YVES JORENS[*]

Does Migration Put the European Coordination Regulations on Social Security under Pressure?

Introduction

I had the pleasure to meet Professor Czúcz already 25 years ago, when I participated as a young assistant in the international seminar for comparative labour and social security law in Szeged. At this seminar, my interest in the social security situation of migrant workers grew and was encouraged. That year, we started a more intensive collaboration in the form of different European projects (Tempus-Consensus programmes). These projects prepared the administrations of Hungary to get acquainted with the implementation of the European legislation dealing with the social security of migrant workers, more in particular at that moment Regulation 1408/71 and 574/72, now Regulations 883/2004 and 987/2009, also called the Coordination Regulations. For every new Member State the introduction of a new European framework such as the Coordination Regulations posed many challenges, not at least due to the increasing number of cases which these Member States were confronted with, but also due to the different interpretations of the concepts and the different rationale behind these Regulations, i.e. the promotion of the free movement of workers.

When Professor Czúcz went to the Hungarian constitutional court and later to the General Court of the European Union, our collaboration with his home university in Szeged continued, in particular with the current Dean of the university's faculty of law and social security colleague, Professor József Hajdú.

When looking for a topic for a contribution in this book in honour of professor Czúcz, I decided to go for a topic that combines two of Professor Czúcz's main interests, i.e. the social protection of migrant workers, and the work of the judicial pillar. In particular I would like to demonstrate how the European social security Regulations encounter certain key challenges through the influence of a dynamic interpretation by the Court of Justice of the European Union of the right to migration, one of the fundamental rights and central pillars of the European structure.[1]

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[*] Professor of (European) Social Security Law – Ghent University; Director of IRIS | international research institute on social fraud – Faculty of Law, Ghent University, Belgium

[1] SEE ALSO JORENS, Y (ED.)., SPIEGEL, B. (ED.), FILLON, J.-C., STRBAN, G.,: '*Think Thank report 2013, Key challenges for the social security coordination Regulations in the perspective of 2020'*, European Commission, DG Employment, Social Affairs and Equal Opportunities, Project DG EMPL/B/4-VC/2012/1110, Brussels, 2012. p.64.

1. Migration: the cornerstone of the European structure

The free movement of persons is one of the fundamental rights and central pillars of the European structure. It is also considered one of the EU's most positive achievements. However, the principle of free movement of workers underwent a process of deepening and widening, continuously expanding its scope. The migration pattern has clearly changed.[2] The migrant worker of 60 years ago is no longer the migrant worker of today. One of the most important changes which have taken place concerns the nature of migration itself, with new patterns of work, including increasingly flexible labour markets. All these evolutions will challenge the Coordination Regulations. The Regulations were set up at a time when workers had a full-time, permanent employment relationship, and the migrant worker was someone – usually a male – who moved to his country of work (with or without his family) and at the end of his career returned to his country of origin. People in general migrated for better working opportunities and conditions, including higher wages. For example, a typical migrant working in the coal mines moved for a long period to another state, often only returning to his country of origin when reaching retirement age. This type of migrant worker in particular focused on fully integrating into the social security systems of the state of his new workplace. When migrating at a later age, the biggest problems these persons were confronted with were related to the possible export of retirement benefits. Today there is greater diversity, with a range of different types of migrant workers, including, for example, cross-border frontier workers, temporary migrant workers and pan-European management personnel, contributing to a growing pan-European labour market. Further globalisation and the creation of a European internal market has led to a growing number of employees being sent out by their employer to perform temporary activities in another Member State. People commute weekly or daily to other States and workplaces. The career planning of a worker today often involves several consecutive international assignments (for a short or longer term), often within a network of companies, throughout different Member States. It is not so much that the permanent move has become the most important trend, but rather that the intra- and interorganisational move has.

In particular, migrant workers that are often working abroad for short periods are more in favour of further belonging to their social security system of origin and less of being integrated in their country of short employment. Some of these migration patterns are confirmed and strengthened by developments that are expected to characterise migration in the future. Migrant worker policies are apparently more and more focused on attracting highly-skilled or educated migrants. Apart from attracting highly skilled migrants, also circular migration is seen as an answer to an existing need to fill seasonal or other temporary jobs. But, it is also regarded as a possible way to replace the brain drain with brain circulation, where typically previous migrant diasporas will often return to their former country of origin for limited periods and will be further engaged in its

[2] SEE ALSO JORENS, Y.: *Towards new rules for the determination of the applicable legislation?* In: Y. Jorens (Ed.), *50 years of social security coordination: past, present, future*, Luxembourg, Publications Office of the European Union, 2010. pp. 170–171.

economic and social life. Increasing temporary geographical mobility by temporary limited migration patterns will characterise European migration.

But not only the migration patterns have changed, also the freedom of movement – the fundamental background principle for the Coordination Regulations – has seen some important changes. The relationship between the free movement of workers as an instrument and the economic concern of the European Union has changed into a growing Union of citizens, where the economic perspective is more and more being replaced by a wider idea of human rights. Initially designed to address shortages of labour, the freedom of workers not only contributed to the emergence of a new wide labour market, but has also become a fundamental individual right. An individual, rights-based perspective replaced the initial labour market perspective. Europe has become an area where every citizen, regardless of his or her professional status, may use his or her right to move freely, and this also regardless of the objective, whether it is for better working conditions, for the climate or for one's self-satisfaction. The economic dimension has moved to the background, in order to establish a legal order consistent with the idea of social justice and people's expectations of European integration, as can be understood from the general objectives of the Treaties. 'The creation of citizenship of the Union, with the corollary of freedom of movement for citizens throughout the territory of the Member States, represents a considerable qualitative step forward in that it separates that freedom from its functional or instrumental elements (the link with an economic activity or attainment of the internal market) and raises it to the level of a genuinely independent right inherent in the political status of the citizens of the Union'.[3] This creation of European Union citizenship, also as interpreted by the Court of Justice of the European Union (CJEU),[4] has established a new set of rights for economically inactive people which had until then been almost ignored under European Union law and have given them the status of active claimants of social welfare provision, even when they have not been or are not exercising an economic activity.[5] A new notion of European solidarity has been created, now also embedding the free movement of workers into a wider EU social policy and into the framework of the Charter of Fundamental Rights of the European Union, which all leads to a new dimension in the case law of the CJEU. Growing possibilities offered by EU law to patients to look for a better medical treatment, but also mobility resulting from tourism and cheaper travel options will contribute to a continued modification of the traditional labour-related migration. The migration of economically non-active persons cannot exclude that situations might arise where free movement will be chiefly inspired by the wish to improve one's social security position by acquiring benefits. Differences between social security systems, certainly in times of economic crises, might be seen as an

[3] Advocate General Ruiz-Jarabo Colomer, para. 82 of the opinion delivered in Morgan (Joined Cases C-11/06 and C-12/06 Morgan [2007] ECR, 9161.

[4] Case C-85/96 Martinez Sala [1998] ECR 2691; Case C-184/99 Grzelczyk [2001] ECR 6193; Case C-413/99 Baumbast [2002] ECR 7091; Case C-138/02 Collins [2004] ECR 2703; Case C-456/02 Trojani [2004] ECR 7573; Case C-138/02 Collins [2004] ECR 2703; Case C-209/03 Bidar [2005] ECR 2119; Case C-192/05 Tas-Hagen [2006] ECR I- 10451; Case C-406/04 De Cuyper [2006] ECR 6947.

[5] E. SPAVENTA: *Free movement of persons in the European Union. Barriers to movement in their constitutional context*, The Hague, Kluwer Law International, 2007. pp. 114–115.

additional incentive for people to (ab)use their right to free movement to profit from and to claim better welfare benefits.

This last new kind of migration may not be underestimated. Especially since the last rounds of accession, there are remarkable gaps between the living standards of certain Member States. This is due to different wage levels, which also result in different benefit levels. Some of these differences are deepened by the impact of the economic situation. The existing differences in wage and benefit levels could create tensions. New ways of gathering information, but also facilitations of 'real' movement between Member States (no more border controls within the Schengen area, cheap flights, new generations who are used to travelling *etc*) lead to a better knowledge of the social security schemes in other Member States. Consequently, European citizens can easily compare benefit levels. Citizens of Member States with a lower level of benefits might envy citizens of Member States with much higher benefit levels and try to become entitled to these higher benefits in the latter States just by travelling to these countries.

Especially in the past few years, the fear for welfare tourism has grown considerably. 'Welfare tourism' is often a political term that carries negative connotations. It should be understood as an umbrella term, grouping both lawful and unlawful claims to welfare benefits. While fraud and abuse of law are the prime categories of illicit behaviour, amongst the lawful claims one can further distinguish the desirable from the undesirable ones. In addition, while benefit tourism is a phenomenon most often associated to economically non-active persons, it should not be limited to this category of persons, as benefit tourism is practiced by non-active as well as economically active persons. Not that this is completely new. Every step towards genuine free movement rights and equal treatment rights has yielded accusations of welfare tourism. Initially, the fear of social tourism was 'hidden'. As free movement concerned only (formerly) economically active persons and their family members, the authors of the EEC Treaty and other European actors were confident that they had allayed the problem. The first step in the creation of a principle of free movement of inactive citizens was taken in the early 1970s by the CJEU when it broadened the notion of 'worker'.[6] Consequently, concerns about welfare tourism came to the fore. The legislative history of the free movement rights of inactive persons is equally imbued with tales of benefit tourism. From the beginning on the Member States were allowed to have these citizens demonstrate that they had sufficient resources at their disposal to provide for their own needs and the dependent members of their family.[7] This proviso, which was the forerunner of the three 1990 Directives[8] and the 2004 Residence Directive,[9] was clearly inspired by the fear of social tourism. A migrant lost his or her residence rights as soon as he or she did not fulfil one of those conditions, for example by

[6] SEE ALSO VAN OVERMEIREN, F. (ED), O'BRIEN, C., SPAVENTA, E., JORENS, Y., and SCHULTE, B.: *'Analytical Report 2014. The Notions Of Obstacle And Discrimination Under EU Law On Free Movement Of Workers'*. FreSsco, Contract No. VC/2013/0300, European Commission, December 2014. p. 48

[7] Art 4(2) of the 1979 Proposal for a Directive on a right of residence for nationals of Member States in the territory of another Member State.

[8] The rights of economically non-active people were elaborated in the three residence Directives (90/364/EEC on the rights of residents; 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity; and 93/96/EEC on the right of residence for students). These three Directives have now been replaced by the general Residence Directive (2004/38/EC).

[9] Residence Directive 2004/38.

having recourse to the social assistance system of the host Member State.[10] Those three Directives were replaced by Directive 2004/38, which perpetuated some limits, dropped others and added some new ones, but this leading principle remained. Residence rights are incremental: between three months and five years economically non-active persons should have sufficient resources for themselves and their family members so that they do not become a burden on the social assistance system of the host Member State during this period and have comprehensive sickness insurance cover.

Again, welfare tourism was on many a mind, especially since the Directive was adopted two days before the 2004 enlargement. The accusation of social tourism is a very sensitive issue, which should be observed and evaluated with great caution. It does question the integrity of national social security schemes and its underlying solidarity. Many will argue that there is no real proof of a welfare tourism. As this concept lacks real scientific data, we may not be encouraged to ignore the concerns expressed in public opinion, certainly as public opinion considers social tourism as a real threat, perhaps irrespective of the numbers involved. Most often, richer Member States fear that they have to subsidise benefit tourism. For example, tax-financed benefits may have to be granted also to persons moving from another Member State who have never paid taxes or paid only an insufficient amount of taxes in the Member State which now has to grant the benefits. Concerns are also raised about situations in which a new Member State of residence should grant benefits without prior and sufficiently close links to that Member State, which could create tensions on the side of the richer Member States. The fear exists that if the number of free riders were to jeopardise the funding of their welfare schemes, the richer Member States will either have to raise taxes, or lower benefits, which could trigger a race to the bottom. It is indeed unclear whether such tourism does and will materialise on such a scale that it is sufficient to trigger a race to the bottom, not least as most EU citizens have little awareness of their rights and the mobility of the less well-off in Europe is rather low. There might indeed be some indications that the actual number of people waiting for welfare benefits is fairly low,[11] especially since social, cultural and linguistic obstacles are often natural limits to welfare tourism. On the other hand, it may not be ignored that the race to the bottom theory is not based on the assumption that social tourism actually exists, but most often on the mere fear that it might occur. Lowering benefits might be seen as a preventive act, as there is always a possibility that the fear of movement may prevent Member States from increasing the benefits. Even if there might not really be a race to the bottom, it might hamper a race to the top.[12]

[10] Art 3 of Dir 90/364; Art 3 of Dir 90/365; Art 4 of Dir 93/96.

[11] See e.g. the Study submitted by ICF GHK in association with Milieu Ltd, 'A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence', DG Employment, Social Affairs and Inclusion via DG Justice Framework Contract, Brussels, 2013. p. 282.

[12] A.P. VAN DER MEI: *'Free Movement of Persons within the European Community: Cross-border Access to Public Benefits'*, 2003. p. 208.

2. The Coordination Regulations challenged

The case law of the CJEU on free movement and European citizenship is clearly further developing into the direction where the Treaty not only condemns discrimination, but also non-discriminatory restrictions to the free movement of workers. The CJEU has emphasised that the Coordination Regulations are no longer the only means for people to obtain social security benefits and rights. This new approach will challenge the Coordination Regulations and may have an impact that goes much further than a merely cosmetic adaptation. The introduction of Union Citizenship has in this respect led to an expansionist approach and to new techniques enhancing the rights of Union citizens on the basis of primary Treaty provisions, apart from the existing secondary legislation framework, written down in the European Coordination Regulations.[13]

All these rules will have to be tested against the background of EU primary law. The new conformity test will imply that every rule is judged against the general test of free movement. This means that it is checked whether the application of the rule concerned constitutes an impediment whereas no objective justification can be found, and to what extent the principle of proportionality is respected. Even when finding an objective justification might still be easy, much more complicated will it become to pass the proportionality test. Member States will be confronted with a new, often political, task, i.e. to find the concrete justification in the case concerned assessed in the light of the proportionality test. European citizens will increasingly question national legislations as well as the European Coordination Regulations and confront these with the fundamental principles of EU law and its proportionality test. Migrant persons are witnessing their welfare rights opening up and being extended, as the Coordination Regulations are constituting the floor of their European rights, and as direct reliance on EU primary law offers a new ceiling.

The review of proportionality performed by the CJEU could be regarded as posing a challenge to the European legislature's autonomy, competencies and powers.[14] National rules in conformity with the Coordination Regulations, as well as the social security Coordination Regulations themselves, will increasingly be confronted with the test of conformity with the fundamental principles of EU law.[15] The ultimate framework is no longer the Regulations, but the conformity with free movement.

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[13] E. SPAVENTA, E:. *The impact of articles 12, 18, 39 and 43 of the EC Treaty on the coordination of social security systems.* In Y. Jorens (Ed.), *50 years of social security coordination: past, present, future*, Luxembourg, Publications Office of the European Union, 2010. p. 126.

[14] See also S. BESSON and A. UTZINGER: *'Introduction: Future challenges of European citizenship – Facing a wide-open Pandora's Box'.* European Law Journal 2007. p. 575.; and M. COUCHEIR (ed.), M. SAKSLIN (ed.), S. GIUBBONI, D. MARTINSEN and *H. Verschueren: 'Think Tank Report 2008: The relationship and interaction between the coordination Regulations and Directive 2004/38/EC – Training and reporting on European social security'*, Project DG EMPL/E/3 – VC/2007/0188, Brussels, 2008. p. 37.

[15] See justification 57 of the conclusions of Advocate General Kokott in Case C-287/05 Hendrix [2007] ECR 6909: 'Thus, a restriction on the fundamental freedoms must be justified by overriding reasons in the general interest even where that restriction derives from a Community regulation or a national measure which is in accordance with secondary law. Admittedly, Community and national legislatures enjoy a discretion when adopting measures in the general interest which affect the fundamental freedoms. The CJ retains the right, however, to examine whether legislatures have exceeded the scope of that discretion and infringed thereby the fundamental freedoms.'

This has led to a boundary approach, according to which the coordination provisions are not conclusive, even when such regime is compatible with the Treaty and allows European citizens to open a new right to welfare rights, based on the primary provisions of EU law. This new opening up of social security rights has resulted in new boundaries of European solidarity, based on the certainty that the claimant has a sufficient link to the Member State's labour market, social security system or society as a whole. The CJEU makes clear that the possible indicators are almost open-ended and that the threshold may not be that high. The real link is a theory of exclusion on the one hand, excluding those people whose links with the Member State concerned are too loose. On the other hand, it also is an instrument of inclusion. Member States will be forced to welcome those persons who have a sufficient link. It is certainly not to be excluded that this theory of a real link will further percolate into the system of the Regulations and will question the current, long-existing basic parameters of the existing Coordination Regulations. [16]

Granting social security or other benefits therefore depends on the question whether or not a person has a sufficiently close link to the Member State concerned. Formulated differently, the extent to which a Union citizen might claim welfare provision in the host State beyond what is allowed by secondary legislation, is constrained by the possibility for the Member States to justify imposing residence criteria to ensure that claimants have established a real link with the host community. This is certainly of great importance for economically inactive persons. It therefore came as no surprise that the CJEU recently had to deal with some questions whether benefits should be granted to persons without a real prior integration into a new Member State of residence and who could be considered as a social tourist. Crucial is the question whether the condition under Residence Directive 2004/38 that one has sufficient resources can be fulfilled through the application of EU law, of Regulation 883/2004 and of the citizenship provisions of the TFEU in particular. Can a person satisfy the condition of having 'sufficient resources' by claiming special non-contributory benefits in the Member State of residence? A favourable answer would contribute to the deepening of social citizenship, at the cost of a risk of benefit tourism.

In the judgment of the *Brey* case[17] and the *Dano* case[18] the CJEU found a balance between on the one hand the right to free movement, in particular also for non-active persons, and on the other hand the concerns for Member States to protect their welfare system from social tourists and to be able to refuse the benefits to those persons without prior and sufficiently close links to that Member State. In these cases, the CJEU draws a line which allows Member States to restrict minimum benefits for citizens of other EU Member States to those which do not become an unreasonable burden to the social assistance scheme of the Member State of residence. In the *Brey* case, the CJEU was of the opinion that national authorities cannot conclude that a person has become an unreasonable burden without first carrying out an overall assessment of the specific burden which granting that benefit would place on the national social assistance system as

[16] See also JORENS, Y (ed.)., SPIEGEL, B. (ed.), FILLON, J.-C., STRBAN, G.: *'Think Thank report 2013, Key challenges for the social security coordination Regulations in the perspective of 2020',* European Commission, DG Employment, Social Affairs and Equal Opportunities, Project DG EMPL/B/4-VC/2012/1110, Brussels, 2012. pp.40–41.

[17] Case C-140/12.

[18] Case C-333/18.

a whole. This should be done not least by also referring to the person's individual situation (by taking into account the amount and the regularity of the income which the economically inactive person receives), and the fact that those factors have led to issuing him or her a certificate of residence in the period during which the benefit applied for is likely to be granted to him or her. In the later case *Dano*, the CJEU clarified that economically inactive Union citizens can only claim equal treatment for social benefits with nationals of the host Member State, as guaranteed by the TFEU as well as by Regulation 883/2004 and Directive 2004/38, if their residence on the territory is in compliance with the conditions of Directive 2004/38. In accordance with this Directive, this implies that in the period of residence between three months and five years in the host Member State, economically inactive Union citizens must have sufficient resources for themselves and their family members. Member States have the possibility of refusing to grant social benefits to Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State's social assistance benefit, although after arriving on the territory of that State they do not have sufficient resources to claim a right to reside. Whether these persons meet this latter condition, requires that their financial situation should be examined in detail, without taking account of the social benefits claimed. Directive 2004/38 therefore seeks to prevent economically inactive Union citizens from using the host Member State's welfare system to fund their means of subsistence. For several Member States, this case law of the CJEU is an important sign, certainly in this difficult European political period, allowing them to set borderlines on how far solidarity has to go. This important issue of European social law demonstrates the difficulties Europe is confronted with in defining the borderlines of its solidarity.

It is clear that in matters of welfare tourism, the interests of home States and host States do not fully concur. The story is clearly not over. All these trends of an increased individualised approach to welfare rights are to the benefit of the EU citizens, but do question the balance of power between the different stakeholders of the Regulation. It will be an important task to find out to what extent Member States' concerns may further limit the free movement of persons or to what extent social tourism, including the right of non-active persons to look for benefits, must be seen as collateral damage of this free movement. The Coordination Regulations are an instrument to the benefit of European citizens (from workers to self-employed persons to economically non-active persons), employers and social security institutions. Each of these trends require the assessment of the balance of the interests of the employee, the employers as well as the institutions in the structure and the rules of coordination. Exactly as the Coordination Regulations are from all sides attacked by EC Treaty principles like European citizenship, freedom of movement, free movement of services and goods *etc*, the Coordination Regulations might risk looking too technical, outdated and therefore subject to being overruled by more fundamental principles. Whenever proposals for amendments to coordination rules are made, which seems to be required taking into account the shift in objectives of European social integration, it will be necessary to carry out an impact assessment in order to know which parties (employees, employers, insurance institutions) are favoured and which are disadvantaged. This might help to find a rational solution. Perhaps the Coordination Regulations have never been challenged so much in their history as today!

YVES JORENS

DOES MIGRATION PUT THE EUROPEAN COORDINATION REGULATIONS ON SOCIAL SECURITY UNDER PRESSURE?

(Summary)

The Coordination Regulations on social security for migrant workers saw the light of day more than 55 years ago and are some of the first EU legal instruments. Today, these regulations are however challenged, not at least at European level due to a dynamic interpretation of EU law by the Court of Justice of the European Union, in particular in the field of free movement. This contribution sketches some of the challenges that call for the start of a process of reflection on some of the fundamental parameters.