The scope of the EU social security coordination

Prof. dr. Herwig VERSCHUEREN
University of Antwerp

Mavrovo April 2011
Overview

- Personal scope (Article 2 Reg. 883/2004):
  - Which persons are covered and in which capacity
  - Nationality clauses
  - Members of the family

- Material scope (Article 3 Reg. 883/2004)
  - Which social security benefits are covered
  - What about contributions/taxes

- Territorial scope
Personal scope: nationality clauses

- Nationals of a Member State
  - see legal base in the Treaty: free movement of workers only for nationals of a MS
  - no residence in a MS required
- Stateless persons and refugees residing in a Member State
  - See *Khalil* judgment (C-95/99)
- Members of family and survivors, irrespective of their nationality; survivors of non-EU nationals where these survivors are nationals of a Member State
Personal scope: non-EU nationals

- Nationals of the European Economic Area
  - EU + Iceland, Norway and Liechtenstein
  - Not yet for Reg. 883/2004
  - In the relations between EU and these 3 states: Reg. 1408/71 continues to apply

- Nationals of Switzerland
  - Agreements between CH and the EU
  - Not yet for Reg. 883/2004
  - Only for Reg. 1408/71
Personal scope: non-EU nationals

- Regulation 859/2003
  - Extended Reg. 1408/71 and 574/52 to third-country nationals
    - Legally residing in a Member State
    - So not: Turkish transport worker, residing in Turkey and doing transport between the EU and Turkey for a firm established in Luxemburg
  - Legal base Article 63(4) EC now Article 79(2)(b) TFEU
  - UK and Ireland opted in; Denmark is not part of it
Personal scope: non-EU nationals

- Regulation 859/2003
  - “bridging” regulation: only one provision: extends provisions of 1408/71 and 574/72 to third-country nationals

- Regulation 1231/2010 of 24 November 2010
  - Entered into force on 1.1.2011
  - Legal base Article 79(2)(b) TFEU
  - Qualified majority voting in Council
Personal scope: non-EU nationals

- Regulation 1231/2010
  - Extends the provisions of Reg. 883/2004 and Reg. 987/2009 to third-country nationals legally residing in a MS
  - Ireland opted in; UK did not; Denmark remains out
  - In the relations between the Member State (other than DK) and the UK: Regulations 1408/71 and 574/72 remain applicable by virtue of Reg. 859/2003 and Article 90(1)(a) of Reg. 883/2004
Personal scope: being or have been subject to the legislation of a MS

- Important innovation compared to Reg. 1408/71
  - The latter referred to “workers”; “self-employed”, “students”, “civil servants”
  - Now only: being or have been subject to the social security legislation of a MS in whatever capacity
    - Depends on the national legislation; see Geven (C-213/05)
- “Legislation”: see material scope
- Covered by one scheme of a MS is sufficient
Personal scope: members of the family and survivors

- Definition in Article 1(i) Reg. 883/2004
- Only needed for the implementation of provisions in the Reg. referring to “members of the family”
  - For instance in the chapters on sickness benefits and family benefits
  - Applicable to the “derived rights” in the first place;
  - But also to “own rights” in some cases
    - For instance parental leave benefits for “not-working” spouses (Hoever Zachow C-245/94)
Members of the family

Definition

- (i): “any person defined or recognised as a member of the family or designated as a member of the household by the legislation under which benefits are provided”
Members of the family

Definition

(ii) “with regard to benefits in kind pursuant to Title III, Chapter 1 on sickness, maternity and equivalent paternity benefits, any person defined or recognised as a member of the family or designated as a member of the household by the legislation of the Member State in which he/she resides”

For sickness benefits in kind: look at the legislation of the MS of residence: may differ from the legislation of the competent State
Members of the family

- Definitions differ between the Member States
  - Age of children for entitlement to family benefits or sickness benefits
  - Which children are relevant to the calculation of unemployment benefits
  - Non-married partners or same-sex married couples for the survivors’ pensions or for sickness benefits in kind
  - Possible that a person is a “member of the family”
    - in the MS of residence but not in the competent MS
    - in the previous competent MS but not in the new competent MS
Material scope: list in Article 3 of Reg. 883/2004

- Legislation concerning a list of branches of social security
- Limitative list
  - Problematic for new forms of social protection
  - Flexible case law of the Court of Justice
- Contributory or not
- General and special schemes
  - For instance schemes for civil servants
Material scope: list of Article 3 of Reg. 883/2004

- (a) sickness benefits;
- (b) maternity and equivalent paternity benefits;
- (c) invalidity benefits;
- (d) old-age benefits;
- (e) survivors' benefits;
- (f) benefits in respect of accidents at work and occupational diseases;
- (g) death grants;
- (h) unemployment benefits;
- (i) pre-retirement benefits;
- (j) family benefits.
Material scope

- Excluded
  - Benefits that cannot be qualified as belonging to these branches
    - For instance: housing allowances; study grants
- CJ: National qualification is not determinative
  - Look at
    - the constituent elements of each particular benefit,
    - its purposes and the conditions on which it is granted
    - Broad interpretation: see for instance
      - Offermanns (C-85/99): advances of maintenance payments
      - Molenaar (C-160/96) and others: long-term care benefits
      - See Flemish Care Insurance (C-212/06)
Material scope: which branch?

- The CJ’s criteria are also relevant to determine the nature of the benefits and thus the applicable provisions
  - See the difference between applying the chapter on “sickness benefits” rather than the chapter on “invalidity benefits” for long-term care benefits
Material scope: social and medical assistance excluded

- Article 3(5)
  - CJ: narrow interpretation of the exclusion
    - Only benefits with no link to the branches of Art. 3(1)
    - Pure financial assistance to the poor
    - Covered by Regulation 1612/68 (Art. 7(2)) and Directive 2004/38 (Art. 24)
      - Prohibition of discrimination on grounds of nationality
      - Not for economically inactive persons in the first three months of residence
  - Not excluded: the so-called special non-contributory benefits (see Articles 3(3) and 70)
Material scope: special non-contributory benefits

- Long-standing case law of the CJ
  - 80’s: the benefits intended to supplement other benefits or benefits for the disabled: between “social security” and “social assistance”
    - Fall within the scope of Reg. 1408/71: thus exportable
  - 1992: special coordination regime for these benefits
    - No export if listed in Annex IIa of Reg. 1408/71
    - Entitlement in MS of residence without previous insurance periods
Material scope: special non-contributory benefits

- CJ continued to be very critical of the list in Annex IIa in particular of benefits intended to improve the health condition of the beneficiary, including the disabled (Jauch, Leclere, Commission v Council & EP)
- Almost 70 benefits, most of them supplements to pensions or specific benefits for the disabled
Material scope: exclusion of some family benefits

- Article 1(z):
  - “‘family benefit’ means all benefits in kind or in cash intended to meet family expenses, excluding advances of maintenance payments and special childbirth and adoption allowances mentioned in Annex I”
  - However: this exclusion does not exclude them from the application of EU law, and more specifically Regulation 1612/68 (the prohibition in general of discrimination on grounds of nationality and of obstacles to the free movement)
  - May lead to coordination problems
Material scope: social security contributions or taxes?

- CJ (*Commission v France; C-34/98*)
  - Qualification under national law is not relevant for the purpose of application of EU coordination rules
  - Decisive is that there is a direct and sufficiently relevant link between the levy and a legislation governing a branch of social security
  - The levy is not designed just to meet general public expenses and does not “disappear” in the general state budget
Material scope: social security contributions or taxes?

- Distinction is relevant for the determination of the applicable legislation
  - Social security coordination: State of employment for economically active persons,
  - may be another MS for taxes pursuant to the bilateral tax agreements
Definition in Article 1(l):

“legislation’ means, in respect of each Member State, laws, regulations and other statutory provisions and all other implementing measures relating to the social security branches covered by Article 3(1)”;
Material scope: legislation only

Definition in Article 1 (l):

“This term excludes contractual provisions

- other than those which serve to implement an insurance obligation arising from the laws and regulations referred to in the preceding subparagraph or

- which have been the subject of a decision by the public authorities which makes them obligatory or extends their scope, provided that the Member State concerned makes a declaration to that effect, …”
“Legislation” includes:

- For instance contractual agreements concluded by employers to implement a legal obligation to set up a sickness insurance scheme for their employees
  - This may include collective agreements
- Generally binding collective agreements for which a declaration had been made by the MS concerned
  - See French ARRCO and AGIRC schemes on unemployment and supplementary pension schemes
Material scope: only legislation

- Excluded: other collective or private arrangements to cover social security risks
  - Such as occupational pensions schemes
  - Very problematic
    - Problem of “vesting periods”; “dormant rights”; “transferability of acquired rights”
    - See Directive 98/49
      - Limited meaning: prohibition of discrimination on grounds of nationality and right to remain under the home country’s scheme for posted workers
  - Recent attempts by the Commission for a new Directive on occupational pensions schemes
Material scope: only legislation

- Application of other EU rules on contractual provisions
  - The general principles of non-discrimination and of the prohibition of obstacles to the free movement
    - Also applicable to contractual provisions
      - See *Commission v France* (C-35/97): early retirement scheme
Material scope: no occupational schemes

- See also recent CJ judgment of 10.3.2011 in *Casteels* (C-379/09)
  - Occupational pension scheme of *British Airways* (BA)
  - Pilot worked less than 5 years for BA in Germany
  - The short duration of this period had a negative impact on the calculation of his occupational pension rights in Germany
  - CJ directly applied the rule of aggregation of periods on the basis of Article 45 TFEU
Territorial scope

- For EU nationals: no residence in the EU needed (only for 3rd country nationals)
  - Workplace in the territory of a MS is sufficient
    - Even if employer is established outside the EU territory
  - Coverage by a MS scheme is sufficient even if workplace is outside EU
    - Bozzone (87/76); Aldewereld (C-60/93)
  - In the event of residence in a third country: Member States must apply the coordination regulations for the calculation of the benefits they export
    - Chuck (C-331/06)
Coordination rules not applicable to purely internal situations

- General principle of EU law on free movement of persons
  - Cross-border element between MS needed
  - *Khalil* (C-95/99)
    - Such element is absent if there is only a link between a MS and a third country
  - Cross-border element within a MS is not sufficient
    - See CJ in *Flemish care insurance* (C-212/06)
  - May lead to “reverse discrimination”
Conclusion

- **Personal scope**
  - Very broad, including all insured persons and third-country nationals

- **Material scope**
  - Limitative list
  - Broadened by the CJ’s case law
    - Including the use of EU criteria
  - Important gaps: occupational schemes

- **Not applicable to purely internal situations**
Thank you for your attention