according to minimum values (minimum premiums) adjusted every year (Künstlersozialkasse 2008b). Other groups are allowed to fall short of

the minimum income twice within six years. Due to the low health insurance premiums membership in the social security insurance for artists is particularly attractive. Figure 1 shows the continuous increase in persons insured by the Artists' Social Security Insurance since 1992.

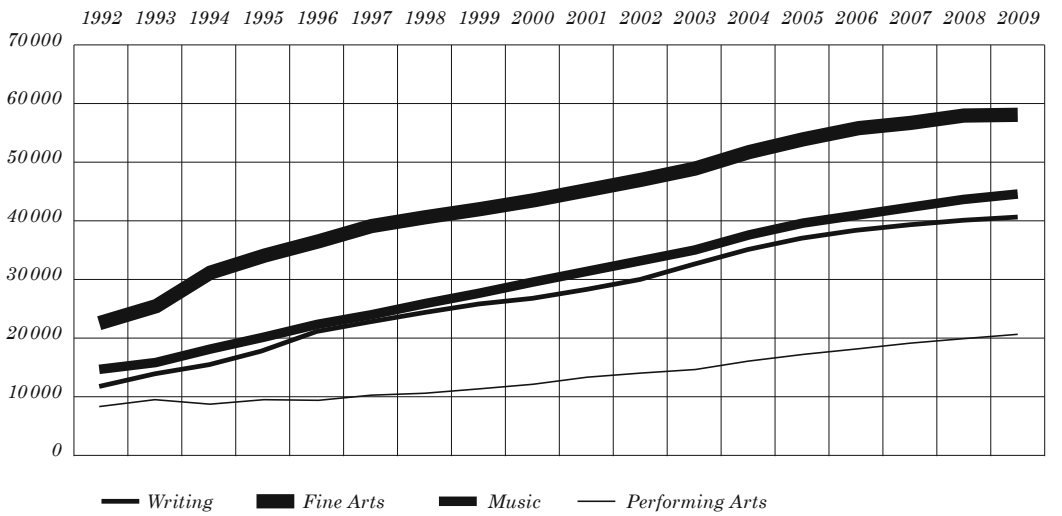

Figure 1: Development of membership in the Artists' Social Security Insurance 1992 to 2009
Source: Künstlersozialkasse 2010a

With a share of over 37 percent, visual artists are the largest group of compulsorily insured in the Artists' Social Security Insurance. This group is composed of traditionally self-employed persons, who are rarely regular employees due to the specific characteristics of their occupation.

Each year, the artists and publicists estimate their anticipated income for the following year. The health, pension and nursing insurance premiums are then calculated on the basis of these estimates.

Similar to employees, the insured artists only have to pay half of the statutory premium. The remaining half is financed by the artists' social security contributions (30 percent) and a government subsidy (20 percent). The artists' social security contributions, which are paid by the organization or business that uses artistic or publicistic services, is a kind of employer's contribution. The Artists' Social Security Insurance assumes that the majority of self-employed artists and publicists are similarly dependent on the companies that use their work as are regular employees. As so-called 'users' *(Verwerter),* companies that regularly use works or services of self-employed artists are obliged to pay the 'employer's contributions' of the social security premiums for artists and publicists. The companies

are required to pay fees on all paid remunerations, even if the artist/publicist is not subject to compulsory insurance according to the Social Security Insurance for Artists Act. If companies contract less than three jobs per year with self-employed artists or publicists they fall under the minimum limit and are exempt pursuant to § 24 Abs. 2 (KSVG).

For the years 1983 through 1989 (inclusive) a uniform contribution rate of 5 percent was established for all areas.[1] Between 1990 and 1999 the contribution rate was different for different areas. Since 2000 the contribution rate has been unified again. At 5.8 percent in 2006, the artists' social security contribution was well below the social security contribution rates of the companies for salaried employees. For the year 2011, the contribution rate is 3.9 percent pursuant to the *Künstlersozialabgabe-Verordnung* 2009 (Artists' Social Security Contribution Regulation; Künstlersozialkasse 2011).

§ 24 Section 1 Line 1 (KSVG) lists companies that are obligated to pay artists' social security contributions. The companies include the following.

- *Book, newspaper and other publishers, press agencies (including image services)*
- *Theaters (other than movie theaters), orchestras, choirs and similar companies, on the condition that their purpose is mainly aimed at publically performing artistic and publicistic works or services*
- *Theater and concert agencies, agencies organizing guest performances and other companies whose purpose is mainly aimed at providing for the presentation and performance of artistic or publicistic works or services*
- *Radio, television*
- *Production of video and sound recordings (excluding sole copying services)*
- *Galleries, art dealing*
- *Advertising or promotion for third parties*
- *Vaudeville and circus companies, museums*
- *Education and training facilities for artistic and publicistic occupations*

Another central building block of the Social Security Insurance for Artists Act is the government subsidy with which the German federation contributes significantly to the social security of self-employed artists and publicists. From 1988 to 1999 the government's share amounted to 25 percent of the Artists' Social Security Insurance expenditures (Bundesregierung 2000: 35).

Since the adoption of the Social Security Insurance for Artists Act, the percentage of the government subsidy has changed three times. In 1981 legislation assumed a direct marketing share of artists of about one third. The government

1 *Writing, Fine Arts, Performing Arts, and Music.*

subsidy was initially set to a rate of 17 percent of expenditures of the Artists' Social Security Insurance. In 1987 it was raised to 25 percent, as a direct marketing share of 50 percent was assumed at that time. On behalf of the federal government the IFO Institute compiled a report on the composition of income of self-employed artists and publicists to establish a solid data base for determining future rates for user contributions and the government subsidy (Hummel 1997). Apart from analyzing data of the Artists' Social Security Insurance, qualitative data from 3,100 artists were collected by means of a survey. The survey covered aspects regarding income, indirect marketing as well as direct marketing sales (Hummel 1997: 8). On November 12, 1999 the German Federal Parliament decided to lower the government subsidy from 25 to 20 percent and once again introduce a uniform contribution rate for the four areas of writing, fine arts, music, and performing arts.

In 2000, the Federal Government was of the opinion that the majority of so-called 'typical users' listed in § 24 Section 1 Line 1 (KSVG) were meanwhile covered by the Artists' Social Security Insurance (Bundesregierung 2000: 34). Compliance by those self-promoters (§ 24 Section 1 Line 2 KSVG) and entrepreneurs who are dutiable under the general clause of § 24 Section 2 KSVG turned out to be problematic. On March 22, 2007 the third amendment to the KSVG was approved in the German Federal Parliament, which provided for a more intensive review of both the insured and the users. The primary objective of this reform is to stabilize the system financially and to remove competitive disadvantages for previously compliant companies. The sample size of the insured to be reviewed was increased from 3 to 5 percent, and the pension insurance carriers are responsible for enforcing compliance from dutiable users. This is done during audits pursuant to § 28p SGB IV, which are carried out regularly among employers. The goal of this reform is also to achieve a reduction in the contribution rate. This goal can be achieved through increasing compliance from dutiable users who have to pay their full contributions to the Artists' Social Security Insurance. At the same time, the Artists' Social Security Insurance is required to verify the actual income earned of 5 percent of the insured (Bundesministerium für Arbeit und Soziales 2010).

2.2 Austria: the artists' social security fund subsidy model

THE SITUATION IN AUSTRIA

A study from 2008 on the social situation of artists in Austria provides information on the current social security status of artists. The project was carried out by L&R Social Research on behalf of the Federal Ministry for Education, Science

and Culture (Schelepa and Wetzel 2008). Results of this study show that in 2007 approximately 82 to 85 percent of all self-employed artists were covered by all social security systems for self-employed persons, i.e. health, accident and pension insurance, just as compulsorily insured persons. Health insurance is the area of social security in which artists outside compulsory insurance avail themselves comparatively well. A differentiated analysis of health insurance in the survey shows that more than 50 percent of female artists are covered through their partner, while 37 percent of men choose the co-insurance model for their health insurance. The results with respect to old-age security outside the compulsory insurance system tell a different story. Nearly 50 percent of these artists do not have their own pension insurance coverage. The shares are higher for young artists than for older artists (Schelepa and Wetzel 2008: 102 et seq.). The old-age security of 25 percent of visual artists is insufficient (Schelepa and Wetzel 2008: 106). The findings indicate that there are no significant differences between various art forms with regard to social security deficiencies.

THE ARTISTS' SOCIAL SECURITY FUND

On January 1, 2001 the Artists' Social Security Fund *(Künstler-Sozialversicherungsfonds,* KSVF) was established. The Artists' Social Security Fund Act (KSVFG) regulates the subsidies from the artists' social security funds. The objective of the fund is to contribute subsidies to the pension insurance premiums and, where applicable since 2008, to the health and accident insurance premiums. Artists who are compulsorily insured pursuant to §2(1)4 Commercial Social Insurance Act *(Gewerbliches Sozialversicherungsgesetz,* GSVG) are considered newly self-employed persons. The self-employed artists must meet certain conditions to qualify for subsidies from the Artists' Social Security Fund. Recipients of the subsidies are all artists who fulfill the following prerequisites:

1. ***Artistic activities referred to in § 2(1) KSVFG: creating works of art in the context of an artistic activity in the areas of visual arts, performing arts, music, literature, cinema, or one of the contemporary forms of art on the basis of the artistic qualification of the artists (for example, through proof of a completed artistic university education). Current artistic activity must be demonstrated when submitting the application. Compulsory insurance pursuant to §2(1)4 GSVG*** **(Neue Selbstständige,** ***'newly self-employed').***
2. ***Self-employed artistic income above the minimum income limit (value 2011: 4,488.24 euro).***
3. ***The sum of total income (includes all income) may not exceed the maximum income limit (value 2011: 22,441.20 euro).***

Since January 1, 2011 self-employed artists in Austria have been subject to compulsory insurance when exceeding the applicable insurance limit.[2] Social security is composed of:

> *accident insurance*
> *health insurance*
> *pension insurance*
> *self-employment security provision*

The self-employment security provision has been in effect since January 1, 2008 and is similar to a company pension plan. The premiums, at a rate of 1.53 percent of the basis for contribution, are collected by the health insurance company and forwarded to a company pension fund, where they accrue.

The annual income from self-employed artistic activity is the basis for the amount of insurance contributions; a fixed amount only applies to accident insurance.

The costs of compulsory insurance in 2011 are illustrated in the following table.

COSTS FOR COMPULSORY INSURANCE

Insurance	Premium share or amount
Accident insurance	8.20 euro/month
Health insurance	7.65 percent
Pension insurance	17.55 percent
Self-employment security provision	1.53 percent

Source: IG Bildende Kunst (2010)

The respective applicable insurance limit is the minimum contribution base; maximum contribution bases have also been stipulated. Income tax assessments by the fiscal authorities are forwarded to the Social Insurance Authority for Business (SVA) by the Federal Office of Assessment *(Bundesrechenamt)* and are used as proof for the determination of contributions. Unlike in the German model, artists who did not comply with their obligation to report to the SVA, have exceeded the applicable insurance limit, and also fail to at least report this before the income tax assessment becomes final are subsequently identified by the compulsory insurance and must pay an additional premium. The Artists' Social Security Fund

2 *The GSVG stipulates two insurance limits. The insurance limit I (value 2011: 4,488.24 euro) applies when, in the calendar year, there is income from other activities or pensions, a child, or allowances or money from statutory health or unemployment insurance in addition to income from self-employment. The insurance limit II in the amount of 6,453.36 euro applies in cases of income based exclusively on self-employment.*

regulates subsidies for all artists who meet the requirements outlined above. Since January 1, 2010 the subsidy amounts to 1,350 euro per year and is paid toward the pension insurance and also, if applicable, toward health and accident insurance.

Funding for the Artists' Social Security Fund comes from telephone cable operators and the sale and rental of satellite systems and decoders. In the first two years (2001 and 2002) the KSVF was also funded by federal contributions.

A frequently voiced criticism of the Austrian model is the regulation of the upper income level and particularly the existence of a lower income level. The narrow definition of 'artistic activity' is regularly mentioned as a central problem. Since many artists fall below the minimum income or exceed the maximum limit, considerable refunds are claimed by the KSVF every year. Since a law amendment in 2008 and as part of an expanded degree of exceptions, upon request by the artists concerned the KSVF has the option to subsequently waive the refund – particularly if the minimum income limit was not reached. This regulation is usually limited to five times per artist. The decision lies with the KSVF and is made in a generally bureaucratically complex reclaim procedure on the basis of documents provided by the artists concerned.

2.3 France: Maison des Artistes organizes social security for visual artists

The *Maison des Artistes* (MDA) was founded in 1952 and is today the most important organization for providing social security for visual artists in France. Since 1965 the *Maison des Artistes* has been responsible for managing social security for visual artists, similar to the Artists' Social Security Insurance in the German system. The *Maison des Artistes* will carry out both the verification of the artistic status and the collection of social security contributions from the artists and users. In 2009, the annual minimum income required for social benefits to be provided was 7,443 euro (Maison des Artistes: 2009). However, in special cases it is possible to benefit from the special system of social security even with a lower income (Hill 2009).

In Article L.382-1 to L.382-14, the Social Security Code provides that with regard to social legislation, self-employed visual artists are equated with salaried workers. Accordingly, the law classifies them as 'employees'. The social benefits are paid from contributions of the visual artists and from contributions by the users. Similar to the German model, a fictitious employment status is assumed which results in a user contribution paid by the users of artistic services. It amounts to 1 percent of the proprietary user fees and conforms to the social security contribution for every artist employed on the basis of a service contract. The social security

contributions for the artists amount to about 15 percent for health and pension insurance. Moreover, artists must contibute 1 percent of their artwork sales to the social system of the *Maison des Artistes.* They thus pay lower immediate social security contributions than regular employees who have to contribute about 23 percent of their income. The lower contribution is due to the lower level of social security compared to regular employees. Artists are not insured in case of work injuries, occupational diseases and unemployment.

The institution responsible for pension insurance for visual artists is the *Institution de Retraite Complémentaire des l'Enseignement et de la Création* (IRCEC). The organization of public pension insurance for visual artists is implemented in collaboration with the *Maison des Artistes.* Artists can individually determine the level of their old-age security benefits within a given framework. The pension principle is implemented by means of credit points. The minimum to be invested annually is six credit points, the maximum is twelve. One credit point costs 60.66 euro. In 2008 every credit point resulted in a pension benefit of 7.40 euro/month. The development of the number of insured persons and users is dynamic. Figure 2 illustrates these developments over time.

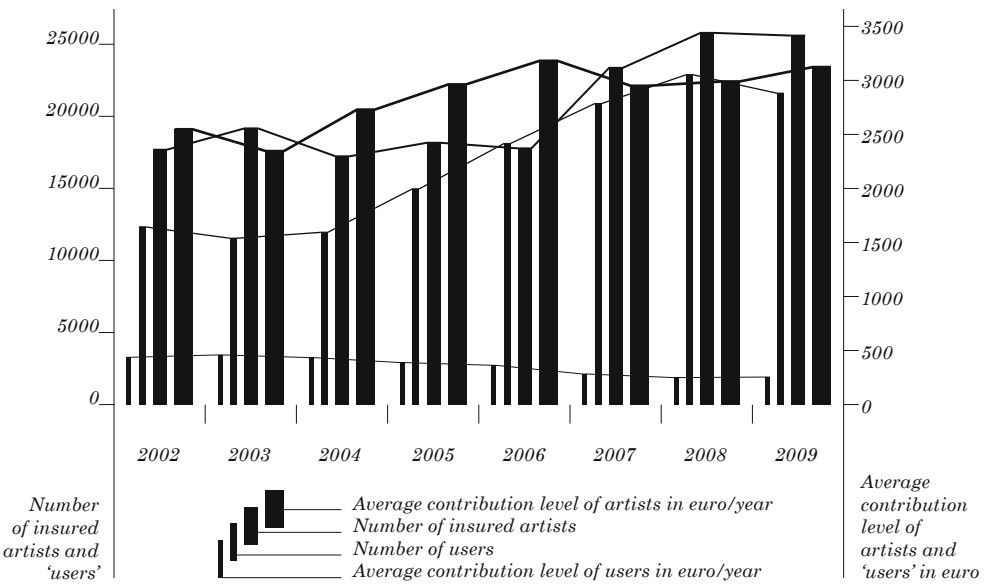

Figure 2: Development of insured artists and users as well as their contributions (2002 to 2009)
Source: Maison des Artistes 2010

Figure 2 shows two y-axes. The values in y-axis 1 refer to the number of insured artists as well as the number of users over time. It can be clearly seen that the number of users has almost doubled from 2002 to 2009. The number of

insured visual artists has been rising continuously since 2002 with the exception of a slight decline in 2007. Of particular interest at this point, however, are the different contribution levels of artists and users. While the artists have to spend nearly 15.5 percent of their income for social security, the contributions of the users are comparatively low. Over time one can observe an increase in the contribution level for artists while user contributions are declining.

The visual artists insured by the *Maison des Artistes* are composed of the following groups.

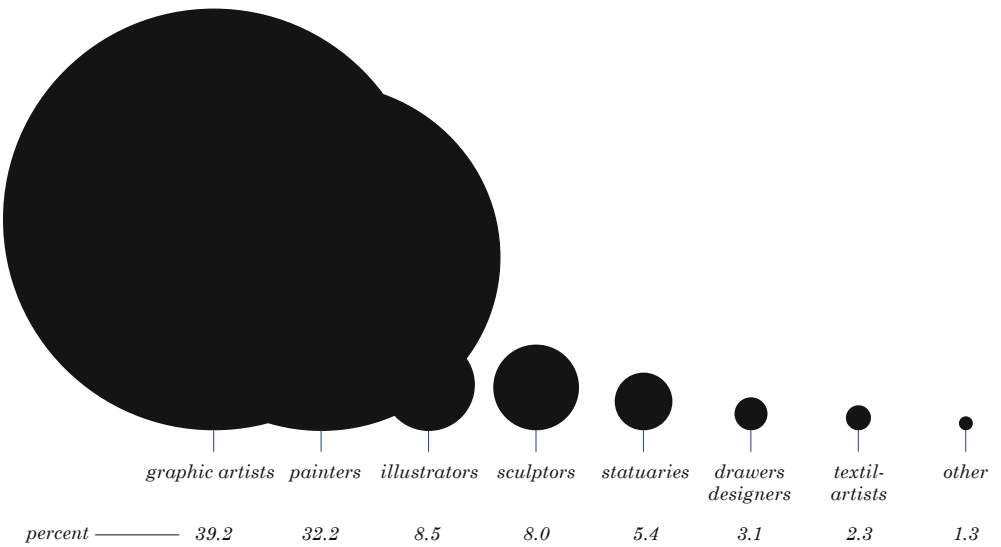

Figure 3: Composition of the professional groups insured by the Maison des Artistes (December 31, 2009)
Source: Maison des Artistes 2010b

The largest group are graphic artists with a share of nearly 40 percent, followed by painters with a share of approximately 32 percent. Five other professional groups (illustrators, statuaries, sculptors, drawers and textile designers) insured by the *Maison des Artistes* each have shares of less than 10 percent. The other professional groups are represented with a share of less than 1 percent each.

2.4 Netherlands: the WWIK subsidy system

The Netherlands are taking a different path in ensuring social security for artists. The *Wet Werk en Inkomen Kunstenaars* (WWIK) law particularly helps aspiring artists to develop their artistic careers by means of monetary benefits and a wide range of courses and advisory services. Artists who can not make a living through gainful employment are also supported.

The goal of this measure is to enable the artists to finance their own long-term livelihood. The law focuses on both the incentive to work on the artistic career and on taking up a spare-time job (Ministry of Education, Culture and Science 2006). The subsidy is paid by the social security departments which are also responsible for social welfare outside the WWIK program. While recipients of social welfare are obligated to look for traditional jobs, WWIK recipients are exempt from this obligation. The following requirements must be fulfilled to obtain these special payments.

The artists must have an artistic qualification from a state-approved institution. In the first twelve months after graduation the artists receive monetary assistance without further conditions. But even established artists can apply for funding. Required for application is a minimum income of 1,200 euro in the twelve months prior and recognition as a professional artist as well as continuation of active artistic work. The organization *Kunstenaars&CO* verifies the status of artists on behalf of the social authorities.

The incomes of artists who receive WWIK subsidies are subject to annual review. The gross annual income of the artists is subject to a 'progressive obligation' and must increase by a certain amount in subsequent years to remain eligible for aid. Exceptions are possible, but they are rarely approved. An exception may be approved if the artist can demonstrate that the preparation of a project took an entire review period and the profits will be generated at a later date. This is only possible if the artists announce their loss of income early. Income losses due to social reasons are not approved. The *Berufsverband der bildenden Künstler* (Professional Association of Visual Artists) therefore recommends that WWIK recipients suspend their WWIK benefits in case of illness, maternity or other social reasons and claim other aid money (Koweindl, Daniela 2010).

AMOUNT AND DURATION OF WWIK SUBSIDIES

Duration of subsidies	Annual gross income
12 months	2,800 euro
24 months	4,400 euro
36 months	6,000 euro

Source: Ministerie von Sociale Zaken en Werkgelegenheid 2010

Artists can claim subsidies for a maximum of four years within a 10-year period. The monthly WWIK payment is based on the guaranteed minimum income, which is usually determined anew annually. The greatest share of artists receives funding for a period of less than one year. About 25 percent of WWIK recipients claim the subsidies for a period of one to two years.

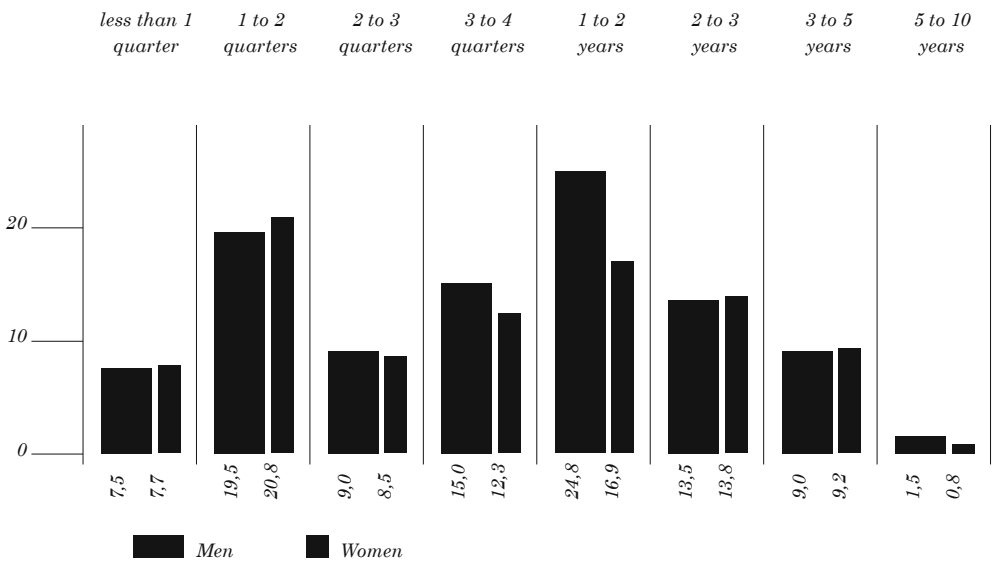

Figure 4: Empirical duration of WWIK benefits in December 2009
Source: Statistics Netherlands 2010

The WWIK amount is based on the Work and Social Assistance Act (WWB)[3] and accounts for a share of 70 percent, i.e. 732.18 euro in 2010 for singles, 1,014.75 euro for single parents, and 1,081.90 euro for single earners. The majority of WWIK recipients are single.

MARITAL STATUS AND WWIK ALLOWANCE

Marital status	Men	Woman	Gross allowance in euro	Net allowance in euro
Single	1,130	1,070	732.18	636.53
Single parent	10	110	1,014.75	896.34
Single earner with partner	180	110	1,081.90	1,026.24
Others	10	10		

Source: Ministerie von Sociale Zaken en Werkgelegenheid 2010, Statistics Netherlands 2010

The application is submitted through registration in one of the local social welfare departments. Here, income and assets of the artist are reviewed. Then the status of the artist is checked by *Kunstenaars&CO*. The application is approved by the social welfare department. The professional status is reviewed annually (BeroepKunstenaar 2010). The number of WWIK recipients is relatively low. In 2009, 2,620 artists received WWIK funds, 49 percent of them women. The largest

3 *WWB is a basic income which every person who legally lives in the Netherlands and is not able to finance their own living is entitled to (Ministerie van Sociale Zaken en Werkgelegenheid 2010).*

group of WWIK recipients are career entrants in the age group of 25 to 29 years, who start their artistic career after completing their studies.

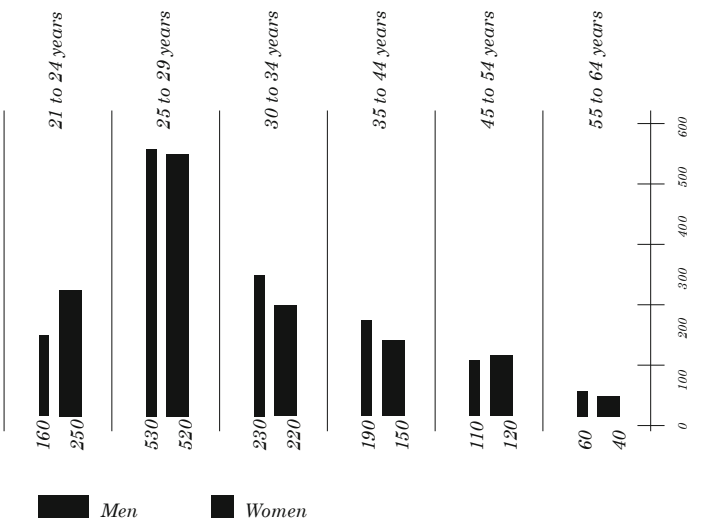

Figure 5: WWIK recipients by sex and age group in 2009[4]
Source: Statistics Netherlands 2010

Kunstenaars&CO accompanies the artist during the time of WWIK funding through advisory services and courses. This includes the review of artistic activities every twelve months. The quality of the art is not important, but rather the number of performances, art sales, internet activities, etc. is relevant. *Kunstenaars&CO* also works together with the social welfare department and makes a recommendation to the authority issuing payments (CentrumGemeente; Koweindl, Daniela 2010). During this process of income verification, the connection between artistic activity and income does not matter. Increases in income may also be due to non-artistic activity, i.e. employment in an art-related (or not) position. Only evidence that the professional artistic activity will be continued in the future is of central importance. Thus, only the amount and not the income source is relevant for continued receipt of WWIK funding. This aspect takes into account the work reality of artists, since the majority of artists are forced to supplement their income with spare-time jobs. If the income thresholds are undercut or exceeded, parts of the subsidies must be paid back (BeroepKunstenaar 2010). The maximum income limit is set at 125 percent of the guaranteed minimum income (Koweindl, Daniela 2010).

4 *As of December 2009.*

The advantages of this system are obvious. The artists can focus on their artistic activity and have the option to take advantage of advanced education offers. Moreover, the law allows artists to enter and exit the program several times within a ten year period. The aspect of mobility is not considered in the program, however. The WWIK recipients are prohibited from staying abroad for more than four weeks per year without the approval of the social welfare department.[5]

The WWIK scheme is on the verge of being abolished by government decision. The government intends to limit public involvement in arts and culture.

2.5 Croatia: comprehensive social security for self-employed artists

The development of a social security system for self-employed artists started in 1957, when the contributions for social security were paid by government. Eight years later, the Croatian Freelance Artist Association was founded with the purpose of encouraging and promoting creative work and public activity in culture and the arts. The association represents the common interests and protects the rights of freelance artists.

After the presentation of the draft of the new law on old-age benefits and health insurance in the cultural sector in Croatia in 2002 there was massive resistance on the part of self-employed artists. This wave of protest triggered a public debate with the Ministry of Culture as well as the Ministry of Finance and the Ministry of Social Affairs. The new law required significant increases in social security contributions from artists outside regular employment. The contributions for pension insurance were to increase to 19.5 percent, those for health insurance to 16 percent. The artists demanded the creation of a special social security status, arguing that artistic work produces goods of crucial public importance. After two years of negotiations, new provisions were introduced that guarantee the continuation of the previous system of public assistance for self-employed artists (Council of Europe/ERICarts 2009).

The *Law on the rights of self-employed artists and promoters of cultural and artistic work* (Narodne novine [Official Gazette], nos. 43/96, 44/96, corr. 127/00) regulates the legal status, particularly old-age benefits, disability, and health insurance of self-employed artists. According to this law, self-employed artists are artists who are not salaried employees and whose professional activity is of an exclusively artistic nature. A separate law regulates the conditions of eligibility for self-employed artists seeking social security benefits from the state. Upon approval, social security contributions to pension insurance, disability and health insurance programs can be provided by a state budget (Narodne novine [Official Gazette], nos. 110/96,39/99,129/99 and 109/00). Self-employed artists who do not

5 *It can be assumed that this scheme was introduced to prevent abuse of the subsidies.*

fulfill these conditions for participation in this system are forced to pay their social security contributions themselves (UNESCO 2010). To meet the eligibility criteria, the artistic work should contribute noticeably to Croatian culture and art. The eligibility is determined by a professionally staffed commission, whose decision is binding for the Ministry of Culture (Council of Europe/ERICarts 2009).

Central to the social security of self-employed artists in Croatia is the Croatian artist organization HZSU with its 30 sub-organizations that promotes the interests of self-employed artists in Croatia and represents their rights. After joining one of the artists' organizations, the artists have the opportunity to apply for the approval of contributions to the social security programs from the state budget. For approval of funds, the artists must meet the criteria stipulated in the *Regulations about the procedures and conditions for the recognition of the rights of artists to have their retirement, disability and medical insurance paid out of the national budget of the Republic of Croatia*. An artist's eligibility requirements are reviewed every five years. While the government expenditures between 2000 and 2003 amounted to approx. 9 million euro, they increased to 22 million euro between 2004 and 2007 (ERICarts 2010).

3. SOCIAL SECURITY OF VISUAL ARTISTS IN EUROPE

3.1 Coordination between the social security systems

The national security systems in Europe differ significantly. The individual countries within Europe can freely decide who is to be insured according to their respective national legislation and what benefits are provided under what conditions.

The statutory provisions for coordinating social security in Europe do not replace the national systems with a Europe-wide social security system (Europäische Kommission 2010a). The activities of the European Union are limited to coordinating national legislation within the European community (Capiau, Suzanne 2007: 3). This coordination is based on four fundamental principles (Europäische Kommission 2010a):

1. ***Only the laws of a single country are valid at a time. There, the contributions are paid. The social security institutions decide on which legislation applies. There is no choice.***[6]

6 *In principle, you are subject to the laws of the country in which you actually work or are self-employed. It does not matter where you live or where your employer is registered.*

2. *The same rights and obligations apply as for nationals of the country in which one is insured. This is known as the principle of equal treatment and non-discrimination.*
3. *When claiming a benefit, previous periods of insurance, work or residence periods in other countries are taken into account if applicable.*
4. *If one is entitled to cash benefit from one country, one may generally receive it even if living in a different country. This is known as the principle of exportability.*

For the coordination and implementation there are a number of regulations, and listing and explaining these regulations is not the focus of the present study.[7] The centralized Regulation (EEC) 1408/71 (Europäische Union 2004) roughly corresponds to a comprehensive social security agreement between all member states of the European Union. The aim of this important European legislation is the removal of obstacles to the free movement of workers. Essentially, it is concerned with improving mobility, standard of living and working conditions for persons within the European Union.

Since the implementation of the executive order VO/987/2009 the new Regulation (EC) 883/2004 has been in effect since May 1, 2010 and is intended to coordinate the systems of social security of the countries within the European Union in a simpler and clearer manner than the previous legislation.[8] It represents the new reference point for coordinating the social security systems of the member states. The highest principle, both according to the law of Regulation (EEC) 1408/71 and the provisions of Regulation (EC) 883/2004, is that workers should only be insured within the system of one country. If persons temporarily work in another European country, the previous legislation continues to apply in certain circumstances.

The new regulation makes life considerably easier for EU citizens, who can now exercise their right to free movement within the European Union with fewer problems. It reinforces the obligation of the administrations to collaborate in the area of social security. The new regulation makes electronic data transfer between the authorities of the member states obligatory.

The Commission of the European Communities established an Administrative Commission on Social Security for Migrant Workers (CASSTM) for applying the regulations. It is mainly concerned with administering and interpreting the Regulation on the Coordination of Social Security Systems in Europe.

7 *This is based on Regulation (EEC) 1408/71 as well as the respective executive order.*

8 *Regulation (EEC) 1408/71 also applies to relationships with EEA countries which are not members of the EU.*

3.2 The posting of self-employed artists

With respect to social security, the law in force at the workplace, i.e. principle of coverage by the host country, must be applied. For the artist who works in several countries, the social security system of the country in which he is employed or self-employed applies. Temporary employment of an artist in another member state effectively implies an interruption of his social status. For example, the entitlement to social security benefits from the unemployment insurance system can only be preserved if a certain number of working days were completed within a predetermined period, for example.

This problem is addressed by the 'Posting' approach in EU Regulation (EEC) 1408/71, Article 14a, which may also be applied to self-employed artists since the ruling of the European Court of Justice of March 30, 2000. A person who is normally self-employed in a member state and then 'posts' herself to another member state to engage in self-employed work there is subject to the legislation of the first member state (Europäischer Gerichtshof 2000).[9] Effective from May 1, 2010, the old Regulation (EEC) 1408/71 of the European Council from 1971 has been replaced with the new Regulation (EC) 883/2004.

The Administrative Commission on Social Security for Migrant Workers has designed a guide for the practical application of the principles and rules of Article 14 of Regulation (EEC) 1408/71, which is to be made available to companies and authorities for answering questions regarding interpretation and application (Europäische Kommission 2010b). Community Law stipulates criteria for examining the requirements for posted self-employed persons to remain in the social security system of the country of origin. These can be summarized as follows.[10]

- ***The self-employed worker has been pursuing 'significant activities' for a certain length of time in the country of origin before moving to another member state to perform work.***[11]
- ***The self-employed worker is able to substantiate the effective nature of his activity performed under a posting arrangement.***
- ***During his time in another member state, the self-employed worker continues to fulfill the conditions enabling him to resume his self-employment in the country of origin (e.g., payment of social security contributions, maintenance of professional infrastructure, etc.).***

9 *When working in several countries, the principle of residence applies.*

10 *The following explanations have been taken from the 'Praktischer Leitfaden für die Entsendung von Erwerbstätigen in die Mitgliedstaaten der europäischen Union, den europäischen Wirtschaftsraum und die Schweiz'.*

11 *The existence of 'significant activities' can be reviewed on the basis of established objective criteria (cf. Europäische Kommission 2010b: 5).*

3.3 Administrative action in the EU: the A1 form

Until the end of April 2010, the coordination of the systems of social security was implemented by means of the E forms. To unify the administrative processes, these were formatted consistently in all national European languages (Capiau, Suzanne: 2007). Since May 1, 2010, the E101 form is no longer being issued and was replaced by the new A1 form, which is simple and more user-friendly. Forms issued before May 1, 2010 must not be replaced and remain valid until their expiration date.

According to the current regulation, posted workers and self-employed people can work in other European countries for up to 24 months. Previously, the period was limited to twelve months. An extension was possible with the E102 form. This process is eliminated by the new rules. After 24 months abroad, there must be a pause of at least 2 months. This rule does not apply if the posted person becomes established in another EU member state. Participation in the social security systems of two EU member states is no longer necessary, not even in exceptional case. According to the old regulation this was only permitted when self-employed and dependent activities were pursued simultaneously.

In Germany, the completed form must be sent to the statutory health insurance. If there is none, the process is completed by the statutory pension insurance. [12]

4. CONCLUSION AND OUTLOOK

The national approaches for improving the social situation of self-employed artists within Europe vary considerably. This paper selected a number of examples from European countries which integrate visual artists in their social security systems to different extents. With its Social Security Insurance for Artists Act (KSVG) Germany offers the most comprehensive social security scheme for self-employed artists in Europe. With regard to their social legislation, France and Croatia equate self-employed artists with employees. Austria has set up a fund that provides recognized artists with subsidies for their social security. The Netherlands practice a subsidy system that operates outside the regular social security systems.

In order to minimize their economic and social risk, many visual artists today take advantage of the opportunity to offer their artistic works on the internal European market. Significant progress has been made at the EU level in reducing mobility barriers within Europe. The new Regulation (EC) 883/2004,

12 *DRV Bund, DRV Knappschaft Bahn-See and responsible regional institutions of the DRV.*

which entered into force on May 1, 2010, replaced the centralized Regulation (EEC) 1408/71 and simplifies the previously applicable law of the social security status during work stays in other EU countries. Visual artists who engage in temporary work in another EU member state are subject to the social security law of their country of origin. The principle of 'posting of the self-employed' applies to self-employed visual artists.

From a formal perspective, the procedure of 'posting of the self-employed' is relatively simple. With this scheme, the European Commission has provided self-employed artists with a tool that allows them to work abroad with little bureaucratic effort while maintaining their social security status.

5. BIBLIOGRAPHY

BEROEPKUNSTENAAR (2010): Artists Income Provision. In: http://www.beroepkunstenaar.nl/oc2/page.asp?PageID=2592

BETZELT, SIGRID UND FACHINGER, UWE (2004): Jenseits des „Normalunternehmers". Selbständige Erwerbsformen und ihre soziale Absicherung – Problemaufriss und Handlungsoptionen. In: Zeitschrift für Sozialreform 50(3): 312-343.

BUNDESMINISTERIUM FÜR ARBEIT UND SOZIALES (2010): Fragen und Antworten zur Künstlersozialversicherung. In: http://www.bmas.de/portal/18898/fragen__und__antworten__zur__kuenstlersozialversicherung__01.html#frage_09

BUNDESREGIERUNG (2000): Bericht der Bundesregierung über die soziale Lage der Künstlerinnen und Künstler in Deutschland, Berlin.

CAPIAU, SUZANNE (2007): Mobilität von Künstlern und soziale Sicherheit. Brussels: Studie des Ausschuss für Kultur und Bildung des Europäischen Parlaments.

COUNCIL OF EUROPE/ERICARTS (2009): Compedium of Cultural Policies and Trends in Europe. 10th edition.

DEUTSCHE RENTENVERSICHERUNG (2010B): http://www.deutsche-rentenversicherung-regional.de/Raa/Raa.do?f=EWGV1408-71ART14R5.1

DEUTSCHE RENTENVERSICHERUNG BUND (2010A): http://www.deutsche-rentenversicherung.de/nn_6480/SharedDocs/de/Inhalt/Servicebereich2/Lexikon/B/beitragsbemessungsgrenze.html

EUROPÄISCHE KOMMISSION (2010A): Was ist unter Koordinierung zu verstehen? In: http://ec.europa.eu/social/main.jsp?langId=de&catId=850 (access October 5, 2010).

EUROPÄISCHE KOMMISSION (2010B): Praktischer Leitfaden für die Entsendung von Erwerbstätigen in die Mitgliedstaaten der Europäischen Union, den europäischen Wirtschaftsraum und die Schweiz. http://*ec.europa.eu/social/BlobServlet?docId=1848&langId=de*

EUROPÄISCHE UNION (2006): Verordnung (EWG) Nr. 1408/71 des Europäischen Rates vom 14. Juni 1971 zur Anwendung der Systeme der sozialen Sicherheit auf Arbeitnehmer und Selbständige sowie deren Familienangehörige, die innerhalb der Gemeinschaft zu- und abwandern. In: Amtsblatt der Europäischen Union.

EUROPÄISCHER GERICHTSHOF (2000): Urteil des Gerichtshofes – Fünfte Kammer – Tribunal du travail de Bruxelles. Rechtssache C-178/97.

FINKE, HUGO (1996): Die Künstler und ihre Rente. Die soziale Sicherung der Künstler und Publizisten. Berlin: Bundesversicherungsanstalt für Angestellte.

HILL, KELLY (2009): Senior Artists Research Project. Hill Strategies Research: Hamilton Ontario (Canada).

HUMMEL, MARLIES (1997): Höhe und Zusammensetzung des Arbeitseinkommens selbständiger Künstler und Publizisten. ifo Institut für Wirtschaftsforschung, Munich.

IG BILDENDE KUNST (2010): Kurzinfo Sozialversicherung. In: http://www.igbildendekunst.at/fileadmin/user_upload/IGBK_Dateien/igbk_online/service/sozialversicherung/2010_SozialversicherungKuenstlerInnen_KURZINFO.pdf (access September 27, 2010).

KOWEINDL, DANIELA (2010): Eine Art Grundgehalt für KünstlerInnen. In: http://igkultur.at/igkultur/kulturrisse/1207745399/1207836881 (access September 29, 2010).

KÜNSTLERSOZIALKASSE (2010A): Entwicklung der Versichertenzahlen – unterteilt nach den Kunstbereichen – ab dem Jahr 1991. In: www.kuenstlersozialkasse.de

KÜNSTLERSOZIALKASSE (2010B): http://www.kuenstlersozialkasse.de/wDeutsch/download/daten/Versicherte/Aktuelle_Werte_in_der_SV_2010.pdf

KÜNSTLERSOZIALKASSE (2011): Künstlersozialabgabesatz bleibt stabil. In: www.kuenstlersozialkasse.de

MAISON DES ARTISTES (2009): Le livre blanc. Les artistes européens revendiquent l'union. Paris.

MAISON DES ARTISTES (2010A): Qui sommes nous? In: http://www.lamaisondesartistes.fr/site/qui-sommes-nous/ (access September 28, 2010).

MAISON DES ARTISTES (2010B): Repartition des affiliés par activités aus 31/12/2009. Paris.

MINISTERIE VAN SOCIALE ZAKEN EN WERKGELEGENHEID (2010): A short survey of Social Security in the Netherlands. In: http://docs.minszw.nl/pdf/135/2010/135_2010_1_25528.pdf (access September 29, 2010).

MINISTRY OF EDUCATION, CULTURE AND SCIENCE (2006): Cultural policy in the Netherlands 2006 (Executive Summary). In: http://english.minocw.nl/documenten/cpinthenl 20executive 20summary.pdf

SCHELEPA, SUSANNE, WETZEL, PETRA UND GERHARD WOHLFAHRT (2008): Zur sozialen Lage der Künstlerinnen und Künstler in Österreich. Endbericht. Vienna: L & R Social Research.

UNESCO (2010): Croatia – Employment & Protection. Laws and regulations governing the work of artists on employment, working conditions and social welfare. In: World Observatory on the Social Status of the Artist. In: http://portal.unesco.org/culture/en/ev.php-URL_ID=33150&URL_DO=DO_TOPIC&URL_SECTION=201.html (access October 5, 2010).

Impressions from the workshop


Die
Europäische


Die
Europäische


Friedenssicherung
Führung im internationalen Klimaschutz
Europas
Gewicht in der Welt
Europaweite Info-
Währungsstabilität
Europäische Charta der Grundrechte
Europäische Notfall-Nummer 112
Die
Förderung der kulturellen
Vielfalt
Schulpartnerschaft
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nion
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Wahlrecht für EU-Bürger
Vie
Führung im inte
Vit Holubec
Werner Schaub


Gerhard Suhrenbrock

: Dr. Bernd Schulte

Law and practice of European social security coordination

1. Preliminary remarks
2. Freedom of movement of persons within the European Union
3. Competencies in the field of social security
4. EU social security coordination: Regulations (EC) 883/2004 and 987/2009
4.1 Overview
4.2 Material scope
4.3 Personal scope
4.4 Applicable legislation

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1. PRELIMINARY REMARKS

The first Article which I ever published in a law journal was titled *Das Künstlersozialversicherungsgesetz,* i.e. the law on social insurance scheme for artists, and dealt with the bill presented on June 2, 1976 by the Federal Government concerning a law on the social insurance for self-employed artists and authors.[1] This Article was followed by a second one in 1980, when the Federal Government submitted a second bill on the same issue: *Künstlersozialversicherungsgesetz – Ein zweiter Anlauf*.[2] This piece of legislation was based to a large extent on reports on the social situation of artists and authors published in the 1970s.[3] There were then international documents as well which were relevant with regard to the envisaged social legislation in Germany, namely a report of the International Labour Organisation and UNESCO on *The Status of the Artists. General Review of Problems of Employment and Conditions of Work and Life* [4], and a Council of Europe *Recommendation on the Social Protection on Intellectual Workers and Artists*.[5]

In 1979 I was commissioned by the – then – Commission of the European Economic Community to write a report on problems relating to social security of cultural workers in Europe,[6] and in 1981 I contributed to a publication by the European Commission on the social situation and the professional problems – including those in the field of social protection – of artists: *Guide de l'artiste plasticien*.[7]

It is obvious that already in the late 1970s and in the 1980s the European Commission was concerned about these specific problems of artists in Europe including those problems which relate to social security.

1 *Schulte, B., Das Künstlersozialversicherungsgesetz, Neue Juristische Wochenschrift (NJW) 1977, p. 93 ff.*

2 *Schulte, B., Künstlersozialversicherungsgesetz – Ein zweiter Anlauf, Zeitschrift für Rechtspolitik (ZRP) 1980, p. 11 ff.*

3 *See: Bericht der Bundesregierung über die wirtschaftliche und soziale Lage der künstlerischen Berufe (Künstlerbericht), BT-Dr. 7/3071; Forbeck/Wiesand, Der Autorenreport, 1972; idem; der Künstlerreport, 1975; idem/Woltereck, Arbeitnehmer oder Unternehmer? Zur Rechtssituation der Kulturberufe, 1976; Wiesand, Journalisten-Bericht, 1977.*

4 *OIT-UNESCO- RCA/II, Paris 1977.*

5 *Recommendation 857 (1979) relative à la protection sociale des travailleurs intellectuels et des professions libérales et artistiques (indépendants et salariés), Strasbourg, March 27, 1979.*

6 *Schulte, B., Probleme der sozialen Sicherheit der Kulturschaffenden in der Europäischen Gemeinschaft: Studie über die Probleme der rechtlichen Ausgestaltung der sozialen Sicherheit der Kulturschaffenden in den Mitgliedstaaten der Europäischen Gemeinschaft, Brussels 1980 (also available in French: Problèmes de la sécurité sociale des travailleurs culturels dans la Communauté Européenne. Etude sur les problèmes de la forme juridique de la sécurité sociale des travailleurs culturels de la Commission des Communautés Européennes, Brussels 1980 (Etudes du secteur culturel), ders./Reinhard, H.-J:, Probleme der sozialen Sicherheit der Kulturschaffenden in der Europäischen Gemeinschaft: Portugal und Spanien, Brussels 1982. See also: Schulte, B., Die soziale Sicherung der Kulturschaffenden als sozialpolitische Aufgabe, in: Zentralblatt für Sozialversicherung, Sozialhilfe und Versorgung (ZfS) 1981, p. 165 ff. u. p. 193 ff.; idem, Die soziale Sicherung von Autoren und Künstlern im Bereich der Europäischen Gemeinschaft, in: Sozialer Fortschritt (SF) 1982, p. 30 ff.*

7 *Schulte, B., Allemagne, in: Moulin (éd.), Guide de l'artiste plasticien, Brussels 1981 (Etudes du Secteur Culturel).*

I am the national expert of the trESS network. trESS (Training and Reporting in European Social Security) is a network of national experts – one of each EU-Member State – initiated and funded by the European Commission (which is intended to be strengthened with respect to legal status and analytical capacity by the inclusion of a specific legal provision in Regulation (EC) 883/2004). The activities of trESS have been focused in the last six years on the following main tasks:

- *to enhance the knowledge of the coordination regulations among specific groups of stakeholders, i.e. civil servants, lawyers, judges, employers, trade unionists, migrant workers, legal experts, etc.*
- *to publish regular reports on the implementation, interpretation and application of social security regulations within Member States;*
- *and to provide expert advice on the evolution of the respective existing regulations and practices in order to meet the changing needs of EU migrants.*

For instance, in 2010 a so-called trESS Think Tank explored the legal status of uninsured persons when migrating to other Member States.

2. FREEDOM OF MOVEMENT OF PERSONS WITHIN THE EUROPEAN UNION

Workers' mobility is a key instrument for an efficiently functioning common market, is essential for allowing more people to find better employment, and is, therefore, a key objective of the Lisbon Strategy.

However, persons' mobility, including workers' mobility in the European Union still continues to be restricted by quite a number of barriers. Aside from an uncertainty over the advantages of being mobile, and going abroad, individuals still face hurdles to such movement which range from legal and administrative obstacles, housing, child-care and schooling facilities, availability and costs, employment of spouses or partners, portability of pensions, linguistic barriers, problems related to the recognition and acceptance of professional qualifications in other Member States, etc.

Based on the strong connection between worker mobility and a number of ongoing policy debates, such as flexicurity, lifelong learning, multilingualism and demographic change, the European Commission launched its Job Mobility Action Plan for 2007-2010.[8] The political aims of this Action Plan are to

- *improve existing national legislation and administrative practices regarding worker mobility;*
- *ensure policy support for mobility from authorities at all levels;*
- *reinforce EURES as the European instrument to facilitate mobility of workers and their families;*
- *foster awareness of the possibilities and advantages of mobility among the wider public.*

At present, workers' mobility in the European Union remains relatively low: Not more than around 2 percent of working-age population from the 27 Member States currently live and work in another Member State, the respective share of third-country citizens residing in the EU being almost twice as high (though the number of seasonal and cross-border workers may be significant and increase further the overall low percentage of EU migrant workers).

An important legal instrument for promoting workers' mobility within the EU is the European legislation on the coordination of social security schemes, currently laid down in Regulation 883/2004 and its implementing regulation Regulation 987/2009. Both have been designed to ensure that EU migrant workers who make use of their rights to freedom of movement do not face a loss of social security protection. Their predecessors, Regulations (EEC) 1408/71[9] and 574/72[10] have proven in the past decades to be successful legal instruments in achieving the above-mentioned objective.

However, new forms of mobility – shorter periods, varying legal statuses, multi-mobility practices, etc. – do often make their implementation and application problematic. For example, a mobile worker, who frequently works on short-term contracts in different Member States, may be faced with a number of different national social security schemes – provided that he or she is not posted (see below), in which case he or she would continue to be subject to only one national scheme, namely that of the Member State where he or she is employed.

8 *Commission of the European Communities, Communication from the Commission to the Council, the European Parliament, the European economic and social Committee and the Committee of the regions. Mobility, an instrument for more and better jobs: The European Job Mobility Action Plan (2007 – 2010), Brussels, December 6, 2007 COM (2007) 773 final.*

9 *OJ L 149, July 5, 1971, as last amended by Regulation 1992/2006 (OJ L 392, December 30, 2006).*

10 *OJ L 74, March 27, 1972, as last amended by Regulation 311/2007 of March 19, 2007 (OJ L 82, March 23, 2007).*

3. COMPETENCIES IN THE FIELD OF SOCIAL SECURITY

Within the EU, the designing and developing of social security systems is, first and foremost, a competence of the Member States themselves. Insofar as social security is concerned, the European founding treaties – today, since the entry of the Treaty on Lisbon on December 1, 2009, the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) – assign hardly any harmonising competences to the European institutions. Article 153(1)(c) TFEU[11] does entitle the EU only to support and complement the activities of the Member States in the field of social security and social protection of workers, including laying down minimum requirements by means of directives. However, the European legislator has never used this competence up to now. The only harmonising initiatives to have been taken are up to now a number of directives concerning the equal treatment of men and women in matters of social security[12] and the provisions on the applicable legislation in EU coordination law (see below 4.4).

EU law in the field of social security provides for the coordination and not for the harmonisation of social security schemes. This means that each EU Member State is free to determine the details of its social security system, including the conditions of eligibility to benefits. EU legal provisions, in particular Regulations 883/2004 and 987/2009, establish common rules and principles which must be observed by all national authorities and courts when applying national law.

The coordination of social security systems was already on the very onset of European integration in the late 1950s considered to be essential for the accomplishment of the free movement of workers within the framework of an initially merely economic cooperation among the Member States of the European Community (Regulation 3 of 1958 which preceded Regulation 1408/71 being the third regulation (European law) ever enacted). The main legislative instrument within this field for more than 35 years has been Regulation 1408/71 implemented by Regulation 574/72 which replaced the former Regulations 3 and 4 enacted in 1959. These legal instruments established a system of coordination of the national social security systems, in which the Member States retain the authority to determine the content provided that they comply with the fundamental principles of European law and those legal provisions of European law which take precedence on the national law of the Member States.

These coordination rules ensure that the application of the Member States'

11 *The Treaty on the Functioning of the European Union (TFEU) was established under the Treaty of Lisbon of December 13, 2007, OJ No C December 17, 2007, No 306,1; see for a consolidated version OJ no C May 9, 2008, 115, p. 37.*

12 *f. Council Directive 79/9 of December 19, 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ No L 6 of January 10, 1979, p. 24.*

different national legislations respects, among others, the fundamental principles of equality of treatment and non-discrimination laid down in EU law. By doing so, it is ensured that the applicability of the different national legislations does not adversely affect persons exercising their right to free movement within the European Union.

With regard to the material scope of the coordination rules, Article 3(1) of Regulation 883/2004 provides that the regulation shall apply to all legislation concerning the following branches of social security, namely sickness (including long-term care) and maternity as well as paternity benefits, invalidity benefits, old-age benefits, survivor's benefits, benefits in respect of accidents at work and occupational disease, death grants, unemployment benefits and family benefits.

Article 1(1) of Regulation 883/2004 defines the term legislation as meaning in respect of each Member State laws, regulations and other statutory provisions and all other implementing measures relating to the social security branches covered by Article 3(1) of Regulation 883/2004. This term excludes contractual provisions other than those which serve to implement a social insurance obligation arising from the laws and regulations referred to in the preceding subparagraph or which have been the subject of a decision by the public authorities which make them obligatory or extends their scope, provided that the Member State concerned makes a declaration to that effect, notified to the President of the European Parliament and the President of the Council of the European Union and published in the EU Official Journal.

These starting points do, however, not prevent EU law from affecting national legislation in the field of social protection. Such indirect impact is due primarily to the principle of the free movement of persons. In addition, the social policies of the Member States including social security policies are affected by EU law, relating to the free movement of goods, persons and services, the EU competition rules, including the prohibition of State aids, and EU public procurement law.

European social security coordination is necessary with a view to ensuring the right to free movement of persons, i.e. the right of European citizens to move and to reside freely within the territory of the Member States, to seek employment, pursue self-employed activities, or provide services in another Member State which is guaranteed under the European founding treaties themselves.[13] The purpose of the respective legal provisions is to coordinate the social security systems of EU Member States in such a way so as to eliminate any negative consequences or differences between the various systems for the migrants concerned. To this very end, the European legislator has worked out an extensive coordination system on social security.

13 *See: Articles 21, 45, 49, 56 TFEU.*

Up to April 2010 the applicable regulations in the 27 EU Member States were Regulations 1408/71[14] and 574/72.[15] These legal instruments have been replaced by Regulations 883/2004[16] and 987/2009 of the European Parliament and of the Council[17] from May 1, 2010 on as far as the 27 EU Member States are concerned. These new regulations started life as part of the programme to simplify the legislation governing the internal market, but may now be regarded more as a modernisation of the legislation on the coordination of statutory social security schemes falling within the material scope of the regulations than a simplification of it.

Substantive and procedural differences between the social security systems of individual Member States, and hence in the rights and obligations of persons residing and working there, are unaffected by that legislation. Accordingly, the AEU–Treaty (ex EC-Treaty) offers no guarantee to a worker that extending his activities into more than one Member State or transferring them to another Member State will be neutral as regards social security. Given the disparities in the social security legislation of the Member States, such cross-border activities may be to the worker's advantage in terms of social security or not, or even to his advantage, according to the circumstances.

4. EU SOCIAL SECURITY COORDINATION: REGULATIONS (EC) 883/2004 AND 987/2009

4.1 Overview

It follows that, in principle, any disadvantage by comparison with the situation of a worker who pursues all his activities in one Member State, resulting from the extension or transfer of his activities into or to one or more other Member States and from his being subject to additional social security legislation, is not contrary to EU law if that legislation does not place that worker at a disadvantage as compared with those nationals of host Member States who pursue all their activities in their State where it applies or as compared with those who were already subject to it, and if it does not simply result in the payment of social security contributions on which there is no return.

Article 42 EC Treaty as the original legal base of Regulation 1408/71 had to be extended by the use of Article 308 of the EC Treaty – now Article 352 TFEU – when its provisions were amended in 1981 to cover self-employed persons.

14 *Regulation 1408/71 of June 14, 1971.*
15 *Regulation 574/72 of March 21, 1972.*
16 *Regulation 883/2004 of April 29, 2004.*
17 *Regulation 987/2009 of September 16, 2009 OJ L October 30, 2009, No 284, 1.*

A more recent development, which must also be considered when the social security regulations are applied, is citizenship of the Union, for which provision was made in Articles 17 to 22 of the EC Treaty – now Articles 20 to 25 of the FEU-Treaty – and which is elaborated in the so-called Citizenship Directive.[18]

Although the new coordinating regulations are silent on the relationship with citizenship of the Union – the word 'citizenship' does not appear in Regulation 883/2004 – the enfranchisement of virtually every citizen of the Union as within the personal scope of the regulations indicates that the concept must not be ignored.

Here is yet another example of rights being decoupled – at least to a certain extent – from any economic activity, though the heart of the coordinating regulations remains anchored to economic activity, and the legal base of the new regulations remains principally, but not exclusively, the chapter of the EC Treaty on the free movement of workers.

The legal base of Regulations 883/2004 and 987/2009 remain Articles 42 and 308 of the EC Treaty. But since the entry into force of the Treaty of Lisbon (see above) amending Article 42 EC-Treaty – now Article 48 TFEU – unanimity in the Council is required rather than qualified majority voting.

Up to November 30, 2009 only clear consensus amendments could be introduced in EU coordination law since Articles 42 and 308 of the EC Treaty required unanimity among the Member States. Under Article 308 of the EC Treaty, the procedure only required consultation with the European Parliament, rather than co-decision with the European Parliament. The entry into force of the Treaty of Lisbon has resulted in an amendment to Article 42 EC in Article 48 TFEU which permits legislation in this field to be passed by qualified majority, subject to a referral to the European Council where a Member State declares that the consequences of the proposed legislation would affect important aspects of its social security system, in which case the act originally proposed shall be deemed not to have been adopted.

The underlying fundamental principles governing coordination of the social security systems of the Member States are the following:

1. ***in respect of any claim to benefit, the beneficiary is, in principle, subject to the social security system of one Member State alone, which, as a general rule subject to exceptions, is the Member State of the place where the person is working;***
2. ***all those covered by the coordinating rules are subject to the same rights and obligations as the nationals of the Member State according to the principle of equal treatment;***

18 *Directive 2004/38 of April 29,2004 on the right of citizens of the Union and their family members to move and reside freely within the Community.*

3. *periods of insurance, employment, self-employment or residence accrued in different Member States may be added together where this is necessary in order to secure entitlement to a benefit covered by the regulations; according to the principle of aggregation;*
4. *there are, in principle, no limitations on the territoriality of benefits, so that a benefit to which title has been acquired in one Member State may be taken to another Member State, though there are exceptions and limitations on the exportability of benefits;*
5. *Member States undertake to cooperate in the administration of the coordinating rules in the regulations according to the principle of cooperation which is new and drawn primarily from the wording of the preamble to the Implementing Regulation, i.e. Regulation 987/2009, and its technical requirements, as there are many provisions calling for improved collaboration between the competent institutions in the Member States and for a move to electronic communication of information between them.*

Already for a long time acknowledged of great importance for the implementation of the coordination rules, good administration and cooperation have clearly been vested with a higher status in the new coordination system. Communication and cooperation between the competent institutions of the Member States is in effect the fundament and the conditio sine qua non for the other principles of coordination, as they are not possible to operate without the former, the practical application of the principles of equal treatment, as the aggregation of periods, the export of benefits or the determination of the applicable legislation are not achievable without the intervention of the relevant national institutions and administrations of the Member States.

Article 2 of Regulation 987/2009 stipulates that the competent institutions of the Member States concerned shall share with each other all data necessary for establishing and determining the rights and obligations of persons covered by Regulation 883/2004. Documents issued by the competent institution of a Member State showing the position of a person for the purposes of the application of Regulations 883/2004 and 987/2009 and supporting documents issued by the authorities of another Member State are applicable as long as they have not been withdrawn or declared invalid by the competent authority or institution of the Member State by which they were issued. When there is doubt about the validity of a document or the accuracy of the facts on which the document has been based, the institution of the Member State that receives the document must ask the issuing institution for the necessary clarification and, where appropriate, the withdrawal of those documents. When the institutions do not agree within these months following the date on which the institution that received the document submitted its request, the matter may be brought before the Administrative Commission on Social Security

(Article 5 of Regulation 987/2009). Article 4 of Regulation 987/2009 provides that the Administrative Commission must lay down the content of the documents and the structure of the standardised electronic messages.

Article 78 of Regulation 883/2004 states that Member States shall progressively use new technologies for the exchange, access and processing of the data required to apply this Regulation and the Implementing Regulation. Electronic exchange of data between both European and national institutions has been deemed necessary in order to speed up administration as well as to facilitate the transfer of the information needed for coordination and, in particular, for ascertaining and calculating the rights of insured persons.

Accordingly, the E-forms for the exchange of information between the competent national authorities will have to make room for electronic data processing, as electronic exchange will become the standard way of processing information in the field of social security coordination. This means that the portable paper forms will be replaced by an electronic alternative, that all insured persons and all involved institutions have to be electronically identifiable, and that a web form service must be created.

The result should be a quicker and more efficient exchange system, with more accurate data and fewer transposing errors.

Thus the definition of the personal scope of the regulation in Regulation 1408/71 was very complex not only in respect of the wording of Article 2, but also in having regard to the Member States' statement to be found in Annexe I of Regulation 1408/71 on various aspects of the application of the personal scope of the regulation within particular Member States.

According to Article 2 of Regulation 883/2004, this Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been the subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.

However, there are still further definitions in Article 1 of 'activity as an employed person', 'activity as a self-employed person', 'insured person', 'civil servant', 'frontier worker', 'refugee', 'stateless person', and 'member of the family'.

Although the new co-ordinating regulations are silent on the relationship with citizenship of the Union – the word 'citizenship' does not appear in Regulation 883/2004 – the enfranchisement of virtually every citizen on the Union as within the personal scope of the regulations indicates that the concept must not be ignored.

Here is yet another example of rights being decoupled – at least to a certain extent – from any economic activity, though the heart of the coordinating regulations remains anchored to economic activity, and the legal base of the new regulations remains principally, but not exclusively, the chapter of the EC Treaty on the free movement of workers.

Where amendments to the regulations touch on either self-employment or on persons who are not economically active, the current legal base is article 352 TFEU. The legislative process under this provision still requires – contrary to Article 48 TFEU – unanimity among the Member States which does make it unlikely that Regulation 883/2004 will be amended to widen its provisions among the economically inactive. However, the European Court of Justice will continue to receive references raising questions of social entitlements arising in the many different situations which occur among the citizens of the Union. Its response to those references will almost certainly enhance the entitlement of citizens to benefits falling both within and outside the material scope of Regulation 883/2004.

Just as Article 39 EC – now Article 48 TFEU – has been found to be important in interpreting provisions of Regulation 1408/71, Article 20 TFEU may be used to assist in the interpretation of the obligations flowing from the coordinating regulations.

> THIRD COUNTRY NATIONALS

Regulation 1408/71 could not be extended to third-country nationals who had been subject to the social security systems of two or more Member States. Regulation 859/2003 covered this group.[19] The legal base for this regulation was Article 63(4) of the EC Treaty within title IV on asylum, immigration and other policies related to free movement of persons. A separate Union instrument is needed to extend the provisions of Regulation 883/2004 to third-country nationals. A proposal is currently before the Union institutions.[20] Member States will be able to opt in or opt out of the new regulation.

> APPLICABLE LEGISLATION

The provisions on applicable legislation are meant not only to prevent the simultaneous application of two or more national legal systems and the complications which might ensure, thereof (positive conflict of laws), but also to ensure that a person in a cross-border situation between two or more Member States is not left without social security coverage because there is no national legislation applicable to him or her (negative conflict of laws).

19 *Regulation 359/2003 extending the provisions of Regulation 1408/71 and Regulation 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of nationality [2003] OJ K 24/1.*

20 *Proposal for a Council Regulation extending the provisions of Regulation of the EC Treaty No 883/2004 and Regulation of the EC Treaty No 9780/2009 to nationals of third countries who are not already covered.*

> ONE STATE PRINCIPLE

A person shall be subject, in principle, to the legislation of a single Member State only (unique State principle). Insofar as the determination of the applicable legislation is concerned, the governing principle is, in accordance, the principle of the place of employment (lex loci laboris). Article 13(2)(a) of Regulation 1408/71 provides that a person employed in the territory of one Member State shall be subject to the social security legislation of that State, even if he resides or his employer is registered in another Member State. This also holds for self-employed persons who are subject to the legislation of the Member State where they pursue their economic activities, even if they reside in the territory of another Member State (Article 13(2)(b) of Regulation 1408/71).

The principle of the lex loci laboris has been kept in Regulation 883/2004.

> PROHIBITION OF DISCRIMINATION BASED ON NATIONALITY

The free movement of workers entails a prohibition of discrimination on ground of nationality by the Member State where the migrant worker is employed (Article 46(2) TFEU). This prohibition does not hold only for all conditions of employment and remuneration which apply in the place of employment, but also to social security provisions. Hence, the place of employment principle is an expression of the premise that a migrating worker is entitled to the same social benefits in the Member State of employment as workers of that State.

4.2 Material scope

Regulation 883/2004 covers the traditional set of social security benefits as already listed in Regulation 1408/71 (and based on a catalogue of social contingencies of ILO Convention No 102 of 1952) as provided by general and special social security schemes, both contributory and non-contributory, regarding sickness and maternity benefits, invalidity benefits, old-age benefits, survivor's benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits and family benefits.

The material scope of application of the coordination rules is determined by a European, i.e. autonomous definition of social security. According to the European Court of Justice, the answer to the question of whether a particular benefit falls within the material scope of one of the branches of social security listed in the European coordination regulations depends on the constituent elements of that benefit, in particular its purpose and the conditions on which it

is granted.[21] How the benefit is classified under the national legislation of the Member State concerned is not relevant.[22]

The matters covered under Regulation 883/2004 are mostly a mere copy of what is covered in the Regulation 1408/71, though 'updated' with paternity and pre-retirement benefits. The European Commission's initial proposal to foresee an open material scope ("This Regulation shall apply to all social security legislations concerning the following, in particular …"[23]) was not accepted by the Council, i.e. the Member States. In accordance, Regulation 883/2004 still has a numerus clausus, i.e. a closed list of benefits (Article 3). It covers, however, paternity benefits in order to adapt the regulation to the developments of equal treatment of men and women, i.e. fathers and mothers and does therefore confirm the assimilation of paternity benefits with maternity benefits which are already included in the material scope. Paternity benefits are paid during the first months after the child was born in order to support the mother.

The material scope of the regulation was also extended to cover statutory pre-retirement benefits, which are defined as all cash benefits, other than unemployment benefits or early old-age benefits, that are provided from a specific age to workers who have ceased, suspended or reduced their working activities. They are granted until the age at which they qualify for an old-age pension or an early retirement pension, and the receipt of which is not conditional upon the person concerned being not legally obliged to seek a job and be for this purpose available to the employment services of the competent Member State.

> NEED OF LONG-TERM CARE

Several Member States – Austria, Belgium (Flanders), Germany, Luxembourg, the Netherlands, Spain – have designed specific social benefits for people in need of long-term care. These social security schemes intend to provide non-medical care to persons who are in need of such assistance in order to perform daily-life tasks like shopping, cooking, cleaning, toiletry, washing, etc. The main problem as regards the EU social security coordination system with respect to long-term care is that these kinds of benefits are not as such incorporated into the material scope of the regulation. However, the European Court of Justice in Molenaar,[24] Jauch[25] et seq. judgments treated them as sickness benefits in cash or in kind.

21 *See: ECJ, Case ECJ C-78/91 (Hughes), ECR 1992, I-4839, at 14; Case C-212/06 (Flemish care insurance), ECR 2008, I, 1683, at 16.*

22 *Cf. ECJ Case C-111/91 (Commission v. Luxembourg), ECR 1993, I, 817, at 28; Case C-160/96 (Molenaar) ECR 1998, I, 843, at 19.*

23 *European Commission, Proposal for a Council Regulation (EC) on coordination of social security systems, Brussels 1998, COM (1998) 779 final.*

24 *Case C-160/96 Molenaar [1998] ECR I-843.*

25 *Case C-215/99 Jauch [2001] ECR I-1901.*

As a result, long-term care benefits are to be coordinated in the same way as sickness benefits. For some of the Member States this implies the payment of benefits in kind by the social security institutions of the Member State of residence or of stay on behalf of the competent Member State, while for others, e.g. Germany, this implies the export of long-term care cash benefits. This leads to various problems, some of them tackled in Article 34 of Regulation 883/2004. According to that provision, the amount that has to be reimbursed by the competent Member State for a long-term care benefit in kind can be deducted from the exported benefit in cash. Benefits in cash include also so-called 'combi-benefits'. Actually, Article 34 of Regulation 883/2004 is the only provision referring to long-term care with respect to the overlapping of benefits in kind in the Member State of residence and exported benefits in cash granted by the competent Member State. Any overcompensation for the beneficiary and overburdening of the competent Member State, paying out cash benefits and reimbursing the benefits in kind of the Member State of residence, should be avoided.

The opposite situation is also possible, namely where the beneficiary is resident in a Member State which only provides benefits in cash and the competent Member State only provides benefits in kind. In that scenario, the person will receive nothing at all under Regulation 883/2004. For the examination and control of recipients in another Member State for the entitlement to benefits, the existing procedures are held to be appropriate for medical examinations for incapacity to work, but not necessarily for long-term care. These coordination problems in the field of long-term care show that there is room for improvement and that a reflection on a new specific chapter is advisable.

There are exceptions to the export principle. The most important exception is the special coordination regime that applies for so-called 'special non-contribution-based benefits' that are situated in between social security and social assistance. For these kinds of benefits, a 'place-of-residence-based coordination system' is applicable.

Another exception is unemployment benefits, which need to be exported for a maximum of three months if the benefit entitled person moves to another Member State in order to seek employment.[26] That means that there is in effect a place-of-residence requirement for unemployment benefit entitlement.

Regulation 1408/71 applies coordinating rules to unemployment benefit for self-employed persons only partially. Self-employed persons were not able to aggregate periods of unemployment. Under Regulation 883/2004 all the provisions apply both to employed and self-employed persons, thus improving access to unemployment benefit for persons who have been self-employed.

The supervision of the job search activities of the beneficiary of unemployment

26 *Article 69 Regulation 1408/71 and Article 64 Regulation 883/2004.*

benefit presents obvious difficulties when the beneficiary stays in another Member State; hence the limited rules in Regulation 1408/71 permitting export of the benefit for a maximum period of three months. A proposal of the European Commission that the period be extended to six months was rejected in the Council. But Regulation 883/2004 does allow an initial period of three months for the export of unemployment benefit to be extended to six months (Article 64(1)(c)).

EU legislation thus tries to resolve the matter of determining to which circle of solidarity a person migrating within the European Union belongs. The answer to this question depends on the circumstances: In the case of economically active persons, the starting point is the place-of-employment principle, whereas in the case of those who are not (or no longer) economically active, it is the place-of-residence principle. Thus the European legislator appears to have tried to establish with which Member State the person concerned is linked most closely from a socioeconomic perspective.

Medical and social assistance as well as war victim benefits are excluded from the material scope of Regulation 883/2004 (as is the case with Regulation 1408/71).

> SUPPLEMENTARY PENSION RIGHTS

Unlike with social security pensions which are aggregated under EU rules, persons who have supplementary pension rights can lose their legal entitlements when they move jobs within or between Member States. A first step to tackle this problem was Council Directive 98/79/EC[27] which effectively ensured that people moving cross-border were treated no worse than those moving within a Member State. The Directive does not cover, however, what is often called portability of supplementary pensions even if this can have a serious effect on worker mobility. The European Commission has recognised that insufficient portability of supplementary pension rights can create important obstacles to workers' mobility, and therefore to the free movement of workers which is one of the basic rights enshrined in the FEU-Treaty. The Commission proposed a new directive in 2005 to set minimum standards for the acquisition, preservation and transferability of supplementary pension rights.[28] These would apply to people moving both within and between EU countries. Internal mobility was included because a separation of internal and external mobility was impractical. In addition labour mobility was key to promoting economic dynamism and labour market adjustment.

This proposal was revised in 2007 to drop the transferability element which had been opposed by some Member States, e.g. Germany, as technically difficult

27 *Council Directive 98/49/EC of June 29, 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community, OJ No L 2009 of July 25, 1998, p. 46.*

28 *Proposal for a Directive of the European Parliament and of the Council on improving the portability of supplementary pension rights. COM (2005) 507 final.*

and potentially burdensome or open to abuse. This left the emphasis on the timely acquisition of pension rights and their subsequent preservation via indexation. However, it has still not been possible to reach the necessary unanimous agreement in the Council.

The Commission plans to launch a Green Paper on the European Framework for Pensions which should also launch a discussion on extending the coverage of Regulation 883/2004 in order to coordinate schemes which are not yet covered by this Regulation, for instance supplementary pension schemes which are not based on legislation as well as considering the boundary between this Regulation and other Regulations.

The aim of this approach is to further reduce obstacles for the free movement of workers and EU citizens as far as possible, see in this respect Article 48 TFEU (ex Article 42 EC).

4.3 Personal scope

Regulation 3/58 covered wage earners or assimilated workers. Regulation 1408/71 referred to employed persons, but in 1981 was extended to include self-employed persons and in 1999 students.

The personal scope (ratione personae) of Regulation 1408/71 has constantly evolved to cover ever more categories of persons. It began as a legal instrument to remove social security-related barriers to the free movement of dependent, i.e. employed workers, on the basis of Article 51 EEC/42 EC – today Article 45 TFEU – and was initially – just like its predecessor Regulation 3/58 – directed only at employees who were nationals of a Member State as well as at stateless persons and refugees living in a Member State, and their family members and survivors. Through a series of modifying regulations, the personal scope was extended to self-employed persons,[29] civil servants,[30] and students.[31]

This personal scope of the social security regulations has always, even before the introduction of the EU citizenship provisions in the EC Treaty (Articles 17 EC et seq. – today Articles 20 et seq. TFEU –), covered also economically non-active persons such as pensioners, disabled persons or the family members of workers, as these categories could be regarded respectively as ex-workers, workers-to-be and persons deriving rights from a working family member, which meant that there existed formerly an economic link.

As the Regulation 1408/71 could only be applied to nationals of Member States as well as to stateless persons, refugees and family members residing there,

29 *Regulation 1390/81 of May 12, 1981, OJ EEC No L 143 of May 29, 1981.*
30 *Regulation 1606/98 of June 29, 1998, OJ EC No L 209 of July 25, 1998.*
31 *Regulation 307/1999 of February 8, 1999, OJ L 38 of February 12, 1999.*

in situations which included a cross-border element, third country nationals were excluded from the personal scope of the regulation. Only in 2009, Regulation 859/2003[32] made Regulation 1408/71 applicable to persons who are citizens of a non-EU country.

In Article 2 of Regulation 883/2004 all references to gainful activities have been removed from the provision with respect to its personal scope. The new regulation is oriented towards "all insured European citizens and those who have been insured". This abolition of any reference to an economic activity and the new orientation towards nationals of the EU Member States who are or have been subject to the legislation of one or more Member States (insured persons) is the expression of the coordination system's being in line with developments in the field of European citizenship legislation (Articles 20 et seq. TFEU), promoting the unhindered free movement of EU citizens, regardless of any engagement in an economic activity. This change represents a break from the regulations' historical economic origin in favour of the inclusion of economically non-active persons (e.g. house-wives, house-men, playboys).

The rights to social security benefits of those non-active persons depend, in particular, on the right of residence. If a person is allowed to live within the territory of a Member State[33], one may not discriminate against her or him. Such persons may therefore not as such be excluded from the regulations anymore.

In accordance, as regards the application of the legal provisions on the personal scope of Regulation 883/2004, a definition of worker or self-employed is not necessary anymore.

However, such definition is still needed for the implementation of the coordination rules, for instance with respect to the provisions on applicable legislation, which differ according to whether the person concerned is either employed or self-employed or economically non-active insofar, as for the first two categories the legislation of the Member State where they perform their activities is applicable (with special rules in case of a person being simultaneously employed and self-employed), whereas for the latter the legislation of the Member State of residence does apply.

In Regulation 883/2004, the nationality requirement has been maintained. Consequently are still excluded from its personal scope third country nationals residing in a Member State. (The initial proposal for a new coordination regulation by the European Commission did not refer to nationality at all. The condition to be a Member State national entered into the final text of Regulation 883/2004 by a European Parliament amendment.[34])

32 *Regulation 859/2003 of May 14, 2003.*

33 *See: Directive 2004/38, op. cit. (note 8).*

34 *European Parliament, Report on the proposal for a European Parliament and Council regulation on coordination of social security systems, Strasbourg/Brussels, June 17, 2003, A5-0226/2003 final.*

Regulation 859/2003 is not applicable either to the EEA-Member States which are not EU Member States, i.e. the non-EU EEA Member States, Iceland, Liechtenstein and Norway, and Switzerland which has been affiliated to the EU by bilateral treaties. For third country nationals' entry into the coordination system of Regulations 883/2004 and 987/2009, the same approach will have to be applied as the one which was used under Regulation 1408/71, namely a separate regulation has to be enacted in order to extend personal coverage of Regulation 883/2004 to this category of persons as well. The European Commission has proposed in 2007 a regulation[35] in order to achieve this goal and to replace Regulation 859/2003.[36]

4.4 Applicable legislation

The legal provisions on the applicable legislation, i.e. the conflict rules regarding social security matters, are contained in Title II of Regulation 883/2004 which the provisions constitute a complete and uniform system of conflict rules aimed at ensuring persons moving within the European Union shall be subject to the social security scheme of only one Member State, in order to prevent more than one legislative system from being applicable and to avoid the complications which may result from that situation. The coordination system is thus designed both, to prevent the simultaneous application of two or more social security legislations and also to avoid migrants 'falling between two stools', as the combination of the requirements of different national systems can also result in the application of no system at all. This rule is both exclusive, as no legislation can be applicable other than the one indicated in the coordination system, and overriding, as national affiliation rules are waived if their application would deprive the conflict rules of their practical effect.

The general rule is that the legislation applicable is the legislation of the Member State in which the migrant worker performs his economic activities, i.e. the legislation of the workplace or the lex loci laboris.

The rules for determining the applicable legislation are based upon the principle lex loci laboris, i.e. the principle of the place where a person is working. Thus the starting point in the determination of the competent Member State is the application of the social security system of the Member State where the employed or the self-employed person is working. Only for persons who are not economically active is the principle of the country of residence (lex loci domicilii) introduced.

35 *European Commission, Proposal for a Council Regulation extending the provisions of Regulation 883/2004 and Regulation 987/09 to nationals of third countries who are not already covered by these provisions solely on the ground of their nationality, Brussels, July 23, 2007 (COM (2007) 439 final).*

36 *See above note 7.*

The place-of-employment principle is an expression of the premise that a migrating worker is entitled to the same rights in the host Member State of employment as workers of that State.

The application of this principle does not imply that a migrant worker is invariably entitled to social security benefits provided in the Member State of employment. If such a person resides in another Member State, for instance a frontier worker, then, for certain benefits, for example coverage of medical costs, he or she shall be entitled to such benefits first and foremost in accordance with the legislation of the Member State of residence albeit at the expense of the Member State of employment. Moreover, the European Court of Justice has ruled that the application of the place-of-employment principle does not preclude a migrant worker from entitlements pursuant to the national legislation of the Member State of residence. Only, this State is not required to grant such social security rights, but EU law does not exclude it.[37]

Special rules are provided for categories such as persons working in two or more Member States, persons working as an employee and as a self-employed person in different Member States, civil servants with other occupations, and persons employed by diplomatic missions and consular posts.

> POSTING

Specific rules relate to posted workers, both employed and self-employed, for which the legislation of the Member State where they normally perform their activities can remain applicable during a certain period of activities abroad. Under Regulation 1408/71 this period is set at 12 months, with a possible extension of another 12 months. Under Regulation 883/2004, the posting period was increased from 12 months to a standard period of 24 months, making extension rules as provided for in Regulation 1408/71 superfluous.

The period during which a person can be working in the territory of another Member State, and still remain socially insured in the Member State of origin/home Member State, has been doubled. Under Regulation 1408/71, a prolongation of the posting period is only possible in exceptional circumstances, i.e. if the duration of the work to be done extends beyond the duration originally anticipated, owing to unforeseeable circumstances, and with the approval of the competent institution of the Member State to which the worker has been posted.

Article 12 of Regulation 883/2004 states that companies posting employees to the territory of another Member State must have significant activities in the Member State from which they post people. This provision refers to all companies having the intention to hire workers to have them posted immediately.

37 *ECJ, Case C-352/06 Bosmann ECR 2008 I-3822, at 27-29.*

Self-employed persons can post themselves for up to 24 months to the territory of another Member State (Article 12(2) of Regulation 883/2004). However, a self-employed person can only be posted when he/she performs activities in the hosting Member State similar to those in the sending Member State. For example, a self-employed farmer cannot be posted to perform activities as a construction worker in another country.

The criterion for determining whether the self-employed activity pursued in another Member State is similar to that normally pursued, is its actual nature rather than the designation of employed or self-employed activity that may be given to it by the other Member State (Article 14 of Regulation 883/2004). A self-employed construction worker can continue to work as a construction worker during his posted term, whatever qualification of his statute is given by the hosting Member State. In this respect the principle is followed that the sending Member State qualifies the activities, as this is the State in which the self-employed person is insured.

The provisions on posting are exceptions to the main principle of lex loci laboris and not a set of specific rules for determining the applicable legislation which exists as an alternative, i.e. a lex specialis to Article 11 of Regulation 883/2004. Indeed, posting was originally introduced for specific reasons, for instance the fact that the application of too many legislations over a short period may result in too high and administrative burden or even a loss of social security rights for the workers concerned.

The posting provisions should hence not be applied on a broader scale than necessary in the light of the objectives they serve. Posting provides a certain flexibility to make a smooth application of freedom of services possible. Indeed, posting is often used within the framework of cross-border services. This freedom to provide services (Article 56 TFEU) should not be hampered by each time applying to the employed or self-employed person the social security legislation of the country, in which the service is provided.

Regulation 883/2004 did not bring any radical changes to the rules for economically non-active people insofar, as there is a clear reference to the Member State of residence. However, some categories of inactive people are assimilated with active persons under Regulation 883/2004 such as persons receiving cash benefits as a consequence of their former activities as an employed or self-employed person. This is not the case for people expected to remain inactive, with the exception of invalidity, old-age or survivors' accidents at work or occupational diseases pensions or of sickness cash benefits covering treatment for an unlimited period (Article 11(2) of Regulation 883/2004).

For persons with occupations in two or more Member States, the legal rules have been simplified with a dominant role for the Member State where the most significant part of the economic activities is performed.

Persons who were employed or self-employed before a social contingency or social risk materialised will be considered as professionally active for the application of the regulations.

Persons on sickness leave are still professionally active, too, as well as persons who interrupted their activities for parental leave, if they were employed or self-employed before they took the leave. The same goes for persons who became unemployed, with the exception of unemployed persons who receive benefit in application of Article 65 of Regulation 883/2004), as this latter provision refers to persons who, before they became unemployed, resided in a Member State other than the Member State where they worked formerly; such persons receive a benefit from the Member State of residence as if they worked there.

Finally, persons who are dependent upon a professionally active person on the basis of derived rights for opening entitlement to a social security scheme are grouped with employed persons.

Regulation 883/2004 provides a new general principle for determining the legislation applicable to people who are not economically active anymore as a consequence of the extension of the personal scope of the new regulation to non-economically active persons (Article 2 of Regulation 883/2004). The personal scope is not defined anymore by enumerating the categories of persons to whom the coordination regulation applies – employees, self-employed people, civil servants, students, etc. as is the case in Regulation 1408/71. But Regulation 883/2004 applies to all nationals of the Member States as well as to all stateless persons and refugees residing in a Member State, and to members of their families and survivors of these persons, provided that such persons are or have been subject to the social security legislation of one or more Member States. Consequently, Regulation 883/2004 extends its scope to the category of non-active persons. Persons who are not economically active are subject to the social security system of the Member State in which they reside (Article 11(3)(e) of Regulation 883/2004). Residence means the place where a person habitually resides (Article 1(j) of Regulation 883/2004). In order to resolve difficulties between the institutions of several Member States in determining the residence of a person covered by Regulation 883/2004, these institutions are held to establish by common accord the centre of interest of the person concerned, taking account of the following facts: duration and continuity of stay, family status, the place where the children attend school, family ties, in the case of workers, the fact of having a stable job, the person's intention, as apparent from all the circumstances, especially the reasons that led him or her to move, the Member State in which the person is subject to taxation on all his/her income, regardless of its source. When and where the application of these criteria does not lead to an agreement, the intention expressed by the person concerned shall be considered to be decisive (Article 11 of Regulation 987/2009).

> SIMULTANEOUS PERFORMANCE OF WAGE EARNER ACTIVITIES

Most of the changes in Title II of Regulation 883/2004 can be found in the legal provisions regarding the simultaneous performance of multiple professional activities. These specific rules have become less diversified and less complex under Regulation 883/2004. For instance, the specific rules for international transportation workers in Regulation 1408/71 have been abolished. The competent Member State for these workers is now determined by the general rules for simultaneous performance of professional activities.

In case of the simultaneous performance of wage-earner activities or self-employed activities in two different Member States, the social security system of the Member State of residence becomes applicable. Contrary to the coordination rules of Regulation 1408/71 (Articles 13 to 17), in Regulation 883/2004 the Member State of residence can only become competent when a substantial part of the activities are performed in this State (Article 13 of Regulation 883/2004). Substantial does not mean that the major part of activities has to be performed in the State of residence, because the proportion of the activity pursued in a Member State can never be substantial, only if it is less than 25 percent of all activities pursued by the worker in terms of turnover, working time, remuneration or income from work.

If the employee is employed by various employers whose registered offices of business are located in different Member States, the Member State of residence of the employee is competent, whatever the size of activity performed in that State (Article 13(1)(a) of Regulation 883/2004). Yet the question is, how to measure exactly the size of the activity.

> SIMULTANEOUS PERFORMANCE OF SELF-EMPLOYED ACTIVITIES

A similar rule applies for the self-employed: the Member State of residence is competent when a self-employed person undertakes at least substantial activities there. If he does not have such substantial activities there, the Member State in which the centre of interest of his activities is situated becomes competent (Article 13(2)(b) of Regulation 883/2004). The centre of the activities of a self-employed person is determined by taking into account all aspects of that person's occupational activities, notably the place where his fixed and permanent place of business is located, the habitual nature or the duration of the activities pursued, the Member State in which the person concerned is subject to taxation on all his income, irrespective of the source, and the intention of the person concerned, as revealed by all the circumstances (Article 14(3) of Regulation 897/2009).

> SIMULTANEOUS PERFORMANCE OF EMPLOYED AND SELF-EMPLOYED ACTIVITIES

In cases in which employed and self-employed activities are performed simultaneously in different Member States, the system of only one Member State will become applicable, i.e. the State where a person performs activities as a wage earner. Contrary to Regulation 1408/71, no exceptions to this rule have been included in Regulation 883/2004. The new rule determines the Member State where the person performs activities as an employee as the competent Member State.

If, in addition to the self-employed activities, a person performs two or more wage earner activities in different Member States, the State of residence will be competent if the person performs a substantial part of the wage-earner activities in this country. The Member State of the place of business of his or her employer is competent if no substantial wage earner activities are performed in the State of residence.

If a person is a civil servant and performs other professional activities he or she is subject to the State where he or she has been nominated as a civil servant (Article 13(4) of Regulation 883/2004).

A person who is employed as a civil servant by one Member State and who pursues employed or self-employed activities in one or more other Member States shall be subject to the legislation of the Member State to which the administration employing him is subject (Article 13(4) of Regulation 883/2004).

The category of economically inactive persons is understood to include pensioners.[38] Unemployed frontier workers are likewise subject to the legislation of the country of residence.[39] Retired persons who do not receive their pension from their Member State of residence are also subject to the legislation of the Member State that does pay their pension insofar as sickness benefits in cash are concerned.

Social security coordination, especially in case of illness, is always a complex matter and this corresponds to the complexity of rules in complex factual situations. A problem is in fact that Regulation 883/2004 has left a number of basic issues of coordinating health-insurance law unregulated and has, in particular, left the relationship with primary EU law concerning freedom of services and competition unelaborated. Regulation 883/2004 leaves the development of patient mobility to ECJ case law and has ignored the developments initiated by the Kohll and Decker judgments.[40] Regulation 883/2004 has reacted to new needs by

38 *See: Article 11(2) of Regulation 883/2004.*
39 *See: Article 11(3) (c) of Regulation 883/2004.*
40 *ECJ, case C-158/96 [1998] ECR I-1931.*

making rules in respect of sickness benefits, following the Molenaar[41] and Jauch[42] judgments, resulting in Article 34 which has an overlapping rule for long-term care benefits.

41 *ECJ, case C-160/96, [1998] ECR I-843.*
42 *ECJ, case C-215/99 [2001] ECR I-1901.*

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