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Dorina Tsotsorou

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“50 years of European Social Security Coordination”. The Conclusions of the 2008 international conference of the EISS

Report by Dorina Tsotsorou, *General Secretariat of Social Security, Greece*

A very important European instrument concerning all insured persons, actually or potentially moving within EU, came recently at the centre of European interest. The European Institute of Social Security- EISS- dedicated its annual International Conference that took place on the 27-8 October of 2008 in Berlin to the celebration of 50 years of European social security coordination. Indeed, on 25 September 1958 Regulation 3 was adopted by the Council, followed - a couple of months later- by its implementing Regulation 4. Outstanding members of the academia, as well as experts in this sensitive field related to national competence with nonetheless significant impact at European level highlighted the special history and the dynamic evolution of this key mechanism along with its synergies within the broader socio-economic environment. The following report summarises the main conclusions of the conference.

Rob. Cornelissen, an eminent and deeply committed expert, since 1983 in DG EMPL and Head of its Unit “Social Security of migrant workers” since 2000, welcomed the celebration of the 50 Years of European social security coordination, as an occasion to reflect on the past, the major developments, achievements and innovations during that long period. A historical overview could be a valuable source for raising awareness on Community Coordination’s unique status, its overall decisive role and its potential evolution in the years to come. Moreover, that celebration constituted an excellent occasion to present the new rules of Regulation 883/2004, essential part of the initiative for modernization and simplification, and to reflect on whether those rules are in a position to meet contemporary issues of the European socio-economic context.

The conception and birth of a truly European coordination of social security systems remounts to the Treaty of Paris establishing the European Coal and Steel Community, providing for free movement of workers in the two industries and stating that social security as a factor should not inhibit labour mobility in these two economic sectors. The European Convention, initially drafted to replace the existing bilateral conventions in the field (signed in 1958), coincided in time with the reference framework, the position in the Treaty of Rome and the social/political purpose of Article 51 of EEC Treaty, opening the way for the Council to adopt measures by means of Community law. Since the common market was to include Member States (MSs) entire economies, the terms of the said Convention were redefined and its scope extended whilst the need to make its provisions operational the sooner possible, led to the latter’s transformation into Regulation (No 3), which came into force along with its implementing Regulation (No 4), ten years before the realization of the free movement of workers.

The fact that the coordination of social security systems is dealt with by Community legislation makes Community Regulations a unique system in the world; a mechanism in

continuous metamorphoses, mainly in conformity with ECJ's case-law, a few times in order to counter the potential impact of jurisprudence or following developments in the broader socio-economic context.

As the Court has stated, the Regulations have a limited objective "to secure and promote the free movement of workers" in conformity with Articles 39 to 42 EC, which are "their basis, their framework and their bounds". Given that the field of social security remains governed by the "principle of territoriality", Community Regulations' aim is to "rectify" the effects of that principle on "migrant workers" and the members of their families. So, implementing the Regulations in the light of Article 42 EC means either to interpret a provision in a way which was not foreseen by the legislature or to declare it invalid. In cases where the treatment of mobile and non-mobile persons on a genuinely same footing may give rise to unforeseen consequences incompatible with the Treaty, the principle of cooperation in good faith under Article 10 EC requires MSs' competent authorities to use all the means at their disposal to interpret their legislation in a way which accords with the requirements of Community law. Where such an application is not possible, national authorities must fully apply Community law, if necessary by not applying domestic law.

Rob. Cornellissen tried to show that current Community Regulations provide a very high standard of protection in the field of social security for persons moving within the EU. Yet, since "we have to live with the limits resulting from the objective of Article 42 EC", there still remain problems in that field.

So, Community coordination only applies to statutory schemes and very modest Community legislation covers persons moving within the Union in the field of non statutory supplementary social security schemes (Directive 98/49/EC). Consensus appears too distant a target at Council level even on Commission's amended Proposal for a Directive on minimum requirements for enhancing workers mobility by improving the acquisition and preservation of supplementary pension rights.

The existing coordination system has been able to deal with the introduction of a whole set of new benefits in MSs' national legislation, mostly due to the Court's case-law, which has significantly extended the scope of certain concepts-provisions (family-sickness benefits), without this having been immediately translated into the appropriate amendments neither to effective and uniform national administrative procedures in all MSs concerned. Overall, the Council and the Commission, as guardian of the Treaty are responsible to adapt or revise their political choices following developments in national legislation, in the Court's jurisprudence or in the socio-economic environment.

Developments in Community legislation and the introduction of European citizenship have (had) a bearing on Community coordination, giving rise to a number of new fundamental questions: To which extent could the coordination system set up by Regulation 883/04 be challenged under Articles 12 and 18 EC? What is the relationship between Directive 2004/38/EC and the separate coordination system set up by Reg. 883/2004 for the "special non-contributory benefits"? Which legal instrument should take precedence? Do persons invoking Reg. 883/2004 (or the current Reg. 1408/71) in order to claim a special non-contributory benefit in the MS in which they reside, put their right of residence at stake because they do no longer fulfil the requirements for having a right to reside in the host State under Directive 2004/38? Or just the opposite, persons entitled to a minimum subsistence benefit of the host State thanks to Reg. 883/2004 (or 1408/71) automatically fulfil the subsistence requirement for obtaining or maintaining residence rights

under Directive 2004/38? As these questions need further clarification and a prompt coordinated response, the Commission has asked the think tank of trESS to present a report on these issues by the end of this year.

Furthermore, regarding settled case-law on cross-border healthcare based on the Treaty provisions on free movement of goods and services, the Council missed the opportunity to integrate it within the reformed Regulations, regrettably leaving space for the coexistence of two legal pathways – instruments dealing with that delicate question.

Highlighting substantial evolution at Community level, the speaker referred in detail to developments in the personal scope of Community coordination: the great leap from workers to EU citizens and to the metamorphoses of the concept “members of the family”, no longer invoking the Regulation for derived only but for proper rights. Summing up, Rob. Cornellißen insisted that European citizenship confers the right to free movement on every citizen of the Union and this is reflected by the fact that there is now one single Community instrument dealing with the right to move and to reside within the Union. In that same spirit, the Commission’s initiative to simplify and modernise Community coordination proposed to extend the personal scope of the new basic Regulation, in an explicit and uniform way, to all EU nationals who are insured under national legislation. So, Reg. 883/2004 not only strengthens European citizenship, it also contributes to simplification. For a more complete picture of the persons actually covered by the Regulations, the speaker gave a rough outline of the coordinated action undertaken towards the inclusion of third country nationals in the Community coordination system by the creation, in the context of the Treaty of Amsterdam, of specific Community competence to legislate: the only way to establish “internal” coordination and offer to third-country nationals, legally resident on the territory of a MS and disposing a cross-border element between two MSs, the same protection in the field of social security as EU citizens moving within the Union.

Essential developments in the material scope have been highlighted as the outcome of “new kinds” of benefits, constituting national social security systems’ response to the challenges of demographic development, the ageing of the population, changes in family structures and the need to reconcile work and family life (enabling a growing participation of women in the workforce). Thus, child-raising allowances or parental benefits, part of family policy measures, have been integrated into the Regulation’s material scope, as family benefits for the purposes of coordination. The same approach has been followed regarding a variety of “alternative” benefits covering the growing care needs of dependent older people (or dependency, in general), by integrating “care allowance” – care insurance, considered as sickness benefits in the context of Community coordination.

Rob. Cornellißen has extensively referred to developments in the system of conflict law rules which determine the applicable legislation: their exclusive effect and mandatory nature, to the developments in the choice of law by the Community Regulations, stating in particular the co-existence of two alternative principles, the *lex loci laboris*, as the general rule and the *lex loci domicilii* for the non-active, a great range of special rules on posting and/or in cases of simultaneous activities pursued in more MSs.

In respect of developments in the socio-economic environment, the question to be answered in the future, as the speaker claimed, is whether the new coordination rules in the domain of conflict law provisions, addressed adequately the requirements deriving at least from new forms of mobility: otherwise, how effective would prove the choice to have maintained the classic *lex loci laboris*, as the core general rule for the determination of the legislation applicable while

strengthening even more the principle of unicity of the applicable legislation. The think tank of trESS, following Commission's consultation procedure, has been asked to present a report on this issue by the end of 2008.

Furthermore, immigration from third countries, as another socio-economic development, will sooner or later raise the question on the appropriateness of agreements concluded between the EU and third countries on the coordination of social security. A system containing apart from "internal" also "external" coordination elements (e.g. export of acquired pensions/benefits to the third country concerned, aggregation of periods completed in the EU and in the third country involved) could support the idea of "circular migration", which is gaining growing importance in view of better managing migration flows.

Moreover, apart from legislating, a correct and smooth application of the rules, at national and at Community level, is very important in order to guarantee that persons who make use of their right to free movement are not penalised. So, the speaker referred to the network on coordination of social security created by the Commission, which aims at liaising – networking at national level of all actors involved and at strengthening their expertise. The so-called trESS, composed of independent experts, organizes on regular basis seminars in all MSs, with a representative of the Commission always present, publishes annual reports presented to the Commission and being the subject of an annual peer review of the Administrative Commission on social security for migrant workers – overall, contributes to better informing on the level of Regulations' implementation, thus, identifying the rules which need clarification, correction or adaptation and will in the future provide advice on the evolution of the existing rules and practices (Think Tank).

A smooth application of the coordination rules is also one of the main objectives of the Commission proposal for a new implementing Regulation, currently pending before Council and Parliament. It aims at achieving a more efficient and closer cooperation between the institutions, providing for exchange of information by electronic means. The smooth application of coordination rules is mostly sought by a set of provisions on the provisional application of legislation as well as on provisional granting of benefits. The principle of good administration is reflected in clear provisions of Reg. 883/2004, avoiding that, in case of difficulties in the interpretation or application of the Regulation, the citizen is left without guidance and overall protection.

As Rob. Cornelissen concluded, Reg. 883/2004 has on a considerable number of points improved the rights of the citizens. However, it is certain that when the new Regulation becomes applicable, it will need further and multiple modifications. In fact, the new Regulation is not a completely new concept but the product of an evolution, which started 50 years ago, of a European concept, having as objective to make one of the most fundamental freedoms a reality: the right of European citizens to move and reside freely within the Union.

Following Dr Axel Reimann's highly interesting intervention, the past and future of Community coordination of social security systems was, from the very outset, put into the overall socio-economic European framework embracing four interacting domains, "social security" as conceived for the purposes of the Internal Market, national "social protection" systems, as that concept has been elaborated for the purposes of the Open Method of Coordination, and economic and employment policies' area. Placing Community social security schemes' coordination into its broader context is an approach which helps to understand its present impact ("obstacles" hindering smooth coordination and perspectives) and mostly to foresee its future, to examine more closely the reasons behind reluctance or backward steps and to identify the way forward (alternative, supportive, complementary paths).

The speaker pointed out a range of existing EU "Coordination levels", such as coordination of individual social security rights, coordination of national social protection systems in the context of the Open Method of Coordination and coordination of economic and employment policies affecting social security; furthermore, he illustrated briefly each one's scope, evolution and potential impact on the others.

Regarding coordination of national social protection systems, OMC's application in its relevant fields has been analysed as including, mainly reports and recommendations with regard to international best practices, coordination of social policies and use of other countries' experience in order to achieve common goals.

Finally, in respect of coordination of economic and employment policies, it has been claimed that both policies have been coordinated for quite a long time within EU, affecting MSs' social policy. More specifically, coordination of Economic policies has been presented as covering Guidelines for economic policy which include requirements for public expenditure (Stability and Growth Pact), pension expenditure as part of public expenditure and recommendations for MSs. Coordination of Employment policies has been presented as including guidelines on that field and the influence of pension systems on labour market development.

Concluding, it is worth pointing out the interrelationship between the above-stated domains and the European initiatives undertaken so far, mainly leading to the following observations regarding the perspectives of possible interactions between those Coordination levels: "Coordination is an indispensable precondition for the implementation of workers' rights of free movement, whilst exchange of experience within the scope of coordination helps, amongst others, to find solutions for demographic challenges. Coordination of economic and employment policies is closely linked to coordination of social policy and there is a need for further action e.g. with regard to the systems of supplementary insurance".

Under his challenging thematic unit, Prof. Yves Jorens focussed on a critical appraisal of the changes "occurred" by reform in respect of the general principles of EU social security coordination, the "arteries of free movement", looked at from a comparative perspective, in an attempt to answer whether Community *acquis* developed substantially and how far, who asked for and who will benefit from the reform, who will bear the costs, shortly, whether the level and quality of redistributive justice between MSs has changed and if Community coordination is itself at crossroads.

The perspectives may be deemed optimistic if one looks closer at the emphasis put on enhancing loyal administrative cooperation by both the basic and the implementing Regulation. Simplification relies on a stronger principle of good administration, on high quality "best practices". Mutual respect of national diversity is "the condition *sine qua non* for the other principles of coordination". Smooth and uniform implementation, effective and efficient administration is "even more important than changing the legal context".

As stated, both Regulations set the context and framework for a much more innovative, continuously developing inter-institutional relationship, a constant link between the insured and the administration, based on mutual respect and raising-consciousness mechanisms regarding rights and duties; transitional periods and the concept of provisional application confirm national administration's commitment to guarantee each time the involvement of at least one legislation – MS, addressing the specific characteristics of a cross-border situation.

As the speaker stressed, "good international coordination presupposes good internal coordination". MSs usually reckon, either directly or indirectly, that any substantial reform

within their system, as an outcome of Community legislation or as a prerequisite for good implementation, constitutes an unbearable (economic) burden, an “illegitimate” or disproportionate “intervention” in a domain of exclusive national competence. It seems hard to understand the complex phrase whereby “the conditions for affiliation and entitlement to benefits should be defined by the legislation of the competent MS while respecting Community law” (explicitly stated now by a new recital). Electronic exchange of data presupposes the creation of structured archives on mobile persons’ professional and insurance career and their family situation within the Community, thus constituting a major issue from that perspective.

Considering the personal and material scope of Reg. 883/2004 as “would-be principles”, Prof. Jorens expressed his strong concern about the significant but pending social deficits. In particular, while the personal scope covers “all insured European citizens”, the issue still is that reform has brought a rather minimal substantial progress (Reg. 1408/71 applies to all insured, European citizens and third-country nationals, under the conditions laid down by Reg. 859/2003). As nationality remains a decisive requirement under the basic Regulation, the latter risks not to apply smoothly and in a cohesive way to literally all insured persons. Yet, the simple comprehensive and uniform description of the persons covered on the basis of a unique, social security criterion, is reform’s undeniable advantage. A prelude to its major aim to move away from specific, ad hoc and casuistic provisions towards a more general, uniform approach, in the light of the new, explicitly established as horizontal, general principles of Community coordination.

Regarding the material scope, modernisation missed adapting the express and exhaustive list of social security branches to the “dynamics of social security law” and brought instead a minimal alteration, an update with “paternity benefits” and “pre-retirement benefits”, the unique positive effect of the latter’s introduction being exportation of acquired cash benefits and retention of coverage for sickness and family benefits: beneficiaries of pre-retirement benefits can exercise in practice their right to free movement, without losing any social entitlement or risking any deterioration of their social coverage.

The exhaustive list of branches on the one hand and the explicit exclusion of advances of maintenance payments on the other are “deviating” from ECJ’s case-law criteria under the Treaty, advocating for the dynamic Community concept of social security. Another substantial omission detected with chain reactions is “health care and free movement of services”, in respect of which certain MSs withheld a reluctant position, inhibiting the Council to reach a unanimous agreement on fully integrating settled case-law under a really modern Community coordination.

In parallel, the way long-term care benefits have been “anonymously” included in the Sickness benefits Chapter, squeezed along with other type but same nature allowances, stemming mostly from the area of the “special non contributory benefits in cash” (ex Annex IIa entries), is being recorded as outstanding omission and thus potential derogation from transparency and legal certainty. Modernisation has not gone that far as to examine in depth the pros and cons of the creation of a totally new chapter, including genuine long-term care benefits, social allowances for disabled/handicapped persons and cash benefits for beneficiaries of invalidity or old-age pension, dependent on third persons’ care. Under certain MSs’ legislation the latter are fully coordinated as pension increases under a different set of rules, the Chapter on Pensions. That diverging implementation of Community coordination, built on national systems’ particularities, has not found a uniform response after modernisation.

The most essential impact of reform appears its introductory part, Title I of the basic Regulation, integrating all horizontal rules, the fundamental principles of coordination,

amongst which the general principle of equality is being further enhanced, aligned with the Court's wide jurisprudence: on the one hand, by waiving the requirement of residence and, on the other, by introducing the "new" explicit principle of assimilation of facts/events which, so long, has been merely implied by a variety of norms (general or special rules, different Titles/ Chapters) of secondary law.

Inserting the general principles as horizontal rules, was considered by the Commission as the most fruitful exercise aimed at eliminating many specific national Annex (XI) entries for the sake of transparency and legal certainty. Subordination of specific situations – peculiarities of national legislation to respective general rules or "umbrella" provisions, proved, yet, an overestimated initiative. MSs, taken by the fear of fraud or disproportionate burden tended to demand more fragmented entries or casuistic provisions either within the basic or the new implementing Regulation.

Although a well-known approach following the Court's interpretative "guidelines", assimilation of facts/events, as an autonomous principle, has raised unexpectedly many questions regarding its ad hoc implementation, its extent, dynamics, and interaction with the other fundamental principle of aggregation of periods, explicitly enshrined in Article 42 EC. Obviously, the speaker wondered whether modernisation was a fully conscious initiative, as would be the case if these horizontal principles could be implemented smoothly and uniformly. Instead, even the principle of aggregation of periods, after its long-lasting implementation, came as a concept closer under the microscope of interpretation (a series of "whereas"), as Community legislature was called to determine clear borderlines and its interaction with that of assimilation. Child-raising periods for the purposes of acquiring entitlement to an old-age pension is the unique explicitly stated situation where a special provision of the new implementing Regulation attempts to determine ad hoc the implementation of the principle of assimilation of facts.

Reflecting the degree of maturity of Community law, the basic principle of exportability, further extended, covers all cash benefits. ECJ's case-law has also been integrated into the special regime which constitutes the unique legitimate derogation from the said general principle. Under a special Chapter -single Article- Community legislature defines by means of simpler, more accurate, transparent and legally certain provisions the Community criteria and scope of the special non-contributory benefits in cash, which along with unemployment benefits are essentially "under attack from free movement rights of EU citizens". In the light of the Court's case-law, the scope of non exportability has been further limited (less Annex X national entries), whereby more and more "new" social measures are deemed as having a close link with one of the explicitly mentioned social security branches/risks (falling under their scope as supplementary sickness, family or unemployment benefits). Moreover, entitlements within the territoriality principle are "supported" by the simultaneous application, where applicable, of the two other general principles, the aggregation of periods and the assimilation of facts/events.

Lastly, the speaker referred to the new dilemmas in the context of new conflict rules on the applicable legislation, where no radical change has actually taken place, although that general principle has been founded on better structured and more coherent provisions. Yet, new perspectives such as the forthcoming attack on the principle of the unicity of the legislation applicable and the direct application of the Treaty in terms of fundamental principles and freedoms or the reinforcement of the European citizenship status, are already raising questions of incompatibility of the coordination Regulation.

Concluding, Prof. Jorens summed up the whole endeavour of modernisation – simplification as “elaboration of existing principles in a new way” and raised the question of whether we are almost up to a new Regulation.

In respect of the crucial question of information and raising consciousness on EU coordination rules, trESS has been pointed out as an exceptional model of disseminating knowledge while following actual developments, building on expertise and elaborating on national as well as European Annual Reports.

Prof. Paul Schoukens, presented a critical overview, an outline of the changes brought along with modernisation in the structure and philosophy of one of the major coordination principle, that of the unicity of the applicable legislation. By establishing uniform general and special rules of both an exclusive and overriding effect, for determining the legislation applicable of a single MS only at a time, Community coordination is expected to resolve legal conflicts so that neither double protection nor loopholes in protection occur.

The principle whereby, economically active persons are only subject to the legislation of the MS on the territory of which they are carrying out their activity (the “lex loci laboris” principle) whilst economically non active persons are exclusively subject to the legislation of the State of their residence (the “lex loci domicilii” principle), has always been deemed as best meeting the need for clarity and legal certainty, both for the persons concerned and administrations. However, Reg. 1408/71 contains many specific provisions deviating from the general rule, as is the case for posting, persons exercising simultaneous activities in more MSs, the personnel in international transport, the employed of diplomatic missions and the personnel of the European Community.

The verdict that exceptions to the general principle no longer appear justifiable was one of the most significant parameters of simplification and modernisation, determining the future architecture of the new choice rules. The Council reached political agreement on reinforcing the general principles governing the single legislation applicable for mobile active and non-active insured persons, at the same time undertaking to draw up specific and well-balanced rules in the event of posting or in case of pursuit of simultaneous activities in several MSs.

However, the speaker held that major issues under the existing Regulation still remain pending after the latter’s reform, since the new Title II provisions of Reg. 883/2004 and its forthcoming implementing Regulation, do not answer some application problems already mentioned at the 1998 national Seminars which paved the way of reform (see D. Pieters, Final overall Report).

In other words, the new rules introduce new concepts, conditioning the application of some designation rules (e.g. substantial activities in case of simultaneous performance of professional activities), whereby the established criteria are either vague or too descriptive: although quantifying the significance of the exercised professional activities (the proportion of the activity pursued in a MS can never be substantial if it is less than 25% of all activities pursued in terms of turnover, working time or remuneration or income from work) those concepts contain no indication of any such criteria’s priority or decisive role. Thus, these concepts, especially the choice between them, leave ample space for diverging interpretation of the “value” of each of those criteria and for burdensome administrative procedures blocking the great number of different actors involved.

Before answering the question of whether the double purpose of simplification and modernisation has been attained, the speaker summarised as more significant changes occurred: the general application of the residence principle, as the alternative to indicate the competent country for non active persons, the extension of the posting period to two years, the sharpening of

posting conditions by incorporating ECJ's case-law and the essential adaptation of the coordination rules for simultaneous performance of activities in different countries (unconditional priority to the employed activity instead of double affiliation, in case of mixed activities, additional criteria for similar activities pursued in several countries -exercise of substantial activities in the country of residence-, deletion of specific provisions for international transport workers).

In order to check how far those changes have altered the economy and philosophy of Title II, Prof. Schoukens juxtaposed some of the fundamental issues raised in the context of the above-stated national Seminars:

-The evolution of the nature of social security systems as opposed to the further strengthened basic designation principle, covering even mixed-type activities:

The shift towards an increasing number of universal risks and benefits is incoherently translated in the actual coordination Regulation. Opposite to its past logic (self-evident principle), Community legislator should have chosen a clear division of designation rules based upon the nature of schemes, i.e. income replacement benefits on the one hand, and cost compensating benefits on the other hand. The schemes dealing with income replacement would continue to be coordinated as at present, mainly on the basis of the *lex loci laboris* principle, whereas the schemes dealing with cost compensation would be coordinated on the basis of the residence principle (*lex loci domicilii*). This distinction would be made for all benefits, both in cash and in kind, as well as for the corresponding contributions.

-Posting as an exception or as a specification of the *lex loci laboris* principle:

The prolongation of the posting period to two years may be deemed as moving from the logic underpinning the posting construction, progressively entering the logic of the right to free establishment or establishing a special rule for new forms of mobility. The future legal consequence would be a search for an "à la carte" designation of the competent state, at the employer's exclusive choice. Such an evolution could lead the Court to change its policy of abstinence from system comparison and start comparing outcomes in connection with the application of the determination rules. Lastly, attention should be paid to diverging posting periods and conditions across social security law, tax law and labour law, hampering considerably in practice the movement of workers in Europe.

-Differentiating posting from specific rules on simultaneous professional activities:

The problem mainly rises in complex situations, which cannot benefit from settled jurisprudence, where the employed or self-employed person has regularly to be active for short periods in various other MSs, which are however not always planned in advance, or where it turns out from the outset that one will work regularly abroad during a period longer than one year. The situation becomes particularly problematic for the international transport workers, falling in the future under the scope of the rules for simultaneous performance of activities and no longer to a special rules featuring their *sui generis* situation.

-What is a tax and what is a social security contribution for the application of the designation rules:

A modern Regulation should pay more attention to the financing side of Community coordination, as MSs have increased recourse to taxation and "alternative techniques" to finance social protection. The question inevitably arises on whether those levies should be treated as taxes or as contributions for the purposes of smoothly applying Title II rules, otherwise, to what extent those levies have a direct and sufficiently relevant link to the legislation governing the social security branches falling under the scope of Community coordination or whether international fiscal law is exclusively applicable.

Looking at the administrative side of the new Regulation, we notice too complicated procedures of communication and data or multiple/continuous information exchange between all parties involved. As legal coherence prevails practical concerns, in the future both the sending and the host MS risk not being in a position to exercise an effective and efficient control over the data exchanged, to follow the loyal and flexible processes of cooperation, in order to find prompt solutions within the time span set out by the implementing Regulation for designating correctly the applicable legislation well in advance or following the provisional commitment of the legislation of the MS of residence.

Otherwise stated, the coordination mechanism as such needs an efficient administrative apparatus, more than simply shifting from the existing paper forms into “electronic” archives and paths to communicate data “electronically”.

The authors’ previous proposals for the introduction of a European Social Insurance Card, on which one could read the whole professional/insurance career of the holder, remains more than valid. Lastly, the speaker stated that all institutions involved need to speed up procedures at various levels, in order to fulfil remaining activities before the new Lisbon Treaty enters into force, since the new decision making procedures and rules may change the whole state of play, putting even the future of Community coordination at risk.

Prof. Franz Marhold attempted a general review of Reg. 883/2004 compared to the actual status of Reg. 1408/71 from the perspective of the Chapter on Sickness benefits, taking into account latest developments under the draft proposal for a Directive on the application of patients’ rights in cross-border healthcare. Despite its third recital, simplification and/or modernisation brought by Reg. 883/2004 have been only basic, the role of Annexes, already increased from 8 to 11, remaining determinant. The legal status of EU citizens may have improved but supervision of the new situation becomes more difficult. The personal scope of certain provisions is evident only by having recourse to Annexes, while, although more fair, the new rules on distribution of costs are yet more complex. Due to partial integration, ECJ’s jurisprudence is still applicable in parallel to new Regulation.

Prof. Marhold declared his duty to complain for the growing complexity of the new rules, because “that situation will last and we will have to live with it”. Coordination under Sickness benefits corresponds to the perplexed attempt to regulate already complicated situations. Yet, conflicts arising from non-transparent situations constitute simplification’s boundaries, its very end. Basic issues of coordination in the field of sickness insurance are left pending: reform has failed to shape a structured relationship with primary law, free provision of services and the European economic law in that area. Reg. 883/2004 continues to leave patients’ mobility on Court’s shoulders, ignores the evolution of legislation ever since Kohll and Decker, and does not pay attention to the financial dimensions of healthcare provisions. On the other hand, an extremely complicated article (34) responds to the need for providing priority rules to regulate conflicts of law regarding long term care provision, without having previously defined the range of benefits it covers.

As really new under Reg. 883/2004 the speaker stated the introduction of two groups of provisions, the first concerning extended rights for frontier workers’ family members and for retired frontier workers (workers who retire and pensioners) and family members, and the second providing for a new status of pensioners’ protection: alignment of rights for active and pensioners during temporary stay, calculation of pensioners’ contributions on the basis of assimilation, the inclusion of non active persons as a horizontal rule. The common provisions

guarantee transparency as regards priority rules and provide for preventing overlapping of long-term care benefits. Yet, the quality and extent to which the intended Community level of protection is finally achieved, is left on MSs' generosity, bilateral initiatives and respective Annex entries and on a high level of structured cooperation. Consequently, Europeanisation of Community coordination is far from being achieved, since we are rather confronted with provisions reflecting mostly individual national positions. Concluding, the extent of those new regulations does not exceed a mere renovation of Reg. 1408/71, the usual adaptation to ECJ's jurisprudence, which leads to facilitating administrative procedures and cooperation.

Finally, looking at the basic Regulation from the Treaty's perspective, Prof. Marhold maintained that what remains open regarding patients' mobility is the relationship between cross-border reimbursement of costs and the provision of benefits in kind (by the institution of the place of stay on the competent institution's behalf), i.e. the relationship between the guarantees deriving from the freedom to provide services under the Treaty and Community coordination's regime. The Commission's Proposal renders that relationship even more complicated, because from now on cross-border healthcare will rely on three legal bases: the Treaty in respect of reimbursement, the Regulation for the provision of healthcare and a Directive for the application of patients' rights. Obviously, that Proposal risks producing conflicts in relation to primary law and the Regulation, situation which will be to the detriment of that very Directive.

Prof. Hervig Verschuere, focussed his analysis on the highly interesting, yet controversial, triangular relationship between three types of quasi mechanisms or regimes co-existing under the Treaty's traditional Community coordination covering essentially the same risks. Those totally different approaches, adopted under Reg. 883/2004, are meant to coordinate "legislation" in case of old age, incapacity to work or invalidity either under the classic coordination mechanism for old-age pensions or invalidity benefits/pensions, in the light of the general principles of Community coordination, or under the restrictive and limited in scope regime of special non-contributory benefits, as the great majority of those benefits actually aim at guaranteeing financial support to pensioners and to invalid or disabled persons. In parallel and within the classic approach, a special "sub-system" of specific and technical provisions established in respect of funded pension schemes – non-statutory supplementary/occupational pension schemes falling under the Regulation's material scope – and the absence of an equivalent mechanism for the majority of schemes excluded in principle, offer the most comprehensive picture of the mobile's overall protection in the domain of pensions. It is still pending, however, the issue of the compatibility of such a deviating sub-mechanism with the objectives of the Treaty on free movement – not less advantageous for mobile persons, and its capacity to address the coordination problems which are typical to such funded schemes. The Council having failed to adopt even Commission's amended proposal for a Directive on minimum requirements for enhancing worker mobility by improving the acquisition and preservation of supplementary pension rights, left an important lacuna in European legislation covering persons moving within the EU; on the other, the extension of the material scope to pre-retirement benefits had a too limited impact [just two countries' legal schemes concerned], actually covering beneficiaries moving within the EU with sickness and/or family benefits.

The core provisions of the new classic coordination regime on invalidity and old-age pensions, rules on the acquisition of the right and the more technical ones on the calculation of the amount and the award of benefits, have actually reproduced the major 1992 reform of Reg. 1408/71; the most remarkable change being their extended scope and the application of the

general horizontal principles of coordination, in particular, the new, explicitly stated principle of assimilation of facts or events, the smooth implementation of which remains to be tested in practice, since neither the basic Regulation's whereas nor the implementing Regulation's provisions guarantee administrations' compliance with ECJ's interpretation.

In respect of the special non-contributory benefits, it is argued that MSs are forced to abandon their territorial approach on the scope of national welfare systems and to export benefits which are not closely linked to the socio-economic situation of their country, as loss of benefits following change of place of residence is considered an obstacle to free movement. Community coordination's special rules provide, as a counterbalance, for the payment of non-exportable, non-contributory minimum benefits by the MS of (new) residence. Yet, there is no easy and uniform way to determine the right boundaries of solidarity a mobile person each time belongs to.

The speaker concludes his interesting comparative presentation, pointing out the reason lying behind the two separate coordination regimes which are established for pensions, explaining also how the solidarity principle underpinning the EU social security coordination functions under each one of them; the first is based on the traditional principle of exportability, where solidarity is grounded on having contributed, financially and economically, to the society of the MS of (past) employment, and the second is built on residence, traditionally the ground for benefits aimed at guaranteeing the old and invalid a minimum level of subsistence, in solidarity with all those residing in the host MS, regardless of their previous employment records and/or their nationality.

Prof. Frans Pennings, reviewing the outcome of the negotiations on the modernization of Reg. 1408/71 in respect of unemployment benefits, put an emphasis on the special nature of such benefits in the context of Community coordination, which has prejudiced the state of play also under the new Reg. 883/2004. In fact, the special rules on the aggregation of periods, the derogation from the principle of exportability of benefits and the deviations from the *lex loci laboris* principle (designating the applicable legislation) for frontier and non-frontier workers not residing in the competent MS have inevitably resulted in a number of too complicated provisions. The Commission's initial 1992 Proposal, was indeed a step towards simplification, since the competent MS remained in all cases responsible to pay the benefits, and modernization as it involved division of tasks between the competent (payment of benefits) and the MS of residence (supervision of obligations). On the opposite, the Council, taking a distance from the said Proposal as too radical or too complicated to be implemented, maintained most of the key rules as well as corresponding problems of the old mechanism. In the speaker's view, although the practice of unemployment benefits' administration may explain those benefits' special position, still the question remains whether the rights and obligations (the division of tasks) in the new Regulation are balanced. Moreover, the changes following that type of modernization seem made to the benefit of the MSs rather than in the interests of the unemployed: the new reimbursement rules for the residence States of frontier workers and payment rules in case of export of benefits where persons are seek a job in another Member State are mentioned as representative examples of measures for MSs' sake. Alongside a few improvements for frontier workers, the speaker argues that the determination of the legislation of the place of residence as applicable is a political choice than an unavoidable rule. As sometimes the rules adopted may have a negative impact, it remains unclear why a frontier worker is not entitled to a supplement as a compensation for

the different levels of benefit existing under respective national schemes. Although, taking into account differences in duration, it is acknowledged that the award of such a differential amount could lead to unease situations, it is still argued that the payment of a supplement, following the case in respect of family benefits, should be deemed fully compatible with the system of coordination and practical problems should not have upset such an initiative.

On the other hand, it is to be regretted that the Council has not paid due attention to reintegration measures, the best way to realize modernisation. Procedures gradually improving cross-border supervision and helping jobseekers to enter any labour force within the Community could be tried on the basis of bilateral agreements – best practices between neighbouring MSs. Such experiments could “deviate” from the legislation applicable as a rule, while the competent MS when applying its obligations on the unemployed should invoke the principle of assimilation (of facts or events) in order to make it easier for the unemployed to satisfy the conditions (e.g. one job application a week) of the latter’s legislation, i.e. to prove that he/she remains available to the employment services of the competent MS. In the same spirit, also the period provided for the exportation of benefits (three to six months) should have been possible to exceed six months where the unemployed takes part in a special programme for reintegration of another MS.

Concluding, the speaker made a point of the political dimensions of Community coordination’s rules on unemployment benefits, whereby the said chapter should systematically serve the ultimate objective of both the European employment strategy and the right of free movement as laid down in the Treaty, in other words, the gradual growth of a pan European labour market. Unfortunately, lack of trust is reflected on and, thus, explains several of the coordination rules on unemployment benefits. That predominant feeling of mistrust could not be appeased either by the exhaustive provisions fostering loyal cooperation between all parties involved. As the speaker concludes “most MSs feared that the employment services of the State of residence would not at all be motivated to find a job for workers for whom they were not financially responsible”.

In respect of the special rules governing family benefits, Prof. Stamatia Devetzi pointed out the exceptionally interesting and in constant evolution nature of that branch, which always raises interesting questions in European law. The Court’s excessive settled case-law has expanded the scope of those benefits, which the Community legislature has from the very beginning included within the concepts deserving a Community definition. The Community criteria progressively developed by jurisprudence, made it possible for respective provisions of the Reg. 1408/71 to follow major reforms in MSs’ legislation, covering, thus, under their broad scope, as cases with cross-border elements, various scenarios applying to insured persons claiming family benefits. The new provisions of Reg. 883/2004 on family benefits, under a more comprehensive definition, reflect both simplification and modernization: a unique chapter on family benefits for active persons’ and pensioners’ children, for orphans and the non active, determines the applicable legislation in combination with a series of most important rules of priority in case of overlapping of rights under both the legislation of the competent as well as that of the Member State of residence – the second by priority MS being obliged to award a differential supplement. Apart from this unified – horizontal approach, shorter and more transparent provisions guarantee simplification. Thus a two-fold goal is being achieved: to bring together under uniform rules different kinds of family benefits and to regulate priority between the MSs involved in order to avoid overlapping of benefits on the one hand and/or to guarantee continuity and legal certainty in the protection of the persons concerned, on the

other. The only conflict with ECJ rulings is the express exception from the new, comprehensive definition of the said concept, of advances of maintenance payments, considered as obligations for compensation under family law rather than direct benefits in favour of families.

The speaker, in the light of recent case-law, made a very interesting proposal on the way subtle questions of interpretation could or should be dealt with in the future: trying to imagine how the ECJ would have reacted in the context of Reg. 883/2004, stated that the application of the new rules on family benefits in conjunction with the new, broader personal scope and the conflict of law rules (general provisions on the applicable legislation), can bring up more changes than expected and have consequences for national legislation going beyond Community legislature's political commitment. Although her viewpoint might seem quite provocative, she reiterated that the MS of residence of the children must always check out if there is a right to family benefits according to its law (regardless of whether or not it is the competent State for the parents), as the Court (in *Bosmann*) has applied a well known from the pensions' chapter principle, that benefit rights acquired by virtue of national law alone must in no way be infringed on the basis of the Regulation (the "Petroni" principle). Thus, leaving apart the jurisprudential approach on the "exclusive effect" of the rules on the applicable legislation -the unicity of the latter- the Court recently emphasised that the non-competent MS should not be precluded from being able to grant a benefit to one of its residents, since the possibility of such a grant arises from its legislation. The systematic implementation of those combined principles may prove quite expensive for some MSs or might raise the politically subtle issue of the "fair division of costs".