

Chapter I

An overview of the reforms in the personal and material scope of the (EC) Regulations on the coordination of Social Security Systems

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I. Introduction

Since the enactment of Regulation 3/58, through Regulation 1408/71 to the current Regulation 883/2004, the numerous reforms in the personal scope of the Regulations on the coordination of social security systems culminated in the inclusion of all insured persons, whether active or not.

As regards reforms in the material scope of these Regulations, there are positive and negative aspects: on the positive side, there is the inclusion of long-term care benefits within the scope of the coordination of Social Security regimes while, on the other hand, the same cannot be said of the reforms aimed at limiting ECJ case law, which tends to support the export of non-contributory benefits. These reforms, though, could be considered obsolete in view of Community case law, which recognises that the right to the freedom of movement of persons is sufficient legal basis to export a non-contributory benefit to another State where Community Law is applicable, as it happened in the cases C-192/05 (Tas-Hagen) and C-499/06 (Nerkowska)¹.

¹ See chapter XII. "Free Movement of Citizens and Non-Contributory Cash Benefits".

II. Reforms in the personal scope

A. Regulation 3/58 and employed persons

Initially, the personal scope of Article 4.1 of Regulation 3/58 only included the employed or equivalent workers who are or have been subject to the legislation of one or more Member States or who are stateless or refugees resident in the territory of one of the Member States, and their family members and survivors.

B. Extension of the scope to include persons protected under Regulation 1408/71

Article 2 of Regulation 1408/71 indicated the persons covered by this Regulation:

“This Regulation shall apply to employed or self-employed persons and to students who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors. This Regulation shall apply to the survivors of employed or self-employed persons and of students who have been subject to the legislation of one or more Member States, irrespective of the nationality of such persons, where their survivors are nationals of one of the Member States, or stateless persons or refugees residing within the territory of one of the Member States”.

1. *Mariners*

Although the coordination of Social Security regimes for mariners was regulated under Regulation 47/67, it was Regulation 1408/71 which expressly included this category of workers in its personal scope.

2. Self-employed persons

After Regulation 1408/71 came into force, it was not until the enactment of Regulation 1390/81 that self-employed persons, as well as the members of their families and their survivors were included within the scope of the coordination of Social Security schemes.

3. Civil servants

Civil servants were included in stages, depending on whether they were protected under coordinated regimes or special regimes falling outside the scope of coordination:

Initially, Regulation 1408/71 referred expressly to this category in its Article 2.3, by virtue of which civil servants and persons treated as such were included in its personal scope “where they are or have been subject to the legislation of a Member State to which this Regulation applies”.

However, in the original drafting of this provision, no reference was made to the family members and survivors of those civil servants. This legal vacuum was filled with the modification of said Article 2.3 under Regulation 1290/97.

Special social security schemes for civil servants were excluded from coordination until Regulation 1606/98 came into force. This Regulation reformed Regulation 1408/71, eliminating Article 2.3. The consequence of this was that civil servants and workers were no longer subject to different regulations.

As a result, for the purposes of the coordination of social security schemes, the terms “employed person” and “civil servant” (whether protected under a general or a special scheme) became synonymous. But this was only in the case of civil servants protected under a social security scheme coordinated by Regulation 1408/71, because otherwise (as in the case of Community civil servants) they were still excluded from its personal scope.

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4. Students

Students and their family members were incorporated under Regulation 307/1999, of 8 February.

5. Non-active persons

Regulation 631/2004 included non-active persons within the scope of Article 22a of Regulation 1408/71, allowing cross-border healthcare to this group of persons.

C. Personal scope of Regulation 883/2004

According to its Article 2.1, Regulation 883/2004 shall apply “to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors”.

Article 2.2 Regulation 883/2004 declares that it “shall also apply to the survivors of persons who have been subject to the legislation of one or more Member States, irrespective of the nationality of such persons, where their survivors are nationals of a Member State or stateless persons or refugees residing in one of the Member States”.

If this precept is compared with Article 2 of Regulation 1408/71, the first noticeable difference is that the terms “employed”, “self-employed persons” and “students” have been replaced by the simpler expression, “persons”.

As was already the case with Regulation 1408/71, holding the nationality of a Member State is not a requirement *sine qua non* for inclusion in the personal scope of Regulation 883/2004.

In the same order of things, the key element for a person to be protected under Regulation 883/2004 is still the fact that he/she is or has been subject to a coordinated social security system, as was the case with Regulation 1408/71.

The conclusion, therefore, which can be drawn is that Regulation 883/2004 has brought about a formal rather than a substantial change in the personal scope.

The possibility, though, of including third-country nationals legally residing in the territory of a Member State is still pending. For the moment, the rules for the coordination of Social Security regimes under Regulation 859/2003 continue to be applied to these persons.

D. Legal vacuums in the coordination of Social Security schemes on the grounds of civil status

1. Homosexual marriages

The concept of spouse does not exist in EU Law.

It is true, however, that the spouse is protected under said Regulation as a family member of a worker, student, stateless person or refugee to whom Regulation 883/2004 is applicable.

It is also true that the concept of spouse is not unambiguous in Europe, nor do the States where EU Law is applicable recognise the same rights for persons living together as unmarried couples, be they of the same or of different sexes.

However, the problem resides in the fact that although civil status is a question that remains under the exclusive competence of Member States, for the purposes of EU Law, the existence or otherwise of a marital relationship can affect the exercise of some of the rights recognised both under Primary Law and Secondary Law.

Therefore, today, although a migrant worker has married under legislation which allows homosexual marriage, his or her surviving spouse cannot claim survivor's benefits under Regulation 883/2004 in a State whose legislation only permits heterosexual marriage. This, obviously, is a flagrant barrier to the exercise of workers' right to freedom of movement.

2. Polygamous marriage

Although none of the States in which EU Law is applicable allows polygamy, a large number of workers in the EU are from countries where polygamy is legal.

In Spain, our courts have, on several occasions addressed the legal problem (and not always with the same criteria) which arises when the death of a worker leaves several widows who each claim survivor's benefit. Should the pension be divided equally between the survivors, proportionally to the duration of the marriage? Or should only the first spouse be recognised and none of the others?

Obviously, these problems are not limited to Spain; they also occur in other EU States. For this reason, it is only a matter of time before the problem arises of how to apply Regulation 883/2004 when there are multiple "widows" claiming survivor's pensions.

III. Reforms in the material scope

A. Regulation 1408/71

According to its Article 4.1, Regulation 1408/71 is applicable to all legislation concerning the following branches of social security:

- a) sickness and maternity benefits;
- b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;
- c) old-age benefits;
- d) survivors' benefits;
- e) benefits in respect of accidents at work and occupational diseases;
- f) death grants;
- g) unemployment benefits;
- h) family benefits

Regulation 1408/71 is applicable only to the contingencies listed above and not to any other social risk.

1. Long-term care benefits

Although long-term care insurance was not included into the material scope of Regulation 1408/71, it should be highlighted that the ECJ, since the judgements given in cases C-160/96 (Molenaar), C-215/99 (Jauch), C-502/01 and C-31/02 (Gaumain-Cerri and Barth), C-286/03 (Hosse) and C-212/06 (Gouvernement de la Communauté Française and Gouvernement Wallon), has invariably defined long-term care benefits as a coordinated Social Security benefit for the purposes of EU Law.

2. Non-contributory benefits

Article 4.2 of Regulation 1408/71 states that it “shall apply to all general and special social security schemes, whether contributory or non-contributory”.

However, Article 4 was subject to successive reforms in order to limit the extensive Community case law which recognises the right to export non-contributory benefits regardless of the classification given to them by Member States.

The first of these reforms came in Regulation 1247/92, which created “special non-contributory benefits” and introduced Articles 4(2 a), 10a and a new Annex IIa into Regulation 1408/71.

Simply by inclusion in Annex IIa, a non-contributory benefit becomes classified at EU level as a “special non-contributory benefits”, which basically carries with it two consequences: the aggregation of periods without pro-rata to get the cash benefit and non exportability of the non-contributory benefit when the beneficiary transfers his residence to a Member State other than that responsible for the payment.

Despite this reform, the ECJ, in cases C-215/99 (Jauch) and C-43/99 (Leclère), declared benefits included in Annex IIa to be exportable.

The Member States reacted with a reform of the coordination of non-contributory benefits that was even more rigid and that was introduced by Regulation 647/2005.

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Surprisingly, in case C-299/05 (Commission v Parliament and Council), the ECJ again declared special non-contributory benefits included in Annex IIa of Regulation 1408/71 reformed by Regulation 647/2005 to be exportable.

B. Regulation 883/2004 and the extension of protected Social Security risks

Regulation 883/2004 describes its material scope in its Article 3. Comparing it with Article 4 of Regulation 1408/71, the following differences can be found:

Unlike Regulation 1408/71, which mentions “sickness and maternity benefits” jointly in the first heading of Article 4.1), Regulation 883/2004 devotes separate headings to them, treating them as the distinct social security risks that they really are. Article 3.1.a) mentions “sickness benefits” and Article 3.1.b), “maternity and equivalent paternity benefits”. The express mention of paternity benefits is another novelty.

While Article 4.1.b) of Regulation 1408/71 speaks of “invalidity benefits, including those intended for the maintenance or improvement of earning capacity”, Article 3.1.c) of Regulation 883/2004 simply mentions “invalidity benefits”.

As regards “family benefits”, whereas Article 1(u) of Regulation 1408/71 distinguishes between family benefits and family allowances, Regulation 883/2004 has formally eliminated this distinction.

But, without any doubt at all, the most important difference as regards the contingencies now included in the scope of the coordination of Social Security schemes is to be found in the new Article 3.1.i), which includes pre-retirement benefits.

Nevertheless, by virtue of the provisions of Article 66 of Regulation 883/2004, the principle of the aggregation of periods, regulated by Article 6 of said Regulation, is not applicable. The principles of equal treatment and the exportability of benefits, though, do remain applicable.

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Lastly, it should be noted that Regulation 883/2004, in accordance with EU law, favours the maintenance of the closed list system for coordinated benefits (as mentioned in its Article 3), rather than the open list proposed by the Commission.