FAMILY BENEFITS IN THE EU

Is It Still Possible to Coordinate Them?

Grega Strban*

ABSTRACT

The coordination and especially the export of family benefits within the EU is high on the agenda, not only due to its complexity, but also because it is politically sensitive. In the present article the plethora of various family benefits, corresponding to distinctive perceptions, historical developments, as well as modified family structures and patterns of mobility is presented. It is questioned whether a definition of a family is important for coordinating family benefits. Moreover, deviations from general principles of social security coordination law are analysed. Among them are the rules on equal treatment, determining the legislation(s) applicable for providing family benefits (including the question of overlapping benefits and the number of so-called 'baskets' of family benefits) as well as the export (of adjusted or unadjusted) family benefits. The question is raised as to whether social security coordination rules should be modified and focus more on a child and child benefit(s), leaving other kind of support to the family to social and tax advantages and the right to reside rules.

Keywords: export of family benefits; family allowances; family benefits; social security; social security coordination

§1. INTRODUCTORY REMARKS

The right to social security is one of the fundamental human rights providing protection to members of society[1] in case of lost (or reduced) income and increased costs. Among

* Full professor at the Faculty of Law, University of Ljubljana, grega.strban@pf.uni-lj.si.

1 Each (Member) State has the duty to guarantee the right to social security (for example, Article 12 of the initial and revised European Social Charter). Next to the state society, there could be broader societies, like the European one.

the social risks are not only old-age, invalidity, decease, sickness, accidents at work and occupational diseases, unemployment, reliance on long-term care,[2] and the lack of sufficient resources but also risks posed by maternity or paternity as well as other family-related risks. Their occurrence might endanger not only the existence and free development of every individual and his or her family, but might affect society as a whole. Therefore, social security benefits are required to enable the social inclusion of those who are forced to rely on them.

Modern social security systems in Europe were developed in the wake of the Second World War. They were adjusted to the industrial society of that time. Within this framework, social security rested on three assumptions:[3] one was full employment.[4] Another one was that a typical industrial worker would be in a stable full-time employment, usually with the same employer from his first employment all the way until his retirement. Finally, there was the assumption that the socially insured worker had family responsibility. Rooted in these assumptions is the idea that social security benefits should guarantee the sustenance of both workers and those individuals in society that depend on the worker's income. Therefore, derived rights of family members (for example in health and pension insurances), family rates for certain benefits (for example in the case of unemployment and old-age) and family benefits were introduced. For instance, according to the ILO Convention No. 102 on minimum standards of social security (1952), a standard beneficiary is a man with a wife and two children.[5]

These assumptions are no longer completely valid. Most recently, high rates of unemployment were reported in some EU Member States.[6] Among those who remain in paid work, a growing number of people are self-employed or have an 'atypical' work contract (for part-time work; fixed-term contract; short-time jobs; interim jobs, and so on).[7] Moreover, the so-called single breadwinner model was replaced by a dual earner model, where both workers are fully employed or one is fully employed and the other is employed part-time (so-called one-full-one-part-time-earner model).[8]

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2 Reliance on long-term care is mentioned as dependency in Article 34 of the Charter of Fundamental Rights of the EU, [2012] OJ C 326/391.

3 For these assumptions, see also J. Berghman, *Basic concepts on social security in Europe* (EMSS, 1999–2000), p. 20.

4 W.H. Beveridge, *Full employment in a free society* (Allen and Unwin, 1944), p. 18.

5 Part XI of the Convention No. 102.

6 This is one of the reasons that the European unemployment benefit scheme (EUBS) is again on the table. For example, high-level conference on Feasibility and Added Value of a EUBS, Co-organised by CEPS, the Slovak Presidency of the Council of the EU and the European Commission, Brussels 11 July 2016.

7 The starting point should be typical, that is stable and full time employment contract. However, it could be doubted that these forms of work are still 'atypical'.

8 E.-M. Hohnerlein and E. Blenk-Knocke, 'Einführung', in Bundesministerium für Familie, Senioren, Frauen und Jugend, *Rollenleitbilder und -realitäten in Europa: Rechtliche, ökonomische und kulturelle Dimensionen* (Nomos, 2008), p. 13.

The way of living has undergone substantial changes. Non-marital relationships and lone parenting have become widely accepted.[9] The number of marriages is declining and the number of divorces is increasing.[10] Moreover, same sex partnerships, who may also be assuming the responsibility for children, are nothing new anymore in many Member States.[11] In some countries, the participation of women (who still care for children in the majority of Member States)[12] in the labour market was already quite high; and it is being promoted and is growing in many countries.[13] Therefore, other persons, outside of the (nuclear) family are to a higher degree taking care for children nowadays.

Member States are free to decide which benefits they will provide to the families, taking into account the way that societal relations have changed (for example, by granting family benefits to same sex partners or increasing benefits to single-parents). It is argued that the rule of law demands legislation to reflect the development in social relations with its normative action.[14] Social security is primarily regulated by national law, which takes into account not only changes in the society but also various historically conditioned structural and cultural elements and policy preferences in every state. The result is that family benefits might be of very distinctive legal nature.

Not only has the family structure as well as the variety of family benefits changed, but the (historically rooted) principle of territoriality can no longer be justified. According to this principle, states usually limit their responsibility for providing family benefits to the territory on which they have sovereignty. However, national social security systems may come into conflict when people start to move from one state to another.

New patterns of mobility have emerged. Mobility is more and more characterized by short periods of stay in different Member States as opposed to long-term migration patterns that were visible in the past. Moreover, mobility within the EU is promoted,

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9 Single-parent households are relatively common in Estonia and in the UK (in both cases above 20%). European Commission, *Demography Report 2010*, p. 73.

10 In 2011, there were 4.2 marriages for every 1.000 persons in the 28 Member States of the EU (that is the crude marriage rate) and 2.0 divorces for every 1.000 persons (that is the crude divorce rate) took place. Since 1965, the crude marriage rate in the EU-28 has declined by almost 50% in relative terms (from 7.8 per 1.000 persons in 1965 to 4.2 in 2011). At the same time, the crude divorce rate increased from 0.8 per 1.000 persons in 1965 to 2.0 in 2011. European Commission, 'Short Analytical web note 3/2015, Demography report', *Website of the European Commission* (2015), http://ec.europa.eu/eurostat/documents/3217494/6917833/KE-BM-15–003-EN-N.pdf/76dac490–9176–47bc-80d9–029e1d967af6, p. 39.

11 For example, from 2014 paternity leave and benefits in Slovenia may be used by the mother's same-sex partner (a woman). B. Kresal et al., *Social Security law in Slovenia* (3rd edition, Kluwer Law International, 2016), p. 86.

12 More men seem to be taking care of children in the Nordic countries. A. Haataja, 'Fathers' use of paternity and parental leave in the Nordic countries', *The Social Insurance Institution of Finland Online Working Paper* 2/2009 (2009), https://helda.helsinki.fi/bitstream/handle/10250/8370/FathersLeaves_Nordic.pdf.

13 European Commission, *Second Biennial Report on social services of general interest* (2011), p. 23.

14 Emphasized for example by the Slovenian Constitutional Court (case U-I-69/03, SI:USRS:2005:U.I.69.03 et seq.).

including labour mobility, which contributes to the functioning (and the positive effects) of the internal market.

Hence, it is not unusual that one parent lives and works in one Member State and the other lives with the children in another Member State. The question might arise as to which Member State is competent for providing family benefits. Moreover, providing (exporting) family benefits to another Member State is also high on the political agenda.

The present article begins by analysing certain notions, most notably family benefits in national and EU law and the definition of a family. In the following sections, social security coordination and its principles are illustrated. At the core is the application of these principles to family benefits. Questions surrounding equal treatment, determining the applicable legislation, the export of benefits and (possible) deviations from general principles are researched.

§2. DEFINING FAMILY BENEFITS

In order to analyse the coordination of family benefits, a definition of family benefits is required. Since coordination is concerned with linking national social security systems and not harmonizing them, definitions in national law are of the utmost importance.

A. A PLETHORA OF FAMILY BENEFITS

When analysing family benefits in the EU, the question is, could all benefits to a member of a family be considered as family benefits? The reply must be negative, since family benefits must be intended to meet family expenses. According to the social security minimum standards, social risk is the additional costs that derive from the responsibility for the maintenance of children.[15] Benefits could take the form of periodical payments to persons who have completed a certain qualifying period (if required) or payments meant for the provision of food, clothing, housing, holidays or domestic help to or in respect of children.[16]

It can be deduced that family benefits may be in cash or in kind. They may be provided by social insurance and are financed by contributions – for example in Austria, France or Italy – or through more universal taxes for all residents, such as in many other Member States.[17]

They may be considered part of the social assistance scheme or very much linked to it. For instance in Croatia, family benefits are provided by a tax-financed scheme covering all residents who satisfy a means test; here, benefits vary according to income. Moreover, in Romania family benefits are part of the social assistance scheme.[18]

15 Article 40 of ILO Convention No. 102 and Article 40 European Code of Social Security (1964).
16 Article 42 of ILO Convention No. 102.
17 Mutual Information System on Social Protection (MISSOC) comparative tables 2016, www.missoc.org.
18 Ibid.

A further distinction can be made between child benefits (which may also vary according to the number and age of children, as well as family income); child-raising allowances (in some Member States considered as maternity and paternity benefits) and child care allowance (right to day care, for example in Finland, or subsides for day-care, for example in Denmark and France, or the reduction of kindergarten fees, progressing with number of children in Slovenia, common financing in the Netherlands).[19]

In many Member States, birth and adoption grants, supplements for single parents and other benefits (such as accommodation and housing allowances) are provided. Special family benefits are available to disabled children or parents caring for them, linking such benefits to invalidity or reliance on long-term care. Many Member States provide advances on maintenance payments, in case of no timely payments by a parent or other responsible person.[20]

Some international instruments within the category of family benefits also include tax relief and social services for families.[21] For instance, a child tax credit is part of family benefits in the UK, but many other Member States recognize tax reliefs (tax benefits)[22] in their respective tax systems.

B. FAMILY BENEFITS IN SOCIAL SECURITY COORDINATION LAW

The purpose of the currently applicable Regulation (EC) 883/2004[23] (hereafter Social Security Coordination Regulation) was the simplification of coordination rules. However, it is always about the offset between simplification, on the one hand, and legal certainty, on the other, especially when very distinctive social security schemes have to be coordinated. Nevertheless, simplification was clearly made with respect to the coordination of family benefits. The Social Security Coordination Regulation strives to do away with the mixture of general coordination rules and benefits related provisions, as was the case in the previous Regulation (EEC) 1408/71,[24] by providing a uniform regulation on family benefits.[25]

Moreover, Regulation (EEC) 1408/71 distinguished between family benefits and family allowances. 'Family benefits' were defined as *all benefits in kind or in cash* intended

19 Under the Childcare Act, the state, parents and employers pay the costs of childcare together when the child is cared for outside the home during working hours of the parents. Ibid.

20 Ibid.

21 Article 47 Revised European Code of Social Security (1990, not yet applicable due to only one ratification, that is, by the Netherlands).

22 Tax benefits may have similar purpose as social security benefits, although they might be far less visible. A. Sinfield, 'Tax Benefits in Non-State Pensions', 2 *European Journal of Social Security* (2000), p. 137.

23 Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, [2004] OJ L 166/1, as amended.

24 Regulation (EEC) No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, [1971] OJ L 149/2, as amended.

25 Chapter 8 of Regulation (EC) 883/2004.

to meet family expenses under the national legislation, excluding the special childbirth or adoption allowances (which had to be included in Annex II of that Regulation). 'Family allowances' were defined as *periodical cash benefits* granted exclusively by reference to the number and, where appropriate, the age of members of the family.[26]

Hence, family benefits were defined much more broadly than cash family allowances. The Court of Justice of the European Union (CJEU) in *Hoever and Zachow*[27] dealt with the question of the notion of family benefits. The case concerned payment of the German non-contributory child-raising allowance. The German government argued that the child-raising allowance did not have the same purpose as a 'family benefit' within the meaning of Regulation (EEC) 1408/71 since it intended, by conferring a personal right, to remunerate the parent who both took on the task of raising a child and personally fulfilled the conditions for the granting of the allowance.[28]

The CJEU did not accept this argument. It concluded that the child-raising allowance is paid only because of the children; its amount varies according to both the age and number of the children as well as on the parents' income. It is intended to enable one of the parents to devote himself/herself to the raising of a young child. Such allowance is aimed at remunerating the service of bringing up a child, meeting other costs of caring for and bringing up a child and mitigating the financial disadvantages entailed in giving up income from full-time employment. Therefore, such a benefit had to be treated as a family benefit.

Similar arguments were also applied to the Swedish parental benefit in the case of *Kuusijärvi*.[29] The CJEU concluded that this benefit was intended to enable the parents to devote themselves, in alternation, to the care of the young child until that child started to attend school and the benefit was intended to offset – to some extent – the loss of income of parents temporarily giving up occupational activity. Consequently, all benefits that are intended to meet family expenses or offset the loss of income of parents caring for children qualify as family benefits.[30]

The CJEU held that the expression 'to meet family expenses' is to be construed as referring in particular to a public contribution to a family's budget to alleviate the financial burdens of the maintenance.[31] Hence, maintenance payments also constituted a family benefit according to Regulation 1408/71.

The EU legislator reacted to these judgments. The today applicable Social Security Coordination Regulation[32] on the one hand uses only the notion of family benefits,

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26 Article 1(u) of Regulation (EEC) 1408/71.

27 Case C-245/94 *Hoever and Zachow*, EU:C:1996:379.

28 Ibid., para. 22.

29 Case C-275/96 *Kuusijärvi*, EU:C:1998:279. More in F. Pennings, *European Social Security Law* (6th edition, Intersentia, 2015), p. 254.

30 S. Devetzi, 'The coordination of family benefits by Regulation 883/2004', 11 *European Journal of Social Security* (2009), p. 207.

31 Case C-85/99 *Offermanns*, EU:C:2001:166; and Case C-255/99 *Humer*, EU:C:2002:73.

32 Regulation (EC) 883/2004.

and no longer applies the notion of family allowances. Though, the notion of family benefits has remained rather broad.[33] On the other hand Social Security Coordination Regulation clearly excludes maintenance payments.

Hence, the notion of 'family benefits' encompasses all benefits in kind and in cash intended to meet family expenses, excluding advances of maintenance payments and special childbirth and adoption allowances (mentioned in Annex I to the Social Security Coordination Regulation).[34]

This new definition demonstrates the comprehensive approach to family benefits. According to the goal of simplification, the distinction between family benefits and family allowances was abolished. The subject of social security coordination are not only child benefits, but also child-raising benefits (which are in some Member States linked to maternity) and child-care benefits.[35] Not only are cash benefits covered, but also benefits in kind.[36]

Moreover, tax benefits for dependent children may fall under coordination rules,[37] although at the same time they could be subject to double taxation avoidance treaties.[38] This leads to another hot topic in the EU, that is the distinctive coordination of social security and tax systems, which might lead to unwanted legal consequences.[39]

Conversely, 'advances of maintenance allowances' are recoverable advances intended to compensate for a parent's failure to fulfil his/her legal obligation of maintenance to his/her own child, which is an obligation under family law. These advances should not be considered as a direct benefit from collective support in favour of families and the coordination rules should not apply to them anymore.[40]

Childbirth and adoption allowances are still exempted from social security coordination rules, if they are mentioned in Annex 1 to the Social Security Coordination

33 See also Recital 34 of the Preamble to Regulation (EC) 883/2004.

34 Article 1(z) of Regulation (EC) 883/2004.

35 In Case C-333/00 *Maaheimo*, EU:C:2002:641, the CJEU argued that home child-care allowance, provided by the Finish local community, is intended to meet family expenses and has to be considered as a family benefit.

36 Case C-75/11 *Commission v. Austria*, EU:C:2012:605. Here, the granting of reduced fares on public transport only to students whose parents are in receipt of Austrian family allowances was contrary to EU law.

37 In Case C-177/12 *Lachheb*, EU:C:2013:689, the CJEU established that the fact that a benefit is governed by national tax law is not conclusive for the purpose of evaluating its constituent elements, which determine whether a benefit is subject to coordination or not. Hence, tax reduction (child bonus in Luxembourg) is a family benefit in social security coordination law.

38 Case C-303/12 *Imfeld and Garcet*, EU:C:2013:822 (on tax exemption for dependent children under the German tax law and the supplementary tax-free income allowance for dependent children under the Belgian tax law).

39 Problems might occur if taxes have to be paid in a country where social security is financed by taxes (e.g. in Denmark) and contributions in a country where social security is financed by contributions (e.g. in Germany), or vice versa. B. Spiegel et al., The relationship between social security coordination and taxation law, Analytical report 2014, European Commission, 2014.

40 Recital 36 of the Preamble to Regulation (EC) 883/2004.

Regulation. An insertion in the annex is a constitutive element and in the case that childbirth allowances are not mentioned in this annex, they would be fully subject to coordination rules (and thus exportable to other Member States).

C. THE NEED FOR DEFINING A FAMILY?

Family benefits are specific compared to many other social security benefits, which are granted to the individual person, for example in case of sickness, maternity, paternity, old-age, invalidity or unemployment. They are granted to a family as a whole. The question is therefore, who is inside and who is outside of the family circle?

Since we are dealing only with the coordination of national social security systems, it is for national legislation to determine who family members are.[41] However, the notion of family members is to a certain extent harmonized, but only if national legislation does not make a distinction between the members of the family and other persons to whom it is applicable. In this case the spouse, minor children, and dependent children who have reached the age of majority are considered to be members of the family.[42]

Moreover, national legislation may consider members of the family or household only as a person living in the same household as the insured person. However, in order to remove the residence requirements, which might prove to be an obstacle to free movement, this condition is considered to be satisfied if the person in question is mainly dependent on the insured person.[43]

As indicated previously, the number of divorces in the EU is increasing and this might have an impact on the definition of the notion of family. However, being married or divorced is irrelevant for the receipt of family benefits. As the CJEU held in the case of *Slanina*,[44] although the Social Security Coordination Regulation does not expressly cover family situations following a divorce, there is nothing to justify the exclusion of such situations from its scope. One of the normal consequences of divorce is that custody of the children is granted to one of the parents, with whom the children reside (if no joint custody is agreed upon). It is possible, for a variety of reasons (in this case as the result of a divorce), that the parent with custody of a child will leave his or her Member State of origin and settle in another Member State in order to reside and possibly work there, and the residence of a minor child will also be transferred.[45]

41 'Member of the family' means any person defined or recognized as a member of the family or designated as a member of the household by the legislation under which benefits are provided. Article 1(i) of Regulation (EC) 883/2004.

42 Regulation (EC) 883/2004 is actually reinforcing the (outdated) single breadwinner model.

43 Article 1(i) of Regulation (EC) 883/2004.

44 Case C-363/08 *Slanina*, EU:C:2009:732. A similar case was dealt with by the EFTA Court in Case E-06/12 *EFTA Surveillance Authority v. The Kingdom of Norway*, [2013] EFTA Ct. Rep. 618.

45 Case C-363/08 *Slanina*, para. 30.

The CJEU further observed that family benefits, by their nature, could not be regarded as payable to an individual in isolation from his/her family circumstances. It is therefore irrelevant that the person to whom the family benefits are to be awarded is the divorced wife (in the case of *Slanina*) rather than the worker (ex-husband) himself.[46]

Moreover, the claim for family benefits may even be submitted by another person than the person subject to the legislation of the Member State granting family benefits. According to the implementing Regulation[47] the situation of the family as a whole must to be taken into account as if all the persons involved (that is family members) were subject to the legislation of the Member State concerned (that is the Member State granting the benefits) and residing there, in particular as regards a person's entitlement to claim such benefits. Where a person entitled to claim the benefits does not exercise his/her right, an application for family benefits submitted by the other parent, a person treated as a parent, or a person or institution acting as the guardian of the child has to be taken into account by the competent institution.

It is interesting to observe that with family benefits, a distinction can be made between the entitling, entitled and receiving person. Family benefits are awarded to a family in order to cover part of the costs of raising a child or children. Without a child, there is no family and no need for family benefits. Hence, a child is an entitling person. However, he/she might not have reached the age of majority and therefore does not possess the capacity to act in legal relations. Therefore, the person who is legally entitled to a family benefit is an adult (for example, a parent). However, the person who actually receives a family benefit might be another person (another parent, partner, other person) who is actually caring for a child.[48]

§3. SOCIAL SECURITY COORDINATION AND ITS PRINCIPLES

One of the main objectives of the EU, alongside the functioning of the internal market, is the promotion of the free movement of EU citizens and economically active persons in particular. Without an effective, uniform social security coordination mechanism, such free movement could be seriously hampered.[49]

The text on linking or coordinating the social security systems of the EU founding Member States was agreed upon in the form of an international convention. However, it

46 Ibid., para. 31.

47 Regulation (EC) No. 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No. 883/2004 on the coordination of social security systems, [2009] OJ L 284/1, as amended. See Case C-378/14 *Trapkowski*, EU:C:2015:720.

48 On entitling person, person opening entitlement and rightful claimant, see D. Pieters, *Social Security: An Introduction to the Basic Principles* (Kluwer Law International, 2006), p. 83.

49 P. Schoukens and L. Monserez, *Introduction to Social security Co-ordination* in the EU, in Ruess Courses Master program Social Security in Europe, Leuven, 2010, p. 1.

was decided to make the coordination rules operational as soon as possible to avoid the time-consuming procedure of ratification and the agreed rules were passed in the form of a regulation. In fact, this was done in the form of the third regulation adopted by the EU,[50] which also was the first real legal instrument.[51]

Choosing a regulation over the traditional international convention has important implications. It gives the possibility to the CJEU to interpret the secondary legislation and establish its conformity with the Treaties, or in fact apply the Treaties directly to the situations under the material scope of the EU law.

The main characteristic of a regulation is that it is a unifying measure. It is generally applicable, binding in its entirety and directly applicable in all Member States.[52] The attribute of direct applicability is linked to the doctrine of supremacy. In principle, it is not open to Member States to interfere with the direct application of a regulation in the national legal order. However, social security systems are not unified, at least not substantive social security law. Rather the part of formal social security law, governing the application of the substantive law in transnational situations, is unified amongst all the Member States.

Member States remain competent to determine the scope of protected persons, the kinds of and the levels of (family) benefits, obligations of the beneficiaries and procedures to enforce the rights. Social Security Coordination Regulation nevertheless also influences the substance of social security. For instance, Member States ensuring protection to all residents are obliged to broaden the personal scope of their social security system also to include migrant workers (even if they reside in another Member State).[53] It could be argued, that the more diverse the social security systems of the growing number of Member States have become, the more complex their coordination has become.[54]

Some principles of social security coordination law already can be deducted from primary law,[55] others from the secondary law – most notably from the Social Security Coordination Regulation. These principles are the equal treatment of EU citizens, the unity of applicable legislation, protection of the rights in course of acquisition (with aggregating all relevant periods), the protection of acquired rights (with export of benefits) and good administrative cooperation.

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50 Regulation (EEC) No. 3 concerning the social security of migrant workers, [1958] OJ L 30/561.

51 Regulations No. 1 and 2 dealt with the use of languages and the form of the *laisser passer* to the Members of the European Parliament, respectively.

52 Article 288 of the Treaty on the Functioning of the European Union (TFEU), [2012] OJ C 326/47.

53 The leading principle for determining the legislation applicable for economically active persons is the *lex loci laboris* (Article 11 of Regulation (EC) 883/2004).

54 The same applies vice versa. The more similar the national social security systems are, the less complicated their coordination is.

55 Articles 18, 21 and 45 TFEU (equal treatment of free moving EU citizens, in the first place workers), 48 TFEU (mentions techniques of aggregation of relevant periods, for example of employment, insurance or residence, and export of benefits).

As a rule, the provision of family benefits follows these general principles of social security coordination, but at the same time, it importantly deviates from them.

§4. EQUAL TREATMENT AND FAMILY BENEFITS

The principle of equal treatment of EU citizens is one of the pillars of EU law. It is also enshrined in the Social Security Coordination Regulation. Persons covered by this Regulation have to enjoy the same benefits and be subject to the same obligations under the legislation of any Member State, on the same conditions as the nationals of that state.[56]

Any direct (overt) and indirect (covert) forms of discrimination are prohibited. Not only nationality, but also residence conditions, which in national legislation are quite often applied to family benefits, may cause discriminatory effects and restrict free movement. Therefore, the general provisions of Social Security Coordination Regulation waive residence clauses for cash (family) benefits. Cash benefits must not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his/her family reside in another Member State.[57]

More specific rules can be found in the chapter on family benefits.[58] A person is entitled to family benefits in accordance with the legislation of the competent Member State, including for his/her family members residing in another Member State, as if they were residing with him/her. Although, it might be argued that this provision is superfluous, since the general rules of the Social Security Coordination Regulation would lead to the same result, it might be good that the legal fiction of family members residing with an entitled person (for example a worker) is maintained.[59] However, it might be questioned where a person or a family (habitually) resides, since residence is one of the core issues of social security coordination.[60]

Residence conditions were also waived by the CJEU, which either based this decision on Treaty provisions or on the Social Security Coordination Regulation. The CJEU decided in the first *Pinna* judgment[61] that the provision of the Regulation (EEC) 1408/71

56 Article 4 of Regulation (EC) 883/2004.

57 Article 7 of Regulation (EC) 883/2004.

58 Article 67 of Regulation (EC) 883/2004.

59 Former Regulation (EEC) 1408/71 had no general rules on waiving residence clauses, and this has to be regulated in the chapter on family benefits (Article 72).

60 For example, Case C-394/13 *B.*, EU:C:2014:2199 (registered permanent residence without habitually residing in the state cannot suffice); Case C-589/10 *Wencel*, EU:C:2013:303 (habitual residence only in one Member State); Case C-255/13 *I*, EU:C:2014:1291 (long-term residence not necessarily means habitual residence); Case C-308/14 *Commission v. United Kingdom*, EU:C:2016:436 (admissibility of the right to reside test for child benefit and child tax credit).

61 Case C-41/84 *Pinna*, EU:C:1986:1.

requiring the benefit level of the state of residence to be used in case of French benefits was contrary to the Treaties (that is, now Article 45 TFEU). In the *Maaheimo*[62] case, the CJEU argued that if the grant of a family benefit (in this case a home child-care allowance) depends on the child's actual residence in the territory of the competent Member State, that condition must be held to be satisfied where the child resides in the territory of another Member State.

§5. DETERMINING THE APPLICABLE LEGISLATION FOR PROVIDING FAMILY BENEFITS

Family benefits are of a specific character. They are granted on behalf of dependent persons (children as entitling persons). Therefore, the equality principle does not only apply but also the principle of unity of applicable legislation is of the utmost importance.[63] It determines which Member State is competent for providing family benefits, if they are provided in both Member States, it determines the Member State of employment (for example of a parent)[64] and the Member State of residence of children.

One of the most discussed matters of social security coordination law revolves around the determination of the applicable legislation. It concerns conflict rules in cross-border matters. By solely applying the national social security rules, one might end up with no social security coverage due to the so-called negative conflict of laws. This similarly applies *vice versa*, that is for positive conflicts of laws. One may be covered by and contributing to two national social security systems, but may not receive benefits from both of them.

This is the reason why a complete and uniform system of conflict rules has to ensure that persons moving within the EU should be subject to the social security system of only one Member State.[65] This rule has a so-called exclusive and overriding effect. The first term ('exclusive') expresses that, in principle, the legislation of a single Member State is only applicable for collecting social security contributions and for granting the benefits. The possibility of the other Member States' social security schemes being simultaneously applicable for the same person in the same time period is excluded. The 'overriding' or 'binding' effect means that the designated social security system has to be applied,

62 Case C-333/00 *Maaheimo*.

63 One of the Recitals in the preamble to Regulation (EEC) 1408/71 explicitly mentioned that with a view to determining the legislation applicable to family benefits, the criterion of employment ensures equal treatment between all workers subject to the same legislation.

64 There is a separate rule for pensioners. They are entitled to family benefits under the legislation of the Member State competent for their pension. This provision (Article 67 of Regulation (EC) 883/2004) is not limited to pensions linked to previous economic activity. Pensions paid in the event of death, like the German pension for bringing up children are also covered. Case C-32/13 *Würker*, EU:C:2014:107.

65 Article 11 of Regulation (EC) 883/2004.

despite any other conditions of that legislation, that is, even if national legislation as such would not include EU migrants in its social security system.[66]

It has to be noted that according to the general rule, economically active migrants are subject to the legislation of the Member State where they work (*lex loci laboris*). Non-active migrants are as a rule subject to the legislation where they reside (*lex loci domicilii*).[67]

A. DEVIATING FROM THE GENERAL RULE

In its endeavour to provide the best possible protection to EU citizen, the CJEU at times might set aside specific rules of the Social Security Coordination Regulation and directly apply the more general provisions of the Treaties, such as the freedom of movement, the free movement of goods and services, and the concept of EU citizenship. A good example concerning family benefits is the decision in the case of *Bosmann*.[68] Until this case, the CJEU upheld the principle of exclusive application of the designated Member State.

In the *Bosmann* case, the CJEU departed from the strong and overriding effect of the principle of unity of the applicable legislation. It argued that while Germany (a non-competent state) was not compelled to provide child benefits, the Social Security Coordination Regulation did not preclude German authorities providing such benefits when they are subject to the condition of residence on its territory. More specifically, the Member State of residence cannot be deprived of the right to grant child benefits to those residing within its territory. The CJEU also referred to the legal basis of the Social Security Coordination Regulation (Article 48 TFEU) which aims to facilitate the free movement of workers.

Some argue that the decision in the *Bosmann* case contravenes the binding effect of the Social Security Coordination Regulation, and that basic principles of social security coordination could be questioned. Others argue that the principle of unity of the applicable legislation has to ensure that complexities arising out of simultaneous application of several social security systems do not have adverse impact on the fundamental right of the free movement of EU citizens.[69]

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66 Y. Jorens and F. Van Overmeiren, 'General Principles of Coordination in Regulation 883/2004', 11 *European Journal of Social Security* (2009), p. 72.

67 H.-D. Steinmeyer, 'Title II Determination of the legislation applicable', in M. Fuchs and R. Cornelissen (eds.), *EU Social Security Law* (C.H. Beck, Hart, Nomos, 2015), p. 144.

68 Case C-352/06 *Bosmann*, EU:C:2008:290. Mrs Bosmann, a Belgian national residing in Germany, took up employment in the Netherlands and the latter became competent. As a consequence, Germany ceased paying family benefits for her two children studying in Germany. Mrs Bosmann was disadvantaged by the coordination regulations, since she was not entitled to the child benefits in the Netherlands, where they are granted up to the age of 18. Students who are studying in the Netherlands may be entitled to study grants.

69 More on the discourse in P. Schoukens and L. Monserez, *Introduction to Social Security Co-ordination in the EU*, in Ruess, Leuven, 2010, p. 40.

It could be argued that it becomes increasingly obvious that the CJEU, in certain cases, perceives the Social Security Coordination Regulation as too technical and inflexible, and rather relies on the more general principles of EU law. Of course, this is only the case when general principles lead to a more favourable situation for the person moving within the Union,[70] according to the so-called *favourability* principle or *Petroni* principle (named after the CJEU's judgment in *Petroni*).[71] It emphasizes that the application of social security coordination law cannot result in a worse situation for the moving person than the application of purely national law. This principle was mainly applied when calculating long-term cash benefits, such as pensions.[72]

The CJEU now seems to follow this line of reasoning for determining the applicable legislation for family benefits. In previous decisions, the CJEU argued that there is a complete system of conflict rules in the Social Security Coordination Regulation and Member States are not entitled to determine the extent to which their own legislation or that of another Member State is applicable. They are under an obligation to comply with the provisions of EU law. At that time, this was not at odds with the *Petroni* principle, since it did not apply to the rules for determining the legislation applicable but to the rules on the overlapping of benefits provided for by different national legislative systems.[73]

In the *Bosmann* case, there was a deviation from previous case law, which is not well recognized in the *Bosmann* judgment itself. Nevertheless, the CJEU confirmed its position in the case of *Hudziński and Wawrzyniak*.[74] The CJEU went even further. In the *Bosmann* case, there was no entitlement to family benefits in the competent Member State (the Netherlands), therefore, Germany could still provide family benefits on the basis of national law. However, in the *Hudziński and Wawrzyniak* case, there was an entitlement to family benefits in Poland. Polish seasonal and posted workers were not disadvantaged by exercising the right to free movement and working in Germany. They neither lost nor suffered any reduction of family benefits.

The CJEU reiterated that it would be against the Social Security Coordination Regulation and the Treaties (Article 48 TFEU) to rule that the non-competent Member State is prohibited from granting workers and members of their family broader social protection than those granted under the Social Security Coordination Regulation. The Social Security Coordination Regulation cannot be applied in such a way as to deprive a migrant worker of benefits granted solely by virtue of the legislation of a single Member State. In this case, the entitlement to child benefits also existed for any person who did not

70 G. Strban, 'Social security of EU migrants – an interplay between the Union and national laws', in M. Király and R. Somssich (eds.), *Central and Eastern European Countries after and before the accession* (ELTE, 2011), p. 88.

71 Case C-24/75 *Petroni*, EU:C:1975:129.

72 When the conditions of national law are met, two calculations have to be made: one according to national law only and the other according to the EU social security coordination law (with aggregation of periods and *pro-rata temporis* payment of pensions).

73 Case C-302/84 *Ten Holder*, EU:C:1986:242.

74 Case C-611/10 *Hudziński and Wawrzyniak*, EU:C:2012:339.

reside in Germany (also children were not residing there) and was subject to unlimited income tax liability (from which the child benefits are financed).

The argument that a non-competent Member State is not deprived or is allowed to pay family benefits might be misleading. Family benefits were indeed refused; otherwise, there would not have be a case before the CJEU. The exclusion from family benefit provisions is actually prohibited, since it could constitute a disadvantage for migrant workers. National courts followed the arguments of the CJEU in the mentioned cases and granted the family benefit.[75] The German Federal Central Tax Office even issued special guidelines for family benefits.[76]

However, the CJEU argued that in order to prevent overlapping of benefits, the German court was allowed to deduct the Polish family benefit from the German one and pay only the difference. This rule of deducting the amount of family benefits from another Member State applies (and there is no discretion), even if the entitlement to family benefits exist but family benefits would actually not be claimed in that Member State.[77]

Due to the specific nature of family benefits, two Member States might be competent. This leads us to another question, that is, which Member State should have priority in providing family benefits? And if both are obliged to do so, should the overlapping of benefits be prevented?

B. WHICH FAMILY BENEFITS ARE OVERLAPPING?

It can be deduced from the preamble of the Social Security Coordination Regulation that the overlapping of family benefits is not desired.[78] Hence, unjustified duplication of social security benefits should be prevented.[79] However, rules on non-overlapping situation are not mentioned in Article 48 TFEU and the anti-overlapping rules are restricted by the principle of favourability or the *Petroni* principle (mentioned above).

The Social Security Coordination Regulation contains a general rule against the overlapping of benefits.[80] The Social Security Coordination Regulation should neither confer nor maintain the right to several benefits of the same kind for one-and-the same

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75 Following the Case C-352/06 *Bosmann*, the fiscal court of Köln granted the family benefit for the disputed period, since the right to German *Kindergeld* is not excluded by EU law. Finanzgericht Köln, 10 K 4830/05, 25.09.2008. For the follow up on the *Hudziński and Wawrzyniak* judgment, see Bundesfinanzhof, III R 8/11, 16.5.2013.

76 Bundeszentralamt für Steuern: Dienstanweisung zur Durchführung des Familienleistungsausgleichs nach dem X. Abschnitt des Einkommensteuergesetzes (DA-FamEStG) Stand 2011, www.bzst.de.

77 Case C-4/13 *Fassbender-Firman*, EU:C:2014:2344.

78 Recital 35 of Regulation (EC) 883/2004 reads '[i]n order to avoid unwarranted overlapping of benefits, there is a need to lay down rules of priority in the case of overlapping of rights to family benefits under the legislation of the competent Member State and under the legislation of the Member State of residence of the members of the family'.

79 For example, Case C-102/91 *Knoch,* EU:C:1992:203.

80 Article 10 of Regulation (EC) 883/2004.

period of compulsory insurance. More specific rules are contained in the chapter on family benefits of the Social Security Coordination Regulation.[81] The distinction is made between the benefits provided by two Member States on a different basis or on the same basis. Bases for payment of family benefits could be economic activity (that is, employment or self-employment)[82] or residence in the country.

If family benefits are paid on a different basis, the general rule of *lex loci laboris* determines the rights based on economic activity as having priority, followed by the rights based on a pension and finally rights based on residence.[83]

Family benefits may also be provided on the same basis. If both Member States provide benefits based on economic activity and children live in one of the Member States, the Member State where the children reside has priority. Family benefits in another Member State are suspended up to this amount. It means that if the second Member State (which does not have priority) provides higher family benefits, then the so-called differential supplement has to be paid.[84] If parents work in two Member States and they reside (with children) in a third Member State, then the Member State of activity which is providing the highest benefit has priority and the other Member State is obliged to reimburse half of the amount (up to the amount it would provide under its law).[85] Hence, in order to avoid restricting the freedom of movement, the highest amount will always be guaranteed.

In cases where the entitlement to family benefits is based on pensions from two Member States, again the Member State in which the children reside is given priority and the other Member State has to pay the (possibly higher) differential supplement. If a third Member State in which no pension is received is involved, priority is based on the longest period of insurance and residence under the conflicting legislations. That is, the Member State where a person has the longest period of pension insurance and residence is responsible for providing family benefits.

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81 Article 68 of Regulation (EC) 883/2004.

82 The Administrative commission for the coordination of social security systems has elucidated the meaning of employment and self-employment activity (Decision F1, [2010] OJ C 106). It includes temporary suspension of such activity due to sickness, maternity, accident at work, occupational disease or unemployment, as long as wages or benefits (excluding pensions) are payable in respect of these contingencies; as well as paid leave, strike or lock-out, and unpaid leave for the purpose of child-raising, as long as this leave is deemed equivalent to activity as an employed or self-employed person according to national legislation.

83 For example, where the father works in Member State A and the mother lives with children in Member State B. If Member State A provides family benefits on the basis of employment, it should have priority over residence of children in Member State B. However, the actual place of residence might not always be clear (for example Case C-333/00 *Maaheimo*).

84 For example, if the primarily competent Member State provides family benefit in the amount of 80 and Member State of child's residence 100, the latter can suspend the benefit up to 80, but has to pay the difference to 100, that is 20.

85 Article 58 of Regulation(EC) 987/2009.

When benefits are provided in two Member States based on residence, the closest link is determined to be with the Member State where the children reside. In this case, the differential supplement is due to be paid by the other Member State.

Rules against overlapping apply for benefits of the same kind. The question therefore is which benefits are deemed to be of the same kind? The CJEU stresses that social security benefits are of the same kind when their purpose and object together with the basis on which they are calculated and the conditions for granting them are identical. Characteristics that are of purely formal nature must not be considered relevant criteria for classification of benefits.[86]

Clearly, family benefits and old-age pensions are of distinctive kind. Conversely, could it be argued that all family benefits are of the same kind (describes as a global approach) or should a distinction be made amongst various family benefits themselves (describes as a categorical approach)?

It seems that the latter position was taken by the CJEU. In the case of *Wiering*,[87] the CJEU argued that family allowances in Luxembourg are allowances of the same kind as German child benefit (*Kindergeld*). However, German child-raising benefit (*Elterngeld*) should be distinguished from them, since its object is to maintain the standard of living of parents who temporarily (fully or partially) give up work in order to look after their young children.[88] This benefit is salary related and linked to a person (a parent) rather than the family as such. Hence, the CJEU added another criterion for establishing whether family benefits are of the same kind, being the persons entitled to such benefits.

The question remains: how many categories or 'baskets' of family benefits were established by the categorical approach of the CJEU? It could be argued that these amount to at least two. First 'basket' is family allowances, which are according to the former Regulation (EEC) 1408/71 periodical cash benefits granted exclusively by reference to the number and possibly age of children (so-called classic child benefits) and the second is 'other' family benefits. It might be difficult to argue that the distinction should be made between child benefits and child-raising benefits, since the latter may also be distinctive, ranging from income replacement to lump sum benefits for the parent who takes care of the child irrespective of employment. Additionally, agreeing on concordance tables for family benefits might prove to be an impossible mission.

The legal consequences of distinctive approaches among Member States are significant. The more baskets of various family benefits are established, the more benefits will have to be provided and the priority (anti-overlapping) rules (with differential supplements) can no longer be applied. This may be to the benefit of persons moving within the EU, but at the same time, it may be perceived as unjust (for example paying contributions and taxes

86 For example, Case C-171/82 *Valentini*, EU:C:1983:189.

87 Case C-347/12 *Wiering*, EU:C:2014:300.

88 More on *Kindergeld*, *Elterngeld*, from mid-2015 also *ElterngeldPlus* and since 2013 *Betreuungsgeld* can be found on the website of the German Federal Ministry of Family, Seniors, Women and Youth at www.bmfsfj.de.

in one Member State while receiving benefits in two Member States). An emanation of equity (justice) in law is the principle of equality. The question is who should be treated equally, all workers in a single Member State or all children residing in the same Member State? Not to mention the influence on solidarity, a cornerstone principle of every social security system.

At the moment, everyone seems to wonder how many baskets of family benefits were established by the CJEU, or how many there should be, since the CJEU only made a distinction in a single concrete case, which so far has not been followed in similar cases. However, was the CJEU correct in applying the general anti-overlapping rule?[89] This rule explicitly mentions benefits of the same kind for one-and-the same period of 'compulsory insurance' (since paying contribution in one country and receiving benefits from two for the same social insurance period would be contrary to equity and solidarity). It is not only important to distinguish between compulsory (social) and voluntary (private) insurance,[90] periods of which may overlap and this has no influence on the benefits (for example pensions) provided. This distinction might be important for family benefits based on social insurance, but might not apply to those based on taxation. For arguments sake, maybe the general rule should not apply to family benefits at all, since there are special provisions foreseen for anti-overlapping of (all) family benefits (*lex specialis derogat legi generali*).

The discussion on anti-overlapping rules is crucial mainly for determining which family benefits have to be paid for family members residing in another Member State. Another intriguing question is at what level should they be provided?

§6. THE EXPORT OF (UN)ADJUSTED FAMILY BENEFITS?

It should be noted that the notion of the 'export' of family benefits might be misleading from a legal point of view. The Social Security Coordination Regulation obliges Member States to pay family benefits, for example, to workers whose children reside in another Member State. In this case, there is no actual payment (export) to another country. However, benefits might be provided to a person actually caring for a child[91] and – in this sense – exported to another country. Nevertheless, the export of family benefits is usually understood in a broader way, that is, when family benefits have to be paid for children residing in another country.

Such exporting is contested by some Member States, arguing that paying for children in another country might not follow the policy aims behind these benefits. These concerns found their way in to the Conclusions of the European Council meeting on 18

89 Article 10 of Regulation (EC) 883/2004.

90 R. Schuler, 'Artikel 10 Verbot des Zusammentreffens von Leistungen', in M. Fuchs (ed.), *Europäisches Sozialrecht* (6th edition, Nomos, 2013), p. 173.

91 Article 68a of Regulation (EC) 883/2004.

and 19 February 2016 (the so-called 'Brexit' agreement, but special arrangements, due to the vote on the UK referendum to leave the EU, ceased to exist).[92] Annex V to these conclusions contained the declaration of the European Commission that a proposal for amending the Social Security Coordination Regulation should be made. It would give the Member States, with regard to the exportation of child benefits to a Member State other than that where the worker resides, an option to index such benefits under the conditions of the Member State where the child resides. The Commission considered that these conditions included the standard of living and the level of child benefits applicable in that Member State.

There are certain problems related to this declaration. It is not clear exactly which benefits are 'child benefits', since the notions used in the Social Security Coordination Regulation are 'family benefits' and 'family allowances'.[93] Alternatively, could this maybe only refer to classic child benefits? Moreover, if a worker's residence is decisive, this might exclude frontier and seasonal workers. It might place pressure on family reunification, since family members could come to reside with the worker. Additionally, which rules should be applied for indexation, what data are used to determine the standard of living and the level of benefits, and will the national legislation have to foresee such option for indexation?[94]

Some argue that wages and some social benefits are also adjusted for EU civil servants residing outside Belgium and Luxembourg under EU Staff Regulations.[95] Another solution to reduce family benefits would be to reverse the priority rules and make the Member State of residence (solely) competent for all family benefits (which might prove to be impossible for contribution-based schemes) or to classify some family allowances as special non-contributory cash benefits (which are not exported).

However, there are other problems with adjusting family benefits, which are of a more general nature. The CJEU already argued that the old rule under which France could restrict the export of family benefits to the national level in the Member State of children's residence is contrary to the provisions of the TFEU.[96] The heads of state have now decided that the arrangements for the UK (including indexation of child benefits), if it decided to remain in the EU, are 'fully compatible with the Treaties'.[97] The final decision on such compatibility would of course have to be taken by the CJEU.

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92 Brussels, 19 February 2016, EUCO 1/16. The UK referendum was held on 23 June 2016.

93 Family allowances are still mentioned in Article 15 of Regulation (EC) 883/2004.

94 Probably yes (Case C-4/13 *Fassbender-Firman*). Extensively B. Spiegel, *Export of family benefits* (ERA, 2016).

95 Regulation No. 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, [1962] OJ P 45/1385, as amended. However, under Article 67(4) of Regulation No. 31 (EEC), 11 (EAEC), adjustment only applies if family allowance is directly paid to a person other than the official to whom the custody of the child is entrusted.

96 Case C-41/84 *Pinna*.

97 Point I.(2) of the European Council Conclusions (18 and 19 February 2016).

Moreover, would the possibility of indexation not only by one, but by all Member States lead to more equality? Probably not, especially if indexation could go both ways, that is, if it could be both downwards and upwards. Member States with higher family benefits could pay less for children residing in another (lower income) country and *vice versa*, Member States with lower family benefits could pay higher family benefits for children residing in higher income countries. If such indexation would be optional, the latter Member States might not foresee such upward adjustment in their legislation. Hence, it would only be a measure to reduce family benefits by the Member States that are already profiting most from the EU.[98]

The export of family benefits is established, in the first place, to enable economic mobility within the EU. Usually, contributions and taxes are paid in the Member State of work and family benefits are mainly financed by these contributions and taxes. Additionally, living costs may also be distinct within a single Member State and this might have no influence on family benefits' levels, and this currently applies also within the EU.

§7. CONCLUDING THOUGHTS

The assumptions underpinning social security systems have changed. The way of living has become more diverse and equally so have benefits supporting families. Also, migration is characterized by a more short-term movement by workers with family members living in different Member States. All of these developments influence social security coordination for persons moving within the EU.

Coordination of family benefits is high on the agenda, not only due to its complexity, but also due to its political sensitivity. It could be argued that it may no longer be possible to coordinate all kinds of support that Member States provide to the families (who may be of distinctive composition). Certain rules in secondary EU legislation exist, but the CJEU tends to depart from these rules in cases where more general rules and principles derived from the Treaties are more favourable to the moving person.

Therefore, perhaps the time has come to rethink the coordination rules for family benefits. Should we still insist on equal of treatment of workers for all kinds of family benefits (not only for contribution based income replacement child-raising allowance) and *lex loci laboris* legislation, or could a movement be made towards the closest link principle, putting the child in the focus? Should we continue to coordinate all kinds of distinctive 'baskets' of family benefits or should we focus more on the 'classic child benefit' or cash family allowances? An argument might be that the more similar social

98 Reference could be made also to cross-border healthcare, where many go for treatment to high income Member States, and the reason why lower income state cannot provide healthcare seems irrelevant (for example Case C-268/13 *Petru*, EU:C:2014:2271).

security systems are, the easier it is to coordinate them and it is not necessary that all Member States 'export' all their particularities.

Moreover, compared to other social security coordination mechanisms, like bilateral agreements, not all mechanisms are comprehensive in their material scope. Some do not include family benefits at all and some may be limited only to (classic) child benefit.[99] Further, Regulation (EEC) 3/58 seems only to have covered family allowances[100] and the so-called 'Brexit' agreement only makes mention of child benefits. If coordination would be restricted to child benefits, they would have to be coordinated in full, possibly without any downward or upward adjustment, thereby limiting solidarity amongst EU citizens.

However, if some family benefits would be excluded from the social security coordination, this does not mean that they would be excluded from EU law as such. They could still be very relevant, if considered as social or tax advantage, and for determining the right to reside in a Member State. It is certain that family benefits will remain a hot topic and a consensus on their coordination within the EU will not be easy to reach.

99 G. Strban, 'The existing bi-and multilateral social security instruments binding EU States and non-EU States', in D. Pieters and P. Schoukens (eds.), *The Social Security Co-Ordination Between the EU and Non-EU Countries* (Intersentia, 2009), p. 89.

100 Article 2(1)(h) and Chapter 7 (Articles 39–42) of Regulation (EEC) 3/58.