

## Chapter XI

### Regulation 883/2004 and coordination of family benefits

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#### I. Simplification of the definition

In contrast to the two definitions contained in Article 1(u) of the repealed Regulation 1408/71, which distinguished between family benefits<sup>22</sup> and family allowances<sup>23</sup>, Regulation 883/2004 is simpler, opting for a single concept: family benefits.

This is defined in Article 1(z) of Regulation 883/2004: “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”.

Chapter 8 (Articles 67-69) of Regulation 883/2004, further developed in Articles 58-61 of Regulation 987/2009, is dedicated to family benefits.

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<sup>22</sup> Article 1(u)(i) of Regulation 1408/71 reads: “family benefits’ means all benefits in kind or in cash intended to meet family expenses under the legislation provided for in Article 4 (1) (h), excluding the special childbirth or adoption allowances referred to in Annex II”.

<sup>23</sup> Article 1(u) (ii) reads: “family allowances’ means periodical cash benefits granted exclusively by reference to the number and, where appropriate, the age of members of the family”.

## **II. Benefits excluded from coordination: Annex I**

The possibility of excluding certain family benefits from the scope of the Regulations governing coordination is not new in Regulation 883/2004, having been contemplated in the repealed Regulation 1408/7, though it was limited to “the special childbirth or adoption allowances referred to in Annex II”.

The novelties, then, introduced under Article 1(z) of Regulation 883/2004 are the change in the number of the Annex (which becomes Annex I) and the greater number of benefits which may be included in said Annex<sup>24</sup>.

Although States may list in said Annex I the family benefits they wish to exclude from the Community coordination rules, this does not mean that the ECJ is bound by such notifications. That is to say, as the highest authority on the interpretation of Community law, the ECJ, should the case arise, may accept or reject the inclusion of a given benefit in the Annex.

## **III. Coordinated benefits to which chapter 8 of Regulation 883/2004 is not applicable**

In accordance with the provisions of Article 69.2, “Benefits paid in the form of pensions or supplements to pensions shall be provided and calculated in accordance with Chapter 5”, which is entitled “Old-age and survivors’ pensions”.

## **IV. Chapter 8 of Regulation 883/2004**

In accordance with Article 67 of Regulation 883/2004, “A person shall be entitled to family benefits in accordance with the legislation of the competent Member State, including for his/her family

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<sup>24</sup> “Advances of maintenance payments and special childbirth and adoption allowances”.

members residing in another Member State, as if they were residing in the former Member State. However, a pensioner shall be entitled to family benefits in accordance with the legislation of the Member State competent for his/her pension”.

## **V. Guiding principles in the application of community law to family benefits**

### **A. Aggregation of periods**

The principle of the aggregation of periods is one of the axes around which the coordination of Social Security schemes revolves, since it allows “bridges” to be built between substantially different Social Security schemes, preventing any prejudice which might be suffered by a migrant worker as a result of having been subject to the legislation of one or several Member States.

In the case of family benefits, aggregation is a peculiar characteristic in which the competent Member State must pay in full, at its own expense, the amount of the benefit in question. That is, they are benefits which are paid by one single country, even though the requirements to obtain them have been fulfilled in several.

It should be underlined that aggregation without pro rata adjustment, although not exclusively found in family benefits, is an exception to the general rule enshrined in Regulation 883/2004 for the calculation of other benefits.

### **B. Non-exportability of benefits**

Community Regulations have never declared family benefits to be exportable.

In the case of the payment of family benefits for children who do not reside in the competent State which makes the payment, it is not so much a question of exportability, given that the worker is in the

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territory of the competent State, but of not discriminating on the grounds of the place of residence of the family members.

That is, although the competent State must pay family benefits for children resident in other Member States when appropriate, this is not strictly a case of the export of benefits as contemplated for cases in which the recipient of the benefit transfers his residence to another Member State, with the competent State continuing to pay –in a foreign country– the benefit to which the worker is entitled under national legislation.

For this reason, the current Article 67 provides that “A person shall be entitled to family benefits, including for his/her family members residing in another Member State, as if they were residing in the former Member State”.

It can be said, therefore, that the purpose of Chapter 8 of Regulation 883/2004 is, basically, to prevent a Member State from making the award or the amount of family benefits depend on residence requirements applied to the worker’s family members in the awarding State, in order to guarantee the migrant worker’s right to freedom of movement.

### **C. Competent Member State**

Article 1(s) of Regulation 883/2004 defines “competent Member State” as “the Member State in which the competent institution is situated”.

According to Article 1(q) of Regulation 883/2004, “competent institution” means:

- “(i) the institution with which the person concerned is insured at the time of the application for benefit;
- or
- (ii) the institution from which the person concerned is or would be entitled to benefits if he/she or a member or members of his/her family resided in the Member State in which the institution is situated;
- or

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(iii) the institution designated by the competent authority of the Member State concerned;

or

(iv) in the case of a scheme relating to an employer's obligations in respect of the benefits set out in Article 3(1), either the employer or the insurer involved or, in default thereof, the body or authority designated by the competent authority of the Member State concerned."

In order to determine which Member State is competent for the payment, in full and at its own expense, of the family benefits, it is necessary to distinguish between the two cases regulated under Article 67 of Regulation 883/2004:

- General rule: persons included in the personal scope of Regulation 883/2004 shall be entitled to family benefits in accordance with the legislation of the competent Member State.
- Exception: pensioners shall only be entitled to family benefits in accordance with the legislation of the Member State competent for his/her pension.

In its original version, Regulation 883/2004 contained no provision analogous to that contained in Article 75.2 of the repealed Regulation 1408/71, under which "the competent institution shall discharge its legal obligations by providing the said benefits to the natural or legal person actually maintaining the members of the family, at the request of, and through the agency of, the institution of their place of residence or of the designated institution or body appointed for this purpose by the competent authority of the country of their residence".

Fortunately, this omission has been remedied by Regulation 988/2009, which modified Regulation 883/2004, adding, among other changes, a new Article 68(a): "in the event that family benefits are not used by the person to whom they should be provided for the maintenance of the members of the family, the competent institution shall discharge its le-

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gal obligations by providing those benefits to the natural or legal person in fact maintaining the members of the family, at the request and through the agency of the institution in their Member State of residence or of the designated institution or body appointed for that purpose by the competent authority of their Member State of residence”.

### **VI. Priority rules in the event of overlapping: Article 68 of Regulation 883/2004**

As the Kromhout<sup>25</sup> judgement illustrates perfectly, the overlapping rule aims to prevent the double payment of family benefits or allowances which would suppose an unjustified overpayment to the worker’s family. This rule should, therefore, be interpreted in such a way that its effect is to avoid the parallel payment of social benefits with respect to one single situation over a single period of time.

In contrast to the repealed Regulation 1408/71, the new text of Article 68, entitled “Priority rules in the event of overlapping”, may have achieved the objective of simplifying the number of applicable precepts, but at the cost of making the article disproportionately extensive.

Furthermore, the drafting of the new Article 68 is confused and obscure, which makes it probable that future problems regarding its application will be due above all to the difficulty of interpreting the meaning of the text.

This is because sub-paragraphs 1(a) and 1(b) of the new Article 68 apply different overlapping rules in cases where, within the same time period and for the same family members, family benefits are available under the legislation of more than one Member State.

#### **A. Benefits payable on different bases or on the same basis**

The order of priority regulated in Article 68.1 (a) is applicable “in the case of benefits payable by more than one Member State on differ-

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<sup>25</sup> Case -104/84 (Kromhout).

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ent bases...”, whereas Article 68.1(b) is only applicable “in the case of benefits payable by more than one Member State on the same basis...”.

The fundamental problem is to decipher what Regulation 883/2004 means by “on different bases” and “on the same basis”, since the Regulation fails to clarify the meaning of these terms. While they may be sufficiently clear to the Community legislator, it is obvious that they will not be so to national interpreters of the law.

Our interpretation is that, since the concept of family benefit is unequivocal in Regulation 883/2004, the expression “benefits payable on different bases or on the same basis” cannot refer to the characteristics or nature of the national benefit in question, whether for birth, adoption, orphanhood, disability, number of children, etc.

For this reason, “on different bases” and “on the same basis” must be interpreted in the light of Article 67 of Regulation 883/2004. They must, therefore, refer to the legal title by which the person protected under the Regulation claims the family benefit, that is, on the basis of activity as an employed or self-employed person, on the basis of the receipt of a pension or on the basis of residence in a State where EU law is applicable.

### **1. Article 68.1 (a)**

This Article regulates the priority rules in the event of the overlapping of benefits payable by more than one Member State on different bases.

The rules for determining the order of priority of legislation are clear and simple:

Firstly, rights available on the basis of an activity as an employed or self-employed person.

Secondly, rights available on the basis of receipt of a pension.

Finally, rights available on the basis of residence.

### **2. Article 68 1 (b)**

In the case of benefits payable by more than one Member State on the same basis, the rules for determining which State is responsible

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for the payment of family benefits shall be as provided for in Article 68.1.(b) of Regulation 883/2004.

The key element in determining the Member State whose legislation has priority is the place of residence of the children.

Taking this criterion as a reference point, Article 68.1 (b), in turn, contemplates three very different situations in its subheadings i), ii) and iii).

### **3. Article 68 (1)(b)(i)**

The priority established in this precept is: “in the case of rights available on the basis of an activity as an employed or self-employed person: the place of residence of the children provided that there is such activity, and additionally, where appropriate, the highest amount of the benefits provided for by the conflicting legislations. In the latter case, the cost of benefits shall be shared in accordance with criteria laid down in the Implementing Regulation”.

The wording of the Article is confusing and is impossible to understand without referral to Article 58 of Implementing Regulation 987/2009.

Firstly, in order to interpret this text, the reader must first decipher the phrase “provided that there is such activity”, which appears to indicate that only the legislation of the State of residence of the children will be applicable when the activity as an employed or self-employed person takes place in that State.

But what happens if the person under Regulation 883/2004 holds the right to family benefits as an employed or self-employed worker in more than one State but his children do not reside in any of them?

Thanks to Article 58 of Regulation 987/2009, we can hazard a solution: “where the order of priority cannot be established on the basis of the children’s place of residence, each Member State concerned shall calculate the amount of benefits including the children not resident within its own territory. In the event of applying Article 68(1)(b) (i), the competent institution of the Member State whose legislation



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provides for the highest level of benefits shall pay the full amount of such benefits and be reimbursed half this sum by the competent institution of the other Member State up to the limit of the amount provided for in the legislation of the latter Member State”.

This rule of applying the legislation which offers the highest level of family benefit with the other State paying half of that sum, frontally contradicts the rule contained in Article 68.2 of Regulation 883/2004, which governs the right to a “differential supplement” at the expense of the legislation which, while applicable, does not have priority.

The only solution we can offer to resolve this apparent contradiction is to argue that in the case of Article 68(1)(b)(i), the beneficiary be paid a family benefit by one State, which has the right to reimbursement by a second State. Under Article 68.2, the beneficiary receives two family benefits from different States between which there is no reimbursement.

### **4. Article 68 (1)(b)(ii)**

Article 68 (1)(b)(ii) states: “in the case of rights available on the basis of receipt of pensions: the place of residence of the children, provided that a pension is payable under its legislation, and additionally, where appropriate, the longest period of insurance or residence under the conflicting legislations”.

That is to say, it is a requirement that, for the priority application of the legislation of the State where the children reside, the person protected under Regulation 883/2004 must receive a pension from that State.

But when the residence of the children does not allow an order of priority to be determined, each Member State concerned shall calculate the amount of the benefits including the children not resident within its own territory (Article 58, paragraph 1, Regulation 987/2009).

In such a case, since Regulation 987/2009 says nothing on this subject, it must be supposed that the priority legislation shall be that of the State of the longest period of insurance or residence of the pensioner, in accordance with the last paragraph of Article 68(1)(b)(ii).

**5. Article 68 (1)(b)(iii)**

Subparagraph iii) is the only one of the three that is clearly drafted, providing that “in the case of rights available on the basis of residence [the priority legislation shall be] the place of residence of the children”.

**VII. Differential supplement: Article 68.2**

Without prejudice to the fact that, in the case of overlapping rights, family benefits are awarded in accordance with the priority legislation under Article 68.1, Article 68.2 contemplates the possibility of providing a “differential supplement [...] for the sum which exceeds this amount”.

This right is not new to Regulation 883/2004 as it was already recognised in Regulation 1408/71 and the Court of Justice has pronounced judgement on it many times.

In all events, it should be noted that the differential supplement implies that the beneficiary of family benefits holds the right to receive the difference between the benefit recognised under the priority legislation and that which he would have received if only the non-priority legislation had been applicable to him, said difference being paid by the State whose legislation is also applicable to him, though not as a priority.

In accordance with Article 60.2 of Regulation 987/2009, the institution to which an application is made shall examine the application and “if it appears to that institution that there may be an entitlement to a differential supplement by virtue of the legislation of another Member State in accordance with Article 68(2) of the basic Regulation, that institution shall forward the application, without delay, to the competent institution of the other Member State and inform the person concerned”.

Article 68.2 of Regulation 883/2004, though, contains an important exception to this right to a differential supplement: “However,

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such a differential supplement does not need to be provided for children residing in another Member State when entitlement to the benefit in question is based on residence only". This precept is, without doubt, open to criticism since, in such cases, it leaves the payment of the supplement to the discretion of States and, above all, because it could suppose an obstacle to the freedom of movement as a result of the State to which the worker emigrates and the State in which the children reside being different.

### **VIII. Article 68.3.**

This Article regulates the procedure for the processing of family benefits when the application is submitted to a State whose legislation is applicable but not by priority. It is further developed in Article 60 of Regulation 987/2009, which provides that "For the purposes of applying Articles 67 and 68 of Regulation 883/2004, the situation of the whole family shall be taken into account as if all the persons involved were subject to the legislation of the Member State concerned and residing there, in particular as regards a person's entitlement to claim such benefits".

As regards the accrual of family benefits, the provisions of Article 68(3)(b) of Regulation 883/2004 should be highlighted: "the competent institution of the Member State whose legislation is applicable by priority shall deal with the application as though it were submitted directly to itself, and the date on which such an application was submitted to the first institution shall be considered as the date of its claim to the institution with priority".

### **IX. Single applicable legislation?**

One of the pillars supporting the coordination of Social Security systems in the Community is the principle of that persons should be subject to the legislation of a single Member State. However, we have

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seen how, in the case of family benefits, this principle has exceptions and in some cases it may be possible to receive benefits through the simultaneous application of the legislation of more than one State.

### **X. Additional or special family benefits for orphans**

Article 69.1 of Regulation 883/2004 reads: “If, under the legislation designated by virtue of Articles 67 and 68, no right is acquired to the payment of additional or special family benefits for orphans, such benefits shall be paid by default, and in addition to the other family benefits acquired in accordance with the abovementioned legislation, under the legislation of the Member State to which the deceased worker was subject for the longest period of time, in so far as the right was acquired under that legislation. If no right was acquired under that legislation, the conditions for the acquisition of such right under the legislations of the other Member States shall be examined and benefits provided in decreasing order of the length of periods of insurance or residence completed under the legislation of those Member States”.

The criticism which must be levelled here is that Regulation 883/2004 does not at any time define what is meant by “additional or special family benefits for orphans”, which makes it difficult to understand the case regulated under Article 69.1 of Regulation 883/2004.

According to Article 61 of Regulation 987/2009 “for the purposes of applying Article 69 of the basic Regulation, the Administrative Commission shall draw up a list of the additional or special family benefits for orphans covered by that Article. If there is no provision for the institution competent to grant, by priority right, such additional or special family benefits for orphans under the legislation it applies, it shall without delay forward any application for family benefits, together with all relevant documents and information, to the institution of the Member State to whose legislation the person concerned has been subject, for the longest period of time and which

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provides such additional or special family benefits for orphans. In some cases, this may mean referring back, under the same conditions, to the institution of the Member State under whose legislation the person concerned has completed the shortest of his or her insurance or residence periods”.

So, what is ultimately going to determine which specific benefits are subject to Article 69 of Regulation 883/2004 will be the fact that they are included in a list or not.

Likewise, it can be deduced from Article 69 of Regulation 883/2004 that this is another exception to the principle of persons being subject to the legislation of a single Member State since, in this case, as well as the benefits acquired through the application of Articles 67 and 69, additional or special family benefits are awarded at the expense of the Member State to whose legislation the person concerned has been subject for the longest period of time and which provides such additional or special family benefits for orphans.