THOMSON REUTERS PROVIEW

¡ENHORABUENA!

USTED ACABA DE ADQUIRIR UNA OBRA QUE **YA INCLUYE**
LA VERSIÓN ELECTRÓNICA.
DESCÁRGUELA AHORA Y APROVÉCHESE DE TODAS LAS FUNCIONALIDADES

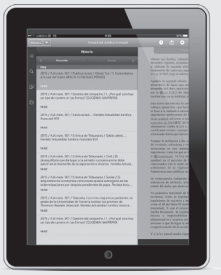
Acceso interactivo a los mejores libros jurídicos desde iPad, Android, Mac, Windows y desde el navegador de internet

THOMSON REUTERS

FUNCIONALIDADES DE UN LIBRO ELECTRÓNICO EN **PROVIEW**

SELECCIONE Y DESTAQUE TEXTOS
Haga anotaciones y escoja los colores para organizar sus notas y subrayados

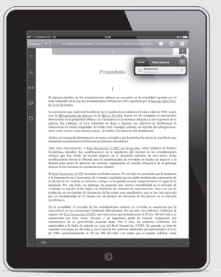
USE EL TESAURO PARA ENCONTRAR INFORMACIÓN
Al comenzar a escribir un término, aparecerán las distintas coincidencias del índice del Tesauro relacionadas con el término buscado



HISTÓRICO DE NAVEGACIÓN
Vuelva a las páginas por las que ya ha navegado

ORDENAR
Ordene su biblioteca por: Título (orden alfabético), Tipo (libros y revistas), Editorial, Jurisdicción o área del derecho, libros leídos recientemente o los títulos propios

CONFIGURACIÓN Y PREFERENCIAS
Escoja la apariencia de sus libros y revistas en ProView cambiando la fuente del texto, el tamaño de los caracteres, el espaciado entre líneas o la relación de colores



MARCADORES DE PÁGINA
Cree un marcador de página en el libro tocando en el icono de Marcador de página situado en el extremo superior derecho de la página

BÚSQUEDA EN LA BIBLIOTECA
Busque en todos sus libros y obtenga resultados con los libros y revistas donde los términos fueron encontrados y las veces que aparecen en cada obra

IMPORTACIÓN DE ANOTACIONES A UNA NUEVA EDICIÓN
Transfiera todas sus anotaciones y marcadores de manera automática a través de esta funcionalidad

SUMARIO NAVEGABLE
Sumario con accesos directos al contenido

THOMSON REUTERS

INFORMACIÓN IMPORTANTE: Si ha recibido previamente un correo electrónico con el asunto **"Proview – Confirmación de Acceso",** para acceder a Thomson Reuters Proview™ deberá seguir los pasos que en él se detallan.

Estimado cliente,

Para acceder a la versión electrónica de este libro, por favor, acceda a **http://onepass.aranzadi.es**

Tras acceder a la página citada, introduzca su dirección de correo electrónico (*) y el código que encontrará en el interior de la cubierta del libro. A continuación pulse enviar.

Si se ha registrado anteriormente en **"One Pass"** (**), en la siguiente pantalla se le pedirá que introduzca la contraseña que usa para acceder a la aplicación **Thomson Reuters ProView™.** Finalmente, le aparecerá un mensaje de confirmación y recibirá un correo electrónico confirmando la disponibilidad de la obra en su biblioteca.

Si es la primera vez que se registra en **"One Pass"** (**), deberá cumplimentar los datos que aparecen en la siguiente imagen para completar el registro y poder acceder a su libro electrónico.

- Los campos **"Nombre de usuario"** y **"Contraseña"** son los datos que utilizará para acceder a las obras que tiene disponibles en **Thomson Reuters Proview™** una vez descargada la aplicación, explicado al final de esta hoja.

Cómo acceder a **Thomson Reuters Proview™:**

- **iPad:** Acceda a AppStore y busque la aplicación **"ProView"** y descárguela en su dispositivo.
- **Android:** acceda a Google Play y busque la aplicación **"ProView"** y descárguela en su dispositivo.
- **Navegador:** acceda a **www.proview.thomsonreuters.com**
- **Aplicación para ordenador:** acceda a **http://thomsonreuters.com/site/proview/download-proview** y en la parte inferior dispondrá de los enlaces necesarios para descargarse la aplicación de escritorio para ordenadores Windows y Mac.

(*) Si ya se ha registrado en **Proview™** o cualquier otro producto de Thomson Reuters (a través de One Pass), deberá introducir el mismo correo electrónico que utilizó la primera vez.

(**) **One Pass:** Sistema de clave común para acceder a Thomson Reuters Proview™ o cualquier otro producto de Thomson Reuters.

GOOD PRACTICES IN SOCIAL LAW

Director
CRISTINA SÁNCHEZ-RODAS NAVARRO
Coordinator
TERESA VELASCO PORTERO

GOOD PRACTICES IN SOCIAL LAW

GOBIERNO DE ESPAÑA
MINISTERIO DE ECONOMÍA Y COMPETITIVIDAD

THOMSON REUTERS
ARANZADI

1 edition, 2015

THOMSON REUTERS PROVIEW™ eBOOKS
Incluye versión en digital

This book has been published in the framework of the R&D project financed by the Spanish Economy Ministry "best legal-procedural practices in the field of labour and European law to reduce labour litigation expenditure at zero cost (I+D DER 2012-32111).

Editorial Aranzadi, SA
Camino de Galar, 15
31190 Cizur Menor (Navarra)
ISBN: 978-84-9099-551-8
Depósito Legal: NA 2337/2015
Printed in Spain. Impreso en España
Fotocomposición: Editorial Aranzadi, SA
Impresión: Rodona Industria Gráfica, SL
Polígono Agustinos, Calle A, Nave D-11
31013 - Pamplona

In memoriam Dr. Bernd Schulte, a great jurist and mentor

Index

Introduction

This book brings together the experience of a group of researchers with a high level of specialisation in social law. It has been published in the framework of the R&D project "Good Legal Practices in the Field of Labour and European Law to Reduce Labour Litigation Expenditure at Zero Cost (DER 2012-32111).

The first objective of this project is to detect and analyse, based on the experience and professional background of the research team, best legal and procedural practices in due process of law allowing for a reduction of labour litigation costs without detriment, inasmuch as possible, to the rights of nationals and EU citizens and of foreigners with legal residence in the European Union.

In order to achieve such goal the first step will be to identify those cases in which either the Central Government or the Regions do not strictly apply the legal regulations or the administrative process is clearly subject to improvement, being the main impact of all of it unnecessary economic costs.

Second, after indentifying the situations in which the application or management of labour regulations is neither effective nor efficient, we will discuss the consequences and implications of the preservation of such status quo in legal and economic terms.

Third, complying in all cases with the legal source system, specific measures will be proposed to adopt the necessary legal reforms or implement administrative best practices that would lead to the suppression or reduction of labour litigation costs.

Moreover, a further objective of this project is to analyse the labour market and Social Security reforms carried out in other EU countries, allowing them to tackle the economic crisis more successfully.

The book is dedicated to Dr. Bernd Schulte, who I met at the MaxPlanck Institute in Munich at the end of the 90s. He was member of the committee

who evaluated my doctoral thesis. During years we worked together on several projects funded by the European Commission. I have only words of gratitude for everything I learned with him.

Cristina Sánchez-Rodas Navarro

Chapter I

Good legal practices in spanish law? Clauses Governing residence and the export of Spanish Social Security Benefits[1]

Prof. Dr. Cristina Sánchez-Rodas Navarro

University of Seville

I. INTRODUCTION

In order to prevent the coexistence of many different social protection regimes from becoming an insurmountable obstacle to the exercise of the right of free movement of persons, the current Article 48 of the Treaty on the Functioning of the European Union proclaims that the European Parliament and the Council shall adopt such measures in the field of Social Security as are necessary to provide freedom of movement for workers.

This precept has been developed in Regulation 883/2004, whose scope of personal application is delimited in Article 2, from which it can be inferred that it is applicable to the nationals of States in which European Union Law is applied and who are or have been subject to the legislation of one or several Member States, as well as their family members and survivors.

Article 7 of Regulation 883/2004 carries the heading "Waiving of residence rules" and provides that "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

1. This report has been published in the framework of the R & D project "Good Legal Practices in the Field of Labour and European Law to Reduce Labour Litigation Expenditure at Zero Cost (I+D DER 2012-32111).

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".

The principle of the waiving of residence rules is better known as the principle of export of benefits.

Regulation 1231/2010 widens the application of Regulation 883/2004 to the nationals of third countries legally residing in EU territory, and so this group also comes under community provisions on the export of Social Security benefits coordinated in the territory in which EU Law is applicable.

II. THE REFORM OF RESIDENCE RULES IN SPANISH LAW

The Fourth Final Provision —section seven— of Law 22/2013, of 23 December, on the General State Budget for 2014, incorporated a new Sixty-Fifth Additional Provision of the Revised Text of the General Social Security Law of 1994[2].

Although the Preamble to Law 22/2013 makes no mention of the purpose of this reform, it can be deduced that it is none other than to prevent the export of non-contributory Social Security benefits and to avoid payment of the healthcare costs generated by those persons who spend over 90 days outside Spain in each calendar year. And, at the same time, it introduces into our Social Security legislation the concept of "habitual" residence, which is mentioned in the articles of Regulation 883/2004 on the coordination of Social Security systems.

III. MATERIAL SCOPE OF THE REFORM

It should first be noted that, pursuant to Article 7 of the Revised Text of the General Social Security Law, residence in Spanish territory is a general requirement of Spanish citizens for their inclusion in the contributory or non-contributory level of the Social Security system. With respect to foreigners, Article 14.1 of Basic Law 4/2000 requires that they reside legally or are legally in Spain.

But it is one thing that, as a translation of the principle of territoriality, one of the requirements for Spanish Social Security legislation to be applicable is to work, reside (or be) in Spain, and another very different thing for residence in Spain, or proven periods of residence in Spain, to be

2. After the new Revised Text of the General Social Law of 2015 came in force, the references to the former Sixty-Fifth Additional Provision should be made to the new article 51.

specifically required for the recognition and maintenance of certain Social Security benefits. Article 51 of the Revised Text of the General Social Security Law would only be applicable to the latter.

From the drafting of the article 51, it can be inferred that it affects two types of benefits: the second section is devoted to monetary Social Security benefits which require residence in Spanish territory:

> "For the purposes of the maintenance of the right to monetary Social Security benefits for which residence in Spanish territory is a requirement, it shall be understood that the beneficiary of said benefits, including supplementary benefits, has his/her habitual residence in Spain, even though he/she has spent periods abroad, provided these do not exceed 90 days in each calendar year, or when the absence from Spanish territory is caused by duly certified illness. Not with standing the provisions of the preceding paragraph, for the purposes of unemployment payments and benefits, the specific regulations governing said benefits shall be applicable".

The third section affects healthcare benefits for which residence in Spanish territory is required:

> "For the purposes of the maintenance of the right to healthcare benefits for which residence in Spanish territory is required, it shall be understood that the beneficiary of said healthcare benefits has his/her habitual residence in Spain even though he/she has spent periods abroad, provided that these do not exceed 90 days in each calendar year".

To make the acquisition and maintenance of the right to a Social Security benefit conditional upon residence in Spain is a requirement that has traditionally been one of the typical features that configure the non-contributory benefits of the Social Security system (and Social Assistance benefits provided by Regional Governments), and this is also required of Spanish citizens.

A. HAS LAW 22/2013 REPEALED THE PREVIOUS EXCEPTIONS RELATING TO THE RESIDENCE REQUIREMENT?

Absence from Spanish territory for reasons of illness, which must be duly certified, is the only cause contemplated under article 51 of the Revised Text of the General Social Security Law that would not be counted to determine whether or not the absences exceed 90 days in each calendar year.

But, scattered throughout the regulations governing Foreign Residents and the Social Security system, there are other cases in which absence

from Spain does not affect the maintenance of the right to the benefit in question.

It is therefore necessary to ask whether the exceptions to the requirement to maintain residence in Spain that is found in our legislation have been tacitly or expressly repealed after the entry into force of Law 22/2013. The answer to this question, in the absence of a better opinion, must be negative.

Firstly, because Law 22/2013 does not revise the text of each and every one of the national regulations which contemplate exceptions to the requirement to reside in Spain as a condition for the maintenance of the right to benefits, whether it be a non-contributory retirement pension, invalidity, family benefits, employment benefits and payments, benefits for the termination of activity or supplementary benefits.

Neither can a tacit repeal be alleged, since the pre-existing regulations are not contrary to or incompatible with the new article 51 of the Revised Text of the General Social Security Law, and this is so because what the latter regulation governs is the moment at which a person is considered to have ceased to have his/her "habitual" residence in Spain for the purposes of the maintenance of his/her right to a benefit of the Spanish Social Security system which requires residence in the country.

But the "habitual" residence, today, is not a general requirement under Spanish Social Security legislation, and so the pre-existing regulations remain in force.

What we believe the Spanish legislators really intended with this new article 51 was to solve the problems arising when European Union Law comes into play (and more specifically, Regulation 883/2004) which, to determine which State is responsible for paying Social Security benefits, uses the concepts of the "habitual residence" and the "stay" of the beneficiary.

IV. THE POLYSEMIC CONCEPT OF "HABITUAL" RESIDENCE

Differentiating between residence and "habitual" residence is far from easy or trouble-free, especially when, depending on the area of legal regulation involved, the expression can have different meanings.

As the Contentious-Administrative Division of the Spanish Supreme Court declared in its sentence of 16.6.2011: "residence requires, on the one hand, a spiritual element, the intention to reside in a certain place. On the other hand, it is necessary for there to be a material element, effective residence. The doctrine of this Chamber with regard to this problem has varied between giving relevance to the subjective or the objective

element. For tax purposes... there is no doubt that the relevant element is the objective element. There is no question that one does not cease to be resident in Spain by the mere fact of declaring that one has applied for residence in another place if this is not accompanied by effective residence in the chosen place".

For its part, the Employment Division of the Supreme Court, in its sentence of 18.10.2012, highlighted that the concept of residence is one that can be graduated and is to some extent "elastic" insofar that the different branches of legal regulation use different parameters to define it. But "something in common can be detected among the different interpretations of the concept: residence implies physical settlement in a single place and for a minimum period of time, in all events greater than 15 days".

The Supreme Court has also indicated that "the legal concept of residence belongs to a family in which it is related to the concepts of domicile and stay. On the other hand, substantive residence is often accompanied, in the different branches of law that use it, by different adjectives: habitual residence, temporary residence, permanent residence or long-term residence. Residence for the purposes of income tax is not exactly the same as residence for the purposes of the right/duty to register as a resident of a municipality, or residence for the purposes of legislation governing foreigners, or residence for the purposes of the geographic mobility of workers, or residence for the purposes of active and passive suffrage rights" (Sentence of the Supreme Court of 3.6.2014 [JUR.188834] and the sentences cited therein).

A. "HABITUAL" RESIDENCE IN THE REVISED TEXT OF THE GENERAL SOCIAL SECURITY LAW

It should first be noted that when the beginning and the conservation of the right to a non-contributory Social Security benefit is subordinated to a residence requirement, the terminology that has traditionally been used in the Revised Text of the General Social Security Law is not "habitual residence" but "legal residence" or "residence", with no adjectives.

The use, then, of the term "habitual residence" in the new article 51 of the Revised Text of the General Social Security Law is apparently a novelty.

B. "HABITUAL" RESIDENCE IN THE LAW ON PERSONAL INCOME TAX

If the legislative panorama were not already sufficiently complex, it

must also be taken into account that, in the sphere of Spanish Tax Law, Personal Income Tax classifies taxpayers as "physical persons who have their habitual residence in Spanish territory"[3].

But, and this is what is most notable, a "habitual" resident is not just someone who "remains for over 183 days during the calendar year in Spanish territory"[4] but it must also be understood that the taxpayer has his/her habitual residence in Spanish territory "when the principal core for the basis of his/her economic activities or interests are directly or indirectly located in Spain"[5]. These are, then, alternative requirements which are not necessarily cumulative.

It is legally possible, therefore, to be a "habitual" resident in Spain for tax purposes, regardless of the time which a person spends abroad.

1. Tax status of Social Security contributions

Depending on the different means of funding, there is a classic dichotomy between contributory benefits (those which are paid for and which are accessed on the basis of direct contributions by beneficiaries or the insured or indirect contributions of employers), and non-contributory benefits (funded by public funds from the budget and receipt of which is not conditional on prior requirements of Social Security registration or contributions).

However, it must be acknowledged that this classification is not definitive and that the "contributory" benefits also have "non-contributory" features, since the State intervenes, through the budget, in the funding of Social Security costs. Typical cases are the non-contributory unemployment benefits regulated under Article 274.1, section 1, letter c) and Article 274, section 2, of the Revised Text of the General Social Security Law[6], and "contributory" family benefits (Article 237 of the same law). In neither of the examples mentioned is it necessary to demonstrate any minimum period of contributions for the "contributory" benefit to be granted.

3. Article 8.1.a) of Law 35/2006, of 28 November, on Personal Income Tax.
4. Article 9.1.a) of Law 35/2006, of 28 November, on Personal Income Tax: "it shall be understood that the taxpayer has his/her habitual residence in Spanish territory when any of the following circumstances applies: a) that he/she remains for more than 183 days per calendar year in Spanish territory. To determine this period of presence in Spanish territory, sporadic absences shall be counted, unless the taxpayer demonstrates that he/she is resident for tax purposes in another country. In the case of countries or territories considered to be tax havens, the Tax Authorities may require proof that the taxpayer has spent 183 days of the calendar year in that place".
5. Article 9.1.b) of Law 35/2006, of 20 November, on Personal Income Tax.
6. In accordance with Article 109.3 RTGSSL, all unemployment benefits, including welfare assistance benefits, must be classified as contributory.

As can be seen from sentence nº 39/1992 of the Constitutional Court, the controversy regarding the legal nature of Social Security contributions is not new. Spanish legal doctrine agrees that its nature is that of a tax, a thesis backed by the Constitutional Court[7]. But there is no unanimity with respect to its specific place among the diversity of figures that the term tax can cover. For some authors, Social Security contributions are in nature a special tax, whereas others believe that it is a charge, "since the worker, as well as being the payer, is also the beneficiary of the service financed with those payments".

In view of the apparently fictitious nature of the contribution-tax dichotomy, we may ask why the legislature does not use better legislative technique and replace the current nomenclature with another.

Among the possible motives that advise against initiatives of this type, the sociological factor is not the least important, given the generalised public rejection of the tax system. In this regard, nobody has spoken with greater clarity than SCHULTE[8] when he declared that the use of the term contribution rather than tax is due to the fact that "it is expected that contributions will be more easily accepted by the citizens, since people have the sensation that they receive something in exchange for their payments".

For the purposes of this paper, and if the thesis that contributions have the nature of a tax is accepted, it is paradoxical that the concept of residence for tax purposes contained in the Law on Personal Income Tax is not applicable for the recognition and conservation of "contributory" and "non-contributory" Social Security benefits.

C. "HABITUAL" RESIDENCE IN REGULATION 883/2004

Given that the principle of unity of the applicable legislation is an essential pillar of the coordination of Social Security systems, a person can only have one "habitual" residence. This is a key concept in the determination of the Social Security legislation that is applicable and which State is competent for the payment of Social Security benefits.

Article 1, letter j) of Regulation 883/2004 contains the definition of

7. Sentence of the Constitutional Court nº 39/1992, of 30 March: "it is undeniable that the social protection system has progressively become separated from the contributory scheme and has become ever closer to the concept of a tax".

8. BerndSchulte;"La Financiación de los Sistemas de Protección Social en la Europa Comunitaria" in: "VV.AA.; Los Sistemas de Social Security y las Nuevas Realidades Sociales". Ministerio de Trabajo. Madrid. 1992; p.52.

residence: "the place in which a person habitually resides", in contrast to "stay": "the temporary residence" (Article 1, letter k).

Given the opacity of this definition, it is no surprise that the concept of residence for the purposes of the coordination of Social Security systems has had to be addressed in Regulation 987/2009, whose Article 11 carries the title "Elements for determining residence".

This Regulation enumerates a wide range of criteria for the determination of the "habitual" residence of a person, which include "the duration and continuity of presence on the territory of the Member States concerned" and "the person's situation" (including, in the latter case, the Member State in which the person is deemed to reside for taxation purposes). In those cases in which not even these criteria are sufficient to offer a conclusive result, Article 11.2 of said Regulation 987/2009 establishes that "the person's intention, as it appears from such facts and circumstances, especially the reasons that led the person to move, shall be considered to be decisive for establishing that person's actual place of residence".

The keystone upon which the concept of "habitual" residence depends for the purposes of the coordination Regulations is the "centre of interests" of the person, as seen in the Brey case[9]:"in accordance with Article 1, letter j), of Regulation 883/2004, the residence of a person is that place in which he/she habitually resides, an expression which refers to the Member State in which the persons affected habitually reside and in which the principal focus of his/her interests are located".

At all events—and it is important to highlight this—the concept of residence for the purposes of the coordination Regulations of Social Security systems is not affected or conditioned by the definitions contained in national regulations, and not even by the definitions contained in other Community texts, such as Directive 2004/38[10].

Furthermore, "a nationally defined residence concept could lead to a situation where a person, despite living all his/her life in the EU, is not considered to be resident by the legislation of any Member State"[11].

At all events, it must be recognised that the community concept

9. Sentence of the Court of Justice of 19.9.2013,140/12, (Brey).
10. The concept of residence in Directive 2004/38 covers situations that would be classified as a stay under Regulation 883/2004.
11. Think Tank Report 2010; "Healthcare Provided During a Temporary Stay in Another Member State to Persons Who Do Not Fulfil Conditions For Statutory Health Insurance Coverage"; p.11.
http://www.tress-network.org/EUROPEAN%20RESOURCES/EUROPEANREPORT/ThinkTank_HealthcareUninsuredCitizens_Final_140111.pdf

of "habitual" residence is subject to controversy and this has led the European Commission to publish in 2014 an Application Guide for the "Habitual Residence Test" for Social Security purposes, "to help Member States apply EU rules on the coordination of social security for EU citizens that have moved to another Member State".

V. NON-APPLICATION OF SPANISH RESIDENCE CLAUSES WHEN EUROPEAN UNION LAW OR INTERNATIONAL SOCIAL SECURITY CONVENTIONS ARE APPLICABLE

Without questioning the competence of the States to introduce legislative reforms in their Social Security systems, the principle of the primacy of European Union Law must be kept very much in mind.

Specifically, as regards Social Security, it is necessary to bring up Regulation 883/2004 (further developed under Regulation 987/2009) which does not institute a common Social Security regime, but allows different national regimes to continue to exist; its sole objective is to guarantee a certain level of coordination between them.

Regulation 883/2004 contains different regulations regarding the export of benefits, depending on whether they are contributory or non-contributory Social Security benefits, and special non-contributory cash benefits or benefits in kind (healthcare).

Said provisions must be applied as a priority in the case of subjects included within the scope of personal application of Regulation 883/2004 who claim Social Security benefits coordinated under the Regulation.

With respect to the application of coordination rules to nationals of third countries, the provisions of Regulation 1231/2010 are applicable, which widen the application of Regulation 883/2004 and Regulation 987/2009 to nationals of third countries who, due only to their nationality, are not covered by said Regulations.

A. THE EXTINCTION OF THE RIGHT TO NON-CONTRIBUTORY SOCIAL SECURITY RETIREMENT AND INVALIDITY PENSIONS DUE TO THE LOSS OF RESIDENCY

According to Spanish legislation, the right to a non-contributory Social Security pension is extinguished if the requirement of legal residence in Spain is not fulfilled.

In contrast to what happens with other benefits coordinated under Regulation 883/2004, which, according to Spanish legislation, are not exportable, but which are exportable under Union law (contributory and

non-contributory unemployment benefits), non-contributory retirement and invalidity pensions ceased to be exportable to other States in which European Union law is applicable, from the moment in which they were notified by the Spanish Government as special non-contributory benefits[12] (currently included in Annex X of Regulation 83/2004[13]). It must be taken into account that, for the purposes of Annex X of Regulation 883/2004, Social Assistance benefits provided by Spanish regional governments to complement non-contributory state Social Security pensions are also classified as special non-exportable cash benefits.

With respect to non-contributory Social Security invalidity and retirement pensions, it must be noted that the wording of Article 51.2 of the Revised Text of the General Social Security Law substantially coincides with Article 10.2 of Royal Decree 357/1991: "residence subsequent to the recognition of the right shall not be considered interrupted by absence from Spanish territory of less than 90 days in each calendar year, or when the absence is due to duly certified illness".

The new Article 51 of the Revised Text of the General Social Security Law contains no novelties, then, with respect to the legal regime governing non-contributory Social Security invalidity and retirement pensions.

B. LOSS OF RESIDENCE AND SUPPLEMENTARY BENEFITS

1. The non-extinction of the right to supplementary benefits due to the loss of "habitual" residence in Spain when Regulation 883/2004 is applicable

Article 59 of the Revised Text of the General Social Security Law regulates supplements to contributory pensions which are lower than the minimum. The recognition of the right to these benefits is conditioned by the residence requirement, though only with respect to pensions originating from events occurring since 1 January 2013.

The thesis proposed here is that the residence requirement is not applicable to subjects protected by Regulation 883/2004 who exercise their right of freedom of movement.

This is justified by the fact that although these supplementary benefits

12. Article 70.3 of Regulation 883/2004 expressly excludes the application of Article 7 (suppression of residence clauses) to special non-contributory cash benefits.
13. Article 3.3 of Regulation 883/2004 provides that said Regulation shall also be applied to the special non-contributory cash benefits contemplated in Article 70. From the reading of the latter Article, it can be inferred that the term "special non-contributory benefit" is reserved for benefits which the States notify in Annex X.

are non-contributory according to Article 109.3.b) of the Revised Text of the General Social Security Law, they have not been notified as special non-contributory cash benefits in Annex X of Regulation 883/2004.

And it must be taken into account that only non-contributory benefits included in said Annex are non-exportable according to European Union Law, all of which is without prejudice to the fact that the Court of Justice in Luxembourg can pronounce on whether or not the governmental notification complies with European Union Law.

Since, for the purposes of Regulation 883/2004, contributory pensions are exportable, the supplements to those pensions must also be exported when Regulation 883/2004 can be invoked by pensioners benefiting from said supplements.

Therefore, the new Article 51 of the Revised Text of the General Social Security Law does not modify, and much less repeal, the right to the exportation of benefits enshrined in the Treaty on the Functioning of the European Union, further developed by Regulation 883/2004.

In conclusion, pensioners with a recognised right to supplementary benefits and who are included in the scope of personal application of Regulation 883/2004 have a recognised right to export not only their contributory pensions but also the supplementary benefits provided that they are resident in one of the States in which the coordination Regulations are applied.

Mutatis mutandi, nationals of third countries also have the right to export the supplementary benefits when Regulation 1231/2010 is applicable.

2. Other cases of the non-extinction of the right to supplementary benefits for absences of more than 90 days in the calendar year

Firstly, absences from Spanish territory which are due to duly certified illness are not counted for the purposes of the loss of the right to receive supplementary benefits, as this is expressly established under Article 51.2 of the Revised Text of the General Social Security Law.

Secondly, it must be borne in mind that Spanish legislators have explicitly laid down that, even in the case of stays of more than 90 over the calendar year, the interested party can "certify by other means that his/her habitual residence is in Spain. For these purposes, the family situation, the existence of professional reasons which oblige him/her to travel frequently, the fact of holding a stable job in Spain or his/her intention of holding such a job may be taken into account" (Article 10.3 of Royal Decree 1716/2012, of 28 December).

That is, there is a rebuttable presumption of the loss of habitual

residence when the beneficiary of the supplementary benefits is absent from Spain for more than 90 days in a calendar year, without prejudice to the fact that proof of the contrary may be accepted and, therefore, the recipient may resort to other means of proof to certify that he/she continues residing habitually in Spain, such as, for example, still being registered as a municipal resident in Spanish territory and having the obligation to pay personal income tax as a habitual resident.

C. UNEMPLOYMENT BENEFITS

Article 51.2 of the Revised Text of the General Social Security Law establishes that "for the purposes of unemployment payments and benefits, the provisions established in the regulations shall be applicable".

This is, then, a block referral to Title III of the Revised Text of the General Social Security Law, which regulates contributory and non-contributory unemployment benefits and, specifically, the causes of the extinction and suspension of the right to said benefits, among which are "the transfer of residence or stay to a foreign country" (Articles 271 and 272 of said law) and which were reformed prior to the inclusion of the new Article 51.

Today, therefore, in accordance with points f) and g) of Article 271.1 of the Revised Text of the General Social Security Law, the payment of the benefit is suspended "in cases of the transfer of residence to a foreign country in which the beneficiary declares that the purpose is to seek or perform work, professional training or international cooperation, for a continuous period of less than 12 months, provided that the departure to the foreign country is previously communicated to and authorised by the managing body, without prejudice to the application of the provisions regarding the export of benefits under European Union rules. In cases of a stay abroad for a maximum period, whether continuous or not, of up to 90 days in each calendar year, provided that the departure to the foreign country is previously communicated to and authorised by the managing body[14]. Departure to a foreign country for a period of not more than fifteen calendar days once per year shall not be considered a stay abroad or a transfer of residence, without prejudice to the fulfilment of the obligations established in Article 299".

In the final analysis, the non-application of Article 51 to unemployment payments and benefits is an expression of the will of the legislators to maintain the recent reform of these benefits under Royal Decree-Law

14. Given that competence for passive employment policies has not been transferred to the Regional Governments, the competent Managing Body is the State Public Employment Service.

11/2013 (later, Law 1/2014, of 28 February) under which legislators adopted the new case law of the Supreme Court regarding the effects of temporary absence from Spain on unemployment payments and benefits.

This case law, which is found, among others, in the sentences of the Supreme Court of 18.10.2012, 30.10.2012, and 3.6.2014, addresses the question of where to draw the "dividing line between a stay and residence, something which the Social Security legislature or the holder of regulatory powers in this field could have established, but which neither have done"... "the aforementioned regulatory vacuum could be filled by... systematic interpretation, bearing in mind that legislation governing foreign residents offers a delimitation which is quite strictly adjusted to the requirements of social order. Under Article 31.1 of the Basic Law on Foreign Residents, temporary residence is distinguished from a stay, beginning as from 90 days of presence. And, as has already been stated, this threshold is practically the same as that of the three months' stay outside the territory of the member state which pays the benefit used in Regulation 883/2004".

Although this legal reasoning may be correct with respect to the specific cases presented to the Supreme Court, to generalise and extrapolate them to all of the benefits subject to the residence requirement, as does Article 51 of the Revised Text of the General Social Security Law, is much more questionable.

Firstly, because it is not true that Basic Law 4/2000 sets the threshold between a stay and residence in all cases as over 90 days' presence in Spain; there are exceptions. Specifically, Article 30.1 of Basic Law 4/2000 provides that: "a stay is presence in Spanish territory for a period of not more than 90 days, without prejudice to the provisions of Article 33 for admission for the purposes of study, student exchange, non-work practice or volunteer services".

Likewise, Basic Law 4/2000, for example, does not consider the absence of foreigners from Spanish territory to be cause for the extinction of long-term residence if the absence is "of up to six months continuously, providing that the sum of these [absences] does not exceed a total of ten months within the five years referred to in section 1, unless the corresponding departures were irregular. In the case of absence for professional reasons, the continuation of residence shall not be affected by absences from Spanish territory of up to six months continuously, provided that sum of these does not exceed a total of one year within the five years required" (Article 148.2 of Royal Decree 557/2011). More exceptions can be found in Article 152 of Royal Decree 557/2011.

Secondly, since the Supreme Court correctly invokes Regulation

883/2004 with respect to the export of unemployment benefits, it should have taken into account that the most remarkable difference between the new coordination Regulation and its predecessor (Regulation 1408/71) in the field of the coordination of unemployment benefits lies precisely in the fact that, currently, unemployment payments and benefits are exportable in the territory in which European Union Law is applicable for a period of up to 6 months (Article 64.1.c) of Regulation 883/2004).

This article is equally applicable to the Active Integration Income (regulated under Royal Decree 1369/2006) for unemployed persons with special economic needs and who face difficulty in finding employment.

Regarding its legal nature, it has been said that it forms part of the public Social Security regime's duty to protect against unemployment, though it has a specific nature differentiated from the contributory and non-contributory level. It is a "tertium genus".

In accordance with Spanish legislation, it is a non-exportable benefit, since departure to another country to seek or perform work or for professional training or international cooperation for a period of less than six months are grounds for temporary cancellation (Article 9.3 d) RD 1369/2006).

Given, though, that all Spanish unemployment benefits are coordinated by Regulation 883/2004 and given that the Active Integration Income has not been notified in Annex X of said Regulation as a non-exportable, non-contributory special benefit, the only solution that can be reached is that it may be exported for up to a maximum of six months to the territory in which European Union Law is applicable (Article 64.1.c) Regulation 883/2004).

D. BENEFIT FOR THE TERMINATION OF ACTIVITY AND ARTICLE 51 OF THE REVISED TEXT OF THE GENERAL SOCIAL SECURITY LAW

Article 15.1.b) of Royal Decree 1541/2011, which develops Law 32/2010, establishes that by virtue of the provisions of Article 11.1.f) of Law 32/2010, of 5 August —currently Article 340 of the Revised Text of the General Social Security Law— the right to protection for the termination of activity shall be suspended in cases of the transfer of residence to a foreign country when the beneficiary declares that it is for the purpose of seeking or performing work, for professional training or for international cooperation, for a continuous period of less than twelve months, without prejudice to the application of the provisions on the export of benefits contained in European Union rules. In other cases, the transfer of residence to a foreign country which does not comply with the

above requirements will suppose the extinction of the right. Occasional departure to a foreign country for a period of not more than 30 calendar days once a year, provided that this departure is previously communicated to and authorised by the managing body, will also suspend this right.

If we compare the transcribed text with the wording of the new sections f) and g) of Article 271.1 of the Revised Text of the General Social Security Law, we see that they are very similar, but not identical.

The fact that, furthermore, Article 51 of the Revised Text of the General Social Security Law does not establish any specific provision for this benefit (unlike the case of unemployment payments and benefits) raises important questions.

We should not forget the fact that, for the purposes of Regulation 883/2004, the regime for the export of unemployment benefits is applied equally to benefits for the termination of activity, and so these will be exportable for a period of up to six months.

E. NON-CONTRIBUTORY FAMILY BENEFITS AND RESIDENCE ABROAD

Non-contributory family benefits are regulated by Chapter I of Title VI of the Revised Text of the General Social Security Law. The beginning and maintenance of the right to these benefits is subordinate to the requirement of legal residence in Spain which is demanded of both the beneficiaries and of the person who gives rise to the right to the benefit.

Before Law 52/2003 reformed the regulations on family benefits, the Spanish courts had been giving a flexible interpretation to the requirements for residence and cohabitation between the person giving rise to the right to the benefits and the beneficiary, in application of Convention 157 of the ILO, requiring residence only of the beneficiary.

Currently, the general rule is the exclusion of children who do not reside in Spain (or in the territory of the European Union when the coordination regulations are applicable). This rule also has other exceptions based on bilateral Social Security conventions.

With respect to internal legislation, the only exceptions to the requirement for cohabitation contained in Royal Decree 1335/2005, of 11 November, which regulates family Social Security benefits, are the following:

Pursuant to Article 9.1.2: "temporary separation for reasons of study, work of parents or foster parents, medical treatment, rehabilitation or other similar causes does not interrupt the cohabitation".

The concept of "temporary" separation is a vague legal concept which depends on the duration, which may be longer or shorter, of the studies or of the medical treatment and rehabilitation, concluding with a final clause which is a catch-all: "other similar causes".

The sloppy drafting of this clause raises the question of whether or not these justified causes of temporary separation which do not interrupt cohabitation absolve both the beneficiaries and the persons giving rise to the right to the benefit from the requirement to maintain their legal residence in Spain.

At all events, and in accordance with the provisions of Article 10.1.a) of Royal Decree 1335/2005, the residence requirement in Spain is considered to be fulfilled even when there is an interruption of cohabitation for reasons of the work of the beneficiaries "in the case of workers transferred by their company outside Spanish territory, who are in a situation similar to that of being registered and contributing under the corresponding Spanish Social Security regime".

As regards European Union Law, it should be recalled that provisions on the coordination of family benefits are contained in Chapter 8 of Regulation 883/2004. The purpose of the chapter is, fundamentally, to prevent a Member State from making the concession or amount of family benefits depend on a residence requirement placed on members of the family of the worker in the State which grants said benefits, thereby guaranteeing the exercise of the right of freedom of movement.

For the purposes of Regulation 883/2004, co-ordinated Spanish family benefits (those regulated under Article 351 of the Revised Text of the General Social Security Law) are classified as non-contributory Social Security benefits and are not included in Annex X of Regulation 883/2004 (and they are not, therefore, special non-contributory benefits for the purposes of Regulation 883/2004, unlike non-contributory Spanish Social Security retirement and invalidity benefits).

The principle of the export of benefits enshrined in Regulation 833/2004 has never been applicable to family benefits. The explanation is very simple: in the case of the payment of family benefits for children who do not reside in the State competent for their payment, the beneficiary does reside in the territory of the competent State; and so this is a case of the equal treatment of the residence of family members.

This is the reason why Article 67 of Regulation 883/2004 states that "a person shall be entitled to family benefits in accordance with the legislation of the competent Member State, including for his family members residing in another Member State, as if they were residing in the former Member State".

Although there may be entitlement to family benefits for family members who do not reside in the territory of the Member State which pays the benefit, it must be underlined that, at all events, the residence must be in one of the States where European Union Law is applicable, as has already been established by the Court of Justice in the Fahmi case[15].

To conclude, it should be noted that the National Social Security Institute published its Circular 4/2006, of 11 October, on the application of rules on Social Security family protection, "which has not been modified since the entry into force of Community Regulations 883/2004 and 987/2009, however they continue to be applied, though the references to Regulations 1408/71 and 574/72, are understood to be made to the new Regulations".

F. INTERNATIONAL SOCIAL SECURITY CONVENTIONS AND SPANISH FAMILY BENEFITS: EXCEPTIONS TO THE REQUIREMENT OF THE RESIDENCE OF FAMILY MEMBERS IN SPAIN OR IN THE EUROPEAN UNION

To resolve the question of whether it is possible to receive family benefits without meeting the requirement laid down in internal regulations regarding residence in the national territory of the persons giving rise to the right to the benefit, National Social Security Institute Circular 4/2006, 11 October, is a key text.

This Circular is headed "Instructions for the application of the rules on family protection under the Social Security system" and it contains specific provisions with respect to family members resident in other countries by which Spain is bound by international rules, with two cases being contemplated: Community Regulations (already analysed in the previous section) and bilateral conventions.

It is with respect to the latter, developed in section 14 of the Circular, where the surprises arise and, specifically, section 14.2 not only lists the bilateral conventions signed by Spain which include family benefits within their scope of application, but on page 43 of Circular 4/2006, it is explicitly stated that "in the application of these Conventions, except that with Australia, the residence of the child or, if applicable, the foster child, in the other signatory State of the bilateral regulation shall be considered

15. Judgement of the CJEC of 20.3.2001, –33/99, (Fama y Esmorís Cerdeara-Pinedo Amado) Rec.; p.I-2452: "if the children of a Moroccan worker do not reside in the Community, neither the Moroccan worker concerned nor his children can rely, in regard to benefits such as those which constitute the object of the main procedure, on the principle of the prohibition of discrimination established in Article 41, sections 1 and 3 of the Cooperation Agreement".

residence in national territory", and it adds "it is important to highlight that these international rules only refer to the residence of the person giving rise to the right to the benefits, not to the beneficiaries...".

In other words, failing to meet the residence requirement in Spain of the children or foster children contained in Article 182.1.b) of the Revised Text of the General Social Security Law, the workers covered by the scope of application of the international conventions which so provide, may be beneficiaries of the monetary benefits with respect to the children or foster children in their care, even though these may reside in Brazil, Canada, Chile, the Dominican Republic, Morocco, Paraguay, Peru, Russia, Tunisia, the Ukraine or Uruguay.

And the new Article 51 of the Revised Text of the General Social Security Law cannot, in any way, repeal or even modify an international convention which is in force.

G. HEALTHCARE

Article 51.3 of the Revised Text of the General Social Security Law provides that: "for the purposes of the maintenance of the right to health benefits for which residence in Spanish territory is required, it shall be understood that the beneficiary of said benefits has his/her habitual residence in Spain even though he/she has spent periods abroad, provided that these do not exceed 90 days in the calendar year".

The first criticism that this clause attracts is its confusing wording, since it uses the term "beneficiary" without taking into account that Article 3 of Law 16/2003, on the Cohesion and Quality of the National Health Service, when describing its scope of application, differentiates between the "insured" and the "beneficiary of an insured". And so, interpreting this third section of Article 51 of the Revised Text of the General Social Security Law strictly, the group of persons to whom the reform is applicable is substantially restricted, even though that was certainly not the intention of the legislators.

Secondly, it is evident that Article 51.3 of the Revised Text of the General Social Security Law cannot be applied literally, since the Informative Note of the Sub-Directorate General for Legal Assistance and Organisation of the National Social Security Institute of 30.1.2014 "On the Regulatory Changes Contained in Law 22/2013" recalls the existence of an important exception: "however, in application of Article 7.2a of Royal Decree 1192/2012 and of Regulation 883/2004, it shall be understood that the beneficiaries of an insured meet the residence requirement when they reside in the territory of any Member State of the European Union, the European Economic Area or in Switzerland".

Given that Article 7.2 of Royal Decree 1192/2004 lays down that the fact of ceasing to reside in the territory does not carry with it the loss of status as a beneficiary when this is established under applicable "international rules", together with the fact that the Informative Note of the National Social Security Institute states that, in these cases, residence has to be in territories in which European Union Law is applicable, we are obliged to conclude that the legislators have erroneously classified European Union Law as International Law, which it is not.

1. Health benefits which require residence in Spanish territory

Article 51.3 of the Revised Text of the General Social Security Law is not intended to apply to all of the insureds and beneficiaries of health benefits in Spain, as its scope of application is much more restricted: the "health benefits for which residence in Spanish territory is required".

In other words, the 65th Additional Provision of the Revised Text of the General Social Security Law is not applicable to the insureds and the beneficiaries listed in Article 3.2 of Law 16/2003, on the Cohesion and Quality of the National Health System, whose right to health benefits is not dependent on residence, which is the case of "employed or self-employed workers affiliated with the Social Security system and who are registered as active or in a similar situation; Social Security pensioners; and recipients of any other periodical Social Security benefit, including unemployment payments and benefits".

With regard to the situations which are similar to being registered as active for the purposes of the right to healthcare, we must consider the Ministerial Order of 27.1.1982, on the scope of situations similar to registration as active in the case of workers employed by Spanish companies—and their family members—who are transferred abroad. With regard to this particular case we must cite Article 3.3.b) of Royal Decree 1192/2012, which waives the requirement to have authorised, effective residence in Spain for "those persons who temporarily come to Spain and are in the charge of workers transferred by their company outside Spanish territory, provided that they are in a situation similar to being registered as active, and are contributing under the corresponding Spanish Social Security regime".

In another line of thinking, and as a hypothesis, the possibility is put forward that the legislators' objective was to apply the new Article 51.3 of the Revised Text of the General Social Security Law to a single case: the unemployed who have exhausted their unemployment payments or benefits and other similar benefits.

This conclusion is reached on the basis that it is Law 22/2013, the

General State Budget, which incorporates the 65th Additional Provision of the Revised Text of the General Social Security Law —currently Article 51— and also gives the new text to Article 3.2.d) of Law 16/2003, expressly requiring, since 1.1.2014, the new requirement of residence in order to recognise the right to healthcare for unemployed persons who have exhausted unemployment payments or benefits or other similar benefits.

But the new Article 51.3 of the Revised Text of the General Social Security Law has a wider potential scope of material and personal application, since sections 3 and 4 of Article 3 of Law 16/2003 contain other cases in which the recognition of this status as an insured or beneficiary of healthcare is expressly and explicitly subordinated to residence in Spain:

> Article 3.3 of Law 16/2003: "… Persons of Spanish nationality or of a Member State of the European Union, European Economic Area or Switzerland who reside in Spain and foreigners who hold an authorisation to reside in Spanish territory may enjoy the status of insured provided that they demonstrate that they do not exceed the income limit laid down in the regulations".
>
> Article 3.4 of Law 16/2003: "… the spouse, or person with a similar personal relationship, who demonstrates the corresponding official registration, the ex-spouse for whom the insured is responsible, as well as the descendants and similar persons for whom the insured is responsible and who are under 26 years of age or who have a disability of 65% or more, shall have the status of beneficiaries of an insured, provided that they reside in Spain".

With respect to descendants and similar persons, it is important to recall that cohabitation is not considered to have been interrupted for reasons of work, study or similar circumstances and that it is understood that the beneficiaries of an insured fulfil the residence requirement when they reside in the territory of any Member State of the European Union, the European Economic Area or Switzerland (Articles 3.2.b) and 7.2a of Royal Decree 1192/2012).

It should be highlighted that neither Section 3 nor 4 of Article 3 of Law 16/2003 were introduced or modified by Law 22/2013. It must, therefore, be admitted that prior to the General Budget Law of 2014, our laws already regulated cases in which the loss of the status as a resident in Spain (or as a person authorised to reside) carried with it the extinction of the right to healthcare.

Likewise, residence in Spain is an essential requirement in order to subscribe to the special convention on the provision of healthcare by means of the payment of the corresponding benefits contemplated under

Article 3.5 of Law 16/2003, further developed by Royal Decree 576/2013, of 26 July.

In all events, the return of the insured to Spain would mean that he/she would have access to healthcare benefits in accordance with the different means of recognition foreseen under current legislation. This is without prejudice to the fact that, during their temporary visits to Spain, Spanish citizens resident abroad may invoke the specific provisions contained in Royal Decree 8/2008.

With respect to insured foreigners who are citizens of third countries, it should be noted, firstly, that in accordance with the Second Additional Provision of Royal Decree 1192/2012, "persons with the right to healthcare under bilateral conventions which cover the provision of healthcare, shall have access to same, provided that they reside in Spanish territory, or during their temporary presence in Spain, in the way, to the extent and under the conditions established under said bilateral provisions".

Secondly, the absences of foreigners from Spanish territory which exceed 90 days are not an automatic cause of the extinction of the authorisation to reside in Spain, since temporary authorisations are extinguished, among other causes, by absences from Spain of over six months in one year.

And, in all events, this six-month limit is not applicable "to the holders of a temporary residence and employment authorisation who have a labour relationship with non-governmental organisations, foundations or associations which are registered in the corresponding general registry and which are officially recognised as being in the public interest, such as aid workers, and those who perform research projects, development cooperation work or humanitarian aid, undertaken abroad, for said organisations. Neither shall it be applicable to the holders of a residence authorisation who remain in the territory of another Member State of the European Union for the purpose of temporary study programmes promoted by the European Union" (Article 162.1.e) of Royal Decree 557/2011).

2. Healthcare, Regulation 883/2004 and Royal Decree 81/2014

It is paradoxical that, unlike the case of the second paragraph of Article 51 of the Revised Text of the General Social Security Law, the third paragraph does not include the "tag" that "absences from Spanish territory due to duly certified illness" are not counted.

And this is despite the fact that Article 19 of Regulation 883/2004 not only regulates the right of beneficiaries and insureds to receive the necessary healthcare paid for by the competent State during temporary stays in other countries in which European Union Law is applicable,

but Article 20 of Regulation 883/2003 also regulates travel to receive programmed medical assistance in a State other than the competent State.

And this is why, despite the silence of the legislator, absence from Spanish territory to receive medical attention under Regulation 883/2004, whatever its duration, should not be counted for the purposes of Article 53.1 of the Revised Text of the General Social Security Law, since the patients are exercising a right which is recognised in a regulation which has primacy and a direct effect on national legislation.

Likewise, it must be ruled out that Article 51.3 of the Revised Text of the General Social Security Law repeals or modifies the regulation applicable to the European Health Insurance Card, which is "the personal, non-transferable document which demonstrates the right to receive the necessary healthcare, from a medical point of view, during a temporary stay for reasons of work, study or tourism, in the territory of the European Union, the European Economic Area and Switzerland".

Neither can it be interpreted that Article 51.3 of the Revised Text of the General Social Security Law has tacitly repealed the Second Additional Provision of Royal Decree 1192/2012, which clearly indicates that "persons with the right to healthcare under community regulations for the coordination of Social Security systems … shall have access to same, provided they reside in Spanish territory or during their temporary presence in Spain, in the way, to the extent and under the conditions established in said community provisions".

In all events, it must also be taken into account that, in the cases in which a beneficiary or insured leaves Spain for a period greater than 90 days in a calendar year, this does not automatically mean that he/she acquires the rights to healthcare in another country.

From the above, the conclusion that can be drawn is that, given the primacy of European Union Law over national legislation (together with the large number of international Social Security conventions subscribed to by Spain) the practical efficacy of Article 51.3 of the Revised Text of the General Social Security Law is significantly lessened.

And to this already complicated legal panorama is added the entry into force of Royal Decree 81/2014, of 7 February, which establishes rules to guarantee cross-border healthcare.

By means of this Royal Decree, Spain has transposed Directive 2011/24, on the application of patients' rights in cross-border healthcare, and Implementing Directive 2012/52 to its national legislation.

With respect to the question of the delimitation between Royal Decree 81/2014 and the Regulations on the coordination of Social

Security systems, the Explanatory Memorandum of Royal Decree 81/2014 indicates that "the most notable practical difference is that, in accordance with the Directive, patients must pay in advance the cost of the healthcare received, which will later be reimbursed, according to each case; while in the Regulations, this is not a general obligation. Another significant difference is that the Directive is applicable to all healthcare providers, public and private, whereas the Regulations coordinate only Social Security systems".

As indicated in the website of the Ministry of Health, Social Services and Equality, "the option of this new rule could benefit patients requiring specialised treatment or who seek a diagnosis or treatment for a rare disease, as well as persons who live in cross-border zones and those who work or reside in Spain but who wish to be treated close to their families in another Member State".

3. Instructions of The National Social Security Institute

On 18.2.2014, the National Social Security Institute issued an Instruction to clarify the application of Regulations 883/2004 and 987/2009 after the modifications made under Law 22/2013, the General State Budget, under Article 3.2.d) of Law 16/2003 and the incorporation of the new 65th Additional Provision al Revised Text of the General Social Security Law.

The starting point, as it had to be, was the recognition by the National Social Security Institute that "the provisions of community Regulations take precedence with respect to the provisions established under the internal legislation of a State".

Consequently, "the insureds whose right to healthcare is recognised under Article 2.1.a) and 2.1.b) of Royal Decree 1192/2012, can obtain a Provisional Replacement Certificate with a maximum validity of 90 days per year for health coverage during a temporary stay in another Member State".

In accordance with Article 7.2.a) of Royal Decree 1192/2012, "ceasing to reside in Spanish territory does not carry with it the loss of that status when it is so established under applicable international Social Security rules" (Regulations 883/2004 and 987/2009). Consequently, "in their temporary travels they may obtain a Provisional Replacement Certificate which is valid for 90 days and which may be renewed as long as the right holder maintains that right in Spain".

Chapter II

The Dutch approach to reduce claims on Social Security Benefits[1]

Prof. Dr. Frans Pennings

University of Utrecht

I. INTRODUCTION

In the 1990s, Dutch policy makers became aware that the Social Security Acts enabled employers and others to use these acts also for purposes not intended or not deemed desirable (anymore) by the legislature[2]. For instance, if an employer had a conflict with an employee, it was cheaper to send himor her home as being 'sick', as the wage costs were then reimbursed by the sickness benefit fund. To some extent, such an employee would indeed often feel ill (i.e., stressed), but such situation can, in principle, be solved by giving the employee other work or additional colleagues to assist him/her. However, since the Sickness Benefit Act was bearing the costs, there was no financial incentive for the employer to find a solution[3]. Thus, the employee remained for long periods in the system, and could believe that he was really ill and finally could even be deemed disabled. For this reason, "activation" became the new term: the

1. This report has been published in the framework of the R & D project "Good Legal Practices in the Field of Labour and European Law to Reduce Labour Litigation Expenditure at Zero Cost (I+D DER 2012-32111).
2. WRR-rapport Belang en Beleid. Naar een verantwoordelijke uitvoering van de werknemersverzekeringen, (Scientific Council for Government Policy, Interest and policy, towards a responsible administration of the employees insurance schemes). Den Haag: SDU-uitgeverij, 1994.
3. Kamerstukken II 1992/93, 22 730 (Parliamentary Report of a Parliamentary Investigation Committee).

persons concerned should be activated to make as little use of the benefit as possible by taking responsibility for themselves[4].

Additionally, disability benefits were being paid more generously than intended[5]. In order to find a solution for the mass redundancies in Dutch workplaces in the 1970s and 1980s, in a considerable number of cases disability benefits were awarded to persons who otherwise would have been terminated[6]. Of course, such workers had to be disabled to some extent, but in practice they received full benefits even in cases of a minor degree of disability. Since often the assessing doctors of the benefit administration made the decision on the basis of the file of the person only, access was made very easy[7].

These examples demonstrate how sometimes the costs of particular decisions were shifted to the benefit system. Of course it was undertaken to change the rules, lower benefits, put fines on abuse etc., but in fact claims to the system kept growing continuously.

Therefore it was thought that the problem had to be approached in a different way: it was better to re-arrange the responsibilities in the total system[8] and those who could influence the risk of becoming ill or disabled should be given incentives to reduce that risk[9]. Since up until then the employer and employee associations, with regard to benefit administration, did not have the necessary incentives to reduce recourse to the benefit system, they were completely removed from benefit administration[10].

After a short period in which it was thought that the system should be

4. Parliamentary papers proposing the obligation of the employer to pay wages during sickness, Papers 1992/93, 22899, no 3.
5. L.J.M. Aarts & R.V. Burkhauser, Curing the Dutch disease: an international perspective on disability policy reform. Avebury: Aldershot, 1996.
6. Kamerstukken II 1992/93, 22 730 (Parliamentary Report of a Parliamentary Investigation Committee).
7. Kamerstukken II 1992/93, 22 730 (Parliamentary Report of a Parliamentary Investigation Committee).
8. See Social Economic Council, Verantwoordelijkheidsverdeling sociale zekerheid (Distribution of Responsibilities in Social Security), The Hague: SER, 1994. The Social Economic Council is a tripartite (i.e. consisting of representatives of employers and employees organizations and independent experts appointed by the minister of social affairs) with the task (inter alia) to advice the government on socio-economic issues.
9. WRR-rapport Belang en Beleid. Naar een verantwoordelijke uitvoering van de werknemersverzekeringen, (Scientific Council for Government Policy, Interest and policy, towards a responsible administration of the employees insurance schemes). Den Haag: SDU-uitgeverij, 1994.
10. Act Suwi (Act on the administration of work and income), OJ 2001, 264.

privatized (private insurance companies should have the responsibility to administer some acts, e.g., disability, sickness), the government decided that the system should remain public, with strict supervision and control by the Ministry of Social Affairs[11]. One major rationale for this conclusion was that assessing incapacity for work is such an essential element of the benefit system that public responsibility should be maintained[12]. It cannot be left to private companies, the more so since they have a conflict of interest in wishing to reduce benefit costs[13]. With this objective the Uitvoeringsinstituutwerknemersverzekeringen (Benefit administration employees' schemes), abbreviated as Uwv, was finally established. This is now a national organization that administers the disability, sickness and unemployment benefit schemes (plus some minor schemes)[14].

Thus the conditions for benefits are still governed by the law and the rights of the beneficiaries are not changed in comparison to the previous situation. Instead, the way the responsibilities are organized varies according to the type of benefit.

II. PROTECTION IN CASE OF SICKNESS

In the area of sickness, the new approach materialized in the introduction of the statutory obligation for employers to continue to pay wages when an employee falls ill. It started with the introduction in 1994 of the rule that employers had to continue to pay wages during the first six weeks of illness (for small enterprises, as defined by the Law, i.e. having fewer than 15 employees, the period was two weeks)[15]. The assumption underlying the new Act was that if employers were responsible for the income provision during sickness, they would check more carefully whether an employee was rightfully absent[16]. Another effect that was expected from the new Law was that employers would take measures to reduce the risk

11. R.J. van der Veen, 'L'histoire se répète? Honderd jaar uitvoeringsorganisatie sociale verzekeringen', (The history is repeated? 100 years of administration of social insurance schemes), in: A. Jaspers et al(ed.), 'De Gemeenschap is aansprakelijk…'. 100 jaar sociale verzekering 1901-2001', Den Haag: Koninklijke Vermande, 2001.
12. Idem, p. 78 P. Fluit, Verzekeringen van solidariteit. (Insurances of solidarity). Deventer: Kluwer, 2001.See for a general overview of the system also F. Pennings, Dutch Social Security Law in an International Context. The Hague: Kluwer Law International, 2002.
13. Idem.
14. It is regulatedby a new Act, Structuuruitvoeringsorganisatie werk en uitkomen (Suwi).
15. Sickness Absence (Reduction) Act, Law of 22 Dec. 1993, Stb. 750.
16. B. Hofman and F. Pennings, Privatisering en activering in de Nederlandse sociale zekerheid en solidariteit – een internationaal perspectief, Deventer, 2013, p. 37 ff.

of injury or sickness caused by dangerous conditions[17]. The construction sector, in particular, was an area where many measures could be taken to reduce the number and effects of accidents[18]. Even though there was a separate Health and Safety Act, the new sickness provisions encouraged additional efforts to prevent accidents and sickness.

Although it was not clear whether the Sick Pay Law really had the desired effect, two years later the employers' responsibility to pay wages to their ill employees was extended to a period of fifty-two weeks[19]. This extension occurred through a law that amended, *inter alia*, the Civil Code in order to give ill employees the legal right to 70% of their wages for up to fifty-two weeks[20]. In collective agreements,the parties often stipulated that this statutory minimum was to be supplemented to make up the full wage[21]. How this was done varied from one collective agreement to another[22].

This process of replacing the right to sickness benefit with an obligation on the part of the employer to pay wages to ill employees (sick pay) is sometimes called the privatization of the Sickness Benefits Act—although it is not a real privatization, since the Acts clearly defined the obligations of the employer and the rights of employees[23]. Still, the employer is entirely responsible for the costs and, although the Civil Code provides strict standards,the employer can supplement these laws by additional rules in order to carry out his responsibilities[24]. However, these rules must fit within the framework of the statutory obligations, and can be tested in court.

Employers can buy private insurance to cover their risk, but they are not obliged to do so. In order to allow a smooth introduction of the act and to gain a new, vast market, the joint insurance companies decided to make no assessment of the health condition of the employees when an

17. Idem.
18. For instance by stronger enforcement of the rules, such as wearing helmets, safety shoes and protection barriers when working on high level sites. Also a policy to avoid sickness due to stress or conflicts at work could contribute to lower costs.
19. Continued Payment of Salary (Sickness) Act, Law of 8 Feb. 1996, Stb. 134.
20. Cite.
21. See also W. Fase et al, Sociale zekerheid: privaat of publiek? (Social security: private or public?) Deventer: Kluwer, 1994.
22. Because of these variations it is difficult to say how many workers were thus guaranteed 100% of their former wage.
23. See on the concept of privatization also U. Becker, and F. Pennings, 'Privatization and Activation: Introduction', in: U. Becker, F. Pennings and T. Dijkhoff, International Standard-Setting and Innovations in Social Security, Alphen a/d Rijn: Wolters Kluwer, 2013, p. 381.
24. See article 7:629 of the Civil Code.

employer took out insurance (these insurances cover all employees, so the employer cannot choose who he wishes to be insured).[25] When the risk was only six weeks, employers often bore the risks themselves, but when the fifty-two-week period was introduced, they bought insurance on a larger scale[26]. In the insurance rules, there still often is a risk period borne by the employer himself, e.g., for the first six weeks, or when the absence for leave is for longer than a certain period ('stop loss insurance')

The Sickness Benefit Act has not been abolished and still applies to those who do not, or no longer, have an employer. An example of the first group is flexible workers, the other group is the unemployed[27]. For them, the Act serves as a safety net. As the new rules may have the effect that employers would be unwilling to employ persons who may have a higher risk of becoming ill, the Act on Medical Examinations was introduced in 1997, restricting medical examinations in recruitment procedures. It prohibits medical examinations as a standard routine; only if the job has specific health requirements (e.g., pilots), is medical examination permitted[28]. The purpose of this Act was to reduce the risk that chronically ill persons may never get work in the future.

In addition to this change in benefit rules, the Law on Conditions at the Workplace was amended in order to introduce more stringent obligations on the part of employer to improve working conditions[29]. Better working conditions were meant to reduce the number of accidents. In addition, the employer had to develop a policy with the aim of reducing sickness in the work place[30]. To this end, employers are obliged to make an inventory of all situations that could potentially endanger the health and safety of their employees[31].

However, the mere obligation of the employer to continue to pay the wages of his ill employees still did not, in the view of the government,

25. Appendix to advice of Social Economic Council, Advieskabinetsvoornemens ZW, AAW en WAO, The Hague, 1995, p. 267.
26. T. Veerman and J. Besseling, Prikkels en privatisering.Den Haag: Elsevier, 2001, p. 27.
27. Unemployed persons are also covered for sickness, even though that may not lead to a different income, since they may be disqualified for unemployment benefit during sickness. In addition, in case of long-term sickness, when they are not able to work again full-time, these persons may qualify for disability benefits. These benefits are financed by contributions paid to the sickness and disability funds.
28. See E. de Vos and others, Evaluatie wet op de medische keuringen, (Assessment of the Act on medical examinations), Den Haag: Zon, 2001.
29. Article 685 of the Civil Code.
30. Health and Safety Act.
31. Health and Safety Act, Article 5.

result in sufficient reintegration efforts by employers.[32] One reason was that private insurance compensated the financial effects of the employer's obligation to pay wages. Another reason was that employers sometimes considered the reintegration measures to be more expensive or bothersome than continuing to pay an ill employee's wages. This led to the Gatekeepers Act.[33].

The Gatekeepers Act's purpose was to narrow access to the Disability Benefits Act.[34]. This Act requires employers and ill employees to undertake reintegration efforts if illness is expected to last for a long period (of course, in most cases of illness, such as colds, no measures are necessary)[35]. Thus, if an employee is expected to be ill for more than six weeks, both the employee and the employer are obliged to make a plan for reintegration.[36] The plan can entail, for instance, that the workplace of the employee is adjusted to his or her impairments, and/or that training or work experience in another position have to be tried. Subsequently, the employer and employee have to meet on a regular basis to see how the reintegration efforts are progressing and if the reintegration plan has to be adjusted[37]. Each party can oblige the other to cooperate; if necessary, cooperation can also be enforced by legal means[38].

Three months before the employee applies for disability benefits, the benefits administration, i.e. the Uwv mentioned above, assesses whether the reintegration activities have been sufficient[39]. For this purpose, the employee has to produce a report on the reintegration activities that have been undertaken[40]. If the employer's actions are considered insufficient by the benefit administration, itextends the employer's obligation to pay wages (for a maximum of twelve months)[41]. Thus, the employer may have to pay wages for three years in total. If the employee has not cooperated satisfactorily, he or she can be refused disability benefits for a certain period, which is regulated in the Disability Benefits Act.[42].

32. Memorandum to Wet Verbetering poortwachter, (Gate keepers Act).
33. OJ 2001, 628.
34. Memorandum to Wet Verbetering poortwachter, (Gate keepers Act).
35. Article 658a Civil Code.
36. Regeling procesgang eerste en tweede ziektejaar (rules on requirements in the first and second year of sickness), Stcrt. 2002, nr. 60, as amended.
37. Idem.
38. Article 658a Civil Code.
39. Regeling procesgan geerste en tweede ziektejaar (rules on the requirements in the first and second year of sickness), Stcrt. 2002, nr. 60, as amended.
40. Idem.
41. Article 7:629(11) Civil Code.
42. Article 30 of Wet werk en inkomen naar arbeidsvermogen, (the Disability Act).

A disadvantage of organizing social protection at a lower level and in various places (such as employers) is that it is difficult to compile good research data on the present situation. However, in general, few problems are reported on the actual payment of sick pay by employers.

Strict labour laws and dismissal law shave narrowed the employers' possibilities of escaping obligations to a minimum. We mentioned already the Act on medical assessment during recruitment that is meant to reduce risk selection. Another example is that of the dismissal law, which includes the rule that notice, in principle, cannot be given during an employee's first two years of sickness[43]. Still, employers can try to reduce their risks by carefully selecting employees and dismissing persons who are often ill during a period in which they have reportedly recovered. To what extent this happens is difficult to identify and to research. If such behaviour amounts to discrimination, this is forbidden by provisions that prohibit discrimination of the disabled[44]. However, in practice it is difficult to prove that in a particular situation the treatment was grounded on disability. In addition, the risk of having to continue to pay wages to sick employees has often led employers to offer contracts for a finite period instead of an indefinite period, or to make use of engaging agencies for temporary work[45].

As a result of the Gatekeepers Act, larger firms developed comprehensive policies for ill employees to make them employable in other work[46]. Still,very many employers are obliged by the benefit administration to pay an extended period of sick pay beyond the first two years, since they were considered to have undertaken insufficient activities to re-integrate a sick employee into work[47].

In any case, this new system strictly encourages sick employees and employers to undertake re-integration into work, and the sanctions are quite severe in cases of negligence. Since the success of re-integration is greatest when an employee is still employed by his employer (which is

43. Article 7:670 Civil Code.
44. Wet gelijke behandeling op grond van handicap of chronische ziekte (Act on equal treatment on grounds of disability or chronic disease), OJ 2003, 206.
45. A new law since 2014 requires employers whose former employees become ill or disabled to pay a contribution that is based on the costs of the benefits for these employees. This was introduced to make it less attractive to make use of flexible workers (see Parliamentary Papers, Wet beperking ziekteverzuim en arbeidsongeschiktheid vangnetetrs) (Act to restrict sick leave and disability of persons in the Sickness Benefits Act), TK 2011-2012 33.241, nr 3.
46. F. A. Reijenga and others, Evaluatie wet verbetering poortwachter (poortwachter Assessment research of gate keepers act), The Hague: Astri, 2006.
47. See previous note.

the case during the first two years of sickness, where labour law gives a general prohibition to dismiss the ill employee), this is a cornerstone of present day Dutch social security policy[48], where the idea of "activation" has become much more important.

In all, employers have been made fully responsible for sick pay for a period of up to two years. The minimum rules are provided in the Civil Code, from which no exception is possible.

III. THE NEW DISABILITY BENEFITS ACT OF 2004

Since the WAO (the Disability Benefit Act) continued to have problems with high numbers of new entrants and only a few beneficiaries leaving the benefit scheme, a new structural approach was followed in the new Disability Benefits Act (2004)[49]. In this approach, the priority of work above benefit was stressed, and for this purpose, the Act introduced several new instruments[50].

The Act makes a distinction between groups of claimants: (A) who are permanently disabled to at least 80%; and (B) who are either not permanently disabled, or who are permanently disabled to a lesser extent than 80%[51].

The former group (Group A) deserves, in the view of the legislature, a generous disability benefit; measures to help them to get back to workare not considered relevant to this group[52]. Persons belonging to this group receive a benefit of 75% of their former wage[53]. Those who are permanently

48. We can describe the main points only, and cannot describe all dimensions of this new approach. It should only be noted here that committees supervising international instruments (like ILO convention 121 and the European Social Charter) have been very critical of this paradigm shift from general solidarity to the individual responsibility of the employer, see F. Pennings, 'Privatization and Activation in the Netherlands', in U. Becker, F. Pennings and T. Dijkhoff (ed), International Standard-Setting and Innovations in Social Security, Alphen a/d Rijn: Kluwer Law International, p. 443-456.
49. This Áct was preceded by a report by a parliamentary committee, Adviescommissie arbeidsongeschiktheid (Commission Donner), Werk maken van arbeidsgeschiktheid. Den Haag: SDU, 2001.
50. See on the Act also B. Barentsen, Arbeidsongeschiktheid: aansprakelijkheid, bescherming en compensatie. Kluwer: Kluwer, 2003.
51. The assessment is done by a comparison of the physical and psychological deficiencies due to medical conditions and a database of job descriptions (whether there are vacancies is irrelevant) with the purpose of determining how much a person can still earn; see Schattingsbesluitarbeidsongeschiktheidswetten (Assessment decree for disability benefit acts). The more a person can earn, the lower the disability rate.
52. These are often called re-integration measures.
53. Up to a ceiling, currently 4137 euro a month. The maximum benefit is 75% of

disabled to at least 80% (the incapacity rate) are entitled to the benefit for the permanently disabled.

The second group (Group B) is made subject to conditions and rules meant to reinforce their activation back into the workplace[54]. In order to be eligible for disability benefits, claimants must be disabled more than 35%[55]. These persons receive a wage-related benefit if they satisfy conditions relating to their employment history, and the duration of benefits depends on their employment history[56]. The rules for entitlement and duration of this benefit follow those of the Unemployment Benefits Act, which is discussed in more detail below.

The benefit for Group B claimants is 70% of the previous wage[57]. After the right to this benefit has expired (or if the claimant is not entitled to this benefit because of an insufficient work record), a so-called'wage supplement benefit' is payable, on condition that the claimant earns an income of at least half the residual earning capacity[58]. This is a provision that until this point had not been found in disability schemes. Thus, if a person is supposed to have an earning capacity of 1,000 euro per month, he or she must have an income from work of at least 500 euro per month in order to be eligible for the wage supplement. The idea behind this rule is that it must be made as attractive as possible for the person concerned to (re)start or to continue working[59].

The level of the wage supplement is 70% of the difference between the individual's previous earnings and his residual earning capacity[60]. Thus, if a person earned 2,000 euro a month and is now able to earn1,000 euro, the wage supplement is 700 euro. This is payable regardless of how much he earns (at least up until the amount of 1,000 euro, the residual earnings capacity)[61], again making it attractive to take up as much work as one can.

---

this amount (which is gross income), Article 17 of the Wet financiering Sociale verzekeringen (Act on financing of social insurance).

54. Wet werk en inkomen naar arbeidsvermogen, (the Disability Act).
55. Idem.
56. Idem.
57. Up to a ceiling, currently 4137 euro a month. The maximum benefit is 75% of this amount (which is gross income), Article 17 of the Wet financiering sociale verzekeringen (Act on financing of social insurance).
58. Wet werk en inkomen naar arbeidsvermogen, (the Disability Act), article 59 and following.
59. Memorandum to Wet werk en inkomen naar arbeidsvermogen, (the Disability Act).
60. Wet werk en inkomen naar arbeidsvermogen, (the Disability Act), Article 59.
61. If one earns more than this amount for more than a year, the assessment of disability will be adjusted, and thus also the benefit will be adjusted, Wet werk en inkomen naar arbeidsvermogen, (the Disability Act), Article 56(3).

In other words, it is beneficial to work as much as possible, since income is not deducted from the benefit received.

The claimant who, upon expiry of his wage-related benefit, does not satisfy the condition that he or she earns at least 50% of his or her remaining earning capacity, is eligible instead for a low benefit, which, in the case of full disability, is 70% of the statutory minimum wage[62]. In cases of partial disability, the level depends on the incapacity rate[63]. Persons who are incapacitated to a level of less than 35% are not eligible for benefits[64]. It was the view of the legislature that their incapacity rate is so low that they should be able to work[65].

Thus, there is now a consistent approach, elaborated in specific (and for each type of scheme) new rules for reducing the claims to sickness and disability. Under this approach, during the sickness period, employer and employee must do everything possible for the latter to stay in or return to work. The hope is that most workers can still do adjusted or other types of work in a modified workplace if necessary. If after two years the employee is not able to earn at least 65% of his or her pre-sickness income, the disability benefit scheme encourages keeping and/or seeking work as this leads to a higher benefit. From evaluations of this program[66], it appears that the number of new entrants for benefits has been much lower than under the old Disability Act, although whether those who are disqualified actually find work is not so clear. The Act is still rather young, so there are no clear research results yet available.

Employers have the possibility to opt out of the disability scheme, but are not obliged to do so[67]. 'Opting out' is maybe not a good term, since opting out here is limited to no longer having to pay contributions to the scheme. Therefore,the term 'own risk bearer' is used. Instead of paying (the major part of) contributions, the employer bears the financial risks of the disability benefits (for the partially disabled and not permanently fully disabled, or group B mentioned above) for the first ten years of disability[68]. The decision on granting and terminating the right to benefits is still in the hands of the public benefit administration, and the statutory

62. Wet werk en inkomen naar arbeidsvermogen, (the Disability Act), Article 62.
63. Idem.
64. Article 61(6) Wet werk en inkomen naar arbeidsvermogen, (the Disability Act).
65. See on the Act also B. Barentsen, Arbeidsongeschiktheid: aansprakelijkheid, bescherming en compensatie. Kluwer: Kluwer, 2003.
66. B. Cuelenaere and others, Onderzoek evaluatie Wia (Assessement of the Wia Act), Leiden: Astri, 2011.
67. Chapter 9 of Wet werk en inkomen naar arbeidsvermogen, (the Disability Act).
68. Article 82 WIA.

rules on benefits also apply[69]. The employer pays the benefit, and this has the advantage for the employer of paying lower contributions. After the first ten years of benefit payment to a person, the benefit administration takes over the costs of the benefit for that person[70]. An employer may buy private insurance for the costs of the first ten years of benefit. Usually, employers buy private insurance when they decide to bear their own risk. These insurance policies are often adjusted to the individual enterprise concerned, and little is known to outsiders on the conditions, price and use.Own risk bearers are responsible for reintegration activities of the persons for whom they bear the risk[71]. Thus, they can influence their risk and if they succeed in getting a person back to work, they have the 'profit' of this work.

Remarkably, own risk bearers have the statutory power to impose a sanction, i.e., to reduce benefits in level during a certain period, if the beneficiary does not sufficiently cooperate with the re-integration activities[72]. Since this measure is an element of public law, the employer can, for this purpose, be seen as a body of public law and subject to the rules of the General Act on Administrative Law[73]. This causes a rather strange effect, but these powers fit in a system whereby the employer administers (partly) an act of administrative law. This means that the system for motivating decisions and the possibilities of asking for review and appeal to the administrative court also apply (even though generally private law —labor law— is applicable to the relationship between employer and employee)[74].

In conclusion, disability benefits provide strong financial incentives for beneficiaries to return to work. Employers are not directly involved (except when a claim is made), but they can be involved by deciding to bear their own risk. In that case, the decisions on benefits are still made by the public benefit administration.

IV. DUTCH UNEMPLOYMENT BENEFITS

The current Unemployment Benefits Act was adopted in 1986[75]. It

69. See F. Pennings, 'Kunnen eigenrisicodragers wel hun eigen risico beïnvloeden?', (Can own risk bearers really bear their risk?), Tijdschrift recht en arbeid, 2014, nr. 52.
70. Article 82 WIA.
71. Article 27(6) WIA.
72. Article 89 WIA.
73. This follows from the fact that the power is given by an Act and that the own risk bearer in fact replaces the Uwv.
74. Idem.
75. See for the history also F. Pennings, Benefits of Doubt. A comparative study of the

provides claimants who have lost at least five working hours per week with an unemployment benefit[76]. In other words, claimants do not have to be completely out of work in order to be considered unemployed[77].

In order to be entitled to a benefit, a claimant has to satisfy the following entitlement conditions: s/he has to be an employee; s/he has to satisfy that s/he has worked a certain period; s/he has to be unemployed, which means that s/he must suffer a relevant loss of working hours; s/he must no longer be entitled to a wage for the hours in which s/he does not work; s/he must be available for work; and there must be no grounds for exclusion[78].

In order to satisfy the conditions on previous employment the claimant must have worked at least one hour a week in at least twenty-six of the thirty-six weeks immediately preceding the first day of unemployment as an employee[79]. If the claimant was ill during this period of reference, the period is prolonged by the length of the period of illness[80].

If one satisfies this condition, the duration of benefit is three months[81]. In order to receive a longer benefit, additional conditions have to be satisfied. These additional conditions require that in each of four calendar years in the five calendar years immediately preceding the commencement of the unemployment period, the claimant received wages over at least 208 hours[82]. If this is the case, any year in which 208 hours are worked leads to an extra benefit month insofar as the number is more than three, with a maximum of 38 months[83]. Basically, this means one year of work is worth one benefit month. However, the law was changed in June 2014 and the maximum period will be reduced to 24 months beginning in 2015, since the government wants to further encourage persons to find work and also to reduce expenditure[84].

The Act imposes an obligation on the benefit administration (not

legal aspects of employment and unemployment schemes in Great-Britain, Germany, France and the Netherlands, Deventer: Kluwer Law and Taxation, 1990, Thesis university of Utrecht.

76. Art. 16 Werkloosheidswet (Unemployment Benefits Act).
77. See for all details F. Pennings, Dutch Social Security Law in an International Context. The Hague: Kluwer Law International, 2002.
78. Articles 16 – 20 Werkloosheidswet.
79. Article 17 Werkloosheidswet.
80. Article 17a Werkloosheidaswet.
81. Article 42 Werkloosjeidswet.
82. Article 42 Werkloosheidswet.
83. Idem.
84. During the first 10 years, one still acquires one month per year; after 10 years, it is half a month per year.

merely discretionary powers) to sanction the beneficiary if s/he does not satisfy his or her obligations as defined under the Law.[85] Until this Law came into force(2006), the benefit administration had discretionary powers to impose a sanction[86].

During the first two months, the benefit, in case of full unemployment, is 75% of the daily wage[87]. After this period, the level is 70%[88]. A person whose benefit is below the applicable subsistence income[89] may be eligible for a supplement on the basis of the Supplements Act.[90]. When the right to benefit has ended, employees who have become unemployed after they have reached the age of 50 (together with their spouse if any) may, subject to certain conditions, claim a benefit under the Income Provision for Older and Partially Disabled Unemployed Employees[91]. One of those conditions is that the household income is below the relevant subsistence minimum[92]. Employees younger than 50 at the time they became unemployed may claim a benefit under the terms of the Public Assistance Act, in which case they have to satisfy a means test on income and capital[93].

The claimant of the unemployment benefit is obliged to notify the Uwv immediately (at its request or on his or her own initiative) of all facts and circumstances that, in all fairness, could affect his or her entitlement to benefit, the assertion of his or her entitlement to benefit, the level or duration of the benefit or the benefit amount paid to the employee[94]. Violation of this broadly formulated obligation is punishable by an administrative fine of EUR 2,269 maximum[95].

Unemployment benefits can be reduced or withdrawn if a person is considered to have become culpably unemployed fora serious reason and s/he can be blamed for this situation[96]. Grounds for such dismissal include theft from the employer and violence against the employer and

85. Article 27 Werkloosheidswet.
86. See also F. Pennings and A. Damsteegt, De Werkloosheidswet, Deventer: Kluwer, 2009.
87. Article 45 Werkloosheidswet.
88. The same ceilings apply as mentioned in note 52 supra.
89. For a couple subsistence benefit is the same as the minimum wage (1520 euro a month), for a single person this is 70 per cent of this amount.
90. Toeslagenwet (Supplements Act).
91. Wet inkomensvoorziening oudere en gedeeltelijk arbeidsonegschikte werknemers.
92. Idem.
93. Idem.
94. Article 25 Werkloosheidswet.
95. Article 27a Werkloosheidswet.
96. Article 27 Werkloosheidswet.

fellow employees[97]. The list is not exhaustive, but in any case it is clear that the behavior must be serious.

In addition, the employee is culpably unemployed if the employment relationship has been ended by or at the request of the employee. At the same time, continuation would not have resulted in such difficulties for the employee that this continuation could not, in all fairness, have been demanded of the employee[98]. This argument makes it clear that in a case where the employee took the initiative to end the employment relationship, s/he is culpably unemployed and benefits will be refused completely.

To conclude, if the employer took the initiative to terminate the unemployment relationship, the employee is safe, i.e. this has no effects on the benefit rights. This approach was adopted in 2006 in order not to hinder the mobility of workers before they had to fight their dismissal, as it was considered that otherwise they had caused more costs for the funds than necessary, which was a ground for refusal or reduction of benefit. If an employee is culpably unemployed, the Uwv must permanently and totally deny all unemployment benefits.

Not only in case of culpable unemployment does the Werkloosheidswet specify what measure must be taken; the same applies if the claimant fails to prevent becoming or staying unemployed as a result of neglecting to accept suitable work or of failing to obtain or to keep suitable work through his own fault[99]. Suitable work is all work that is appropriate given the employee's strength and competence, unless acceptance may not be demanded of him or her for reasons of a physical, mental or social nature[100].

If an employee neglects to accept suitable work or if s/he fails to obtain suitable work through his or her own fault and therefore remains unemployed, the benefit must permanently be refused over the number of hours for which the entitlement to benefit would have ended if the employee had accepted or obtained the work in question[101]. The Act also obliges the claimant to apply actively for work and not to impose requirements which make it difficult to get such work[102]. The employee is, moreover, obliged to cooperate in obtaining education or training which is considered necessary for his or her employment, or in other activities which are beneficial to his or her reintegration[103].

97. Article 24 Werkloosheidswet.
98. Article 24 Werkloosheidswet.
99. Idem.
100. Idem.
101. Article 27 Werkloosheidswet.
102. Article 24 Werklooshewidswet.
103. Article 26 Werkloosheidswet.

In addition to the previously mentioned obligations, the WW specifies obligations for the employee meant to make the administration of unemployment benefits easier. These obligations concern actions or omissions by the employee which could delay, hamper or hinder the Uwv's work[104]. Some administrative obligations must be met within a specific period of time. Among these are: notification of unemployment, submission of a request for benefit, registration as a job-seeker, extension of that registration, granting inspection of passport or driver's license, and submission of worksheets[105]. A worksheet is a form listing, among other things, questions on previous employment, and income received.

The Unemployment Benefit Act seeks to promote reintegration of persons into the workplace or to prevent them from claiming by implementing higher thresholds and reducing the level and duration of benefits. This makes it possible to receive unemployment benefits in cases of partial unemployment.

At this moment the government has asked for recommendations from the Social Economic Council on how to involve employers and trade unions more closely in the administration of unemployment benefits,which could be done if these groups were fully responsible for the financing of the scheme. In that case the employers would receive the full advantage of an active policy of preventing unemployment and helping the unemployed at the same time. This plan is more difficult to achieve than in case of sickness, since unemployment can occur by waves and is thus difficult to finance and handle. Still, it is expected that here also the solution lies in the labour market.

V. HEALTH CARE SCHEME

Until 2006, the health care system was a dual system: only employees were covered (if they earned a wage below a certain level) by the compulsory Law on Health Care[106]; others could buy voluntary insurance. This dual system was criticized because of the differences between the systems, often resulting in more generous conditions for private insurance and a lack of compulsory insurance for everyone[107]. This old system was

104. Idem.
105. Idem.
106. Ziekenfondswet.
107. B. Hofman en F.J.L. Pennings, Privatisering en activering in de Nederlandse sociale zekerheid en solidariteit – een internationaal perspectief, Deventer: Kluwer 2013.

replaced in 2005 by the Care Insurance Act.[108]. The new Act obliges all residents of the Netherlands to take out private health care insurance[109].

The main reason for implementing the new Act was that new mechanisms were deemed necessary to reacquire control over health care expenses[110]. The costs for medical care had been rising for several years, due to the ageing of the population and rapid medical-technological developments, which introduced expensive new tools, machines, and treatment methods—and the costs were expected to continue increasing[111].

Economic approaches have become very influential in Dutch health care. The main idea behind the new Act was to have a system of controlled competition between insurance companies; in this respect there is a large difference from the old health care act, which was much more centrally regulated by the State[112].

The objective of the new Act is to ensure that insurance companies, care providers, and the insured are encouraged to organize and make use of health care more efficiently[113]. For this purpose, the Act obliges each insured person (i.e., each resident) to choose a care insurance company from which s/he buys insurance[114]. This leads to competition between insurance companies, which as a result, will focus more on the preferences of the insured. At the same time, they will also have to arrange for buying care more efficiently from the care providers, since otherwise the contributions for which they have to pay will be too high (or the losses will become too great)[115]. In addition to this competition element, the Act also contains important solidarity elements. All residents are compulsorily insured, and insurance companies have to provide all applicants with insurance, regardless of their personal characteristics and situations, under the same conditions of the insurance they offer[116]. The Act also guarantees that an insurance company can only charge the same contribution for the basic insurance (i.e., the insurance regulated by the Act.)[117]. In the Act, the contents of the basic insurance are defined, i.e., what care is available and under what conditions. Examples are: medical care by general practitioners, medical specialists and midwives;

108. Zorgverzekeringswet. See also literature mentioned in the previous note.
109. Idem.
110. As was discussed in Parliamentary Papers, Second Chamber 2003/04, 29763, no. 3, 2.
111. As was discussed in Parliamentary Papers, Second Chamber 2003/04, 29763.
112. Idem.
113. Idem.
114. Zorgverzekeringswet, Article 2.
115. As was discussed in Parliamentary Papers, Second Chamber 2003/04, 29763.
116. Zorgverzekeringswet Articles 2-4.
117. Zorgverzekeringswet, Article 17.

hospital stays; medicines;mental health care by a medical specialist, including treatment by a psychiatrist; basic mental health care, including a primary care psychologist and Internet treatment;tools for treatment, care, rehabilitation, nursing for a specific limitation; physiotherapy up to 18 years; limited physical therapy and exercise therapy from the 21st treatment for certain chronic diseases; pelvic physiotherapy for urinary incontinence until the 9th treatment; speech therapy and occupational therapy;dental care (control and treatment) for children up to 18 years; dental surgical care (surgery) and dentures; patient transport; maternity care; up to 3 hours of treatment dietary advice; fee for 3 IVF treatments; dyslexia care; stop-smoking programs[118].

Insurance companies have choices concerning the implementation of the health insurance plan. For instance, they can decide whether the costs will be reimbursed or care providers are paid directly by the company, and whether a risk borne by the insured person (in addition to the statutory risk) may lead to contribution reductions or not. In this way, they can compete with other companies. The insurance companies are permitted to make a profit from their insurance schemes.

Strictly speaking, under the Act there are no longer insured persons, but persons have the obligation to buy insurance from an insurance company. If a person does not buy such insurance, she is not insured. In addition, in the case of non-insurance, a fine can be imposed.

Insurance coverage starts on the day on which the company receives the application for insurance, and can even have retroactive effect, i.e., with a maximum of four months after the obligation to be insured arises. The purpose of this provision, which is atypical for insurance coverage (in general, 'burning houses are no longer insured'), is to guarantee the comprehensiveness of the system, so that there is continuous coverage for those who are slow in making a choice or for those who change companies at the end of the calendar year.

On the basis of the Act, the insured person can give notice of termination of the contract to the insurance company each year. The objective of this provision is to make changing insurance companies easier. In the case of a change of companies, the new company has the obligation to accept all applications, regardless of the 'risk profile' of the applicant. Thus, 'bad risks' can also change companies.

In addition to the statutory insurance products, health care companies can offer supplementary insurance, which is for provisions and services

118. http://www.rijksoverheid.nl/onderwerpen/zorgverzekering/vraag-en-antwoord/wat-zit-er-in-het-basispakket-van-de-zorgverzekering.html.

not included in the basic insurance. These supplementary insurances are not compulsory, but for the companies they are attractive, as they are often much more profitable than the statutory insurances. Insurance companies are allowed to refuse applicants for supplementary insurance. For supplementary insurance, many companies require that the basic insurance is also accepted from their company, so that selection of the supplementary scheme can thus influence the possibility of moving to another insurance company.

As we have already seen, the insured person has to pay the contribution of the insurance contract s/he has chosen; this contribution is the same for all those who have bought this insurance from this insurance company. No differences are allowed, e.g., for risk level or for age. Between companies, however, the contribution rates may vary.

The contribution is a flat-rate one, so it does not depend on income. The contribution can, however, be lower if the applicant has opted for a higher risk to be borne by him or herself (up to 500 euro a year) in addition to the compulsory statutory own risk borne by the insured (350 euro a year).

Some insurance companies provide for a so-called collective contract. Under this approach, which applies to employees of a particular firm, for members of a football club or trade union, or for an association of patients,there is no limit to the type of unit with which an insurance company can make an agreement. On the basis of the contract, reductions to the contribution can be offered to the members of the collective contract up to a maximum of 10%.

Persons under 18 years of age do not have to pay contributions, and persons on a low income can receive a compensation for paying the contribution, paid by the Tax office.

In addition, a wage-related contribution is paid by the employer to a risk equalization fund. This fund compensates an insurance fund if it has persons of higher than average risk. It was feared that otherwise particular funds would try to discourage persons of high risk, such as the chronically ill, from buying insurance. In 2012, the government announced that it would gradually reduce the sums payable under the system, as it appears that it does not sufficiently encourage insurance companies to buy care efficiently, since they are compensated anyway. For this reason, the equalization will take place *ex ante* only, i.e., on the basis of specified characteristics of the clients.

The contents of the health care to be provided are still defined by statutory rules, but the administration of the health benefits is by private organizations. Thus, this system maintains a tight balance between solidarity and room for making profit. Its purpose is to introduce efficiency

into the system (with market instruments) and still provide a sufficient and affordable system for all residents.

VI. CONCLUSIONS REGARDING DUTCH BENEFIT SYSTEM

In this description of the Dutch system, we have not described all the benefits (e.g., family benefits and survivor benefits are not mentioned), but a major part. Sickness and disability benefits have been refocused in the past decade to encourage persons to stay or reintegrate into work. For sickness benefits this has been done by giving the full responsibility to the employer (while carefully defining the statutory framework for the powers and obligations of the employer). Although employees certainly feel the effects of this change and have clear obligations for cooperating in re-integration themselves, the major focus is on the employer, who no longer benefits from the solidarity of other employers that was previously organized in the Sickness Benefits Act.

With disability, the focus is more on the employees. After the wage-related period, they are encouraged by financial incentives to take up work. These persons will first have had a period during which they and their employer had to undertake re-integration activities. After this, the employee can, as long as there is an employment relationship, require the employer to plan for reintegration, which may cause the employer to feel the effects of the disability act. As a result of this system, disabled persons with better chances on the labour market receive a higher benefit. Thus, the system does not merely respond to differences in disability, but other factors —such as having a (cooperative) employer, having a network, being 'employable', being motivated and sufficiently qualified— play an important role.

Unemployment benefits have also undergone an important change in terms of prevention. Since 2006, after a decision of the employer to dismiss an employee, the latter is admitted to the benefit system if the other conditions are fulfilled. Here, the benefit system is used to serve as "oil for the labor market"— workers should be encouraged to go where they are needed, and may make use of the benefit in the intermediary period. Currently, the Government has asked the Social-Economic Council to investigate whether incentives, such as for sick pay, can be introduced as well for employers to keep their employees fit for work ('employable') during their employment relationship, so that they can more easily find a job when they are dismissed. In case of unemployment, it is more difficult to impose measures on employers which dismiss employees, since these include companies with economic problems.

With respect to the Health Care Insurance Act, one must acknowledge

that, first of all, solidarity has increased, since until this Act only employees up to a certain wage were compulsorily insured. The present system covers all residents. Since the companies compete with each other, it is not a solidarity system as such. However, the government keeps a strict control on maximum contributions and rises in premiums. By having lower contributions for those who accept their own high risks, by making special insurance products for those with academic degrees, and by means of special supplementary insurances, companies try to select more attractive clients.

The prohibition of risk selection (even in the case of a new choice for a company) and the obligation to charge the same contributions of all buyers of the same insurance product are also important elements of solidarity. Furthermore, the obligation of the employer to pay a wage-related contribution and the risk equalization fund achieve solidarity, this time between the companies, as they share responsibility for the heavy risks. Here we see a tension, however, since the question is whether it hinders effective working of the insurance market, as such a fund does not fit well with profit-making companies.

Thus the approach does not lie in continually changing the rules, or applying the rules more strictly or less strictly in order to be more efficient and to save money, since the actors in society will try to shift their costs to the collective funds if such a possibility exists. This must not be seen as immoral behaviour, but as a rational approach —at least at an individual level— so therefore a rational response is required.

Such a rational response can lie in putting the responsibilities at the most basic level, with those who are directly concerned. Thus they will organize an adequate approach. This can differ from benefit to benefit: i.e. the approach in case of sickness differs from unemployment, disability and health care.

It is important that employees not be negatively affected and that thus, for instance in the case of sickness, the method of assessing sickness, the level and duration of sick pay, the grounds for exclusion and sanction, and the exceptions to the obligation to pay sick pay are strictly defined. In addition, labour law should not allow escape routes (such as dismissal), and there must be a quick and accessible court system. If this exists, the system does not deprive employees from their rights, but it encourages employers to do much more to prevent sickness and help people back to work. In this respect the outcome is positive overall: it does not rely on public finances, and people find work that they can still do. There may still be problems in some areas, especially in case of persons who are often ill who may be dismissed during periods of recovery. There is also a tendency for employers to avoid permanent employment contracts and

to prefer short-term contacts of temporary agency workers instead. The government has now introduced a system where employers have to pay a higher contribution for sick pay if their former employees become sick or disabled. In this way it is hoped that the share of flexible work is reduced.

The last example shows that the system will never be perfect. It is also quite uncertain whether it can be exported to other countries, as systems vary immensely and also the system of labour law is decisive for its success, which system may be different from country to country. The last issue is that detailed data on income effects, on people returing to work, on the quality of work, etc., are missing.

Still, I hope that developments in the Netherlands are useful for a discussion on how a system can be shaped in terms of distributing responsibilities, and thus influencing costs, while basically leaving the rights of the claimants intact.

Chapter III

Does the Bulgarian Labour and Social Security Legislation help to combat the Economic crisis?[1]

Prof. Dr. Krassimira Sredkova

Sofia University "St. KlimentOhridski"(Bulgaria)

I. INTRODUCTION

The development of the law as a regulator of social relations is a dynamic phenomenon, which is determined by changes in socio-economic, social and political relationships. Legal reform is an ongoing process aimed primarily at changes in the legal framework, in the implementing institutions and authorities, the interaction between them, the provision of resources for the law enforcement, and the professional qualification of staff.

Bulgarian labour legislation has more than a century of history. Slightly shorter is the history of social security legislation. During this time, there were times of both advances and setbacks.

The new economic and social conditions in Bulgaria—globalisation, EU membership—called for new requirements for the regulation primarily of the employment relation ships, which must be met by modern legislative procedure. It is very unfortunate that in the recent years, it revealed a number of problems both in the content of the labour legislation and in the legal instruments. More over, what is particularly worrying–instead of being addressed, these problems are exacerbated. To the traditional

1. This report has been published in the framework of the R&D project "Good Legal Practices in the Field of Labour and European Law to Reduce Labour Litigation Expenditure at Zero Cost (I+D DER 2012-32111).

explanation of these with the EU membership[2], one current explanation was added — the economic crisis. It indeed has serious consequences in labour law as well. Among these are substantially increased unemployment, lower living standards, rising inflation, increasing poverty and aggravation of social inequality in the society between a small group of the very rich and a majority of the very poor[3].

Naturally, the solution of economic problems should be accomplished via development of the economy. However, the law must find its place as well. This is especially relevant to labour law[4]. The law regulates employment relationships, which are the means of implementing the production process. That is why the importance of the law in overcoming the adverse effects of the crisis is invaluable; however, it must be balanced to take into account the interests of both parties to the employment relationship, to look for the most efficient combination of the protective and the economic functions of labour law.

II. LABOUR LEGISLATION IN BULGARIA

Unfortunately, labour legislation in Bulgaria in recent years has shown less and less success in this regard. It is first and foremost unstable —new regulations are being adopted, those in force are constantly changing— and this creates difficulties in their implementation. For example, since the democratic changes at the end of 1989 the Labour Code (LC) has been amended 82 times, and the Social Insurance Code, adopted in 1999, 109 times! Short-sighted and unstable legislation is being created, which undermines its enforcement. This extends the collisions in the relevant legal act, since too often the movers do not take into account other aspects of the law under amendment or the impact of proposed amendments on the general legal framework. Such an approach, besides the harm it causes, suggests that there is only a rush to implement rather populist purposes than to trace the path for a serious, professional legislative process with a clear long-term strategy. The lack of proper consideration of the draft legislation creates frequent and hasty changes of newly adopted laws, which in turn creates serious difficulties for law enforcement authorities,

2. See on these issues Средкова, Кр. Пореднинедоразумениявтрудовотозаконодателствос европейскооправдание. – Съвременноправо, 2006, № 2, 7-21; Средкова, Кр. Икономиче скатакризалиепричиназакризатавтрудовотозаконодателство? – In: Съвременнотоправо: проблемиитенденции. Ред. Кр. Средкова. С.: Сиби, 2011, 330-346.
3. See Хесел, Ст. Възмутетесе. С.: Колибри, 2011, 12-24; Мръчков, В. Трудовоправо. 8. изд. С.: Сиби, 2012, 30-31.
4. See in particular Simitis, S. Is there still a Future for Employment Law? – In: 5th European Regional Congress for Labour Law and Social Security. General Reports. Leiden, 1996, 1-24.

uncertainty in turnover, and instability in the present legal order. This gives rise to mistrust in the Bulgarian legal system between the effected persons and the legal entities.

III. PROBLEMS OF THE BULGARIAN LEGISLATIVE PROCESS

One of the biggest problems of the Bulgarian legislative process in general, and of the legal regulation of employment and social insurance relationships in particular, is the transposition of EU law[5].

The unfounded copying of word for word (and very often inaccurate) translations of EU directives continues. This word for word copying underestimates the national legal tradition and its achievements. This often leads to a reversal from traditional Bulgarian legal solutions not being required by the EU law. It does not take into account the fact that every EU directive states that the provisions of this Act shall not affect national legislative decisions, collective agreements, national practice or others, establishing more favourable legal decisions.

On the other hand, the fact that the transposition of an act of EU law into the domestic legal system does not necessarily require a separate, specific national act is not sufficiently taken into account. For example, the transposition of Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees could have been done with amendment to the general legal act on regulating employment relationships —the Labour Code— rather than with the adoption of a wordy separate act— the Informing and Consulting Employees In Cross-Border Undertakings And Groups Of Undertakings And European Companies Act.

Another example. Often due to lack of other serious arguments the movers of draft legislation use the circular argument: "It is required by the EU law", without specifying what is required by which EU act. A typical example is a series of amendments to the Social Insurance Code, given that EU law only deals with the coordination of social schemes systems, and does not establish binding standards to be set in the context of the national legal framework.

5. See Средкова, Кр. Пореднинедоразумения, 7-21; Средкова, Кр. ТрудовотоправонаЕвроп ейскиясъюзибългарскатаправнасистема. – In: Актуалнипроблеминатрудовотоиосигури телнотоправо. Т. III. С.: УИ „Св. Кл. Охридски", 2009, 11-37.

IV. THE PROCESS OF OVERCOMING THE ADVERSE EFFECTS OF THE ECONOMIC CRISIS

Yet one must render an account of the efforts, more or less successful, that the Bulgarian legislation is making to reconcile the interests of the parties to employment relationships which are in the process of overcoming the adverse effects of the economic crisis.

Bulgarian labour legislation primarily regulates work under the standard employment relationships: for an indefinite, and for a definite period.

The rule deals with work under employment contract for an indefinite period. It is derived from the provision of Article 67, para. 2 LC, in which "the employment contract is deemed established for an indefinite period, unless expressly agreed otherwise. "In addition, Article 327, para. 1, sub-para 7 LC, entitles the employee who works under fixed-term employment contract for a definite period or as a substitute, to terminate it without notice if taking up employment elsewhere under a contract of employment for an indefinite period. It is not necessary to point out the benefits of this form of employment.

The establishment of fixed-term employment contracts is permitted. As referred to in Article 68, para. 1 LC, these may be: for a definite period which shall not be longer than 3 years, insofar as a law or an act of the Council of Ministers do not provide otherwise; until completion of some specified work; for substitution for an employee who is absent from work; for working at a job, which is to be filled through a competitive examination, for the time until it is taken on the basis of the competitive examination; for a certain mandate, where such has been specified for the respective body. This range of options for fixed-term employment contracts allows for both satisfying the specific needs of the employer as well as employment (albeit temporary) of more citizens. However, because often fixed-term employment contracts were used to circumvent the law (mostly for ease of termination), some restrictions have been introduced since 2001. For example, Article 67, para. 3 LC provides that an employment contract established for an indefinite period may not be transformed into a fixed-term employment contract, except where explicitly desired by the employee, and stated so in writing. The scope of fixed-term employment contracts for a definite period was also limited. As referred to in Article 68, para. 3 LC, such contracts may be established for execution of temporary, seasonal or short-term jobs and activities, as well as with newly hired employees in enterprises that have been declared bankrupt or in liquidation. Only as an exception, they can be established for works and activities that are not temporary, seasonal or of short-term nature, for not less than one year (Article 68, para. 4 LC).

The exception, as provided in § 1, p. 8 SP LC should be linked to specific economic, technological, financial and other objective reasons that exist at the time of the execution of the contract of employment. They shall be stated in the contract.

These changes in the statutory regulation have produced good results.

V. THE NEW ECONOMIC CONDITIONS

The new economic conditions imposed a framework that allows more flexibility and which takes into account the interests of both parties to the employment relationship. In this regard, the current legal framework of standard employment relationships was upgraded and a new one was established. Here are some examples:

A. PART-TIME EMPLOYMENT[6]

The option to establish a part-time employment contract has existed since the adoption of the Labour Code in 1986. However, it was not as widely used as in the recent years. Both the advantages and the disadvantages of this working arrangement are known. Unfortunately, in our country it is used not only to meet the objective needs of the employee and employer, but also to circumvent labour legislation—mostly for reducing the due social insurance contributions. Furthermore, the General Labour Inspectorate has revealed cases of full-time work declared as part-time work, where the remuneration paid is not the amount fixed in the contract, but an amount based on a verbal agreement between the parties; and in the worst cases the contract is established for part-time employment, while actually the work is done at normal full-time working hours, without the full remuneration due in such cases. To combat such offenses, in 2012 a new compulsory administrative measure was introduced (Article 404, para. 1 sub-para. 9 LC). When such a violation is identified, authorities in charge of compliance with the labour law may issue a mandatory direction to employers to amend the employment

6. See Банова, Ем. Трудовдоговорпринепълнаработновреме. –Трудиправо, 2000, № 7; Микова, В. Можелиработодателятедностранносъсзаповеддавъведешестчасовработ енден. – Трудиправо, 2001, № 2; Средкова, Кр. Трудовоправо. Специалначаст. ДялII. Индивидуалнотрудовоправо. С.: УИ „Св. Кл. Охридски“, 2011, 173-174; Средкова, Кр. – In: Мръчков, В., Кр. Средкова, Ат. Василев. КоментарнаКодексанатруда.11. изд.С.: Сиби, 2013, 463-476; Мръчков, В. Op. cit., 331-337; Sredkova, Kr. Work ingtime and the principle off lexicurity in Bulgarian Labour Law. – In: Current issues of busines law, 2011, 6(2); Нинева, См. Правнарегламентациянавъзможноститезагъвкаваорганиза циянаработнотовремевбългарскототрудовозаконодателство – предимстваинедостатъци. – Информационенбюлетинпотруда, 2013, № 4.

contract for part-time employment into an employment contract for normal working hours. Failure to comply with such mandatory direction leads to administrative liability of the employer or the official concerned (Article 415, para. 1 LC).

The option for unilateral establishment of part-time work by the employer was introduced in 2006 (Article 138a LC). This is possible in case of reduced volume of work. When the reduced work volume is temporary and is expected to be overcome, the employer can maintain employment relationships, but temporarily reduce the related working hours. Thus, his/her obligation to pay remuneration for idle time and the relevant social insurance contributions is mitigated.

Nevertheless, the employer does not have complete freedom to act in these cases. The unilateral imposition of part-time work is subject to several important requirements:

First, the working time duration cannot be less than half of the statutory working time. This guarantees that the employee will get credit for one full day in terms of period of service.

Second, the right of the employer to introduce part-time work unilaterally is limited to three months in one calendar year. This can be done by a single introduction of the part-time regime for the maximum period allowed, or through repeated introduction for shorter periods whose total duration does not exceed the three-month maximum.

Third, the employer may unilaterally introduce part-time work for the employees in the whole company or in a particular unit of that company, but it is not allowed for a particular individual's employment contract.

Fourth, the introduction of part-time work by the employer requires prior coordination with the representatives of employees and of the trade unions.

This option is used relatively rarely. Unfortunately, some unscrupulous employers abuse this option as well, saving money on salaries and social insurance contributions, while the employees actually work longer hours and only for salary (without social insurance contributions).

B. EXTENSION OF WORKING TIME[7]

With the amendments to the Labour Code of 2001 and 2006 came the

7. See Средкова, Кр. Трудовоправо, 142-147; Средкова, Кр. – In: Коментар, 447-458; Мръчков, В. Op. cit., 326-331; Банова, Ем. Правнавъзможностзаудължаваненаработно товреме. –Трудиправо, 2013, № 3; Нинева, См. Op. cit.

possibility for the employer to extend employees' working hours (Article 136a). It is permitted for production-related reasons. The option of extending the working time reflects the economic interest of the employer, implementing the operations of the company more rhythmically and effectively. The extension consists of establishing a working time of greater than usual (normal or reduced) duration.

In these cases, the law sets certain requirements to prevent undue violation of employees' rights in relation to their working and free time. These requirements relate to:

First, the length of the working day may not exceed 10 hours in the cases of normal duration of eight hours, and for a reduced working day (e.g. work under hardship conditions) — one hour in excess of the statutory.

Second, the period of extension may not be more than 60 working days in one calendar year. In order to avoid excessive strain on the employee and violation of the usual rhythm not only of their employment, but also of personal, family and social life, the extension cannot be for more than 20 consecutive working days.

Third, the introduction of longer working hours is permitted only upon prior consultation with representatives of employees and of the trade unions and prior notification of the labour inspectorate.

Fourth, the compensation for the extension of working hours is provided by a respective reduction of working hours on other working days. This compensation should be done within four months for each working day. Where the employer fails to compensate the extension of the working hours, the employees shall be entitled to determine themselves the time to compensate for the extension of the working hours with respective reduction thereof, whereas they shall notify in writing the employer to that effect at least two weeks in advance. Upon termination of the employment relationship prior to compensating it, the difference to the normal working day shall be paid as overtime.

This option was not widely implemented, mainly due to an overall drop in production, which sometimes does not allow sufficient workload for normal working hours, let alone to require its extension.

C. WORKING TIME ACCOUNTS[8]

This is a good opportunity to facilitate the activities of the employer,

8. See Анчев, Д. Трудътнад 8 часавработнидниприсумираноизчисляваненаработнотоврем енееизвънредентруд. – Трудиправо, 2000, № 8; Средкова, Кр. Развитиенапроизводствена

provided no breaches of the rights of employees are made. In working time accounts the working time is determined not for a work day, but for longer periods —a week, month or other period, not exceeding six months. Until the amendment of Article 142 LC in 2006, such an option existed only for work in a continuous production or un-interruptible work environment. After the amendments, there are no such restrictions—working time accounts are allowed at the discretion of the employer. This has its advantages related to the rational organisation of work—the opportunity to work all days of the week, as weekends are not rest days in working time accounts; avoiding overtime when there is intensive seasonal work; reducing the numbers of required manpower, etc.

Unfortunately, these cases also allow for a number of violations. According to the General Labour Inspectorate, the working time accountsoften are used to hide overtime, and when planning work shifts the employees' minimum daily rest, etc. is not always guaranteed. Trade unions react very strongly against such violations[9].

The above examples (there are others as well) demonstrate that the Bulgarian labour legislation provides ample means for more efficient use of the workforce. The problem lies in their use in practice. It depends on the will and good faith of the two parties in the employment relationship. Forced by the needs (albeit different in nature) of employees and employers, both take the liberty to circumvent and even directly violate the law in the name of economic gain—remuneration and profit, respectively.

VI. ATYPICAL FORMS OF EMPLOYMENT

Along with the standard employment relationships, in recent years Bulgarian legislation has started introducing some novelties to the Bulgarian reality: atypical forms of employment. These are common in the more developed European countries (UK, Germany, France and others), however for our country this is still quite a new phenomenon, with insufficient implementation in practice[10]. These include:

тафункциянатрудовотоправочрезправнатауредбанаработнотовреме. – Юридическисвят, 2001, № 2; Средкова, Кр. Трудовоправо, с. 159; Средкова, Кр. – In: Коментар, 498-500; Нинева, См. Op. cit.

9. See КНСБ. Сумираноизчисляване/отчитанеработнотовреме. С.: 2014, 12-24.

10. See Средкова, Кр. Нетипичнитеформинатрудовазаетостсенуждаятотправнауредба. – In: Правнатанаука.Традицииииактуалност. Пловдив: ПУ „П. Хилендарски", 2012, 446-452; Средкова, Кр. За „специфичното" вправнатауредбанаспецифичнитетрудовиправоотношения. – In: Актуалнипроблеминатрудовотоиосигурителнотоправо. Т. VI. С.: УИ „Св. Кл. Охридски", 2013, 26-39.

A. HOME WORKING[11]

This form of employment was known to the Bulgarian labour law until 2011only for mothers with children under six (Article 312 LC)[12]. However, it is hardly ever used in practice.

Initially with an agreement between the representative trade unions and employers' organisations, and later with the introduction of new articles 107b-107g in the Labour Code in 2011, a general opportunity for home working was established, along with the general rules of its legal regime. It is regulated as a contract of employment for production of goods or provision of services in the home of the employee, or in other premises of his/her choice outside the employer's enterprise for remuneration, using his/her own and/or employer's equipment, materials and other aids. Based on data from the General Labour Inspectorate, this form is still rarely used;

B. TELEWORKING[13]

Like homeworking, teleworking was also initially regulated with an agreement between the representative organisations of employees and of employers[14]. Then, by amending the Labour Code in 2011 (new articles 107h-107o), it was included in the legal framework. It is regulated as a form of organising the work under an employment relationship outside the premises of the employer by means of information technology, which before its moving out has been or could have been performed at the

11. See Мръчков, В. Работновреме и почивки при извършване на надомна работа. – In: Трудови отношения 2012. С.: Труд и право, 2012, 367-385; Мръчков, В. Трудово право, 247-248; Мръчков,В. – In: Коментар, 316-323; Сербезова, Ст. Задължения на работника или служителя при извършване на надомна работа. –In:Трудови отношения 2012, 352-354; Симеонова, Ст. Определение за надомна работа. – In: Трудови отношения 2012, 345-347; Симеонова, Ст. Трудов договор за надомна работа. – In: Трудови отношения 2012, 347-349.
12. See Средкова, Кр. – In: Коментар, 921—924.
13. See Нинева, См. Промените в Кодекса на труда относнодистанционната работа (работата от разстояние). – Информационенбюлетин по труда, 2011, № 12; Мръчков, В. Допълнение на Кодекса на труда: работа от разстояние. – In: Трудови отношения 2012, 354-367; Мръчков, В. Трудово право, 249-255; Мръчков, В. – In: Коментар, 323-338; Симеонова, Ст. Работата от разстояние – нова форма на трудовазаетост.– Информационенбюлетин по труда, 2013, № 2.
14. See for details Микова, В. Ново споразумение за организацията и прилагането на дистанционната работа. – Информационенбюлетин по труда, 2011, № 1; Генова, Яр. Националнотоспоразумение за организацията и прилагането на дистанционната работа в РепубликаБългария – прецедент в българскотоколективнопреговаряне.– In: Правнатанаука.Традиции и актуалност, 462-468.

premises of the employer. This form of work is becoming increasingly widespread.

Unfortunately, in home working and teleworking, along with some weaknesses in the legal regulation, there are also some difficulties with the implementation of the control related to the need to visit the home of the employee where the work is performed.

C. TEMPORARY AGENCY WORK[15]

This problematic new form of employment has been widely discussed in the legal literature and among social partners. It was only introduced with difficulty in our country,over vigorous resistance from the trade unions. It was introduced with the amendment of the Labour Code in 2012 (Articles 107p-107w). Pursuant to Article 107p, para. 1 LC, what differentiates this form of employment is that in the contract with the agency which provides the temporary work it is agreed that the employee will be sent for temporary work to the undertaking user, and work under its guidance and control.

The legal relationship for temporary agency work differs greatly from the traditional employment relationship. While in home working and teleworking the difference is only in the place of work and some related characteristics of the working conditions, here we are facing a division of employers' rights and obligations between two legal entities: the employer-agency providing temporary work, and the undertaking user. The undertaking user does not enter into an employment relationship with the employee, but there are still mutual rights and obligations between them with respect to rendering the labour. Through this contract,

15. See Мръчков, В. Договорът в трудовото право. С.: Сиби, 2010, 182-206; Мръчков, В. Трудово право, 259-268; Мръчков, В.Допълнения в Кодекса на труда и в Закона за насърчаване на заетосттаотносновременната работа. –Труд и право, 2012, № 1, Приложение; Мръчков, В. Допълнение в Кодекса на труда за временната работа. – In:Трудовиотношения 2012, 367-385; Мръчков, В.– In: Коментар, 338-357; Мръчков, В. Солидарна отговорност на предприятието, коетоосигурява временна работа и предприятиетоползвател. – In: Трудови отношения 2014. С.: Труд и право, 2014, 387-388; Нинева, См. Промените в Кодекса на труда относнопредприятията, коитоосигуряват временна работа. – Информационенбюлетин по труда, 2012, № 3; Нинева, См. Допълнителни условия за извършване на работа чрез предприятие, коетоосигурява временна работа. – Информационенбюлетин по труда, 2012, № 4; Нинева, См. Подбор и масовоуволнение на работници и служители, изпратени в предприятие ползвател от предприятие, коетоосигурява временна работа. –Информационенбюлетин по труда, 2013, № 8; Димитрова, Е. Оценка на въвеждането на регулаторен режим при регистрацията на предприятия, коитоосигуряват временна работа. – Информационенбюлетин по труда, 2012, № 3; Мингов, Ем. Особености на трудовите правоотношения на работниците и служителите с работодател, осигуряващ временна заетост. – Норма, 2012, № 2..

the undertaking user reduces its costs related to the management and maintenance of the workforce. The main advantage of such a relationship is the ability to respond quickly to fluctuations in the demand for labour (e.g. more workers are needed but only for a certain period of time, to replace an absent employee, until a project is completed, or in case of temporary increase of the workload due to a larger number of orders, etc.). It saves costs for search and recruitment of job applicants. Also very attractive for the undertaking user is the opportunity for easier termination of the employment relationship when the temporary employee is no longer needed, compared to the termination of employment of its staff members. This type of employment could be very convenient for the employee as well, since it would save him/her the efforts to search for work and go to job interviews. It provides to him/her at least some temporary alternative to unemployment, and allows him/her to gain experience and specialise in a particular occupation or activity. Sometimes temporary work is a stepping-stone to permanent employment with the same employer.

Unfortunately, despite the short period since it has been introduced in Bulgaria, this type of work relationship shows a number of weaknesses. Almost all researchers of this type of relationship agree that the people working under it enjoy a lower level of social protection than those working under a regular employment relationship. However, such weaknesses are quoted not only in the Bulgarian legal literature[16]. The primary one is the lower salary compared to the employer's permanent staff. The lack of a steady job that provides security and peace of mind related to the availability of labour income, opportunity for upgrade within the profession, and promotion linked to pay increase, etc., required frequent change of the working environment, making it difficult to integrate into a new team, are just some of the problems associated with this form of employment. Therefore, it is very important to seek the optimal balance between economic efficiency and protection of fundamental labour rights of employees, because very often economic efficiency is at odds with social security. In other words, in the regulation of these employment relation ships it is necessary to look for a compromise between the two functions of the labour law—economic and protective.

16. See for example Нуртдинова А. Заемный труд: особенности организации и возможности правового регулирования. – Хозяйство и право, 2004, № 9; Злобин, Р.Гибкий рынок труда: стандартные и нестандартные формы занятости. – Вестник Саратовского государственного социально-экономического университета, 2011, № 4; Davidov, G. Joint Employer Status in Triangular Employment Relationships. – *British Journal of Industrial Relations*, 2004, № 1; Mitlacher, L.Temporary agency work and the blurring of the traditional employment relationship in multi-party arrangements – the case of Germany and the United States.– International Journal of Employment Studies, 2007, Vol. 15, № 2.

VII. WORK WITHOUT AN EMPLOYMENT RELATIONSHIP

One major problem of the Bulgarian labour law is that of work without an employment relationship. Despite the imperative requirement of Article 1, para. 2 LC that relations for providing labour are regulated only as employment relationships, in our country it still occurs that employment relationships are disguised by entering into so-called "civil contracts", and even work without any legal basis. The reasons are clear. For the employer, this is related to the relaxing of any protective measures for the employees, and for the latter, the need for remuneration. To overcome this phenomenon, the Labour Code (Article 405a) provides a specific remedy. It specifies that the labour inspectorate shall be entitled to announce the existence of an employment relationship, should it ascertain the provision of labour force in violation of Article 1, para. 2. In these cases, the existence of an employment relationship may be established by any means of evidence.

The rule mentioned above is a legal remedy not against the use of civil contracts in general, but against their unlawful use, which hides employment relationships and harms the interests of employees[17]. Among other things, the employer saves payment of social insurance contributions, has no problems with the termination of the legal employment relationships, and the employee is not entitled to unemployment benefits. There are even phenomena such as the request of the employee him/herself to work without a contract, so that during the relevant period he/she could continue to receive unemployment benefits if prior employment was terminated.

The measure of Article 405a LC has produced certain results. For example, in 2013 the General Labour Inspectorate established 2993 violations, which is 1182 less compared to the violations in the previous year 2012.

VIII. SOCIAL INSURANCE CONTRIBUTIONS

One of the many problems of Bulgarian social security law is related to the payment of social insurance contributions due from the employers. On one hand, the remuneration fixed in the employment contracts is low, and is used as a basis for determining social insurance contributions, and on the other, the delayed payment of those contributions. They are the main source of income for social insurance funds. Unfortunately, their share in this budget in recent years keeps reducing. According to the National

17. See for more details Мръчков, В. Трудово право, 968-972; Мръчков, В. – In: Коментар, 1166-1174.

Social Security Institute, their share since 2010 has fallen by 15%. One of the measures to remedy the situation was the establishment of a minimum level of insurable income on which contributions are due (Article 6 para. 2 of the Social Insurance Code). It is determined annual lyin the State Social Insurance Budget Act through the so-called minimum social insurance thresholds introduced in 2003[18]. These thresholds establish minimum levels of remuneration (which is the insurable income of employees) on which are determined the social insurance contributions, irrespective of whether exactly the same remuneration is set, and whether it is paid to the insured employee. The purpose of these thresholds is to stop the common practice, to which some employers resorted, of setting in the contracts minimum wages on which minimum social insurance contributions are due, and to pay actual wages in cash. Insurance thresholds are determined based on the sector of economic activity of the employer, and on the qualification group of professions to which the insured person belongs. Their introduction is beginning to deliver the expected results.

IX. CONCLUSIONS

In this report, it is neither necessary nor possible to analyse the entire Bulgarian labour and social security legislation in view of their contribution to overcoming the adverse effects of the economic crisis. It turns out that in our country the problem is not so much with the content of the law, but with its implementation. Of course, the objectively difficult economic situation and the on going political instability do not encourage strict compliance with the laws, and ultimately weaken faith in them.

18. See Мръчков, В. Осигурително право. 6. изд. С.: Сиби, 2014, 145-146.

Chapter IV

Spanish pension, contributions for health care in Germany and European law – a poisonous mixture

Prof. Dr. Hans-Joachim Reinhard

Max Planck Institute (Munich)/ Fulda Sciences University of Applied

I. INTRODUCTION

Bernd Schulte was my colleague at the Max-Planck Institute for Foreign and International Social Law for almost 30 years, and as a young researcher I benefited very much from his profound experience in European law, namely in the field of the regulations that coordinate the benefits of social security systems in case of transnational migration. For the commemorative book I selected a case that has recently been decided by a German court[1], a case that shows that coordination rules do not always work in favour of the person involved, in particular if a contributory system like the German one and a tax-financed system like the Spanish one collide. I chose the Spanish example because my last meeting with Bernd was at a conference in Madrid where he gave a lecture on transnational health care and its implications for national health care systems. I could also have chosen the British example because at the Institute Bernd's task had been to work on the British social security system — on which he made plenty of publications[2]. Since the British

1. Landessozialgericht (Superior State Social Court) Baden-Württemberg, Judgement 19 June 2015, L 4 KR 2901/12 published in BetrAV 2015, 616-621
2. Einführung in das Recht der sozialen Sicherheit von Großbritannien; in: Igl, Gerhard/ Schulte, Bernd/Simons, Thomas, Einführung in das Recht der sozialen Sicherheit von Frankreich, Großbritannien und Italien. Berlin: Schweitzer (Vierteljahresschrift für Sozialrecht [VSSR] Beiheft 1), 1977, pp. 149-337; Alterssicherung im Vereinigten

health care system is also tax-financed the findings of the German court would also apply to a British pensioner.

II. THE FACTS

The claimant was born in 1947 and has at least one daughter. She is a Spanish citizen and lives in Germany. The German statutory pension scheme pays a survivor's pension. She is insured with defendant 1) for health care benefits and defendant 2) covers her long-term care benefits[3].

Since April 2012 the claimant has also drawn a survivor's pension from the Spanish system payable 14 times a year. On 29 September 2012 the claimant informed defendant 1) that she received a Spanish pension of 90 €. She signed a form assuring that she was liable to report to the defendants immediately any changes in the pension amount. She attached a notification of the Spanish pension administration stating that in 2011 a 15.82 € payment of arrears for the fiscal year of 2010 had been due, too.

III. THE ADMINISTRATIVE PROCEEDINGS

On 21 October 2011 defendant 1) — acting also in the name of claimant 2) — stipulated, on the basis of 90 €, contributions for health care benefits that amounted to 7.38 € (contribution rate 8.2 per cent) and contributions

---

Königreich, in: Zeitschrift für ausländisches und internationales Arbeits– und Sozialrecht (ZIAS) 1999; Landesbericht Vereinigtes Königreich, in: Reinhard, Hans-Joachim/Kruse, Jürgen/von Maydell, Bernd (Hrsg.), Invaliditätssicherung im Rechtsvergleich, Baden-Baden: Nomos, 1998, pp. 595-657; Großbritannien – Das Ende des Wohlfahrtsstaats?, in: Sozialer Fortschritt (SF) 46 (1997), pp. 30-33; Großbritannien. Zur Reform der Medizinhaftung in Großbritannien, in: In: Köhler, Peter A./von Maydell, Bernd (Hrsg.), Arzthaftung – „Patientenversicherung" – Versicherungsschutz im Gesundheitssektor, Baden-Baden: Nomos, 1997, pp. 125-146; Vereinigtes Königreich, in: Zacher, Hans F. (Hrsg.), Alterssicherung im Rechtsvergleich, Baden-Baden: Nomos, 1991, pp. 497-547; Sozialversicherung in Großbritannien, in: Internationale Wirtschafts-Briefe (IWB) 21 (1991), pp. 841-852; Alterssicherung in Großbritannien, in: Die Angestelltenversicherung (DAngVers) 38 (1991), pp. 369-377; Grundzüge der Reform der Alterssicherung in Großbritannien: Zur Neugestaltung der britischen Rentenversicherung durch den Social Security Pensions Act 1975, in: In: Deutsche Rentenversicherung (DRV) 1981, pp. 521-531; Familienlastenausgleich durch monetäre staatliche Sozialleistungen in Großbritannien, in: Zeitschrift für Bevölkerungswissenschaft 1978, pp. 89-96.

3. Formally, in Germany the health care system (sickness insurance) and the system providing long-term care benefits are two schemes with independent budgets and different legislations (SGB V and SGB XI, respectively). However, they are jointly administered. The member of a sickness insurance (Krankenversicherung) is compulsorily affiliated to the long-term care scheme (Pflegekasse) that administrates his or her health care benefits.

of 1.76 € for long-term care benefits (contribution rate 1.95 per cent) payable as from 1 July 2011. The defendant referred to a new law that had come into force on 1 July 2011. According to this new law, pensions from abroad are taken into account for the calculation of contributions to the health care system and the system for long-term care, respectively.

The claimant objected to this order. Her representative was an employee of the Spanish Consulate General alleging that this order and the respective German law as its legal basis were against European law because the claimant made her social security contributions for the pension in Spain.

The defendants rejected the intervention stating that they did not share the claimant's opinion. In Nikula[4] the European Court of Justice (ECJ) had decided that it was contrary to Art. 39 of the Treaty establishing the European Community (TEEC)[5] for contributions on pensions paid by another Member State to be deducted when contributions have already been paid on salaries in the respective Member State. However, this conclusion is only relevant if contributions are effectively paid in another Member State. The claimant is compulsorily insured in the German health care system for pensioners. She is residing in Germany and receives both a Spanish pension and a German pension. Therefore, the competence lies with the German health care system and not with the Spanish health care system. Thus, the ECJ decision is not applicable on the claimant's situation.

The committee on opposition proceedings rejected the disagreement. It stated that Regulation No. 883/2004[6] and Regulation No. 987/2009[7] allowed the possibility to levy contributions on foreign pensions if the pensioner is compulsorily insured for health care benefits. The German legislator had transferred this rule into national law[8]. The cited ECJ judgement does not apply for the reasons mentioned above.

IV. THE CLAIM

On 4 April 2012 an employee of the Spanish Consulate General at

4. ECJ judgement 18 July 2006 (C-50/05 – Nikula)
5. Treaty establishing the European Community (Nice consolidated version) Official Journal C 325, 24/12/2002 P. 0033 – 0184Official Journal C 340, 10/11/1997 P. 0173 – Consolidated version
6. Regulation (EC) No 883/2004 ofthe European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166/1
7. Regulation (EC) No 987/2009 ofthe European Parliament and of the Council of 16 September 2009laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ L 284/1
8. Gesetz zur Koordinierung der Systeme der sozialen Sicherheit in Europa und zur Änderung anderer Gesetze vom 22. Juni 2011, BGBl. 2011 I 1202

Frankfurt filed a claim with the Social Court in the city of Ulm demanding the annulment of the administrative order. He referred again to the ECJ decision mentioned above and argued that there was an infringement against the principle of free movement because according to Member State law the claimant has to contribute to another social security system without receiving the respective social protection. She receives two pensions and according to art. 23 Regulation (EC) No 883/2004 she is entitled to benefits in kind provided by the German health care system. However, she is also affiliated to the Spanish contributory health care system for pensioners. It is true that she does not contribute at the moment. But the reason for this is the fact that she had already contributed in the past to the health care system when contributing to the pension system during employment. According to art. 23 Regulation (EC) No 883/2004 the health care system of the state of residence prevails and the health insurance of the other Member State, here Spain, is inactive. Also, the fact that the Spanish health care system for pensioners does not prescribe a deduction of contributions distinguishes her from those pensioners who receive only a German pension which is subject to contributions. Her opinion does not discriminate anybody. §§ 228 and 249a SGB V[9] (Social Security Code Book V) are contrary to European law. In addition, the Spanish pension is not a comparable pension in the sense of § 228 SGB V.

The defendants argued that pensioners receiving only a German pension would be treated unequally if the foreign pension was not taken into account. They would have to pay the full contribution rate for health care benefits and long-term benefits whereas pensioners who receive a pension from Germany and from abroad would have to pay contributions only on part of their income, namely the German pension.

The court of first instance rejected the claim. It is uncontested that the Spanish pension is comparable to a German pension. German law is not contrary to European law. When implementing § 228 Para. 1 S. 2 SGB V the German legislator only wanted to clarify Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009. The claimant cannot refer to the ECJ judgement of 18 July 2006 in Nikula because in that case the foreign pension being paid had already been subject to contributions abroad. Consequently, a further subjection to contributions was not admitted. The new German law makes sure that the liability to contribute takes into account the financial capability which is a principle of the German system. Foreigners who have migrated to Germany also take advantage of the German health care system, which is more extensive than other health care systems in Europe. If a person is entitled to the advantages

9. Social Security Code Book 5 (SGB V) regulates the German statutory health care system

the liability to contribute has to be equal to the obligation of a national resident. There is no reason to discriminate national residents. Even the European Parliament and the European Council had realized that they are not competent to regulate the contribution matter if a national and a foreign pension coincide. Moreover, art. 5 Regulation (EC) No 883/2004 stipulates that the effects of the law with regard to income should be equal for all persons residing in a Member State. The court could not see an obstacle against the right to free movement if contributions have to be paid on both pensions.

V. APPEAL

On 6 July 2012 the employee of the Spanish Consulate General lodged an appeal against the judgement of first instance. He indicated again that the Spanish pension was not comparable to a German pension. In Spain, the Spanish pension is not subject to contributions because the contributions for health care benefits are presumed as having been paid in the context of the contributions to the pension system during the time of employment. In addition, the Spanish pension authority is — other than the German pension authority — part of the state administration. Defendant 1) is only an entity of the state of residence and solely competent for providing benefits in kind according to the EC regulation. In addition, the modification in the German SGB V constitutes a discrimination of Spanish pensioners who receive two pensions in comparison with Spanish pensioners residing in Germany who receive only one pension. This is a restriction to the right of free movement. According to art. 6 Regulation (EC) No 883/2004 contributory periods in another Member State are only taken into account if they are necessary to fulfill the prerequisites for an entitlement. The claimant fulfills all prerequisites for the German health care system for pensioners. Thus, the Spanish pension must not be taken into account. The former art. 33 sec. 1 Regulation (EEC) No 1408/71 is equal to the current art. 30 sec. 1 Regulation (EC) No 883/2004. This article has to be interpreted in such a manner that the Member State of residence may only levy contributions for health care and long-term care on the basis of the pension being paid by the Member State of residence in case the pensioner receives two pensions. This is also the interpretation of the ECJ[10] concerning art. 33 Regulation (EEC) No. 1408/71. The claimant provided a supplemental notification of the European Commission confirming that in Spain,until a reform in 1999, employees had to contribute 2.5 per cent of their income for health care and non-work-related accidents; employers had to pay 7.5 per cent, respectively. The relatively high contribution rate

10. ECJ 10 May 2001 (C-389/99 – Rundgren).

compared with the contribution rate to the pension system (employee 1 per cent; employer 3 per cent) was justified with the guarantee that health care would be completely free of charge for persons once they have reachedthe pensionable age.

The court of second instance admitted the claim formally. In particular, it explained that the employee of the Spanish Consulate General was competent to file a claim according to European law. According to art. 45 sec. 2 Convention between the Federal Republic of Germany and the Spanish State[11] diplomatic employees and employees of the Consulate are entitled to represent their own citizens before authorities and courts concerning social matters of the other contracting state. There is no need to certify officially the power to represent the claimant. This legal rule is still in force because it was transferred to Annex II Regulation (EC) No 883/2004 by virtue of Regulation (EC) No 988/2008.

However, the court held that the administrative bodies of the health care system and the long-term care system were allowed to levy contributions on the claimant`s Spanish pension[12]. That court stated that until 30 June 2011 only foreign occupational pensions were subject to contributions but not pensions paid by a foreign statutory pension scheme[13]. By inserting § 228 Para. 1 S. 2 SGBV the German legislator wanted to close this legislative gap for reasons of equal treatment of national and foreign pensioners[14]. This modification affects pensions from EU Member States as well as pensions from countries outside the EU. The considerations in the draft show that the modification of art. 5 Regulation (EC) No 883/2004 was not the exclusive incentive for changing the German law. The legislator generally intended to incorporate all foreign pensions into the German contributory system for health care and long term care.

The Spanish pension is regarded as a payment *comparable* to the German pension. It does neither matter that —according to the claimant's explanations —employee contributions for the Spanish health care systemare also used for financing social assistance benefits, nor is it of importance that contributions for pensioners' health care are presumed as having been paid, nor is it relevant that the Spanish pension system is part of the state administration. "Comparability" does not mean full identity. It is sufficient if the foreign benefit equals in its crucial points the

11. Convention between the Federal Republic of Germany and the Spanish State of 4 December 1973 (BGBl. II 1977, 687)
12. § 237 Para. 1 S. 1 Nr. 1, § 228 Para. 1 S. 2 SGB V (health care); § 57 Abs. 1 S. 1 SGB XI (long-term care)
13. Cf. BSG (Federal Social Court), Judgement 10 June 1988 –12 KR 39/87
14. Cf. Legislative considerations in the draft of the act, Bundestags-Drucksache 17/4978 p. 20 and Bundesrats-Drucksache 17/846/10 p. 30

typical and essential characters of the German benefit. For this case to be decided by the court it is sufficient that the claimant receives a survivor's pension which is paid by a public pension system.

The defendants calculated the contribution rate correctly when distributing the annual two extra payments (and the payment of arrears) over twelve months. As per 1 January 2015 the contribution rate for health care (sickness insurance) is 7.3 per cent plus an extra 0.9 percent. For long-term care the contribution rate is at present fixed at 2.35 per cent. The extra payment of 0.25 per cent for childless persons is not due because the claimant has given birth to at least one child.

The German provisions are not contrary to European law. The court had no reason to forward the case to the European Court of Justice[15] because the matter had already been clarified and decided in a former judgement[16]. In particular, the contested § 228 Para. 1 S. 2 SGB V does not infringe Regulation (EC) No 883/2004. Art. 30 Regulation (EC) No 883/2004 does not prevent Member States from levying contributions for health care and long-term care benefits on pensions paid from a Member State that is not the state of residence. Art. 30 Regulation (EC) No 883/2004 had replaced Art. 33 Regulation (EEC) No 1408/71 but has —contrary to the claimant's opinion— a broader legislative impact. This is why the claimant cannot refer to the ECJ case mentioned above which dealt with Art. 33 Regulation (EC) No 1408/71.[17]

Art. 33 sec. 1 Regulation (EEC) No 1408/71 stipulated that the authority of a Member State that owes a pension payment may levy contributions on the basis of the due pension amount in order to cover the costs for health care benefits and motherhood if this Member State has to bear the costs of the benefits according to arts. 27, 28, 28a, 29, 31 and 32 Regulation (EEC) No 1408/71. Art. 30 Regulation (EC) No 883/2004, however, now stipulates that the Member State may only charge and levy contributions according to its national rules for the costs of health care, motherhood and fatherhood if this Member State has to bear the costs according to arts. 23 to 26 Regulation (EC) No 883/2004.

Whereas according to the precedent regulation it had only been allowed "to charge contributions on the pension *being owed*", art. 30 Regulation (EC) No 883/2004 states instead that contributions may be charged and levied without any restriction to the pension being owed. Therefore, nowadays foreign statutory pensions of other Member States may be subject to compulsory contributions according to the law of the Member State that

15. Art, 267 TFEU
16. LSG Baden-Württemberg, Judgement 10 December 2014 – L 5 KR 2498/13
17. ECJ 10 May 2001 (C-389/99 – Rundgren)

is bearing the costs for health care. This opinion is consistent with art. 5 lit. b Regulation (EC) No 883/2004. This article stipulates that "where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory." Thus, the payment of the Spanish pension is to be treated like that of a German pension. The prerequisites of art. 30 sec. 1 last clause are met, too: according to art. 23 to 26 Regulation (EC) No 883/2004 the defendants are obliged to provide health care and long-term care benefits for pensioners by virtue of the claimant's affiliation to the systems.

Art. 30 Regulation (EC) No 987/2009 confirms the lawfulness to levy contributions also on a foreign pension saying: "If a person receives a pension from more than one Member State,the amount of contributions deducted from all the pensions paid shall under no circumstances be greater than the amount deducted in respect of a person who receives the same amount of pension from the competent Member State." By stipulating an upper earning limit this article recognizes the lawfulness of deducting contributions from a foreign pension.

The ECJ in its judgement cited above already recognized in principle the lawfulness to deduct contributions on foreign pensions when arguing: "Thus, in a case such as that of the main proceedings, in which an institution of the Member State of residence pays a pension and an institution of the same Member State is responsible for payment of sickness insurance expenses, there is no provision of Regulation No 1408/71 which prohibits that State from calculating the amount of the social contributions of a resident on the basis of his total income, whether it comes from pensions paid by the Member State of residence or from pensions paid by another Member State.". So, this decision is no valid foundation of the claimant's legal opinion. The defendants may issue an administrative act demanding the contributions directly from the claimant. The defendants are not restricted to deduct contributions only from the pension paid by the Member State of residence. In this regard, art. 30 sec. 1 Regulation (EC) No 883/2004 is broader than art. 33 sec. 1 Regulation (EEC) No 1408/71 to which the ECJ referred to in the Nikula case.

The deduction of contributions does not infringe the basic right of free movement[18]. Every citizen of the European Union is entitled to move and reside freely within a Member State but is subject to the restrictions and conditions laid down in the implementing rules. Thus, art. 21 TFEC explicitly refers to restrictions and conditions which may be implemented

18. Art. 21 sec. 1 TFEC (ex-art. 18 TEC).

by secondary law. Art. 30 sec. 1 Regulation (EU) No 883/2004 is such a restriction in secondary law and there are no indications that this provision is contrary to primary law, i.e. the treaty.

The claimant's argument that in Spain a pension is not subject to contributions and that her income from employment has already financed in advance the costs for health care is also not sufficient to constitute an infringement of her right to free movement. The ECJ had decided that a double payment of contributions might be an obstacle to the right of free movement[19]. But in that case, the claimant had effectively paid contributions for health care in France. This case is distinct because the claimant does not pay contributions in Spain. But in Nikula, the ECJ had ruled that the claimant had to give evidence that contributions for health care had been effectively paid in the past. The Nikula case is not applicable on the claimant's situation. The claimant did not finance the entitlement for free health care in Spain with individual payments of contributions during employment. She has repeatedly indicated that contributions for health care are *presumed* as having been paid. Documents show that during employment a contribution of 2.5 per cent had to be paid for health care in general. A precise attribution for financing health care benefits in pensionable age is not identifiable in the documents. Thus, there was no individual double payment of contributions that the ECJ had seen as inadmissible. Even if the 7.5 per cent contribution which the employer had to pay conduced to finance health care costs for future pensioners this would be irrelevant because it had not been the claimant who paid this part of the contribution rate but her employer. In the end, this is not important at all because the claimant receives a survivor's pension derived from her husband's old-age pension. It is clear that the claimant herself did not pay any contributions and she never asserted to have done so.

There is no infringement of the principle of non-discrimination[20]. The claimant is not discriminated on the reason of her citizenship because she is treated in the same way as German pensioners. Moreover, it is the objective of the new § 228 Para. 1 S. 2 SGB V to treat pensioners equally independent of their citizenship and the origin of their pension. The claimant is affiliated to the German health care system because of her residence in Germany and the payment of a pension from the German statutory pension scheme. In Spain, her protection for health care benefits is suspended. According to art. 23 Regulation (EU) No 883/2004 she is only subjected to the compulsory health care system in Germany. This conflict rule precisely specifies for double pensioners the applicable law for benefits in kind, which is the law of the Member State of residence.

19. ECJ Judgement 15 June 2000 (C-302/98 – Sehrer)
20. Art. 18 TFEU (ex-Art. 12 TEC)

The claimant alleges that not all Spanish pensioners are incorporated into the German health care system. This is the case if they do not receive a German pension. Despite their residence in Germany these pensioners continue to be affiliated with the Spanish system. They receive benefits in kind via form E 121 and for the costs incurred the Spanish state pays a flat-rate compensation to the German provider. For the claimant, however, the competent German scheme has to pay all benefits at its own expenses. This allows the levying of contributions for the coverage of benefits. These benefits are, unlike ECJ in Rundgren, not charged to the other Member State. The ECJ held only such contributions as inadmissible.

Finally, the claimant indicates that art. 6 Regulation (EU) No. 883/2004 stipulates that contribution periods are only taken into account if they are necessary for completion of the requested period for entitlement. But this article does not deal with levying contributions and is not applicable.

The European Charter of Fundamental Rights (EChFR) is only applicable if institutions of the European Union have acted or if the Member States are executing the law of the European Union[21]. This is not the case when executing SGB V and SGB XI because despite Regulation (EU) 883/2004 the Member State is competent to fix the requirements for the obligation to contribute[22].

VI. CONCLUSION

Of course, the decision on the appeal did not satisfy the claimant. But the court did not admit an appeal on the points of law to the Federal Social Court. Meanwhile, there are similar decisions concerning other countries (e.g. France, Turkey). As a consequence, pensioners residing in Germany who receive also a German pension have to pay 10.55 percent on their pension, childless persons aged over 23 years even 0.25 per cent more. This obligation is not limited to foreign statutory pensions but extends to occupational pension schemes and civil servants' retirement benefits, too. On the other hand, German pensioners residing in Spain who are entitled also to a Spanish pension do not have to contribute to the Spanish system neither for health care nor for long-term care benefits. Given the huge quantity of Germans living under the Mediterranean sun and the relatively small number of Spaniards living in Germany, a different financial compensation scheme should be elaborated in the long run.

21. Art. 51 EChFR; Bundesverfassungsgericht (Federal Constitutional Court) Resolution 24 April 2013 – 1BvR 1215/07
22. Cf. ECJ Judgement 11 November 2014 (C-333/13 Dano), No 89ff.

Chapter V

"Reducing social costs" by the rehabilitation system in Germany: rehabilitation, prevention and the role of employers[1]

Prof. Dr. Stamatia Devetzi

Fulda Sciences University of Applied

I. INTRODUCTION

"Reducing social costs" can be a legitimate and an attractive goal in the field of social security. However, it is a very broad and vague one and has to be made concrete.

One way of "reducing" costs is to retain or restore peoples' employability and health, so that they can stay active longer in the labour market. This way, the payment of income-replacement benefits can be reduced or postponed; and in addition, social security contributions are being paid for a longer time and thus the financial sustainability of the social security system can be preserved.

Retaining and restoring the health and employability of persons who have become ill or are at the risk of becoming disabled has always been a central goal of the German rehabilitation system. The legal provisions for rehabilitation have been incorporated as Book IX into the German Social Code. Book IX has the title "Rehabilitation and Integration of disabled

1. This report has been published in the framework of the R&D project "Good Legal Practices in the Field of Labour and European Law to Reduce Labour Litigation Expenditure at Zero Cost (I+D DER 2012-32111).
A slightly modified version of this paper has been published in: Social Cohesion and Development 2015, Volume 10, Issue 1. p. 21-28.

persons", i.e. it covers not only rehabilitation matters, but it includes all the relevant provisions that facilitate the participation and integration into society for disabled persons as well as for persons "at risk of becoming disabled". The legal provisions provide for medical, occupational and welfare benefits in order to achieve the goal of participation and integration into society quickly, effectively and economically. These benefits have been brought together under the heading of "integration assistance".

In this chapter, firstly, the rehabilitation system will be briefly described. Secondly, the question of prevention and the role of employers will be highlighted.

II. THE "MOTTO" OF THE REHABILITATION SYSTEM: "REHABILITATION BEFORE CASH BENEFITS"

The main feature of the German rehabilitation system is "rehabilitation before pension" or—more specifically—rehabilitation before any kind of cash benefits. All kinds of medical and occupational rehabilitation assistance have priority over payments of sickness allowance or pensions. The same applies if integration assistance helps to avoid, overcome or alleviate the need for long-term care or prevent its aggrevation, under the principle of "integration assistance before long-term care"[2]. In this sense, all possibilities of restoring a person's health and capacity for work must be exhausted before any kind of benefit can be paid.

III. HISTORICAL DEVELOPMENT

When the first legal provisions of the German social law were created at the end of the 19th century, the era of codified and comprehensive regulations of the type seen today[3] had not yet arrived. Rather, regulations were made for individual groups of people and their specific problems[4]. Nevertheless, one can say that modern social security in Germany is still based on the reforms Bismarck[5] began in 1881 with the establishment of social insurance for workers in the areas of industrial production, old-age pensions and health care[6].

2. Section 8 (3) of the Book IX of the Social Code.
3. Particularly Section 4 of Book IX and Section 10 of Book I of the Social Code.
4. BMAS (Federal Ministry for Work and Social Security), Rehabilitation and Integration of People with Disabilities, 2014, p. 169.
5. KaiserlicheBotschaft, 17 Nov. 1881, Reichstag V.1, 1.
6. M. Stolleis, Origins of the German Welfare State – Social Policy in Germany to 1945 (Springer
2013); F. Kaufmann, Thinking About Social Policy – The German Tradition (Springer 2013); A.

The first social security law was Occupational Accident Insurance Act of 1884. The competent funds soon began, on the basis of this law, to provide medical services as quickly as possible —starting in 1890 in accident hospitals— with the aim of effectively limiting the consequences of accidents at work and reducing the amount of pensions that would have been payable otherwise. With regard to pension insurance, it was already legally possible as early as 1889 for the funds to assume the costs of medical care if illness or accident threatened to cause incapacity for work and a subsequent need for a disability pension. The principle of 'rehabilitation before pension' was thus clearly already in operation. The uniform regulations on war victims' welfare (first issued in 1919) were also intended to reintegrate war victims into gainful employment wherever possible. These regulations were supplemented by provisions,also dating back to 1919, which required employers to employ severely disabled persons who were victims of war and accidents. For the integration of disabled persons not belonging to the groups mentioned above, the first special uniform regulations were introduced in 1924, whereby disabled persons were regarded as 'healable poor'. Similarly, from the very beginning, the duties of placement into employment and providing unemployment insurance which were regulated by law in 1927 included counselling and placement services for disabled persons. These were supplemented in the late 1960s by extensive duties related to vocational rehabilitation as a part of a "pro-active labour market policy".

In the decades to follow, the objective of integrating disabled persons and persons at risk of becoming disabled into working life and into society as a whole was pursued with increasing vigour before and after the era of National Socialism. Thus, the principle of as early an intervention as possible was strengthened.

In 2001, the different legal provisions concerning the integration of persons with disabilities or at risk of becoming disabled were consolidated and incorporated as Book IX into the German Social Code. The aim was to achieve more cooperation, coordination and convergence of the different bodies involved into the rehabilitation system. For the first time, the obligations of all social security authorities in the field of rehabilitation —and also of employers— were regulated in one law. This way, the rather complex rehabilitation system has been streamlined by harmonizing the legal basis of service provision[7].

Hänlein& F. Tennstedt, Geschichte des Sozialrechts in: B. von Maydell, F. Ruland & U. Becker (eds.), Sozialrechtshandbuch (SRH), 55 (4th ed., Nomos 2008).

7. OECD, Sickness, Disability and Work: Breaking the Barriers, 2010, p. 149.

IV. GOALS, PRINCIPLES AND BENEFITS OF THE REHABILITATION SYSTEM

Under Section 4 (1) of Book IX of the Social Code, integration assistance includes all social security benefits which are necessary, regardless of the cause of a person's disability:

— To avert, eliminate, or alleviate a disability, to prevent its aggravation or to reduce its effects

— To avoid, overcome or alleviate reductions in earning capacity or the need for long-term care, or prevent an aggravation and to avoid the early receipt of other social benefits or reductions in social benefits already paid

— To secure permanent participation in working life in accordance with a person's leanings and abilities

— To promote an individual's personal development in a holistic approach, enable their participation in the life of society and facilitate a life as autonomous and self-determined as possible.

The most important principles of the German rehabilitation system are:

— The priority of prevention

— The right of the beneficiaries to express wishes and to make choices

— The speedy, efficient and economic provision of integration assistance

— The cooperation between the different rehabilitation funds

Many different social security benefits and services are provided by the rehabilitation system. These can be categorized as following:

— Medical rehabilitation assistance

— Occupational integration assistance

— Assistance to cover living expenses and other supplementary assistance

— Social integration assistance

V. THE DUTY FOR COOPERATION BETWEEN THE REHABILITATION FUNDS

Due to the differentiated system of social insurance in Germany, integration assistance is not provided by only one insurance scheme, but can be provided by different schemes or funds. The system of medical,

occupational and social rehabilitation is a joint responsibility of pension insurance, health insurance, accident insurance, Federal Employment Agency and social welfare bodies.

The question as to which integration assistance is provided by which rehabilitation fund and under which conditions depends on the laws applicable to the individual rehabilitation funds[8]; this takes account of the fact that the established system consists of various branches. Thus, pension insurance assistance may only be granted to persons who are covered by that scheme and social assistance only to those who meet the requirements of that particular scheme; the relevant regulations are laid down in the respective Books of the Social Code and in other laws on the provision of assistance. In contrast, regulations on the nature and objectives of integration assistance are to be found in a single piece of legislation — in Book IX of the Social Code. This is meant to illustrate that the common objective of integrating disabled persons and persons who are at risk of becoming disabled into society to the greatest possible extent is generally pursued in the same way by all rehabilitation funds responsible in individual cases[9].

The rehabilitation funds are under obligation to cooperate. Under Section 13 of Book IX of the Social Code, ambiguous responsibilities between the various rehabilitation funds should be resolved by mutual agreement and wherever possible in the form of joint recommendations. The coordinating body is the Federal Committee for Rehabilitation, which not only consists of the various (public) rehabilitation funds, but also of trade unions, employers' organizations, organizations representing the disabled, and rehabilitation service providers. At a regional revel, public rehabilitation funds are obliged to have common service units[10] for persons and employers. They also involve disability organizations in the counselling[11].

When assistance from different rehabilitation funds is necessary, Section 10 (1) of Book IX of the Social Code provides that, in consultation with the persons, the rehabilitation funds involved are required to combine the benefits that are likely to be necessary to meet the individual's needs in such a way that a smooth process is ensured. In fact, the rehabilitation

8. Section 7, Clause 2, of Book IX of the Social Code.
9. BMAS, Rehabilitation and Integration of People with Disabilities, 2014, p. 41.
10. "GemeinsameServicestellen": R.F. Shafaei, Die gemeinsamenServicestellenfür Rehabilitation (Nomos 2008).
11. F. Welti/H. Groskreutz, The Role of Non-Public Actors in Social Security in Germany, in: F. Pennings/Th. Erhag/ S. Stendahl (Eds.), Non-public Actors in Social Security Administration (Wolters Kluwer 2013), p. 16.

funds have to ensure a continuous process in line with the respective needs (integration management).

The responsible rehabilitation fund assesses, when medical rehabilitation is initiated, whether the earning capacity of a person may be maintained, improved or restored by means of appropriate integration assistance. If it becomes evident during the provision of the medical rehabilitation assistance that it may be difficult for a person to keep his or her current job, the question of whether occupational integration assistance is necessary must be clarified without delay, both in consultations with the person concerned and with the responsible rehabilitation fund[12].

VI. PREVENTION, EARLY INTERVENTION AND THE ROLE OF EMPLOYERS

A step before rehabilitation is prevention: According to the objective enshrined in Section 3 of Book IX of the Social Code, the primary aim is to avoid as far as possible the manifestation of chronic diseases and disabilities by implementing targeted prevention in all age groups and areas of life. Key areas include health and safety at work, accident prevention, workplace integration management, environmental protection, and health protection-especially with regard to chronic, degenerative diseases.

Under Section 23 of Book V of the Social Code, members of statutory health insurance funds are entitled to medical prevention services. Also of relevance for prevention are the regulations regarding the prevention of work-related accidents and occupational diseases (Book VII of the Social Code) and numerous statutory and collectively agreed-upon provisions on health and safety at work.

New approaches to prevention at company level are laid down in Section 84 of Book IX of the Social Code. Since 2004, all employers are required to introduce integration management measures into their company policy, i.e. they must provide targeted assistance and support services for employees who fall ill for a longer time. This is called "in-company" or "workplace integration management process" (Betriebliches Eingliederungs management")[13]. Through early intervention, the objectives of prevention and rehabilitation result in employees retaining their employability rather than facing dismissal or early retirement. If employees are unfit for work for more than six weeks in a given year, either

12. BMAS, Rehabilitation and Integration of People with Disabilities, 2014, p. 51.
13. K. Nebe, Prävention und Rehabilitation – Erhaltung und Wiederherstellung der ErwerbsfähigkeitalsSchnittstellenproblem, in: DeutscherSozialrechtsverband (Ed.), Das SozialrechtfüreinlängeresLeben (Erich Schmitt 2013), p. 57 f., 63.

continuously or repeatedly,employers must assess how an employee's inability to work can best be overcome and must identify the type of assistance or support needed to prevent a recurrence so that the position can be retained. Section 84 (2) of SGB IX intentionally does not prescribe in detail how this is to be done. An appropriate solution must be found at each workplace to meet individual needs. The law merely requires (with the agreement of the individual concerned) the involvement of the responsible employee representative (works or employee council) and, if the individual is severely disabled, the severely disabled employee's representative, in order to identify ways to overcome the employee's unfitness to work and the type of assistance or aids needed in doing so.

Where participation-oriented benefits or employment support are considered in overcoming an inability to work and preventing a repeat episode of ill health, the local joint rehabilitation services office—or, in the case of severely disabled persons, the integration office—must be involved. Their know-how and support is often very helpful and constructive, particularly for smaller companies.

Employers who introduce workplace integration management measures may receive incentives from rehabilitation funds in the form of awards or grants for financing technical aids or work assistance. Besides these payments, workplace integration management can also be supported by the "gradual re-integration" ("stufenweise Wiedereingliederung"). Those who are being gradually reintegrated still have the status of being unable to work, but nevertheless start working (again), often part-time or with a reduced workload. They are supported by medical rehabilitation and are still entitled to (temporary) incapacity benefits from health insurance or pension insurance[14].

While failure to introduce integration management measures is not subject to sanctions, employers who fail to meet this requirement will find it significantly more difficult to enforce illness-related terminations of employment against the will of the employee concerned: The Federal Labour Tribunal has stated that if the employer fails to complete proper integration management, his right to dismiss the employee in the particular case can be affected[15], following the case law of the European Court of Justice on disability discrimination[16].

Workplace integration management can be described as a cooperative

14. K. Nebe, (Re–)Integration von Arbeitnehmern: StufenweiseWiedereingliederung und BetrieblichesEingliederungsmanagement – einneuesKooperationsverhältnis, DB 2008, p 1801 f.
15. Bundesarbeitsgericht, 12.7.2007, 2 AZR 716/06, BAGE 123, 134.
16. ECJ C-13/05 (ChacónNavas), ECR 2006, I-06467.

approach to mobilising internal and external knowledge. The aim is to prevent job loss by restoring the employability of employees who have fallen ill and safeguarding their employability for the long term. It has become an important tool of social responsibility in German companies, being subject to many agreements between company management and works councils. Politically it is not only meant to help long-term ill employees, but also to relieve the pressure on health care insurance and pension insurance budgets, and not least to retain a qualified workforce in the labour market which itself is necessary due to the demographic change in Germany[17].

VII. CONCLUSION

Retaining and restoring employability is a major goal in the German social security system. The main tool to achieve this is rehabilitation. "Rehabilitation before benefits" is one of the most important principles of the social security law. Although not new, this principle has gained more importance since the codification of all rehabilitation provisions in one single chapter of the Social Book in the year 2001. In particular, prevention and early intervention have been strengthened. To this end, the role of employers and their responsibilities were made clearer. With the "workplace integration management," an important step towards retaining and restoring employees' health and employability has been taken. By maintaining employability, integration management becomes a key part of mitigating the effects of demographic change.

17. F. Welti/H. Groskreutz, The Role of Non-Public Actors in Social Security in Germany, in: F. Pennings/Th. Erhag/ S. Stendahl (Eds.), Non-public Actors in Social Security Administration (Wolters Kluwer 2013), p. 27.

Chapter VI

Commitment to work, job-seeking and unemployement protection in the European Union[1]

Andrés Ramón Trillo García

Chief of Central Delegated Legal Services of the Social Security Institute (INSS)

I. THE COMMITMENT TO WORK AS AN OBLIGATION ON THE UNEMPLOYED WORKER. ORIGIN AND JUSTIFICATION

A. ORIGIN OF THE COMMITMENT TO WORK

The first precedent of the demand of a commitment to work as a requirement to obtain unemployment benefits was established in Article 219 of the General Law of the Social Security[2] (herein and following the Spanish acronym, LGSS) stating that "in order to grant the extension of the unemployment benefit, the Institution may demand that, upon submission of the application for the extension, the beneficiaries of such benefits subscribe to an agreement for undertaking actions for job reinsertion in the public employment service".

The Royal Decree 236/2000, of 18 February, regulating the 2000 Scheme for job reinsertion of long-term unemployed workers over the

1. This report has been published in the framework of the R&D project "Good Legal Practices in the Field of Labour and European Law to Reduce Labour Litigation Expenditure at Zero Cost (I+D DER 2012-32111).
2. García García, José María. "El compromiso de actividad". Revista Laboral Legislación 17/2003. Lex Nova.

age of forty-five and in need (in force until 1 January 2000, transposing EU Work and Social Security Directives) was intended to combine active and passive individualized actions pursuing job reinsertion. In this sense, a commitment to work was established as an essential requirement for the provision of economic protection to the unemployed worker, by which different actions oriented to the reinsertion of the unemployed worker, in agreement with the public employment service, will be developed as long as the unemployed worker continues to be part of the Scheme. This requirement was maintained in successive annual royal decrees regulating reinsertion Schemes.

The aforementioned commitment to work was included in the Royal Decree-Law 5/2000, which reforms the content of Articles 209.1, 212.3, 219 and 231 LGSS. Article 209.1 LGSS, when regulating the creation of the right to unemployment benefits, required that at the time of applying for the benefit, the commitment to work had been already subscribed. Furthermore, article 212.3 LGSS foresaw that in cases were the right to unemployment benefits was suspended, in order to resume the right it was required to resume the commitment to work, unless the Institution demanded the subscription of a new commitment.

Also, as aforesaid, Article 219.1.b) LGSS, when regulating the dynamic of the unemployment benefits, demanded signing a commitment to work as a condition of the extension of the right to benefits. Finally, Article 231.1.h) LGSS described the signature of commitment to work as an obligation of the employed worker receiving the benefits, in the second paragraph of that Article: "For the purposes of this Title, the commitment to work is to be understood as the commitment of the applying or beneficiary unemployed worker to actively seek employment, to accept adequate employment and to participate in specific actions related to motivation, information, orientation, formation, reconversion or professional reinsertion, in such a way that his or her opportunities to find employment are increased, as well as to comply with all remaining obligations of this Article".

After the Law 42/2002 of 12 December, the commitment to work is introduced in other Articles of the LGSS. Article 1.1. of the Law 42/2002 includes such a commitment in Article 207.c) LGSS, establishing as a requirement for obtaining unemployment benefits "to be in a lawful unemployment situation, to certify availability to be actively seeking employment, and to accept adequate employment through the signature of a commitment to work regulated in Article 231 of this Law", and in article 208.2 LGSS when determining what situations are not to be considered a lawful unemployment situation when "the worker does not certify his or her availability to actively seek employment or to accept

adequate employment, through the commitment to work". On the other hand, the derogating provision suppresses the last paragraph of Article 219.4 LGSS—that is, the requirement to sign the commitment to work to qualify for the extension of unemployment benefit.

Surely, the commitment to work has its origin in Community law[3], and in particular, after the European Council in Copenhagen of 21 and 23 June 1993, in which the need of the creation of a White Paper on a medium-term strategy to promote economic growth, competitiveness and employment in the Community is raised (Delors´ White Paper). In such a strategy, the approval of yearly guidelines for employment was laid out; these guidelines would be approved by the Council under the Commission´s proposal which would begin after the Extraordinary European Council meeting on employment, held in Luxembourg, 20-21 November 1997.

At that time, the Guidelines for 1998 and those in the following two years set the goal to improve employment reinsertion policies. To achieve this end,the need was recognized to substitute passive protective actions by active ones[4,5].

After this, Schemes on Employment Reinsertion Incomehave been marked since their outset by the requirement to sign a commitment to work in order to be part of the Scheme.

B. THE COMMITMENT TO WORK UNDER THE LAW 56/2006, OF 16 DECEMBER, ON EMPLOYMENT

Article 27.1 of the Law on Employment (herein and following the Spanish acronym, LE) establishes that applicants and recipients of unemployment benefits shall register and remain registered as a person seeking work with the public employment service, in accordance with Article 231 LGSS. This involves the registration in the service of the commitment to work, and the duty to fulfil the commitment's requirements, which will be introduced in the document for renewing the employment request.

As well, the 2nd paragraph of this Article establishes that the registration as a person seeking work shall be carried out with full willingness to

3. Mella Méndez, Lourdes. "El compromiso de actividad del desempleado". Ediciones Estudios Financieros. 2005. Pags. 18 y ss.
4. Quintero Lima, Mª Gema y Blázquez Agudo, Eva María. La protección por desempleo: ¿La ocupabilidad como contrapartida?. Revista Doctrinal Aranzadi Social nº 7/2012.
5. Council Decision of 18 February 2002 (2002/177/CE-DOCE 60/60 de1 de marzo: Council Recommendation of 18 February 2002 (2002/178/CE-DOCE L60/70 de 1 de marzo); Council Decision of 22 de julio de 2003 (2003/578/CE-DOCE L60/70 1 March).

accept an adequate placement offer and to fulfill the rest of requirements of the commitment to work. This commitment shall be considered to be signed from the date of the application for unemployment benefit.

The third paragraph of this Article states that the competent public administrations in job-matching and in management of the active employment policies, shall guarantee its application to recipients of unemployment benefits. This mandate shall be performed within the frame of the appropriate actions that may be established in the application of the Spanish Employment Activation Strategy. In this way, these actions shall be addressed to the volume of recipients proportional to the actions' impact on the total number of unemployed persons in the territory.

Thus, once they have signed the commitment to work, beneficiaries of unemployment benefit registered with the public employment service shall participate in the active employment policies established in the labour integration itinerary. The public employment service will thereby verify the compliance of the obligations derived from the unemployment benefit. The service shall report, where applicable, the sanction when imposing it, to either the State Public Employment Service (SPES) or the ISM (Social Marine Institute), as appropriate, for its enforcement.

The competent public employment service shall verify as well the fulfilment of the beneficiary´s obligation to remain registered as a person seeking work. These persons must inform the non-compliance of this obligation to the SPES or ISM, when appropriate, at the time it is arisen or known. This communication can be done electronically, and will constitute a sufficient document for initiating the appropriate infringement procedure by the SPES or the ISM, as appropriate.

C. OBLIGATIONS IN THE COMMITMENT TO WORK

Article 231.2 LGSS clarifies the concept of commitment to work,stating that "the recipient of the benefit has the legal obligation to make an active job search, to accept a suitable job, and to participate in specific actions of motivation, information, orientation, training, vocational retraining or labour integration in order to improve his/her employability and to fulfil the remaining obligations established in this Article."

The State Public Employment Service and the Regional Public Employment Services shall require recipients of the unemployment benefit to certify in the form required in the framework of mutual collaboration, the performance of those actions directed toward labour integration or the improvement of his/her employability. Non-accreditation shall be considered as the failure of the commitment to work.

In order to apply what is stated above, the competent State Public Employment Service shall take into consideration the condition of a victim of gender-based violence, for the purposes of relaxing the obligations arisen from the commitment.

In this sense, the commitment to work is configured as a requirement for obtaining the unemployment benefit, both at the contributory and care levels. Thus, when signing the commitment, certain contractual protection is provided, and consequently the recognition of the right depends on whether the worker accepts future actions directed toward labour integration. This commitment is never assumed, as it must be evidenced in writing.

Where the legal nature of the institution is concerned, this commitment is apparently contractual but certainly, as Mella points out[6], is configured as a requisite for obtaining and maintaining benefits, even when the willingness and subjective conditions of the beneficiary are, to some extent, relevant. On the other hand, Mercader believes in the strictly administrative nature of the commitment, as he states that it is configured as a sort of "collateral modal clause, legally established, and which involves a declarative administrative resolution of rights, being in this case the one that recognises the unemployment benefit[7]".

The commitment is required just once, at the time of formally applying for the unemployment benefit. It therefore is configured as a necessary requirement for the entitlement and retention of the right to this benefit[8]. The obligations incurred by this commitment can be omitted without sanction only when circumstances beyond the worker's willingness have unexpectedly arisen[9, 10, 11].

In this sense, in case of suspension of the right to benefit, the

6. Mella Méndez, Lourdes. "El compromiso de actividad del desempleado". Ediciones Estudios Financieros. 2005. Pags. 66.
7. Mercarder Uguina, J.R. "Reformas y contrarreformas en el sistema de protección por desempleo. La Ley 45/2002 como telón de fondo". Tirant lo Blanch. 2002. Pag. 66.
8. Ruling of the Tribunal Superior de Justicia (TSJ) of Asturias of 9 January 2009 (appeal 2000/2008). The right to unemployment benefit is dismissed on grounds of not signing the commitment to work.
9. Ruling of the Tribunal Superior de Justicia (TSJ) of the Comunidad Valenciana of 25 October 2005 (appeal 2440/2005). Non-fulfilment of the obligation to go to work as an extra worker because of gastroenteritis.
10. Ruling of the TSJ of Madrid of 24 June 2014 (appeal 223/2014). The defective notification is not a due cause when the recipient participates in the ineffectiveness of the notification.
11. Ruling of the TSJ of Madrid of 5 May 2005 (appeal 1806/2005). The commitment to work is consistent with the perception of a non-contributory invalidity pension.

commitment will be re-activated when the worker applies for the renewal of the protection, unless the Institution requires a new commitment because of specific reasons[12].

The content of the commitment is generic and refers to the obligation of making an active job search, accepting a suitable job, and participating in specific actions of motivation, information, orientation, training, vocational retraining or labour integration in order to improve the applicant's employability. It also includes the obligation of joining social collaboration, employment and promotion programmes; regardless of whether they are provided by the public employment service or by duly-authorised employment agencies.

However, those activities included as obligations in the content of the commitment emerge from two previous activities that must be performed by the public employment service. First, it shall provide the unemployed worker with individualised advice by appointing a guardian. This guardian after assessing and evaluating the worker's capabilities, shall individually advise him/her on the possibilities of labour integration. Second, it shall provide a labour integration itinerary to the beneficiary which must be adapted to the characteristics and to his/her personal and professional requirements with the objective of planning the worker's professional integration.

The strict requirement of the commitment to work is relaxed when the recipient of the unemployment benefit is victim of gender-based violence. In this case, the obligations of the commitment to work must be adapted to protection, security and comprehensive social care requirements.

The non-fulfilment of the commitment to work enables the Social Court to exercise the sanctioning power, although the relevance of the non-fulfilment is linked to the seriousness of the different obligations included in the commitment to work. In this sense, Article 17.3 of the Law on Labour Infringements and Sanctions (herein and following the Spanish acronym, LISOS) states that, in terms of employment, the following constitute minor infringements:

a) When the worker does not appear before the public employment service at its request, or before the employment agency when they perform activities in the scope of collaboration with these institutions and when this duty is established in the collaboration agreement. Also when the worker does not renew the employment request in the form and within the period required in the document

12. Ruling of TSJ of Madrid of 22 April 2010 (appeal 107/2010).

for renewing the employment request, except in cases which are duly justified.

b) When the worker does not submit to the public employment service or the employment agency (when performing activities in the scope of collaboration with them and when it is required in the collaboration agreement)a corresponding certificate of having gone to them in the place and date specified in order to fill vacancies facilitated by them, except in cases which are duly justified.

c) When the worker does not meet the requirements stated in the Personal Employment Agreement, except in cases which are duly justified; and always that the conduct is not considered as another minor infringement.

In this respect, Article 47.1.a) LISOS establishes that when applicants and recipients of the unemployment benefit commit infringements, they shall be sanctioned:

1st infringement. Loss of the benefit for one month.

2nd infringement. Loss of the benefit for three months.

3rd infringement. Loss of the benefit for six months.

4th infringement. Termination of the benefit.

Rather, according to Article 17.2 LISOS, the non-fulfilment of the commitment to work will be considered as a serious infringement by the worker when the obligation has not been fulfilled by rejecting a suitable employment, regardless of whether it is offered by the public employment service or employment agencies when they perform activities in the scope of collaboration with them. Also, the obligation will be considered not fulfilled when the worker refuses to participate in employment programmes offered by the public employment service, including professional integration, promotion, training and vocational retraining actions, except in cases which are duly justified.

When these serious infringements are concerned, the sanction that shall be applied, according to Article 47.1.b) LISOS, is the termination of the benefit.

II. THE SUSPENSION AND TERMINATION OF THE BENEFIT CAUSED BY THE DEPARTURE ABROAD OF THE BENEFICIARY

Article 212.2.f) and g) LGSS states that departure abroad may be

grounds for the suspension and termination of benefits in the following circumstances:

—In the case of change of residence abroad when the beneficiary declares that it is for the purpose of seeking or performing of work, for vocational training or international cooperation, for a continuous period less than 12 months. This departure always must be reported to and authorised by the Institution, without prejudice to the application of what is laid down in EU rules on the exportation of benefits.

—In the case of staying abroad for a period of no more than 90 days, whether it is continuous or not, during each calendar year; always that the departure abroad is reported to and authorised by the Institution.

However, the stay or change of residence shall not be considered when the departure abroad is for a period of no more than 15 calendar days and only done once a year; without prejudice to the fulfilment of the obligations of workers established in Article 231.1 LGSS.

Article 213.1.f) states that the unemployment benefit can be terminated when the worker changes his/her residence or stays abroad; except in those cases of suspension described in Article 212.1. f) and g).

With regard to the suspension of the right, Article 6.3 of the Royal Decree 625/1985, of 2 of April, establishes that the right to unemployment benefit shall be suspended in the case of change of residence abroad when the beneficiary declares that his/her aim is seeking or performing work, vocational training, or international cooperation. These activities must be performed within a continuous period of no more than 12 months[13]; without prejudice of the application of EU Conventions or Rules on the exportation of benefits. Otherwise, the non-fulfilment of any of the previous requirements when changing residence abroad terminates the right.

This Article states as well that the change of residence shall not be considered when the departure abroad is for a period of no more than 15 calendar days and when it is performed only once per year; without prejudice of the fulfilment of the obligations that are established in Article 231.1. LGSS.

The regulation of the suspension or termination of the unemployment benefit is based on the impossibility of fulfilling the requirements of the commitment to work, and particularly of the obligations concerning the participation in training, promotion and labour integration activities. As

13. Ruling of TSJ País Vasco of 24 February 1998 (appeal 3189/1997). In this period holidays are included.

we pointed out, these obligations arise from Article 231 LGSS and Article 27.2 LE[14].

The Supreme Court's ruling of 18 October 2012 (appeal 4325/2011) distinguishes the following situations related to the effects of the suspension or termination of the benefit on grounds of the departure abroad:

a) A "maintained" benefit, in the cases of departure abroad for a period of no more than 15 calendar days per year, only performed once, and always that the travel is reported in a timely manner to the Spanish Administration.

b) A "terminated" benefit, except in the case of extension of travel abroad that entails a change of residence. That is, for a period of more than 90 days that under the Spanish Foreigners Law, the stay turns into a temporary residence. In this sense, the termination of the benefit shall be also applied when the travel abroad for a period of no more than 90 days is performed in two different periods with an interval of 10 days; without reporting to the Public Employment Service[15].

c) A "suspended" benefit, in the particular case addressed by Article 6.3 of the Royal Decree 625/1985, of the "seeking or performance of work" or "vocational training" abroad for a period of no more than "twelve months" as literally established by the Royal Decree 200/2006.

d) A "suspended" benefit, in all remaining cases of travel abroad for a period less than 90 days, with the consequent absence of the benefit's recipient from the Spanish labour market[16].

As García de Paredes points out[17], the third referred case is considered by the Sala de lo Social (Labour Chamber) of the Supreme Court as a separate situation from the literal wording of the rule, which raises some problems as well. On one hand, the suspensory effect of the benefit is not precisely determined. On the other, an unequal and unjustified treatment would result if this effect is not applicable to self-employed workers and

14. CervillaGarzón, María José. "El traslado al extranjero como circunstancia suspensiva del derecho a la prestación por desempleo. RelacionesLaborales 1/2014.
15. Ruling of the Supreme Court of 3 July 2014 (appeal 1518/2013).
16. Ruling of the TSJ of Andalusia/Granada of 11 December 2013 (appeal 1997/2013); ruling of the TSJ of La Rioja of 31 July 2013 (appeal 140/2013).
17. García de Paredes; María Luz. Glosa Judicial. Desempleo del trabajador no comunitario. Salida al extranjero del beneficiario: circunstancias y efectos. (Comentario a la STS de 18 de octubre de 2012). Actualidad Laboral nº 4/2013.

recipients of the Renta Social de Inserción (Social benefit for —labour— Integration). This would be even more damaging for those workers who stay within Spanish territory and are subject to the rules in the benefit system, not having the time of suspension of the benefit, whether they are reduced or not.

The reimbursement of the unemployment benefit unduly received will depend on whether or not the worker received the benefit during its suspension or termination[18]. However, returning to the Spanish territory will determine if the suspended right would be again recognised, even when the foreign worker returns after he/she complied with the expulsion order[19].

III. THE WORKER RECEIVING THE UNEMPLOYMENT BENEFIT WHO TRAVELS TO ANOTHER EU STATE, AND THE COMMITMENT TO WORK

As we stressed earlier, Article 212 LGSS and Article 6.3 of the Royal Decree 625/1985 establish which suspension regime shall be applied, according to International Conventions and EU Law.

The regulation of the possible exportation of the unemployment benefit is established in Article 64 of the EC Regulation 883/2004, where this exportation is allowed,within a period of no more than three months.

This Article states that the recipient of the contributory or care benefit who satisfies the conditions of the legislation of the competent Member State for entitlement to benefits, and who goes to another Member State in order to seek work there, shall retain his entitlement to unemployment benefits in cash under the following conditions and within the following limits:

a) before his departure, the unemployed person must have been registered as a person seeking work and have remained available to the employment services of the competent Member State for at least four weeks after becoming unemployed (in the case of Spain, the SEPES, Servicio Público de Empleo Estatal —Public Service of State Employment). However, the competent services or institutions may authorise his departure before such time has expired;

b) the unemployed person must register as a person seeking work with the employment services of the Member State to which he has gone, be subject to the control procedure organised there and

18. Ruling of TSJ of Aragon of 2 July 2014 (appeal 31072014).
19. Ruling of the TSJ of Madrid of 7 October 1999 (appeal 3633/1999).

adhere to the conditions laid down under the legislation of that Member State. This condition shall be considered satisfied for the period before registration if the person concerned registers within seven days of the date on which he ceased to be available to the employment services of the Member State which he left. In exceptional cases, the competent services or institutions may extend this period;

c) entitlement to benefits shall be retained for a period of three months from the date when the unemployed person ceased to be available to the employment services of the Member State which he left, provided that the total duration for which the benefits are provided does not exceed the total duration of the period of his entitlement to benefits under the legislation of that Member State; the competent services or institutions may extend the period of three months up to a maximum of six months;

d) the benefits shall be provided by the competent institution in accordance with the applicable legislation and at its own expense.

On the other hand, if the person concerned returns to Spain on or before the expiry of the period of three months during which he is entitled to benefits, he shall continue to be entitled to benefits under the Spanish legislation. He shall lose all entitlement to benefits under the Spanish legislation if he does not return there before or just at the expiry of the period. However, as we pointed out, cases mentioned in article 212.1.f) and g) LGSS will have a suspensory effect.

In exceptional cases the SEPES may allow the person concerned to return at a later date without loss of his entitlement.

Article 64 of the EC Regulation 883/2004 also states that, unless the legislation of the competent Member State is more favourable, between two periods of employment the maximum total period for which entitlement to benefits shall be retained shall be three months; the competent services or institutions may extend that period up to a maximum of six months.

Finally, the EC Regulation 883/2004 establishes that the arrangements for exchanges of information, cooperation and mutual assistance between the institutions and services of the competent Member State and the Member State to which the person goes in order to seek work shall be laid down in the Implementing Regulation.

In this sense, Article 55 of the EC Regulation 987/2009 states that in order to be covered by Article 64 of the EC Regulation 883/2004, the unemployed person going to another Member State shall inform the SEPES prior to his/her departure and request a document certifying that

he/she retains his/her entitlement to benefits under the conditions laid down in Article 64.1.a) of the EC Regulation 883/2004.

The SEPES shall inform the person concerned of his obligations and shall provide the above mentioned document that shall include the following information:

a) the date on which the unemployed person ceased to be available to the employment services of the competent State;

b) the period granted in order to register as a person seeking work in the Member State were the unemployed person has gone;

c) the maximum period during which the entitlement to benefits may be retained;

d) circumstances likely to affect the entitlement to benefits.

The unemployed person shall register as a person seeking work with the employment services of the Member State to which he goes, and shall provide the document referred to in paragraph 1 to the institution of that Member State. If he has informed the SEPES but fails to provide this document, the institution in the Member State to which the unemployed person has gone shall contact the SEPES in order to obtain the necessary information.

The employment services in the Member State to which the unemployed person has gone to seek employment shall inform the unemployed person of his obligations.

The SEPES shall immediately send a document to the competent institution containing the date on which the unemployed person registered with the employment services, and his new address.

From this moment, the institution in the Member State to which the recipient of the unemployment benefit has gone shall carry out or arrange for checks to be carried out if any circumstance affects to the right to benefits, and it shall send immediately to the competent institution and to the person concerned a document containing the relevant information. At the request of the SEPES, the institution in the Member State to which the unemployed person has gone shall provide relevant information on a monthly basis concerning the situation, in particular whether the latter is still registered with the employment services and is complying with organised checking procedures. In this respect, the institution in the Member State to which the unemployed person has gone shall carry out or arrange for checks to be carried out, as if the person concerned were an unemployed person obtaining benefits under its own legislation. Where necessary, it shall immediately inform the SEPES of any change

of circumstances which might affect the right to benefits. The competent authorities or competent institutions of two or more Member States may agree among themselves on the specific procedures and time-limits concerning the follow-up of the unemployed person's situation, as well as other measures to facilitate the job-seeking activities of unemployed persons who go to one of those Member States.

As we can see, the principle of equal treatment determines that the worker who goes to another State is going to be subject to the same control and follow-up measures established for unemployed persons in the State where the worker goes. This is applied even when the State of origin (in this case the SEPES) pays the benefit at its own expense. These same reasons are why nationals of other EU States who are recipients of unemployment benefits and who go to Spain to seek work must compulsorily sign the commitment to work. Also because of these reasons, if the beneficiary does not fulfill these obligations, the SEPES shall immediately inform the employment service of the State of origin of any change of circumstances and any sanction determined by the latter, where applicable. However, if the person goes, for example, to United Kingdom or France, the worker shall sign a document similar to the commitment to work; this document being necessary for providing the unemployment benefit[20]. In other States this condition is not required for providing the benefit. In the present day the number of unemployed workers travelling to other EU States has significantly increased. For this reason, it appears logical that under Article 55.6 of the EC Regulation 987/2009, the SEPES and the EU States' public employment services may agree among themselves upon specific procedures and time-limits concerning the follow-up of the unemployed person's situation, as well as other measures to facilitate the job-seeking activities of unemployed persons who go to one of those Member States. These measures could include, on one hand, the provision of the labour integration itineraries that were drafted in Spain, and on the other, the communication between the involved institutions through the appropriate channels about all actions performed, evaluating as well to what extent the beneficiary of the benefit has fulfilled them.

In this sense, despite the brief period allowed for exporting the benefit and particularly because of this reason, the involved institutions shall share information on the displaced worker's labour integration and the evolution of the integration itinerary. It is also recommended to continue the activities included in this itinerary in the host State.

20. Mella Méndez, Lourdes. "El compromiso de actividad del desempleado". Ediciones Estudios Financieros. 2005. P. 57.

IV. PROTECTION OF FRONTIER WORKERS AND OF THOSE RESIDING IN OTHER STATES THAN THE COMPETENT ONE CAUSING UNEMPLOYMENT AND COMMITMENT TO WORK

Article 65 of the EC Regulation 883/2004, which is regulated under the title of "Unemployed persons who resided in a Member State other than the competent State", talks about the co-ordination between States in order to provide the unemployment benefit to frontier workers and distinguishes between partial and wholly unemployed persons[21].

First, Article 65.1 establishes that a person who is partially or intermittently unemployed and who, during his last activity as an employed or self-employed person, resides in a Member State other than the competent Member State, shall make himself available to his employer or to the employment services in the competent Member State. He shall receive benefits in accordance to the legislation of the competent Member State as if he were residing in that Member State. These benefits shall be provided by the institution of the competent Member State. Thus, for example, the Portuguese frontier worker whose working day has been reduced or suspended will have the right to receive the unemployment benefit from the SEPES in accordance with the Spanish legislation, and have the same obligations than Spanish workers.

Secondly, a wholly unemployed person who, during his last activity as an employed or self-employed person, resided in a Member State other than the competent Member State and who continues to reside in that Member State or returns to that Member State shall make himself available to the employment services in the Member State of residence. Without prejudice to the obligation of registering with the employment services within the period of 7 days as states in Article 64 of the EC Regulation 883/2004, a wholly unemployed person may, as a supplementary step, make himself available to the employment services of the Member State in which he pursued his last activity as an employed or self-employed person. As we say, he shall register as a person seeking work with the competent employment services of the Member State in which he resides, shall be subject to the control procedure organised there, and shall adhere to the conditions laid down under the legislation of that Member State. Nevertheless, if he chooses also to register as a person seeking work in the Member State in which he pursued his last activity as an employed or self-employed person, he shall comply with the obligations applicable

21. Ayuso Mozas, Raúl. "La prestación por desempleo en la normativa y en la jurisprudencia comunitarias". Revista del Ministerio de Trabajo y Asuntos Sociales" nº 72.

in that State, even when the retention of the entitlement to benefits is not affected.

Rather, an unemployed person, other than a frontier worker, who does not return to his Member State of residence, shall make himself available to the employment services in the Member State to whose legislation he was last subject. This person shall register as a person seeking work with the competent employment services of this Member State, shall be subject to the control procedure organised there, and shall adhere to the conditions laid down under the legislation of that Member State.

A wholly unemployed person who, during his last activity as an employed or self-employed person, resided in a Member State other than the competent Member State and who continues to reside in that Member State or returns to that Member State shall receive benefits in accordance with the legislation of the Member State of residence as if he had been subject to that legislation during his last activity as an employed or self-employed person. This shall be applied even where, as a supplementary step, this person makes himself available to the employment services of the Member State in which he pursued his last activity. Those benefits shall be provided by the institution of his place of residence.

However, a worker other than a frontier worker who has been provided benefits at the expense of the competent institution of the Member State to whose legislation he was last subject shall firstly receive, on his return to the Member State of residence, benefits in accordance with Article 64, receipt of the benefits in accordance with (a) being suspended for the period during which he receives benefits under the legislation to which he was last subject.

The benefits provided by the institution of the place of residence shall continue to be at its own expense. The competent institution of the Member State to whose legislation he was last subject shall reimburse to the institution of the place of residence the full amount of the benefits provided by the latter institution during the first three months. The amount of the reimbursement during this period may not be higher than the amount payable, in the case of unemployment, under the legislation of the competent Member State. However, benefits received by the frontier worker in the terms established for displaced workers seeking a job shall be deducted from those that have been reimbursed. The reimbursement period of three months shall be extended to five months when the person concerned has, during the preceding 24 months, completed periods of employment or self-employment of at least 12 months in the Member State to whose legislation he was last subject, where such periods would qualify him for the purposes of establishing entitlement to unemployment benefits. For the purposes of benefits co-ordination, two or more Member

States, or their competent authorities, may provide for other methods of reimbursement or waive all reimbursement between the institutions falling under their jurisdiction.

Article 56 of the EC Regulation 987/2009 establishes that, where the unemployed person decides to make himself/herself also available to the employment services in the Member State not providing the benefits, by registering there as a person seeking work, he/she shall inform the institution and the employment services of the Member State providing the benefits. Therefore, at the request of the employment services of the Member State not providing the benefits, the employment services in the Member State that is providing the benefits shall send the relevant information concerning the unemployed person's registration and his/her search for employment.

Thus, where the legislation applicable in the Member States concerned requires the fulfilment of certain obligations and/or job-seeking activities by the unemployed person, the obligations and/or job-seeking activities by the unemployed person in the Member State providing the benefits shall have priority. This means that the non-fulfilment by the unemployed person of all the obligations and/or job-seeking activities in the Member State which does not provide the benefits shall not affect the benefits awarded in the other Member State.

If the unemployed person resides in a State other that the one in which he pursued his last activity, the institution of the place of residence shall request reimbursement of unemployment benefits pursuant to Article 65 of the EC Regulation 883/2004 from the institution of the Member State to whose legislation the beneficiary was last subject[22].

The request shall be made within six months of the end of the calendar half-year during which the last payment of unemployment benefit, for which reimbursement is requested, was made. The request shall indicate the amount of benefit paid during the three or five month-period referred to in Article 65(6) and (7) of the EC Regulation 883/2004, the period for which the benefits were paid and the identification data of the unemployed person.

The claims shall be introduced and paid via the liaison institutions of the Member States concerned. However, there is no requirement to consider requests introduced after the time-limit of six months. These requests shall be under the Common provisions concerning the reimbursement

22. García Viña, Jordi. "La coordinación de prestaciones de desempleo en el Reglamento 883/2004. La Coordinación de los Sistemas de Seguridad Social. VVAA, Dirigido por Sánchez-Rodas Navarro, Cristina. Laborum 2010. Pag. 285.

between institutions when health-care is concerned. Thus, from the end of the 18-month period for performing the payment, interest may be charged by the creditor institution on outstanding claims.

Finally, the maximum amount of reimbursement is in each individual case the amount of the benefit to which a person concerned would be entitled according to the legislation of the Member State to which he was last subject, if registered with the employment services of that Member State. However, in relations between the Member States listed in Annex 5 to the implementing Regulation, the competent institutions of one of those Member States to whose legislation the person concerned was last subject shall determine the maximum amount in each individual case on the basis of the average amount of unemployment benefits provided under the legislation of that Member State in the preceding calendar year.

As far as the commitment to work is concerned, the application of the principle of equal treatment leads us to the same conclusion as mentioned in relation to beneficiaries of unemployment benefits who export their benefit in order to seek work in another EU State. In general terms, the worker shall be subject to the obligations established by the legislation of the employment services in the State of residence. In the case of Spain, he will be required to sign the commitment to work. In France and United Kingdom similar obligations will be demanded. As stressed above, appropriate reporting protocols should be put in place so the employment services of the State of residence can closely follow up the unemployed person's labour integration itinerary, as well as his chances of employability.

Chapter VII

Good practices regarding the concept of the frontier worker and his unemployment protection under EU coordinating regulations[1]

Prof. Dr. Dolores Carrascosa Bermejo

Universidad Pontificia Comillas (ICADE). Madrid

I. INTRODUCTION

The lack of harmonization in Social Security rules among EU Member States have a highly negative impact on frontier workers. Those rules are intrinsically territorially based; national lawmakers use "territorial elements for defining its scope of application, the requirements that define its beneficiaries, and the payment conditions of those benefits that are recognised[2]. In effect, Social Security rules are based on the wrong idea that beneficiaries were born, reside and work within the national territory. These elements are precisely the basis for the entitlement to benefits or the obligation of insurance. These premises do not reflect migrant workers' reality. Further, they do not even correspond to the situation of frontier workers, who obtain their professional income from one country and maintain their residence in a different one, to which they return regularly.

In this paper we propose some good practices related to frontier workers regarding their own identification and focusing on their unemployment

1. This report has been published in the framework of the R & D project "Good Legal Practices in the Field of Labour and European Law to Reduce Labour Litigation Expenditure at Zero Cost" (I+D DER 2012-32111).

2. Cornelissen, Rob. "The principle of territoriality and the Community Regulations on Social Security (Regulations 1408/71 and 574/72)" Common Market Law Review 1996, p. 441.

protection within the framework of EU Regulations on coordination of National Social Security systems in force since 1-5-2010 (CE/883/2004 and CE 987/2009 Regulations). According to previous studies regarding coordinating Regulations[3] or free movement of workers[4] and taking into account ECJ recent rulings, we note that unemployment is still the most controversial and complex benefit; this is the reason why we focus our interest on this topic.

In general terms, also regarding frontier workers, coordinating Regulations prioritise the application of the Social Security Law of the country of employment (*lex loci laboris*), ban, any discrimination on grounds of nationality, permit the aggregation of insurance periods and allow exportation of cash benefits[5]. Thus, frontier workers' insurance and contribution payments must be made in the State where they are employed, in application of coordinating Regulations. In this way, the affected national administration cannot invoke non-performance of the residence requirement by the frontier worker as a ground for barring his entrance or registration in its Social Security System. This mandatory rule also affects employers that have to fulfil the obligation of contributing, regardless of whether the worker resides in a different Member State[6]. Consequently,

3. Considering all kind of benefits can be consulted these previous studies . Desdentado Bonete, A. "Trabajadores desplazados y trabajadores fronterizos en la Seguridad Social europea: del Reglamento 1408/1971 al Reglamento 883/2004" Revista del Ministerio de Trabajo Asuntos Sociales nº 64 p. 33 a 37. Carrascosa Bermejo, Dolores. "Los trabajadores fronterizos presente y futuro en la norma de coordinación comunitaria (Rgto 1408/71/CEE y Rgto 883/2004/CE)" / en/ VV.AA (Dir Correa Carrasco, M.) Protección social en las relaciones laborales extraterritoriales. Madrid. Universidad Carlos III y BOE (Col Monografías nº 57). 2008. 412-461. Also available at the Spanish Ministry of Labour website (DG for Social Security Organisation; pages 147-192 http://www.seg-social.es/stpri00/groups/public/ documents/ binario/097537.pdf. Miranda Boto, J.Mª. /en/ VVAA Sánchez-Rodas Navarro, C. (Director) La Coordinación de los Sistemas de Seguridad Social. Murcia. Laborum. 2010.
4. The 2015 report on EU Commission's FreSsco network regarding free movement of frontier workers, on one hand, identifies the major and classic barriers to free movement of this target group. On the other, it discusses problems of their attention and registration at the employment service of the country where they work but do not reside. Finally it is highlighted that the lack of access to tax advantages and the existing problems related to access to social security; which are not co-ordinated areas and they operate with non-common criteria See Jorens, Y., Mindehoud, P. y De Coninck, J. Comparative Report: frontier workers in the EU. FreSsco European Commission. January 2015. 123 p.
5. An approach to coordinating Regulations in Carrascosa Bermejo, D. "Seguridad Social de los trabajadores migrantes (I): Rasgos y principios generales" /en/ VV.AA (Dir. Nogueira Guastavino, M.; FotinopoulouBasurko, O. y Miranda Boto, J.Mª.) Lecciones de Derecho Social de la UE. Valencia. Tirant lo Blanch. 2011.
6. See the ECJ ruling 24-6-75, Case Football Club d'Andlau 8/75.

they should be treated on the same basis as national employers from the State of employment. Prioritising the "*lex loci laboris*" rule, a uniform treatment by this State of frontier workers in comparison with their co-workers is more easily achieved. Any distortion in the labour market is also avoided by this rule, as well as double ontributions, because of its exclusive character. Even when a national legislation wrongly considers a kind of Social Security contribution a tax burden alien to its Social Security system. Besides, as the Court of Justice has recognised, migrant and frontier workers, once they have gained access to the labour market of a particular State, have created, in principle, a fundamental "link of integration" with that State. This has allowed them to benefit from the principle of equal treatment in relation to national and resident workers, respectively. This link of integration could specifically derive from the following facts: with the social contributions payed in the employment Member State by frontier workers by means of the professional activity that they carry out there, and considering that they also contribute with their taxes to the funding of social policies of that State[7].

As we will see, the Regulations include an ad-hoc conflict rule for the protection of frontier workers who have become wholly unemployed. This specific rule exclusively identifies the State of residence Law as the one that must be applied for the recognition and in such a case the calculation of this benefit.

On the other hand, the exportation of the unemployment benefits workers it is not going to be examined in detail in this paper as far as there is not a specific treatment by coordinating Regulations for frontier workers[8]. Indeed, the frontier worker, in the same way as a regular migrant worker is subject to strict requirements established by those Regulations in order to have the right to the temporarily limited exportation of unemployment benefits[9]. This regime seems to prioritise the administrative control and

7. See ECJ ruling 13-12-12 Case Caves Krier C-379/11 paragraph 53, and particularly ECJ ruling 14-6-12, Case Commission vs the Netherlands, C542/09, paragraphs 63, 65 and 66 and the case-law mentioned in it.

8. See ECJ ruling of 6-11-03, about the Commission vs. the Netherlands case C-311/01. This ruling confirmed the non-fulfillment of this State when it prevented Mr. Lorenz from exporting its benefit to France with the aim of seeking employment. Mr. Lorenz was a frontier worker residing in the Netherlands and working in Germany. This impediment, which has a noticeably negative effect on the frontier worker, is not justified in the protective purpose demonstrated by the coordinating Regulations (as this target group is not excluded). Therefore, Mr. Lorenz would have the right, on the one hand, to go to France for three months to seek employment, and on the other, to receive the unemployment benefit paid by the State of residence, being in this case the Netherlands.

9. See Regulation CE/883/2004 Article 64.

the promotion of job search over the mobility of unemployed persons entitled to unemployment benefits.

Finally, we can conclude this introduction by remembering that coordinated Social Security unemployment benefits are just one type of social advantage linked to employment. Considering free movement of workers rules, that obviously also apply to frontier workers, that can not be discriminated against on grounds of nationality[10]. There are many other social advantages (such as social care, scholarships for the children of employees, etc.) that as far as are excluded from the objective scope of application of the coordinating Regulations, are not analysed in this paper. Regarding those other social advantage issues, it could be emphasized that a frontier worker's link of integration with the State of employment is controversial. Specially when the accreditation of the so-called "sufficient link of integration " with this State has to be guaranteed considering where these workers pay taxes, as these social advantages are finaced by means of them[11]. This requirement can be problematic for these frontier workers that, thanks to bilateral double taxation agreements, do not always pay taxes in the State where they work. In general, it should be strongly recommended to reactivate the protection of social advantages by means of the new protective measures which Member States will have to implement by incorporating the Directive 1014/54/EU[12].

A. THE CONCEPT OF FRONTIER WORKER

According to the coordinating Regulations, the "frontier worker means any person pursuing an activity as an employed or self-employed person

10. Frontier migrant workers is a target group protected by regulations of free movement of persons. See paragraphs 26 and 27 of the Court of Justice ruling 13-12-12; Case Caves Krier C-379/11. Social assistance benefits, which are always excluded from the objective scope of coordinating Regulations, are part of the social advantages that are considered a broader or higher category (TFEU Article 45; Regulation EU/492/2011 Article 7.2; paragraph 28 of the ECJ ruling 12-5-98; Case Martínez Sala C-85/96). Frontier workers' protection is based on the principle of non-discrimination on grounds of nationality. Thus, this cause can be only be claimed by the nationals of Member States; not necessarily because they are workers, but because of European citizenship (ECJ ruling 20-9-01, Case Grzelczyk). See ECJ ruling 8-6-99, Case Meeusen C-337/97; concerning the protection of frontier workers ensured by the EU Law on free movement of persons. See Case Meints C-57/96, and Case Fahmi C-33/99; concerning retired frontier workers.
11. See ECJ ruling 20-6-13, Case Giersch (C-20/12); concerning to scholarships. Linked to ECJ ruling 18-7-07, Case Geven C-213/05..
12. This Directive on the promotion measures for exercising workers rights in the field of the free movement of workers is applied as well to frontier workers (see the first point of its Preamble). The implementation of this Directive into national law is planned before 21-5-2016..

in a Member State and who resides in another Member State to which he returns as a rule daily or at least once a week"[13]. The peculiarity that defines the frontier worker is thus, on the one hand, that he does not reside in the State where he works and is insured for Social Security purposes[14]; and, on the other, that he must return to the State of residence with the minimum periodicity legally established. The transnational element required for the application of the coordinating Regulations appears during territorial separation from the State of residence/employment[15]. Surprisingly, however, there are not reliable statistics on frontier workers. The Commission considers that there are around 1.600.000 frontier workers in the EU[16], being those workers located in the north western Europe[17].

If we consider the application of coordinating Regulations to the frontier workers, two aspects shall be recalled:

On one hand, the mobility within the frame of the European Economic Area (EEA) or in Switzerland[18], does not have to correspond to migratory

13. See Article 1.f) of the Regulation EC/883/2004 in the same meaning as the rest of the previous coordinating Regulations.
14. The insurance of the citizen as a worker is not relevant if it is: a) Total or partial (ECJ ruling 12-5-98, Case Martínez Sala C-85/96). b) Voluntary or compulsory. In this latter case, meeting the material and legal requirements is enough for the worker to be considered insured, even if formal conditions are not fulfilled (ECJ ruling 15-12-76, Case Mouthaan 39/76). c) Current or previous. This means before demanding the application of the Regulation protecting inactive citizens or pensioners (ECJ ruling 9-7-87, Case Laborero and Sabato 82/86 and 103/86); and those whose contract has terminated because of maternity leave, but they keep insured under some branch of Social Security (ECJ ruling 7-6-05, Case Dodl and Oberhollenzer C-543/03, paragraphs 26ff).
15. See how the implementation of the coordinating rule is blocked to purely national situations where a single Member State is involved (ECJ ruling 6-12-77, Case Maris 55/77; ECJ ruling 22-9-92, Case Petit 153/91; ECJ ruling 11-10-0, Case Khalil and others C-95/99).
16. This amount was mentioned by the Commission in FreSsco seminar in Lisbon that took place in October 2015. Approximately a year before, the Commission considered there were around 1.1 million of frontier workers considering the accession of new States to the EU. EU Commission "Labour Mobility within the EU" Memo. Brussels, 25 September 2014.
17. Furthermore, the increase of the number of accessions of new States between Estonia and Finland, Hungary and Austria, and Italy and Eslovenia has been highlighted. See G. Nerb (et alii) "Scientific Report on the Mobility of frontier Workers within the EU-27/ EEA/EFTA Countries" MKW Wirtschaftsforschung GmbH and EmpiricaKft. January. 2009. http://borderpeople.info/wp-content/uploads/2014/10/eu-commission-frontier-workers-in-europe-2009.pdf..
18. Specifically the 3 AELC Member States (Norway, Island and Liechtenstein) plus Switzerland, in the frame of the 28 EU Member States, shaping all together the EEA (European Economic Area).

or professional motives[19]. Firstly, the "non-professional" displacements allow the application of the coordinating Regulations to frontier workers who need healthcare while on holiday in another Member State. Secondly, it also allows them to export to a different Member State a pension which has been exclusively acquired under a National Law.

On the other hand, it has to be remembered that Regulations are applied to third national workers in a regular residence administrative situation who have a transnational status, despite not having the right to freedom of movement[20]. Since June 2003, nationals of third States can obtain —thanks to coordinating Regulations— the protection of their original Social Security rights (unemployment benefit, retirement pension...); and not only of those that derive from the condition of being a family member or survivor of an EU national worker (survivor's pension, orphan's pension...)[21]. The importance of this legislative change is evidenced in the ECJ 25-10-01 ruling, Ruhr (C-189/00) case[22]: if the current EU regulations had been applied, the operative part of the judgment would have been significantly different. In fact, Ms. Ruhr —as a frontier worker— would have obtained, under the Regulations, a German unemployment benefit (place of residence), aggregating Luxembourg's periods of employment. However it should be noted that third national frontier workers, just as those nationals of a State that have recently acceded to the EU and whose rights of free movement

19. Being this assumed in ECJ earlier judgments. See ECJ ruling 19-3-64, Case Unger 75/63.

20. Regulation EU/1231/2010 that replaced the Regulation EC/859/2003. The first Regulation is not applied in Denmark and the United Kingdom (in this Member State is still admitted the application of the 2003 Regulation to non-EU nationals).

21. Being this admitted in ECJ rulings before June 2003: ECJ ruling 23-11-1976, Case Kermaschek (40/76), moderated by the ECJ ruling 30-4-96 Case Cabanis-Issarte (C-308/93), which recognised to non-EU nationals' relatives the right to family benefits (ECJ ruling 10-10-96, Case Hoever y Zachow, joined cases C-245/94 and C-312/94 paragraph 32).

22. This preliminary ruling arose from a national litigation about a Polish national, Mrs. Ruhr, who was residing in Germany with her husband, a German sedentary worker. This lady, who was by then a non-EU citizen, worked for more than a year in Luxembourg. During this period, she did not change her German residence, where she returned every day. However, once she lost this job she couldn't request the unemployment benefit in Luxembourg; as she didn't fulfil the residence condition required by this Social Security system. For this reason she requested this benefit in Germany, her place of residence, where she registered as unemployed. Consequently, the German managing body issued the E301 form so Luxembourg certifies the periods of employment computable for the granting of unemployment benefits. However, the Luxembourg administration refused to complete these formalities based on the following reason: Mrs. Ruhr wasn't a EU citizen, so she couldn't profit from the Regulation for obtaining an original right of Security Social such as the unemployment. As a result, Germany considered that she did not work within its territory and rejected her application for those benefits.

are temporarily restricted, could only export their unemployment benefits to a Member State where residing and working is authorised[23].

B. PROBLEMS LINKED TO THE DEFINITION OF FRONTIER WORKER

The following is an analysis of some problematic aspects closely connected to the definition of frontier worker. In my view, these aspects must be clarified in order to justify the application of the ad-hoc coordinating rules foreseen in the Regulations and addressed to this target group.

1. The concept of residence: coordinating Regulations laconically define the term of "residence" as habitual stay. This is in contrast with the term of "stay", which is associated with a temporary stay. According to the ECJ case law related to the Regulations application, the following issues are clarified:

a) The residence is unique: it is not possible to reside in two Member States (ECJ 16-5-13 Wencel C-589/10 paragraphs 45 and 46).

b) It has a specific and autonomous definition, which may or not coincide with the administrative residence within the frame of the Directive on the free movement of persons (Dir 2004/38/EC) or with the Tax residence (ECJ 5-2-99 Swaddling C-90/97 par. 28ED3J98; ECJ 5-6-14 Mr I C-255/13).

c) It clarifies the location of the centre of interest of the insured person. The following factors (not listed in order of priority) must be taken into consideration for identifying it:

- the family and professional situation of the insured person;
- the reasons for the displacement;
- the residence duration and continuity (this issue seems barely controllable within a frontier-free area such as the Schengen area);
- the intention of the migrant himself that results from all circumstances involved.

Regulation EC/987/2009 now contains these criteria that, as the Court of Justice itself recognizes, are useful to determine the place of residence in doubtful cases. Also when it is controversial between an insured person and a national Social Security system[24]. Logically, these criteria are

23. See recital 15 of the Preamble of the EU/1231/2010 Regulation.
24. ECJ 5-6-14 Mr I C-255/13 against the advocate-general's interpretation which limited its scope of application.

employed in the Commission's Practical Guide on the determination of the applicable law, published in December 2013.

In any case, the identification of the place of residence is not easy (as expressed in the case law included in footnote). In the case of a Polish frontier worker who is single with no children, who during a period of 5 years only returns to his residence in Poland on weekends and holidays, while having a long-established domicile on his the State of employment: where would his centre of interest be located? Can the Social Security public system control his legal residence? And those workers who have a domicile in the State of employment—are they identified as frontier workers for Social Security purposes?

Unifying the more objective criteria in the different regulatory areas (fiscal, administrative and social) that are used for determining residence would perhaps be a good practice for simplifying this issue. We could consider, for example, an approach to the administrative/temporary concept of residence established in the Directive 2004/38/CE. The establishment of temporary periods of stay in order to assume the change of residence (unless there is proof to the contrary) could also be considered.

2. Within the **framework of free movement of workers**, there are substantial differences between the migrant frontier worker as defined in Directive 2014/54/EU; Regulation EU/493/2011 and Directive 2004/38/EC[25], and the one included in the scope of application of the coordinating Regulations. Thus a frontier worker may be, under the coordinating rule, a self-employed worker and a national of Argentina[26]; but may not be considered as such according to the specific rules on free movement[27].

25. See as an example article 17 about the right to remain.

26. Apart from the EU Law, Third Country Nationals are subject to the Spanish Law on Foreigners where an specific border work permit is collected; being this permit in force for 5 years and renewable (Organic Law on the rights, freedoms and social integration of foreigners in Spain, Article 43; and Royal Decree 2393/2004 Article 84). Is a permit seldom used as it is referred to workers residing in the frontier zone of an adjacent Member State, where they daily return after carrying out profit-making, professional or work activities in the Spanish state frontier areas; being its validity limited to that territorial area. See regarding this national permit Sanchez-Rodas Navarro, C. "Trabajadores transfronterizos y prestaciones por desempleo: un ejemplo de praxis legislative mejorable. /en/ VV.AA Buenas practices jurídico procesales para reducer el gasto social II. Laborum. Granada. 2014 p. 89-94.

27. Furthermore the coordinating Regulations may recognise a frontier worker that, even so, when he carries out a very reduced work activity (4 hours, two days per week at a school in the neighbouring State), is not considered worker under the EU rules on free movement of workers. See the ECJ ruling 3-5-90 on Kits Van Heijningen 2/8 case. More widely in Carrascosa Bermejo, Dolores. La coordinación comunitaria… Op. cit; p. 71.

3. Transit between **neighbouring States** seems reasonable because of proximity, cultural reasons, and language; as indeed, all cases analysed by the ECJ concerning this target group demonstrate. However, other types of frontier workers may exist as the result of the widespread improvement of communications (high-speed trains, cheap plane tickets). For example, if we talk about a worker residing in Madrid who works in London or Paris and returns to his place of residence every weekend—could he be categorised as a frontier worker? The coordinating Regulation seems to permit this possibility when it only requires a number of returns to the place of residence within a specified time period. This enables the law to assume the continuity and primacy of the origin residence. Indeed, the fact that a worker resides at a certain distance from the existing frontier between the State of residence and the State of employment is not even required under EU coordinating Regulation[28].

The next question raised is related to teleworkers[29] and whether they could be considered to be frontier workers. Would a German teleworker be a frontier worker, if he has been recruited in Germany when he and his family have settled in Mallorca, and has to return to his Berlin office once per week, when he daily sends his work from his computer terminal? Where would his residence be if he maintains his domicile in Germany where two children of his first marriage live?

In this case, the worker is settled abroad and returns periodically to his domicile of origin,but where would his centre of interest or residence be? Where would his place of employment be? Would it be in Germany, where he receives his work guidelines and salary, as well as being the place where he returns once per week? Is it Spain, where he actually works 4 days per week and where he spends the highest number of days per year? In this case, the worker should apply for insurance (affiliate and register) in the Spanish Social Security system. To do so, the company would request the registration in our national System by means of, for

28. This requisite was required under other international standards. A distance of 20 km between both sides from the frontier and the daily return were required by the Spanish-Portuguese Bilateral convention on Social Security of 11-6-69 and by the administrative agreement signed in 4-9-71. However, three years later (31-10-74), article 6 of the Bilateral convention on Social Security, signed this time by France, contained a wider concept which coincides with the one that exists nowadays under EU Law.

29. The EU Framework agreement on telework of 16-7-02 is not legally binding because it has not been incorporated into Spanish Law, even though it has been implemented in the latest inter-confederal agreements signed on collective bargaining. The agreement defines telework "as a form of organising and/or performing work, using information technology, in the context of an employment contract/relationship, where work, which could also be performed at the employer's premises, is carried out away from those premises on a regular basis".

example, a Graduate in Labour Relations, for the purposes of notification and worker's contributions, and the worker should register in the Spanish Social Security system[30].

The development of technology will continue to bring up such cases, which should be treated or addressed by the coordinating Regulations in force.

4. Other issues related to the differences between the frontier worker and other specific types of migrant workers can also arise, such as the following:

a) The **posted worker** is the one temporarily sent or posted by the employer to another Member State but —thanks to ad-hoc coordination rules— maintains his insurance link with the Social Security system of the State of origin and the new and actual "lex loci laboris" is not temporarily applied. Frontier workers are indeed insured in the State of employment but they maintain their residence or centre of interest in a different State[31]. The latter circumstance may occur with respect to posted workers that maintain their residence in the State of origin, as happens in many cases. The relevant difference lies in the temporary nature of the condition of the posted person, which does not have to be the case with frontier workers (there is no legal obstacle to be be considered a frontier worker in a permanent basis).

The possibility of a frontier worker to be simultaneously a posted worker is not considered by current Regulations[32]. In principle, an employer could easily post a frontier worker. However in order to maintain his frontier worker status It seems he could not be posted to the Member State of residence as far as in this case his residence and employment would be placed in the same Member State. Nevertheless considering that this coincidence is just temporary, it could be sustained that the fixed legal connexion (being insured in the place of employment) prevailed over the factual link (temporary posting in the place of residence). In all other cases, when the

30. General Social Security Law (Ley General de la Seguridad Social) Article 99 (Since 2nd of January 2016 Royal Decree Legislative 8/2015 art. 138); Royal Decree 84/1996 Article 5.

31. See ECJ ruling 7-11-02, Case Maaheimo C-333/00, related to the residence of the displaced worker's children and his right to family benefits.

32. Regulation 1408/71/EEC Article 1.b): "(…) a frontier worker who is posted elsewhere in the territory of the same or another Member State by the undertaking to which he is normally attached and is prevented on account of such posting from returning daily or at least once a week to the place where he resides shall nevertheless retain the status of frontier worker for a period not exceeding four months"..

frontier worker it is posted to a different State the problem may arise with fulfilling the requirement of returning to the place of residence within the required periodicity (daily or weekly). This problem was already addressed under the previous Regulations, that solved it by eliminating this requirement but only during a maximum period of 4 months.

b) Also, frontier workers may be **simultaneously mobile workers**. These workers would perform their professional activity in the territory of two or more Member States different from their State of residence and where they could return at least once a week. In principle, this type of worker could be considered frontier workers if they do not carry out their professional activity in the State of residence. As in this case, in general terms and under the ad-hoc established Community conflict rules, they would be obliged to reside, affiliate and contribute there, since the place of employment and residence are the same; even if this coincidence is partial[33].

In order to better target the specific issues mentioned in this paper, the ECJ 16-2-95 ruling, Calle Grenzshop C-425/93 case, can be very useful. This ruling was about a German food retail company (Calle Grenzshop) located close to the border with Denmark. Mr. Wandahl, who was resident in Denmark and affiliated to the Danish Social Security system, worked for this company as manager. He also performed professional activities for this company in Denmark, 10 hours per week, on a permanent basis for several years. The question referred to the preliminary ruling arises from the claim brought by the German Social Security Administration as it considered that Mr. Wandahl should be affiliated in Germany and pay his contributions there. Nevertheless, the ECJ considered that the worker was correctly affiliated to the Danish Social Security system under the coordinating Regulation, which is provided for those who are workers in the territory of two or more Member States. Also, this rule's application binds the worker involved to be subject to the legislation of the Member State of residence if he pursues a substantial part of his activity in that Member State, or if he is employed by various companies or employers whose registered offices or places of business are in different Member

33. Broadly speaking, different connections are provided by the Community conflict rule depending on whether the worker is member of the travelling or the flying personnel. The first group are in principle addressed by the Law of the State where the registered office of the company is (lex domicilii). The not-travelling personnel is required to be insured in the State of residence when part of the activity is performed there too. If this is not possible, they will remain affiliated in the Member State where the registered office of the company is.

States[34]. Whether he did not work in the State of residence and the company had its registered office in a Member State, this State's Social Security system would specifically be the one of insurance. The ECJ also rejected the idea that Mr. Wandahl was a posted worker, as the absence of a time limit on the professional activity he performed in Denmark was confirmed.

II. UNEMPLOYMENT PROTECTION GUARANTEED TO THE FRONTIER WORKER

This section analyses two key areas. First, the national applicable Law for entitlement to this benefit; second, the benefits' calculation rules and their partial reimbursement by the State of employment, if possible.

II-A. THE LAW APPLICABLE TO THE UNEMPLOYED FRONTIER WORKER

A specific conflict rule has not been established on EU coordinating Regulation for etermining the competent State to provide unemployment benefit to "common" migrants. In this case, the Social Security system of the last State of employment should be applied; therefore, this is the competent State. This can be considered a legal connection that actually gives preference to the latest State of insurance (is the State of the latest employment or where insurance/contribution periods have been covered).

As we will see, frontier workers are under the general rule when partial unemployment is considered. However, in cases of total unemployment, the Law of the State of residence is exclusively applied. This change appears to be based on the strong links that allegedly exist between the frontier worker and this latter State to which he periodically returns. It is true that in some cases a frontier worker can feel more confortable applying for benefits in the State of residence. He can also be easily monitored by the employment services if he chooses this option. Nevertheless, this is by no means a neutral solution for frontier workers, because migrations usually come from less-developed States towards more developed countries, where salaries and Social Security systems are often more generous. The receipt of unemployment benefits within these States, despite being the States of employment, are banned in the frame of the new Regulations. The exclusive submission to the law of the State of residence appears to only benefit the State of employment of the frontier worker, as it could

34. See the previous Regulation 1408/71/EEC Article 14.2.b).i); at present Regulation 883/2004/EC Article 13.1.

involve substantial savings for this State. The State of residence only receives a partial reimbursement from the latter. This means that these States of employments will almost always pay less than they should pay in cases of recognising their own unemployment benefits.

Thus the legislature distinguishes between the two following unemployment situations of frontier workers[35] (Regulation 883/2004/EC art. 65):

1. **PARTIAL** UNEMPLOYMENT. This is when there is a contractual link between the parties. Thus the worker who is partially unemployed is one whose contract has been suspended and can be restarted at any time[36]. Also in this situation is the frontier worker who starts a part-time job in the Member State where his previous full-time job ended and is hired by a new employer[37]. In such a situation, the worker has to apply for unemployment benefits under the State of employment.

   He must apply as if he were residing in that State, that is, at the expense of the competent institution. In this case, the general rule has priority, and as far as the employment relationship is only suspended, the law of the State of employment "lex loci laboris" continues to apply.

2. **TOTAL** UNEMPLOYMENT. This is when the work relationship is withdrawn or terminated[38]. In this case a frontier worker, according to paragraph 13 of the Preamble to Regulation 987/2009, and as the ECJ has confirmed[39]:

   a) Is exclusively subject to the State of residence Social Security Law for guaranteeing the unemployment benefit, the same as the worker would have been subject to the legislation of that State while performing his latest job. It is a legal fiction that the general rule is exempt from the competence of lex loci laboris.

35. Article 65 bis establishes a specific rule for self-employed frontier workers who have become wholly unemployed in order to avoid a lack of insurance protection and foreseeing that not every State grants unemployment benefits.
36. See the ACCSSS's Decision (Administrative Commission for the coordination of social security systems) no. U3 OJEU C-106 24-4-10, paragraphs 1 and 2. This Decision follows the approach of the CA.SS.TM's Decision (Administrative Commission on Social Security for Migrant Workers) delivered in the frame of the previous Regulations in force and that included the doctrine expressed in the ECJ ruling 15-3-01 ruling, Case Laat C-444/98.
37. See ECJ ruling 5-2-15, Case Mertens C-655/13.
38. See ACCSSS's Decision no. U3 OJEU C-106 24-4-10, paragraph 3.
39. See ECJ ruling 11-4-13, Case Jeltes C-443/11.

b) May make himself available to the employment services of the State where he has been last employed. This is envisaged in the frame of active employment policies, as applying for unemployment benefit in the State of employment is not possible.

The first element, the exclusive competence of the State of residence, binds this State to check if the migrant meets the access requirements established in its own legislation to be entitled to unemployment benefits using the aggregation of foreing insurance periods if they are needed.

If he does meet them, he may receive benefit from the State where he posbecomes ibly never contributed. For this reason a reimbursement system between the institutions involved is established.

We must emphasize that not every worker residing in a Member State which is not the State of employment is in the situation of being under the exclusive competence of the State of residence. Rather, this special rule can only be applied where frontier workers are concerned, as in other cases the legislature offers the option for workers to decide to apply to the employment services of the State of employment and to receive those benefits from that country in the first place if they established their residence in the Employment State. In this case, those benefits they are entitled to receive in the State of residence are suspended while workers collect benefits from the former[40]. This right of option has been extended in the frame of the previous coordinating Regulation related to the so-called "false frontier workers".

In effect, the designation of the State of residence suspended the State of employment's competence, if the frontier worker is not registered in the employment offices of this State, or even if he changes his residence to this state. The interpretation of the ECJ in the Miethe ruling configured a special conflict rule, an exception to the exception considered under the ad-hoc rule for wholly unemployed frontier workers. The ad-hoc frontier worker conflict rule was not applicable when demonstrating that this worker exceptionally maintained personal and professional links with his latest State of employment, and also when those links were of such a nature that it could be assumed that it was in this State where the worker had better

40. Non-frontier workers residing in a different Member State from the one of employment or the State that is competent subjected to the referred conflict rule are identified in the ACCSSS's Decision no. U2 OJEU C-106 24-4-10. This is addressed to workers concerned by the following Articles of the Regulation 883/2004/EEC: Article 11§4 (sea workers on board of ships with flags of a Member State); Article 13 (people that perform activities in two or more Member States) and Article 16 (workers submitted to any existing agreement between institutions which exempt Community conflict rules).

opportunities for reintegration[41]. In fact, in these cases, it can be understood that the centre of interest was located in the State of employment. For this reason, his residence, under the coordinating Regulations, was also located there. Thus he was not actually a frontier worker. This is what is called "false frontier, pseudo-frontier or denaturalised workers". Nevertheless, observing the preparatory works of the ECJ, and under the coordinating Regulation in force, it was not desireable to follow the doctrine settled in the Miethe ruling, as confirmed by the ECJ[42]. On the contrary, opting for benefits from the State of employment is no longer possible, and access to its active employment policies is only granted complementarily. However, in my opinion, this ECJ ruling is not entirely consistent. If the frontier worker demonstrates that his centre of interest is in the State of employment, actually he would be proving that this is his State of residence in terms of coordinating rule (ex Regulation 987/2009 article 11). In this case, he would hardly be considered a frontier worker. Strictly speaking, as an "ordinary migrant worker", he would benefit from the general rule, this is, the lex loci laboris principle. In fact, if the State of residence is actually the one of his employment, we could consider that his right to free movement is infringed, as he is being discriminated against because of his migrant condition compared to workers resident in the State of employment (TFEU Article 45)[43].

Administrations or National courts should examine the existence of these links. In cases of conflict when analysing the concurrent details, it is recommended to turn to SOLVIT and to solve this point before going to court.

Whether the unemployed frontier worker decides to change his residence to the Member State of employment it is worth highlighting that this option should not be understood as an exportation of the benefit provided by the State of residence, as recognised as recognised by the EU case-law (ECJ judgement 7-3- 85, Case Cochet 145/84; ECJ judgement 13-3-97, Case Huijbrechts C-131/95). In previous Regulations, the conflict rule creates the legal fiction that the wholly unemployed frontier worker last worked in the State of residence. This fiction suspends but not cancels the obligations of the State of employment, provided that the frontier worker maintains his residence in another Member State. If the worker changes his residence to the territory of the State of employment, the rules

41. ECJ ruling 12-6-86, Case Miethe 1/85, paragraphs 16, 17 and 18; this objective is recently reiterated, among others, in the ECJ ruling 6-11-03, Commission vs the Netherlands C-311/01, paragraph 46.

42. See Considerandum no. 13 of the Regulation of development and the ECJ ruling 11-4-13, Case Jeltes C-443/11, paragraphs 32ff.

43. See the contrary analysis provided when the residence is not in the State of employment in paragraphs 41ff. of the ECJ ruling 11-4-13, Case Jeltes C-443/11

on exportation of unemployment benefit should not be applied. In fact, we are actually returning to the general rule, the lex loci laboris rule, as these persons would lose their condition of frontier workers. In this context, the State of the most recent employment, shall assume the unemployment benefit, discounting those benefits that have been previously paid by the former State of residence, as if they were paid by itself.

The exclusive application of the Law of residence to the wholly unemployed frontier worker could be justified, as it facilitates the anti-fraud control of unemployed persons. Also, it mainly rests on the requirement to adapt benefit levels to the living standards of the State of residence. Indeed, a disproportionate benefit may lead to a lack of motivation in job-seeking. The same argument can be used for justifying the temporary limitation of unemployment benefits, or for prohibiting the complete exportation of non-contributory special benefits. However, it is also important to highlight that the State of residence takes into consideration the last foreign salary of the applicant when calculating the wholly unemployed frontier workers' benefit, instead of considering the living standards of the State of residence. But this should always be done within the quantitative limits usually established in the Social Security legislation applied in the State of residence.

We should also consider that the Law of the State of residence is applied regarding unemployment exclusively. This means that the remaining benefits are still under the Law of the State of employment. This alleged simplicity (the irrelevance of the denaturalised character of the frontier worker) results in a very confusing situation when different eventualities concur. This happens, for example, when the unemployed frontier worker has a child or falls ill. In these cases a maternity or paternity benefit or a temporary incapacity benefit in cash should be provided by the State of employment. Logically the State of residence could suspend the unemployment benefits. Managing these situations appropriately appears to require an administrative collaboration at the highest level[44].

The second issue analysed is the worker's right to register in the employment offices of the latest State of employment where he worked—in order to benefit from a retraining programme, for example. Regarding this, it must be pointed out that this is an important measure for this target group of frontier workers. Certainly, many of them would want to remain employed in the State where they work. Nevertheless, it seems

44. See ECJ ruling 15-10-91, Case Napoleón and Jocelyn Faux C-302/90. In this case the frontier worker is allowed to apply for the temporary incapacity benefit in the State of employment while receiving unemployment benefit from the State of residence. Here the period of unemployment would be calculated in the same way as if the worker had performed it in that State.

that States have not assumed this clear requirement by adapting their national legislation. This is why relevant administrative burdens appear to exist that are, in practice, obstacles preventing these workers from exercising their rights. One such obstacle is the requirement of residing in the State of employment or at least having a domicile in its territory in order to proceed with registration. This is evidenced by the ECJ case law [45] and a recent study of the Commission[46], where it is highlighted that, for example in Spain and France, having a domicile/residence in their territory is de facto required for registration (in Spain, it is even required to have it in the specific area covered of the employment office where the worker applies for registration). This requirement de facto prevents frontier workers from getting access to the benefit. This is a bureaucratic and unacceptable obstacle that frustrates the free movement of workers and undermines their basic rights. These administrative national barriers are against the Community's effort to enhance this freedom, for example by promoting job search across national borders, as shown in the recently signed Royal Decree 4379/2015, BOE 10-6-15. This rule contains the "your EURES-ESF job" action, founded by the European Social Fund with the aim of boosting labour mobility within Europe. As the ECJ recognised in the 90's, the purpose of the coordinating Regulations concerning this issue is to promote the unemployed person's reintegration; adding that the worker is "who is in the best position to know what the possibilities of finding new employment are"[47]. This is the conclusion that should also be applied to frontier workers who should be able to register according to their interests and without legal or administrative barriers.

The legislature does not rule out that frontier workers who reside in a different Member State than the one that is competent, could simultaneously be put at the disposal of the employment services of both States involved (employment and residence). In this way, their opportunities of finding a new job are optimised. To this end, the worker must firstly report his intention to the institution and to the employment services of his place of residence,since this state is the one which provides, where appropriate, the unemployment benefit. At the request of the employment services of the Member State in which he pursued his last activity, the employment services in the place of residence shall send the relevant information concerning the unemployed person's registration and search for employment.

45. ECJ ruling 13-12-12, Case Caves Krier Frères C-379/11.
46. See Member States' sheets included in Jorens, Y., Mindehoud, P. y De Coninck, J. Comparative Report: Frontier workers in the EU. FreSsco European Commission. January 2015. 123 p.
47. See ECJ ruling 29-6-95, Case Joop Van Gestel C-454/93.

Logically, the State which pays the benefit —the one of residence— can force the unemployed person to first fulfill certain obligations and/or activities related to a job search. If the worker does not meet those obligations or activities related to the job search in the State of employment, his benefit recognised by the State of residence cannot be jeopardised because of this non-compliance.

II-B. CALCULATION AND REIMBURSEMENT OF BENEFITS

The rule in force assumes the previous case law and allows the State of residence to take into consideration "the income received by the person involved in respect of his last employment" (Regulation 883/2004/EEC Article 62.3)[48]. The Regulation of development clears the two following issues from which a reinforced administrative collaboration is again deduced (Regulation 987/2009/EC Article 55):

— Firstly, the competent institution of the latest State of employment or professional activity shall report, at the request of that of the State of residence, all required data for calculating the unemployment benefit, and particularly the amount of the salary or professional incomes received.

— Secondly, the applicable legislation provides that the calculation of benefits varies depending on the number of family members, even if they reside in another Member State they should also be taken into account as if they resided in the competent Member State. In the same way that the rule in force tries to prevent the overlap of benefits, this provision shall not be applied when another family member is entitled to unemployment benefits in the same State of residence. This shall be foreseen in those States where the number of family members determines the amount of the benefit, avoiding unjustified overprotection.

It should not be forgotten that the foreign salary is applied in the framework of the Social Security legislation of the State of residence. For example, the Spanish legislation reduces the top limits, and therefore the amount of the unemployment benefit decreases, moving away from the replacement rate desirable for job loss.

As a new feature, the Regulation 883/2004/EC includes a limited reimbursement between the affected institutions. This enables the State of residence to obtain some financial compensation from the State of employment for the benefits that have already been paid, considering that the frontier worker was contributing to the State of employment as a result of his professional activity. Accordingly, the Social Security

48. See ECJ ruling 28-2-80 on Fellinger (67/79) case; see also ECJ ruling 1-8-92 on Grisvard y Kreitz case.

system of the State of residence has to reimburse the unemployment benefit that has already been paid to the frontier worker in the first three months, up to the maximum paid in his own State. If the unemployment benefit has been payed or even exported, it should be deducted from those three months (Regulation 883/2004/EC Article 65.6). This period of reimbursement shall be extended to five months when the person concerned has performed his activity in the preceding 24 months, during a period of at least 12 months in the latest State of employment, where such periods would be taken into account for generating unemployment benefits (Regulation 883/2004/EC Article 65.7). In any case, "for the purposes of paragraphs 6 and 7, two or more Member States, or their competent authorities, may provide for other methods of reimbursement or waive all reimbursement between the institutions falling under their jurisdiction" (Regulation 883/2004/EC Article 65.8).

Throughout the Decision No. U4 (OJEU C-57 of 25-2-2012), the ACCSSS has tried to clarify the complex reimbursement procedure between institutions. The bureaucratic burden imposed on the State of residence and the limitation of the entitled amount (hardly understandable in the frame of a contributive model) may discourage its use. As we pointed out, the rules in force seem to only favour the host States of frontier workers.

III. CONCLUSIONS

On one hand, it is not appropriate to apply the legislation of the State of residence, enabled by the ad-hoc conflict rule, to the wholly unemployed frontier worker. Also, it is even more complex than invoking the general rule applicable to the common migrant, which allows him the option to choose between benefits by placing himself at the disposal of the employment services of either State.

The coordinating Regulations should be amended in order to remove this ad-hoc conflict rule. At least the wholly unemployed frontier workers should be entitled to decide whether they want to receive the unemployment benefit in the State of employment, after establishing their residence in said State, just as any other migrant that works and resides in different Member States. The Regulation in force does not seem to envisage this possibility. Following case Jeltes C-43/11, fully unemployed frontier workers are entitled to unemployment benefit only in the Member State of residence, while the Member State of employment just permits the registration as unemployed person and provides access to "active employment policies" in force regarding the registered frontier workers.

However, in this connection, it is worth highlighting that even if there is not such an amendment, it could be sustained —under in-force

Regulations— that the Member State of employment must provide benefits to fully unemployed frontier workers in the following two cases:

1. There is evidence clearly proving that actually the frontier worker is strongly connected to the State of employment and has there his centre of interest, his residence, as defined in article 11 of Regulation 987/2009. To the extent of the Regulations, the Member State of employment would be in such cases the State of residence and the person would not be considered a frontier worker any more.
2. The unemployed frontier worker decides to move to the Member State of employment. According to the above mentioned cases Huijbrechts C-131/95 and Cochet 145/86, it seems that this decision could also be taken once the person is receiving the unemployment benefit in the State of residence. Both rulings establish that once the benefit is exported to the State of employment, the fictitious competence of the State of residence loses its logic and therefore the unemployed person should receive the benefit fom the State of employment. To sum up, the benefit cannot be exported because the State of employment becomes the competent Member State.

These two situations are in accordance with the current version of the coordination Regulations and with case-law Jeltes C-43/11, where the ruling was based on the premise that the unemployed person was an actual frontier worker —residing in a State different from the one of employment— and not willing to move to the State of employment in order to change that situation.

On the other hand, following the migration flows from less developed Member States towards those which are more developed, this legislative decision allows substantial savings for the States of employment under the Regulations in force. This is due to the fact that the foreign benefit that must be partially reimbursed can never be higher than the national one, and normally will be a lower amount. States of residence face an additional cost that is not intended in their Social Security systems, as well as an increase of their administrative burden related to the calculation of the benefit with foreign salaries and to the request for the entitled partial reimbursement.

In conclusion, the bureaucratic burden, the complexity of calculations and the reimbursement system do not appear to be a strong support for this political option. In many cases, this makes the frontier worker feel discriminated against in relation to his co-workers because of residing abroad; and undoubtedly it discourages his mobility.

Chapter VIII

Good practices regarding the cost reimbursement of cross-border healthcare in the European Union[1]

Prof. Dr. Dolores Carrascosa Bermejo

Universidad Pontificia Comillas (ICADE). Madrid

I. INTRODUCTION

This study will introduce the reader to some of the problems detected in relation to cost reimbursement under cross-border healthcare, i.e., care provided by a different EU member State from the State where the insured person has the right to healthcare. My intention is to open a discussion about possible good practices in this area, to propos some legal changes with the aim of improving the garantees of citizens rights, always within the framework of good management of the available health resources.

The detailed analysis of the cost reimbursement of cross-border healthcare in the EU exceeds the object of this study, and has already been considered in previous studies[2]. Nevertheless, a brief overview

1. This report has been published in the framework of the R & D project "Good Legal Practices in the Field of Labour and European Law to Reduce Labour Litigation Expenditure at Zero Cost" (I+D DER 2012-32111).

2. See VV.AA (Carrascosa Bermejo, D. Dir.) Reembolso de gastos por asistencia sanitaria transfronteriza en la Unión Europea Col. Claves Prácticas. Francis Lefebvre Editions. Madrid 2014 containing an annex with the bibliography on disposal. See also Carrascosa Bermejo, D. "Cross-border healthcare in the EU: Interaction between Directive 2011/24/EU and the Regulations on Social Security coordination". ERA Forum (Journal of the Academy of European Law) Vol 14, nº 3/October 2014. p. 359-380. DOI 10.1007/s12027-014-0358-8. Briefly "Reembolso de gastos por asistencia sanitaria transfronteriza en la UE. Novedades en el RD 81/2014 y su articulación con

of the different methods of reimbursement existing in Spain, and their interaction or articulation, is presented in the next paragraphs.

II. OVERVIEW OF THE METHODS OF REIMBURSEMENT IN SPAIN

There are four processes for reimbursement of cross-border healthcare by Spanish institutions (INSS or the corresponding Autonomous health services and the INGESA):

1. By means of the EU coordinating **Regulations**.
2. By means of the **Directive** and its implementing Royal Decree.
3. By means of **European Court of Justice Case-law** regarding freedom to provide health services.
4. By means of **national law** in cases of vital urgency.

Each one of them will be develop in a little more detail, identifying in each case the extent of the reimbursement, whether the coverage is total or only part of the paid cost (although logically the patient cannot in any case obtain a higher amount of what he has already paid.

II-1.—Reimbursement by means of the coordinating Regulations in the EU (Regulation CE/883/2004 and Regulation CE/987/2009).

The Regulations establish two cases where a reimbursement of the costs paid for receiving scheduled (planned) or non-programmed (unplanned) healthcare in another member State can be paid to the insured person by the competent State (normally, the State of residence)[3]. Healthcare obtained by this means shall always be offered by health suppliers included in the Social Security system in the 28 member States of the EU, together with the other three States belonging to the EEA (European Economic Area: Norway, Iceland and Liechtenstein) and Switzerland.

a) **Unplanned healthcare** is that which occurs during a temporary stay in another member State for non-medical purposes (for example, due to holidays or business travel). In this case, the

la vía de los Reglamentos de coordinación". Tribuna. El Derecho. Julio. 2014. http://www.elderecho.com/tribuna/wwwelderecho-com/Reembolso-UE-Novedades-RD-Reglamentos_11_704305001.html.

3. The Regulations also establish the coverage in case of moving the residence to another member State by the competent State. However, in this case neither exists the reimbursement to the insured nor is applicable the Directive 24/2011/UE or the RD 81/2014 that implements it in Spanish law because of the lack of the cross-border element on which the freedom to provide healthcare benefits is based (see in that sense ECJ 16-7-09, case Petra Von ChamierGlisczinski C-208/07EDJ 2009/143614).

Regulations establish that the person insured in Spain shall be entitled in the destination member State to the necessary healthcare from a medical point of view (not necessarily urgent or immediate healthcare) in order to continue his stay under safe medical conditions and equal treatment as an insured citizen in the State of the treatment (Regulation CE/883/200429-4-2004 art. 19; Regulation CE/987/200916– 9-2009 art. 25).

b) Planned or scheduled healthcare is that which occurs due to travel specifically for health purposes, when the aim is to receive healthcare treatment in another member State. In this case, the Regulations require the patient to obtain a previous authorization (E-112 or S2). The authorization issued by the INSS —with a detailed report by the healthcare providers— cannot be denied once the following two requirements are fulfilled:

— First, the treatment required has to be included in the basket of services, either the National potfolio (RD 1030/2006) or the Autonomous one (that improves upon the former).

— Second, there is no possibility of receiving such treatment —with the same effectiveness— in Spain (the competent Member State) within a time-limit which is medically justifiable, taking into account the current state of health of the patient and the probable course of his illness. In effect, there shall be an individual evaluation —with an objective medical assessment— if the patient has to suffer a delay, considering the probable evolution of the illness, his background, pain suffered or the possible incapacity caused by the illness. This second requirement is related to the poor performance of the health system, since, without any delay, no authorization shall be accorded. Nevertheless, in the case of a medically acceptable delay in the specific case —despite the existence of a waiting list— the authorization will not be accorded4. In Spain, the evaluation is granted automatically in cases where the maximum waiting times established in the national regulation regarding some surgical operations (RD 1039/2011), or the ones assumed by the Autonomous communities regarding their own health benefits, are exceeded[4].

— **REIMBURSEMENT according to the Regulations:** the general applicable rule is the reimbursement among institutions (Spain would

4. ECJ 16-5-06 Watts C-372/04. It is irrelevant if the cause originating that delay is due to a lack of material means or of medical specialists in the National authorizating system. ECJ 9-10-14 Petru C-268/13.

reimburse to the destination State the invoice issued, and the State of treatment would provide free assistance with the warranty of payment implied by the same European health card issued by Spain to the insured person, or the application form E-112 or document S2). However, the Regulation also establishes a special rule when in the State of treatment there are mechanisms of reimbursement applicable to their own insured patients. According to this rule the Spanish insured patient (under planned or unplanned healthcare) can choose to apply for reimbursement to the Spanish administration when they return to or even previously to the administration of the State of treatment (see Regulation 987/2009/CE art. 25.B).

In fact, a person insured in Spain, who receives and pays healthcare provided in another member State, can submit upon his/her return to Spain all the invoices in a Centre of Attention and Information of the Social Security (CAISS), and by doing so, request the reimbursement. The INSS will issue in those cases an application form E126 or S67 to the member State of treatment in order to obtain the invoice information and to make certain that the coverage has been provided in a center included in the Social security of that State.

The reimbursement obtained by means of the Regulations always covers the health cost invoiced by the foreign administration, being considered therefore as economically neutral for patients. However, there is a distortion when the treatment system ask for a health copayment in the same way as national insured persons in this country. In this case, we must distinguish between the two types of healthcare:

— Under **planned healthcare**, a total or partial coverage can be provided due to the so-called "Vanbraekel complement", lately incorporated into the developing Regulation and whose application shall be requested by the insured person (Regulation CE/987/2009 art. 26.b.7). This legislation enforces a comparative rate, contemplating the reimbursement of the copayment when the "Spanish" rate established for the treatment provided abroad exceeds the foreign health cost (the cost of the invoiced treatment) and is sufficiently high as to cover that copayment totally or partially. Obviously, the Spanish insured, who is accustomed to free healthcare, shall assume the copayment if the treatment invoiced together with the foreign copayment exceeds the Spanish public prices established by the Autonomous health services or the INGESA regarding that specific treatment (as is the case of the nationals of the treatment member State).

— In the case of **unplanned healthcare**, the coverage of copayment is never considered due to the non-applicability of the above mentioned "Vanbraekel complement", which tries to preserve the freedom to

provide health services. The comparison of rates imposed by that complement is already dismissed by the developing Regulation, in line with a controversial ruling of the Court of Justice that considered its non-application in the scope of the unplanned healthcare as not infringing upon the freedom to provide services (ECJ 15-6-10 Commission against Spain C-211/08)[5].

II.2.—Reimbursement by means of the Directive 2011/24/UE incorporated into Spanish law through Royal Decree 81/2014

By this process an insured person under the Spanish Social Security system can also obtain reimbursement of healthcare covered by the basket of services. In this case, the reimbursement will be assumed by the Autonomous health services (or by the INGESA in the cases of Ceuta and Melilla[6]). Unlike the means established in the Regulations, this right exists independently of whether the healthcare has been provided by either public or private suppliers, even under the circumstance that the supplier does not belong to the Social Security system of the member State where the treatment has been given.

As required by the Directive regulating this procedure, the national legislature has established a "National Point of Contact" in the Health Ministry whose duty is to inform the insured person of the right to reimbursement (*http://www.msssi.gob.es/pnc/home.htm*). Besides that Point of Contact there have been established connections to the health services in the 17 Autonomous Communities, the benefit societies for civil servants (mutualidades), and the INGESA (the competent institution in the Autonomous towns of Ceuta and Melilla).

Under this Directive, there is no difference between planned and unplanned healthcare; there is only the distinction between authorized and non-authorized treatments, the general rule being applied only to the latter, because it only requires authorization —which limits the freedom to provide services— when there are justified overriding reasons

5. See a commentary of this judgement in Carrascosa Bermejo, D. "Libre prestación de servicios y reembolso de gastos de hospitalización no programada durante estancia temporal en otro Estado miembro: ¿procede abonar el complemento diferencial Vanbraekel? Comentario de la STJ (Gran Sala) 15-6-2010, Asunto Comisión Europea contra el Reino de España C-211/08 (TJCE 2010/175". Aranzadi Social nº 10-11. October 2010. P. 45 to 60 and under Hierro Hierro, F.J. "La validez del sistema español de reembolso de gastos médicos; el caso Comisión vs. España. Revista del Ministerio de Empleo y Seguridad Social nr. 102/2013 p.353 and f.
6. The right of reimbursement in the case of civil servants included in benefit societies (mutualidades) is not analysed here. On this topic see CEA Martín, Mª V. "Peculiaridades del reembolso en el ámbito de las mutualidades de funcionarios" / en/ VV.AA. Reembolso de gastos por asistencia sanitaria…, op. cit. p. 159.

of general interest. In this case, the Spanish legislature has chosen the most restrictive option regarding the right to reimbursement for Spanish insured persons when the Directive was implemented. In fact, it requires previous authorization in all the cases permitted in the Directive, and incluyes every possibility for denial established in its articles (RD 81/2014 art. 10.5 y 15). Thus, previous authorization is required for any hospital healthcare, including an overnight stay, as well as for a controversial list of non-hospital or non-ambulatory treatments mentioned in the RD 81/2014[7]. The insured shall apply for previous authorization from the health service corresponding to his place of residence, which will not be deniable in the cases in which it would be granted under the same Regulations through the application form E-112 or portable document S2. However, a denial is permitted when there are several concurring circumstances which involve risks to the patient´s safety or to the population in general, or when the health supplier does not provide enough guarantees (RD 81/2014 art. 17). The patient shall be notified regarding the allowance or rejection of the authorization, and of the reason for the decision, within 45 days after the reception of the application. Silence by the administration is considered a positive response (RD 81/2014 art. 16).

Besides the authorization, Spain demands, as an administrative additional requirement for reimbursement, that the insured person comply with the same applicable conditions for access to public healthcare provided in Spain. This requirement is so ambiguous that it seems to be possible that the National Health System is demanding of the insured person the presentation of a previous evaluation justifying the health benefit described in his application—a previous requirement prior to both the treatment and the authorization. The evaluation shall be performed by a Primary care doctor when done in Spain, but if the patient is already abroad it is unclear who would be responsible for that evaluation. Even the Royal Decree establishes that these evaluations cannot constitute an obstacle or discrimination to the free movement of patients, services or goods in any case, except for objective justification (RD 81/2014 art.10.4).

7. The Royal Decree even recognizes that some health treatments mentioned were selected because they require the use of highly specialised medical procedures or equipment, the need to provide care to patients suffering complex problems or due to their cost-intensiveness. Some of its categories have aroused controversy regarding the case-law supporting the authorization in some cases. All of them have to overcome the reasonableness and proportionality control for not being considered unjustified obstruction to the freedom to provide services. There are also some doubts regarding the exhaustive character of the listed treatments of the Annex, in this sense see Lousada Arochena, F. "Reembolso en el Real Decreto 81/2014: la implementación de la Directiva 2011/24/UE" /en/ VV.AA Reembolso de gastos por asistencia sanitaria… op. cit. p. 120 s.

The reimbursement applied for at the Autonomous service shall be presented according to the established format, together with the documents mentioned in RD 81/2014 Annex I. Chief among the requirements is that the invoice be as detailed as possible, identifying the different benefit concepts provided, the cost of each one, and the date of its performance. Any medical prescription or medical report of the healthcare provided is also compulsory, with special mention of the clinical explanation of the diagnostic and therapeutic healthcare provided, preferably using an identifying code already approved (CIE9-MC or similar). All these requirements aim to help evaluate the origin of the health benefit and to continue follow-up treatments and medical supervision when back in Spain.

Finally, it is worth noting that the patient who wishes to receive or has already received healthcare in another member State has the right, among others, to (RD 81/2014 art. 5):

a) Availability of a copy of their clinical reports on appropriate media, along with the results of diagnostic tests and/or therapeutic procedures, providing information on the procedure to gain access to them. Public administrations shall promote access to clinical documentation by means of the information systems laid down for such purpose by the legal system.

b) Medical follow-up in Spain after the healthcare is delivered, in the same way as if the care received in another Member State had been delivered in Spain. Also the recognition and dispensation of the prescriptions issued in the other member State, corresponding to the established community standard (RD 1718/2010 art.15 bis phrased by RD 81/2014; Dir 2012/52/UE and Dir 2011/24/UE).

— **REIMBURSEMENT by the Directive 2011/24/UE and RD 81/2014**. The insured person must always pay the initial health costs, and afterwards apply for reimbursement to the competent health service (or the INGESA in the cases of Ceuta and Melilla). Unfortunately, as some have criticized, this method is only available to people with economic resources that will permit them to assume these initial payments. The reimbursement by this means is limited to the amount established by the Autonomous or National health service rates (public prices) for the treatment provided (always up to the limit of the total cost paid). This rate does not necessarily cover the entire foreign health cost, and it is not always economically neutral for the insured. Furthermore, it will only cover the copayment totally or partially in the case that the foreign health cost is lower than the rate in the State of insurance (in this study, in Spain)[8].

8. For example, in the case of a person insured by the Spanish system who goes to

Regarding the Social Security systems, this method of reimbursement is considered economically neutral because they introduce the health costs in the prices reimbursed, even saving costs if the foreign rate is far lower[9]. This evident assertion regarding the national systems that reimburse healthcare costs internally, could be controversial regarding other national systems, like the Spanish one, offering healthcare to all their insured persons at their own expense and means, which causes in the end very high and fixed expenses. Under these latter systems the Directive reimbursement is considered an additional cost to others already assumed.

II-3.—Reimbursement by means of the European Court of Justice case-law on Single Market rules, mainly concerning freedom to provide health services[10]. One of the main objectives of the Directive 2011/24 was to gather all the principles established by EU case-law together, aiming to provide legal certainty. However, this third process exists even without it, because the case-law is applicable even in the cases where the Directive or the national implementing norm differ from the case-law and can be considered contrary to the Treaties. It must also be considered that the Court of Justice is still active, and could evolve or clarify differently from the case-law currently in force[11].

---

a private Portuguese gynecologist that charges 80 euros per visit, and the public prices of the Autonomous health system establish a rate of 130 euros for visit, the insured will receive a total reimbursement. If she goes to a French gynecologist that will charge 120 euros plus 20 euros for copayment, the reimbursement will not be total and the patient will assume a cost of 10 euros. See Carrascosa Bermejo, D. "Reembolso de gastos por asistencia sanitaria transfronteriza en la UE. Novedades en el RD 81/2014…" op. cit.

9. See Carrascosa Bermejo, D. "Cross-borderhealthcare in the EU…" op cit. p. 375.

10. ECJ 28-4-98 Decker C-120/95; ECJ 28-4-98 Kohll C-158/96; ECJ 12-7-01 Vanbraekel C-368/98; ECJ 12-7-01 Smits y Peerbooms C-157/99; ECJ 13-5-03 Müller-Fauré y Van Riet C-385/99; ECJ 23-10-03 Inizan C-56/01; ECJ 18-3-04 Leichtle C-8/02; ECJ 16-5-06 Watts C-372/04; ECJ 19-4-07 Stamatelaki C-444/05; ECJ 15-6-10 Commission against Spain C-211/08; ECJ 5-10-10 Commissionag ainst France C-512/08; ECJ 5-10-10 Elchinov C-173/09; ECJ 27-1-11, Commissionag ainstLuxemburg C-490/09. See an extended study of part of this case-law in Hierro Hierro, F.J. Problemas de coordinación de la asistencia sanitaria en el Derecho Europeo. Ministerio del Trabajo e Inmigración. Madrid. 2009. Garcia de Cortazar y Nebreda, C. "¿Libre circulación de pacientes en la Unión Europea? La atención de los dependientes y la tarjeta sanitaria europea" RMTAS nº 47/2003 y "Movilidad de pacientes en la UE y atención sanitaria transfronteriza" /en/ VV.AA La gestión del sistema de Seguridad Social. Laborum. Murcia 2009.

11. See Carrascosa Bermejo, D. and Carrillo Márquez, D. "Jurisprudencia del Tribunal de Justicia sobre asistencia sanitaria y libre prestación de servicios. Su recepción en

— REIMBURSEMENT under the case-law. The reimbursement obtained by means of this process is identical to the one pointed out in the previous paragraph regarding the Directive and the RD 81/2014.

II-4.—Reimbursement by means of the national law regarding vital urgency (Law 16/2003 article 9 and Royal Decree article 4.3). This reimbursement method is only applicable when it is recognized that the foreign treatment, included in the Spanish basket of services, was provided in very exceptional cases of vital urgency that requires immediate healthcare[12]. This method is established not only in life and death cases but also when the lack of inmediate treatment may lead the patient to unacceptable loss of functionality of important organs, for instance, the retinal detachment when it generates vision loss[13].

— **REIMBURSEMENT under national law**. This reimbursement method by means of this process is the most comprehensive one, as it covers all the health costs envisaged by the Spanish basket of services, including the foreign copayment. This fourth, method when granting additional coverage compared to the above mentioned, shall be of preferential application. It has been accepted as such regarding the coordinating Regulations as far as, due to their totally protective nature, its application cannot imply a loss of the rights that assist the insured person in the framework of the Autonomous or exclusive application of his own National law (ECJ 15-6-06, case Acereda Herrera C-466/04EDJ 2006/80750 regarding the denial of reimbursement of some health transport cost; TSJ Cantabria 5-10-06, AS 2620Rec 150/04EDJ 296010)[14].

III. ARTICULATION OF THE DIFFERENT REIMBURSEMENT METHODS

Briefly[15], it is remarkable that when the two first processes are applicable,

---

la Directiva 2011/24/UE y el riesgo de una tercera vía." /en/ VV.AA Reembolso de gastos por asistencia sanitaria… op. cit. p. 77 s.

12. See a detailed study of this method of reimbursement in Sempere Navarro, A.V and Carrascosa Bermejo, D. "El reintegro de gastos sanitarios: una visión general" /en/ VV.AA. Derecho Farmacéutico Actual. Eupharlaw. Aranzadi. 2009. p. 32 s.
13. See the following supreme court judgements TS 4-7-2007, Rec 2215/2006 and TS 20-10-2003 Rec 3043/2002.
14. See Supreme Court Judgements TS 4-3-2010, Rec 1504/09 and TS 13-7-2010, Rec 2194/09). In this sense Carrascosa Bermejo, D. "Novedades normativas y jurisprudenciales en el reembolso de gastos por asistencia sanitaria transfronteriza en la UE: entre la coordinación de los sistemas nacionales y la libre prestación de servicios" /in/ VV.AA. (Sánchez-Rodas Navarro, C. Dir.) Inmigración mujeres y menores. Laborum. Murcia. 2010.
15. See an extended study under Carrascosa Bermejo, D. "Cross-border healthcare in the

the insured person shall be informed previously by the National Point of Contact of the rights contained in the coordinating Regulations and the ones envisaged under the national law implementing the Directive (RD 81/2014 art. 9). Once properly informed, the process of freedom to provide services, i.e., the one established in the RD 81/2014, is only applicable if the insured person choses expressly this option. In effect, if there is no explicit decision, the Regulation shall apply as far as they are considered "a priori" more beneficial to the insured person. They allow a complete reimbursement of the health cost (although not always of the copayment), in many cases without requiring upfront payment (Dir 2011/24/UE art.5.b) and RD 81/2014 art. 1.2º y 5.1).

Specifically, it is established that if authorization via RD 81/2014 is required, and the requirements for applying for assistance through the Regulations concur (presenting the application form E-112 or the document S2), the process of reimbursement by means of the Regulation shall apply, except if the patient expressly asks for reimbursement under RD 81/2014. When authorization is not necessary under RD 81/2014, the Spanish insured person can also choose this less demanding method compared to planned healthcare under the Regulations, which always requires authorization.

IV. GOOD PRACTICES AND PROPOSALS FOR IMPROVEMENT OF THE LEGISLATION IN FORCE

Based on the current situation outlined above, we propose some good practices and possible improvements de lege ferenda. All of them have been grouped in the following three sections:

1. Information.
2. Authorization.
3. Reimbursement.

IV.1. INFORMATION

a) The National and the Autonomous Points of Contact should inform the insured person about all the possible methods of reimbursement mentioned in this study, as well as the one under National law in case of vital urgency. Even if one process can be more costly for the national healthcare system than others, objectivity obligates the Contact Points to give the patient a complete overview of his reimbursement options.

EU: Interaction between Directive 2011/24/EU and the Regulations on social..." op. cit. p. 359 s.

b) It is necessary to improve transparency and to facilitate access to information regarding:

— The basket of services (the national Portfolio and the Portfolio of each Autonomous Service).

— The charges (public prices) established for each treatment.

Both should be available on the web sites of the National Point of Contact and of the Autonomous points of information. Furthermore, the charges (public prices) established by the different Autonomous Communities should not differ widely. At least a minimum amount and common standards for establishing the prices should be agreed at a National level. The current differences can lead to unequal situations among the insured persons in Spain. Besides, it is remarkable that even a simple change of residence or census registration would enable the access to a specific Services Portfolio eventually broader or providing a higher reimbursement amount.

c) The National Point of Contact should also inform patients whether it is possible to obtain reimbursement without authorization. In effect, the authorization on its own cannot be considered a constitutive element of the right to reimbursement. Under the existing EU case-law on this question, it is arguable that the following patients are entitled to reimbursement despite not having obtained a previous authorization[16]:

c.1) When authorization is granted after treatment, due to a judicial or administrative review ruling that its denial was unjustified; and the affected person had already received treatment in another member State (Vanbraekel art. 34 and Elchinov 48, 77 y 78), for instance if the delay was controversial and subsequently proven to be medically unacceptable by the court or the administration. A patient cannot be obliged to wait until the end of a trial or a claim, often unjustly, as EU law would lose its effectiveness.

c.2) A right to reimbursement can also derive from the above mentioned Elchinov case-law. When the patient -—despite fulfilling all the requirements— does not apply for authorization or does not wait until it is granted, due to the need for urgent hospital care, specialized treatment, or outpatient assistance that

16. See Carrascosa Bermejo, D. and Carrillo Márquez, D. "Jurisprudencia del Tribunal de Justicia sobre…" op. cit. p. 10.

cannot admit a delay by the competent service, the authorization becomes a limitation to the freedom to provide services that is not justified by overriding reasons of general interest.

c.3) Under the process of the Directive and the RD 81/2014, it is implicitly understood that reimbursement could be granted after the denial of authorization —even if it is justified (for example, when the treatment can be provided within a medically acceptable time-limit)— if the requirement for authorization is contrary to the existing EU case-law. For instance, in case of reimbursement of non-expensive outpatient treatment, since in that case the authorization can not be required so whether it is granted or denied is irrelevant.

d) It would be useful to have an "EU point of contact", even if it were only accessible via internet a kind of official healthcare "Tripadvisor" that would include all the national information and would allow patients to compare parameters among the different member States. Since managing large amounts of information coherentely in various official languages would be problematic, all information should be translated, at least, into English.

IV.2. REQUIREMENTS FOR REIMBURSEMENT: AUTHORIZATION

a) In order to avoid unnecessary litigation RD 81/2014 should be modified clarifying whether the list contained in Annex II is a closed one or not. Besides, this list should be amended, not only to make it more specific, but also to adapt it to the case-law of the EU Court of Justice, which seemed to consider authorization to be required only in cases of specialized and expensive outpatient treatment (ECJ 5-10-10 Commission against France C-512/08). Can a treatment over 1.500 euros be considered expensive under this interpretation? Could there be an authorization requiremente in case of a treatment provided to patients referred to centers for specialized care as the RD 81/2014 Annex establishes?

b) An effort needs to be made to unify procedures for granting authorization through different channels. Although the authorization established in the RD 81/2014 is issued by the Autonomous health services, and that based on the Regulation is issued by the INSS, this later institution only grants authorizations based on the preceptive report issued by the Autonomous health services. Therefore, the procedure followed by the Autonomous service should be exactly the same in both cases. In the sense of this unification, it should be taken into account

that article 15 of the RD 81/2014 envisages the following measures. The Benefits, Insurance and Funding Comisión (Comisión de Prestaciones, Aseguramiento y Financiación) will propose (and the Interterritorial Council of the National Health Service —Consejo Interterritorial del Sistema Nacional de Salud— shall subsequently issue a favourable report) common criteria to be applied by all regional authorities, the National Institute for Healthcare Management (INGESA) and by mutual societies for civil servants (mutualidades de funcionarios) in order to grant the relevant prior authorisations. Said criteria should apply at least for all the health services issuing the authorizations under both the Directive and the Regulations.

c) According to the above mentioned requirements, authorization can only be denied when the healthcare treatment is not mentioned in the basket of services, or when there is an acceptable waiting list on medical grounds for the specific case. This makes it incomprehensible that some Autonomous communities are still authorizing, for instance, planned births in other member States when there is no waiting list regarding this specific procedure. The voluntary granting of these authorizations implies assuming an unjustifiably high economic cost when other patients rights are being undermined because of the economic crisis.

On the other hand, considering the statements from the recent ruling by the EU Court of Justice from 9-10-14, case Petru C-268/13, it could be said that previous authorization shall only be granted when none of the Autonomous health services can provide the necessary treatment within a time limit that can be justified on medical grounds. This requirement can save costs to the Autonomous services, since the coverage in another Autonomous Community will have a lower cost compared to the one in a different Member State. Besides, it could also be an advantage for the patient who perhaps prefers to stay in the national territory and to use his mother tongue. In addition, it would be convenient to establish a mandatory procedure —a step prior to any cross-border healthcare authorization— that would determine the possibility of providing the treatment within Spain.

That would require an adequate and reasonable National reimbursement between the Autonomous health services involved, avoiding restrictions on the internal circulation of patients[17]. This

17. *http://www.europapress.es/madrid/noticia-comunidad-no-firmara-ningun-acuerdoatender-pacientes-lm-si-no-pagan-asistencia-recibida-20140910122931.html.*

coordinating requirement, according to the above mentioned ruling, implies the existence of an actual right for Nationally insured persons to receive coverage in all Spanish territories, eliminating the current restrictions established by the different Autonomous services on the mobility of patients.

d) Other requirements

It is necessary to illustrate the cases in which, in order to obtain reimbursement, it is compulsory to receive primary care clinic (visit the family doctor) before receiving a treatment abroad. Is there such requirement when the insured person has recently seen a specialist in Spain, or has been receiving continuous treatment in another Member State for some time?

It is also necessary to clarify what happens when the insured person is already abroad or when the need for health care is urgent. Is it then necessary to visit a Primary care doctor or a similar service in the State where the patient is?

IV.3. REIMBURSEMENT

a) Given the existance of an EU model for prescriptions (RD 1718/2010 art.15 bis redacted by RD 81/2014), an EU model of invoice should also be established. Considering that this proposal was already offered by the Spanish authorities and rejected by the EU, Spain should establish a model invoice, at least in Spanish and English, to be filled in by the foreign supplier. This would guarantee to the Spanish insured person that the documentation presented later for obtaining the reimbursement is not defective difficult to rectify once back in Spain.

b) The maximum term for demanding the reimbursement established by the RD 81/2014 —3 months after the date of payment for the healthcare received in another member State— needs to be modified and aligned with the LGSS (Social Security General Law). In effect, this term is not acceptable since healthcare, like all the benefits provided by the Social Security, is bound to a longer prescription term (5 years) and the LGSS is hierarchically superior to those lower terms[18].

c) Some of the reimbursement norms contained in the developing

18. See Carrascosa Bermejo, D. "Reembolso de gastos por asistencia sanitaria transfronteriza en la UE. Novedades en el RD 81/2014…" op. cit.

Regulation —specifically the ones established by the Regulation CE/987/2009 26.B.6 y 7— needs clarifying of their scope by the Administrative Commission[19].

V. CONCLUSIONS

As already highlighted in this study, there is a lot of work to be done regarding reimbursement, founded on the freedom to provide services established in the Directive and its National norm of implementation, which try to be a reasonably accurate reflection of the EU case-law. There are several aspects to be improved, coordinated and clarified in the area of reimbursement of costs due to healthcare received in another member State. The situation is extremely complex and full of uncertainty, discouraging its use. Nevertheless, thanks to the Directive and its implementation (although that was not its purpose) there is an increase in citizens' knowledge about their rights to obtain healthcare in a different member State —also according to the Regulations— and the reimbursement of the paid costs[20].

In the end, it is worth noting that this subject is closely connected with another matter that can be considered the other face of this reality. In effect, on one hand, we have the subject matter of this study, i.e., the reimbursement of the healthcare costs incurred by the insured persons in Spain; however, on the other hand, we have the invoicing, that is, the charge to other member States of the healthcare cost due for the coverage or treatment given to their insured persons in Spain.

On this subject, we can mention that there are constant problems associated with the defective invoicing of the actual expenditure (or real costs) by the Autonomous services regarding the unplanned healthcare provided to patients insured in other Member States according to the public prices established for the treatment or medicines received (especially outpatient and pharmaceutical costs) [21]. Although the situation has improved compared to previous years, especially regarding hospital costs, it does not make any sense, for example, that Spain received during

19. See Carrascosa Bermejo, D. "Cross-border healthcare in the EU: Interaction between Directive 2011/24/EU and the Regulations on social." op. cit. p. 375.
20. See Carrascosa Bermejo, D. "Cross-border healthcare in the EU: Interaction between Directive 2011/24/EU …. " op. cit. p. 359.
21. See on this matter the demolishing report of the Spanish Court of Auditors (Tribunal de Cuentas) Issued in 2012 "Informe de fiscalización de la Gestión de las Prestaciones de Asistencia Sanitaria derivadas de la aplicación de los Reglamentos Comunitarios y Convenios Internacionales de la Seguridad Social".

2012 —according to the official statistics published by the Tourism Institute of Spain— 51,2 million tourists from other Member States and invoiced only 141.207.977,79 euros for unplanned healthcare, while being charged 53.945.342,98 euros for the unplanned healthcare received by the 4,5 million travellers insured in Spain that went on holiday in other Member States[22].

It should also be considered that Spain faces difficulties in recovering costs from other Member States, that must pay fixed amounts[23] for the healthcare provided to the thousands of EU pensioners residing in our country[24].

Autonomous Communities are responsible for healthcare in Spain but, under the Regulations, a national body the INSS manage the invoicing of the actual expenditure and the fixed amounts, and is also in charge of controlling the Health Cohesion Fund (Fondo de Cohesión Sanitaria). INSS position has been strengthened, specifically, by a recent management modification of this Fund that seems to be prompting the Autonomous Communities to improve their invoicing of the healthcare provided in Spain for patients insured in other Member State. In effect, when an Autonomous community has a net balance for negative "actual expenditure", a compensation and deduction of those quantities is established on the amount of the "fixed amounts" they are entitled to[25]. It is expected that Autonomous Communities will begin to take concrete measures in order to increase their invoicing for pharmaceutical and ambulatory healthcare. Implementing a

22. And so was stated by Mrs. Mª Teresa López González. Technical Adviser in the International Area, General Subdirection on benefit management by the INSS. Ministry for Employment and Social Security in her brilliant speech offered during the FreSsco Convention regarding "Cross-border healthcare and costs reimbursement" celebrated in Madrid, Icade, 10-10-2014.

23. Regarding pensioners from other Member States residing in our country, Spain is reimbursed on the basis of **fixed amounts** (lump-sums) see EU Regulation 987/2009 art. 64. This is a method of reimbursement use by the Member States «where reimbursement on the basis of actual expenditure is not appropriate". This Member States are included in Regulation 883/04 Anex III.

24. Regarding the entitlement to access to Spanish healthcare by other member States´ pensioners, see Carrascosa Bermejo, D. "Case Study 2: Access by EU pensioners to healthcare in Spain" /in/ VV.AA A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence. http://ec.europa.eu/social/BlobServlet?docId=10972&langId=en.

25. See the Budget Law 2014 22/2013 adic. disp. 69ª, nowadays included in the Social Security Law LGSS (Royal Decree Legislative 8/2015 aditional disposition 12ª) in this sense Carrascosa Bermejo, D. and Trillo García, A.R. "Cobertura sanitaria y reembolso en el marco de los Reglamentos de coordinación" /in/ VV.AA Reembolso de gastos por asistencia sanitaria transfronteriza en la Unión Europea. op.cit. p. 73.

direct reward could help, i.e. the most diligent suppliers could see their budgets increased by improving the invoicement of treatments rewarding the resulting administrative burden.

From the Spanish point of view, the following two issues merit mention. Firstly, it is necessary to consider the proper identification of other Member States´ pensioners residing in Spain in order to receive the corresponding fixed amount for the healthcare received. Besides Spain should start the transition from fixed amounts compensation to reimbursement on the basis of actual expenditure, more accurate to real cost. This ties in with the second issue as far as there is a need to improve and encourage the proper invoicing to other Member States for the healthcare provided. During this last period of crisis and cutbacks the creation of measures for monitoring —and invoicing— should be prioritize in order to obtain a proper compensation of the healthcare provided, in some cases at not cost, by Spain to persons insured in other Member States.

Chapter IX

Particular aspects regarding illegal immigration in the National Healthcare System[1]

Dr. Fuencisla Rubio Velasco

University of Sevilla

I. HEALTHCARE BEFORE THE SPANISH ORGANIC LAW 4/2000 ON RIGHTS AND FREEDOMS OF FOREIGNERS IN SPAIN AND THEIR SOCIAL INTEGRATION

The right of foreigners to receive healthcare has been one of the earliest claims made by organizations defending the rights of immigrants[2]. The Spanish Law on Foreigners of 1985 did not mention this matter, unlike the Royal Decree 155/1996[3], which established that "foreigners are entitled to access to services and benefits for health protection organized by public institutions according to the specific legislation regarding this matter."

It was surprising that the Law on Foreigners (LE/1985) did not include any clarification of that right, since, due to its inclusion in the rights provided under Title I of the Spanish Constitution, it was interpreted that

1. This report has been published in the framework of the R& D project "Good Legal Practices in the Field of Labour and European Law to Reduce Labour Litigation Expenditure at Zero Cost (I+D DER 2012-32111).
2. Tarabini-Castellani Aznar, M.: Reforma y contrarreforma de la Ley de Extranjería (Análisis especial del trabajo de los extranjeros en España) Includes the RD 864/2001 from the 20th July that adopts the implementing Regulation of the Law for Foreigners. Tirant lo Blanch, Valencia, 2002.
3. Royal Decree 155/1996, of 2nd February approving the Executive Regulation of the Organic Law 7/1985. (in force until the 1st of August 2001).

foreigners were entitled to it in application of art.4[4]. The enactment of the General Social Security Law (hereinafter referred to according to the Spanish acronym of this Law: LGSS) implied a qualitative improvement on this subject, although it only extended its coverage to foreigners with residence and work permits (a/1996 on Fiscal, Administrative and Social Order Measures of 30th December[5]) establishing that "foreigners with residence or entitled to legal stay in Spain when performing their work in national territory" will be included in the Social Security system, and will be entitled to receive contributory benefits. However, the principle of equality is complemented by the principle of universality, due to which every individual who fulfills the condition of being a person is entitled to healthcare protection without holding any special legal title[6].

So, after this first approximation, before the enactment of Law 4/2000, only foreigners in a legal situation in Spain were entitled to healthcare services[7].

II. FOREIGNERS´ HEALTHCARE IN THE ORGANIC LAW AND ITS SUBSEQUENT REFORMS OF DECEMBER 2000 AND 2003

Article 12 of the Law 4/2000 was not modified by the Organic Law 8/2000 or by the Organic Law 2003/8, and it implied a great change regarding the former legislation since it regulates the right to Social Security, especially in extending this right in specific cases to illegal immigrants[8].

As established in this article, those foreigners registered in the municipality census of their regular residence are entitled to healthcare under the same conditions as Spanish citizens. They are also entitled to

4. Art. 4 Law on Foreigners of 1985: "1. Foreigners in Spain are entitled to the rights and freedoms recognized by Title I of the Constitution in the terms established by the present Law and the laws regulating the exercise of each one of them. 2. Foreigners that, due to their residence or interest, are related to Spain shall fulfill the established requirements for their identification and are bound to duties, obligations and impositions enforced by the legislation, except for the ones exclusively corresponding to Spanish".
5. Fiscal, Administrative and Social Order Measures Act. BOE 31.12.1996.
6. Mercader Uguina, J.R.: "La protección social de los trabajadores extranjeros", in Derechos y Libertades de los Extranjeros en España. Tomo II. XII Congreso Nacional de Derecho del Trabajo y de la Seguridad Social, Goverment of Cantabria, 2003, p. 1103-1216.
7. Article 1 of the LGSS "2. All the Spanish and foreign citizens that have their residence established in national territory are entitled of the right to healthcare and primary attention".
8. Gorelli Hernández, J. y Vílchez Porras, M.: "La protección social de los alógenos", in Extranjeros en España. Régimen Jurídico. Laborum, Murcia, p. 95-139.

emergency public healthcare when suffering serious illnesses or accidents, no matter what the cause, until their medical discharge. Foreign citizens under eighteen staying in Spain are entitled to receive healthcare under the same conditions as Spanish citizens, and pregnant foreigners will have the same right during pregnancy, birth and postnatal care.

Accordingly, relating this to articles 10.1 and 14.1 Law 4/2000, when recognizing illegal immigrants in Spain the right to Social Security, both at contributory and non-contributory levels, and under Article 1.2 LGSS when establishing the right to healthcare and primary attention for all te Spanish and foreign citizens whose legal residence is in Spain, we can conclude that Article 12 is referring to foreigners who are in our country, regardless of their administrative status, as the common case of being in a regular situation is established in Article 10.1 and 14.1 Law 4/2000 and in Article 12 LGSS. In these cases, the registration in the census is not necessary for receiving healthcare, which is the same case as for Spanish citizens[9].

According to Alvarez Cortés, this Article 12 of Law 4/2000 is written in such a way that it will allow for the protection of foreigners whose situation in Spain is irregular[10].

A. FOREIGNERS REGISTERED IN THE MUNICIPALITY CENSUS

Article 12.1 Law 4/2000 establishes that foreigners registered in the census of the municipality were they have their habitual residence will be entitled to the right of healthcare "under the same conditions as Spanish citizens".

This law introduces a change of great interest and relevance, because it involves overturning the traditional requirement of "legal residence". Thus, the guarantee of transparency regarding the actual population of a specific municipality will, according to Law, confer the social right to healthcare under the same conditions as Spanish citizens. This guarantee is aimed to reconcile the protection of those whose healthcare needs are granted by this personal right (which would lead to extending protection to any person being currently in the territory in an equal position as with Spanish citizens)with fulfilling the exigencies of control and rationality of any universal public service (which would lead to the limitation of access of those persons who are able to prove a minimum stability or

9. Fernández Collados, B.: El estatuto jurídico del trabajador extracomunitario en España, Laborum, Murcia, 2007.

10. Álvarez Cortés, J.C.: "Los beneficiarios del derecho a la asistencia sanitaria en la Ley de extranjería", Relaciones Laborales I, 2001, La Ley, Madrid, 2001, p. 365-398.

settlement in our country)[11]. Therefore, by simply registering themselves in the census, foreigners become holders of the same right to healthcare as any Spanish citizen[12], this being the "key to change" [13] and a logical requirement for illegal immigrants[14].

The greatest change that has been questioned and criticized is the Seventh Additional Disposition of the Law regulating the rules of local government (Ley 7/1985 de 2 de Abril, Reguladora de las Bases de Régimen Local; hereinafter and according to the Spanish acronym, LBRL) when establishing after the reform of the Organic Law of 2003 the following: "the General Directorate of the Police will have access to the data contained in the inscription of foreigners in the municipality census, preferably by telematic means. In order to guarantee the strict fulfillment of the regulation of personal data protection, access will be performed with the highest security measures". It seems unlikely that the General Directorate of the Police will obtain and use the data from census for monitoring the administrative status of foreigners[15]; nevertheless, since the enactment of the Law 4/2000, it is assumed that, if there have been few illegal immigrants venturing to register themselves in the census for fear of highlighting their irregular situation[16], there will be fewer and fewer who will consider registering in the future.

The legislature has considered healthcare as a right directly related to the dignity of the person, and is willing to recognize it with the same extension for foreigners as for nationals, with only the condition of registering in the census[17].

11. Molina Navarrete, C.: "Artículo 12. Derecho a la asistencia sanitaria", in Comentario a la Ley y al reglamento de Extranjería e Integración Social (LO 4/2000, LO 8/2000 y RD 864/2001). Comares, Granada, 2001, p. 232-245
12. Fernández Orrico, F. J.: "La protección social de los extranjeros en España", Aranzadi Social núm. 21/2001 parte Estudio, Aranzadi, Pamplona, 2001, pp. 1-17. Luján Alcaraz, J. J.: "El trabajo de los extranjeros en España en la Ley Orgánica 4/2000, de 11 de enero (RCL 2000, 72 y 209)", Revista Doctrinal Aranzadi Social vol. V parte Tribuna, Aranzadi, Pamplona, 1999, p. 1-14.
13. Mercader Uguina, J. R.: "La protección social de los trabajadores extranjeros", in Derechos y Libertades de los Extranjeros en España. Tomo II. XII Congreso Nacional de Derecho del Trabajo y de la Seguridad Social, Gobierno de Cantabria, 2003, pp. 1103-1216.
14. Ballester Pastor, M. A. y Blasco Pellicer, A.: "Aspectos socio-laborales de la nueva Ley de Extranjería. Análisis de una regulación provisional", Justicia Laboral nr. 2, Lex Nova, 2000, Valladolid, pp. 5-32.
15. Fernández Collados, B.: El estatuto jurídico del trabajador extracomunitario en España, Laborum, Murcia, 2007.
16. Álvarez Cortés, J. C.: "Los beneficiarios del derecho a la asistencia sanitaria en la Ley de extranjería", Relaciones Laborales I, 2001, La Ley, Madrid, 2001, p. 365-398.
17. Fernández Orrico F. J.: "La protección social de los extranjeros en España", Aranzadi Social núm. 21/2001 parte Estudio, Aranzadi, Pamplona, 2001, p. 1-17.

B. ACCIDENT OR SERIOUS ILLNESS OF FOREIGNERS THAT ARE NOT REGISTERED

The second paragraph of Article 12 of the Law 4/2000 establishes that those foreigners suffering an accident or serious illness, "are entitled to have access to emergency healthcare until the point of medical discharge". The concept of "accident" does not need further explanation since it includes any harm caused by an external agent[18].

1. Foreigners under eighteen

Article 12.3 of Law 4/2000 anticipates that foreigners under the age of eighteen that are in Spain will have the right to healthcare under the same conditions as Spanish citizens. The criteria of equal treatment with Spanish citizens is again established by recognizing this right for younger illegal immigrants. Before the approval of this Law, there were major legal vacuums, since these foreigners received the same treatment as illegal foreigners over eighteen. Thus, the Law legalizes this practice that until that time was an isolated consideration[19].

2. Pregnant foreigners

Article 12.4 of the Law 4/2000 considers the category of pregnant foreigners, establishing that they will be entitled to the right to healthcare during the pregnancy, birth and postnatal care under the same conditions as Spanish citizens[20]. Moreover, interpreting the law, the healthcare to

18. Tarabini-Castellani Aznar, M.: Reforma y contrarreforma de la Ley de Extranjería (Análisis especial del trabajo de los extranjeros en España) Incorpora el RD 864/2001, de 20 de julio, que aprueba el Reglamento de ejecución de la Ley de Extranjería. Tirant lo Blanch, Valencia, 2002.

19. Masso Garrote, M. F.: Nuevo Régimen de Extranjería. Comentarios, Procedimientos, Formularios, y Modelos de la LO 4/2000, de Extranjería, tras la reforma de la LO 8/2000. La Ley, Madrid, 2001, pp. 166-169; Mercader Uguina, J. R.: "La protección social de los trabajadores extranjeros", en Derechos y Libertades de los Extranjeros en España. Tomo II. XII Congreso Nacional de Derecho del Trabajo y de la Seguridad Social, Gobierno de Cantabria, 2003, pp. 1103-1216; y Usúa Palacios, F.: "Seguridad Social y Servicios Sociales", in Comentario Sistemático a la Ley de Extranjería (LO 4/2000 y LO 8/2000). Comares, Granada, 2001, p. 640-658.

20. Gorelli Hernández, J. and Víchez Porras, M.: "La protección social de los alógenos", in Extranjeros en España. Régimen Jurídico. Laborum, Murcia, p. 95-139, Ballester Pastor, M. A. and Blasco Pellicer, A.: "Aspectos socio-laborales de la nueva Ley de Extranjería. Análisis de una regulación provisional", Justicia Laboralnr. 2, Lex Nova, 2000, Valladolid, pp. 5-32.

which they are entitled not only covers the pregnancy and birth but also includes any other condition they might have[21].

III. THE ORGANIC LAW/2009[22] AND REGISTRATION IN THE CENSUS AS A CONDITION FOR ACCESS TO HEALTHCARE

Article 12 scarcely changes after the Organic Law/2009. The only requirement for foreigners is still registration in the census of the municipality where they habitually live[23]. In any case, foreigners who are under eighteen[24] or pregnant[25] are exempt from fulfilling the requirement of registration, and will have the right to healthcare.

The new drafting offers a subtle variation which strengthens the entitlement to the aforementioned right, on equal terms with Spanish citizens. Thus, it only requires a "habitual permanent address" in order to be registered. This norm overcomes any doubt regarding the requirement of a habitual residence in a Spanish municipality as a result of an administrative authorization for residence. Reading Article 12 jointly with paragraph VII of the Preamble shows that it is not mandatory for foreigners to have residence or to stay in Spain in order to exercise their rights to healthcare. By these means, the legislature does not connect their entitlement to specific rights, and particularly, to the right to healthcare, to the foreigner's administrative situation[26].

IV. THE ROYAL DECREE-LAW 16/2012, OF 20 APRIL, OF URGENT MEASURES FOR GUARANTEEING THE SUSTAINABILITY OF THE NATIONAL HEALTH DYSTEM AND IMPROVE THE QUALITY AND SECURITY OF ITS BENEFITS[27]

The Royal Decree-Law 16/2012 has modified the regulation concerning the regime of foreigners' status and healthcare. One of the most important

21. Fernández Orrico, F. J.: "La protección social de los extranjeros en España", Aranzadi Social núm. 21/2001 parte Estudio, Aranzadi, Pamplona, 2001, p. 1-17.
22. Organic Law 2/2009, of 11th December reforming the Organic Law 4/2000, of 11th January on rights and freedoms of foreigners in Spain and their social integration. BOE of 12th December 2009.
23. Article 12.1 Organic Law/2009.
24. Article 12.3 Organic Law/2009.
25. Article 12.4 OrganicLaw/2009.
26. Arbeláez Rudas, M.: "La nueva regulación del derecho a la asistencia sanitaria de los extranjeros. Comentarios sobre las modificaciones en la redacción del art. 12 LODYLE", in Comentarios a la reforma de la Ley de Extranjería (lo 2/2009). Tirant lo Blanch, Valencia, 2011, p. 109-114.
27. BOE of 24th April 2012.

measures it establishes is not extending the right to healthcare to illegal foreigners, except under specific circumstances. As can be inferred from the Preamble, the modifications are especially necessary in the current context of the economic crisis that we are suffering, in order to rationalize Public Expenditure and increase efficiency while managing the health services by the Autonomous Communities.

Article 86 of the Spanish Constitution grants the Government the capacity to dictate legislative norms in cases of "urgent and extraordinary need". And according to the Spanish Constitutional Court, the concept of extraordinary and urgent need "is not a clause lacking significance in which the logical political assessment of the Government is freely performed without any restrictions: it is the verification of a legal limit to the Government's performance capacity imposed by Decree-Laws"[28].

A. CONDITION OF THE INSURED PERSON

One of the most relevant modifications introduced by the abovementioned Royal Decree-Law affects Article 3 of the Law 16/2003, of 28th May[29], in which the determination of the entitlement to the right to healthcare changes from requiring the status of citizen to the status of insured. After this regulation, we will have to talk about beneficiaries instead of persons or citizens, corresponding the recognition of that status by the National Institute of Social Security instead of the healthcare institutions.

1. Registration in the census

Another of the important changes introduced by the abovementioned Royal Decree-Law is that regarding the registration in the municipal census of the place of residence. So, since the modification made by an Article of the Law 16/2003, of 28th May, those illegal immigrants will not be entitled to the right to healthcare, despite being registered[30].

As regards the right to healthcare itself, Article 12 of the Organic Law/2009 also modifies that right, stating: "foreigners shall be entitled

28. Ruling of the Constitutional Court 68/2007, of 28th March 2007 (Appeal to the Constitutional Court: RTC 2007,68).
29. Quality and cohesion of the National Health System. BOE 29.5.2003.
30. Article 3 ter. Healthcare in special situations. "Unregistered or not authorized foreigners to reside in Spain, shall be entitled to healthcare in the following modalities: a) emergency healthcare due to serious illness or accident until the medical discharge, whatever the cause might be; b) Care while pregnancy, birth and afterbirth. In any case, foreigners under eighteen will be entitled to healthcare under the same conditions as Spanish."

to healthcare under the terms established by the healthcare legislation in force".

This revocation causes problems, especially, in relation to medical ethics, that obliges healthcare to be given to anybody in need[31].

2. Considerations to the Royal Decree-law

This regulation excluded the right to healthcare from certain national collectives of citizens, like those over 26 years that have not yet held a job. The Royal Decree 1192/2012 of 3rd August[32], published for developing the Royal Decree-Law 16/2012 will correct this situation. It contains and extends the group of persons that may be considered as insured individuals by means of the 2nd paragraph of Article 3 of the Law 16/2003[33].

Thereby, the status of insured is also applied to those who do not have a higher annual income than one hundred thousand euro and do not have the opportunity to obtain healthcare by other means, if they are in one of the following cases: having Spanish nationality and residing in the Spanish territory; being nationals of another EU Member State, of the European Economic Zone or Switzerland and being registered in the Central Register of Foreign Nationals; being a national of a different country than those above mentioned, or stateless, and entitled to a residence authorization in Spain, while it is in force on the terms mentioned in the specific legislation[34].

Paragraph 3 from the Article 3 of the Law 16/2003 establishes that foreigners who are "holders of an authorization to live in the Spanish

31. Beltrán Aguirre, J. L.: "Real decreto-ley 16/2012, de 20 de abril, de medidas urgentes para garantizar la sostenibilidad del sistema nacional de salud. Análisis crítico en relación con los derechos ciudadanos y las competencias autonómicas." Revista Aranzadi Doctrinal núm. 3/2012 (Tribuna), Aranzadi, Pamplona, 2012, p. 1-10.
32. Establishing the condition of insured and beneficiary to receive healthcare in Spain assumed by public means through the National System of Healthcare. BOE4.8.2012.
33. Article 2.1.a) Royal Decree 1192/2012, of 3rd August, "for the considerations established by this Royal Decree, persons considered as insured individuals are the following: a) the ones considered under the cases stated by Article 3.2 of the Law 16/2003, of 28th May, on cohesion and quality of the National Healthcare System, that are the following: 3rd. Be entitled to any periodic benefit granted by the Social Security, like the benefit and the unemployment benefit or others of similar nature. 4. Losing, while being unemployed, the unemployment benefit or others of similar nature not proving the condition of insured by any other title. This case is not applicable to persons mentioned in Article 3 of the Law 16/2003, of 28th May".
34. Article 2.1.b) Royal Decree 1192/2012, of 3rd August. Also the youngsters under administrative guardianship will be considered insured, except for the cases considered under Article 3 of the Law 16/2003, of 28th May. Article 2.2 Royal Decree 1192/2012.

territory when they do not fulfill one of the cases mentioned in the 2nd paragraph will be considered as insured individuals only if they do not exceed the income limits legally established".

Therefore, foreigners must be residents and have the status of insured as stated by Article 3.2 of the Law 16/2003 in order to have access to public healthcare in our country and be entitled to this right in the same way as Spanish citizens. If any of the requirements contained in the former article is not fulfilled, it is necessary to prove an income under one hundred thousand euro and also, that healthcare is not obtainable by other means[35].

Illegal foreigners will not be entitled to the right of healthcare under the same conditions as Spanish citizens or resident foreigners, even when they are registered, except for the special cases described in Article 3 in the Law 16/2003, included by the Royal Decree-Law 16/2012. This article reproduces what is stated in paragraphs 2, 3 and 4 of Article 12 of the Organic Law/2009, when establishing that unregistered foreigners or foreigners not authorized to reside in Spain shall be entitled to healthcare in cases of emergency due to serious illness or accident, independent of its cause, until medical discharge, and in cases of assistance to pregnancy, birth and postnatal care. In any case, foreigners under eighteen will receive healthcare under the same conditions as Spanish citizens.

3. Special agreement on healthcare

According to Article 3.5 of the Law 16/2003, the Third Additional Disposition of the Royal Decree 1192/2012 considers the regulation of a special agreement by means of which those persons not being insured or beneficiaries, and who do not have access to healthcare by any other means, shall be entitled to healthcare by paying a rate or a specific amount. Among these persons, illegal foreigners could be included. We are talking about the Royal Decree 576/2013, of 26th July, which establishes the basic requirements of the special agreement for granting healthcare to persons that do not have the condition of insured or beneficiaries of the National Health System, and which modifies the Royal Decree 1192/2013, on the condition of insured and beneficiary under the healthcare in Spain, charging it to public budgets through the National Healthcare System[36].

All persons who are resident in Spain and who do not have the condition of insured or beneficiary of the National Healthcare System shall be able to sign the special agreement to have access to healthcare, and

35. Article 2.1.b.3.º Royal Decree 1192/2012; Article 8 bis Law 16/2003. And additional provisions forth and fifth of the Royal Decree 1192/2012, modified by the Royal Decree 576/2013.

36. BOE of 27th of July 2013. In force since 1st of September 2003.

this possibility can also be extended to illegal immigrants. Nevertheless, it is compulsory to prove the effective residence in Spain during a specific period, being registered in the census at the moment of applying for the agreement, and not being entitled to any public healthcare system due to other circumstances. Signing the agreement will not imply issuing the insurance card[37].

The above mentioned healthcare agreement will grant the persons subscribing it the access to the benefits included in the basic common portfolio of care services from the National Healthcare System[38]. The benefits contained in the supplementary common portfolio and the accessory services common portfolio[39] are excluded[40]. However, due to their basic content, the Autonomous Communities will be able to facilitate their own care benefits mentioned in their complementary service portfolio, beyond those included among the services of the common portfolio of the National Health System[41], if the Autonomous Community has incorporated them into the special agreement[42].

The minimum economical rate that the person subscribing the special agreement shall pay is 60€ monthly when the subscriber is under 65 and 157€ if he is 65 or over.

Definitely, the Royal Decree-Law 16/2012 only extends public and free healthcare to illegal foreigners over 18 in cases of emergency due to serious illness or accident and only until medical discharge.

4. Constitutional appeals against the Royal Decree-law 16/2012

Among the consequences following the reform made by the controverted Royal Decree-Law has been the admission by the Constitutional Court of the unconstitutionality appeals brought by the Andalusian and Asturian Governments.

As published in the (Spanish) States´ Official Diary (BOE), the appeals brought by the Asturian and Andalusian Governments against articles of the Royal Decree-Law 6/2012 were admitted.

It only remains to wait for the decision of the Constitutional Court to answer those important questions.

37. Article 57 of the Law 16/2003 and Article 4 of the Royal Decree 1192/2012.
38. Article 8 bis of theLaw 16/2003
39. Article 8 of the Law 16/2003.
40. Article 8 of the Law 16/2003.
41. Article 8 quinquiesof the Law 16/2003
42. Article 2.2 of the Royal Decree 576/2013.

Chapter X

Obesity, disability and the Court of Justice in the European Union

José Joaquín Pérez-Beneyto Abad

Judge of the High Court of Justice of Andalusia

I. INTRODUCTION

On December 18, 2014, the European Court of Justice published a sentence (Case C-354/13, Fag og Arbejde (FOA) against Kommunernes Landsforening [KL]) responding to a preliminary ruling addressed by a Danish court in a process to claim for damages raised between a public employee and the Danish administration, in which the incidence of obesity on the maintenance and extinction of the employment contract relationship between a worker and the company where he was employed was analyzed.

The fact consisted on the dismissal of a caregiver by his employer, a Danish municipal administration, this dismissal was based on objective reasons, due to organizational and productive causes: the decrease in the number of children that each worker had to take care of.

The contract relation began on November 1, 1996, by means of a contract of limited period establishing the care of children in his own residence. The temporary contract relation turned into permanent after two years and lasted fifteen years until the dismissal occurred. It is a fact that the worker was already "obese" (BMI over 30) from the very beginning of the working relation and remained the same during the time when the contract relation was effective. The worker had tried to lose weight several times-even with economical support provided by his employer in the frame of the health policies established for the development of public servants— without any positive results. The worker was on leave for one

year, going back to work in March 2010. The company contacted him to communicate that they had begun the legal procedure for the dismissal of the contract due to objective reasons, being stated as the dismissal clause "…the decreasing number of children and, consequently, the work amount descend due to it, that would imply serious consequences for the childcare service and its organization". The dismissed worker was the only caregiver fired from the total of workers. He maintained that the real reason for having being fired was his obesity, and he claimed to have been treated in a discriminatory manner.

The worker presented a claim for obtaining the damages compensation and the Court in Kolding suspended proceedings to raise four prejudicial questions regarding the existence of possible discrimination for obesity in the European legal scope and the inclusion of obesity in the general definition for disability.

Basically, the response given by the ECJ starts from two statements considering if the law in the European Union establishes a general principle of non discrimination on account of obesity under the scope of employment and occupation. The first one takes into consideration the existence, among the fundamental rights belonging to the general principles of European law of a general principle of non discrimination due to that reason, but there is no article in the Treaties with a concrete prohibition regarding discrimination by means of obesity. And, the second one, it is not possible to extend the application scope of the Directive by means of analogy. The ECJ sustains both precisions in the cases Chacón Navas, C-13/05, and Coleman, C-303/06 and concludes by asseverating that "EU law has not enshrined a general principle of non-discrimination on grounds of obesity under employment and occupational scope".

However, the ECJ could not disclaim two circumstances. One of them, the sentence ECJ from 11th April 2013 (C-335/11 and C-337/11 HK Denmark) and the other, the adhesion of the EU by Decision taken by the Council the 26th November 2009 to the UN Convention on the Rights of Persons with Disabilities and its Optional Protocol from 2006. The consequence of this adhesion is that the ECJ performs the Directive 2000/78 by considering the obesity a motivating cause of disability, which is already entitled to be considered discriminatory on grounds of art. 1 of the Directive. Comparing obesity to disability, the ECJ argues that the protection of the latter can be extended to the former when the conditions for disability concur under the Directive 2000/78/CE by the Council from 27th November, i.e., "where it entails a limitation resulting in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective

participation of the person concerned in professional life on an equal basis with other workers".

In summary, the ECJ interprets the concept of disability as referred to a long-term limitation, resulting from physical, mental or psychological impairments which in interaction with various barriers may hinder the performance of his professional activity or can constitute a long-term limitation, that could be included in the concept of disability established in the Directive 2000/78.

II. DISABILITY MODELS

An overweight person is someone whose corporality has not yet been recognized in its singularity and nowadays, as in the case of disability, consists of a social, cultural and historical construction on social categories conforming a different schema depending on the times we take into account. So, following its social development through history, we find diverse explanatory models of disability, beginning with a total absence of its consideration in Ancient Greek and Roman world, thought to be a divine punishment, to a biological deficiency and till nowadays, when an overlapping of two models, the medical and the social one are seen.

During the XVII and XVIII centuries disability began not to be considered of divine origin anymore, but an effective cause of the organism, and so it has begun to be studied by the medical science. Disability is fundamentally equated to the physiological substrate on which it is originated, it means, the deficiency, no matter if physical, sensorial or psychical, and is associated to the concept of "illness". The arise of the capitalist societies linked to the Industrial Revolution consolidated a scientific-medical vision of disability from logical Positivists and Darwinists points of view. Medicine has conquered spaces that symbolized the economical and aesthetic success reproduced until nowadays: aesthetic surgery, healthy diets and a long lists of examples longing for the healthy body, identified with a beautiful body associating it to success.

Medicine gives disability its actual sense, presupposing, because it has been stated by the medical science, that the human organism shall fulfill some standards in its constitution and performance in order to be classified as normal. A diversion from the medical standards corresponds to a non suitable organism for performing certain functions that a normal body could perfectly do. After all, reality is just a social construction crossed by dominant speeches. The abnormality emerges as the opposed to the norm, the diversion arises as the contrary of the law, the disability comes up as opposite of the health, the disabled body as the other compared to the healthy-beautiful body considered as the ruling pattern.

In the last decades, disability is submitted to a model named mostly after a social model, for which disability is caused ultimately by the environment, by the context surrounding the person. It does not consist of a model trying to force a sociological vision for the study of disability, but simply, points out its social dimension for not having been adequately considered, pointing out that disability is the product of interaction between the human physiological substrate and the environmental social conditions surrounding him in his habitat and that can consist in barriers or obstructions.

Disability only reaches its own sense in a specific social and cultural context. Disability can be conceived differently from an objective characteristic applied to the human being, but as an interpretative construction belonging to a culture in which, due its particular way to describe the normality, disability would be a derivation of that norm. So, for example, the prevailing hierarchy of senses has not always been the same, we passed from the oral culture to a visual one after the invention of the alphabet, due to the writing, that became the principal way of acquiring knowledge. This fact was intensively improved by the invention of the printing and the massive literacy occurred in the state run schools.

We can also verify how our own personal identity is socially built because it is originated in the coexistence with other individuals; in the case of disabled persons, their identity is being built by others, by people with no disability.

Ultimately, the process we have just described shows how something apparently neutral in principle (obesity) is socially built and follows some scientific and ideologically interested parameters, until they reach in the social imagination an idea considered the reference for daily performances. In the same sense, obesity is considered in the same imagination through a similar scientific-medical knowledge and intervention. Both realities refuse their neutrality for becoming legal concepts. Everything that does not fulfill the norm is, following its definition, abnormal, and needs a special consideration. The social reality is being built under the impulse of dominant speeches that cover others to be finally considered the unique and truly ones, erasing the former.

III. DISABILITY AND FORDISM

The First World War caused the maiming of thousands of people who, once the conflict was finished, faced the impossibility of their assimilation into society. Simultaneously, a new economical system associated to the second Industrial Revolution emerged ruling the living and productive

conditions. It consisted of a new productive order that excluded the participation of persons not suitable to contribute with all their work force, on one side, those who began to be considered abnormal or deviant considering the patterns of the "statistic normality". And, on the other, that productive order becomes an efficient producer of work injured: ex-workers not suitable to perform their duties in factories, who, in addition to the massive itinerant war handicaps conducted the States to create policies and healthcare measures from a social scope (subsidies, benefits, social benefits) to a medical one (rehabilitation for returning to the production system). As a result,, all the professions linked to those policies and measures emerged and were consolidated.

Professional activity has been consolidated since the beginning of the XXth century as the fundamental condition for the existence of all persons. Economical structure articulated around the capitalist industrial production has driven most human beings to assume the working condition? Fordial[1] capitalism needs specific functional requirements; in other words, it requires capable, productive manpower. On the other hand, it also needs solvent consumers, so that for the majority, the first condition is a requirement in order to fulfill the second one. In this economical system, disabled people cannot offer the required efficiency conditions that are necessary for performing the work to be done, and this fact justifies their withdrawal from the system. As a result of this exclusion, disability acquires a specific form: an individual problem requiring medical treatment. The conclusion becomes obvious, so if production is an essential element in capitalists societies, disabled persons are in an extremely disadvantageous position, since they cannot sell their work force as others, because it is established that they do not produce the same. Under the consumerist view, they are also rejected from that space, since they cannot consume following the same standards as those who have no impairments.

IV. SOCIAL MODEL FOR DISABILITY

A new movement appeared at the end of the sixties proposing a political way that would overcome the independence and autonomy disabled persons lacked by practicing a medical model and an idea of independence is established for answering and breaking off from the previous model. Namely, independence in relation with practices denying or undermining it. The emphasis is driven to attain an effective equality in rights and opportunities among disabled persons, and to adopt necessary measures to accomplish it. This leads to practices which are typical of the

1. T. N.: based on the assembly line production invented by Henry Ford in 1913.

social model, among which the consideration of the disabled's entitlement to rights appears. Disability is going to be considered not the result of a deficient physiological substratum, but the consequence of social structures that does not count with the real needs of the disabled while marginalizing and excluding them from participation of collective life. So, disability has been transferred from the individual to the collective level, the social context mainly being the one producing the concept in a specific sense; in the same way as some associated practices such as a context, where physical spaces are inadequate and the stereotype discriminatory, will also produce disability.

A basic idea of the social model is to consider disability the result of a disabling society instead of the result of a personal corporal pathology. Disability is to be taken as a problem located in society itself, so that the way to weaken it needs to be transforming the social environment.

Disability produced by society is directly related to discrimination.

The social model explained the causes that motivated the historic origin for disability in its modern definition, placing the causes for its oppression in the structural requirements of the capitalist system, fundamentally, capable, efficient and productive manpower.

Likewise, since the social model claimed the autonomy of these persons to decide on their own lives, it therefore focused on removing any type of obstacles, in order to offer an appropriate equality of opportunities. These obstacles lead to the inaccessibility to education, information and communication systems, work environments and provoke unsuitable benefit systems for disabled, discriminating health and social support services, transport, residence, inaccessible public buildings and leisure spaces, and also the devaluation of persons classified as disabled by their both their image and their negative representation in mass media.

Even the EU has assumed those new considerations regarding discrimination due to disability, stemming from the social model, insisting that the requirement for goods and services provided by society shall be adapted to possible special needs for the person, and not the other way around ("Discrimination by design". Working document. European Day of persons with Disabilities. Conference 3-12-2001). It is remarkable to mention regarding it that historically and since its very first beginnings, the Movement for Independent Life was aware that design constituted a crucial element in the way to equality when equal opportunities in the exercise of their civil rights for disabled persons were being demanded.

V. THE DISABILITY MODEL UNTIL THE ECJ 18-12-2014 SENTENCE (CASE C-354-13)

The ECJ used to follow the medical model, the one considering disability as an individual condition, being the result of a physical, psychical or sensorial deficiency. To date, the Court interprets disability as an illness situation and assumes that people with any disability shall go through a rehabilitation process to resemble in as much as possible to the rest "healthy" and "able" persons in society. Disabled people become thus object of mainly medical attention and their reality is considered from a highly medical perspective. Following those statements, the Court was settling that a worker affected by an illness was left out of the application of non-discriminatory norms. Illness is not a discriminatory element for the Court, since it is not even mentioned as such in Community Directives nor can it be subsumed under the circumstances considered by them. Thereby, the sentence from 11th July 2006 (Case Chacón Navas) explained that the person dismissed exclusively due to illness is not included under the protection of Directive 2000/78/CE and also interpreted that Community law dismisses equating illness with disability since "there is no disposal in the EC Treaty containing a prohibition to discriminate by means of illness" and "the scope of Directive 2000/78 should not be extended by analogy."

As it is more and more common, echoes of American Law are changing European case-law, due to the severe limits of the discrimination causes in Community Law, that do not permit enclosing potentially discriminating situations, under its protection, like obesity, in which elements not considered in the norm but that shall receive legal protection, concur. Therefore, those causes that are not able to be assimilated or identified with the ones expressly protected in the anti-discrimination Directive (Directives 2006/54, 2000/78 and 2000/43) are encased under the non-discriminatory protection by the Court, creating a new interpretation on the concept of disability including in it, from the perspective of the functional repercussion, not only the impossibility of performing a professional activity, but also the difficulty of its performance and, from the perspective of the illness causing a limitation, when the characteristics of the illness and its permanence expectation can constitute an obstacle for the complete and effective participation of the person in his professional life in equal conditions as the rest of workers due to different barriers interacting.

North American Law uses non-discriminatory protection as a referent and identifies obesity with the case in which a functional diversity, physical or mentally, determines a bigger or lower limitation in activities or when it is medically recognized or when it is assumed that it will drive

to it, without needing any psychological disorder in addition to outlaw dismissal if it is possible to continue performing the fundamental tasks of the job, with or without reasonable adjustments and, therefore, if it is just based on simple perceptions or prejudices. On the other hand, North American case-law maintains different favorable thesis to the binomial obesity-discrimination, associating it to disability in 2008 in the sentences EEOC v. Resources for Human Development, Inc, and EEOC v. BAE Systems Tactical Vehicle Systems, LP, and finally, Whittaker v. America's Car-Mart, Inc., case No. 1:13-cv-00108, in the U.S. District Court for the Eastern District of Missouri, cases that equate morbid obesity to disability, considering the cases perfectly subsumable under the Americans with Disability Act, ADA.

The latter sentence is almost contemporary with the SECJ dated on 18th December 2014, case C-354/13, Fag og Arbejde (FOA) y Kommunernes Lands forening (KL) that curiously reaches a similar conclusion while admitting the equalization of obesity and disability and, consequently, the protection based on this protection when concurring the conditions for it under Directive 2000/78/CE from the Council, from 27th November.

Canadian courts had already stated their own and more interesting answer from the point of view of warranties entitled to the obese worker regarding the Law against discrimination in the work, overcoming the tight limits on the causes established by non-discriminatory European Law (Canadian Charter of Human Rights and Freedoms, Part I of the Constitution Act, 1982, Schedule B of the Canada Act 198297, c. 11; the Employment Equity Act de 1986).

A specific treatment was given in the scope of labour to this cause of discrimination, but under the framework of human rights, under which the protection for obesity by means of assimilating it to disability is understood.

VI. THE MODEL OF DISABILITY IN THE ECJ 18-12-14 SENTENCE (CASE C-354/13)

The Community Law turns into the social model due to the influence of American Law, that created the model ON that shore of the Atlantic.

We consider as disability what is not related to causes of individual or medical nature, but of social nature, and whose origin is the limitations imposed by society for offering services that can take the performing requirements (physical, psychical and sensorial) of every person into account. It assumes that disabled persons can take part in the society in equal conditions as others, something which requires the inclusion and acceptance of their difference. Disability is considered the result of a

disabling society and the only way to weaken it requires, a transformation of the social environment.

The union of practices attributable to the social model emerges as the answer to previous practices carried out by the medical model, with a fundamentally emancipatory component from which a totally opposite context to the performances by the medical model is claimed. The disabled person's status rises and is considered entitled to rights, far from the former vision as simple object of rehabilitating care; those rights are being claimed as an assertion of the autonomy and the capability to decide of disabled persons, as the demand of both respect for them and equal opportunities in all the spaces and contexts from the society.

Ability and disability take us to performance conditions. Performance, like these categories, is thus a social construction related to the body. The performance categories are related to the organic difference between a healthy and a sick body, between health and illness, which, taken to the functional level, drives to determine an efficient performance (ability) and a deficient one (disability). This implies for example, the so-called "physical disability" as a deficient physical performance, or a deficient performance on a physical level. So that starting from the health and illness conditions tribute to an organism, we arrive to the medical and social construction for performance by means of capacity (functional efficiency) and disability (functional deficiency).

The sentence from 18th December 2014, Case C-354/13, Fag og Arbejde (FOA) y Kommunernes Lands forening (KL) implies the turn to a social model for disability and, literally, conceives it as "it entails a limitation resulting in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers" . To equalize obesity with disability, the ECJ requires the following characteristics:

a) The existence of an obesity level that could be symptomatic of a pejorative treatment while interacting with various barriers that may hinder the full and effective participation of that person in professional life on an equal basis with other workers. (p. 59), independently of the cause that would have motivated it (p. 56), not constituting a 'disability' in itself, despite the serious level of it (p. 58).

b) That obesity limits or prevents the achievement of the professional duties by themselves, independently of the application of reasonable settings (p. 57) on account of reduced mobility or the onset, in that person, of medical conditions preventing him from carrying out

his work or causing discomfort when carrying out his professional activity (p. 60).

c) Obesity as long-lasting, considered to be permanent, though not necessarily definitive.

d) The court or judge entitled to solve the question shall prove both the permanence of the illness or the excluded limitation and the existence of barriers that could interfere in the total working inclusion of the person hypothetically discriminated (p. 62), according to the rule for the "flexibility" of the burden of proof (p. 63).

VII. REVIEW

Although from the political point of view, the proposals emerged from the social model seem to be enough for reaching legally the equal of opportunities and the absence of discrimination, from the ethic scope, the model entails shortage because any human being, not depending on the nature or complexity of the functional diversion that affects him, is granted to receive equal based dignity, defining the idea of dignity as a trait that pertains to all, and not leaving open to interpretation that some human beings can be worthier than others.

The conclusion is that disabled persons have the right to equal opportunities, on account to their humanity, and not due to functionality. We overpass the traditional concept of human dignity established in the social model, based on capacity, in several competences, generally rational ones, that are intrinsically part to a regulated and functional human being, given equal value to all lives of every human being, whatever his functional diversity might be and guaranteeing the same rights and opportunities for everybody. Therefore, the word functional diversity should substitute the word disability as the positive expression of this vital situation inherent to human life and accept functional diversity as another one of the diversities conforming and enriching humankind.

In this diversity model, every person acquires the same dignity and human condition. All the persons are entitled to the same moral value, independently from their abilities or disabilities and, therefore, shall have the same human rights granted. In this model, the fact of disability turns into a question of ethic and philosophical character and acquires a moral status (unreachable until now), through which any person with serious disability and despite being incapable of taking care of himself acquires the same condition regarding humanity and dignity; and thus, any discrimination suffered by this person will be expressly as a violation of the human rights belonging to disabled people.

Chapter XI

The EU minimum income scheme two decades later[1]

Mª Dolores Ramírez Bendala

University of Seville

I. INTRODUCTION

On 12th February the Decision adopted by European Economic and Social Committee (EESC) approved on 11th December 2013 on European minimum income and poverty indicators was presented in the European Parliament Offices in Madrid[2]. The own-initiative Opinion issued by this EU consultative body analyses in-depth an essential topic from the EU social policies scope, and is focused on the economic, social and territorial cohesion.

This Opinion encourages EU Institutions to draft a Directive which expands the minimum income regimes to all Member States and to improve the effectiveness of those that already exist always considering the diverse national contexts. The aim of this Directive would be to combate poverty and social exclusion and to encourage and facilitate the active inclusion in labour markets of all affected persons. For this purpose, it offers measures and actions for not only guaranteeing coverage to people in need, but also transit and socio-labour insertion programmes.

Now the old debate about the need of recognising a right to establish a

1. This report has been published in the framework of the R & D project "Good Legal Practices in the Field of Labour and European Law to Reduce Labour Litigation Expenditure at Zero Cost (I+D DER 2012-32111).

2. Opinion of the European Economic and Social Committee on European minimum income and poverty indicators (own-initiative Opinion) 2014/C 170/04, (OJEU 5.6.2014).

minimum income scheme is reopened, serving as basis for the European social model. This right would be directly linked to the dignity of the person and based on EU founding treaties. Therefore, Article 153[3] of the TFEU establishes that in order to achieve its objectives, the Union shall support and complement the activities of the Member States in fields such as combating social exclusion, the integration of persons excluded from the labour market or the modernisation of social protection systems. In this sense, the Community Charter of the Fundamental Social Rights of Workers (1989) establishes in its Article 10 that persons who have been unable either to enter or re-enter the labour market must be able to receive sufficient resources and social assistance in keeping with their particular situation. Finally we must highlight that the Charter of Fundamental Rights of the European Union (2000), states in its first Article that human dignity is inviolable and that it must be respected and protected. It also establishes the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources. Therefore, it is recognised that the EU and Member States must be involved in combating social exclusion by granting benefits for people in need and guaranteeing the access to services of general interest.

The EESC recognises in its Opinion as a central axis that the Guaranteed Minimum Income (GMI) is income support that is not linked to payment of contributions and that provides a safety net for those not eligible to social security benefits. As the last defence against poverty, it is inextricably linked to the right to a decent life for people who have no other means of ensuring an income and for their dependants. This GMI shall be accompanied by measures of active inclusion in the labour market with the objectives of reinsertion and fight against social exclusion.

II. POVERTY AND SOCIAL EXCLUSION

Firstly, we must delimit the subjective scope of application for the intended right; to which target group the Community action is addressed, or who would be entitled to a minimum income.

In the 80's the Community legislation considered poor people those persons or families whose (material, cultural and social) resources were so limited that they were excluded from the minimum standard acceptable as a way of living in the Member State where they lived. Later, it was proposed that this concept was replaced by the "social exclusion" notion; so the entitlement is not limited only to the lack of economic resources but

3. Consolidated version of the Treaty on the Functioning of the European Union (Official Journey of the European Union 30.03.2010 C 83/47).

its dimension is expanded to the participation in the labour market, social protection systems, education, cultural or housing access.

At present, the Europe 2020 strategy[4] considers that population is at risk of poverty and social exclusion when one of the following situations concurr: a) the at-risk-of-poverty rate is the share of people with an equivalent income at disposal(after social transfer) below the at-risk-of-poverty threshold, which is set at 60 % of the national median equivalent disposable income after social transfers; b) material deprivation (population that cannot afford at least four of the nine items listed)[5]; c) Persons living in households with low work intensity (the number of persons living in a household having a work intensity below a threshold set at 0.20). The EU 2020 Strategy developed an specific rate called AROPE[6] or "At risk of poverty or social exclusion" which is harmonised at the EU level and serves to compare countries' situation. This indicator complements the measuring of poverty with exclusion features and combined with income factors (relative poverty), severe material deprivation and very low work intensity.

We can see that the delimitation of persons concerned and the definition of the configuring elements is extended. The concept of poverty is booming because of the effects of the economic crisis in which we are currently living, the monetary adjustments that impact on the weakest in society and the high unemployment rates and precarious working situations occurring in our time. This way, the number of persons at risk of poverty or social exclusion and inequalities at all levels is increasing. We cannot talk anymore about poverty only taking into consideration the lack of economic resources or material poverty, as poverty is considered as a multi-dimensional problem that affects fundamental areas of the persons life concerned. Concepts such as energy poverty, educational poverty, poverty on health or cultural poverty are therefore analysed. Child poverty, feminisation of poverty, ethnic factor of poverty, old age poverty or working poor are even configured depending on social or demographic aspects[7].

4. Communication from the Commission Europe 2020 "A strategy for smart, sustainable and inclusive growth". Brusels 3.3.2010. COM (2010)2020.
5. The material deprivation indicator refers to the enforced inability to pay at least four of the following nine items: 1) to pay their rent, mortgage or utility bills; 2) to keep their home adequately warm during cold months; 3) to face unexpected expenses; 4) to eat meat or proteins every second day; 5) to go on holiday away from home at least one week per year; 6) a television set; 7) a washing machine; 8) a car; 9) a telephone.
6. At-Risk-Of Poverty and Exclusion.
7. Fernández Maillo, Guillermo. "¿Tiene apellidos la pobreza?, Revista "Estudios y Cultura", Fundación 1º de Mayo no. 65, October 2014.

Statistic data confirms that the levels of population at risk of poverty and social exclusion have increased since the start of the economic and financial crisis; Spain being one of the countries with highest rates[8].

Poverty and social exclusion affect the basic rights of every citizen and are evidenced in different social dimensions. Public authorities shall act at all levels for adopting measures and actions for eradicating all these serious problems which prevent from achieving a balanced European social model.

III. EU MINIMUM INCOME BACKGROUND

European projects and programmes on poverty and exclusion have been developed since 1.975, and were aimed at raising States' awareness of this social problem and on trying to find appropriate channels for mitigating its effects. Nevertheless, the lack of legal basis (as social issues were under the competence of Member States), the attempts to perform operational programmes within this field were unsuccessful. The Treaty of Amsterdam[9] finally settles the EU legal basis for combating social exclusion.

More than two decades have passed since the Council Recommendations 92/441[10] and 92/442[11] encouraged recognizing the basic right of a person to sufficient resources and social assistance in order to live in a manner compatible with human dignity as part of a comprehensive and consistent drive to combat social exclusion, and to adapt their social protection systems, if necessary. Among the general principles that were taken into consideration for recognising this right, the first recommendation establishes that: every person without individual access to sufficient resources is to have access to such right; access is not to be limited in its duration; the right is auxiliary in relation to other social rights; and it is to be accompanied by those policies deemed necessary, at national level, for the economic and social integration of those concerned. It is recommended as well to develop social protection policies for guaranteeing the basic

8. Source *https://www.europa.eu/eurostat/web/income-and-living-conditions/data/main-tables.*
9. The Treaty of Amsterdam modifies the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts, and was signed in Amsterdam the 2nd of October 1997 (OJEU no. 340, of 10 de November 1997).
10. Council Recommendation 92/441/EEC of 24 June 1992 on common criteria concerning sufficient resources and social assistance in social protection systems [Published in the Official Journal L 245 of 26.8.1992].
11. Council Recommendation of 27 July 1992 on the convergence of social protection objectives and policies (92/442/EEC): OJEU No. L 245/49 of 26.08.1992.

right of a person to sufficient resources, favouring as well social and labour inclusion of the person concerned.

In 1999 the Commission[12] evaluated the role of minimum income schemes within social protection systems as components of the fight against poverty and exclusion in the frame of Member States' social protection systems. In this Report the Commission stressed out that measures performed in this area still had (in those States where they exist) a limited impact and should evolve to improve integration of minimum income recipients into the labour market. This Report analyses the following issues in depth: to cover better essential needs and take into account associated benefits; improving the functioning of the schemes for the benefit of their users; to what extent these schemes can be used to top up wages; participation in general training and employment measures in order to facilitate labour market integration; and ultimately, what solutions should be looked for to improve social inclusion.

Later, the Lisbon Strategy (2000) took a step forward for the construction of the European social model and the Social Integration was confirmed as the core element of it. For this purpose, a co-operation of policies for combating social exclusion through a strategic instrument is required, the OMC (the open method of coordination). It was agreed to periodically present National Action Plans for combating poverty and social exclusion; and to share experiences, objectives and benchmarks for guiding Member States policies[13]. Nevertheless, in 2008[14] the Commission updated the Recommendation 92/441 asking States to complement a comprehensive and integrated strategy for active integration where an adequate income support, inclusive labour markets and access to quality services was combined. These policies were aimed to guarantee the recognition of the fundamental right of the person to sufficient resources and social benefits in keeping with human dignity, as part of the strategy for combating social exclusion.

The year 2010 was named "European Year for combating poverty and social exclusion" and awareness actions on poverty eradication were

12. Report from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the implementation of the recommendation 92/441/EEC of 24 June 1992 on common criteria concerning sufficient resources and social assistance in social protection systems. Brussels 25.01.1999. COM (1998) 774 final.
13. In 2005 the European Commission establishes a new framework for the open coordination of social protection and inclusion policies in the European Union.
14. Commission Recommendation of 3 October 2008 on the active inclusion of people excluded from the labour market (notified under document number C[2008] 5737) (2008/867/EC). OJEU 18.11.2008 L 307/11.

carried out, being this target the core objective of social policies. In the same year, the Europe 2020 Strategy establishes the inclusive growth as a priority through promoting a high-employment economy delivering economic, social and territorial cohesion. One of its main goals was to reduce the number of Europeans living below the national poverty by 20 million people; being this quantifiable objective difficult to fully achieve. For this purpose, the Commission[15] presented as a Flagship Initiative the "European Platform against Poverty". This initiative aimed to ensuring social and territorial cohesion such the benefits of growth and jobs are widely shared and people experiencing poverty and social exclusion are enabled to live in dignity and take an active part in society. The Platform aims at creating a joint commitment among the Member States, EU Institutions and the key stakeholders to fight poverty and social exclusion. It also calls for the transformation of the OMC on exclusion and social protection in a Platform of cooperation and exchange of good practices; where specific measures are adopted with the support of Structural Funds. It establishes also the need for adapting and promoting social protection and pension systems. On the other hand, Member States shall promote shared collective and individual responsibility in combating poverty and social exclusion; implement measures and actions addressing the specific circumstances of groups at particular risk (such as one-parent families, elderly persons, children, people with a disability, the homeless and minorities); and to fully deploy their social security and pension systems to ensure adequate income support and access to essential services.

From that moment on, a turning point is established and a new stage in the frame of EU inclusion and social cohesion polices begins. Several Community acts[16] on the need of achieving a social and territorial cohesion through Member States actions are approved in order to meet the objective stated in EU 2020 Strategy by the cooperation and collaboration

15. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. The European Platform against Poverty and Social Exclusion: A European framework for social and territorial cohesion /* COM/2010/0758 final */ 16.12.2010.

16. European Parliament resolution of 20 October 2010 on the role of minimum income in combating poverty and promoting an inclusive society in Europe (2010/2039[INI]) 2012/C 70 E/02. OJEU 9.03.2012 CE 70/8; Communication from the Commission to the European Parliament – "The European Platform against Poverty and Social Exclusion", op cit.; Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European — Platform against Poverty and Social Exclusion: A European framework for social and territorial cohesion. COM(2010) 758 final) (2011/C 248/22). OJEU 25.08.2011 C 248/130; European Parliament resolution of 15 November 2011 on the European Platform against poverty and social exclusion (2011/2052[INI]).

with EU institutions and the key stakeholders. These acts highlight the importance of reinforcing social protection systems turning them into modern and efficient systems that could be combined with broad social policies (education, healthcare, social assistance...) and active inclusion policies. This way, the role of these systems considered as automatic economic stabilisers is reinforced as poverty adversely affects economy by harming growth and increasing deficit. The Opinion of the European Economic and Social Committee on the European Platform[17] points out the priority need of developing an action framework on active inclusion and drafting a Directive that guarantees an adequate minimum income scheme that at least is above the poverty line. In this sense, the EESC's Opinion "For a social dimension of European Economic and Monetary Union"[18] once again raises the issue of promoting the right of European citizens to a minimum guaranteed income. The Committee calls for a more binding and properly financed EU-wide programme of social action and commitment including the following specific objectives. It also proposes to draw up a legislative proposal to introduce an adequate minimum income, this issue being reiterated in subsequent communications[19].

The role that these Community instruments grant to the establishment of a minimum income in combating poverty is essential. This income shall include specific support measures for individuals whose income is insufficient through the granting of benefits and access to essential public services. Income support schemes shall ensure citizens in poverty or social exclusion to live in a manner compatible with human dignity and additionally promote active inclusion (employment policies) and access to quality work and services. This way the minimum income is configured as a very important pillar and as a key instrument for raising the most vulnerable persons' living standards.

This European initiative on minimum income in Member States shall establish: common rules for accessing to minimum income schemes; criteria for determining the most appropriate territorial levels for applying this measure; indicators and evaluation criteria for assessing results and the effectiveness of this policy; guarantees in the monitoring and exchange of national experiences so better practices in this area are identified.

17. Opinion of the European Economic and Social Committee on the European Platform against Poverty and Social Exclusion (2011/C 166/04). OJEU 7.6.2011 C 166/18.
18. Opinion of the European Economic and Social Committee"For a social dimension of European Economic and Monetary Union" SC/038. Brussels 22.05.2013
19. European Economic and Social Committee "An action plan for Europe". Brussels 30.04.2014. Opinion of Opinion of the European Economic and Social Committee on "Completing European Monetary Union — The proposals of the European Economic and Social Committee for the next European legislature".ECO/357. Brussels 3.09.2014

Nevertheless, since the EESC 1989' Opinion[20] recommending to establish a social minimum income for poor people and a necessary instrument for social reinsertion and after the Recommendation 92/441, there have not been specific and binding actions. A new European instrument for efficiently supporting policies on combating poverty and social inclusion is requested; always taking into consideration national constraints. The numerous recommendations, communications and opinions have been fruitless as not being fully applied; despite being benchmarks for Community policies in this area. The progressive establishment of a guaranteed resources system is essential for achieving a social model with poverty indicators well below current levels.

IV. THE PROPOSAL OF DIRECTIVE

The EESC's Opinion on European minimum income recognizes that poverty constitutes a human rights violation and considers overcoming poverty as a Europe-wide challenge. Income disparities and social inequalities have worsened seriously with the crisis. What is more, population groups who were already disadvantaged before the crisis are becoming even more so. After adopting numerous Opinions and Recommendations on minimum income and poverty' related issues, it considers that the need of updating their content is urgent.

"Persistent poverty and exclusion are detrimental to the economy as they deplete disposable income and demand, undermine competitiveness and constrain national budgets". This is why the EESC is strongly convinced that the best way to reduce poverty is to re-start growth, to boost competitiveness and to create favourable framework conditions for European companies. It also points out that the need for a political paradigm that can reinforce solidarity and the fundamental values of Europe's acquired social rights is now a matter of extreme urgency. The EESC also stresses that establishing a European minimum income under a framework directive will help to protect the fundamental rights at the EU level, calling to examine funding possibilities for a European minimum income and focusing in particular on the prospect of setting up an appropriate European Fund. This Directive would extend minimum income schemes to all Member States and improve the adequacy of existing schemes taking into account different national contexts. To this end, minimum income schemes should be flanked by general policies and targeted measures such as active labour market policies, employment services, benefits and programme management, including training

20. Opinion of the European Economic and Social Committee. DO C 221 28.08.1989

programmes. Also effective institutions in all related areas for ensuring access to public services of high quality are also essential.

The EESC underlines that stabilising potential of minimum income schemes can both mitigate the social impact of the crisis and have a counter-cyclical impact. It also highlights the importance of employment and lifelong learning as instruments for combating poverty and social exclusions apart from the social entrepreneurship as a source of growth and employment.

Nevertheless, the EESC is aware that framing a specific central role for the EU in minimum income protection would be an exceptionally complex policy operation, given the economic differentiation between the Member States and diversity of social protection structures. Also the EESC fears that minimum income schemes, which vary widely in most Member States in terms of coverage, comprehensiveness and effectiveness fall short of alleviating poverty and it sees the need for strengthening minimum income schemes and guaranteeing their accessibility and adequacy in order to meet the cumulative objectives of EU 2020 Strategy and to reduce poverty.

Two decades later the Decision reiterates two decades what was already provided: the need of a legal binding instrument that establishes European minimum income schemes and harmonises the key issues for establishing or revising national minimum income schemes.

V. ADEQUACY OF A FRAMEWORK DIRECTIVE AS INSTRUMENT FOR REACHING THE MINIMUM EUROPEAN INCOME

Poverty is certainly increasing in Europe and the existing mechanism of Minimum income is not sufficient to stop its growth rate.

The majority of studies coincide in the convenience of introducing an European instrument legally binding to support and regulate the Minimum Income, as one of the social mechanism that will balance the misalignments derived from the economic recession and adjustments. However, the margins of that mechanism are actually delimitated and also conditioned by the subsidiarity principle. The social policy is a shared competence between the EU and the member States, and they have to supplement themselves as well. The practical actions regarding poverty and social exclusion belong to the member States and local and regional administrations fundamentally. It is an essential responsibility of National policies. The various National contexts require that every State finds its own balance between sustainability and adaptation to its social protection system.

However, due to the lack of political will in some States, the need to create an adequate frame for its implementation in the whole European territory is being focused. It is necessary to recognize and guarantee some minimum income, the latest stage of social protection that plays a major role in combating poverty and social exclusion.

Due to the subsidiarity principle and the European juridical base for combating poverty and social exclusion this last point is in need of recognition. Article 153.2.B TFEU excludes this matter from the scope in which is possible introducing minimum binding provisions. Furthermore, art. 152.2.A of the same Treaty allows adopting measures in order to promote the cooperation, but excludes any armonization of legal and reglamentary rules in the member States, which derives in a weakness of the basis with the aim of introducing a binding instrument to combat social exclusion and poverty[21].

From another angle, and considering the possibility ok establishing of guaranteed minimum income a frame Directive, recognizing social Fundamental Rights and the horizontal clause expressed in the at 9 TFEU, among its objectives it should contain the ones already established by the European Parliament on many previous occasions: fixing norms and common indicators regarding elegibility and the access conditions to minimum income schemes; establishing evaluation criteria of the most appropriate institutional and territorial levels to apply measures regarding those schemes, specifying indicators and comparative common evaluation criteria; guaranteeing the tracking and effective exchange of best practices and allowing the participation of social partners and involved parties while establishing and reviewing the National schemes of minimum income.

However, are some aspects here that demand consideration. The first question to be taken into account in this sense is the one related to the "relative poverty threshold", determinant criteria and that European documents try to avoid. Only the European Parliament in 2010 dared to invite all the member States to guarantee a minimum income equivalent to the 60% of the Nationals average income, by quantifying the necessary quantities for establishing those minimum incomes. Directly related with this aspect, is the financing of the minimum income devices, both in States where they exist as in others that do not contemplate them. In this context, several possibilities can be pointed out that differ from using the European Social Fund by allocating existing resources to those objectives

21. Peña-Casas, Ramón ; "vancer vers des standards sociaux européens – quelles bases légales et financiéres pour un instrument européen en matiére de revenu mínimum garanti". "European mínimum income and poverty indicators" Audition Publique au Comité Économique et Social Européen 28.05.2013

(always directly linked to employment), financing projects for social activation or social experiments to increase the existing minimum income till the creation of a specific and suitable European Social Fund to support the minimum income. At this very moment and as a relevant fact, the Commission has proposed for the period of 2014-2020 that minimum 20% of all the total resources by the ESF shall be assigned in each member State to the thematic objective of promoting the social inclusion and combat poverty. Even so, some authors wonder about the political will to raise a new fund at European level[22].

Undoubtedly, the existence of some European minimum social rules is necessary as a fundamental element for a social model, including funding and programs. Establishing a European social mechanism to stabilize economical recession and disparities is urgent together with the social pillar that shall consider the social consequences of economical adjustments. However, and as already stated by the EESC in former occasions, some measures, such as the provision of a sufficient minimum income for groups living under poverty line or the establishment of common rules regarding welfare and benefit require modifying the Treaties.

The possibility of establishing a minimum income system through a Frame Directive seems to be a complex matter, capable of overcoming some significant obstacles, directly related to the political will, in the actual context of crisis, both on European as on National level.

So it seems that we will continue with the policy of non binding European facts that will try to strengthen the inadmissibility of social inequalities in the name of solidarity and for the good of European citizenship.

22. Peña-Casas, Ramón; "Avancer vers des standards sociaux européens – quelles bases légales et financiéres pour un instrument européen en matiére de revenu mínimum garanti". Op. Cit.

Chapter XII

Good practices at health and safety at work

Prof. Dr. María Teresa Igartua Miró

University of Sevilla

I. WHAT ARE GOOD PRACTICES AND WHY ARE THEY USEFUL IN SAFETY AND HEALTH IN WORK?

Before analysing the good practices of a determined field, it is necessary to establish what we consider as such. Even if it is usual that they are related with quality[1], it is also agree that good practices could be defined as an innovative form of action which improve current solutions in terms of effectiveness or appropriateness and which could be transferred to others in order to cover the same aim expected by the ones who are generating them[2]. There is not a single definition, but broad options which include successful experiences with high-quality standards and which cause positive effects, whose demonstration could be based on evidence or depending of certain criterion[3]. Nevertheless, this concept is a dynamic one which could vary and evolve over time[4].

1. Accordingto Cabré Castellví, M.T., «Terminología y buenas prácticas», Atti Convegno Assiterm 2009, Publifarumn. 12, 2010, consulted 16/04/2015, url: http://publifarum.farum.it/ezine_pdf.php?id=161, la noción de calidad es un precedente a la de buenas prácticas en distintos ámbitos.
2. Cultura preventiva y buenas prácticas, Foment de Treball Nacional, 2014, p. 12; Olivarri, R. (Coord.), Un análisis de evidencias y experiencias de gestión de la prevención para la identificación de buenas prácticas: informe bibliográfico, INSHT-Universidad de Cantabria, 2010, p. 6.
3. Boletín del observatorio de la exclusión social (edit.um.es/exclusionsocial/buenas-practicas-inclusivas). Rueda-Catry, M. y Vega Ruíz, M.J., Buenas prácticas de Relaciones Laborales en las Américas, Oficina Internacional del Trabajo, Oficina Regional para América Latina y el Caribe, 2005, p. 9.
4. In this regard, Rueda-Catry, M. y Vega Ruíz, M.J., Buenas prácticas..., ob. cit., p. 12

If we synthesize all the previous information, we can establish three main features of a best practice: relevance regarding to the expected objectives, proved utility and potentiality to be transferred or adapted to other situations.

Regarding the key aspects of the previous definitions, the most relevant ones in Health and Safety at work are the effectiveness and utility of good practices. Or, in other words, the progressive improvement of life and work conditions and its capacity to be transferred, that is, the possibility to be followed as examples by other business belonging either to the same sector of activity or to a different one.

Therefore, we could define good practices as the innovative actions or projects developed by enterprises which provide positive results regarding to the continuous improvement of Health and Safety work conditions The good practices depart from the existing regulatory framework and what is looked for is its efficient, participated and transparent application. Besides reducing workplaces accidents, the main goal is guaranteeing health in work, intended as a whole state of physical and mental welfare.

Once we have briefly defined the concept, it is relevant to highlight its relevance in the matter currently concerning us, which connect to one of the main problems that afflict the prevention of risk at work management in business, that is, the inefficiency and inefficacy of good practices along with the practices that stem from the merely formal compliance of legal standards, which affect SME and micro-enterprises in particular.

It seems advisable to highlight the importance of good practices in domains where decisions and modes of actions are not regulated by fixed options, but where a wide margin of manoeuvre is allowed and so they are the alternative means of compliance. Therefore, in this field we found a place to experiment with Safety and Health in work regulation.Security standards are flexible, they require the adaptation and adjustment to the needs of the organization, and can be applied in diverse ways. Therefore, it leads to a difficult compliance, erroneous interpretation or even malpractices or inappropriate or inefficient practices.

II. MOMENTUM TO GOOD PRACTICES AT EU OCCUPATIONAL SAFETY AND HEALTH (OSH) STRATEGIC FRAMEWORK (2014-2020) AND SPANISH STRATEGY (2015-020)

The topic which currently concerns us has been given political impetus by the Communication from the Commission to the Council and the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions related to a Common

Strategic framework in the field of Health and Safety at work, 2014-2020[5], even if this field had been referred to in the European strategy 2002-2006[6].

The strategic framework is preceded by the Final Evaluation report about Strategy 2007-2012[7]. This report states a positive global valuation of its relevance and the role it plays in the establishment of clear political bases, in addition to a framework for coordination and a common sense of direction for national actors. Nevertheless, it also states that there are many aspects which need to be improved. To sum up, it emphasizes that even if many of the actions planned have been executed, such as the exchange of good practices or the preparation for the review of legislation, in practice the actualization and simplification of the legal framework has not experienced significant progress and important legal laps still exist.

One of the biggest problems good practices are confronted with is the lack of compliance of regulation by micro-enterprises and small enterprises, which is considered the first cause of failure of preventive politics. Therefore, it is relevant to improve the quality of the orientation and to provide practical tools which make easy the compliance with health and safety at work regulation. In order to achieve this goal, some measures which should be taken would be increase the financial and technical aids specially aimed to institute evaluative tools, develop guide lines and gather good practices examples, encourage their exchange and continue with awareness campaigns.

This kind of actions have been developed by the EU since time ago, some of them through the European Campaign "Healthy works" 2012-2013, "Working together for risk prevention". They also appear at the Luxemburg Declaration about promotion of health at the workplace in the EU (1997), which considers essential the increase awareness and compromise, the identification and diffusion of good practices, guidelines for the effective promotion of health at work and other similar[8].

Recently, The Spanish Strategy of Health and Safety at work (2015-2020) has been approved. Good practices have a relevant place in this strategy, and their objectives of continue improvement, efficiency, inventiveness, awareness, leadership and compromise are taken into account.

5. Bruselas 6.6.2014, COM (2014) 332 final.
6. Cómo adaptarse a los cambios en la sociedad y en el mundo del trabajo: Una nueva estrategia comunitaria de salud y seguridad, Comisión de las Comunidades Europeas, Bruselas, 2002.
7. DG Employment, Social affairs and inclusion, Final Report: Evaluation of the European Strategy on safety and health at work 2007-2012, Denmark, 2013
8. «Los Gobiernos locales por la calidad en el empleo. Municipios andaluces y prevención de riesgos laborales. Buenas prácticas de Seguridad y Salud», Federación Andaluza de Municipios y Provincias, Junta de Andalucía, Prevenlo, 2007, p. 9.

This Strategy states that its aim is to reach a society where well-being at work will be perceived as a reality, not as a utopia in a way that the focus on well-being should be accompanied by a continuous improvement of work conditions, in addition to the constant and gradual reduction of work accidents and diseases. In order to achieve this goal, we need to work harder and better, in a proactive way, while we consolidate the achieve goals and we establish new reachable goals which go behind the strict compliance of legal obligations. In words of the same text (2C objective), it is fundamental to promote the action of exchange of good practices among enterprises, besides of stimulating the efforts made in favour of excellence at safety and health at work management by recognition, awards, or incentives among enterprises, in order to create better work environments which would be safer and healthier. The most important action that should be taken is encourage the excellence in health and safety at work management by the recognition, exchange and diffusion of good practices. In this field, the Spanish Network of Health and Safety at work would be the principal motor. Besides, more specific aspects are encouraged, being the most important ones the field of the SME and good practices related to concrete risks, such as the ones related to traffic accidents at the workplace, mental health or the ones aimed to improve the protection of determined groups of workers, such as temporary, young, older workers and women.

III. OBJECTIVES: CONTINUOUS IMPROVEMENT OF WORK AND LIFE CONDITIONS

As we have pointed, the implementation and diffusion of good practices have the objective of constantly improve the protection of Health and Safety at work levels, the increase of efficacy and effectiveness of the preventive polices and, even to some extent, the reach of an increment of enterprise productivity, being the latest a point in which the Strategic Framework and the ILO itself are interested in. Generally speaking, the aim of good practices is not only to reach "zero accidents", but other more ambitious objectives are being sought, such as to eliminate the unsafe situations and to reach of well-being at the workplace. It is obvious for some enterprises that the improvements obtained by this experience make the enterprise a more competitive one, the innovation on preventive field is encouraged and, as a result, the enterprise become a socially responsible and sustainable one. Cost-benefit appreciation of this kind of acts tend to be considered a very positive one in the work field, especially if we consider some aspects such as the observable improvement of satisfaction at the workplace, quality, work ambiance, compliance itself, the workers' implication and motivation

IV. BROAD LINES OF GOOD PRACTICES IN HEALTH AND SAFETY AT WORK

By analysing different examples of good practices inducted in different enterprises we are able to establish some broad lines or series of main elements that are the key for the success. All of them belongs to organizations which have avoided to apply in a purely formal and standardized way the laws on prevention of occupational hazards, but which have transformed prevention in a reality and which have establish a real preventive system, adapted to the specific features of the enterprise, the staff and their work centre design. Usually, after achieving these goals, the next step is to face specific projects of implementation of good practices on prevention, either general ones or focused on concrete aspects, such as psychosocial risks, ergonomics or culture of safety.

Down Below, a set of common guidelines of good practices, which don't have to come together cumulatively, and without damaging other practices more exceptional or less frequent.

a) Leadership: In a huge amount of good practices analysed, leadership[9] is considered the more relevant guideline. The management of the enterprise in this field has to be solid, credible and easily visible. So that, the commitment with risk prevention and Health and Safety guarantee will be clear. The importance of leadership has its roots in the fact that workers are aware of the interest of their enterprise in providing a safest work and in constantly improving their working conditions.

   The Spanish Strategy of Health and Safety at work (2015-2020) makes reference to this specific point by affirming that the increased sensitivity and awareness at all levels of the organization, is one of the ways that allows the improvement of attitudes and conduct. On one hand, entrepreneurs have to achieve a change in the way of leadership and an implication in the commitment of including

9. More extended, European Agency for Safety and Health at Work, Diverse cultures at work: ensuring safety and health through leadership and participation, Luxembourg, 2013. Following the same structure, the WHO establish that the essential aspect in order to create a safe workplace are the leadership, the inclusion of workers and their managers and the study of other's strategies.
   World Health Organization, Entornos Laborales Saludables: Fundamentos y Modelo de la OMS. Contextualización, Prácticas y Literatura de Apoyo, OMS, Ginebra, 2010, en especial pp. 68 ss. Also Figueras Esgleas, J. «Liderazgo de la dirección y participación de los trabajadores en el ámbito de la seguridad y salud en el trabajo» y Ambroj Sancho, L. et altri, «Liderazgo en prevención de riesgos laborales», both at Revista de Medicina y Seguridad en el Trabajo, 59 (suplemento extraordinario), 2013, pp. 16 ss. y 22 y ss., respectively. Also, Olivarri, R. (Coord.), Un análisis de evidencias y experiencias..., ob. cit., pp. 76 ss.

Health and Safety in their decision-making, their work and their day-to-day operations. On the other hand, it is important to achieve the complete collaboration of workers with the company and the application of good practices in the day-to-day work. The guideline 4D is focused in the aspects related to business leadership and workers participation.

b) Implication and active participation: another key factor is the active participation of all the staff of an enterprise, especially from workers. The establishment of good practices has its origins in an individual compromise but also in a collective one, where everyone (staff, managers and middle managers, representatives, inspectors) has a commitment to safety, as well as formulae which would encourage the change of habits and behaviours of workers to safer ones[10].

Attending to the Spanish situation, without a doubt, besides the commitment of management, it is crucial the increase of the active participation of workers and their representatives, as well as the awareness-rising acts devoted to make workers accomplish their role which is even highlighted at the article 29 LPRL that in the cooperation with the entrepreneur in order to achieve him or her goals, in this issue have to be commons and be far from confrontation.

Regarding this aspect, it is also important the educational aspect, as long as training is a key factor in order to achieve awareness-raising, change of attitudes and the achievement of the workers' effective implication. We emphasize a training focused not only on the traditional and obligatory one imposed by the 19 article LRPL, but also based on the experience and the analysis and discussion

10. In this regard, there are interesting examples of best practices developped by different ententerprises (ADIF, Asociación de Empresarios del Polígono Industrial San Cibrao de Viñas, Croda ibérica, SA-MevisaSite, Empresa Malagueña de Transportes SAM, FCC servicios ciudadanos, Iberdrola y Protón Electrónica), included in «Buenas prácticas en liderazgo y participación de los trabajadores en prevención de riesgos», at *http://www.insht.es/portal/site/Insht/menuitem.1fla3bc79ab34c574c2*. Also Moreno Ucelay, A. y Palacios Linaza, J.J., «Programa RADAR en Iberdrola: «Incremento del compromiso personal/grupal/organizacional para conseguir el éxito en prevención de riesgos Laborales», Revista de Medicina y Seguridad en el Trabajo, 59 (suplemento extraordinario), 2013, pp. 45 ss. More examples at prevenblog.com/buenas-practicas-en-cultura-preventiva-circulos-de-prevencion or at Cultura preventiva...,ob. cit., en especial pp. 19 ss. It is also possible to consult AA.VV., Buenas prácticas en el ámbito de la seguridad y salud laboral, a publication of the Technical Seminar hold in Zaragoza, 28 de abril de 2008, Asepeyo, 2008. Also, Models of good Practice, Health employees in Healthy Organisations, Good practice in Workplace Health Promotion (WHP) in Europe, Essen, 1999, consulted on *www.enwhp.org*.

of it, studying the detected deficiencies and establishing possible solutions, especially through work teams.

Workers become protagonists in this topic, and have to adopt a proactive role in health and safety. Their intervention would be as far more effective if it is developed in an ambiance where their opinions are certainly important, and they are conscious that they have relevance and are taken into account.

Actions that contribute to ease the assumption of measures by all the parts implicated in the prevention of occupational hazards are the complete participation of workers in the decision-making about Health and Safety, the debates about crucial topics or meetings aimed to discuss detected fails, health problems or accidents and incidents, among many others. It is important to take into account in this issue, given all the characteristics of the productive framework and the high rate of micro-enterprise, the direct implication and participation of workers belonging to enterprises with no representation became especially necessary, as well as the search for solutions both sectorial or territorial type. Additionally, it would be essential an encouragement of the collective negotiation in this sector which continue to produce results which are not up to expectations, with no innovative and effective solutions and, of course, faltous of good practices.

c) Direct and effective communication channels. Effectiveness at communication paths is achieve by an especial significance among managers, middle managers and workers. In order to detect deficiencies and propose improvement actions, it is essential to joint good practices with the achievement of direct and effective communication channels. This channels have to work properly in both direction from top to bottom, from management to the rest of staff, in order to reassure the leadership in prevention and transfer information in the inverted direction, where mechanisms of collection and notification of information from bottom to top which would transfer alerts, suggestions, and results valuations, among others. The information constitutes as it is well known, a key factor on prevention, but it is also important to avoid it exaggeration and the inefficacy when managing it. Quantitative excesses must be avoided, as long as too much information hinder discern between what is relevant and what is not and that could demotivate prevention actors. Information which would result essential must be provided in a synthesized and easily understandable way to their receptors.

d) Formation of interdisciplinar task forces. The development of good

practices is usually supported by a formation of interdisciplinary task forces, which could be more or less permanent, in order to establish adequate decision-making. In this kind of task forces use to be implicated the department of Health and Safety or de Prevention service, if any, different technical security (specialists in different preventive disciplines), the representative of the committee of health and safety or the prevention delegate, and other. This way, the interdisciplinary aspect of the task forces which characterize the LPRL is assured, as well as the participation and implication of different actors of prevention.

e) Integration of management systems. Besides the first obligation established on the regulation related to prevention, which has to be accomplished by all the enterprise and which consists on the integration of prevention in the set composed by the activities and decisions of the enterprise and its management system (16 article LPRL), there are various project which go further and implant integrated management systems.

   This way, topics as quality, safety, workplace safety, environment, the social corporative responsibility and other related topics are addressed and very exigent standards are imposed on them. Obviously, problems which could be derivative from a merely formal integration are not ignored, and neither is the fact that once the scale of values of the enterprise is forced into a goal conflict, prevention would not lead the predominant place[11], something that should be avoided, as logical. Nevertheless, enterprises which voluntary pay effort to project and develop good practices on the preventive area, are not frequent.

f) Monitoring and improvement systems: Good practices must be focused on the monitoring of the correct running of the implanted system, which would guarantee high rates of success on the continuous improvement and which is fed back by the experience adopted thanks to the different started projects. Audits take a relevant place on this field, either the voluntary ones (33 article RPS) and the inner ones, as well as debate, share deficiencies and propose improvements. As it is known, Spanish regulation (16.3 article LPRL) also imposes obligations related to accidents investigation. This legal precept impose this fact as a useful preventive tool which contribute effectively to the detection of deficiencies, to their

11. This problem was also studied by authors as Roy quoted by Olivarri, R. (Coord.), Un análisis de evidencias y experiencias..., ob. cit., p. 49.

correction and continuous improvement, as well as it is reflected on the evaluation of occupational risks. (6 article RPS)

g) Overcoming of blame culture. This essential step which tend to avoid the criminalization of the accident, would pretend as we can appreciate on some examples of good practices, overcome the search for a guilty of the accident and tend to management system based on solution-searching. They tend to stimulate the share of information about possible incidences, and they support who report them[12]. Therefore, in this field take precedence the search of endeavour of improvement actions as well as the relevance of learning from the detected accidents or fails.

V. GOOD PRACTICES: TOWARDS ITS DIFFUSION AND EXCHANGE

To sum up, it is necessary to go back to a key aspect of good practices, that is, its "exportability". It seems essential the diffusion and exchange among enterprises and countries, especially inside the Union. The European Network for Workplace Health Promotion (ENWHP)[13] devote its effort to this primordial task, as well as the European Agency for Health and Safety at work shows its concern about this topic, and among other acts, gives each year the Good Practices Awards[14].

Logically, good practices came out from the implication of the enterprise and it which of improve the integration of prevention on the general management system and other quality systems, as well as search for high rates of health and well-being at work. Nevertheless, the good practices can multiply their effects if once imposed and being their good results determined, enterprise keep on working on this field and try to achieve their diffusion, their export to other field belonging to the same organization, close organization or, what is more, the extent to other enterprises of the sector which may have similar features. In order to achieve this, it is essential to create channels of communication, specialized web pages, single-topic courses and others focused on good practices. The European Union Strategic Framework and the Spanish Strategy, as we have said before, are focused on the development of this tools. The first of them even if it departs from the proven utility of legislation, especially on the field of providing to the Union a common body, accentuate the relevance that nowadays have non-legislative tools, especially the comparative evaluations, identification and exchange of good practices (which could

12. Cultura preventiva..., ob. cit., p. 15 (p.e. en BASF o Endesa).
13. *www.enwhp.org*.
14. http://osha.europa.eu/es/competions/good-practice-award_2014-2015.

include the creation of a database), increase awareness, information and communication, the establishment of voluntary rules or IT tools easy to manage. This final aspect has an especial relevance if we relate it to challenges such as the improvement on the health of older or younger workers, workers with no experience, with some kind of disability and women, as well as prevent mental risks at the workplace. Nationally, the Spanish Network of Health and Safety at Work is the one who must have a relevant role on this course of action.

Chapter XIII

Good practices to promote the equal opportunities in companies in the organization of working time[1]

Dr. Mª Teresa Velasco Portero

Loyola Andalucía University

I. INTRODUCTION

Equal opportunities at work are intimately linked to reconciling family, work and personal life. Co-responsibility is still a pending matter in the current society to such a degree that women assume the care of, minors dependent persons and housework to greater extend compared to men[2]. Therefore, taking into account that gender element, in order to achieve a real equality of opportunities between men and women, it is very important to establish measures that allow a working person to reconcile both aspects of his life (working and familiar life) and, that at the same time, allow and improve the co-responsibility of men.

In this sense, there is an important acquit of working rights at a legal level, but it is at the collective agreement and company praxis level where legal measures can be adapted, improved, developed and completed.

1. This report has been carried out under the project financed by the Spanish Economy Ministry "best legal-procedural practices in the field of labour and European law to reduce labour litigation expenditure at zero cost (I+D DER 2012-32111).

2. According to figures contained in the latest survey in use of time (2009-2010), the percentage of women using time in the house and family care was of 91,9% using a daily average of 4 hours and 29 minutes (74,7% of men used 2 hours 32 minutes in the same tasks). (Data source: Basic demographic indicators. Statistic National Institute. More information under: *http://www.ine.es/dyngs/INEbase/es/operacion.htm?c=Estadistica_C&cid=1254736176815&menu=resultados&idp=1254735976608*).

Business' good practices in this subject shall take into account the gender perspective, evaluating among their working men and women the different impact of the organization of working times' systems, which are inflexible or only focused in production needs.

It is evident, that the working contract is by nature subordinated and that the employer is the one with the capacity of managing the working activity (Article 20 of the Spanish Statute of Workers Rights, hereinafter and according to the Spanish acronym, ET). However, in some occasions, the organization of working time is focused in the presence, the rigidity in fulfilling timetables, the homogeneity, and the freedom of employer to enforce last minute changes based on pretended production requirements of last minute. This type of organizational systems, that are prior conceived by the company as propitious due to the ample freedom they provide, derive in secondary effects of great importance. On one side, they imply a higher demand for women than for their male colleagues since their familiar charge is higher. This drives to greater stress for women or, that women have to renounce to specific work. And not only this, but the discomfort and low working satisfaction among workers increases since, definitely, all of them are affected by this situation that does not consider their personal situation.

Therefore, a new approach to company policies needs to be taken, overcoming rigid visions and including, as far as possible, practices that shall ease a higher compatibility between working and family life for male and female workers. We will introduce some of them in this paper.

II. THE RIGHT OF THE EMPLOYER TO ESTABLISH AN IRREGULAR DISTRIBUTION OF THE WORKING DAY (ARTICLE 34.2. ET)

A. LIMITS TO THE RIGHT OF THE EMPLOYER: REGULATION UNDER ET AND COLLECTIVE AGREEMENTS PRACTICE

The possibility of irregularly distributing the working day was initially assign to the collective bargaining or to the agreement between the company and the workers' representatives and was extended by the labor reform of 2012 to the unilateral will of employer with limits that has been exteded again by the Royal Decree-Law 16/2013. So, under Article 34.2 ET "an irregular distribution of the working day during the year could be established in the collective agreement or, if not considered, by agreement between the company and the representatives of workers. If not agreed, the company shall be able to irregularly distribute ten per cent of the working day during the year. That distribution shall respect,

in any case, the minimum periods of daily and weekly rest established by law and the worker shall know within a notice of five days the date and time when it will take place. The difference between the effective working day and the maximum duration of the legal daily working day or the agreed one, if over or under it, shall be compensated following the collective agreement or, if not considered, as agreed between the company and the representative of the workers. If there is lack of agreement, the differences driven by an irregular distribution of the working day shall be compensated within twelve months since their emergence."

We consider the regular distribution of the working day when the same hour schedule is being performed each day of the week, all the annual weeks, or when the working day is distributed proportionally among different weeks all the year around, despite having an irregular weekly distribution on a daily basis. The regular working day helps the worker to plan and organize his personal and family life, that, a lot of occasions, is being marked by repeated weekly schedules. On the contrary, the possibility of irregular distribution is a measure of business flexibility that allows adapting to productive processes and, therefore, provokes a conflict for reconciling family-work life.

As already mentioned, before the labor reform of 2012, the possibility of establishing an irregular distribution of the working day was reserved to the collective agreement or, if not considered, to the agreement between the company and the legal representative of workers. In fact, under Spanish collective agreements´praxis, was and is habitual that the working day is more or less established in the sectorial collective agreements, fixing a maximum working day on an annual basis and leaving expressly the possibility of adopting an irregular distribution different to the one agreed in the company. This is a reasonable solution since it allows a higher adaptation of the working days to the productive requirements, so that the company is entitled to establish them.

Most collective agreements consider the possibility of an irregular distribution of the working day; which can be more or less clear and with different rigidity levels. For example, considering the national based collective agreements, it is remarkable that there are the following varieties, that are combined among themselves:

1. Agreements that assign exclusively the employers the power to distribute an irregular working day. It is a minor possibility. Some of them establish that possibility, but requiring causality for the application of irregular working day.
2. Most agreements require the participation of workers to reach an agreement. Sometimes, those agreements are only limited by

the compulsory legal resting periods and others, there are some additional requirements established (for example, a limitation in the number of daily or weekly hours or both limitations).

3. Agreements entitling employer to distribute irregularly the working day with some limits, contemplating the possibility to increase them by new agreements taken with the workers' representatives. It is the same case as when is established that an irregular distribution of the working day shall be agreed between companies and workers, but at the same time, the company is allowed to distribute on its own a "pack of hours".

The reform in 2012 considerably extends this discretion by the company since "if not agreed, the company will be able to distribute irregularly ten percent of the working day during a whole year". I.e., without needing to agree anything with the workers, employer can enforce this type of working times' organization; which is hardly compatible with the requirements to reconcile familiar, personal, and work life at least regarding ten percent of the working day and simply respecting the five days notice. Moreover, the Royal Decree-Law 16/2013 has enlarged flexibility even more when allowing that the differences in working day, if over or under it, shall be compensated the year following the one when they were produced ("When lack of agreement, the differences driven by an irregular distribution of the working day shall be compensated within twelve months since their emergence"). The workers private life planning becomes highly determinate because of this.

1. Collision between the right of employer to irregularly distribute the working day and the requirements for reconciling personal, working and familiar life of workers: negotiated solution in the company

The variety of ways to establish leads an irregular distribution of the working day to adjust to the productive process given to the only will of employer, drives inescapably to an uncertain and precarious situation for workers, since the planning of their personal and familiar life is submitted to incidental changes in the organization of work in their company. As already mentioned, this employer's unilateral will has negative consequences on the management of human resources due to several reasons: the use of unilateral enforcement in cases when specific and real tensions occur between the working and family life of workers do not solve that tension, but, on the contrary, it damages the working environment and, at the end, the productivity. Companies shall take into account that not considering such problems workers face, will have a negative impact on work. Furthermore, due to the afore mentioned distribution of roles in Spanish society, women are the ones to suffer the

consequences of that tension to a greater extent. Therefore, companies either would lose talent which would escape towards reduced working day schedules in order to reconcile their working and home life better or simply not find hiring women under these conditions attractive. Both cases give rise to indirect discrimination.

Furthermore, a collision with the right of workers to adapt to the working day distribution established by the art. 34.8 ET can appear. Although the exercise of this right is submitted to "what established by the collective agreement or by an agreement with the employer regarding this question". There is an argue must of what happens when there is no existing agreement, and we are going to analyze it when studying that right to reconciling family life and work.

Therefore, under the framework of such generous legal system for the employer power to decide the working day of workers that does not consider possible collisions with the workers reconciling problems, it would be convenient that the collective agreements should consider the matter, fixing a range of general standards on the subject, avoiding thus the employer to find specific and possibly conflicting solutions to the particular practical problems. Anticipating the problems can occur on the collective agreements or on agreements with the company, and also in the equality plan of the company, if they exist. It is not an element that has been taken into account very often in the collective agreements until now, but have appear some statements establishing a different irregular distribution of working day among workers depending on having or not familiar duties. Since the superior interest of the family plays its role, an irregular distribution of working day could be agreed only for those workers not having to take care of children or dependent relatives. For this reason, collective agreements and contractual clauses would be admissible for giving up an irregular time availability due to family duties.

We can mention an example of good practice established in the Article 42.3. of the XVII General Agreement for Chemical Industry for 2013-2014 regarding the flexible working day when establishing "that it cannot be applied to (male and female) workers that have a limited presence for security, healthy reasons, for taking care of younger, pregnancy or nursing periods". The agreement also contemplates an enlarged period for notice since it establishes that "for the application of the flexible working day there shall be considered causal reasons and an explanation of the productive or planning technical reasons justifying them given to the representative of workers, and to the directly concerned workers, seven days in advance". The enlargement of the notice period (5 days under the

ET regulation) is an important measure that facilitates the organization of the workers themselves and, thus, the family-work reconciling.

III. HOLIDAYS FIXING (ART. 38.2 ET) AND RECONCILING THE PERSONAL AND FAMILY LIFE

The ET derives the question regarding setting periods to common agreement between employer and worker, according to what is established where appropriate, on the collective agreements regarding annual planning of holidays. In case of disagreement, the ET establishes the competent court entitled fix the dates for holidays their decision not being appealable. With this short regulation, the law leaves the dates fixing standards to the collective agreement, not establishing any primacy between the needs of the company or the workers.

Our courts recognize the importance of the agreement. They do not admit that the company unilaterally fixes the working schedule, so if enforced, it can be appealed by means of the industrial action (showing the prevalence of the general interest in these cases). Thereby, the period of holidays shall be fixed together by the employer and the workers representatives, with no possibility of its unilateral determination pleading the non possible agreement or the reiteration of agreements taken previous years. Nevertheless, in cases where no agreement was taken, the case law allowed the company to fix the holidays unilaterally as long as the dates were reasonable due to productivity requirements. In any case, when it is an obligation taken by the company as a result of the collective negotiation, the employer is not entitled any more to fix it unilaterally. In any case, when due to collective agreement it derives to an obligation assumed by the company, the employer will not have the possibility of establishing unilaterally the obligation. Although due to agreements between the company and two represented trade unions, there is a possibility to modify the way of spending annual holidays.

Therefore, rejecting the possibility of a unilateral imposition by the company in which only the productive requirements would be taken into account, the right way to regulate it is by the collective agreement. This is how it works in praxis, establishing with the collective agreements varied systems on holiday fixing, in which the age criterion occupies a relevant place. Some clauses establish for example, a rotation order —that is sometimes the fundamental or exclusive criteria—; contemplate a drawing system; or depend on the category of the worker. Besides them (although of minor importance) or we can be find criteria regarding personal circumstances of the worker, like his age, the existence of relatives under his care, preferably, children of preschool or at the age

of compulsory school, so that both school and professional holidays take place at the same time or the concur of the couple within the same company. In this sense, the XII Collective agreement of the company Hibu Connect, SAU is remarkable by pointing out: "parents with children in ages for the compulsory school will have prevalence to spend their holidays during period for school holidays". Also the VI Collective Agreement of the company NCR España SL, establishes in its Article 33 that "workers of the same category and with more seniority than others shall have a prevalent right to choose their holidays over the rest of the members in the department, section or service, not counting the right of workers with children in school age to spend holidays in that school period. School age is considered the one between 4 and 18 years and school holidays period is the one established each time by the competent academic authority". As another example of adaptation the new family realities, we can mention the Collective agreement of the company Alcatel Lucent España S.A., when establishing in its Article 8 that "in case of workers affected by a separation or divorce agreement, spending holidays coinciding with the period of children's custody shall be prioritized, so that the planning of holidays between workers and their supervisor shall be done, depending on working needs, at least two months in advance".

The prevalence of the seniority criteria deserves a critic, even from the point of view of constitutional values as from the practical one. The importance of the constitutional right to conciliation and its relation to equal opportunities should deserve a better value given by the agreements to the criteria related with family responsibilities compare to others so neutral as the seniority criteria. Besides, not considering subjective matters and the conciliation needs of workers have such practical repercussions in the organization of familiar and personal life that it can even empty the contend of right to holidays, obstructing the real rest for workers.

On the other hand and regarding the specific subject of holidays and the suspension due to maternity it is convenient to remind that, after a long and troubled evolution in which the case law by the court has played a fundamental role, the Spanish ET recognizes now a whole protective system for the worker. The art. 38.3. ET establishes that when the holidays period fixed in the holidays schedule coincides in time with a temporary disability due to pregnancy, birth or natural nursing or with the suspension period in case of a maternity contract (in all the models contemplated under art. 48.8. ET) or parenthood, "there is a right to spend holidays in a different timing of that when the temporary disability occurs or of the concrete leave (…) at the end of the suspension period, although the natural year corresponding to them has already passed by". As rightly stated by Gorelli, this article devotes the right to change dates for spending holidays, but not that the concerned worker

could fix unilaterally the new dates for holidays. Even, on the contrary, there shall be go back again to the general rule regarding the fixing of holiday dates, which means that an agreement shall be taken among the parts pursuant the rules that can be stated in the collective negotiation. As regards the question if the dates for spending holidays in those cases shall be necessarily after the suspension (as it seems to be established by the literacy of the norm), we consider that the agreement between employer and worker shall not be submitted to that limitation. Since the general rules fixing the dates address to an agreement, that one can determinate the dates before the beginning of suspension or even once it has finished, but inserting a period of effective work. We consider the statutory norm only applicable in the absence of agreement and when the dispute shall be judicially solved.

In order to incardinate this matter with the general rules fixing holidays, it would be interesting that the agreement would include any preference favoring pregnant women.

IV. DETERMINATION OF THE DATES FOR SPENDING AND THE TIME CONCRETION OF SUSPENSIONS AND LEAVES RELATED TO CONCILIATION. PARTICULAR CASE OF THE ACCUMULATION IN NURSING LEAVE

The ET gathers a set of rights to the suspension of contract and of payable absences in cases related to childcare: suspensions for parenthood, the leave to care about a newborn staying at the hospital and the nursing leave; some of them need a timing concretion and others admit a different time to spend them. The general rule uses to be that both questions correspond to the worker entitled to the right, respecting in any case, the legal limitations.

In general, this rule is also applicable to the nursing leave (right to absent oneself daily an hour from work, that can be divided twice, or reduced the daily work half an hour). The art. 37.6 ET establishes that its time concretion and the determination of its spending "corresponds to the worker during his ordinary daily work". Nevertheless, there is a way to exercise the right to nursing linked to the previsions established by the collective agreement and, secondly, to a possible individual agreement with the employer submitted in any case to the establishments in the collective agreement: accumulation of nursing leaves in complete working days.

As stated in art. 37.4. ET "Anybody performing this right on his will (…) will be able to accumulate it in whole working days as established in the collective agreement or in the conditions agreed with the employer

respecting in its case what agreed in the collective agreement''. Therefore, the statements on the collective agreement will performed as the minimum norm, that could be improved by an eventual amelioration of the conventional agreement by means of an arrangement between the employer and the worker.

The collective agreement shall determinate the form, requirements and extension to exercise the right. In order to calculate the accumulating days there shall be used as a standard the right to a daily hour absence (not half an hour), independently of the real working day (i.e., without the proportional application to the working day). It is important taking into account that the right begins with the child´s birth within an extension till he is nine months old and can be applied by the same person exercising the right to maternity suspension or another one. Foremost, it is not acceptable the fact that many regulations about collective agreements assume the fact that it is the mother the one exercising both rights and, therefore, calculate it depending on the period between sixteen weeks till nine months.

The collective agreement is able to fix the legal order for the accumulation, being capable to establish a maximum accumulation, a top with a higher or lesser number of days, or even excluding the accumulation, as already stated by the Supreme Court in his sentence from 11-11-09. On the other way, despite the remission given by the law to collective agreements, it does not mean that on the lack of its express mention, there is no chance to use that possibility. For example, our courts have endorse the chance to invoke the regular practice in companies to confer 13 days of accumulated nursing leave and even, they have recognize that in the absence of an expressed mention in the agreement and the accumulation is chosen, it has to be applied to each daily hour of absence.

There is a great amount of possibilities contemplated in the collective agreements to do an accumulate spending; as an example, we can consider the modality to accumulate the total amount of nursing leave spending it uninterruptedly following the maternity suspension of the working contract or accumulating the hours corresponding to a trimester or semester to spend it in the same way as in the previous case and also, more frequently used, the substitution by some additional days of maternity leave. More specifically, there are some collective agreements establishing 7 days without the chance of extension after the maternity leave, accumulating only 85% of the total corresponding hours in whole working days after the maternity leave, 15 working days after the end of maternity leave, 15 natural days following the maternity leave, three weeks after suspension for maternity, 11 days, 14 natural days, or even 26 days. In general, all of them are excessively simple systems and since it

is usual to consider women the ones entitled to the right, it is understood that it will be spent by the same person spending the suspension of maternity. All these statements should adapt themselves to the new legal regulation, which is broader as regards entitlement and encouraging dual responsibility by these means.

V. TIMING CONCRETION AND DETERMINATION OF THE DATE TO SPEND THE WORKING DAY REDUCTION DUE TO FAMILY REASONS

The ET recognizes several conciliating rights concerning the possibility of reducing the working day due to family reasons and not all of them have equal legal systems regarding their timing concretion and determination of dates. In some cases, it is a faculty assigned to the worker without any limitations, in others, it is established that the collective agreements are able to fix criteria in which the organizational requirements of the company are taken into account.

The case that gives the worker most freedom to choose is in case of early birth children or if the child needs to stay in the hospital for any case after the birth: art. 37.4 bis ET foresees that the father or mother can absent from work during one hour, without losing any salary or reduce their working day with a proportional reduction in salary (until two hours). In both cases, due to the literacy from art. 37.6 ET the timing concretion and the determination of dates correspond to the worker during his daily work.

On contrary, the other rights to a reduction of working day due to familiar reasons (the two cases considered in art. 37.5 ET), the redaction of art. 37.6 ET in force begins ascribing the worker the right to establish the timing concretion and the determination of dates, but it follows introducing a reference to the standards considered by the collective negotiation that could influence the familiar interests. It affects not only the case of the working day reduction for taking care of youngsters under 12 years or a physical, psychical or sensorial disable person not performing a paid employment, but also for the case of taking care of relatives until second degree of consanguinity or affinity that, due to age, accident or illness, cannot avail themselves and do not perform a paid activity.

As a starting point, we consider assigning in general the worker the faculty to specify the timetable and dates means given prevalence to conciliation, since there is no necessary to reach an agreement with the employer. However, we do not want to derive that there are no limits to the workers´ will. The right of workers to the timing concretion could collide with the right of direction and organization ascribed to the

employer, therefore, even the art. 37.6 ET establishes that any disagreement originated between worker and employer regarding timing concretion shall be solved before court by means of the special procedure appeared in art. 139 LIS. Anyway, we consider that the possibilities of the company to disagree shall be interpreted restrictively by the court because if the case of not doing so, the right to a reduction in the working day due to family care would empty its contend and there could derive to alter the spirit and finality of the mentioned right.

The disagreement argued by the employer shall be always based on organizational or production reasons, not in arbitrary reasons. Whenever these reasons exist, we will be in a collision of two constitutional principles, the freedom for companies and the protection of the family. Therefore, despite that as a general rule the second one shall prevail in case of interpretation, the specific circumstances of each case shall be considered included the good will in order to solve the disagreement in one sense or another. The worker is the one who needs to proof the reasons legitimizing his position and his interest in the new schedule opposite the one proposed by the company organizational power, so that concretion shall not be abusive or against the requirements for goodwill, nor arbitrary, unusual or even less satisfactorily to the objective of childcare.

However, once established as a general rule that the timing concretion and the dates for spending the leave correspond to the worker, the labor reform of 2012 introduced for cases of working day reduction under art. 37.5 ET a submission to possible standards fixed by the collective agreement in which both the rights to conciliate for the worker and the production and organizational needs of the company shall be taken into account. Furthermore, the law contemplates the possibility for the collective agreement to fix a notice period over fifteen days: "the worker shall forewarn the employer within fifteen days advance or the term established by the competent collective agreement, pointing the dates for beginning and ending of the nursing leave or the reduction of working day, except for major force".

In this manner, the labor reform of 2012, responding its general objective for adjusting the working conditions to productive and organizational requirements, adds in this subject, the collective negotiation in order to fix standards that expressly take into account those requirements.

This matter has been criticized by the doctrine since it could drive to a situation in which the collective agreement would empty in practice the right of workers to specify his timetable. Before the reform, the question of exercising the right to a working day reduction (like the rest of conciliation rights) was considered among the possible contends of the collective negotiation under art. 85.2 ET but, considering the fact that the

reduction of working day was a relative necessary right, for which the collective agreement could only improve its legal regulation. In fact, the courts had revoke specified conventional clauses that were restrictive, considering that the agreement could not include clauses that "would limit in a general way the right of workers to determinate that mentioned concretion". It is particularly interesting the STS from 21st March 2010 that revoked a prescript in a collective agreement establishing several requirements for the timing concretion of the reduction in working day that do not appear in the art. 37 ET. The reasons used by the Supreme Court for canceling are very interesting and are worth to explain:

1 First, the Supreme Court reminds that art. 37.5 ET belongs to the developing articles from art. 39 of the Spanish Constitution, that establishes the protection for family and childhood. This goal shall prevail and serve as an orientation when facing any interpretative doubt (STS 20-7-00).

2. Secondly, the Court points out that art. 37.5 ET establishes that the reduction of working day constitutes an individual right for workers, men and women, so that, in principle, its exercise shall not be limited but for the ones contained in art. 7 Civil Code, ergo, it shall be performed according to the needs for goodwill and shall not entail an abuse of rights or its antisocial exercise. They consider the denial — or in its case, limitation — of the exercise from rights regarding the parenthood leaves established by the law can drive to an infringement of the right to non discrimination for gender of working women — indirect discrimination, since working woman are notoriously the group exercising that right most frequently — so that the exercise of a fundamental right is affected. (STC 3/07 from 15th January).

3. The High Court also recognizes that the exercise of the right to a working day reduction could fall upon the performing frame of other rights that are subject to protection, like the right of businessmen to exercise the power of direction contained under art. 20 ET and that an unlimited recognition of the right for workers could drive to serious organizational difficulties in the company.

Starting from that premise, the Court analyses the impugn norm and states that in it "there is no weighting among the involved interest, but, in general, it establishes a range of limitations to the exercise of the right to a working day reduction in order to get a timing concretion". That is the reason why the norm is declared invalid, but the sentence also adds: "The previous considerations do not imply forbidding the collective agreement the possibility to establish the way to make the timing concretion of the working day reduction, but this concretion needs to be

done weighting the several concurrent interest, not limiting in a general way the right of workers to determinate that mentioned concretion since there shall be taken into account that we are considering an individual right and any limitation of rights has to be based on sufficiently justified reasons."

Nevertheless, the former statement could be denied after the new redaction of art. 37.5 ET, at least, as regards the second point when settling that the exercise of the right to reduction cannot have more limitations than the ones contained in art. 7 Civil Code. Now, art. 35.6 ET authorizes expressly the collective agreements to fix criteria of timing concretion considering "the rights to conciliate (…) and the production and organizational requirements from the company", without prioritizing none of both interests. Although some authors have already warned that risk, we consider that it is still necessary a weighting, in which the constitutional right for protecting the family and the fundamental right to equality and non discrimination should have a particular importance.

In any case, the collective negotiation after the reform has not extensively used the faculty given by the new writing of art. 37.6 ET. As it has already been happening before, there are not many collective agreements contemplating the right to the working day reduction, in many cases, they just repeat what the ET has already ruled, sometimes even without including the reform made in the article. However, in some cases there is a limitation to the right to concretion, like the one under the art. 21 of the XIV Interprovince Agreement for the commerce of flowers and plants when pointing that "The mentioned timing concretion will not be able to affect the system of turns established in the company, if they existed."

VI. TIMING CONCRETION AND TURN OF WORK

The schedule of a worker, capital for the conciliation of his working, familiar and personal life, is affected by the possible existence of work shifts in the company. Therefore, the existence of a possible workers right to get a change in shift (or the ascription to a fix one in case of rotator shifts) is a question of great practical importance, that have arose a controversial debate both in doctrine and case law.

There is a different treatment to the problem by judicial segment depending on the work shift to be associated or not to a reduction in the working day, most benign to the worker in this latter case. So, despite being working day and timetable different concepts, we can assert that the latest case law from our courts admits the worker´s right to apply the change of work shifts in the cases when a reduction of working day

occurs, although there are some explanations regarding that matter. The most reputed and extended case law, maintains that the way how art. 37.6 ET is written does not permit to exclude any possibility of the adjusted timing to the new length of the working day to include a change in the system of work shifts or even to establish a fixed shift. If the company refuses the proposed timing concretion, there shall occur a weighting of each case with all the concurring circumstances. The conflict between the workers right to conciliate and the right of the company to organize work shall be solved favoring the one whose interest becomes prevalent in order to favor the effectiveness of the concurring constitutional rights without causing an important damage to the production activity of the company. In this sense, the weighting is capital in the STC 3/2007 from 15th January, that was judging the case of a woman working in a commercial center with a double shift working day from Monday to Saturday, in order to be able to conciliate her working and familiar life, she applied for a reduction of the working day and besides, that the reduced working day from Monday to Saturday would be accumulated from Monday to Wednesday and change from the rotator shifts to a fixed one only mornings. The Constitutional Court has remark that the rights contained in art. 37.5 and 6 ET shall be interpret taking into account the constitutional rights in force, which are non discrimination and the protection of the family and minor. They also consider that, since the ET does not establish the prevailing interests between the company interest or the workers´, it is necessary to do the weighting to make them all compatible. Finally, the Court concludes that, since in this particular case the weighting of specific circumstances was not taken, the fundamental right of the worker was damaged incurring in an indirect discrimination.

Therefore, we can assert that in those cases where the worker applies at the same time to a reduction of the working day and the change in work shift, the change will not be accepted automatically, and neither the refusal. The most recent judicial doctrine follows this line, and reconciles the interest of minors and the worker with the business faculties to organize work. This weighting needs to consider the requirements for goodwill, interdiction of law abuse or its non social exercise. And, surely, as in the other cases of timing concretion, since the protection of the family and the right to equality are constitutional recognized rights, what impregnates them with a special value.

This doctrine is already consolidated regarding cases in which the work shift change is asked for under the framework of a timing reduction, but cannot be invoke when applying only for a change in the work shift. In this second case, the worker is exercising his right to adapt the duration

and distribution of the working day, recognized by art. 34.8 ET and the courts have denied this possibility in the terms we will explain in the next paragraph.

VII. THE RIGHT OF WORKERS TO THE ADAPTATION AND DISTRIBUTION OF THE WORKING DAY (ART. 34.8 ET): TIME FLEXIBILITY AND WORK SHIFT ELECTION

The LOI added paragraph 8 to art. 34 ET, containing the regulation of the working day, that since its very beginning has created a great controversial among the experts and continuous doing so. Its literal statement is as follows: "The worker is entitled to adapt the duration and distribution of the working day in order to exercise effectively his right to conciliate his personal, family and working life to the extends established by the collective negotiation or the agreement with the employer, always respecting in his case, the statements of the collective agreement. Therefore, there will be promoted the use of the continuous working day, the flexible schedule or other organizational means for the working time and for rests that will allow a higher compatibility between the right to a conciliation of personal, familiar and working life and the productivity improvement in companies."

The norm implies very different interpretation problems, some of which has not have a practical repercussion, like the problem of delimiting the so called "adaptation of the duration in the working day". The adaptation of duration involves the right to a reduction of working day (with or without the corresponding reduction of salary) overcomig the expressly cases named in art. 37.4, 4 bis and 5 ET. Practically, this possibility has not arose the interest of workers because of the wide range of cases contemplated in the reduction of working day due to familiar reasons and the extended casuistry of security measures for the worker accompanying them. Apart from this question, the debate is centered in the determination of the level of enforceability attributed to the right: if it is a direct recognition of the right to the working day adaption or if it needs to be understood that is dependable on what could be established by the collective agreement or in the individual agreement with the employer. Therefore, we shall link together art. 34.8 ET ("The worker is entitled to adapt the […] distribution of the working day in order to exercise effectively his right to conciliate his personal, familiar and working life to the extends established by the collective negotiation or the agreement with the employer, always respecting in his case, the statements of the collective agreement.") with art. 85 ET ("Notwithstanding the freedom of both parts to determinate the contend of collective agreements, during the negotiation of them, both parts are obliged in any case to negotiate measures in order to promote

the equal treatment and offer of opportunities among women and men in the labor framework or, in its case, planes to promote equality…").

The doctrine admits unanimously that the right to adaptation of the working day is not an absolute one for the worker, but it is submitted to the terms and conditions established by the collective agreement. However, the different opinions are controversial when considering the situations created when the collective agreement does not contain an express mention regarding this matter. Shall we understand in this case that the worker is not entitled to any adaptation of his working day, even despite having accredited his needs for conciliation and when there are no organization or production needs against it?. This is the most accepted solution defended by the judicial doctrine, but the majority of the labor doctrine considers it inappropriate. Some authors maintain that if the collective negotiation does not mention it expressly, it would be breaking the obligation established under art. 85 ET and the worker should have the right for his petition to be considered and get the corresponding weighting, while others affirm without any doubt that the right established in art. 34.8 ET is not susceptible to be appealed before courts. There are some opinions that do not consider this matter so extremely, like the one maintain by Prof. Lahera, who defends an intermediate way that considers the obligation to negotiate equality measures, the prohibition of discrimination and the right to an effective judicial protection concluding that, despite the absence of a unilateral right of the worker, the company cannot deny in an unjustified and disproportionate way the timing proposal without any negotiation, questioning by these means constitutional values. We share the former opinion, although it is not the one applied by the case law or maintain by the judicial doctrine, mostly in the frequent cases in which the workers request a change in the work shift or his adscription to a specific one without any relation to a working day reduction. In this sense, since the sentence from 13/06/08, it is proven that the Fourth Chamber of the Supreme Court has established in different decisions (SS 18/06/08, 20/05/09, 19/10/09 and 24/04/12 and Auto 21/07/09) that the right recognized under art. 37.6 ET to fix the timing concretion is related to the existence of a reduction in working day, with its corresponding retribution reduction, so that it is not of application in the cases when the application for changing the timing or shift of work is not accompanied by an application for a reduction in the working day. Further, they secure the next criteria: in the absence of a collective agreement decision or an agreement due to individual autonomy, the pretension for a timing variation or a change in the working shift is not legally granted; the same criteria is followed by the majority Upper Justice Courts at Autonomous level (Tribunales Superiores de Justicia).

But nevertheless, despite the former to be the most extended opinion

mentioned by the case law, there are also discordant sentences recognizing that, despite the application asking for a timing adaptation independently from the working day reduction, the constitutional values affected need a weighting to be taken.

VIII. THE FLEXIBILITY IN THE COLLECTIVE BARGAINING

Despite the importance of the collective bargaining in order to specify the right for the adaption of duration and distribution of the working day, and its invocation by both the LOI and the art. 34.8 ET itself, the reality is that the agreement praxis does not care a lot about regulating flexibility timing measures that would favor the workers. In the cases when the agreements consider that matter, it is just simply maintaining that in specific departments a flexible entrance and exit schedule can be established, when it is previously applied for and agreed with the company[3]; in other cases, the flexibility is limited to a certain period of time or just for persons with children or in charge of dependable people. There are some interesting cases establishing an individual bourse of available time[4], consisting in the following types: compulsory resting hours result from recovery, for the compensation of flexible hours, extraordinary hours or agreed extended working days, so as free days at disposal, or surplus of working days in annual calculation. There is also the possibility of a combination counting personal and collective hours like in the case of the XVIII Collective Agreement by SEAT S.A. art. 74.

A certain sensibility is displayed in some collective agreements while

3. Art. 42 Collective Agreement for companies and workers of perfumery and related for 2012 and 2013. A similar rule and remitting to an agreement with the company under art. 42 XV Collective Agreement in chemical Industry.

4. Art. 45 bis XVII Collective Agreement of Chemical industry: " The individual bourse of available time is formed by all the mandatory resting hours, no matter if derived from recovery, or for compensation for flexible hours, extraordinary hours or agreed extended working days. If the company has agreed free days at disposal or they came out of the elaboration of the annual labor schedule, they will become part of the bourse for its individual spending, except for a collective spending of the whole amount of days or just part of them. This system of individual flexible hours will also apply for workers with a working contract for specific time. (…) 3. The individual bourse can be used for personal and/or familiar purposes. The periods for the corresponding compensatory rests will be spent in whole working days trying to be fixed on an agreement basis between the company and affected worker. In case of disagreement, the dates chosen by the worker will be of preference when cursing a notice of seven days. In this latest case of disagreement, the corresponding days and hours for resting will not be possible to be accumulated to bridges or holidays. The compensation hours generated within the first eight months of the natural years shall be spent within that year and the ones generated in the last four months can be spent within the first 6 months of the next natural year".

establishing preference criteria for the election of work shifts. For example, the case of the collective agreement of the company Hertz de España S.L., subscribed the 30th May 2013 in whose art. 24 expressly mentions the personal situations to be taken into account in order to establish shifts: "In the moment of negotiating shifts and following the indicated order, the following points shall be taken into account: a) familiar situa The reform in 2012 considerably tion, mainly, number of persons related or under the care of worker (…)".

Definitely, a poor development of a good business practice that could solved in a very effective manner and adapted to the specific circumstances in the sector and company the tensions emerged between production and organizational requirements and the conciliation needs of workers.

Chapter XIV

Proceedings for interim measures before the European Court of Justice[1]

Prof. Dr. Ana María Chocrón Giráldez

University of Seville

I. INTRODUCTION

The aim of the proceeding for interim measures is to guarantee the full effectiveness of the ECJ's future final decision in order to avoid the lack of judicial protection that shall be ensured by this Court[1]. This statement is reiterated in ECJ's case law when assessing applications for interim measures (Order of the Vice-President of the ECJ of 21 January 2014,1 Case C-574/13, ECJ 2014/36). It also provides us with an opportunity to reflect on the so-called interim measures at the European level.

Certainly, the basis of these interim measures are Articles 278 and 279 of the Treaty on the Functioning of the European Union (TFEU). According to these legal precepts, actions brought before the Court of Justice of the European Union shall not have suspensory effect. The Court may order, however, if it considers that circumstances so require, the suspension in executing the act appealed or adopt other necessary measures. Consequently, we firstly highlight that the granting of provisional measures is an exemption to the general rule according to which acts adopted by the EU institutions benefit from a presumption of legality and shall be in principle enforceable.

As we will see, Articles 278 and 279 are developed in the Rules of

1. This report has been carried out under the project financed by the Spanish Economy Ministry "best legal-procedural practices in the field of labour and European law to reduce labour litigation expenditure at zero cost (I+D DER 2012-32111).

Procedure of the Court of Justice (25 September 2012), and also in the Practice Directions to Parties Concerning Cases brought before the Court (25 November 2013). Here the most striking aspects of the procedure for ordering provisional measures are detailed (application's requirements, conditions, decision of the Court...). Also the Rules of Procedure of the General Court (2 May 1991) consider these Articles.

II. PROVISIONAL MEASURES AND THE RIGHT TO AN EFFECTIVE REMEDY

In the EU Charter of Fundamental Rights there are rights related to Justice and to the effective remedy. The latter is the most relevant as it serves as a reference to the remaining rights established in Article 47 concerning parties' procedural guarantees and particularly, the right to defence during trial[2].

It must be recalled that the provisional protection which always happens at a national level, is therefore strongly linked with the need of achieving effectiveness in the effective remedy. In other words, protective measures are intended to ensuring the effectiveness of declaration procedures and rights enforcement as the period that takes between both of them may distort the court's future ruling.

Therefore, the legal basis of these measures is the need of guaranteeing the effectiveness of the court's future ruling as there is a risk of obstructing the effective remedy which could be granted to the party requesting the interim measure. The ECJ has emphasized this concern in its notorious Factor-tame ruling (19 June 1990, Case C-213/89)[3]. This ruling offers a wide interpretation for adopting interim measures by national judges in order to guarantee the effectiveness of the Community Law protection. These judges may not respect the eventual prohibitions for adopting these measures imposed by National Law.

More recently and after the Lisbon Treaty entered into force (2009),

2. Article 47 of the EU Charter of Fundamental Rights states: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice". OJEU, no. 83, 30 March 2010.
3. An exhaustive analysis of this ruling in García de Enterría, E.: La batalla por las medidas cautelares, Civitas, Madrid, 2006, p. 97 ff. See also the rulings of the cases Zuckerfabrik (21 February 1991) and Atlanta (9 November 1995).

the EU Charter of Fundamental Rights has the same legal value as the Treaties. The Order of the Vice-President of the ECJ of 20 November 2013 (Case C– 390/13, TJ 3013/795) determines, on the basis of this Charter, the need of requesting the measure against the imminent risk of any serious and irreparable harm to the effective remedy stated in Article 47 of this Charter. It would then be a "provisional protection linked to the effective judicial protection"[4].

Nevertheless, it cannot be said that rejecting a request for a protective measure is an infringement of the fundamental right to effective remedy recognised in Article 47. These measures are regulated at the EU level and subordinated to certain requirements for their adoption and to an specific procedural regime[5].

It should be noted that EU rules refer to "provisional measures", but the ruling of Court of Justice of the European Communities of 26 March 1992 (Case C-261/90) defined "provisional, including protective, measures" as measures which "are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter".

In any case, the legal regulation of provisional measures is linked to the protective measures' requirements (fumus boni iuris and periculum in mora) and to the specific characters of these measures; even if a protective effect that expands the provisional protection is derived from them. Furthermore, the most recognised scientific doctrine treat them as protective measures despite that EU rules refer to them as provisional measures[6].

III. CHARACTERISTICS OF MEASURES

As we think about the characteristics of interim measures we can see that EU regulations establish that those that are derived from protective measures shall be applied to provisional measures. This occurs with the features of provisionality and instrumentality. As an example, the Order of the Vice-President of the Court of Justice of 19 December 2013 (Case

4. García Valdecasas and Fernández R., and Carpi Badía, J. Mª.; "El Tribunal de Justicia de la Unión Europea. Algunas consideraciones respecto a su papel en el marco la construcción europea", Revista Jurídica de Castilla León, n. 3, 2004, p. 38.
5. We are referring to Articles 279 and 379 of the TFEU and to Articles 104ff. of the Rules of Procedure of the General Court.
6. Pastor Borgoñón, B. and Van Ginderachter, E.: El procedimiento de medidas cautelares ante el Tribunal de Justicia de y el Tribunal de Primera Instancia de las Comunidades Europeas, Civitas, Madrid, 1993.

C-426/13, ECJ 2013/848) establishes that: the judge hearing an application for interim relief had powers whose impact vis-à–vis the institutions of the European Union went beyond the effects attaching to a judgment annulling a measure, provided that those interim measures apply only for the duration of the proceedings on the substance (…). So they are temporally subordinated to a judgement.

But also, if there is a required feature of protective measures this is the so-called instrumentality. This means that the measure cannot autonomously exist as it is subordinated to a proceeding on the substance. Similarly, the ruling of the Spanish Constitutional Court 39/1995 of 13 February (Appeal 1995/39) states that protective measures anticipate in some way the effects of the final decision. This is why protective measures that produce consequences that never could derive from a final decision shall not be adopted. Is therefore interesting to highlight that the ECJ has pointed out in the so called Case C-426/13 two features that shall be required to provisional measures: a) not prejudicing the decision of the Court on the substance of the case and b) not obstructing the effect of the proceeding on the substance[7].

Concerning the first feature, the ECJ states that the jurisdiction of the competent judge for adopting the requested measures is limited to whether the legally established requirements for their adoption are fulfilled or not. But if we consider those as real protective measures we will finally accept that it is possible to adopt measures with similar or identical content to the proceeding on the substance one. However, the interim measure stricto sensu providesa protection to certain interests that is not granted by the protective measure adopted to guarantee the effectiveness of a ruling that upholds the plaintiff claim[8].

With regards to the second feature, it is clear that the adopted measure cannot neutralise or obstruct the effects of the decision that precisely they are intended to guarantee.

7. See Article 162.4 of Rules of Procedure of the Court of Justice.

8. Continuing with the Case C-426/13, the Member State applied for the provisional measure "for the purposes of protecting human health and, specifically, children's health" which were the recipients of the toys with controversial materials; being this concern part of the proceeding on the substance. Either way, the Rules of Procedure of the Court of Justice is not precisely rigorous when treating interim measures as it considers as such measures the applications to suspend the enforcement of a decision of the Court or of any measure adopted by the Council, the European Commission or the European Central Bank, submitted pursuant to Articles 280 TFEU and 299 TFEU, Article 164 TEAEC, or Article 81 TEAEC; as they are not adopted to guarantee the effectiveness of the future final decision.

IV. TYPES OF MEASURES THAT MAY BE ADOPTED

The measures that may be adopted according to Articles 278 and 279 of TFEU are categorised in two main components:

- The first one establishes an specific interim measure, this is, the suspension of the enforcement of the contested act.
- The second one refers to other measures that without being specified are necessary according to the competent opinion of the court.

With regards to ex Articles 242 and 243 (nowadays Articles 278 and 279) it has been criticised that there is not an exhaustive list of the possible measures by which the judge may order any action as it deems appropriate[9]. In contrast, our national legislation establishes a catalogue of specific measures that may be adopted. This list of measures is closed with a generic protective clause (Article 727.11 of the Civil Procedural Act – Law 1/2000): it is possible to adopt "those other measures that in order to protect certain rights are legally established or are necessary for ensuring the protection of the effective remedy that may be granted in the judgment upholding the plaintiff's claim".

So if we analyse it and we obviate the evident differences, the scheme is essentially maintained: specific measure —which is the one used in practice—, and measures considered necessary in order to achieve the specific aim of the interim measure.

Before briefly explaining these two components, we must highlight that from a legal point of view, the request for provisional measures is recognised in the frame of the so-called direct actions. Therefore is usual their approach by a separate document in cases of actions of annulment (and of failure) brought against the EU Institutions by the Member States, by the EU Institutions themselves and by any natural or legal person if the decision is addressed to them.

A. THE INTERIM MEASURE SUSPENDING THE CONTESTED ACT

An application to suspend the operation of any measure adopted by an institution shall be admissible only if the applicant has challenged that measure in an action before the Court (Article 160.1 of the Rules of Procedure of the Court of Justice) and only if it is made by a party to a case before the Court and relates to that case[10].

9. Giménez Sánchez, I: La eficacia de las sentencias dictadas por el TJCE, Aranzadi, Pamplona, 2003, pg. 180.
10. Villagómez Cebrián, M,: Derecho Procesal Comunitario, Tirant lo Blanch, Valencia, 2001, pg. 292.

Nevertheless, this requirement is not always strongly required and therefore the Order of the Vice-President of the Court of Justice of 7 March 2013 in the Case C-551/12 (ECJ 2013/157) establishes that "whilst, in the present case, the application for interim measures does not formally seek suspension of the operation of a measure, the interim measures sought resemble such a suspension since the appellant seeks to obtain an additional period of more than two years in order to choose between the two options laid down in the commitments given by it with regard to the Nest-Energie project".

In contrast, we can see in the Order of the Vice-President of the Court of Justice of 21 January 2014 concerning the Case C-574/12 (ECJ 2014/36) that the act whose suspension is requested corresponds to the contested act in the main appeal. In this case, the Member State brings an action of annulment of the Decision of the Commission on the recovery of a benefit at a national level (a benefit granted by the State) and, simultaneously is recommended to suspend the Decision concerned as an interim measure, until the General Court decides on the substance of the appeal, as understands that "giving immediate effect to the contested decision, which ordered the recovery from the Société Nationale Corse Méditerranée (SNCM) of more than EUR 220 million and the cancellation of all payments after the date of notification of the decision, would inevitably bring about the insolvency and liquidation of that company and thus cause serious, irreparable and immediate harm to that Member State.

B. OTHER MEASURES FOR GUARANTEEING THE EFFECTIVENESS OF THE FUTURE DECISION ON THE SUBSTANCE OF THE MATTER

As we said, under Article 279 TFEU other interim measures can be adopted but only in two specified cases (Article 160.2 Rules of Procedure of the Court of Justice):

1. If they are applied by a party to a case before the Court
2. If they are related to that case.

These requirements means that they have to be similar measures as the ones adopted for the enforcement of the judgement upholding the petitioner's claim[11]. Indeed, adopting a measure which provisionally allows to maintain stricter national provisions than those rules established at the EU level on toys' materials is addressed by the Order of the Vice-President of the Court of Justice of 19 December 2013 (Case C-426/13, ECJ 2013/848). Here suspending the enforcement of an act in the sense

11. Villa Gómez Cebrián, M, op. cit., pg. 293:

established in Article 278 TFEU is not pursued, but instead other interim measure that grants an enhanced protection to the recipients of the toys is sought, in the sense stated in Article 279 TFEU.

V. REQUIREMENTS

Articles 160.3 of the Rules of Procedure of the Court of Justice and 107 of the Rules of Procedure of the General Court state that adopting interim measures is subjected to the "circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measure applied for". Also we must highlight that "the execution of the order may be made conditional on the lodging by the applicant of security, of an amount and nature to be fixed in the light of the circumstances". This way the so-called requirements of the protective measures that are established in our national legislation (Article 728 of the Civil Procedural Act) correspond with the appearance of a prima facie caseor "fumus boni juris" and urgency or "periculum in mora".

In the EU case-law, the competent judge may order the suspension of the operation of an act or other interim measures when concuring the following requirements:

1. The urgency, this means that in order to avoid serious and irreparable harm to the applicant's interests, the measure shall be adopted and produce its effects before a decision is reached in the main action[12]. The urgency must therefore be assessed with regards to the need of provisionally protecting the applicant's interests and is related to the chances of a serious and irreparable harm[13].
2. Fumus boni iuris, which is fulfilled when the applicant proves that the granting of the interim measure is justified prima facie, in fact and in law[14].

In that order, the applicant shall prove to the competent authority the fulfilment of both requirements but is not necessary to prove that in all cases

12. For more information on the concept of serious and irreparable damage see Pastor Borgoñón, B. and Van Ginderachter, E.. op. cit. pg. 97.
13. Cfr. the periculum in mora established in Article 728 of the Civil Procedural Act: "Protective measures shall only be adopted when the applicant justifies that situations that can show up when pending the proceeding could impede or obstruct the effectiveness of the remedy granted by an eventual judgement upholding the petitioner's claim".
14. Cfr. the fumusboniiuris established in Article 728 of the Civil Procedural Act: "The applicant of the protective measures shall attach to his application the data, grounds and documentary justification so the Court can inform without prejudicing on the substance of the matter a provisional judgement favourable to his application".

the harm is going to inevitably be produced, but that there is a reasonable chance that this harm may occur[15]. In other words, it is not necessary that the imminence of the danger is proved with absolute certainty; but only that this damaging effect is foreseen with a sufficient degree of probability. This does not prevent to requiring the applicant of the measure to prove the facts that are the basis of the belief that the mentioned harm is going to happen. This is also required when fundamental rights are at stake and even considering the reinforced protection granted by the Treaty of Lisbon. In this sense, the ECJ stated that "it is not sufficient to allege infringement of fundamental rights for the purposes of establishing that the harm which could result would necessarily be irreparable"[16].

As far as the fumus boni iuris principle is concerned, it is only required to justify prima facie that the requested measure is appropriated for its aimed purpose of guaranteeing the effectiveness of the final decision. Exceeding that limit involves a consideration of the evidence unrelated to the one that shall perform the competent judge.

One of the most complex issues in proceedings for interim measures is precisely the provisional assessment that the judge has to carry out for upholding the application for provisional measures. Here we must highlight:

- The need of taking into consideration in a comprehensive manner the application for interim measures. The conditions of fumus boni iuris, the urgency and the harm that may be produced are cumulative requirements, so that an application for interim measures must be dismissed if any one of them is absent (Order of the President of Court of Justice of 14 October 1996, Case C-268/96).
- The need of balancing the conflicting interests and favour certain of them instead of the others[17]. This assessment will lead the judge

15. Op. cit. pg. 97. See also the Case of the EU Commission against ANKO AE Antiprosopeion, EmporioukaiViomichanias. Order of 8 April 2014. ECJ 2014\161 and the mentioned case-law, op. cit. pg.. 97. See also the Case of the EU Commission against ANKO AE Antiprosopeion, EmporioukaiViomichanias. Order of 8 April 2014. ECJ 2014\161 and the mentioned case-law.
16. See Order of the President of the ECJ of 15 April 1998, Camar/Commission, C-43/98).
17. The balancing of interests in our national legal system is linked to the adoption of protective measures when administrative acts are under appeal. In this sense, the "provisional suspension of the act under appeal or the contested administrative decisions" is foreseen as an specific measure; and in general terms, "all those measures that guarantee the effectiveness of the final decision" are granted. (Article 129 and 130 of the Law 29/1998 of 13 July governing Administrative Jurisdiction. See also Maurandi Guillén, N.: Comentarios a la Ley Reguladora de la Jurisdicción Social, AAVV, Dir. Folguera Crespo, Salinas Molina y Segoviano Astaburuaga, 3ª ed., Lex Nova, Valladolid, 2012, p. 655.

of interim measures to compare or collate between the conflicting interests.

VI. PROCEEDING

The application for suspending the operation of an act or for the adoption of other interim measures shall state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measure applied for (Article 160.3 of the Rules of Procedure of the Court of Justice and 104.2 of the Rules of Procedure of the General Court). The application shall be made by a separate document[18]. This rules out the possibility of applying for the measure jointly with the main application; which is allowed by our Civil Procedural Act[19].

Nevertheless, the regulation of the proceeding for ordering provisional measures is characterised, in my opinion, by these two features: 1) it is short and brief, and Regulations only establish the most basic aspects; and 2) it grants to the competent judge a wide discretion for deciding on procedural matters which are in some way secondary (way of contesting the application, preparatory inquiry).

In any case, the proceeding is based on the principles of urgency/ expeditiousness — given the urgency on which is based — and on the principle of party disposition.

• Procedural stage for applying: the application for interim measures usually is jointly submitted with the direct actions. But when Regulations do not bar the party who applied for interim measures from making a further application on the basis of new facts after being rejected a previous application (Articles 164 of the Rules of Procedure of the Court of Justice and 109 of the Rules of Procedure of the General Court), we understand that while the main proceeding is pending, the applicant can choose the procedural stage for applying for the interim measure or for provisionally

18. The Rules of Procedure of the Court of Justice establishes the content of the application of direct actions:
a) the name and address of the applicant;
b) the name of the party against whom the application is made;
c) the subject-matter of the proceedings, the pleas in law and arguments relied on and a summary of those pleas in law;
d) the form of order sought by the applicant;
e) when appropriate, any evidence produced or offered.

19. Article 730.2 of the Civil Procedural Act states: "protective measures may also be requested before submitting the application if the applicant at the same time alleges and proves urgency or necessity reasons"

suspending an act that may provoke a serious and irreparable harm on him.

- The President shall either decide himself on the application or refer it immediately to the Court. The Rules of Procedure of the General Court establishes that being the President of the General Court absent or prevented from attending, he will be substituted by other Judge as the "judge hearing the application for interim measures".
- The applicant undoubtedly has the locus standi, this is, he is entitled to submit the application for suspending the execution of the act. When granting other provisional measures requested "by a party to a case before the Court" the locus standi is more problematic. In this case, a third party may be considered as an intervener as he may have an interest in the applicant's application[20]. The opposite party shall be the defendant in the main proceeding.
- Processing of the defendant's arguments: The application shall be served on the opposite party, and the President shall prescribe a short time-limit within which that party may submit written or oral observations (not being subject to any other requirement as to form)[21].
- Interim and urgent provisional measures. We believe that the extreme urgency of the measure, in the absence of regulation in this respect, shall be assessed by the President in each particular case. So in this situation, the President may grant the application even before the observations of the opposite party have been submitted (without hearing the other party), but the decision which terminates the proceeding for interim measures could only be adopted after hearing that party. This decision may be varied or cancelled even without any application being made by any party.
- The decision on the application for interim measures or for the suspension of the execution of an act, shall take the form of a reasoned order. The order shall be forthwith served on the parties. The President may, where he considers it appropriate, adopt temporary solutions, in particular by granting an application seeking the suspension in part of the operation of an act (Order of the Vice-President of the Court of Justice of 28 November 2013, Case C-390/13).

20. Pastor Borgoñón, B. and Van Ginderachter, E., op. cit. p. 46.
21. On an indicative basis, see Article 124 of the Rules of Procedure of the Court of Justice when the defendant lodges a defence within the written procedure of the direct actions.

- Appeals: the Order delivered by the President of the Court of Justice can in any way be contested. Consequently, it has to be complied by the parties and has relative authorityas res judicata[22]. Orders made by the General Court can be subject of an appeal brought before the Court of Justice.
- Modification of the measure: on application by a party, the order may at any time be varied or cancelled on account of a change in circumstances.

22. Villagómez Cebrián, op. cit., p. 304. We have to consider that the order shall only have an interim effect, and shall be without prejudice to the decision of the General Court on the substance of the case.

Chapter XV

Court fees and the right to an effective judicial wardship[1]

Dr. Teresa Meana Cubero

University of Seville

I. THE MOTHER OF ALL BATTLES

Before considering the question of this study, we shall warn about the lack of economical issues regarding the costs of the Spanish Justice. If they existed, they could support all the commentaries for the purpose of this matter. We should not only fathom the costs implied in the performance of courts, but we should also consider the benefits that implies their activity, with their own dysfunction like the delays, that benefit debtors and, therefore, the public Authorities as well, that are normally occupying the position of the defendant, mainly in the contentious-administrative proceedings. Borrajo Iniesta (2013) illustrates how the Spanish justice is financed: since its very origins, there was a complicated system of tariffs together with shorter and shorter budgets, until the Law 25/1986, from the 24th of December, removed all the rates and tariffs in force until that moment. In 2002 the legislator introduces not very high rates again in the civil and administrative orders through the Law 53/2002, from the 30th of December: it affected bigger companies and with not very high amounts. After 10 years, the Law 10/2012, from the 20th of November, regulating specific rates in the scope of the Justice Administration and the National Institute for Toxicology and Forensic Science —BOE from the 21 of November— has extended the rates to every juridical or physical

1. This report has been carried out under the project financed by the Spanish Economy Ministry "best legal-procedural practices in the field of labour and European law to reduce labour litigation expenditure at zero cost (I+D DER 2012-32111).

person in the civil, social and administrative orders, increasing their amounts highly. Different circles of persons have maintain that the rates have come to remain in time, that it is not the most convenient thing to keep the justice for free established by the art. 119 Spanish Constitution due to the vertiginous increase of complaints since 1986, when the judicial tariffs were removed —even if there can exist other concomitant factors—, and that the Access to Justice shall be subsidized without any limitation by the taxes, that shall be used as well to attend many other social needs.

In February 2012 and in the frame of a serious economical crisis, the former Ministry of Justice, Mr. Alberto Ruíz Gallardón announced a regulation about rates, maintaining that they would disappear in the first instance but would remain in the second instance in a symbolic way to discourage people doing a misleading use of Justice. Nobody complained against those declarations awaiting to know how were the concrete measures to imply them, but the Minister did not maintain his word and with the inforce coming of the norm, a general protest among the whole juridical community began and has last more than one thousand days.

The Preamble of the Law 10/2012 from the 20th November established a rationalization of the exercise of the judicial power as the aim of rates and, at the same time, it will be the instrument to improve means to finance the judicial system and, particularly, the free legal assistance. Therefore, the most important finality of it was, not only reducing the litigiousness, but assuming a copayment by the citizens, in a similar way of what happens in specific Autonomic Social Securities. The Preamble also states that it aims promoting solutions of litigation by means that are not juridical, since it offers returning the rate in every process where an agreement is taken.

This Law extended its application to the physical persons, thus requiring the payment of rates in any process applied for, increasing its amount from the previous one established in the art. 35 of the Law 53/2002 from the 30th December on administrative, taxing or social order measures, in order to recover the rate for pleading under the judge, modified by a subsequent reform done by the Law 4/2011 that modified the Law 1/2000 from the 7th January for Civil Judgement, enlarging the payment of the rate to all the monitory processes and by the Law 37/2011 from the 10th October on expedite measures.

Nevertheless, the mentioned Law has only obstructed or inhibited the Access to Justice to thousands of citizens: during the last two and a half years since the in force coming of the rates established by the Law 10/2012 (RCL 2012,1586) there has been an increase of scarcely 500 million euros, and none of those euros has reverted in benefit of the Justice in general and, even less, in free Justice, as stated in the Preamble. The rejection

that the Law 10/2012 has generated in every juridical environment for putting limits to the general access to free Justice is remarkable. The General Council of Lawyers (from now on, the CGAE) has conducted the hard fight for the abolition of the judicial rates in every possible forum —Justice Ministry, Ombudsman, political parties, Constitutional Court, Parliaments, Autonomous Governments or even on the streets, because they consider it a tremendous error. Among the arguments maintain for the removal of that Law are that, Justice cannot be concede against the citizens or establishing barriers —some of them impassable, indeed— to the legitimate exercise of rights; Justice cannot be considered heritage of judges, prosecutors or, even worse, of politicians: Justice belongs to the citizens and is being given for them, so that any obstacle that hinders even more the access to jurisdictional solution of conflicts shall be rejected by all the implied sectors. The Advocacy has sent a letter to the former Minister of Justice Alberto Ruíz Gallardón since April 2012 when the approval of the Project of the Judicial Taxes by the Council of Ministers, asking for the abolition of rates for being unjust and excessive, not having any legal or constitutional basis to justify its imposition, as already stated in a Report by the Legal Commission of CGAE in June 2012. Since its very beginning, they have been considered an unnecessary and unjustified impediment for accessing to the effective judicial protection, injuring precisely, those with less economical means, making Justice out of reach for a wide part of the society. Since there is no scale of rates depending on the economical capacity, the middle class is suffering its application, if "middle class" can be considered those families surviving with 1.100 euro monthly, amount fixed as the limit for the tax exemption. It is irrelevant for companies, since for them and contrary to what happens to individuals, it is a cost that can be fiscally deductive, like the VAT; debtors in concourse and also the State are exempt of paying the rates. The Law 10/2012 establishes the impunity of the most powerful and a minor protection against the arbitrary performance of the public institutions; let us just consider the contentious-administrative appeal against a traffic fine, where the amount of the rate could be even higher than the fine itself. Even more serious is the disappearance of the consumers´ protection: very expensive rates for small matters, like the complaints of consumers against big companies, where the rates constitute a deterrent element by itself.

The Project of Law approved by the Council of Ministers in July 2012 was negotiated in the Deputies´Congress with urgent character, being approved in the Justice Committee of the Congress the 30th October 2012. The day after, thousands of lawyers took part in all the protests that were promoted in all the country by the Spanish Association of Young Lawyers. In November 2012, the President of the CGAE asked the ombudsman to present an unconstitutional appeal. Several demonstrations of lawyers

were organized during the 1000 days in which the norm was in force. Together with the demonstration of the one taking place the 31st October, there are remarkable the one of 20th November in Madrid, with more than 25.000 lawyers and the one by Deans and members of the Ruling Councils of the 83 Lawyers Associations, directed by Carlos Carnicer, who was the President of the CGAE (Spanish General Council for Lawyers).

The Law 10/2012 of judicial rates published in the BOE from 21st November was rejected at the same time and getting together by the CGAE, Judges and Fiscals, performing all of them a Public Event defending the Administration of Justice in December 2012. The same month, the Platform Justice for Everybody was created, being formed by the Council of Consumers and Users, the trade unions UGT, CCOO, USO and CSI-F, who rejected in common the Law of Rates and the Preliminary Draft of Free Justice Law, that was an obstacle to the access to Justice for extended sectors in the society.

In the parliamentary scope, the socialist Party presented in February 2013 unconstitutional appeal in the Constitutional Court, that was put together with the ones enacted by the Autonomous Governments in Catalonia, Andalusia, Canary Island and Aragon.

There are also some remarkable initiatives like collecting more than 170.000 signatures through internet or the Resolution by the European Federation of Lawyers Associations demanding the abolition of the Spanish regulation on rates and signing during their Congress in Frankfurt a resolution of total rejection to the regulation adopted by our Government.

There is even an agreement dated on June 2013 from the non jurisdictional Chamber of the Forth Section in the Spanish Supreme Court denying the mandatory requirement of paying taxes for workers, trade unions, Social Security benefit users, functionaries and statutory workers in the case of appeal for supplication and normal appeal. There were also members of the University communities that arose their voices against this regulation: a study by the Autonomous University in Madrid showed in July 2013 how the real number of appeals presented were just 20% of the figures given by the CGPJ (General Council of Judicial Force), so that the figures of appeals cannot be used as an argument used by the Minister of Justice in order to establish a system of rates.

The fight against the Law extended its action to social media: A group called "Brigada Tuitera" was created with more than 8.000 lawyers in it after the first year of enforcement, and since its very beginnings, the group was very active against the Law, even organizing specialized seminars, and meetings like the one called "Night against rates" in

the Lawyers Association in Madrid. They described themselves as a vindictive movement, not connected to any ideology and whose aim was to advise Spanish citizens of the defusing of our Justice. The unanimous rejection was extended all over the year 2014 until the resignation of the former Minister of Justice Alberto Ruiz Gallardón the 23rd September, being his successor Rafael Catalán, who announced in his designation the modification of the law for judicial rates, forming a mixed working Commission together with the CGAE (National Lawyers` Association) in order to promote the necessary reforms explained by the Minister. The long awaited reform of the Rates` Law was announced by the Minister in the Parliament, more concrete, in the Senate the 2nd December 2014, arguing that the rates could never imply the limitation to the right of free access to Justice entitled to the citizenship.

A fundamental event in that fierce battle was the publication in the Spanish BOE (States´ Official Bulletin) the 18th March 2015 of the Resolution adopted by the Congress the 12 of March, containing the requirement to publish the Convalidation Agreement of the Royal Order 1/2015, adopted by the Ministers Council the 27th of February of mechanisms of second chance and decrease on financial costs and other social measures. This rule establishes the abolition of judicial rates for physical persons because of the hopefully signs of recovery experimented by the Spanish Economy and the necessity of attending an unfavorable economical situation for an important amount of citizens that, not being entitled to an effective and free judicial protection, shall be considered because of the influence over them of the system of rates to exercise their judicial power. This is an euphemistic way to recognize what has been reminded to the Government from every part of the juridical community in the last two and a half years of the Law`s inforcement to physical persons.

The Government has used the Royal Order due to the extraordinary and urgent necessity of the situation, and ending a situation that had provoked an important social rejection because of introducing an element to discourage the access to the court. The Government recognizes in the Explanatory Preamble of the Royal Order 1/2015, faster than a law, the additional effect that should emerge from the using of the Royal Order: that there should be a high number of cases whose judicialization would be postpone until the inforce coming of the rule, thus, provoking a massive entry of cases in courts.

Nevertheless, the battle has not finished yet, since juridical persons shall still pay rates and it can affect, according to the Minister, small companies by many reasons: all the conflicts in which they are involved are usually under two thousand euros, reaching thus the legally exempting amount or companies could used rates to decrease fiscally their Society Tax. It

seems that the Minister pretends to go back to the system of 2003. The CGAE, through its President, Mr. Carnicer, has announced that they will continue the battle until the abolition of all the rates for Autonomous workers and small companies, which will be very positively considered for a higher economical growth and the creation of employment.

II. CONSTITUTIONAL DOCTRINE: THE SENTENCE OF CONSTITUTIONAL COURT 20/2012, FROM THE 16TH FEBRUARY

Judicial rates approved by the Law 10/2012, from the 20th November, conform the judicial happening that has mostly affected to the right to effective and free judicial protection in the last years. It is not a new measure, because the art. 35 of the Law 53/2002, from the 30th December on Fiscal, administrative and social measures was introduced as a requirement to the access of Justice administration. The Law 10/2012 was partially modified by the Royal Order 3/2013 of the 22nd of February, and it introduced some novelties regarding the former regulation: an extension of the rates to the social jurisdictional administration, abolition of the exemption for physical persons and a considerable increase of their amount. As already stated, the reaction of the juridical community has been visceral and, in the legal field, five unconstitutional appeals have been presented, together with some unconstitutional claims presented by different jurisdictional institutions, that have not yet been solved by our Constitutional Court.

However, our Constitutional Court had the opportunity to express its opinion regarding judicial rates in its sentence STC 20/2012 from the 16th of February solving a question aroused by a First Instance Court from La Coruña, that was even used by the legislator as an argument favoring the establishment of a rates` system in the Preamble of the Law 10/2012 stating that the Law had confirmed the constitutionality of the rates, recognizing the possibility of a model in which part of the Administration of Justice cost shall be afford by those who most benefit from it. This sentence considered the constitutionality of art. 35 in the Law 53/2002, from the 30th December (RCL 2002, 3081 and RCL 2003, 933), finding the requirement of rates constitutionally acceptable in that article, and also being this interpretation the one adopted by the legislator in the Preamble of the Law 10/2012. We could discuss if it is really so.

We maintained, following Villafáñez (2014), that the answer to that question shall be negative, since what that sentence really adopted was the general principle of freedom given to the legislator in order to create a system to finance the cost of Justice, so that choosing one or another

model corresponds effectively to the legislator (Legal Foundation 8th). Once settled this principle, the Constitutional Court descends to the specific regulation presented in the discussed statement, art. 35 of the Law 53/2002 and in its Legal Foundation 9th establishing that a norm with legal category requiring the payment of rates to companies of high invoicing does not infringe in principle the Constitution. This cost shall reimburse to finance the jurisdictional activity implied by the appeals freely presented by the companies in the civil order to preserve their legitimate rights and interests.

However, this assertion is nuanced with respect to the Legal Foundation 10th when establishing that this general conclusion could only be modified if proven that the amount of rates is so high that inhibits or blocks the access to court (…) in non reasonable terms, addressing to the criteria maintain in the case-law regarding the right to effective judicial protection from the art. 24.1. Spanish Constitution. That right could be damaged by legal dispositions establishing inhibiting or blocking requirements to the access to court, if those impediments become unnecessary, excessive and lacking of reason or proportionality as regards the objectives search lawfully by the legislator (Legal Foundation 7º).

The basic conclusions subscribed by Magro Servet (2013) about the sentence of the Spanish Constitutional Court STC 20/2012 (RTC 2012, 20) are the following:

a) It is constitutional to establish the payment of court fees in the civil order for receiving juridical performance.

b) It is not logical to protest against the legislator for having chosen a determinate system to finance the Justice. And that the protest to get the exemption of rates is presented by those who are entitled to receive Justice.

c) The legislator has decided to establish a rate to be paid by big companies when they appeal for Justice as a way to finance partially the cost of attending and solving their appeals.

d) It is constitutionally valid the limitation imposed by the norm in art. 35 of the law 53/2002, from the 30th December.

Villafáñez (2014) maintains that the sentence not only affirms the constitutionality of the system from the art. 35 of the Law 53/2002, but it also has included a safeguarding of the fundamental right to the effective judicial protection following the case-law by the ECHR and the ECJ: the right to access to court is not an absolute one, and it can be restricted by limitations. Those limitations will be considered against the art. 6.1. of the European Convention on Human Rights if they restrict the

access to court in such way that the very essence of the right should be damaged. The restrictions will only be acceptable towards that norm if they search a legitimate objective and there is proportionality between the measures employed and the legitimate objective search by the legislator, so that when the rates disdained for the financial situation of the citizen or are extremely high and totally inflexible, they become an obstacle or hindrance on their own to the access to Justice.

Some authors maintain that the sentence 20/2012 does not have anything to do with the scope and content of the right to an effective judicial protection, but that it was dictated as regards the compatibility of one article in the Law 53/2002 with the art. 24.1 Spanish Constitution; against this statement, Villafáñez (2014) maintains that the new regulation is similar on the grounds to the one in the Law 53/2002.

The doctrine by the Spanish Constitutional Court mentioned in the sentence STC 20/2012 should be of application in order to determinate the conformity with the constitutional text in the Law 10/2012, since that norm introduces an economical requirement for trials, that is an obstacle to the access to Justice, similar as done by the art. 35 of the Law 53/2002. The author highlights the rigidity of the rates regulation in the Law 10/2012, compared to the flexibility foreseen in the regulation of the right to Free Justice —Law 1/1996, from the 10th of January of Free Legal Aid Act—, where established that the trial costs shall be taken on by those who, in the case of having to assume that cost, should leave the appeal or would extremely risk the minimum level for personal and familiar subsistence.

This regulation contemplates different flexibility mechanism, like the recognition of the right to those who, not fulfilling all the requirements by art. 3, have economical income under certain limits or do not have enough patrimony, or when there are specific familiar or health circumstances in the solicitor. That right is also guaranteed by means of the possibility of judicial challenge to resolutions denying or recognizing the right to free legal assistance.

Unlike this regulation, the Law 10/2012 has not foreseen a similar system to modulate the application of rates depending on determinate circumstances concurring in the taxable subjects. Therefore, the inflexible or rigidity above mentioned. A specific procedure requirement has been passed over. It should have been the suspension of the process until a decision is taken as regards the enforceability or not of the rates. Thus, the Constitutional Court recognizes definitively that those rates that due to their amount will consist practically on an impediment or difficulty to access to court in unreasonable terms are not compatible with the right to an effective judicial protection.

This conducts us to maintain together with Borrajo hiniesta (2013) that the Law 10/2012 affects to the fundamental right of art. 24.1. in the Spanish Constitution when establishing rates for appealing or the access to legal resources; therefore, its validity depends on the search of a legitimate objective with proportionate measures.

Villafáñez (2014) maintains that, in the lack of a specific procedure, the Law 1/2000 of the Act of Civil Procedure shall be applied as supplementary in order to use the procedure for incidental questions of prior determination (arts. 392 y 393 of the Law 1/2000) since the rates are an obstacle to continue the trial by its ordinary procedures. It is the case of art. 391.3º of our Act of Civil Procedure as regards facts of prior determination: 3.º any other incidence happened during the trial and whose resolution shall be absolutely necessary, de facto or de iure, to decide whether to continue with the trial following its ordinary procedures or its ending. This incident of prior determination should have suspensory effect and, in order to adopt the decision, any circumstances that would practically compromise the efectiveness of the right to judicial wardship should be considered.

Definitely, the concurring circumstances should be pondered trying to find the balance between legal requirements and the guarantee of the fundamental right for court access expressed in the art. 24.1 Spanish Constitution, that needs to hold a leading position in a democratic society. It is legitimate thus, using the constitutional challenge or constitutional question to verify the compatibility of the Law 10/2012 to the Spanish Constitution, as has been already happened in the circa one thousand days that the judicial rates whose taxable person where physical persons has been in force.

III. FINAL REFLECTION

Different spheres maintain that the rates have come to remain in our system. It is a contentious issue that Justice is to be free of charge as expressed in art. 119 Spanish Constitution shall be most convenient due to the vertiginous increase of litigiousness since the judicial rates were delete in 1986 — even in the case of other attendant circumstances in this increase, and that the access to Justice shall be subsidized by taxes with no limit at all, that they have to cover many other social needs as well. Nevertheless, the magnificent increase of the rates system established by the Law 10/2012 has been scarcely considered, without any works about the real costs of Justice and not pondering the different interests in conflict, behind the backs of the legal community and the basic interest of citizens. Adding to the circumstance that there has been no reimbursement of

the amount collected by those means, 564,4 millions euros, to improve the financing of the Free Justice, as solemnly proclaimed under art. 11 of the Law 10/2012, not modified by any other subsequent regulations, there shall be deduced that the system devised by the former Minister Gallardón has not been supported by any of the implied sectors, having also been rejected by the advocacy and other judicial sectors even in an institutional scope as on street level. If as above mentioned, the rates have come to remain, it is unavoidable to establish a different system: it will be necessary to potentiate the payment of the proceedings costs in order to avoid any recklessly litigation, that the amounts shall descend to an affordable fixed price, so as to remove them in the Social Jurisdiction and establishing some exemptions in the civil and contentious administrative order.

Even the actual Minister has said that the partial derogation of the rates for physical persons has obeyed to a better economic climate in Spain, and not because of being an obstacle to the access to Justice and because of not being an important amount for the State´s budget. This is a disregard towards many and many citizens affected because of not being able to exercise their appeals since they were not able to support the costs of it. We do not understand the scope of the words by the Minister, considering the mass protests of thousands voices from every corner against the norm during its inforce of almost one thousand days. There would be no problem in recognizing the error occurred while universalizing the system of rates to both, physical and juridical persons opting for a different way to finance Justice, if it would have been adopted by consensus of all the sectors involved, with a calm reflexion considering all the interests in conflict.

Chapter XVI

"Good practices" and crisis of the labour proceeding principles[1]

Prof. Dr. Eduardo González Biedma

University of Seville

I. CLASSIC PRINCIPLES OF THE LABOUR PROCEEDING

Labour Procedural Law is not historically the result of a specialization from the civil or criminal proceedings, as known. Labour proceeding is from the very beginning not only based on its own principles and original mechanisms but also with a very specified purpose[2].

This purpose was more than settling disputes. Labour Procedural Law was particularly intended to complete the original protective function and characteristic of the Labour Law. This was achieved through mechanisms geared to facilitate the implementation of the rights derived from its execution.

The Spanish Industrial Courts created in 1908, and the joint committees created in 1922 that finally turned into the mixed juries in 1931 illustrate this point. Later, the Labour Courts were established in 1938 at the end of the Spanish Civil War, and the Central Labour Court (subordinated to the organization and competences of the Ministry of Labour and not to

1. This report has been carried out under the project financed by the Spanish Economy Ministry "Best Legal-Procedural Practices in the Field of Labour and European Law to Reduce Labour Litigation Expenditure at Zero Cost (I+D DER 2012-32111).

2. Seetheclassicalstudy of Rodríguez-Piñero, M., *Sobre los principios informadores del proceso de trabajo*, RPS, no. 81 (1969), pages 21-83. Also Alonso Olea, M., Miñambres Puig, C., Alonso García, R. M., *Derecho Procesal del Trabajo*, *Valencia,* Tirant lo Blanch, 2004, pages 35ff.

the Ministry of Justice[3]) confirmed these core elements in order to ensure the effectiveness of Labour norms. Also, these elements were an essential complement to the substantive rules of the former work legislation, and later, of the Labour Law.

Therefore, the proper path for applying labour norms almost dates back for the same time as the substantive rules.

Furthermore, we should point out that the labour procedural system is mainly used at the request of the workers. The overwhelming majority of labour proceedings are initiated at the request of workers themselves; scarcely being used by employers (excluding those appeals that may be brought by them against workers claims). Labour proceedings are mainly addressed to collective disputes but hardly used for individual litigation (recovery of undue salaries; or when causing damages to the company, in cases of unfair competition or failure to respect a post-contractual non-competition covenant).

This would make us doubt if the Labour Procedural Law originally participated in Labour Law's "horizontal approach" (this means the extension of its scope to include figures from other legal disciplines), when actually it lies at the heart of the Labour Law itself.

In short, Labour Procedural Law not only consists of specific procedural rules based on the particularities of the subject-matter. It rather, but is shaped within a singular system with a differentiated jurisdiction, specific rules (innovative if compared with the civil proceeding) and in parallel with the ordinary civil proceeding.

Our purpose with these statements is not to deny the influence of the ordinary proceeding in labour proceeding (and vice versa), but to confirm the singularity of the labour proceeding and its approach as a core element in the shaping of Labour Law. Consequently,, as stated by Prof. Rodríguez Piñero[4] and Prof. Alonso Olea[5] we can not conceive it as a secondary or added feature.

Labour procedural rules were therefore always conceived as tools for improving the effectiveness of labour rights, being interconnected. Each substantive Law element was continued in the procedural rule that completed substantive aspects. Here, legal figures concerned are well-known and applied in practice as the conflict resulting from not

3. Particularly, Martín Valverde, A., *La formación del Derecho del Trabajo en España, (Estudio preliminar),* in AA.VV., *La Legislación Social en la Historia de España. De la revolución liberal a 1936*, Madrid (Congreso de los Diputados), 1987, pages XII-CXIV.
4. Cit., particularly pages 32ff.
5. Ob. cit., pages 37ff.

performing the reinstatement of the worker. The dismissal demonstrated it as it was precisely applied to the most litigious matter under the scope of Labour Law.

In a nutshell, proceedings and Labour Law share a common objective despite being more apparent at the Procedural Law level: the conflict settlement. If Labour Law is more oriented to the conflict settlement, something similar can be confirmed when the labour proceeding is concerned. This is very evident in the collective dispute settlement procedure as the labour procedural rule establishes a continuity of the judicial activity with respect to the conflict settlement achieved by the parties. Only when the attempt of the parties for settling the conflict fails, the judge has to act.

In this case is very clear, perhaps even more than in others, the strong interconnection that exists between the labour proceeding and the substantive Labour Law[6].

This origin and configuration of Labour Law is what justifies its remarkable specialities, and the particular principles on which it is built and that inspire other proceedings belonging to different legal fields:

A. ORALITY

The labour proceeding is the oral proceeding par excellence.

The oral expression of the parties positions allows the judge to promptly and undoubtedly informed on the positions of the parties in an almost "tactile" manner. He also is able to easily understand what the parties want with the possibility of re-examining, investigating, and directly analyzing the parties positions or even their emotions. All this shall always appropriately be interpreted by the judge in order to fulfill the ultimate purpose of the proceeding: finding the truth and re-establishing justice through it.

It also (theoretically) enables an accessible and easy proceeding developed at a rapid pace and without unnecessary technical requirements. Orality contributes to speeding the proceeding. It is not necessary to allow the parties time to express their observations in written; thereby avoiding timelines, reviews and examinations.

Orality enables the judge to quickly find the material truth, and consequently to guarantee the ultimate objective pursued: the restoration of Law.

6. Article 156 of the Royal Legislative Decree 2/1995 approving the Consolidated Version of the Regulatory Law of the Social Jurisdiction.

B. JUDICIAL INTERVENTION

This principle is linked to the previous one. This principle means that a judge must be present in all stages of the proceedings. According to this principle, only judge that has heard the parties and have been present in the taking of evidence is the competent for giving a judgement. A different judge from the one who assisted to trial cannot pass a judgement; provided that as this "experience" or personal monitoring of the dispute cannot be extrapolated. This judge leaves a conviction and data that other judge after reviewing an "inert" evidentiary material and a succinct trial (nowadays replaced by the digital recording) cannot recreate.

Undoubtedly, by respecting this principle the judge will better, faster and more direct in a manner assess the subject-matter. Like wise this principle will be the basis for settling the dispute in both a faster and more appropriate manner.

III. "PRINCIPLE OF CONCENTRATION"

This principle is intended to achieve a rapid process without undue delay. According to this principle, homogeneity in trial proceedings is pursued so they are not extended beyond what is strictly necessary.

IV. PRINCIPLE OF URGENCY

This is the principle according to which simplifying the proceeding is pursued. Its aim is also to achieve the absence of stages or prior hearings, and the establishment of mandatory and rapid time-limits for developing the different procedural steps.

By this principle, the legislator seeks to shorten time-limits so labour justice is performed in a rapid manner.

This principle is also aimed to avoid the trial: the compulsory attempt at conciliation; both at judicial and extrajudicial levels. Originally, this objective was pursued exclusively through the administrative procedure with a curious "intervention" of the public administration in the labour judicial system; and later, of trade-union bodies in certain cases. Finally, this principle pursues the objective of providing the worker the opportunity of having his rights restored in a faster manner.

V. FREE-OF-CHARGE PROCEEDINGS (FOR THE WORKER)

From the very beginning, this type of proceedings have respected the principle of access to justice free of charge. This means that the worker

(in addition to public institutions but not employers) shall benefit from proceedings free of fees, charges and costs.

Even the absence of requiring the worker to be represented in legal proceedings pursued the objective of saving charges for the worker; as he could be heard in Court without paying costs and Attorney fees.

The lawyer's signature in the appeal for reconsideration (which in this case is unavoidable as so it is the technical charge of an appeal of this nature) could be also be conceived for this purpose. This requirement was limited to the minimum necessary in order to fulfill this objective; so the representation by an Attorney General was not mandatory.

VI. "GREATER FORMAL FLEXIBILITY"

We should point out that the labour proceeding always has benefited from form a greater flexibility regarding procedural required forms. However, nowadays this flexibility may not appear in a less striking manner because it appears in other jurisdictions: facilities when remedying procedural defects, greater freedom when accepting and taking evidence (witnesses), and accepting documents that regardless of their ratification in trial or validation as authentic copies (even if they are e-mails) can be freely assessed by the Judge. Not requiring the representation of the parties by an Attorney also implies the designing of a less formalized proceeding aimed at finding out the "material truth" of the subject-matter. This search of the material truth would be performed by the Judge. Being this truth revealed by this manner the Judge will also be able to rule in accordance to the Law and later enforce his judgment.

VII. THE CURRENT CRISIS OF THESE PRINCIPLES

However, we have to be aware that nowadays all these principles are to some extent in crisis. In many cases, there seems to appear a serious crisis by which their original function is challenged. This crisis is not just due to distortions or bad practices in the system due to unforeseen conducts or the lack of material resources (some of the reasons, as we will show below). But they are also a result from the subsequent reforms of the labour procedural law that, despite the objective of respecting the labour proceeding singularities, has been brought in line with the remaining procedural figures existing in Spain.

The following provides an overview of the above mentioned principles in order to analyze this crisis:

A. ORALITY

The undoubted advantages of orality have been already expressed. However, the complexity of labour proceedings and their economic relevance makes us reflect on the crisis of this principle. Would it be logical in this context that the defendant (usually the company) could only orally answer the claim when the proceeding is being performed without being able to present case law, legislation, observations and material details concerning the subject-matter? In this sense, would the necessary balance required in every proceeding be inevitably broken when a party does bring the claim in written and the defendant cannot contest it in such a manner?

We should consider that as we know, labour proceedings are not limited to whether a specific amount is owed to the worker or not; or whether a particular act constitutes a disciplinary dismissal or not (according to the Spanish Labour Legislation, Article 54.2 of the *Estatuto de los Trabajadores* —Workers Statute— the disciplinary dismissal would be the one performed by the employer's will on grounds of serious and negligent breach of the contract by the worker. In contrast, labour proceedings include all kinds of claims and are characterized by an immense technical complexity: regarding pension schemes, collective dismissals, complex issues concerning fundamental rights, occupational accidents and injuries, insurance... These cases lead to trials that may be extended for hours and to a huge corpus of evidentiary material. This gives rise to the question whether orality is nowadays as realistic and advantageous as it was at its beginning.

The following aspects, at least, be analyzed the following aspects: claims often do not together specify in writing their observations on the subject-matter in a reasonable or detailed way; also these observations presented at trial are increasingly more complex, as they have to be founded on case law criteria or on a doctrinal basis where appropriate. It should also be pointed out that this absence of the formal possibility to answer in writing leads in an objective manner to a lack of equality between the parties; as the claimant has granted this possibility without limits on the length or content of the claim.

But similarly appellants suffer from the fact that observations made by defendants deprive them of the possibility to counter-argument in an appropriate and accurate manner and to carefully study those observations; as they are being exposed for the first time at the Court.

As a result, combining orality with a previous presentation of observations (by both parties) has to be reconsidered; particularly in extremely complex proceedings.

The 2011 Spanish Law regulating the Social Jurisdiction (hereinafter and following the Spanish acronym, LRJS) has promoted certain changes in this sense. We could mention for example the possibility of the parties to bring "brief calculations notes or summary numerical data" to trial (Article 85.6 LRJS). This would legitimate to some extent the presentation of written notes at trial. This shall be performed within the limits of the restricted objective established in the law, which does not prevent either from exceeding these limits of exposing mere calculations. Other example would be the possibility of bringing "brief complementary conclusions" to trial, in writing and preferably through telematic means (Article 87.6 LRJS). This would be foreseen when documentary or expert evidence is of an "extraordinary volume or complexity".

Beyond this, the practice of submitting written notes or legal observations at trial has been extended. Here the parties (particularly the defendant) present their factual and legal considerations concerning the proceeding in a written manner. However, this practice, which is not legally regulated, has its limits: not every Judge admits this practice, not always is known by the other party (here the *audialteram partem* rule will inevitably be jeopardized), and it cannot either be included in the Judge's orders. This may mean that Judges of Spanish High Courts (Tribunal Superior), in the event of an appeal, cannot assess nor examine its content.

Ultimately, the orality principle has been practically and (not enough yet) legally modified as it cannot be completely fulfilled. This non-compliance is due to the complexity of the labour legislation and of the matters that are under the competence of labour Courts. Also because of the material relevancy of labour proceedings. For all these reasons a deep review on at least those proceedings that are more relevant or technically complex is recommended. The principle of orality currently presents jointly with its advantages, serious shortcomings that may jeopardize the seek of both the material truth and the equality of the parties; being these principles the mandatory basis of every trial.

B. "PRINCIPLE OF CONCENTRATION"

Efficiently examining complex matters at a single trial becomes very difficult, particularly when dismissals are concerned. Pre-trial evidences, conclusions and final proceedings are important constraints.

Therefore, the labour proceeding has to bring its unique functions back as these functions shaped it as an inherent part of Labour Law. This shall be performed through a proper review on the topic and appropriate tools. The labour proceeding gives the legislator and governments a very clear and serious message: if the necessary means are not put in place,

no matter how procedural rules are reviewed, all would be worthless. The mere review of procedural rules as performed in other legal orders provides thus only a part of the solution.

C. PRINCIPLE OF URGENCY

Among all the existing principles in crisis, the principle of urgency is with no doubt the most undermined. As we stated before, urgency has generally been represented through the removal of pointless red tape and by fixing clear deadlines for carrying out procedural steps. It is known that the absence of prior hearings, short and mandatory time-limits for most of the procedural steps, limitations for suspending trials, the concentration of legal acts among others. are very present in this principle.

But, is this principle real? Do its practical effects justify these short time-limits and simplified procedural steps? The answer cannot be positive. Firstly, most obviously, is that such mandatory and short time-limits that the law establishes are rarely complied. This non-fulfillment is not due to judges will nor to their inadequate training or diligence. In contrast, is known that Social Court judges are traditionally assuming heavy workload and a technical competence at the highest level within the judiciary.

However, the excessively high number of matters per Court (practically there are no exceptions within each and every Court) makes this principle unachievable. In this sense, we are not going to expose an exhaustive statistical analysis. A study of the Spanish Supreme or other Courts' rulings is enough to notice the large time gap existing between the facts that are under judicial review and the final judicial decision. Particularly when these facts are referred to subject-matters that because of their nature should not receive a preferential or summary treatment. Once the claim has been brought, there is sometimes a delay that takes more than 2 years for summoning the parties to appear before the Court. This is unusual even when other jurisdictions are concerned, as they do not appear require urgency as one of their key principles.

In practice we can usually note that the right to an effective remedy (which is on the other hand constitutionally required and therefore unavoidable) leads to all kind of causes of prolongation of trials: suspension of trials because of an extraordinary set of circumstances on which the proceeding might be based, the need of extending claims and of performing all type of judicial proceedings... Jointly, some matters complexity derives to all kind of measures of inquiry and pre-trial judicial proceedings, or even to final proceedings upon request by the judge himself. This limits with no doubt the urgency principle requirements.

However, these limitations are in reasonable every respect. Urgency shall not be considered as a basis for depriving the judge and the parties from having the necessary knowledge of the evidence required for settling the dispute, and by which the judge can appropriately be instructed on the factual grounds of this dispute.

But, as already stated, the major reason why this urgency principle is undermined is clearly that labour Courts are overloaded. Even being aware of the limits of those public resources addressed to this objective, it should be acknowledged that if the number of Social Courts is not increased, it is almost impossible to comply with this principle. This would dramatically reduce the effectiveness of Labour Law itself. But also, this would challenge the reason of designing a labour proceeding as a unique proceeding; with the features of being simpler, more accessible, and particularly, faster. Thus, which is the point of designing quicker procedural steps, concentrating prosecution and jeopardizing other procedural steps that are useful for clarifying matters in an appropriate manner? Also, which is the purpose of limiting the possibility of appealing precisely on grounds of urgency, if finally the practical result is not that conceivable on this respect?

D. FREE-OF-CHARGE PROCEEDINGS

This principle seems to be respected enough as far as workers are concerned, as they are not intended to pay court fees. Nevertheless, it also appears that the aspect which further increases the costs of the proceedings (the requirement of being represented by an Attorney before the Court) cannot be avoided. Given the current situation stated above, it is almost unfeasible that a worker can bring a claim before the Social Court without the adequate legal assistance, despite this not being legally requested. It is true that he can benefit from free legal aid and an ex officio lawyer shall be appointed to him. However, we should not forget that in order to grant this, the worker has to comply with the requirements of a specific module evaluating the economic situation of applicants, which is established by the applicable law. This module is ultimately established at double of the minimum wage. This means that the free legal aid and the principle of free-of-charge proceedings are not guaranteed to all workers, but only to those who are within the ranges established by this module.

E. "GREATER FORMAL FLEXIBILITY"

This principle cannot be considered to be in crisis, but it is true also that it is not a such distinctive nor specific principle in the labour proceeding. The trend towards both the elimination of excessive formalities and

simplification of court proceedings is somehow appearing in other jurisdictions. Evaluating whether this trend is being performed at a higher or lower level in those jurisdictions than it is in the area of the social order shall remain under subjective assessments. Nevertheless, it is true that an homogenizing tendency is appearing in this area.

In short, beyond the legal and technical improvements, reshaping (legal) procedural rules is not that much needed (however they can always be subject of improvement). In contrast, it is highly recommended to grant judicial structures for the existence of a larger number of Courts with enough resources so a relaxed and efficient labour justice is guaranteed. Also adapting norms to the new complex legal-labour reality shall be foreseen.

VIII. WHY HAS THIS CRISIS OCCURRED?

Why are the different "classical" principles of the labour proceeding not so clearly identified in it? And is the social jurisdiction nowadays in such an unsatisfactory situation? Providing final answers to these questions is not easy, but we can highlight the following aspects explaining this situation:

— The first one is linked to the mandatory respect of the right to effective remedy. When this principle is applied to the labour proceeding, those requirements that homogenize it with other jurisdictions appear. This way many peculiarities should no longer be considered, as the requirements demanded by the Spanish Constitutional Court must compulsorily be applied to it.

— The second one, the increasingly complexity of labour rules and the larger number of matters under the social jurisdiction may, as stated above, contribute to this crisis. If the "classical" Labour Law is itself complex, we should reflect on the legislation on prevention of occupational risks, pensions, sanctions, social security... This particularly affects the former legislator's intentions: the possibility of the parties of bringing actions on their own behalf or the orality are in many cases limited.

— The third reason is related to the lack of resources of the social jurisdiction, which faces the increasing litigiousness existing in this area. This lack may be due to the fake assumption that the Social Court judge can deal with more disputes per year than others from different jurisdictions.

— The fourth one is based on the fact that the legislator itself has renounced to some extent to establish, regarding the labour

> proceeding, rules and criteria which are very differentiated from the ones that are addressed to the rest of the judicial proceedings. Beyond the very different demonstrations that have happened in this sense in the past few decades, it will be enough to take into consideration the most relevant rule on the modernization of justice. The Law 13/2009 of 3rd November, reforming the procedural legislation for the implementation of the new Judicial Office ("B.O.E. 4 November) already applied common principles to all jurisdictions. And this is to some extent the path to follow.

In a nutshell, the Social jurisdiction is not as special as it was at first. But, furthermore, its specialities cannot longer be considered as an example to follow as they were initially. If these principles, have to be rectified they will finally not be so beneficial and practical.

It is still clear that the material content of the labour proceeding necessarily requires its own legal regulation: among the different arguments existing, it should be enough to superficially reflect on the different procedural modalities that exist under the social jurisdiction so this issue can be confirmed. However, considering these "classical" principles as an exemplary and beneficial path as they were cannot originally longer be accepted. The path to follow (and which in fact is the one being recently considered) is to maintain a specific procedural legislation. This should be performed through an ever more intense process of unification between principles and the remaining jurisdictions.

Chapter XVII

Reception of social security coordination in the ibero-american region. A process following the european experience

Prof. Dr. Pablo Arellano Ortiz

Pontificia Universidad Católica de Valparaíso, Chile

I. INTRODUCTION

It might be considered strange trying to find a relation between the protection standards of Social Security in European Union law and the existing standards in Latin America. It might even considered to be impossible, as these are totally different regions, especially in terms of migration. However, there are some points both regions have in common and some experiences they share. Under this aspect we will try to show how European standards have served as an example for Latin America to some extent.

As already pointed out, migration is generally associated with the migrating or moving population belonging to the developed or non-developed economies, such as the ones from countries of the Southern hemisphere. Latin America and the Caribbean are two of the main regions that generate labor migrants on a global level (Arellano, 2013; Martínez, 2011). Where those migrant workers are employed depends on their country of origin, history, language, education, gender and occupation (ECLAC, 2011; Awad, 2009). A total of 25 million internal migrant workers could be found in this region in 2005 (Arellano, 2013, p. 17). By the year 2010 the migrant population of the Americas was estimated at 57 million. This means that one out of sixteen inhabitants of the continent is a migrant. When putting this into a global perspective, it can be said that about one fourth of all migrants in the world come from Latin America

(González, 2013, p. 7). These numbers are to be taken seriously and represent a percentage of people in motion which is much higher than that of European citizens within the European region.

On the other hand, Social Security as a protection branch against social risks was originated in Europe at the end of the 19th Century, at the same time as in North America and Australia, even before WWII (ILO, 1993, p. 9).This branch of law is set up by a number of mechanisms, for example Social Security insurances against social risks, such as health insurance and Seniors pensions (ILO, 1984; Cichon et al., 2006; Beveridge, 1942; Titmus, 1958; Durand, 2005). Doctrine has pointed out that due to special circumstances in Latin America Social Security was started relatively early, in some cases before or during WWII, in other regions later,only after their independence (Rys, 2010). However, current Social Security in Latin America is on a rather different technical and qualitative level compared to other regions in the world (ILO, 2007, 2006, 2002a, 2002b & 1998; Murro, 2004; Mesa-Lago, 2004, 1996 & 1985).Some characteristics of the region are the reason for the different levels of effectiveness of social security in the region (ECLAC, 2006).

All this allows us to confirm that in these two regions Social Security is more developed than in the rest of the world, at least considering the legislation, as in coverage Latin America is far from the levels found in Europe (Arellano Ortiz & Briganti, 2012). The phenomena of the Industrial Revolution and the developments it performed at the beginning of the 19th Century have provoke an abundant Social Security legislation in both regions. There are certainly different levels of protection contemplated by both legislations, but the technical advances in the field of social insurance and social assistance are present in the legislations of both regions, although certainly weaker and with a lower coverage in the case of Latin America.

Nevertheless, Latin America is suffering the same changes in the working circumstances that have taken place on a global scale (Ermida Uriarte & Colotuzzo, 2009). The changes observed as a result of globalisation (Supiot, 2001; Lyon-Caen, A. & Urban, Q., 2008; Moreau, 2006) are perfectly known in Latin America, too. Among these is the increasing movement of the workforce, which in the end is nothing but the migration of workers.

In order to understand the problem of migration and Social Security in this region, it is necessary to consider certain numbers. The Latin America region has a total population of 575.867.000, out of which some 276.551.000 belong to the active population. Internal migration in the region amounted to a total of 25 million in 2005. Hence, the Latin American region is considered the region with the highest migration rate

in the world, according to ECLAC numbers. Taking these considerations into account, it is assumed that the working life of many citizens generally takes place in different countries of the region (Jiménez, 2011). Also, 78% of the migrant population of the Ibero-American region can be found in Latin America, 20% in Spain and only 2% in Portugal (Maguid & Salinas, 2010).

Under these circumstances, when law has to create protection mechanisms, we consider that Europe is a step ahead. From the beginning, the European Union has understood the problem of protecting migrant workers against social risks. So the first economic communities created in the 1950s adopted regulations to protect this category of residents. We refer to Regulation (EEC) Nº 3, 25.9.1958, and Regulation (EEC) Nº 4, 3.12.1958, both D.O. 16.12.1958. The basic principles of these communities have always been the free movement of goods and services and the free movement of people, so standards for the free movement of workers were established (Pennings, 2010 & 2005; L'Hernould, 2009; Kahil-Wolff, & Greber, 2006; Hennion, Le Barbier-Le Bris, & Del Sol, 2010). These protection standards against social risks for migrant workers have undergone important changes in the European region, and in April 2004, after many difficult discussions and compromises between the member States, a new regulation was adopted, Regulation 883/04. Regulation 987/09 providing the application rules for measures was adopted after. Both regulations, 883/04 and 987/09, entered into force on May 1, 2010 (Pennings, 2012; Sánchez-Rodas, 2010 a); Cornelissen, 2010) and constitute the most advanced existing set of standards for the coordination of Social Security in the world.

The issue of relating both regions in juridical terms is to be seen under this context. Has Social Security coordination coming from abroad influenced measures adopted in the Latin America region? We must then define and explain in what these coordination measures consist, in order to establish a point of comparison and clarify if Latin America has welcome this kind of instruments or not.

The coordination of Social Security systems as a process is tightly related to the political and economic integration of two or more countries (Arellano, 2015, p. 49). For the purpose of this paper, we will stick to the ILO definition, which points out that:

"Coordination means establishing mechanisms through which the social security systems of different countries can work together to achieve mutually agreed objectives —in particular, ensuring that migrant workers and the members of their families have protection that is as complete and continuous as possible— while, at the same time, maintaining and respecting the separate definitions and rules of each system. Coordination

does not involve replacing the different definitions and rules of each system with common definitions and rules, which is usually referred to as harmonization" (Hirose, Nikac & Tamagno, 2011, p. 24).

Mechanisms which can offer continuity to Social Security benefits for migrant workers and their family members may be classified as unilateral, bilateral and multilateral. Only bilateral and multilateral mechanisms require a certain degree of coordination (Arellano, 2015, p. 75). As we are studying two regions, only regional instruments will be considered, what means those multilateral agreements which have tried to establish coordination of Social Security on a regional level, both in Europe as in Latin America.

In this context Europe has a considerable set of standards that existed for some time, providing protection against social risks for migrant workers. In Latin America, and in particular in Iberoamerica, there is a rather recent instrument trying to bring about the same coordination as in Europe, which is the Multilateral Ibero-American Agreementon Social Security.

As already mentioned, migration has become a concern for different governments in Latin America. Different efforts have been made to provide continuity of Social Security benefits for the continent´s migrants. Initiatives under this context are for example those realized by Mercosur[1] and Caricom[2]. However, the goal of this paper is to deal with the aspect of coordination on an Iberoamerican/European level and not refer to sub-regional instruments, which is why we will leave these multilateral instruments aside, although they may be an interesting study object.

II. THE MULTILATERAL IBERO-AMERICAN AGREEMENT ON SOCIAL SECURITY

When looking at the Multilateral Ibero-American Agreement on Social Security (CMISS) we can confirm that there are two countries which somehow are both European and Ibero-American, that are Spain and Portugal. The presence of these two countries, in particular Spain, has contributed greatly to the adoption and entering into force of the Multilateral Ibero-American Agreement on Social Security.

The origin of the Multilateral Ibero-American Agreement on Social Security is to be found in the 5th Conference of Ministers and Senior Officers Responsible for Social Security of Ibero-American countries, held in Segovia, Spain in 2005, and the agreements adopted at the XV and XVI

1. More details about this sub regional agreement:http://www.mercosur.int/
2. More details about this regional agreement:http://www.caricom.org/index.jsp

Ibero-American Summit of Heads of State and Government, which led to the approval of the final text of the Multilateral Agreements by the Heads of State and Government at the XVII Ibero-American Summit in Santiago de Chile in November 2007.

In 2009, during meetings in Lisbon, the way was cleared for the content of the Implementation Agreement. This agreement is important for the determination of the date of effective entry into force of the Convention. The Convention entered into force on May 1, 2011. Up to the present day 12 countries[3] have ratified the Agreement and 9 of these have deposited the ratification instrument with the Secretary General of the Ibero-American Social Security Organisation (OISS).

However, for its effective implementation it is necessary for the various countries to have signed the Implementation Agreement. The OISS was entrusted with the responsibility of elaborating this instrument and was designed by the Summit as the organism in charge of organising the process of elaborating the technical standards for its application. The Agreement is fully effective in Bolivia, Brazil, Chile, Ecuador, El Salvador, Spain, Paraguay, Portugal and Uruguay.

The Agreement is divided into 6 titles, in which not only the basic definitions are established, but also the different benefits and the administrative dispositions to put them into practice. The titles of the Agreement are the following: Title I General Rules and determination of the applicable legislation; Title II Special Dispositions for the different categories of benefits; Title III Administrative cooperation mechanisms[4]; Title IV Administrative Technical Committee, Title V Transitory Dispositions, Title VI Final Dispositions.

One of the Agreement´s aspects that has raised most attention is the fact that —just like in the case of European coordination—, it has a system of proration to calculate the continuity of benefits, and moreover in Chapter 2, named "Coordination of systems and legislations based on savings and capitalization" it refers, as its name suggests, to the problem existing in Europe after the opening to the East. The situation is regulated by a compulsory system, with a guaranteed minimum benefit plus a voluntary

3. Countries that have ratified: Argentina, Brasil, Bolivia, Chile, Ecuador, El Salvador, España, Paraguay, Perú, Portugal, Uruguay & Venezuela.

4. On this subject were ccommend seeing American experience analysed in Latin America Mariuzzo, Alberto (2015), "Base Única de Latinoamérica Seguridad Social del Mercosur –Sistema de Transferencia & Validación de datos de Seguridad Social. Hacia LatinAmerica integración lógica de datos & procesos en beneficios de LatinAmerica seguridad social & de los ciudadanos del Mercosur", in Arellano Ortiz, Pablo (Editor) (2015), Trabajadores Migrantes & seguridad social, Librotecnia, Santiago, pp. 141-158.

system. Also, it is expressively stated that mechanisms of fund transfer may be established in order to perceive benefits in the case of disability, old age of death. It should be seen with satisfaction that different types of social security systems indeed can be coordinated, wether they are based on capitalisation or redistribution.

It is difficult to deny that the wording of the Multilateral Ibero-American Agreement on Social Security has been influenced by European regulations. For example Sánchez-Rodas reminds us that its wording and articles resemble or even improve the European version (Sánchez-Rodas, 2011). The contents of the Multilateral Ibero-American Agreement on Social Security are the result of the effort and collaboration of representatives from all countries as well as the technical cooperation of the OISS. Clearly there is a European effort to regulate the protection of migrant workers in Iberoamerica. There is a clear intention to cover citizens from Portugal and Spain who realize part of their active life in Latin America countries and vice versa.

Adolfo Jiménez, ex Secretary General of the OISS states that "it is interesting to remember that the Multilateral Ibero-American Agreement on Social Security, which coordinates but does not modify or substitute national legislations, constitutes a totally new experience, as it assumes an agreement in terms of social security between states with very different models, in an environment without previous political association, facilitating the juridical basis which might support it, which is why it has demanded the participation of all parts and its ratification —or adherence— requires the incorporation as internal legislation of each of the states" (Jiménez, 2011, p. 19). In this sense the intention of the Multilateral Ibero-American Agreement on Social Security is the same as the one of the European regulations, not to alter the national social models and provide protection against social risks of migrant workers.

Coordination contained in international instruments has become the basis for a series of internationally accepted principles. These form the general framework for the celebration of bilateral or multilateral agreements, regulating the coordination of Social Security systems[5].

5. About the principle see Arellano Ortiz (2015) Marco teórico de la coordinación de seguridad social: Comparación Unión Europea e Iberoamérica, Thomson Reuters, Santigo de Chile; Servais, Jean-Michel (2013), International social security, Wolter Kluwer Law& Business, Holanda, pp. 105-109; Thouvenin, Jean-Marc, &Trebilcock, Anne (2013), Droit international social. Droits économiques sociaux et culturels, Tome 2 Règles du droit international social, Cedin, Bruylant, Bruselas, Bélgica, pp. 1519-1549; Pennings, Frans (2012), European social security law, Wolter Kluwer Law & Business, Holanda 2012; Carrascosa Bermejo, Dolores (2012), "Seguridad social de los trabajadores migrantes (I): rasgos & principios generales" en Nogueira Guastavino, Magdalena, Fotinopoulou Basurko, Olga & Miranda Boto, José María, Lecciones

Coordination as established within the Multilateral Ibero-American Agreement on Social Security is built over four fundamental pillars (Sánchez-Rodas, 2011) which are: Uniqueness of applicable legislation; Equality of treatment; Totalisation of periods; Suppression of residence clauses. In this it follows the same principles as the European instruments. The standards of the Multilateral Ibero-American Agreement on Social Security containing these principles will be described briefly in the following.

The principle of Equality in treatment is contained in Article 4 of the Agreement. It states that all those to whom the Agreement is applied have a right to its benefits and are subject to the obligations established in the legislation of the State Party where they develop their activity under the same conditions as the citizens of the State, unless otherwise provided for in the Agreement.

The principle of Totalisation of periods is established in Article 5 of the Agreement, where it is stated that, unless otherwise provided for in the Agreement, the Competent Institution of a State Party, the legislation of which predetermines the coverage by legislation, acquisition, conservation, duration or recovery of benefits, the access or exemption from compulsory or voluntary insurance, the requirement of having covered determined periods of insurance, contribution or employment, will, if necessary for the determination of benefits, take into account the periods of insurance, contribution or employment accredited by the legislation of any other State Party as if they were periods covered under the legislation of the Institution in question, but only if they do not overlap.

When determining applicable legislation, the general principle of lex loci laboris is followed, meaning law of the territory where the services are provided. This is laid down in Article 9, stating a general rule on this matter by providing that: all those to whom the Agreement is applied are subject exclusively to the Social Security legislation of the State Party where they exercise their activity, no matter if in a dependent or independent work relationship, and where they are included within the application of the relevant legislation, unless otherwise provided for in

de Derecho Social de la Unión Europea, Ediciones Tirant lo Blanch, Valencia, pp. 187-215; Servais, Jean-Michel (2011) DrILO social de l'Union Européenne, Bruylant, Bruselas, Bélgica, 2011; Hirose, Kenichi; Nikac, Milos & Tamagno, Edward (2011), Social security for migrant workers. A right-based approach, International Labour Organization, Decent Work Technical Support Team, and Country Office for Central and Eastern Europe-Budapest, ILO; Cifuentes Lillo, Hugo (1998), "Tratados internacionales de seguridad social: Convenios bilaterales" in Estudios en Homenaje al profesor William Thayer, Sociedad Chilena de Derecho del Trabajo & Seguridad Social, Santiago, 1998, p. 22 & social security; ILO (1984), Introducción a la seguridad social, Oficina Internacional del Trabajo, Ginebra.

the following article. In Articles 10, 11 and 12 special rules, exceptions and standards for voluntary insurance respectively are established, altering the general rule.

It is important to mention that the Convention includes rules on the conservation of acquired rights and the payment of benefits abroad in Article 6, and on the revalorization of pensions in Article 7.

The above mentioned principles are also the basis for the coordination regulation of social security systems in those states, where European Union Law is applicable, namely: Regulation 883/2004 and its Application Regulation 987/2009. Here again it becomes clear that the Multilateral Ibero-American Agreement on Social Security follows the European example in terms of coordination through a multilateral coordination instrument.

But this is not the end of the comparison. When it comes to the personal application of the Agreement, Article 2 of the Agreement determines that "the Agreement will be applied to all those who are or have been subject to the legislation of one or several State Parties, as well as their family beneficiaries and right holders". The latter are defined in Article 1 e) of the Agreement e) "family beneficiary or right holder", the person defined or admitted as such by the legislation under which the benefits are granted.

The Agreement does not expressively deal with the question whether the family beneficiaries and right holders of the protected subjects may invoke the rights recognized by this international instrument as own rights or rights derived from the condition of being family beneficiaries or right holders (Sánchez-Rodas, 2011). Despite this observation the scope of the personal application of the instrument clearly is the person as such without any further definition. Other coordination instruments limit the personal application to workers only. In this aspect, the Agreement goes beyond the scope of the European regulations.

The material application, meaning the risks covered, of the Multilateral Agreement is contained in Article 3, establishing that the Agreement will apply to all legislation relevant to the related Social Security branches with: a) economic benefits for disability; b) economic benefits for pensioners; c) economic benefits for widowhood, and d) economic benefits for work-related injuries and occupational diseases. The Agreement gives preference to periodical benefits, which are those implying the payment of a regular amount of money, such as different kinds of pensions.

Rules about the coordination of each of these branches are established it Title II: Special Dispositions for the different categories of benefits, which contains three chapters, namely: Chapter 1: Benefits for disability, old age and survival; Chapter 2: Coordination of systems and legislations

based on savings and capitalisation, and Chapter 3: Benefits for work-related injuries and occupational diseases. Notwithstanding the foregoing, in relation to medical benefits not envisaged in the Agreement, the possibility is contemplated to include them in the future, extending material coverage to benefits or systems excluded in the first place.

Bilateral or multilateral agreements dealing with this extension and its effects are included in Annex III. Rules corresponding to systems and benefits subject to extension will only affect those states which have signed the Agreement, causing no effects whatsoever to the other State Parties of the Agreement.

Chapter 3.2 determines that the Agreement is applied to general and special contribution-based Social Security systems. However, in relation to the latter, some exceptions are considered, which are included in Annex I.

Chapter 3.4 mentions expressively that the Agreement does not apply to non-contribution-based systems, nor to social assistance, nor to benefit systems for victims of war or its consequences. This is of major importance for Latin America, as recent extension efforts of Social Security are taking the form of non-contribution-based benefits. Also, it is important to mention that many migrant workers are beneficiaries of non-contribution-based or welfare benefits and their exclusion may cause them serious prejudice when obliged to migrate.

Finally, the Agreement allows the State Parties to exclude certain benefits in terms of material application. This can be concluded from Article 3.3, which states that the Agreement is not to be applied to economic benefits detailed under Annex II, which under no circumstance may include any of the Social Security branches mentioned in Article 3.1.

Hence, as to the material application the European model is followed, but only to a limited degree, as European regulation contemplate the possibility of including the protection against social risks through non-contribution-based benefits.

A relevant aspect of the Agreement is the regulation established in Article 8 on the relation of the agreement to other Social Security coordination instruments, determining that the Agreement is fully applied in all those cases, where there are no existing bilateral or multilateral Social Security agreements between the State Parties. For the case of existing bilateral or multilateral agreements those dispositions are to be applied which are more favourable for the beneficiary.

In this context, each State Party must inform the Ibero-American General Secretariat through the Secretary General of the Ibero-American

Social Security Organization (OISS) of the existence of any bilateral or multilateral agreements between the State Parties, which would be registered in Annex IV of the Agreement then. After the entry into force of the Agreement the State Parties must determine which of the dispositions are more favourable and communicate them to the Secretary General of the OISS. This rule favours coordination mechanisms and encourages the countries to expand their Social Security agreements.

On the other hand, countries with different economic levels will not be affected by the coordination rule in the Agreements. Adopting this rule does not really mean adopting the European standards, as there is no direct relation with them, but we consider it constitutes a great step forward in comparison with European standards.

One last thing we would like to point out is the control mechanism established in Title IV of the Agreement, referring to the Administrative Technical Committee. The composition of the Committee is laid down in Article 23 of the Agreement, determining that it is to be made up by a government representative of each of the State Parties, assisted, if necessary, by technical counsellors. The committee has its own statutes defined by common agreement of the committee members. Decisions made on topics of interpretation must be adopted in accordance with the stipulations of the Application Agreement of the Convention.

The functions of the Committee are described in Article 24 as follows:

a) Enable the fair application of the Agreement, in particular through the encouragement of exchanging experiences and best administrative practices.

b) Solve issues related to the administration or interpretation of the Agreement or its Application Agreement.

c) Promote and develop the collaboration among the State Parties and their institutions in the field of Social Security, in particular facilitate measures leading to cross-border cooperation in the field of Social Security system coordination.

d) Encourage the use of new technologies, in particular through the modernization of the necessary procedures for the exchange of information and the adaptation to the electronic exchange of information between the Competent Institutions.

e) Any other function which may be part of their competences under the Agreement and its Application Agreement, or any other agreement or convention which may be celebrated within the framework of these instruments.

It is very interesting to note that only one administrative committee is in charge of solving problems of administration and interpretation. It would seem more adequate for this type of mechanism to have established a court or tribunal, as in the European case. A jurisdictional organism seems more appropriate to solve conflicts between two or more legislations or between national legislations and rules of International law.

We share what Sánchez-Rodas expressed when saying: "There is no similar possibility like the one in the legal framework of the European Union where judicial bodies are the ones to solve a dispute in which supranational dispositions are applied by placing a preliminary ruling before the Court of Justice seated in Luxembourg" (Sánchez-Rodas, 2011).

No doubt, the fact of contemplating an authority to solve arising conflicts seems a wise decision, but this is not comparable to a judicial body. Also, this committee has functions which do not only have to do with purely solving a conflict of interpretation, but also the promotion and collaboration in the field of Social Security among the signing countries. Clearly, in this aspect something was pretended to be done but never received the necessary force. It seems to us that in this matter things still need to be improved, there should be some kind of jurisdictional control over possible coordination conflicts. Notwithstanding the foregoing, we believe that there may be a jurisdictional way out through regional standards related to Human Rights. These are being watched by the Inter-American Court of Human Rights seated in San José de Costa Rica. By choosing this option we would have a similar procedure as the European Court in Strasbourg and the existing regional Human Rights instruments of that region. Also, we believe that involving the Inter-American Court of Human Rights can give rise to a process of dialogue between this Court and National courts of justice with the aim of solving and correcting deficiencies related to coordination, something which is also existing in Europe (Arellano, 2015).

It may be worth noting that the relationship and influence between both regions does not seem to be reduced to similarities between the Multilateral Agreement and the European regulations. It is also worth considering the evolution of the European standards and their recent tendency to be extended to other regions. In this context we would like to mention some recent rules and their most relevant considerations.

Directive 2011/98/EU from 13.12.2011, establishes one application procedure for living and working in a member State for third country nationals, leading to one common set of rights for workers coming from third countries legally residing in a member State. However, this Directive has been regarded as insufficient, but on the other hand it is essential for

legal migration and facilitates the way for future regulations (Pascouau & Mcloughlin, 2012). Although this directive certainly can be seen as progress, the issue of protecting irregular migrants is still to be dealt with.

Directive 2014/36/EU from 26.2.2014 on the conditions of entry and stay of third country nationals as seasonal workers. Without any doubt this directive will allow regularising the protection of seasonal workers coming from third countries, a situation ever more common all over the world. The directive creates a combined framework of immigration rules and labour protection ones. In the short time since its adoption, it is difficult to draw any analysis or criticism, although some studies have compared the initial proposal with the finally adopted version (Fudge & Herzfeld Olsson, 2014).

Another important legal instrument to be considered is Regulation Nº 1231/2010 from 24.11. 2010, by which the dispositions of Regulation Nº 883/04 are extended to third country nationals with legal residence in a European Union member State (with the exception of Denmark and the UK). This Regulation Nº 1231/2010 extending coordination benefits to third country nationals has received a lot of attention[6]. But this is not the only aspect of this Regulation. A very importance sentence was pronounced some time ago by the EU Court of Justice, namely the Gottardo case from 15.1.2002, –55/00 Rec.; p. I-413134, modifying the previously existing criterion (Pérez Yáñez, 2002; Sánchez-Rodas, 2010 c), pp. 98 a 100; Vonk, 2013; Pennings, 2012; Pieters & Schoukens, 2009).

Doubtlessly, the extension of benefits through Regulation Nº 1231/2010 and the Gottardo precedent constitute a clear manifestation that European coordination is in the process of extension onto other nationalities. This extension may occur with citizens belonging to the Maghreb countries, who spend part of their active life in the EU, as for instance nationals from Morocco (Vonk, 2013).But what has been more interesting is the establishment of a principle which allows third country nationals to benefit from European regulation. In this context, the creation of bonds between European coordination regulations and the Multilateral

6. On this subject see: Vonk, Gijsbert (2013), "Social Security Rights of Migrants: Links between the Hemispheres", in Roger Blanpain, Pablo Arellano, Marius Olivier & GisjbertVonk (eds.), Bulletin of Comparative Labour Relations vol. 84, Social Security and Migrant Workers, Selected Studies of Cross-Border Social Security Mechanisms, Kluwer, 2013, pp. 47-68; Pennings, Frans (2013 a) "Coordination of Social Security within the EU Context", in Roger Blanpain, Pablo Arellano, Marius Olivier & GisjbertVonk (eds.), Bulletin of Comparative Labour Relations vol. 84, Social Security and Migrant Workers, Selected Studies of Cross-Border Social Security Mechanisms, Kluwer, 2013, pp. 117-132; Pieters, Danny & Schoukens, Paul (eds.) (2009), The social security Co-ordination between the EU and Non– EU countries, Intersentia, Metro, Antwerp, Cambridge, Portland.

Agreement CMISS certainly has been a wise decision. Some kind of Euro-Ibero-American Social Security agreement (Vonk, 2013, p. 68), which would also positively enshrine the principle contained in the Gottardo sentence (Vonk, 2013, p. 66). The political will for its realisation and the conflict regulations to be applied are issues to be determined.

III. FINAL THOUGHTS

We would like to end this report with some reflections. The first idea to be pointed out is that these two regions constitute the part of the world where Social Security is most developed, despite their different levels of coverage (RYS, 2010; ECLAC, 2006; ILO 1994, ILO 2011), as shown above. Also, it is important to bear in mind that the migrant worker typically finds himself in a situation of insecurity (Fudge, 2011). Hence, in a parallel movement both regions —first Europe and then Iberoamerica— have started coordination processes of their social security systems.

On the other hand, in Latin America globalisation and changes in the labour structure are beginning to have effects, leading to a situation of a serious lack of protection of the more vulnerable layers (ECLAC, 2006). In order to face this problem, a form of protection for workers crossing borders looking for better opportunities has been developed, like in the developed countries (ECLAC, 2011). New, complex and more protective mechanisms are becoming ever more important. Here the European influence is necessary.

Doubtlessly, an aspect shared between the two regions is the fact that agreements and regulations have allowed both the rise and further evolution of coordination. We can only confirm here that there is an influence of the European regulations onto Social Security coordination instruments in the Ibero-American region. This becomes clearly visible in the wording of the Multilateral Ibero-American Agreement on Social Security.

Nevertheless it is the prevailing political union between the member States of each region which has made coordination possible. Here the political union of the EU is much stronger than in the Ibero-American context.

This aspect leads to the conclusion that although there is some influence, it is limited and in some aspects insufficient. The Multilateral Ibero-American Agreement on Social Security is an important step in the right direction, but does not cover all the risks; it does not include non-contribution-based benefits and lacks jurisdictional control. On the other hand the European Union continues trying to cover new situations, be

applied to more people and is possibly extending its application scope to other regions[7].

We share the thesis proposed by Professor Vonk in order to create an instrument to unify the European regulations with the Multilateral Social Security Agreement. According to our understanding this would create a coordination framework of major dimensions and would allow remedying the deficiencies existing within the Multilateral Ibero-American Agreement on Social Security.

7. It is convenient to consider: COM (2012)153 final, 30 March 2012.

Selected Bibliography

ARELLANO ORTIZ, Pablo (2015) Marco teórico de la coordinación de seguridad social, Comparación Unión Europea e Iberoamérica, Thomson Reuters Legal Publishing AbeledoPerrot, Santiago de Chile.

ARELLANO ORTIZ, Pablo (2013), "Características y desafíos de la migración para la seguridad social en la región latinoamericana", Revista Chilena de Derecho y Ciencia Política, Universidad Católica de Temuco, (Volume 4, n. 1.

ARELLANO ORTIZ, Pablo y BRIGANTI, Francesco (2012) "Europa y América Latina: encuentros y desencuentros en la búsqueda de la coordinación de los sistemas de seguridad social", in Programa de Estudios Europeos UDEC, Europa y América Latina. Dos caminos, ¿un destino común?, Programa de Estudios Europeos Universidad de Concepción, (RIL Editores).

AWAD, I. (2009) The global economic crisis and migrant workers: Impact and response, International Labour Office, International Migration Programme. – Geneva: ILO.

BEVERIDGE, William,Social insurance and allied services, London, HM Stationery Services, 1942.

CARRASCOSA BERMEJO, Dolores (2012), "Seguridad social de los trabajadores migrantes (I): rasgos & principios generales" en Nogueira Guastavino, Magdalena, Fotinopoulou Basurko, Olga & Miranda Boto, José María, Lecciones de Derecho Social de la Unión Europea, Ediciones Tirant lo Blanch, Valencia.

CICHON, Michael, SCHOLZ, Wolfgang, VAN DE MEERENDONK, Arthur, HAGEMEJER, Krzysztof., BERTRANOU, Fabio, y PLAMONDON, Pierre (2006) Financiación de la protección social, Colección Informes OIT, Ministerio de Trabajo y Asuntos Sociales, Madrid.

CIFUENTES LILLO, Hugo (1998), "Tratados internacionales de seguridad social: Convenios bilaterales" in Estudios en Homenaje al profesor William Thayer, Sociedad Chilena de Derecho del Trabajo & Seguridad Social, Santiago, 1998.

CORNELISSEN, Rob (2010). "Les axes de réforme les príncipes généraux du reglement 883/2004", RDSS 2010, dossier spécial Le nouveau droit communautaire de la sécurité sociale.

DURAND, Paul, (2005) La politique contemporaine de Sécurité Sociale, (Paris, 1953 reedición 2005).

ECLAC (2011). Debates sobre las nuevas tendencias de la migración internacional y los enfoques para comprenderlas. En Migración internacional en América Latina y el Caribe. Nuevas tendencias, nuevos enfoques. Cepal, United Nations, Santiago.

ECLAC (2006). La protección social de cara al futuro: acceso, financiamiento y solidaridad. CEPALC, NationsUnits, Santiago, 2006.

ERMIDA URIARTE, ÓSCAR y COLOTUZZO, NATALIA (2009), Descentralización, Tercerización, Subcontratación, OIT, Lima.

GONZALEZ, Felipe (2013) "El sistema interamericano y los derechos de los migrantes", in VVAA (2013) Migraciones, Conferencia Internacional sobre Migraciones y Derecho Humanos: estándares y prácticas, Centro de Derecho Humanos UDP, Comisión Interamericana de Derecho Humanos, Delegación Regional de Cooperación para el Cono Sur y Brasil del Gobierno Francés, Aun Creemos en los Sueños Editions, Le Monde Diplomatique, Santiago de Chile.

HENNION, S., LE BARBIER-LE BRIS, M. y DEL SOL, M. Droit Social Européen et International, Thémis droit, Paris, 2010.

HIROSE, Kenichi; NIKAC, Milos y TAMAGNO, Edward (2011) Social security for migrant workers. A right-based approach. International Labour Organization, Decent Work Technical Support Team, and Country Office for Central and Eastern Europe – Budapest, ILO, 2011.

ILO (2007) El futuro de la protección social en América Latina: Aportes para el desarrollo económico y social en el marco de la agenda global de trabajo decente, Santiago.

ILO (2006) Envejecimiento, empleo y protección social en América Latina, Santiago.

ILO (2002a) Pensiones no contributivas y asistenciales. Argentina, Brasil, Chile, Costa Rica y Uruguay, Santiago.

ILO (2002b) Seguridad social: un nuevo consenso,Ginebra.

ILO (1998) Pensiones en América Latina. Dos décadas de reforma, Ginebra

ILO (1993) El seguro social y la protección social, Conferencia Internacional

del Trabajo. 80ª reunión Memoria del director general. (Part I), Ginebra, OIT.

ILO (1984). Introducción a la seguridad social. Oficina Internacional del Trabajo, Ginebra.

JIMÉNEZ, Adolfo (2011). "Una experiencia inédita", in: Miradas al Exterior, Revista de Información Diplomática del Ministerio de Asuntos Exteriores y de Cooperación, ABRIL-JUNIO 2011. N. 18.

KAHIL-WOLFF, B. y GREBER, P.–Y. (2006) Sécurité sociale: aspects de droit national, international et européen, Dossier de droit européen n° 14, Bruylant, Bruxelles, L.G.D.J., Paris.

LHERNOULD, J.–Ph. (2009) « La coordination des regimes nationaux de sécurité sociale hors des reglements n° 1408/71 et 883/2004: constat de faiblesse ou tremplin pour des nouvelles ambitions ? », JCP S, 2009, n° 1449.

LYON-CAEN, A y URBAN, Q. (2008), Le droit du travail á l'épreuve de la globalisation, Dalloz "Thémes et commentaires", Paris.

MAGUID, Alicia y SALINAS, Viviana (2010). "Inserción laboral y acceso a mecanismos de seguridad social de los migrantes en Iberoamérica". En Serie población y desarrollo (N. 96), Cepal, Naciones Unidas. EE.UU: CEPAL & ONU.

MARTINEZ PIZARRO, J. (Editor) (2011) Migración internacional en América Latina y el Caribe. Nuevas tendencias, nuevos enfoques. Cepal, UnitedNations, Santiago.

MARIUZZO, Alberto (2015), "Base Única de Latinoamérica Seguridad Social del Mercosur –Sistema de Transferencia & Validación de datos de Seguridad Social. Hacia Latinoamérica integración lógica de datos & procesos en beneficios de Latinoamérica seguridad social & de los ciudadanos del Mercosur", in Arellano Ortiz, Pablo (Editor) (2015), Trabajadores Migrantes & seguridad social, Librotecnia, Santiago.

MESA-LAGO, Carmelo (2004) "Lecciones y desafíos de 23 años de reformas estructurales de pensiones en América Latina", en BIT, El sistema de pensiones en Chile en el contexto mundial y de América latina: evaluación y desafíos, Conferences in the International seminar, OIT, (Santiago, 2004).

MESA-LAGO, Carmelo (1996) "Las Reformas de Pensiones de Seguridad Social en América Latina: Sistemas Públicos, Privados, Mixtos y Paralelos", in Est. de la Seguridad Social n. 80.

MESA LAGO, Carmelo (1985) El Desarrollo de la Seguridad Social en América Latina, CEPAL (Santiago, 1985).

MOREAU, Marie-Ange (2006) Normessociales, droit du travail et mondialisation – Confrontations et mutations, A droit ouvert, Dalloz-Sirey, Paris.

MURRO OBERLÍN, Ernesto (2004) El dilema de la seguridad social en el Cono Sur, primera edición, International Labour Office, Lima.

PENNINGS, Frans (2013 a) "Coordination of Social Security within the EU Context", in Roger Blanpain, Pablo Arellano, Marius Olivier & GisjbertVonk (eds.), Bulletin of Comparative Labour Relations vol. 84, Social Security and Migrant Workers, Selected Studies of Cross-Border Social Security Mechanisms, Kluwer, 2013.

PENNINGS, Frans (2012) European Social Security Law, Wolter Kluwer Law & Business, Holand.

PENNINGS, Frans (2010) "The Open Method of Coordination in the Area of Social Policy and the Legality Principle", in L.F.M. Besselink, F.J.L. Pennings en A. Prechal, The Eclipse of the Legality Principle in the European Union, Alphen aan den Rijn: Kluwer Law International, 2010.

PENNINGS Frans, (2005) "Co-ordination of Social Security on the Basis of the State-of-Employment Principle: Time for an Alternative?",Common Market Law Review, 42(1), 2005.

PEREZ YAÑEZ, Rosa (2002) "La extensión del ámbito subjetivo de los convenios bilaterales, en materia de Seguridad Social, suscritos entre un estado miembro y un tercer estado", in Temas Laborales N. 65/2002.

PIETERS, Danny & SCHOUKENS, Paul (eds.) (2009), The social security Co-ordination between the EU and Non– EU countries, Intersentia, Metro, Antwerp, Cambridge, Portland.

RYS, V. (2010). Reinventing social security worldwide, Back to the essentials. The Policy Press, UK.

SÁNCHEZ-RODAS NAVARRO, Cristina (2011). "El Convenio Multilateral Iberoamericano de Seguridad Social", IUSTEL, June 2011.

SÁNCHEZ-RODAS NAVARRO, Cristina (Dir) (2010 a), La Coordinación de los Sistemas de Seguridad Social. Los Reglamentos 883/2004 y 987/2009, Murcia, Laborum.

SÁNCHEZ-RODAS NAVARRO, Cristina (2010), «La Coordinación de las prestaciones familiares en el nuevo Reglamento 883/2004» in: Sánchez-Rodas Navarro, Cristina, (Dir) La Coordinación de los Sistemas de

Seguridad Social. Los reglamentos 883/2004 y 987/2009, Murcia, Laborum.

SÁNCHEZ-RODAS NAVARRO, Cristina (2010), «Libre circulación de personas y prestaciones en metálico no contributivas» in: Sánchez-Rodas Navarro, Cristina, (Dir) La Coordinación de los Sistemas de Seguridad Social. Los reglamentos 883/2004 y 987/2009, Murcia, Laborum.

SÁNCHEZ-RODAS NAVARRO, Cristina (2010 d), «Convenios internacionales de Seguridad Social y reglamentos de coordinacion de Sistemas de seguridad social», in: Sánchez-Rodas Navarro, Cristina, (Dir) La Coordinación de los Sistemas de Seguridad Social. Los Reglamentos 883/2004 y 987/2009, Murcia, Laborum.

SERVAIS, Jean-Michel (2013), International social security, Wolter Kluwer Law& Business, Holanda.

SERVAIS, Jean-Michel (2011) Droit social de l'Union Européenne, Bruylant, Bruselas, Bélgica.

SUPIOT, Alain (2001) Beyond Employment. Changes in Work and the Future of Labour Law in Europe, Oxford University Press. 2001.

THOUVENIN, Jean-Marc, & Trebilcock, Anne (2013), Droit international social. Droit économiques sociaux et culturels, Tome 2 Règles du droit international social, Cedin, Bruylant, Bruselas, Bélgica.

TITMUS, Richard, (1958) Essays on the Welfare State, Allen and Unwin, Londres

VONK, Gijsbert (2013), "Social Security Rights of Migrants: Links between the Hemispheres", in Roger Blanpain, Pablo Arellano, Marius Olivier & GisjbertVonk (eds.), Bulletin of Comparative Labour Relations vol. 84, Social Security and Migrant Workers, Selected Studies of Cross-Border Social Security Mechanisms, Kluwer, 2013.