

The discussion on the revision of the coordination rules of unemployment benefits – a battlefield between East and West

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Frans Pennings

School of Law, Utrecht University, the Netherlands

Abstract

Unemployment benefits are a special type of benefit for coordination purposes since Member States exporting benefits tend to fear that supervision of their benefit recipients in the host State will not be satisfactory. For this reason, several complicated rules have been made, which are disadvantageous for the benefit recipients living in a country with low unemployment benefits who last worked in a country with higher benefits. The rules are also disadvantageous for countries with many outgoing frontier workers. Although the proposal for revising the Regulation includes new rules to address these problems, the large differences in interests between Member States make it difficult to reach a compromise.

Keywords

coordination of social security, unemployment benefits, revision of the coordination regulation

1. The context of the coordination of unemployment benefits

Coordination of unemployment benefits has encountered some specific problems over time which seem to follow from the specific characteristics of this type of benefit. These benefits are closely related to the right of free movement and create a safety net in case the take-up of work in a new Member State fails. On the basis of coordination rules, periods completed in the State of origin can be aggregated. Without such rules, a person who becomes unemployed may be without income protection. Losing employment is serious risk for persons who take up work in another Member State since there is generally no employment protection during the probation period in a new job.

Corresponding author:

Professor Frans Pennings, School of Law, Newtonlaan 201, Utrecht 3584 HB, the Netherlands.

E-mail: f.pennings@uu.nl

The rule that unemployment benefits can be used as a means of income support when seeking work in another Member State is also relevant for promoting free movement; this is known as the export of unemployment benefit.

There are two major issues that affect the coordination of unemployment benefits. The first is that the search for work leads to movements that are not symmetrical for Member States, but they go predominantly from poorer Member States to richer States and from East to West. This means that the aggregation of periods is mainly paid for by the richer States while the export of benefits is mainly paid for by the richer States.¹ The second major problem is related to the condition that, in order to be entitled to unemployment benefit, a person has to be seeking work. This is a complicated condition, particularly for the export of unemployment benefits, as supervision of the work-seeking activities of the benefit recipient has to be carried out by a State other than the one that pays the benefits. Doubts whether the host State is really monitoring search activities are very relevant to discussions of the maximum duration and possible extension of the export of unemployment benefit. Both in the case of aggregation and in the case of export of benefit there can be a suspicion of abuse of the rules, i.e. that persons have entered work and lost work in the host State in order to obtain higher benefits in the State of origin and, in case of export, that they are not really seeking work, but have a kind of holiday, often in the State of origin. This is the context of the discussions of the revision of the Coordination Regulation.

Since the accession of Central and Eastern European States to the EU, movement of workers from these States to Western States has grown considerably. Although in absolute numbers the cost of unemployment benefit for cross-border workers is relatively small, the issue of the fair distribution of costs is a matter of principle for some receiving States.²

In preparation for the revision of the Coordination Regulation, the issues concerning unemployment benefits were a major topic for discussion. Disagreement on this chapter was even the reason for suspending the revision of the Regulation in Spring 2019 although agreement had already been reached on the other chapters. At the time of completion of this article, no agreement on a final text has been reached. Still, it is worth discussing the issues that were the subject of heated debate, which even caught the attention in some national Parliaments and news media.

The staff of the European Commission produced an Impact document (hereafter, Impact Document) containing valuable figures on the actual use of unemployment benefits.³ It also mentions the different points of views of the Member States in the Administrative Commission on the proposals, and provides a good insight into how the coordination of unemployment benefits is understood. There will be frequent references to this document in the discussion below.

2. Aggregation rules

2.1. Which periods can be aggregated?

For unemployment benefits, the general aggregation rules (Article 6 of the Coordination Regulation) do not apply. Instead, Article 61 gives special rules, which have to do with the fact that there are differences between national unemployment benefit schemes in which types of periods are

1. See De Wispelaere, De Smedt and Pacolet (2020).

2. *Idem*.

3. European Commission, *Commission staff working document. Impact assessment. Initiative to partially review Regulation (EC) No 883/2004*, SWD (2016) 460, Brussels, 2016.

relevant to acquiring benefit rights. The EU legislature did not want to treat all these periods in the same way, hence this special article.

Article 61 provides that the competent institution of a Member State has to aggregate periods of insurance, employment or self-employment completed under the legislation of any other Member State as though they were completed under the legislation it applies. However, when the applicable legislation requires periods of insurance, the periods of employment or self-employment completed under the legislation of another Member State shall not be taken into account unless such periods would have been considered to be periods of insurance had they been completed in accordance with the applicable legislation.

The Court of Justice, however, has given a broad interpretation of term 'period of insurance' in the *Warmerdam* judgment.⁴ The Court considered that the term 'periods of work' refers only to periods in which work was done which, under the system under which these periods are performed, are not considered as periods which give the right to affiliation with a system of unemployment insurance. In other words, periods of insurance are all periods which are relevant to acquiring a right under the unemployment benefit scheme. Secondly, the Court of Justice considered that the aggregation rule does not require that periods have to be completed as periods of insurance for the same branch of social security. As a consequence, the Netherlands had to take into account the periods completed in the United Kingdom even though these were not periods of insurance for the British Unemployment Benefit Act, since these periods would have been periods of insurance if they had been completed in the Netherlands.

The effect can be seen in respect of the mini jobs in Germany. In Germany, jobs for which less than 450 euros are paid are not insured for unemployment. In the Netherlands, there are no thresholds for considering periods of work as insured. If a person has first worked in Germany and then starts to work in the Netherlands, and needs the aggregation of periods in Germany for his claim in the Netherlands, the periods in Germany count for this purpose since they are considered as insured periods in the Netherlands; the fact that they are not insured for unemployment insurance in Germany is no obstacle to the aggregation of these periods.

The *Impact Document*⁵ discusses the example of Denmark that provides coverage in an unemployment scheme on a voluntary basis. Take a mobile worker who chose not to be covered by this voluntary scheme during her period of employment in Denmark. As result of the *Warmerdam* case law of the Court of Justice, she is able to aggregate the periods of work in Denmark when she claims unemployment benefit (after having taken up work there) in another Member State if the periods fulfilled in Denmark would qualify as insured periods against the risk of unemployment in that other Member State.

According to the *Impact Document*, the *Warmerdam* case law is not consistently applied in the various Member States. An explanatory factor for this is, as appeared in discussions in the Administrative Commission, that many Member States are of the view that the wide interpretation of the Court leads to unjustified results.⁶

Consequently, there is an uneven application of the rules, which leads to legal uncertainty. This is undesirable, *inter alia* since it may discourage the search for work in another Member State.

4. Case 388/87, [1989] ECR 1203.

5. *Impact Document*: 39.

6. *Impact Document*: 43.

2.2. The proposed new rules for assimilation

For this reason, in the proposal for revision of the Coordination Regulation a new Article 60a is proposed, that has special rules on aggregation of periods for unemployment benefits. It provides that only the periods which are taken into account under the legislation of the Member State in which they were completed for the purpose of acquiring and retaining the right to unemployment benefits, shall be aggregated by the competent Member State.

2.3. Which conditions apply on the periods fulfilled in the host State before aggregation is possible?

Since in this discussion also concerns about costs and possible abuse of the aggregation rules play a role, the figures mentioned in the *Impact Document* are interesting. These show that in 2013, on average, 0.11% of the total expenses on unemployment benefits could be related to the application of aggregation of periods. Even more relevant is the duration of the period worked in the last State, as reported in the *Impact Document*, as this is an indication of the costs following from the application of the aggregation rules: the total expenditure for unemployed benefits reported by 23 Member States for the 24,821 cases of mobile EU workers who had to rely on periods of aggregation was around 100 million euro, of which 36 million euro for workers who had worked for less than 30 days, 15 million euro for workers who had worked between one and three months, and 46 million euro for workers who had worked three months or more (figures for 2013).⁷ So, there is a considerable group of persons among the unemployment benefit recipients who worked only a short period in the host State.

There are important differences between the Member States, In absolute terms, France (53 million euro) and Belgium (20.5 million euro) are the main spending Member States; Romania (2157 euro), Cyprus (3890 euro) and Latvia (4908 euro) can be found on the lower end, influenced by the low number of cases for aggregation and the lower annual average expenditure per unemployed person.⁸

Article 61(2) provides that aggregation is conditional on the person concerned having *most recently* completed (author's italics), in accordance with the legislation under which the benefits are claimed, periods of insurance, if the legislation requires this. This is *mutatis mutandis* true if the legislation requires periods of employment (as a worker) or periods of self-employment. A controversial issue seems to be how long a person must have been insured in the host State before the aggregation rules apply. Currently, Article 61 provides that, for the application of these aggregation rules, it is required that the person concerned has *most recently* completed periods of insurance, employment or self-employment. The unemployed person, therefore, cannot use the Regulation to apply for benefits from States in which he previously worked.

Article 61 does not set conditions on the duration of the period during which a claimant must have worked in the competent State. One day of work in the host State could, with the help of the aggregation rules, be sufficient to claim unemployment benefit in that State. The *Impact Document* remarks that the condition that periods have to be aggregated by the institution as soon as the unemployed person has 'most recently' completed periods of insurance, employment or self-

7. *Impact Document*: 46.

8. *Ibid.*

employment in that country is not uniformly applied.⁹ The reason for this is that the length of the required period of ‘most recent insurance’ or (self-)employment is not specified in the Regulation.¹⁰ Most Member States take the view that aggregation is required after ‘any’ period of insurance or (self-)employment, even one day; some Member States, however, have specifically defined periods for the application of the aggregation principle in their national law. This is because periods of insurance or (self-)employment in their legislation are expressed in terms of weeks and not in days, or they interpret ‘period’ as a longer period of time. For instance, Finland requires four weeks (for employed persons) or four months (for self-employed persons); Denmark provides that at least 296 working hours in the past three months have to be completed in that country. The *Impact Document* concludes that there is a need to harmonise these requirements, as otherwise the differences may lead to legal uncertainty.

According to the *Impact Document*,¹¹ Member States complained that unemployment benefits have to be paid by a host Member State in situations where a worker has been employed only for an extremely short period, e.g. for only one day. They argued that their respective schemes should be protected from the claims of mobile workers who have not in any substantial way contributed to the financing of their scheme. Some countries (United Kingdom, Belgium, Spain, France) received relatively more requests for aggregation within a period of 30 days than others (Hungary, Romania, Bulgaria, Poland, and Slovakia).

2.4. The proposed new aggregation rules

In view of these concerns, the European Commission feared, as stated in the *Impact Document*, that not undertaking action could lead to increased public disenchantment and exacerbate criticism of, and anxiety about, the consequences of free movement. It could also lead to a situation in which (more) Member States apply their own interpretation of the current rules in restrictive ways.¹²

There appeared to be several options; one was requiring one month of previous employment before the aggregation rules apply another was requiring three months. The Commission opted for the three-month period. However, this was not followed by the Council and Parliament, which preferred one month, and this was included in the most recent version of the Proposal for revision (Spring 2019).

Persons who do not fulfill this condition of one uninterrupted month in the competent State can fall back on unemployment benefits from the country where they were previously insured or where they previously worked, referred to as the penultimate State (the benefits are then determined according to the legislation of that State) (Article 61(2)). However, for this fallback option to apply, the claimant must have completed an uninterrupted period of insurance or employment of at least one month in the penultimate State. The penultimate State must, if this condition is fulfilled, provide unemployment benefits in accordance with its legislation after applying the aggregation

9. *Impact Document*: 43.

10. In this discussion, the term ‘most recently’ plays a role since it could be argued that this suggests that the period to be taken into account must be small. Note, however, that other language versions use other terms, that are the equivalent of ‘lastly’, *laatstelijk* (Dutch), *en dernier lieu* (French), *senast* (Swedish), *da ultimo* (Italian), *unmittelbar* (directly) (German), *en último lugar* (Spanish).

11. *Impact Document*: 44.

12. *Impact Document*: 48.

rules.¹³ It exports these benefits if the person remains in the State where he or she last worked and wants to search for work in that State. Different from the rules in Article 64(1) which apply to the export of unemployment benefits, there is no condition that this person has to seek work in the competent State before he or she can export the unemployment benefit.

If the unemployed person, however, wishes to seek work in another State rather than in the penultimate State or the State of most recent periods of work or insurance, all the conditions of Article 64 apply.

There is a second fallback option (Article 61(3)), which is that if an unemployed person has not completed an uninterrupted period of at least one month of insurance, employment or self-employment in the penultimate State, the Member State of most recent insurance, employment or self-employment shall become the competent State. It has to provide unemployment benefits, in accordance with its legislation and the aggregation rules are applicable. So, in the case of a very mobile person, whatever the reasons for this mobility or frequent unemployment, the last Member State where he or she was insured or worked is the competent one.

Although the Commission wrote in its Proposal for the revision of the Regulation that the new rules on aggregation of periods for unemployment benefits would have 'no significant impact on regulatory costs',¹⁴ it can be doubted whether it is really that simple. In any case, it is clearly not that simple for the unemployed person since the differences in benefit conditions between the last and penultimate State can have different effects. Article 61(2) of the Coordination Regulation provides that when the penultimate Member State becomes competent, it shall provide unemployment benefits in accordance with its legislation. It is clear the Regulation helps with the aggregation rules. However, there may also be other rules that the penultimate State applies, according to its legislation, and these may lead to a rejection of the claim, whereas this would not be the case if the legislation of the last State of employment were applicable.

One example is that of a person who has resigned to take up work in another Member State. If the person involuntarily loses this job then, under the coordination rules that have applied so far, the earlier resignation cannot be held against him. However, if it is the penultimate State that has to apply its own legislation, it may well be the case that it decides that it was a resignation from work and that, as a result, this is a reason for refusing benefit. Most unemployment benefit schemes have such a rule. It could be argued that such an application of the rule hinders free movement and is therefore contrary to Article 48 TFEU. However, it is far from certain that national administrations will follow such an interpretation; they are likely to argue that, in domestic situations, a person can experience negative effects if he or she resigns from a new job. This may make it more difficult and riskier for persons to seek work abroad. It is advisable that this uncertainty is taken away, for example by means of a decision of the Administrative Commission.

Another example is that of a person who loses a full-time job and, after some time, takes up part-time work. Whereas in the last State of employment, benefit rules may provide that unemployment benefit is also paid in the case of partial unemployment, those of the penultimate State may provide that only wholly unemployed persons are entitled to unemployment benefit. As a result, the person will be worse off than had he or she been able to claim unemployment benefit in the host State.

13. Here an exception is made to the condition for aggregation that one must have recently fulfilled a period in the country that has to aggregate.

14. Commission (2016: 6).

If only one month (instead of three months) was required for the aggregation of periods, such problems would occur less frequently than if three months are required, but this could still happen.

3. Unemployed persons who reside in a state other than the competent one

3.1. Introduction

Under Regulation 883/2004, wholly unemployed frontier workers are (until the Regulation is revised) subject to the legislation on unemployment benefits of their country of residence, even if they apply for work in the country of last employment (Article 65(2)). For partially unemployed persons, a different system applies, but the focus here is on the wholly unemployed.

For wholly unemployed frontier workers, the Coordination Regulation deviates from the State of employment principle and makes the State of residence the competent State for unemployment benefits. The conditions and the level of benefit are set according to the legislation of the State from which the benefits are due.

In theory, frontier workers can live quite far from where they work. However, as long as they return home once a week, according to the definition in the Coordination Regulation, they are frontier workers. Their movements must, if necessary, be demonstrated by means of travel tickets or in other ways. In the case of a daily return to their permanent home, there will be few problems with proof. But in other situations, as was pointed out in the *Impact Document*,¹⁵ it has become more and more difficult to assess in practice whether a person is a frontier worker. Large distances can be easily overcome nowadays, so that it cannot be ruled out that, for example, a person who works in Brussels returns every weekend to Athens and is therefore a frontier worker in terms of the Regulation.

For frontier workers, the rule on the competent State for their unemployment benefits can be disadvantageous, as they are deprived of the rights they have acquired by virtue of the legislation of the State of employment. These benefits might be higher and/or longer than those of the State of residence (the reverse may also be true, of course). This rule is also unattractive to the State of residence, as no contributions for this benefit were paid in this State, whereas it is now confronted with the expenses for this benefit. In particular, less prosperous countries whose inhabitants go to work as frontier workers in more prosperous countries feel the effects of these rules.

The *Impact Document*¹⁶ remarks that, as cross-border workers tend to work in countries where comparatively higher wages and benefits are paid, there is some evidence that, as a general rule, they would be entitled to higher unemployment benefits if they were allowed to claim them in their country of last activity. The document mentions an average difference of 68 per cent between the amount of the unemployment benefits paid by the State of last activity and the State of residence.

The rule that wholly unemployed frontier workers should receive unemployment benefits in accordance with the legislation of the State of residence was challenged before the Court of Justice a couple of times (Regulation 1408/71 had a comparable rule). The first time was in the *Mouthaan* judgment.¹⁷ In this judgment, the Court held that the frontier workers rule was not inconsistent with the Treaty. It argued that it served to ensure that a worker may receive unemployment benefits

15. *Impact Document*: 81.

16. *Impact Document*: 81.

17. Case 39/76, [1976] ECR 1901.

under the most favourable conditions to the search for new employment. In this approach, it is assumed that the State of residence for frontier workers is the place where the conditions are most favourable to the search for new work. Therefore, it was right that unemployment benefits should be paid by this State. The *Mouthaan* judgment was confirmed in the *Aubin* judgment.¹⁸

Although it is hard to find empirical data proving that the assumption underlying this rule is correct, in many situations it is quite plausible: education systems, languages and cultures differ from State to State, and if the State of residence is also the State where the worker grew up and was educated, he or she may be more familiar with the labour market and society in that State than in another State. However, even if the assumption is true, it does not automatically follow why frontier workers cannot receive benefits from the State where they were last insured before they became unemployed. Even if frontier workers have to seek work or are allowed to seek work in the State of residence, they could still be paid unemployment benefits in the State where they last worked. Their work-seeking activities could be supervised either by the the State in which they live, or by the State of residence on behalf of the competent State.

In practice, however, supervising beneficiaries in another Member State is not easy: there may be legal restrictions that prevent a State from obtaining information on individuals in another State (e.g. from the data base of the employment offices). Therefore, it may be more efficient and effective for the State of residence to supervise the obligations of the benefit recipient. However, States find it hard to leave the supervision of the obligations to find work to other Member States, despite duties placed on Member States under the Treaty to cooperate to meet the obligations flowing from the Treaty, and despite employment strategies that have been developed within the EU framework in the past decade. If a State does not have to pay unemployment benefits to jobseekers, it is assumed that they have little interest in supervising them; after all, considerable effort is needed to help their 'own' jobseekers return to work.¹⁹ This lack of trust explains the coordination rules on unemployment benefit in which the State that supervises the activities also pays the unemployment benefit.

The assumption that frontier workers have the best chance of finding work on the labour market in the State where they live raises the question of what follows if that assumption can be refuted in a particular case. For example, a person living in a country other than the one where he or she grew up. In the *Miethe* case²⁰ this question had to be decided in terms of Regulation 1408/71. The Court ruled that, if a wholly unemployed person who qualifies as a frontier worker, has the (personal and professional) connections in the State of employment, both personally and professionally so that he or she will have the best chance of finding work in that State, then that person is not a frontier worker for the purposes of the Coordination Regulation (regarding unemployment benefits). If the person has the best chance of reintegration in the State of employment, he or she can choose between receiving unemployment benefit from the State of residence or from the State of employment. Although the Court found a solution in this individual case, which had an effect in many other

18. Case 227/81, [1982] ECR 1991. It has to be noted that in the *Mouthaan* and *Aubin* cases, the application of this rule was favourable for the claimants, as they were not entitled to unemployment benefit in the State of last employment, and as a result of the Court's approach they received benefit in the State of residence.

19. The general feeling of mistrust was worded explicitly during the Council meetings on the preparation on the Chapter on unemployment benefits of Regulation 883/2004, as expressed by Rob Cornelissen, one of those who were present: 'In fact, most Member States 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', see Cornelissen (2017: 218).

20. Case 1/85, [1986] ECR 1837.

cases as well as for benefit administrations, it was a difficult rule to apply. States had to check, for example, whether a benefit claim was also made in the other country. And, the claimant him/herself was sometimes sent to the other country where he/she was assumed to have a better chance on the labour market.

Regulation 883/2004 uses a different wording of the rules on frontier workers and non-frontier workers not residing in the competent State. In the *Jeltes* judgment,²¹ the Court ruled that the *Miethe* judgment was no longer relevant to Regulation 883/2004. This put the dispute on these benefits fully on the agenda again since there are no longer any exceptions.

According to the *Impact Document*, in 2013 and 2014 an estimated average of 927,000 cross-border workers (76% of the total number of cross-border workers) were employed for longer than 12 months in the State of activity before becoming unemployed.²²

The Document remarks that there were vivid discussions in the Administrative Commission on whether the present rules needed to be revised.²³ The delegations in the Administrative Commission were quite divided between keeping the system as it is now, and moving to a coordination system under which the State of last activity pays for the unemployment benefit. The delegations in favour of the *status quo* feared that a change in the coordination system would not provide adequate protection for the person and would put a heavy financial burden on the State of last activity in the case of short periods of employment there. Moreover, this option would require more stringent monitoring and control measures from the labour market authorities in the Member State paying the benefits.

Other Member States criticised the present shift of costs to the countries of residence that do not receive the contributions for these benefits. Moreover, since a large proportion of frontier workers work for a considerable period in another Member State, it becomes questionable whether frontier workers, when they become unemployed, actually have a better chance of finding employment on the home country's labour market.

This division of opinion provided a reason for proposing a compromise, which makes the State of last activity competent if the cross-border worker is deemed to have a 'sufficient link' with the labour market of that State. This 'sufficient link' is reflected in the duration of insurance for unemployment benefits in the State of last activity. As a result, Member States will not be confronted with claims for unemployment benefits after only a very short period of insurance in that Member State. Moreover, the option aims at a better correlation between the level of the benefit and the earning level of the person concerned.

The Commission has proposed requiring a link with the labour market of the State of last activity that the person had been insured in that State of at least the last twelve months before becoming unemployed. Parliament and the Council agreed that it should be three months.

3.2. The proposed new rules

The proposed revised Article 65 treats partially, wholly and intermittently unemployed persons who reside in a State other than the competent State during the last activity as an employed and self-employed person in the same way: they receive benefit from the competent State, as if they are

21. Case C-443/11, ECLI: EU:C:2013:224.

22. The Document refers to Pacolet and De Wispelaere (2005).

23. *Impact Document*: 87.

residing in that State. However, this rule does not apply to persons who have not completed an uninterrupted period of a certain period exclusively under the legislation of the competent State. The Conclusions of the Council of June 2018 mentioned three months, but the Spring 2019 compromise made it six months. The proposed new article no longer distinguishes between frontier workers and non-frontier workers who do not reside in the competent State.

For persons who have completed more than three (or, according to the last compromise, six) months in the competent State, the new rule is an improvement. These persons have to make themselves available to their employer, or to the employment services in the competent Member State, and receive benefit from that State. Thus, under the new rules it is not relevant whether a person is a frontier worker, or is wholly or partially unemployed.

The proposed new rule means that, after having been insured for at least three (or, according to the last compromise, six) months in the competent State, they receive unemployment benefit from that State as long as they are available for work in that State, even if they do not reside in that State. However, if they do not want to be available for work in that State, they can invoke the export rule, in which case they can still receive unemployment benefit from the competent State, according to the Spring 2019 compromise, for 15 months.²⁴

If a person, not residing in the competent State, has not completed an uninterrupted period of at least three (or, according to the last compromise, six) months of insurance or (self-)employment exclusively under the legislation of the competent Member State, the State of residence is the competent one. In that case, the unemployed person has to make him or herself available to the employment service of the Member State of residence and he or she receives benefits in accordance with the legislation of the Member State of residence as if he or she had completed all periods of insurance under the legislation of that Member State. Unlike in the case of aggregation rules, it is not required that the uninterrupted period of three (six) months ends immediately before the moment unemployment starts. Thus, if a person works one year in country A, then works in country B for a certain period, and then returns to A, and becomes unemployed after one month, he is entitled to unemployment benefit under the legislation of that State.

Alternatively, a wholly unemployed person who had not completed this period of three (six) months, who would be entitled to unemployment benefits solely under the national legislation of the competent Member State without the application of the aggregation rules (Article 6), may instead opt to make himself or herself available to the employment services in that Member State and to receive benefits in accordance with the legislation of that Member State as if he or she were residing there.

A special provision applies to the self-employed (Article 65(2a)): the rule that one falls under the State of residence if one has fulfilled fewer than three (or six, depending on which will be finally accepted for the revised Regulation) months does not apply to a person who was insured as a self-employed person in a Member State other than his or her Member State of residence and the latter State has declared that there is no possibility for any category of self-employed persons to be covered by an unemployment benefits system of that Member State. In that case, the person can still claim unemployment benefit in the State of last employment.

24. Under the rules so far, there was a partial reimbursement system to the State of residence. The new rules rendered this reimbursement mechanism redundant.

4. Export of unemployment benefits

4.1. The Conditions for Export

Unemployment benefits are a complicated type of benefit because of their close link with the obligation to seek work. Recipients of unemployment benefit are required to keep their period of unemployment as short as possible by actively seeking work. For this purpose, supervision by the employment office is essential. This supervision can usually, although not always, best be realised in the State where benefit is paid. The possibilities of receiving unemployment benefits from more than one Member State are therefore more restricted than in the case of other types of benefits.

Article 48 TFEU provides that the Council has to take measures to guarantee the payment of social security benefits in another Member State. This principle is laid down in the general waiving of residence conditions (Article 7 of the Regulation). Nevertheless, this Article does not apply to unemployment benefits. Instead, Article 64 of Regulation 883/2004 governs the export of unemployment benefits and the possibility of exporting unemployment benefit exists to only a limited extent.

In order to invoke Article 64, the employed person must have been registered as a person seeking work and must have remained available to the employment services of the competent State for at least four weeks after becoming unemployed. The competent services may authorise his or her departure before such time has expired.

Furthermore, in order to be entitled to export unemployment benefit, the claimant must register as a person seeking work with the employment services of the Member State to which he or she has moved to seek work and must be subject to the control procedures of that State. The person must also adhere to the conditions laid down in the legislation of that State. This condition is satisfied if the job seeker registers within seven days of the date that he or she is no longer available for the employment services of the competent State. In the Proposal for Simplification of Regulation 1408/71 – the preparation for Regulation 883/2004 – the Commission proposed to extend the period a person can seek work from three months to six months.²⁵ The Council, however, did not accept this proposal. During the Council discussions of that proposal, it appeared that many Member States were concerned that an extended period would be abused, and the Commission proposal was therefore not adopted.²⁶ Consequently, like Regulation 1408/71, Article 64 of Regulation 883/2004 mentions three months as a maximum period for export of unemployment benefits.²⁷

The Impact Document remarks that the number of persons exporting their unemployment benefits are low. Only approximately 27,000 unemployed persons exported their unemployment benefits in 2013 and in 2014.²⁸ Spain (3,128), Portugal (1,751), Germany (circa 1,600) and France (1,510) issued the highest number of export certificates during the second semester of 2013, whereas Malta (6) and Romania (3) issued the fewest.

Under the coordination rules, Member States can grant an extension of the export period. However, currently nine Member States do not grant any extension of the export period. One of the reasons for this stringent attitude seems to be inspired by (potential) difficulties in the mutual

25. COM (1998) 779.

26. Cornelissen (2007: 204).

27. The total duration of benefit must not be longer than if the person concerned had stayed in the competent State.

28. Pacolet and De Wispelaere (2014: 25).

cooperation between Member States for monitoring the person's job seeking activities, as well as fear that the person is not genuinely looking for work. Member States find it much more difficult to trust information confirming active job search from foreign employment services institutions than from their own institutions.²⁹

The Document remarks further that there is no evidence that points to a wide-scale abuse of the system.³⁰ Difficulties and obstacles in exchanging data do not derive from the Regulations, but are rather due to a lack of cooperation, prioritisation, long delays in answering and fragmented replies, as well as to limitations in domestic law in certain Member States on exchanging personal data with institutions in other countries.

4.2. *The proposed new Rules for exporting unemployment benefit*

Initially, the Commission proposed to amend Article 64 so that the unemployed person would retain his or her entitlement to benefits for a maximum period of six months. Like in the present Regulation there is a cap in that the total duration for which the benefit is provided must not exceed the total duration of the period of his or her entitlement to benefits under the legislation of that Member State. The competent services or institutions may extend the export period up to the end of the period of that person's entitlement to benefits.

The Commission remarked, on page 6 of its Proposal for revising the Regulation of December 2016, that Member States had divergent views in that some wanted to keep the three months period, while others supported a right to export for at least six months. Employers' organisations supported the current provisions, while trade unions and NGOs supported the option of a right to export of at least six months.

The Council, in making its conclusions, retained the present period of three months. The European Parliament insisted, however, on having a maximum period of six months. This led to the proposal, prepared for the Council meeting of Spring 2019, which mentioned six months.

The Council was however, still divided on this topic.³¹ As a result, no final text was adopted and the revision project was left to the new European Commission, which will take this up in 2020.

One of the issues related to export was, as has been mentioned above, whether a person who is searching for work can be effectively monitored. The Commission Proposal reads that 'This option [of an extension to six months] will be combined with a reinforced cooperation mechanism to support jobseekers to search for work increasing the likelihood of labour market reintegration'. For this purpose, an article was proposed in the Implementing Regulation (Article 55(4)) that addresses these obligations. It provides that '(a) the institution in the Member State to which the unemployed person has gone shall immediately send a document to the competent institution containing the date on which the unemployed person registered with the employment services and his or her new address. (b) If there is any circumstance likely to affect the entitlement to benefits, the institution in the Member State sends immediately to the competent institution and to the person concerned a document containing the relevant information. (c) At the request of the competent institution, the institution in the Member State to which the unemployed person has gone shall provide relevant information concerning the follow-up of the unemployed person's situation, in particular whether

29. *Impact Document*: 68.

30. *Impact Document*: 68.

31. In March 2019, this issue was intensively followed by the media, e.g. see: <https://nos.nl/artikel/2277819-extra-beraad-over-langduriger-ww-export-naar-andere-cu-landen.html> (retrieved 10 January 2020).

the latter is still registered with the employment services and is complying with organised checking procedures on a monthly basis’.

Remarkably enough, the sentence indicated by (b) is not found in the compromise proposal of Spring 2019. Apparently, this was seen as involving too much work for the country where the person is seeking work. Although it is understandable that the host State wants to limit its requirements, it is essential for the effective functioning of the export provision that active monitoring is carried out by the host State.

Although the provisions of the Coordination Regulation require the host State to inform the competent State in this way of the circumstances of the persons seeking work in that State, it is understandable that some States are not convinced that this mechanism will really ensure that a person is seeking work. After all, if the checking procedures are really global, it is hard to check whether a person is actually seeking work. This is even more true where wages in the host country are low compared to benefits and this does not encourage seeking work. Strict supervision is essential to make the unemployed do what is necessary to find work.

Another problem is that the host State (i.e. the State where the benefit recipient seeks work) has to apply its own legislation. This may include conditions different from those in the competent State. For example, the competent State may have a rule requiring the unemployed person to show, for example by undertaking a concrete activity (every week), that he or she is seeking work. The host State may have, as a condition, that the person simply registers at the employment services and renews this registration at certain intervals. This discrepancy may create a lack of trust.

Of course, the departing point has to be that the host State has to apply its own legislation, otherwise its activities become very complicated. Nevertheless, it should be possible to have a system in which supervision is more in line with what the competent State requires. For this purpose, the rules on payment of sickness benefit in cash may be an example. For these benefits, Article 27 of the Implementing Regulation provides that the competent Member State can require that the insured person presents a certificate relating to incapacity for work that is provided by a doctor in the State of residence to certify his or her incapacity for work and its probable duration. The Regulation ensures that this certificate is in principle proof of the state of health of the sick person and gives protection to him or her. This documentation must be sent to the competent State. The forwarding of such a document does not exempt the insured person from fulfilling the obligations provided for by the applicable legislation of the competent State. Where appropriate, the employer and/or the competent institution may call upon the employee to participate in activities designed to promote and assist his or her return to employment. At the request of the competent institution, the institution of the place of residence may have to carry out any necessary administrative checks or medical examinations of the person concerned in accordance with the legislation applied by this latter institution. The competent institution shall reserve the right to have the insured person examined by a doctor of its choice.

These provisions give the competent State the power to check whether a person is really ill and the expected duration of this illness. These powers are stronger than for unemployment benefits. Whether this is justified and if so, why are questions that need to be addressed. Of course, there are differences between sickness benefits and unemployment benefits, but it is suggested that asking whether rules that apply to the export of sickness benefits can serve as an example for drafting rules for exporting unemployment benefit should be examined. For example, if a country requires a person seeking work to show at least one job search activity a week, the person could be expected to undertake this, even if this is not required by the legislation of the host State. The jobseeker should be required to report on his or her job seeking activities according to the requirements of the

competent State. The easiest step would be to complement the Regulation with such a rule. Maybe it would be too work intensive to also introduce a rule that the employment services in the host State ought to certify these activities systematically. However, they could be asked to do so where there is any doubt about the performance of particular activities. This would have to be a binding obligation in that, if a Member State does not provide the required information within a certain period (e.g. a week), it would take over the obligation to pay unemployment benefit until the information is provided.

5. Conclusions

The Revision of the Regulation is a large and time-consuming project. Earlier revisions were also time consuming (e.g. the drafting of Regulation 883/2004 itself) and the positions of the Member States are also different. Their discussions are now much more transparent than before, thanks to, *inter alia*, the *Impact Document*. Furthermore, contributions by the other institutions, notably the Council and the European Parliament, shed some light on the discussions. This is a good development, not only for democratic reasons, but also for future interpretation of the Coordination Regulation because it is useful to have an insight into the underlying discussions and the rejected alternatives.

In this discussion, we can see, as regards several proposals, a clear divide between those countries with a predominantly outgoing flow of workers and countries which receive these workers, or in other words from countries with, in general, relatively lower wages to those with higher wages (and low unemployment rates). We have seen several examples of this in the field of unemployment benefits, e.g. in the case of aggregation of periods, the determination of the relevant State for frontier workers and export of unemployment benefits.

In such discussions, countries own interests may play an important role. This may lead to difficult situations, where compromises are difficult to reach. Countries referred to as 'the West' in the title of this contribution have a tendency to ask what it costs for them, and whether there is a risk of abuse? Although the countries in 'the East' are right to stress that free movement is an essential freedom, they are sometimes reluctant to accept the task of applying necessary monitoring and supervision activities to make sure that the rules are applied correctly. News reports on the March 2019 negotiations in the Council mentioned that part of the bargaining process concerned with attempting to exchange a shorter export period for unemployment benefit for a less strict application of the posting rules.³²

Although these opposing interests seem to make a compromise difficult, it should be possible to find a way out. After all, it is the Treaty that defines the priority in these discussions that should be given to the free movement of workers (article 48 TFEU). This freedom is also in the interest of the Western countries. After all, the greying of society makes it clear that there would be a substantial shortage of workers if no supply is provided by the Eastern countries.

To prevent the negative effects of free movement, both the sending and the receiving countries have to take compensatory measures without actually affecting the right to free movement itself. An example in the Netherlands is that (until 1 January 2020) it was attractive for employers to make contracts of employment no longer than two years, since in that case no dismissal payment

32. See: <https://www.trouw.nl/nieuws/waarom-de-nederlandse-ophef-over-de-ww-export-overdreven-is~b800db2e/> (retrieved 10 January 2020).

was due and there is no need to give the workers a contract for an indefinite period when their contracts are extended. Also, migrant workers are often given these short contracts and, when the contract ends, they return to their country of origin, they ask for the export of benefits. Who is then making use of the rules?

If national labour and social security law in the receiving countries take these possible effects on migrant workers into account, this may reduce the effectiveness of the coordination rules that are seen as negatively impacting on the national system.

As was already said, Eastern countries are completely right in claiming that free movement of workers is an essential freedom. However, that should never lead to the weakening of supervision and monitoring rules. In the previous sections, some proposals for supervision rules that might be useful in restricting abuse or the non-application of benefit rules were proposed and these proposals may improve support for the free movement rules. All EU Member States should join together to gain support for EU rules, in particular those on free movement.

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