

## Chapter XII

### Free movement of citizens and non-contributory cash benefits

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#### I. Material scope of Regulation 883/2004

According to Article 3.2 of Regulation 883/2004<sup>26</sup>, “unless otherwise provided for in Annex XI, this Regulation shall apply to general and special social security schemes, whether contributory or non-contributory”.

Article 3.3 of Regulation 883/2004 reads: “this Regulation shall also apply to the special non-contributory cash benefits covered by Article 70<sup>26</sup>”. From the reading of this latter provision, it can be inferred that the term “special non-contributory cash benefit” is reserved for those benefits notified by the States in Annex X.

Nevertheless, Article 3.5<sup>27</sup> excludes social assistance benefits from the material scope of Regulation 883/2004.

Although neither Regulation 883/2004 nor its precedents, Regulations 140/71 and 3/58, contain a definition of Social Security or Social Assistance, or of “contributory and non-contributory benefit”, the requirement for uniform application of EU law implies that the terms used in the Regulations cannot be altered either by the inherent pe-

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<sup>26</sup> See Heading III.

<sup>27</sup> Regulation 988/2009 modified Article 3.5 of Regulation 883/2004.

cularities of national statutory provisions or by internal interpretations of terms used in EU law.

## **II. Non-exportability of special non-contributory cash benefits**

Despite the export of social benefits being a basic principle of social EU law which is manifested in the principle of “waiving of residence rules” contained in Article 7 of Regulation 883/2004<sup>28</sup>, the principle has never been applicable to special non-contributory benefits notified by the Member States in certain annexes (Annexe II of Regulation 1408/71 and Annexe X of Regulation 883/2004).

This situation has not been altered by the entry into force of Regulation 883/2004, in which Article 70.3 expressly excludes the application of the aforementioned Article 7 to special non-contributory cash benefits.

Article 70.4 adds that said benefits “shall be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. Such benefits shall be provided by and at the expense of the institution of the place of residence”.

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

Given that Article 6 of Regulation 883/2004, which enshrines the principle of the aggregation of periods, is applicable to special non-contributory benefits, the State which recognises them must aggregate, if necessary, the periods of residence covered in other Member States or in which EU law is applicable (European Economic Area and Switzerland).

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<sup>28</sup> It reads: “unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his/her family reside in a Member State other than that in which the institution responsible for providing benefits is situated”.

### **III. Special non-contributory benefits and article 70 of Regulation 883/2004**

Article 70 of Regulation 883/2004 reads:

1. "This Article shall apply to special non-contributory cash benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement, has characteristics both of the social security legislation referred to in Article 3(1) and of social assistance.
2. For the purposes of this Chapter, 'special non-contributory cash benefits' means those which:
  - (a) are intended to provide either:
    - (i) supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 3(1), and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned;
    - or
    - (ii) solely specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned, and
  - (b) where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary. However, benefits provided to supplement a contributory benefit shall not be considered to be contributory benefits for this reason alone, and
  - (c) are listed in Annex X.
3. Article 7 and the other chapters of this Title shall not apply to the benefits referred to in paragraph 2 of this Article.

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4. The benefits referred to in paragraph 2 shall be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. Such benefits shall be provided by and at the expense of the institution of the place of residence”.

From the reading of this provision, it can be deduced that the requirements mentioned are cumulative.

### **IV. A criticism of the new rules governing special non-contributory cash benefits**

#### **A. A new(?) definition**

There are practically no differences between the text of Article 4.2 of Regulation 1408/71 (in the version contained in Regulation 647/2005) and the new Article 70 of Regulation 883/2004.

The statement contained in Article 70 to the effect that special non-contributory cash benefits have “characteristics both of the social security legislation and of social assistance” represents nothing new. This is something that both ECJ case law and the authors had stated with respect to special non-contributory cash benefits included in the repealed Annex II of Regulation 1408/71.

In all events, there is something which has not changed in any way, and that is the fact that in order for special non-contributory cash benefits to be classified as such and, therefore, not to be exportable, it is essential that they be notified in a specific Annex (in Regulation 1408/71, this was in Annex IIa and now, in Regulation 883/2004, Annex X).

The relevant issue, therefore, is not so much the definition itself as the inclusion of the benefit in the Annex since, although a benefit may be classified as a special non-contributory cash benefit in accordance with the new definition contained in Article 70 of Regula-

tion 883/2004, if it does not appear in Annex X, it will be exportable to other States in which said Regulation is applicable.

## **B. Financing**

It is controversial that the “keystone” in the classification of special non-contributory cash benefits should be the fact that “financing exclusively derives from compulsory taxation intended to cover general public expenditure”.

It is true that, traditionally, non-contributory benefits have been defined, in contrast to contributory benefits, by examining mainly the means of funding.

But it should be highlighted that doctrine coincides in recognising the fiscal nature of contributions, a thesis echoed by the Spanish Constitutional Court; though there are discrepancies with regard to the specific category in which the contribution is included.

Consequently, both contributory and non-contributory benefits are publicly-funded, regardless of whether they are called contributions or taxes.

## **C. “Supplementary, substitute or ancillary cover against the risks covered by the branches of Social Security”**

According to Article 70 of Regulation 883/2004, another of the characteristics which define special non-contributory cash benefits is that their purpose must be to provide “supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 3(1)”.

This does not constitute a remarkable novelty, since Article 4.2 of Regulation 1408/71 already referred to the essential link between special non-contributory benefit and the contingencies listed in Article 4.1 of Regulation 1408/71.

#### **D. Simplification?**

As regards special non-contributory cash benefits, Regulation 883/2004 does not appear to have met expectations regarding the desired “simplification” of the rules on the coordination of Social Security schemes.

This is because the Regulation still contains references to non-contributory benefits, special non-contributory cash benefits and Social Assistance benefits without clearly defining the borders between these different concepts. And this is despite the very different legal consequences which may arise from defining a benefit as one or another of these under EU law.

#### **V. Special non-contributory cash benefits as social advantages**

The concept of social advantage is not enshrined in Regulation 883/2004, but in Article 7 of Regulation 1612/68.

It is an undefined legal concept whose profile has been determined by ECJ case law, which has invoked this idea in very diverse situations. Case law includes in this category all of the advantages which, whether or not they are linked to a work contract, are generally recognised for national workers on the basis, mainly, of their status as workers or for the mere fact that their habitual place of abode is in the territory of a Member State. This means that its extension to migrant workers facilitates their mobility within the EU.

The application of the case law of the ECJ makes it possible for a benefit which cannot be paid in a foreign country as a result of its having been classified at EU level as a special non-contributory cash benefit nevertheless to be recognised as a social advantage for workers included within the personal scope of Regulation 1612/68.

As occurred in the two *Frascona*<sup>29</sup> cases, in which, with respect

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<sup>29</sup> See ECJ *Frascona* (6.6.1985, case-157/84) and ECJ *Frascona* (9.7.1987, case 256/86).

to an Italian citizen who lived in France with her son (who was also Italian and who was employed in France), the concession of a special non-contributory old-age benefit notified in Annexe IIa of Regulation 1408/71 was classified as a “social advantage” for the purposes of Article 7.2 of Regulation 1612/68.

The ECJ came to a similar conclusion in case C-287/05 (Hendrix), in which the Court classified the Dutch benefit claimed (for the protection of young persons with disability) as a special non-contributory cash benefit and, therefore, non-. But, on the other hand, the Court recognises the right to receive the payment in Belgium, to where the worker had moved his residence, classifying it as a social advantage under Regulation 1612/68.

## **VI. The Treaty as a basis for the export of non-contributory benefits**

The sentence of the ECJ of 26.10.2006, C-192/05 (Tas-Hagen et Tas) opened up a revolutionary line of case law which could throw up surprising results as regards the export of non-contributory benefits.

This litigation arose as a result of the refusal by the Dutch authorities to grant the applicants a benefit payable to the civil victims of war on the grounds that they did not reside in the Netherlands. They did not evoke Regulation 1408/71, since Article 4.4 expressly excludes benefits to war victims from its material scope. Regulation 1612/68 was not invoked either, since there was no evidence that the litigants had ever worked as employees in another Member State.

The applicants based their claim exclusively on Article 18. 1 of the EC Treaty – actually Article 21.1 of the Treaty on the Functioning of the European Union-which recognises the right of all EU citizens to move and reside freely within the territory of a Member State other than that of the State whose nationality he holds. And the ECJ held that “Article 18(1) EC is to be interpreted as precluding legislation of a Member State under which it refuses to grant to one of its nation-

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als a benefit for civilian war victims solely on the ground that, at the time at which the application was submitted, the person concerned was resident, not in the territory of that Member State, but in the territory of another Member State”.

Analogous legal arguments were also used before in the case *Nerkowska*<sup>30</sup>:

“Ms Nerkowska was entitled to a pension as a result of partial incapacity for work linked to her stay in places of isolation, but payment of this benefit was suspended on the ground that she did not reside in Polish territory as far as she had taken up residence in Germany. A situation in which the exercise by Ms Nerkowska of a freedom accorded by Community law has an impact on her right to the payment of a benefit under national legislation cannot be considered to be a purely internal matter with no link to Community law”.

As a result the EJC held that “Article 18(1) EC is to be interpreted as precluding legislation of a Member State under which it refuses, generally and in all circumstances, to pay to its nationals a benefit granted to civilian victims of war or repression solely because they are not resident in the territory of that State throughout the period of payment of the benefit, but in the territory of another Member State”.

In the light of these judgements, it appears plausible to invoke the Treaty on the Functioning of the European Union directly in order to claim the export of a non-contributory benefit, leaving aside the cumbersome, restrictive rules contained in the Regulations on the coordination of Social Security schemes.

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<sup>30</sup> ECJ *Nerkowska* (22.5.2008, case 499/06).