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GENERAL COORDINATION PRINCIPLES IN THE REGULATION (EC) 883/2004 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AND ITS IMPACT ON THE OLD-AGE PENSION SYSTEM IN POLAND

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ABSTRACT

European Social Security System has been created to make the employment of workers easier and to increase their occupational mobility within the European Union. Taking into account the changes affecting social security in the EU and the essential features of a EU and national approach, this article will review the fundamental principles laid down in the EU coordination rules, namely applicable legislation, equal treatment, aggregation of periods and exportability.

We will show that the principles prevent the possible negative effects on old-age pension benefits for workers and their families that the exercise of the freedom of movement set out in the article 45 of the Treaty on the *Functioning of the European Union*, and how they are applied in Poland.

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INTRODUCTION

Social security system contains a collection of the EU legal measures for the improvement of the traditional branches of social security, including the old-age pensions (Pennings, 2001). The right to social security for everyone is already laid down in Article 9 of the International Covenant on Economic, Social and Cultural Rights (UN International Covenant 1966). In the European Union, coordination of social security is one of the tools allowing free population movement.

Coordination of old-age benefits in the EU requires consideration of a series of differences resulting from retirement schemes of particular Members States. They relate both the scope of the public, subject and differences to the required age retirements or general principles of financing and calculating old-age benefits (Amitsis 2012, Ślebzak 2012).

As noted by Van Der Mei, the existence of different territorially organised social security system could have a deterrent effect on the existence of free movement rights guaranteed by the EU law. However, harmonisation of national social security systems or the establishment of a common social security system has never been seriously considered. (Van Der Mei, 2003). The two main issues of coordination of national legal systems, which had to be solved in the EU was elimination of a double burden of the Regulation among Member States and creating a system enabling the transfer of rights and advantages from a Member State to the target Member State (Bernard, 1996).

The first Community rules governing the coordination of Member States' social security systems relating to migrant workers were contained in Article 51 of the EC Treaty, which empowers the Council to adopt measures necessary for securing a free movement of workers in the area of social security. In 1958, the Council adopted Regulation No. 3/58, which established the first mechanism of coordination of social security schemes to migrant workers (JO 30, 1958, p. 561). The next regulations adopted in 1972 by the Council in response to the Court of Justice case law was Regulation (EC) No. 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (consolidated version — OJ 1997 L 28, p. 1). That regulation had been amended many times and therefore was repealed and replaced in 2004 by the Regulation (EC) No. 883/2004 of the European Parliament and of the Council on the coordination of social security systems (OJ 2004 L 166, p. 1) with effect as of 1 May 2010 and by the Regulation (EC) No. 987/2009, laying down the procedure for implementing Regulation (EC) No. 883/2004 in the coordination of social security systems (OJ L 284, pp. 1-42). As noted by the European Report in the Social Security Coordination (2013), the key objective of the adoption of Regulation 883/2004 was to find solutions to common problems, to modernise and simplify new regulations, and to adapt these provisions to areas where they were considered less effective.

The Council Regulation (EC) No. 1408/71 and Regulation No. 883/2004 both are merely a means of coordinating national laws and do not harmonise Member States' social security legislation, so that it is still for the Member States to decide what benefits they will grant to whom and subject to what conditions and how their social security systems are to be funded. Regulations are in principle without prejudice to the substantive conditions that each Member State may establish for the purpose of granting the social security benefits coordinated by the Regulation, provided that they observe the common principles laid down therein (Case: *Brey,* p. 41). The coordination of social security in the EU is based on four principles: applicable legislation, equality of treatment, aggregation of periods and exportability of benefits. Member States must organise, administer and finance social security schemes with respect to those general principles.

In the case of Poland's accession to the EU, coordination of social security systems among Members States is based on provisions of the Treaty and regulations of the Commission. Article 8 (1) 1 of the Regulation (EC) No. 883/2004 determines the principle of automatic replacement of every previous agreement in Poland relating to social security with provisions of the Regulation. This relates to agreements, to which the EU

Member States were parties. It should be emphasised that the current bilateral or multilateral agreements in terms of old-age benefits, including the establishment of the entitlement to old-age pensions, may apply in exceptional cases, if their provisions are more favourable to a person entitled or result from special historical aspects and their term is limited.

According to the foregoing, the article outlines said four general principles are derived from the European Union (EU) Regulations that replace Polish national provisions with those of the EU and European Economic Area (EEA) concerning the old-age pension issues. The article also looks at Polish regulations that specify the circumstances and rules under which individuals working abroad are entitled to state pensions.

OLD-AGE PENSION SYSTEM IN POLAND

In Poland, the retirement and other pensions are governed by the Law on Retirement and Other Pensions Provided by the Social Security Fund of 17 December 1998 (Ustawa o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych).

Principles of establishment of the right to old-age pension and amount of the same in Poland depend on the age of the insured person. The Act on old-age pensions introduced a division into two basic age groups. The first of them covers, as a rule, persons born before 1 January 1949. Such persons acquire their old-age pension entitlements following fulfilment of two conditions, namely attainment of a specified retirement age and completion of a specified period of insurance, including contributory and non-contributory periods, which is 25 years for men and 20 years for women, respectively. Persons born after 31 December 1948, are entitled to old-age pension after attaining common retirement age, regardless of the duration of period of insurance.

The EU coordination will be significant only for those systems, in which acquisition of the entitlement to old-age benefits has been made contingent upon years of service (Dzieniesiuk, 2004). Consequently, Polish old-age pensions will be subject to coordination only to the extent relating to benefits of the so-called "old" old-age pension system, which depends on years of service and, thus applies to persons born before 1 January 1949. Under the so-called new system of old-age pensions, the amount of benefits will depend on the amount of contributions registered and not on duration of the period of insurance. The exception is calculation of the initial capital in case of periods of insurance shorter than one year within the meaning of Article 57 of the Regulation No. 883/2004. In this case, it is also necessary to consider periods spent abroad.

Polish law also provides for an opportunity to apply for old-age pension at a reduced age (i.e. so-called bridging old-age pension) after proving the period of work (i.e. contributory and non-contributory) equal to 20 years for women and 25 years for men, respectively, at an age reduced by five years in relation to the common age (i.e. 55 years in case of women and 60 in case of men). One of criteria for awarding the bridging old-age pension is to prove, by 1 January 1999, at least 15 years of service under special conditions or conditions of special nature. However, as regards the establishment of entitlements to old-age pensions, the EU provisions of the Regulation (EC) No. 883/2004 do not apply. This is due to the fact that the bridging old-age pension is not treated as a "benefit paid on account of old age" as provided for in Article 3 (1) (d) of the Regulation

No. 883/2004. It only constitutes "a temporary benefit" payable between the period of work and proper old-age pension and the entitlement to the same ceases on the day preceding the day of acquisition of the entitlement to the actual old-age pension (a benefit paid on account of old age).

FUNDAMENTAL PRINCIPLES

The coordination system created by Regulation No. 883/2004 is based on the following principles:

Determination of applicable law

It results from Article 11 (1) of the Regulation (EC) No. 883/2004 on the coordination of social security systems that migrant workers pursuing activities within the territory of the EU, are subject, in terms of old-age pensions, to legislation of one Member State only. This principle aims at elimination of positive and negative competence disputes concerning concurrent local legislations to be applied in order to determine the scope of legal protection available to persons applying for old-age benefits.

The basic link allowing for determination of legislation of a competent Member State is the place of work (*lex loci laboris)* within the meaning of Article 11 (3) of the Regulation. It provides that, in order to guarantee equal treatment of all persons working in the territory of a Member State most effectively, it will be appropriate to deem, as a general rule, that applicable legislation will be the legislation of a Member State, in which the person performs his/her work as an employed or self-employed person.

The provisions of Title II of the Regulation No. 883/2004, constitute a complete system of conflict rules where Member States cannot determine themselves to whom their legislation applies and the territory within which that legislation takes effect. Those provisions are intended not only to prevent the simultaneous application of a number of national legislative systems, but also to guarantee that persons covered by Regulation No. 883/2004 are not left without social security cover because there is no legislation that applies to them.

The Act on the system of social security covers Polish citizens and foreigners, regardless of their place of residence. However, the place of vocational activities is important here. Colliding standards of the EU law comply with Article 6 (1) (4) of the Act, which specifies the principle of territoriality, i.e. association of the relationship of old-age and disability pension insurance with employment in the territory of the Republic of Poland and the term of "employment" are understood as any activities constituting the right to insurance. (B. Gudowska 2011).

Right to equal treatment

Initially, the principle of equal treatment enshrined in Article 3 (1) of the Regulation No. 1408/71 had protected persons who were residents in a Member State against discrimination on the grounds of nationality in the conditions for affiliation, for entitlement or for the payment of a benefit. In 1999, the European Court of Justice has ruled in the

Meeusen case that *Member State may not make the grant of a social advantage dependent on the condition that the beneficiaries be resident within its territory.*

The result of this judgment was Article 4 of the Regulation (EC) No. 883/2004, which explicitly provides for the equality of treatment between nationals and nationals of other member states, stateless persons and refugees resident in the territory of a Member State, who are or have been subject to the social security legislation of one or more Member States, as well as to the members of their families and to their survivors. This regulation embodies the specific area of social security, namely, the prohibition of discrimination on grounds of nationality, which is applicable to all EU laws under Article 18 TFEU. The prohibition covers direct and overt discrimination which occurs where two categories of persons whose factual and legal situations are not essentially different, receive different treatment or where different situations are treated in the same way. In the field of social security, it concerns national provisions and practices which differentiate without justification nationals of an EU country and which make the enjoyment of, or eligibility for, a certain right, benefit or opportunity explicitly conditional upon the nationality (Van der Mei 2003, p. 69). The principle of equality applies to an EU citizen who is exercising his right to free movement and residence in territory of member state lawfully (the matter of *EC v. UK, p. 89*).

Principle of equal treatment prohibits not only overt discrimination based on the nationality of the beneficiaries of social security schemes but also all covert (indirect) forms of discrimination which, through the application of other distinguishing criteria, lead in fact to the same result (Case: *Celozzi)*. The Court of Justice stated in the matter of *O'Flynn*, that conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers or where a great majority of those affected are migrant workers, where they are applicable without distinction but can more easily be satisfied by national workers than by migrant workers or where there is a risk that they may operate to the particular detriment of the latter. A provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect the nationals of other Member States to a larger extent than the nationals of the state whose legislation is at issue and if there is a consequent risk that it will place the former at a particular disadvantage. In that regard, it must be borne in mind first that it is not necessary to establish that the provision in question does in practice affect a substantially higher proportion of migrant workers. The Court held that it is sufficient that it is liable to have such an effect. Nevertheless, it should be noted that it does not prohibit all discrimination based on nationality but rather discrimination for which no specifically justified reasons exist (*Kenny*, p. 18).

The principle of equal treatment, as laid down in Article 5 of the Regulation (EC) No. 883/2004, also includes equal treatment of benefits, income, facts or events in the territory of another Member State as if they had taken place in the territory of the Member State whose legislation is applicable. The facts or events occurring in one Member State must be taken into account by another Member State as though they had taken place in its own territory. Therefore, if under the legislation of one Member State, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation shall also apply to the receipt of equivalent benefits or to income acquired under the legislation of another Member State. Equally, if

under the legislation of one Member State, legal effects are attributed to the occurrence of certain facts or events, that State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory. According to Recital 10 of the Regulation 883/2004, the principle of treating certain facts or events should not interfere with the principle of aggregating periods of insurance, completed under the legislation of another Member State. Periods completed under the legislation of another Member State should therefore be taken into account solely by applying the principle of aggregation of periods.

As regards the consequences of failure to observe the principle of equal treatment, the Court recalled that, where discrimination contrary to the EU law has been established, as long as measures reinstating equal treatment have not been adopted, observance of the principle of equality can be ensured only by granting persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category, the latter arrangements, for want of the correct application of EU law, being the only valid point of reference remaining. (the matter of *Landtová*, p. 51).

Aggregation of periods

The principle of the aggregation of periods constitutes a guarantee that the previous periods of beneficiaries' insurance, work or residence in the EU countries will be taken into account in the calculation of the old-age pension. "Periods of insurance", as defined in Article 1 (t) of the Regulation No. 883/2004, cover periods of insurance determined under national legislation.

Article 6 of the Regulation (EC) No. 883/2004 provides for the principle of aggregation of periods which, under the national legislation, are counted in terms of qualifying for or in terms of increasing the benefit. Periods of insurance communicated as such by one Member State must be accepted by the receiving Member State without questioning their quality while preserving the autonomy of said Member State in determining their national conditions for granting social security benefits.

Presumption of lack of confluence of periods of insurance means, however, that if the time in which certain periods of insurance or residence completed under the legislation of a Member State cannot be determined precisely, it shall be presumed that these periods do not overlap with periods of insurance or residence completed under the legislation of another Member State, and account shall be taken thereof, where advantageous to the person concerned, insofar as they can reasonably be taken into consideration. (see *Supreme Court of Poland*, *Case II UK 333/12*)

The principle of aggregation relates to a situation in which a person interested in obtaining old-age pension (an applicant) cannot prove the appropriate period of insurance as required for obtaining the benefit in a given country. The person may demand that periods of insurance, periods of work in the capacity of an employee, periods of self-employment or residence abroad should be recognised, unless they coincide with periods recognised in a country, which establishes the person's entitlement to old-age pension.

In case of coincidence of the periods of mandatory insurance with a period of insurance completed as part of any voluntary or continued additional insurance in accordance with the law of other Member State, the period fulfilled as part of mandatory

insurance will be assigned a priority. Additionally, all coinciding periods of insurance in the EU member states, to which the applicant was subject, recognized by legislation of a state competent for payment of old-age pension as equal to the periods of insurance. Polish law does not provide for any possibility to include periods of residence in Poland in periods of insurance. Thus, foreign periods of insurance may be considered for the purposes of old-age pensions only, if the law of the Member State in which the person has completed the periods, makes awarding of old-age pension contingent upon the period of residence in the territory of the state.

Periods of insurance and periods of residence abroad in Member States are recognised to the extent confirmed by a foreign social security agency of a given Member State. Zakład Ubezpieczeń Społecznych (ZUS) is a social security agency operating in Poland.

In order to determine the amount of old-age benefits, the existence of an independent and proportional benefit should be established first. An independent benefit applies to a situation in which conditions for entitlement to old-age benefits have been fulfilled on the ground of the local law exclusively. In Poland, the principles of calculation of old-age pensions are specified in provisions of Article 51-56 of the Old-Age and Disability Pension Act of the Social Insurance Fund.

Following establishment of the independent benefit, a competent institution establishes the so-called proportional benefit (partial old-age pension) by way of determination of a theoretical amount of the benefit and, then, the actual amount of the benefit. The theoretical amount of the benefit equals a benefit for which the person could apply, if all periods of insurance or residence as completed in consideration of recognized periods spent abroad, have been completed on the ground of the legislation of a Member State that pays old-age pensions and the legislation applies as of the benefit awarding date. If, under the legislation, the amount of the benefit does not depend on the duration of periods of insurance completed, the amount will be recognized as a theoretical amount.

The competent institution, i.e. Zakład Ubezpieczeń Społecznych in Poland, determines the actual (partial) amount of old-age pension corresponding to the relationship between periods of insurance (residence) completed in a state establishing the benefit and the total duration of the periods of insurance (residence) completed in all Member States in which the beneficiary worked and whose periods of insurance were recognized. The amount of proportional old-age pension calculated as above constitutes the benefit amount due to the person.

In order to determine a period of work necessary for acquisition of entitlement to old-age pension by a migrant worker subject to the old old-age pension system, the Polish pension authority should consider both contributory and non-contributory periods completed in Poland with their length not exceeding one third of the contributory periods completed in Poland and in other EU Member States (The matter of *Tomaszewska, p. 39)*.

Example

Ms X born in 1948 applies for the old-age pension on account of her periods of insurance in Poland, which amount to 15 years (including 5 non-contributory years) and in

the UK – amounting to 10 years (including 2 non-contributory years). While establishing the entitlement to old-age pension, ZUS has to include her periods of insurance in the UK, as the Polish system of insurance is not sufficient for obtaining the old-age pension in Poland.

ZUS calculates the theoretical amount, which would be due to Ms X, if she completed the entire 25 years' period of insurance in Poland as based on the general principles specified in the Old-Age and Disability Pension Act;

Next, the resulting amount is multiplied by the relation of duration of the Polish periods of insurance to the total duration of the Polish and the UK periods of insurance (15/25);

Assuming that the theoretical amount of old-age pension due to Ms X for her 25 years' period of insurance amounted to PLN 1,000, the actual amount of old-age pension will be: 1,000*15/25 = PLN 600.

The old-age pension calculated as above will be subject to payment as a due amount.

Principle of the exportability of benefits

Under Article 48 (b) TFEU and Article 7 of the Regulation (EC) No. 883/2004, it is not permissible to withhold benefit on the sole ground that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated. Any provision of national legislation relating to residence, which has the effect of preventing the export of old age benefit is contrary to those provisions and the national court must refuse its application. (*Opinion in the case of Molenaar, p. 61*).

However, Chapter 9 of the Regulation No. 883/2004 introduced a derogation from the principle of exportability: the waiving of residency rules does not apply to special non-contributory cash benefits, which means that they can only be granted by the Member State of residence of the beneficiary according to the legislation of that state. Provisions which derogate from the principle of the exportability of social security benefits must be interpreted strictly. According to Jorens, Van Overmeier (Jorens, Van Overmeier, 2009, p. 71) to justify the non-exportability of special non-contributory benefits, Member States ought to find a possible objective justification for a benefit, and prove that the proportionality clause is respected. While finding an objective justification will be easy for Member States, passing the proportionality test becomes much more complicated. Until now, Member States have hardly been in a position to do that.

CONCLUSION

In summary of the results, it should be said that Regulation 883/2004 constitutes an important factor embodying the freedom of movement set out in the Article 45 of the Treaty on the Functioning of the European Union.

In reference to the analysed practice of the Polish courts and insurance authority, it should be emphasised that principles of equal treatment, aggregation of periods and exportability, are generally respected. Similar conclusions can be drawn from the analysis of the Report expertise in social security coordination (2013). Under the aggregation

provisions, employees and self-employed mobile workers are entitled to acquire right to a Polish old-age pension in the circumstances where, under Polish legislation, there would be no entitlement because of the insufficient qualifying periods. Besides, contributions that have been paid in Poland would not be transferred to another Member State or paid out to the beneficiary, until the beneficiary reaches the pensionable age under the Polish law. Moreover, old-age pensions are payable at the Polish rate to persons covered by the EU law who are residents in another EU state. Similarly, persons who have acquired entitlement to old-age pensions under the legislation of other EU states, may receive their pensions in Poland at the rate that would be payable in the Member State that grants the benefit.

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