

EUROPEAN SOCIAL SECURITY LAW

Frans PENNINGS

6th edition



intersentia

Cambridge – Antwerp – Portland

CONTENTS

<i>Series Preface</i>	v
<i>Preface</i>	ix
<i>Abbreviations</i>	xxiii

PART I. COORDINATION OF SOCIAL SECURITY

Chapter 1.	
Introduction to the Concept of Coordination	3
1.1. General.....	3
1.2. The Territoriality Principle	4
1.3. A Definition of Coordination.....	6
1.4. Tasks of a Coordination Instrument.....	8
1.4.1. Solving Conflicts of Law	8
1.4.2. Prohibition of Discrimination on the Basis of Nationality	10
1.4.3. Territorial Requirements for Acquiring Benefit Rights	11
1.4.4. Territorial Requirements for Payment of Benefit.....	11
Chapter 2.	
The Legal Basis and Context of Regulation 883/2004	13
2.1. The Treaty Rules for Adopting a Coordination Regulation.....	13
2.2. The Court of Justice	15
2.3. The Legal Basis for the Coordination Regulation	15
2.4. Is Direct Application of Article 48 TFEU Possible?	18
2.5. A Very Short History of the Coordination Regulations.....	19
2.6. The Structure of Regulation 883/2004.....	21
2.7. Coordination Regulations Organisations other than the EU	24
2.7.1. Coordination Conventions of the International Labour Organisation	24
2.7.2. Coordination Conventions of the Council of Europe.....	25

Chapter 3.

The Conditions for Applicability of Regulation 883/2004	27
3.1. Introduction	27
3.2. The Facts of the Case Must not be Restricted to One Member State	27
3.3. The Territorial Scope of Regulation 883/2004	29
3.4. Applicability outside the EU	30
3.5. Rules for Determining the Legislation Applicable for Persons Working Outside the EU	31
3.6. Applicability to the Continental Shelf.	32

Chapter 4.

The Personal Scope of Regulation 883/2004	35
4.1. Introduction	35
4.2. A Historical Overview of the Personal Scope of Regulations 3 and 1408/71	36
4.3. The Personal Scope of Regulation 883/2004.	39
4.3.1. Introduction.	39
4.3.2. The Requirement of Being Subject to the Legislation of a Member State.	39
4.3.3. The Nationality Condition	40
4.3.4. Stateless Persons and Refugees	42
4.4. Third Country Nationals are Covered by a Separate Regulation	43
4.5. Members of the Family and Survivors	47

Chapter 5.

The Material Scope of Regulation 883/2004	51
5.1. Introduction	51
5.2. The Term Legislation and the Exclusion of Contractual Schemes	52
5.3. The Classification of Benefits	55
5.3.1. Introduction: A Limited Material Scope.	55
5.3.2. The Criteria for Classifying Benefits	56
5.3.3. The Coverage of Benefits which Form Part of Schemes outside the Material Scope and the Coverage of Schemes Containing Rules not Related to Social Security Benefits	57
5.3.4. Taxation and the Coordination Regulation	59
5.3.5. Liability of Employers and the Scope of the Regulation.	60
5.4. Benefits for Victims of War or its Consequences	61
5.5. Social and Medical Assistance	62
5.6. Special Non-contributory Benefits.	65
5.6.1. The Provisions Relevant to the Special Non-contributory Benefits	65

5.6.2.	The Interpretation of the Term ‘Reside’	66
5.6.3.	The Qualification as Special Non-contributory Benefit	67
5.6.4.	Revision of the Annex as a Result of the <i>Leclere</i> Judgment	70
5.6.5.	Claiming a Non-contributory Benefit and the Right to Residence	72
5.6.6.	Non-exportability of the Special Non-contributory Benefits and Free Movement	75

Chapter 6.

The Rules for Determining the Legislation Applicable..... 79

6.1.	Introduction	80
6.2.	The Main Characteristics of the Rules for Determining the Legislation Applicable	81
6.2.1.	The State of Employment Principle	81
6.2.2.	The Exclusive Effect of the Rules for Determining the Legislation Applicable	82
6.2.2.1.	Introduction	82
6.2.2.2.	Case Law of the Court on Exclusive Effect	84
6.2.2.3.	The Right of Member States to Grant Benefit even if the Legislation of Another Member State is Applicable.....	85
6.2.3.	The Binding Effect of the Rules for Determining the Legislation Applicable	89
6.2.3.1.	The Case Law under Regulation 1408/71.....	89
6.2.3.2.	The Binding Effect and Regulation 883/2004.....	90
6.2.4.	The Practical Effect Doctrine	90
6.2.5.	The Inescapability of the Rules for Determining the Legislation Applicable	91
6.2.6.	Special Rules for Determining the Legislation Applicable for Specific Benefits.....	92
6.3.	The Legislation Applicable for Persons Working in one Member State only	93
6.4.	The Legislation Applicable for Persons who Ceased Working	94
6.4.1.	The Case Law under Regulation 1408/71	94
6.4.1.1.	The <i>Ten Holder, Daalmeijer</i> and <i>Kuusijärvi</i> Judgments.....	94
6.4.1.2.	The <i>Van Pommeren-Bourgondiën</i> Judgment.....	96
6.4.2.	Regulation 883/2004 and Post-active Persons	97
6.5.	The Applicable Rules for Unemployed Persons	98
6.6.	The Applicable Rules for Non-active Persons	98
6.7.	Persons Working Simultaneously in Two or More Member States	98
6.7.1.	Working as an Employee in Two or More Member States.....	99

6.7.1.1.	The System of Regulation 1408/71	99
6.7.1.2.	Regulation 883/2004.....	99
6.7.1.3.	The Rules are Now as Follows	100
6.7.1.4.	Definitions	102
6.7.1.5.	Working Simultaneously in More than one Member State	103
6.7.1.6.	Place of Employment	103
6.7.2.	Working as a Self-employed Person in Two or More Member States	105
6.7.3.	Working in one State as Employed Person and in the other as Self-employed	105
6.8.	The Legislation Applicable to Civil Servants	107
6.9.	The Rules Applicable to Special Non-contributory Benefits	108
6.10.	The Coordination System for Compulsory and Voluntary Insurance	108
6.11.	Persons Working Outside the Territory of the EU	109
6.12.	Transitional Rules.....	109

Chapter 7.

Posting.....	111
7.1. Posting of Employees	111
7.1.1. Conditions for Posting	111
7.1.1.1. The Employee is Sent to Work on that Employer's Behalf	112
7.1.1.2. The Employer Normally Carries out his Activities in the Sending State.....	114
7.1.1.3. The Employee is Subject to the Legislation of the Sending State	115
7.1.1.4. The Employee is not Sent to Replace Another Person	116
7.1.1.5. The Employee is not Sent for More than 24 Months ..	116
7.1.2. Posting by an Agency for Temporary Work.....	117
7.1.3. Posting and Social Dumping	118
7.2. Posting of Self-employed Persons	119
7.2.1. The Case Law under Regulation 1408/71	119
7.2.2. Conditions for Posting as Self-employed Person under Regulation 883/2004.....	121
7.3. The Relevance of a Posting Certificate	121
7.4. The Small Border Line between Posting and Working Simultaneously in Two Countries	124
7.5. Agreements on the Basis of Article 16.....	125

Chapter 8.**The Non-discrimination and Assimilation Provisions of**

Regulation 883/2004.	127
8.1. Introduction	127
8.2. Article 4 of Regulation 883/2004	128
8.2.1. Indirect Discrimination.	130
8.3. Assimilation of Receipt of Benefit, Events and Facts (Article 5).	133
8.4. Waiving of Residence Conditions (Article 7).	134
8.5. Aggregation of Periods (Article 6).	134
8.6. The General Rules against Overlapping	135

Chapter 9.**Article 45 TFEU and Regulation 492/2011**

	137
9.1. Introduction	138
9.2. Article 45 TFEU: Prohibiting Discrimination on the Ground of Nationality.	138
9.3. Article 45 TFEU: Obstacles to Free Movement are not Allowed	141
9.3.1. General	141
9.3.2. Even if National Law is not Contrary to Article 45, the National Court Must Interpret National Law in the Light of EU Law.	144
9.3.3. May Persons be Worse off after Having Made Use of the Right to Free Movement?	145
9.3.3.1. Overview: When Are the Negative Effects of the Application of the Rules for Determining the Legislation Applicable Contrary to Articles 45 and 48 TFEU?	147
9.4. Regulation 492/2011.	148
9.4.1. General	148
9.4.2. The Personal Scope	149
9.4.2.1. The Meaning of the Term Worker	149
9.4.2.2. Job Seekers and Former Workers	151
9.4.2.3. Members of the Family.	152
9.4.3. The Material Scope	154
9.4.4. The Non-Discrimination Provision: Article 7	155
9.4.4.1. Objective Justifications Related to Degree of Integration in the Work State: The <i>Geven</i> Judgment.	156
9.5. The Relationship between Regulation 883/2004 and Regulation 492/2011	161
9.6. Article 49 TFEU and Equal Treatment of the Self-employed	162

Chapter 10.

EU Citizenship	163
10.1. EU Citizenship and Non-discrimination on Ground of Nationality...	163
10.1.1. General	163
10.1.2. The Material Scope of Article 18.	164
10.1.3. The Personal Scope of Article 21	165
10.1.4. Invoking the Non-discrimination Provision and Residence Rights	166
10.1.5. Objective Justifications.	168
10.1.5.1. The <i>Förster</i> Judgment	171
10.2. EU Citizenship and Free Movement	172
10.2.1. Unemployment Benefits and Free Movement	174
10.3. Overview of the Relation between Regulation 883/2004, Regulation 492/2011 and Article 18 TFEU.	175
10.4. Can Article 21 Take Away the Negative Effects of the Use of the Right to Free Movement	176

Chapter 11.

Sickness Benefits	179
11.1. The Meaning of the Term Sickness Benefit.	180
11.2. The Distinction between Benefits in Cash and Benefits in Kind	182
11.3. Benefits in Cash.	183
11.3.1. Aggregation Rules.	183
11.3.2. Benefits in Cash Are Exportable.	184
11.3.3. Claiming and Supervision Procedures	184
11.4. Benefits in Kind for Persons not Residing in the Competent State	188
11.4.1. Persons not Residing in the Competent State	188
11.4.1.1. An Insured Person and Members of his or her Family who Reside in a State Other than the Competent one Receive Benefits in Kind in the State of Residence. ...	188
11.4.1.2. Persons not Residing in the Competent State Are also Entitled to Benefits in the Competent State	189
11.4.1.3. Is State of Residence Principle Contrary to the Right to Free Movement?	189
11.4.2. Members of the Family of Frontier Workers	190
11.4.3. Retired Frontier Workers.	191
11.4.4. The Relation between Independent and Derivative Rights	192
11.4.5. Pensioners and Members of Their Family.	192
11.4.5.1. Pensions from two or more Member States, including the State of Residence and the Right to Benefits in Kind in the State of Residence.	193

11.4.5.2.	The Pensioner Receives one or more Pensions and is not Entitled to Benefits in Kind under the Legislation of the State of Residence.	193
11.4.5.3.	The Inescapability of the Provisions on Sickness Benefit for Pensioners	195
11.4.5.4.	If the Right to Benefits in Kind is not Subject to Conditions of Insurance or Employment	196
11.4.5.5.	Pensioners Who Go for Planned Care to the Competent State.	196
11.4.5.6.	If Family Members Do not Reside in the Same Country as the Pensioner.	197
11.4.6.	Levying Contributions on Pensioners.	197
11.4.7.	Coordination of Care Insurance Benefits in Case of Overlapping of Benefits in Kind and Benefits in Cash	198
11.5.	Stay outside the Competent State: Benefits which Become Necessary. .	198
11.6.	Planned Care.	200
11.6.1.	Planned Care and Authorisation	200
11.6.2.	The Criterion that Care Can Be Obtained without Undue Delay	202
11.6.3.	Obtaining Planned Care without Authorisation on the Basis of the Treaty	202
11.6.3.1.	The <i>Kohll</i> and <i>Decker</i> Case Law	202
11.6.3.2.	Applicability to Hospitals.	204
11.6.3.3.	Undue Delay.	206
11.6.3.4.	Confirmation of the Case Law on Non-hospital Care	206
11.6.3.5.	The Level of Reimbursement and Travelling Costs ..	208
11.6.3.6.	Summary.	209
11.6.4.	The Directive on Patients' Rights in Cross-border Healthcare .	211
11.6.4.1.	Reimbursement under the Directive	212
11.6.4.2.	The System of Authorisation Conditions.	212
11.7.	Reimbursement Rules	213

Chapter 12.

Old-Age and Survivor's Pensions.	215
12.1. Introduction	216
12.2. Aggregation of Periods	217
12.3. Calculation of the Amount of Benefits	218
12.3.1. Calculation of the Independent Benefit.	218
12.3.2. The Pro-rata Benefit	219
12.3.2.1. The Theoretical Amount.	219
12.3.2.2. The Pro-rata Benefit	220

12.3.3. Comparison of the Independent and Pro-rata Benefits	220
12.4. The History of the Community Rules to Prevent Overlapping: <i>The Petroni Case Law</i>	221
12.5. The Present Rules to Prevent Overlapping	223
12.5.1. Introduction	223
12.5.2. General Principles	223
12.5.3. Overlapping of Benefits of the Same Kind	224
12.5.4. Overlapping of Benefits of a Different Kind	225
12.6. Recalculation of Benefits	226
12.7. Removing Effects of Differing National Schemes	227
12.8. Periods Completed before the Coming into Force of the Regulation	229
12.9. The Relationship between International Conventions and the Regulation	229
12.10. The Coordination of Non-statutory Pensions	231
12.10.1. General	231
12.10.2. Directive 98/49 on Safeguarding the Supplementary Pension Rights of Employed and Self-employed Persons Moving within the Community	231
12.10.3. Application of Article 45 TFEU on Waiting Periods for Non-statutory Pensions	232
12.10.4. The Directive on Improving the Acquisition and Preservation of Supplementary Benefit Rights	234
 Chapter 13.	
Invalidity Pensions	237
13.1. Introduction	237
13.2. Aggregation Rules	239
13.3. A Person Has Been Exclusively Subject to Type A Schemes	240
13.4. A Person Has Been Subject to at Least one Type B Scheme	241
13.4.1. Determining the Incapacity for Work	241
13.4.2. Fiction of Insurance	242
13.4.3. The Calculation of the Amount	243
13.5. Recalculation of Benefits	246
13.6. Transition of Invalidity Benefits to Old-age Benefits	247
13.7. The Problem of Differences in Waiting Periods	247
13.8. Benefits for Accidents at Work and Occupational Diseases	249
13.9. Special Non-contributory Benefits for Invalidity	251

Chapter 14.

Family Benefits	253
14.1. Introduction	253
14.2. Which Benefit Level: That of the State of Employment or Residence?	255
14.3. Competent State and Overruling of Residence Requirements	256
14.4. Priority Rules	257
14.4.1. Introduction	257
14.4.1.1. The Relationship between the Rules for Determining the Legislation Applicable and the Export Rules	260
14.4.2. Differential Supplements	260

Chapter 15.

Unemployment Benefits	265
15.1. The Term Unemployment Benefits	266
15.2. Overview of the System of Coordination of Unemployment Benefits ..	269
15.3. The Unemployed Person Resides in the Competent State	270
15.4. Frontier Workers	274
15.4.1. Introduction	274
15.4.2. The Definition of Frontier Workers	274
15.4.3. The Wholly Unemployed Frontier Workers	275
15.4.4. Is the Wholly Unemployed Frontier Workers' Rule Consistent with the Treaty?	276
15.4.4.1. Atypical Frontier Workers and Regulation 883/2004	279
15.4.5. Partially Unemployed Frontier Workers	281
15.4.6. The Frontier Worker Moves to the State of Last Employment ..	283
15.5. Persons Other than Frontier Workers Who Do Not Reside in the Competent State	284
15.5.1. The Criteria for Qualification as Non-frontier Worker	284
15.5.2. The Applicable Unemployment Benefits Scheme for Non-frontier Workers	285
15.6. Reimbursement Rules	287
15.7. The Calculation of Unemployment Benefits	287
15.8. Export of Unemployment Benefits	289
15.8.1. The Conditions for Export	289
15.8.2. The Powers to Extend the Export Period	291
15.8.3. The Loss of Remaining Benefit Rights in Case of a Late Return	291

15.8.4. The Present Rules	293
15.8.5. Frontier Workers and Export of Benefit	293
Chapter 16.	
The Relation between Regulation 883/2004 and Bilateral Treaties	295
16.1. Introduction	295
16.2. Infringement on Social Security Advantages Acquired on the Basis of International Treaties	296
Chapter 17.	
EU Agreements with Third Countries Containing Coordination Provisions.....	301
17.1. The Euro-Mediterranean Association Agreements	301
17.2. Decision 3/80 of the Association Council EC-Turkey	303
17.3. Future Developments.....	307
Chapter 18.	
Some Conclusions on the Development of Coordination Law	309
18.1. The Impact of the Coordination Regulation	309
18.2. Simplification and Modernisation.....	310
18.3. The Relationship of the Regulation with the Treaty.....	314
18.4. Conclusions	315
PART II.	
SOCIAL POLICY	
Chapter 19.	
Social Policy Instruments of the European Union.....	319
19.1. General: The Powers of the EU to Take Social Policy Initiatives	319
19.2. The Subsidiarity Principle.....	320
19.3. The Instruments of Title X to Take Social Policy Measures	322
19.4. The Open Method of Coordination.....	323
Chapter 20.	
Equal Pay and Equal Treatment of Men and Women	329
20.1. Introduction	330
20.2. The Equal Pay Provision of the Treaty	330
20.2.1. General.....	330
20.2.2. Supplementary and Occupational Pensions.....	332

20.2.3. Indirect Discrimination.....	333
20.2.4. Differences in Pension Age	333
20.3. Equal Treatment of Men and Women in Statutory Social Security:	
Directive 79/7	334
20.3.1. Introduction.....	334
20.3.2. The Personal Scope of Directive 79/7.....	334
20.3.3. The Material Scope of Directive 79/7.....	335
20.3.4. The Equal Treatment Rule of Directive 79/7	336
20.3.4.1. Introduction.....	336
20.3.4.2. The Direct Effect of Directive 79/7	337
20.3.4.3. Prohibition of the Effects of a Former Discriminatory Rule	338
20.3.4.4. Indirect Discrimination.....	339
20.3.4.5. The Article 7 Exception	342
20.3.5. Conclusion	344
20.4. Equal Treatment of Men and Women: The Other Directives	344
20.4.1. Directive 86/37: Occupational Social Security.....	344
20.4.1.1. The Personal Scope of Directive 86/378.....	345
20.4.1.2. The Material Scope of Directive 86/378.....	345
20.4.1.3. The Principle of Equal Treatment in Directive 86/378	346
20.4.1.4. The Exceptions to the Principle of Equal Treatment	348
20.4.2. Directive 86/613: Equal Treatment of the Self-employed.....	348
20.4.3. Proposal for a Directive Completing the Principle of Equal Treatment	349
<i>Bibliography</i>	351
<i>Table of Cases</i>	361
<i>Case Law Index</i>	371
<i>Subject Index</i>	377