



# Freedom of Movement and Transfer of Social Security Rights

Pension Rights and the EC Coordination Rules on Applicable  
Legislation in the Light of Migration and Labour-Market  
Developments

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### 1. Introduction

The specific aim of this paper is to look into the rules of Regulation (EEC) No. 1408/71 on the application of social security schemes – especially pension schemes – to employed persons, to self-employed persons and to members of their families moving within the Community, and to investigate how those rules interrelate with labour-market needs and actual patterns of migration. I will also look into national pension schemes and any reforms of such schemes in the light of labour-market developments and sustainable employment. This is, however, no ‘European Report’ in the real sense, as it is not based on a set of national reports. It represents a rather more ‘essayistic’ approach. National reports – due precisely in September 2002 – will soon provide us with detailed information about national pension strategies in the different Member States as part of the ‘Pension Process’ that was adopted by the Council in December 2001 and endorsed at the Laeken summit in December 2001. The coordination rules will be addressed in the process of modernisation of Regulation No. 1408/71 with the intention of having a new regulation by the end of 2003.<sup>1</sup>

Regulation No. 1408/71 was introduced at an early stage as a necessary means to guarantee the free movement of workers, one of the four ‘freedoms’ at the heart of the Community and the single market. Since then much has happened both to labour markets and to European integration.<sup>2</sup> The European Union (EU) has widened its ambitions – not only economic but also social integration is now at the heart of European policy, combating poverty and social exclusion and promoting economic and social cohesion.

My point of departure is that the labour market and the social security system are two interacting systems, the labour market being the dominant system. The basic function of social security is to fill the gaps in maintenance inherent in the labour-market order. The modern labour market cannot function as a societal order for distribution of resources without a supplementary distributive system which guarantees a reasonable maintenance to those who – for longer or shorter periods – cannot earn their living in the labour market. Thus there is a relationship of mutual dependency between the two systems. All changes in the primary system will affect social security in one way or another. However, influence also goes in the other direction. The way social security is shaped affects

both the labour market and the family. This is one very good reason for examining pension schemes and the coordination rules as regards such schemes. The labour market is a dynamic structure which has been undergoing fundamental changes and transformations in the last couple of decades. Social security is bound to react to the changes emanating from the dominant labour-market structure, and a reluctance to adapt may influence European developments unfavourably, both at Member-State and Union level.

During the decades following the Second World War, the labour market was characterised by the following conditions. The primary system of distribution, the work and the wages, comprised – by and large – the entire population in working age groups. There was no long-term or permanent exclusion of certain groups. People, or at least the male part of the population, were in gainful occupation during the greater part of their life. They got their first jobs immediately after leaving school and went on working until reaching the age when it was not reasonable to demand further work from them. The remaining part of life was rather short. The typical employment was full-time employment for an indefinite period of time. The typical working career was a career within the same profession or occupation and with no interruptions for other activities. The basic maintenance entity was the family. The family was made up by the male family provider and his wife, who stopped working outside the home after marriage. The wages earned, supplemented by social security benefits based on previous earnings, provided a satisfactory level of income to all 'normal' households.

Now all this has changed. The changes emanate from changes in the underlying systems, both the changes in the productive sector, the new economy, the knowledge society, globalisation and increased competition, and the changes in family patterns and demography.

Social security can no longer be built on the assumption that there is 'full employment', but must learn how to cope with 'unemployability' and the risk of exclusion. The continuous exclusion of the elderly and demographic developments towards lower birth rates and longer life expectancy have altered the basic conditions of old-age pension schemes – many are no longer sustainable. The process described as the 'flexibilisation' of working life makes it necessary to adapt social security to new forms of employment, including self-employment, and to more heterogeneous working careers.<sup>3</sup> As a result of the increased participation of women in the labour market and new family patterns, social security can no longer be based on the male breadwinner family and the typical male employment. There are new kinds of households which cannot obtain a sufficient living standard by wages and the earnings-related part of the social security system – such as single elderly women without an earnings-related pension. With Sarfati and Bonoli we can say that 'The social protection institutions that we have inherited were effective in the postwar socioeconomic context, but seem less adequate to address today's problems and challenges'.<sup>4</sup>

As early as December 1996, the Employment Declaration of the Dublin Euro-panel Council stressed the need to create more employment-friendly social security systems by developing social protection systems capable of adapting to new patterns of work and providing appropriate protection to those engaged in such work.

At the Lisbon European Council in March 2000, the promotion of a knowledge-based society was recognised as a key condition for competitiveness and growth in a global economy. The Union committed itself to achieving ‘the new strategic goal for the next decade of becoming the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion’. The strategy can be described as designed to help Europe regain the conditions for full employment; in a manner similar to the policy outlined in Dublin, it considers economic, employment and social aims to be interdependent and mutually reinforcing. Later, in Stockholm in the spring of 2001, this strategy was concretised and also complemented with an environmental dimension for overall *sustainable development* within the Union.<sup>5</sup> At the Barcelona summit in March 2002, the progress made in the first two years of the Lisbon strategy was reviewed and endorsed.

As regards employment, the Lisbon goal set for the Union is to have a 70% employment rate by 2010. Special goals were set with respect to women – a 60% activity rate by 2010 – and older workers – a 50% activity rate by 2010. This entails special efforts to encourage older workers to stay active. According to the Commission’s report on ‘Increasing labour force participation and promoting active ageing’, the overall aim must be ‘to ensure that present and future working generations will remain active as they grow older; to attract a substantial part of those currently inactive but able to work, particularly women, to the labour market on a lasting basis; and, to maintain the participation of today’s older workers; those over 50 being at high risk for early retirement’. The Member States are encouraged to apply a dynamic, life-cycle approach and to make work pay, *inter alia* by reducing early-retirement incentives and introducing flexible and gradual retirement formulas to enhance opportunities for older workers to remain in the labour market.<sup>6</sup> This *sustainable employment* strategy also entails action for the lifelong development of competence and qualifications, i.e. employability.

The strategy also entails the eradication of poverty. The perception of trends in poverty and social exclusion is quite uneven across Member States. Of particular concern is the still high proportion – estimated at about 18% in February 2002<sup>7</sup> – of people living on low incomes, at risk of poverty; a ‘Social Inclusion Process’ with National Action Plans aiming at a Joint Report on Social Exclusion according to the open method of coordination (already used in the fields of economic policy and employment policy) has been launched. Social security systems are, of course, crucial when it comes to *sustainable social cohesion*.

To ensure the adequacy of pension systems, as was already indicated above, the open method of coordination has also been extended to cover reform strategies in the Member States with a view to meeting both social and financial objectives in a sustainable way, according to the objectives adopted at Laeken.<sup>8</sup> Later, to the Barcelona summit, the Council (Employment and Social Policy) stated the aim as ‘safeguarding the capacity of systems to fulfil their social objectives, ensuring financial sustainability, and adapting their capacity to meet the new needs of society’. In this context we may speak of long-term *sustainable pension systems*.

Moreover, at the Barcelona summit in March 2002 the European Council welcomed the Commission’s Action Plan for Skills and Mobility.<sup>9</sup> The Action Plan stresses *the key function for European economic and social development of increased occupational and geographic mobility* within the EU. The plan builds on

the report of the High Level Task Force on Skills and Mobility of 14 December 2001.<sup>10</sup> This is based on the following three main principles: 'Firstly, the freedom of movement within the European single market is a fundamental objective of the European Union, and barriers to it must be eliminated. Secondly, the development of a knowledge-based society is a fundamental determinant of competitiveness and growth in a global economy, and therefore policies to foster skills endowment in Europe must be strengthened. Thirdly, the achievement of both the freedom of movement and the construction of a knowledge-based society are key conditions of achieving the objective of full employment in Europe, set at the Lisbon European Council in the spring of 2000'. As regards geographical mobility, the Task Force urged the Commission and the Member States to speed up the modernisation of the regulatory framework governing the transferability of pensions and social security rights.

The Action Plan is designed to tackle three main challenges: insufficient occupational mobility, low levels of geographical mobility and poor access to information on mobility. As regards geographical mobility, special mention is made of the effective maintenance of social security rights for workers changing Member States to live, effective access to right of residence and employment in other Member States, the creation of an EU health-insurance card and the creation of portable supplementary pension rights as well as intensified efforts to create a single market in cross-border services and to remove barriers to freedom of establishment.

In other words, sustainable development including sustainable employment, sustainable social cohesion, sustainable social security systems and sustainable pension schemes must be considered to be an overall aim of the Union and its diverse strategies, mobility and integration being core elements in the realisation of that development. In this context, the forthcoming enlargement of the Union is to be regarded as the ultimate challenge, and its implications for patterns of employment and mobility within a wider Europe (and thus for the normative approach) is of course extremely difficult to estimate. The Commission's Action Plan states: 'In view of enlargement, candidate countries should be invited to adopt the goals of the action plan to the largest extent possible. Regardless of the fact that the labour force mobility from candidate countries into the EU after accession will be subject to a flexible system of transitional periods, the new Member States share the challenge of promoting a better skilled and adaptable labour force'.

## 2. On Mobility and Migration

The current mobility situation in Europe is as follows, according to the Commission's 'Employment in Europe 2001' report. The total immigration flow in the EU in 1998–99 consisted of little more than 2 million persons, representing 0.8% of the total working-age population. Less than half (or 41.3%) of this immigration flow came from other EU countries, whereas 58.7% came from outside the EU.<sup>11</sup> The relative importance of *intra-EU mobility* as a share of total immigration varies among the different Member States. The highest proportions are found in Ireland (83%, immigrants making up 1.6% of the working-age population), Greece (77.1%, but immigrants only making up 0.2% of the working-age population) and Luxembourg (72.1%, immigrants making up as

much as 4.5% of the working-age population). Intra-EU migration is extremely low in France (6.1%, immigrants making up 0.3% of the working-age population); it is also low in Italy (22.1%, immigrants amounting to 0.4% of the working-age population), Portugal (31.6%, immigrants 0.2% of the working-age population) and Austria (35%, immigrants 1.4% of the working-age population).<sup>12</sup> Data suggest a slight increase in cross-border mobility within the EU over the past five years in most Member States, with the exception of Germany. The extent to which immigration to Germany from other EU countries slowed down made cross-border mobility at the aggregate EU level appear to be totally static. The German figures are attributed to the relatively lower employment growth there, whereas the observed increase in other countries is attributed to social and demographic change and the processes of European integration, as well as to the restructuring of labour markets.<sup>13</sup> Mobility in Europe is considered to be much lower than in the United States; in the U.S., though, mobility is on the decrease owing to the ageing of the population. Net inward migration (from outside the EU) is also considerably less important in Europe than in the United States, though immigration is supposed to become increasingly important to offset the expected reduction in the working-age population.

While geographic mobility between EU Member States remains relatively low, geographic mobility between regions and the incidence of commuting are high and becoming increasingly important. *Regional mobility* of workers, implying a change of residence, is highest in Austria, France, the Netherlands and the UK (lowest in Spain, Greece and Belgium). 0.4% (or some 600,000 people) of the total employed population in the EU worked in a country different from the country of main residence, but only about half of them commuted to another EU Member State.<sup>14</sup> The incidence of *cross-border commuters* was highest in Austria, Belgium, France and Luxembourg, where it exceeded 1% of the employees.<sup>15</sup>

It is especially the *young* and the *highly-skilled* workers in the EU who are becoming increasingly mobile.<sup>16</sup> *Student mobility* has increased strongly over the last couple of years, but it still amounts to less than 2% of all students enrolled in higher education in the EU.<sup>17</sup> Younger workers were also more likely to combine work and education, and their share in part-time work increased markedly over the 1995–2000 period. This is especially true of the Netherlands and Denmark.<sup>18</sup>

Traditional employment still exists, but not really in the old sense. It is not realistic to expect a lifelong occupation.<sup>19</sup> Of course, there still are – they are in fact the majority – workers with full-time, permanent employment. Some of them may still be at work/have also worked all their lives in the same occupation/sector (maybe even with the same employer) as the one they once started their careers in. These people are rather few – restructuring etc has already marginalised most of the elderly workers in such employment.<sup>20</sup> Expectations for the future hardly give room for life-long occupations even for core-group workers. Life-long education and occupational mobility are what the systems must plan for!

*Occupational mobility* is reflected in figures on job tenure. Though stable in the main, in 2000 as compared to 1995 the share who had been in their job for less than two years had increased somewhat (26.5% as compared to 23.3%) because of massive job creation during this period as well as increased job mobility.<sup>21</sup> Job-to-job mobility is on the increase among highly-skilled employees, being slightly higher for women than for men.<sup>22</sup> The likelihood of becoming unemployed is

considerably higher in the industrial sector than in the service sector, and highly-skilled individuals are the least likely to be unemployed in the EU.<sup>23</sup> Occupational mobility is often a prerequisite for geographical mobility.

Mobility of people, human-resources development, job creation and the mobility of jobs in and to regions that are lagging behind must also be seen as inter-linked and complementary issues. Efforts to support geographic mobility must be combined with measures for occupational mobility in order to provide opportunities for workers to move between sectors and regions simultaneously. Attempts to promote sustainable growth and development in the less advantaged regions should be made as well. Therefore, concludes the Commission, 'encouraging geographic mobility does not contradict the need for creating new employment opportunities and improving the quality of life, in particular in the least advantaged regions. This will be even more crucial for the enlarged EU'.<sup>24</sup>

In its 'New Strategy on building New European Labour Markets by 2005', the Commission has summarised developments in the following way: 'The nature of mobility has changed a lot in the EU over the last years. The main characteristics of EU mobility are; mobility tends to be between urban centre to urban centre... [and in] high-growth high-technology sectors; mobile workers are young... and are highly skilled; there is an increasing tendency to three types of migration: temporary migration..., cross-border commuting... and pan-European management of human resources by multinational enterprises'.<sup>25</sup>

The empirical data presented above purport an analysis along the lines set up by the following categories; *the traditional migrant worker* moving to the Work State, perhaps leaving the family back home, and then moving back to his state of origin (Sec. 4.2); *the flexible migrant worker*, whether highly skilled or in a more precarious position (Sec. 4.3); *the cross-border commuter/frontier worker*, whether in traditional employment or flexible work – or both (Sec. 4.4); and *the pan-European management 'migrant' worker* and situations such as posting, etc. (4.5).

Actually promoting these different types of work may occasionally seem controversial. Most of them represent both pros and cons. In general, however, they have all attracted attention as more or less crucial to sustainable employment. Therefore, I think it justified to consider the coordination rules of the Regulation No. 1408/71 from the viewpoint of each of these groups. To the extent that they exist, the problems can be said to deserve adequate solutions, and sometimes rules ought to be shaped so as to actually promote 'sustainable' development in these forms.

### 3. Pension Schemes and Sustainable Employment/Social Security

#### 3.1 General Background

In any historical presentation of social security schemes in a European context, four different models will emerge. Bismarck was the first to introduce a 'modern' social security scheme in Germany in the 1880s. The Bismarckian social security model is first and foremost applicable to workers (and some groups of self-employed professionals). Family members are insured through derived rights. Benefits are income-related and the scheme is financed by contributions. Then there is the Beveridge model, which developed in the UK during the II World War.

Typically universal in application, its benefits are flat-rate and mainly financed by state tax revenue. Higher incomes must be privately financed. To these two models one can add a Nordic model and a Southern model. The Nordic model is universal (residence-based) and individual in character and tax revenue is important for its financing. The Southern model is applied in the traditionally Roman Catholic countries, where family and the Church are important providers of social security. Public social security schemes are introduced to complement wage-work for workers, and benefits are thus income-related. Family members are included through derived rights. In today's real world there are no clear-cut models, but different combinations of the historically developed models sketched above are numerous. Where there was universal basic protection, income-related protection has increased over time. Where there was income-related protection for workers, more basic and universal protection has developed, etc.

Despite the different models, European pension schemes may generally be said to have some characteristics in common, and they face some common challenges. They have been summarised by the late Professor Anna Christensen in the following way: 'Pension schemes are based on the economic and demographic conditions that prevailed during the decades after the Second World War, when most of the schemes got their present form. Pensionable age was settled close to the average duration of life. The underlying normative assumption was that people should continue to work as long as they were capable of working. The pensioner period of life was short compared with the period of working life. This was also a period when everybody took it for granted that wages and the general standard of living would continue to rise for each generation, and that any new generation would be at least as numerous as that of their parents. These conditions have changed in a rather drastic way. The most important change is perhaps the increase in average life expectancy, which is now close to 80 years in Europe. This demographic change has not resulted in any change in pensionable age, which remains the same as during the fifties. The other important change is the low birth rates. The result is that an ever-decreasing number of working persons must support an ever-increasing number of non-working persons. This situation is simply not tenable in the long run. Work and working life are the ideological and economic centre of our societies, but at the same time the period of active work is reduced to an ever-shorter period in middle life, when people must work so hard that they do not have time for children. This period of concentrated work is followed by a long period where people are not expected to work at all, but to live on their pensions. The situation that has been created is in fact absurd. But at the same time retirement from work around the age of sixty with a good pension has become a "social right", perhaps the most sacred of the existing social rights. All governments who have tried to alter the existing pension schemes know about the hard political resistance to any change in that direction.'<sup>26</sup>

Labour-market developments have also led to an increased exclusion of the elderly from regular wage-work. Employers have come to look on greater age as a negative factor, and labour-law schemes are generally linked together so that employment protection ends (at least) when the employee reaches pensionable age. The right to a pension at a certain age has also resulted in a duty to leave employment at that age, despite otherwise generally well-developed employment-protection devices. And the social security system has responded – not only

retirement but also early retirement for labour-market reasons has become a recognised and accepted social position in the European society.

Demographic changes – with increased average life expectancy and decreasing birth-rates – are thus a very important challenge to the sustainability of pension schemes as such. These developments are also closely linked to labour-market issues, and as for sustainable employment the non-marginalisation of older workers and maybe also the integration of people of post-pensionable age are crucial. As Anna Christensen pointed out, ‘the solution of the problem of financing the pension schemes including early retirement, does not lie within the social security but within the labour market’.<sup>27</sup> Nevertheless, pension-scheme design is crucial in this context as well.

The relation between sustainable development and pension schemes is at the heart of the Lisbon strategy, and even more so of the ‘Pension Process’ applying the open method of coordination, as was already indicated in Sec. 1 above. It was agreed in the 2001 Broad Economic Policy Guidelines that the coming decade offers an opportunity to address the challenges outlined above by raising employment rates, reducing public debt and adapting social protection systems, including pension systems. According to the Joint report on objectives and working methods in the area of pensions, presented to the Laeken summit, the Pension Process involves agreeing broad common objectives, translating these objectives into national policy strategies and, as part of a mutual learning process, monitoring progress periodically on the basis of commonly agreed and defined indicators. The process builds on a set of recognised broad common objectives. These objectives include the adequacy of pensions with regard to their social objectives; ensuring that older people are not at risk of poverty and enjoy a decent standard of living; providing pension arrangements that enable older people to maintain, to a reasonable degree, their living standard after retirement; and promoting solidarity within and between generations. They also include the financial sustainability of pension systems; offering effective incentives for the labour-market participation of older workers; reducing opportunities of early retirement; facilitating the option of gradual retirement; and not penalising post-retirement activities. A final common objective is the modernisation of pension systems in response to changing needs; being compatible with the requirements of flexibility and security on the labour market and not penalising mobility, non-standard employment and self-employment; ensuring the principle of equal treatment between women and men; and making pension systems more transparent and adaptable to changing circumstances in general.

Labour-market and societal developments are reflected in the coverage of pension schemes as they have developed. From the start, the supplementary function of public pension schemes with regard to wage-work was obvious. The norm in the agricultural society and the early industrial society was that one should work for as long as one had the necessary physical strength. There was no idea that work should end at a certain age. Most people did not even live long enough to have a pension, and when they did the pension as such was not enough to live on. The early statutory pension schemes, introduced around the turn of the century 1800–1900, were all combined old-age and invalidity pension schemes.<sup>28</sup> Pensions of this kind did not constitute an alternative to continued work. They formed a basic support and a complement to partial work, family support, etc., and the element of social justice played a part. During the post-war period,

however, the normative idea underlying pension schemes changed into the notion that the pensioner should be able to maintain the standard of living achieved during working life.<sup>29</sup>

However, it is not self-evident that it is for the state to guarantee that the big middle class will retain their former standard of living in a life-long perspective. Some European countries, for example the United Kingdom and Ireland, have chosen to restrict the state's responsibility to a basic pension. In countries with statutory earnings-related schemes, there is almost always an 'upper earning limit'. For groups with incomes not 'covered' by statutory pension schemes, other systems have arisen to secure better compensation. These supplementary systems are often based on collective agreements or particular company schemes, and they are frequently constructed as final salary pensions. If there are no such schemes, the great majority of the better-off classes will turn to the private pension industry to secure a pension that allows an unchanged standard of living after retirement. The state often exerts a strong influence in these non-statutory sectors, too – through tax legislation and by supervising and controlling that the pensions provided by the pension industry are safe and in accordance with recognised social values. Ultimately, then, pension schemes thus encompass all the different layers in the stratified wage-earning society – but this is done through what is frequently called the 'three-pillar principle'<sup>30</sup>, i.e. complementary statutory, occupational and private schemes.

In this report, I will concentrate on the first pillar – that is, statutory pension schemes. No doubt, however, the second and third pillars are becoming increasingly important as regards the long-term expectations and also – probably – the actual behaviour of numerous groups in the European labour market. This is particularly true of workers in 'qualitative employment', i.e. highly-skilled knowledge workers in the most dynamic parts of labour markets.<sup>31</sup> Important initiatives at the European level with regard to both co-ordination and harmonisation of pension schemes concern precisely occupational and private schemes.<sup>32</sup>

The developments dealt with so far are also reflected in the design of statutory pension schemes. Ever since the post-war period, the basic normative idea underlying the statutory pension schemes was thus that the pensioner should maintain the standard of living achieved during working life. Hence, the schemes were constructed as defined benefit schemes. And as one wanted these schemes to take effect immediately, they were constructed as pay-as-you-go schemes. In a pay-as-you-go scheme, pensions are paid for by the contributions of the working population as time goes by. A defined-benefit scheme means that pension benefits are pre-set, normally as a percentage of previous incomes. Such an income-related pension scheme normally entails an element of 'earning'. Pension rights are earned through – often a fixed number of – working years at a certain income level. Benefits might be based on an average of earnings during these years, an average of the best years or on the final salary. The more years that are involved, the closer we come to a pension based on life-long average earnings, entirely based on the earning principle. A pay-as-you-go scheme can, however, also be of the defined-contribution type; i.e. what is pre-fixed are the contributions, not the benefits.<sup>33</sup> Neither are pension schemes necessarily pay-as-you-go schemes. In recent years the importance of pre-funded schemes has been growing in respect of statutory pensions, too.<sup>34</sup> Here contributions are set aside, to be paid out later when the individual retires. Such schemes do not entail the solidarity between generations

that is inherent in pay-as-you-go schemes;<sup>35</sup> instead, they lay particular stress on the property-rights character of social security.<sup>36</sup>

I would also like to touch upon the application of national pension schemes. National social security systems – and hence pension schemes – are traditionally only applicable to persons who ‘belong’ to the system at issue. Since national supremacy is the very basis of the national legislator, it is only natural that nationality has long been a relevant element in depictions of such belonging. Over time, however, residence and work – within the territory of the state in question – have become increasingly important as the relevant criteria of belonging.<sup>37</sup> The scope for residence and work criteria of belonging, respectively, differs between the different social security models of Europe, as was described above. Moreover, in the present context nationality as the proper criterion of belonging is circumscribed by the founding principle of European integration as described in Article 12 EC. Discrimination – both direct and indirect – on the grounds of nationality is prohibited within the EU.<sup>38</sup>

The function of certain criteria of belonging is to exclude those who do not belong to the national system. There has always been an interest in the exclusion of the poor and needy from ‘outside’ your own ‘solidarity circle’.<sup>39</sup> Despite the overall goals of integration, the community principle of free movement still mainly applies to workers, although there are some later developments with regard to pensioners, students and also Union citizens in general.<sup>40</sup> As regards the core group – workers – the aspect of ‘the principle of territoriality’ anchored in national social security schemes, according to which social support is offered within the national territory only, is no longer accepted.<sup>41</sup> There are rules both on the exportation of social rights and on the aggregation of earning periods.<sup>42</sup> Even within national social security schemes themselves, though, there are known to be components of exportability, for instance as regards ‘earned’ (i.e. work-based) pensions. Residence, on the other hand, is at national level still the relevant criterion of belonging as regards benefits based on more clear-cut redistributive patterns rather than work and/or contributions – what I here will call solidarity benefits.<sup>43</sup>

In their project on coordinating labour-market and social protection policies, Sarfati and Bonoli identify the following four potentially problematic areas of interaction between labour-market developments and social protection systems: employment promotion and the long-term sustainability of social protection; preserving security for the most disadvantaged; decent protection for atypical workers; and socially sustainable ‘qualitative-work’ strategies.<sup>44</sup> In parallel with these authors, and recalling what was indicated above as being the major challenges to the sustainability of social security as well as employment, I will discuss national statutory pension schemes under the following headings: *pension schemes, sustainable employment and older workers* (3.2); *pension schemes, sustainable employment and women workers* (3.3); and, *pension schemes, sustainable social cohesion and basic protection* (3.4). In respect of the important – not only to Sarfati and Bonoli, but also to me and to labour-market developments in general – question of social protection for flexible workers, I have chosen to deal with this in connection with the headings already introduced. Flexible or atypical work is becoming increasingly typical precisely as regards the elderly workers and women, and is also highly relevant to the issue of social cohesion.

### 3.2 Pension schemes, sustainable employment and older workers

The income-related statutory pension schemes are often built upon a model similar to that of original occupational pension schemes. They are based on well-defined principles of how working life ought to be shaped, i.e. traditionally full-time, life-long employment. Working life ought to include a certain number of working years and end at a settled retirement age. The right to a pension could – especially as regards occupational schemes – be conditioned by the fact that the employee had stayed in employment until reaching pensionable age. Since pension rights have become vested rights, such conditions are no longer permitted. But there may be long qualification periods before any pension rights come into being. Even in some statutory schemes, there are very long qualification periods for entitlement to any earnings-related pension. It is true that once there is a right to a pension, a smaller number of years than the ideal working career creates such rights, too; but only in proportion to what is considered to be a full working life.

Most Member States traditionally rely on these earnings-related statutory pension schemes. In some countries, for instance the UK, Ireland, the Netherlands, Denmark and Finland, the basic statutory pension scheme is a flat-rate public scheme, in some cases complemented by a public earnings-related scheme and in others by more or less compulsory earnings-related occupational schemes.<sup>45</sup>

Demographical developments thus indicate that in the future there will be a declining number of ‘actives’ to support an increasing number of pensioners. Moreover, a comparison of Europe’s employment patterns to competing markets, like those of the United States or Japan, shows that the incidence of employment is considerably lower in Europe. Sustainable development requires that older workers work considerably more in the future, which *implies keeping older workers in employment until at least 65 and even encouraging post-retirement work*. These are core issues both with regard to sustainable pension schemes and sustainable employment. In addition, *higher incidences of employment among the elderly typically imply an increased number of flexible labour contracts, more part-time jobs, more short-term employment, an increase in the number of self-employed and more heterogeneous working careers as well*. This is also what characterises the process called ‘the flexibilisation of working life’. Though it is not necessarily true with regard to all workers, a clear ideological and normative shift towards the more flexible labour market is discernible at the general level.

Working careers have become more heterogeneous and varied. More heterogeneous working careers with more changes between different employers and different kinds of work contracts will probably mean that many workers can no longer count on their salaries to continue to rise with growing age. One may dislike this process of flexibilisation, but *social security must accept that it exists and affects substantial groups on the labour market*. Flexible employment and heterogeneous working careers can no longer be brushed aside as atypical.

The process of the flexibilisation of working life generates two different normative questions with regard to pension schemes. One is whether this process may result in certain groups receiving no pension at all or a pension not sufficient to live on, the old problem of old-age poverty (see further Sec. 3.4 below). But the main question is another. With what justification can it be accepted that the earnings-related pension schemes still favour the traditional working career?

With regard to many traditional pension schemes, these developments imply that pensionable age must be raised, as must the number of earning years required for a full pension. An even better solution may be to abolish the fixed pensionable age and the fixed number of qualifying years altogether in the earning-related schemes, and calculate the amount of pension on the basis of life-long average earnings. To make (flexible) work post-retirement possible and attractive, the right to a pension should preferably not be conditional on retirement from working life. Such schemes would be better adapted to a more flexible working life in general. Pension schemes with long qualification periods and a low pensionable age disfavour persons with gaps in their working careers. They also disfavour persons who must continue to work after normal retirement age. Final-salary schemes are unfair to those with their best working years early in life and also to groups with a rather even income over life. Moreover, once an increasing number of persons must accept changes that may lead to a lower income while they still work, it is not consistent for the statutory pension to guarantee a living standard equivalent precisely to the period immediately before retirement. Those fortunate enough to have a high final salary can protect themselves by means of a supplementary private insurance policy. *Pension schemes should thus stick to the principle of neutrality with regard to different work contracts and different working careers.* That means going back to the basic principle according to which the pension should correspond to the value of the work. This principle should be observed irrespective of how and when the work is performed.

Anna Christensen has expressed this view in the following words: 'The normative evaluation of pension schemes must not be reduced to the question as to how to distribute available resources in a given situation. It is also a question about creating principles that can affect the basic underlying problem, namely the absurd division of work over a life-time. A defined benefit scheme has no such dynamic aspects. ... To sum up, there are strong normative arguments in favour of the pay-as-you-go schemes of the defined contribution type. ... A defined contribution scheme based on life-time earnings and with no upper age limit is a dynamic system that can interact with the labour market in such a way as to loosen up the three stages of life and result in a more fair distribution of work over a life-time. It is also a much more flexible system from the individual point of view. It allows – at least in principle – the choice between a relatively early retirement with a lower pension and a relatively late retirement with a higher pension. How free that choice will be of course will depend upon the development in the labour market. The basic underlying problem is the uneven division of work over a lifetime and this problem can only be solved within the labour market.' According to Anna Christensen, this is also where we are heading: 'there seems to be a gradual movement away from the defined-benefit principle towards the principles of defined contribution and life-long earnings'.<sup>46</sup>

Part of the flexibilisation process is an increase in the number of self-employed workers.<sup>47</sup> In the Nordic countries, the self-employed are covered by the main earnings-related pension scheme under the same conditions as are employees, apart from the fact that they must pay all contributions themselves. In most countries they are not, although certain groups of professionals were integrated into some statutory social security schemes at an early stage. There now seems to be a general tendency to include the self-employed as well in the general,

mandatory system. This applies particularly to the part of social security that covers a relatively prolonged loss of income – as pension schemes do. However, the benefits that the self-employed are entitled to are often flat-rate, not earnings-related. This trend in social security legislation must be regarded as a direct response to the pension problem among the increasing number of self-employed in the sector of producer services.

Although basically earnings-related, pension schemes must, however, also include pension rights for other socially valuable use of time, such as years spent in higher education. This will become an issue of growing concern in the 'Knowledge Society' with continuous education, life-long learning and employability as core concepts. Consequently, although work is the natural criterion of belonging to an earnings-related pension scheme, other additional criteria of belonging may appear.<sup>48</sup>

Employment protection as well as income-related social security schemes aim to secure a situation once established. Employment protection is a guarantee for continued employment by the present employer. In this way, employment protection tends to promote a long-term working career with one and the same employer. The process of flexibilisation of working life has frequently been addressed as an issue relevant to the deregulation of employment protection. Characteristic of employment-protection legislation is that what has been protected is first and foremost the 'traditional' full-time employment of indefinite duration. Flexible – or atypical – employment is, on the other hand, characterised by its more precarious character. The correctness of this way of depicting labour law and the challenges it will pose in a future labour market can be called into question.<sup>49</sup> However, employment protection as it stands constitutes an adequate reflection of the complementary relation between traditional employment and traditional pension schemes. Labour law which generally protects open-ended employment through employment-protection devices frequently contains a duty to leave when reaching retirement age/the right to a pension. The protection of the position as a worker is then replaced by the protection of standards of living up to that point through an income-related pension.

Two EC-directives on 'atypical employment' were recently adopted, both stemming from agreements between the parties on the European labour market.<sup>50</sup> The Council's Directive 97/81/EC on Part-time Work may be said to encourage part-time work as such as a means of promoting flexible working arrangements. The Council's Directive 99/70/EC on Fixed-term Work may be said to be more ambivalent. Fixed-term employment is also accepted as a legitimate work contract, but there are rules to prevent the abuse of temporary employment, particularly successive fixed-term contracts. A main trend in both directives is, however, that workers in 'atypical employment' shall otherwise enjoy the same advantages and opportunities as 'regular' employees, the same hourly wages, the same possibilities for occupational training – and the same right to an occupational pension in relation to the amount of work performed. Another recent development in community law is the adoption of the Council's Directive 2000/78 establishing a general framework for equal treatment in employment and occupation. This directive is based on Article 13 EC and contains a provision on equal treatment of the elderly, to the effect that there shall be no direct or indirect discrimination on the grounds of age as regards employment and occupation. Even so, Article 6

recognises a number of justifications for differences in treatment, especially on the grounds of age. Occupational pension schemes may depend on age criteria, provided this does not result in discrimination on the grounds of sex.

Neither of the directives mentioned applies to social security issues *per se*. Labour-law issues and social security issues are, however, interrelated. The development of a right to a pension has – as was already indicated – been accompanied by a duty to retire. In relation to work post-retirement age and ‘new’ statutory pension schemes with no fixed pensionable age, the ‘limits’ of employment protection become interesting. The new Community rules on equal treatment of atypical workers and of the elderly put traditional length-of-employment seniority rules and rules on automatic resignation to the test in new ways.<sup>51</sup>

### 3.3 Pension schemes, sustainable employment and women workers

All pre-industrial societies were built on the existence of a division of labour between the sexes, which confirms their complimentary relationship of mutual dependency. Industrialism and the market economy shattered this social and sex-determined division of labour. After the first and rather chaotic period of transition, however, the normative structure stabilised in a compromise between the old segregated society and the new industrial one. The family as a production unit disappeared to be replaced by the new family, which consisted of a provision-cum-consumption unit. It was the man’s responsibility to provide for the family, while the married woman was in charge of ‘family work’ at home. Where married women did work, women’s wages were set at lower levels, and this was seen as perfectly legitimate. Wages were set not (only) in accordance with the work performed, but also in relation to the typical requirements as regards providing for families. For a long time we still had a society based not on equality, but on a complementary relation between the sexes.<sup>52</sup> Social security was constructed according to these conditions. ‘The family, not the individual, became the basic provision unit. The part of social security that was intended to compensate for loss of income was structured around the family and the complementary relationship between the spouses. “Dependency additions” were paid for wives and children. If a married woman had a job of her own and a salary or wage to go with it, it was regarded as an extra, which was not necessary for the upkeep of the family. Consequently, there was no need to compensate for this income if it was lost.’<sup>53</sup> Married women were excluded from or could choose to remain outside parts of the social security system; but they enjoyed other benefits to which men were not entitled, such as widow’s pensions<sup>54</sup> and a lower retirement age.

New practices have emerged in society, however, and more and more people live in ways that differ from the mode presumed by the traditional system. Women’s paid work has gained greater significance, both in the economy as a whole and as part of what a family lives on. The destabilising of the family has now come a long way. These days an increasing number of people live outside the provision unit made up of the family for increasing periods of time and are hence dependent on an income of their own. More and more marriages end in divorce and more and more families are not based on marriage but on other forms of cohabitation. *As more and more women work – also after marriage – the two-provider family becomes the ‘normal family’. Social security schemes can no longer leave the women out. Nor are ‘family-unit-based’ social security schemes satisfyingly adapted to new and more flexible*

*family patterns. Moreover, schemes that favour the 'typical employment' are particularly disadvantageous to women. It is mainly women who have 'atypical' jobs.* Traditional employment is actually the traditional male employment. Rules – including pensions schemes based on the seniority principle and a steady and homogenous full-time working career – based on traditional careers appear in a new normative light as discrimination of the other sex.

As was indicated in Section 3.2 above, there is a development where pension schemes are concerned, which goes from a pension based on the typical working career towards a pension based on life-long earnings. Generally, all arguments in favour of life-long average earnings as the basis for pensions are particularly valuable with regard to women's pensions. However, as women – owing to the still-prevailing division of work – have fewer years and fewer hours in gainful occupation and women's wages are lower than men's, this principle will also lead to women's receiving lower pensions than men. This problem can hardly be solved within the framework of social security. As women's participation in the labour market is increasing, pensions will follow this trend. Nevertheless, they will be better off than in a scheme based on the typical male working career.<sup>55</sup>

An inclusion of women's working careers into pension schemes calls for the inclusion of more distributive elements, as do other developments in the Knowledge Economy. Many earnings-related pension schemes contain special rules on pension rights for child-raising years. Even if the rules are not directly related to sex, it is mostly women that benefit from them. These rules are not disappearing. Rather, they have been reinforced.<sup>56</sup>

The reformation of social security schemes – and thus pension schemes – in the interests of women can be said to have been fostered by developments within labour law. The principle of equal pay in the original Treaty of Rome was not really intended to create equality between the sexes in any general sense. Working life and social security in the original Member States were constructed around the family and the complementary division of labour between the sexes. The principle of equal pay was not intended to do away with this order of things. It had a much more limited purpose, namely that of preventing unfair competition with low women's wages. However, with the European Court of Justice's (ECJ) judgment in the well-known *Defrenne II* case,<sup>57</sup> the principle of equal pay in the Treaty became directly applicable to private employers, and the principle of equal pay in the EC Treaty began to evolve into a more general principle of equality between the sexes which comprises all of working life and – to an increasing extent – social security as well.

Existing directives mostly apply to working life and encompass both direct and indirect discrimination. The Council's Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security was introduced in 1979, and it was to be implemented six years from that date.<sup>58</sup> At this time, the social security systems of many European countries still contained regulations which entailed direct discrimination of married women. These regulations were rescinded. According to the Directive, however, Member States are entitled to exempt sex-based rules on pensionable age, child-rearing rights within pension systems, widow's pensions and additional benefits as derived rights. These 'female privileges' within social security are only gradually disappearing. When the rules on a lower pensionable age for women were introduced, few women were entitled to a full earnings-related pension.

Income-related pension rights for women will become more costly as a result of the increasing numbers of women in gainful occupation. Women also live longer than men. As a result, practically all countries are now introducing a common pensionable age for men and women, and this common pensionable age is always set at the age that previously applied to men.

When it comes to utilising the potential that resides in the concept of indirect discrimination on the grounds of sex, the ECJ has been very cautious as regard social security systems, although Article 4 in the Social Security Directive prohibits both direct and indirect discrimination.

The Rinner-Kühn case<sup>59</sup> regarded German sickness benefits in cash in the form of employer's 'sick-pay'. Like the statutory scheme at the time, the right to sick-pay did not apply to workers with short part-time working schedules. The legislated benefit was conceived of as wages according to Article 119 in the Treaty of Rome (now Article 141 EC); and since workers in short part-time were mostly women, there was a *prima-facie* case of indirect discrimination. Germany had to show that the rules met a justifiable social aim and were adequate and necessary for the attaining of this aim, an assessment to be made by the national courts according to the judgment. Other cases have been tested against the Social Security Directive itself, like the cases of *Ruzius-Wilbrink*,<sup>60</sup> *Teuling*<sup>61</sup> and *Molenbroeck*,<sup>62</sup> all regarding the social security schemes of the Netherlands. In *Ruzius-Wilbrink* the ECJ itself seems to be critical of the differential treatment of part-timers that was the issue here. In *Teuling*, however, the ECJ seemingly approved of an invalidity pension scheme with reduced benefits for non-providers although this was mostly to the disadvantage of women, since the system sought to ensure an adequate minimum subsistence income for beneficiaries who have a dependent spouse or children, by means of a supplement to the social security benefit which compensate for the greater burdens they bear in comparison with single persons.

The conclusion of the ECJ's case law is that formally neutral family-provider benefits in statutory social security schemes, despite obvious adverse effects on women, are not generally considered to contravene the equal-treatment principle. In the other 'pillars' of pension schemes, however, the equal-treatment principle – and especially the notion of indirect discrimination – has done away with much of the differential treatment as regards women. There is the Council's Directive 86/378/EEC on equal treatment for men and women in occupational social security schemes,<sup>63</sup> amended through the Council's Directive 96/97/EC.<sup>64</sup> Article 5 and 6 prohibits both direct and indirect discrimination on the grounds of sex in occupational and company schemes in principle. Article 9, however, allows Member States to postpone the reform of differential pensionable age and rules on widow's pensions in occupational/company schemes if related to a statutory system. A lower pensionable age for women is thus still permitted according to the EC social security directive, and even according to the special directive on occupational pensions. The Court of Justice has, however, reached the conclusion that occupational pensions are to be regarded as pay and that a lower pensionable age for women consequently constitutes a violation of the principle of equal pay in the Treaty of Rome!<sup>65</sup>

The concept of indirect sex discrimination has also been used in relation to differential treatment as regards part-time employment and even employment protection schemes, which have paved the way for an equal-treatment principle as regards atypical employment *per se*.<sup>66</sup>

Recent Directives directly introduce the equal-treatment principle with regard to flexible employment (see Sec. 3.2 above). Notably, however, those Directives do not apply to social security *per se*. Nevertheless, normative developments in these areas are likely, in the long run, to influence statutory social security schemes as regards the normative approach to flexible working careers.

#### 3.4 Pension schemes, sustainable social cohesion and basic protection

Many social security systems – but not all – have basic pension schemes to secure decent living conditions for all. Such an approach may be said to be at the heart of the Nordic model. The Beverage model with its flat-rate benefits and the statutory scheme of the UK can also be labelled a basic pension scheme. There is a contributory condition, but no relation between contributions and the flat-rate benefits paid once you are within the system. The Netherlands and Ireland have basic pension schemes as well. The Southern model traditionally relies on earnings-based pensions. There are, however, *minimum pensions*, too. Those are paid to persons outside the general contributions-based scheme and are generally means-tested.

*Keeping paid employment and/or the family relation to a worker as the only basis for social protection entitlements is becoming more and more anachronistic. The marginalisation of increasing groups from paid wage work in combination with the need for more individual rights to social security make the call for basically guaranteed levels within social security systems, and thus statutory pension schemes stronger. These developments – along with the flexibilisation process – constitute an argument for the adoption of a four-pillar structure or, maybe better, ‘four-tier’ structure of pension schemes: an inner guarantee-level of the otherwise earnings-based statutory pension scheme, which together makes up the two first tiers and is then complemented by occupational and private pension schemes.*

*Work is not necessarily the relevant criterion of belonging to the inner tier of such a system. It calls for complementary criteria. There always were valid normative reasons for deviating from the principle of equivalence between the value of the work performed and the amount of pension. Practically all statutory schemes grant pension rights for periods of sickness and unemployment. In most schemes the contributions and/or the amount of pension are calculated in such a way that there is some redistribution from groups with high incomes to groups with low incomes. The normative arguments for such deviations from the principle of equivalence have become stronger through the process of flexibilisation. As was already indicated, the Knowledge Society, and the mere fact that all adults – men and women – are active on the labour market but not necessarily to an equal extent, calls for the acquiring of pension rights also for other activities as well, such as periods in education and child-rearing years. If flexibilisation affords scope for really ‘precarious’ careers, there is also an increased ‘typical’ need within the system to guarantee a minimum living standard for all. As Schulte puts it: ‘the responsibility of the state is meant in particular for those who are disadvantaged by the traditional, employment-oriented welfare state, i.e. persons not in full-time employment, mainly women; job entrants without access to the labour market; the long-term unemployed; disabled persons; minorities (inter alia ethnic and racial ones) threatened by discrimination; and fringe groups’.<sup>67</sup>*

*Social security pension schemes should preferably be designed to allow a flexible and successive entitlement to pension on an uninterrupted scale, which does not imply either surmounting a barrier to an earnings-related pension or meeting the special need-requirements for being entitled to a basic/minimum pension. The need to provide social security to individuals who pursue more heterogeneous careers than the ones covered by traditional social security schemes calls for more schematic solutions that are not really based on case-by-case need assessments. However, what we are witnessing seems to be a development towards more 'basic-need' schemes, outside the regular pension schemes.<sup>68</sup> There is an increase in so-called special non-contributory benefits or hybrid benefits, regulated in Article 10a of Regulation 1408/71, and also in social assistance benefits altogether outside the scope of the Regulation. A major conclusion of a recent comparative study on pension reforms was that 'attempting to separate social assistance from social insurance is a more substantial issue for pension reforms than the simplistic choice between "public, pay-as-you-go" and "private, funded" schemes'.<sup>69</sup> This growing mismatch between the institutionalist structure of social protection and changes in the environment has been considered to be more serious in the corporatist welfare states of the Bismarckian model. Here the allocative and distributive implications of the mismatch have combined to create a real gap between adequately protected individuals and households on the one hand, and the growing numbers of unprotected or underprotected 'outsiders' on the other.<sup>70</sup>*

Whatever their form, the fundamental function of basic-need schemes is to guarantee adequate and reasonably equal living conditions for all. Such schemes are an expression of the normative principle of social justice (or just distribution), and their existence is a condition *sine qua non* for sustainable social cohesion and legitimacy, both in a national and a European integration perspective. This is, however, a normative approach not immediately compatible with the vested rights approach to accrued pension rights and the goals of European integration up to now, goals focussing on the free movement of workers. It stresses the issue of relevant criteria of belonging, and it puts the principle of territoriality, traditionally inherent in national social security schemes, in the foreground. Another way of expressing it would be to say that the principles of the Regulation No. 1408/71 are put under considerable pressure.

## 4. EC Coordination Rules on Applicable Legislation and Mobility

### 4.1 General Background

When the Regulation (EEC) No. 1408/71 was introduced, all (six) Member States had social security schemes which, in principle, covered the working population, were based on contributions and comprised families insured through derived rights – that, in other words, these schemes were based on the Bismarckian and/or Southern model.<sup>71</sup> Since then, the design of social security schemes to be coordinated has been more diversified, as the number of Member States has increased and social conditions changed. This is partially – but only partially – reflected by successive changes in the Regulation.

The Regulation is part and parcel of the fundamental goal of the then European Communities, now the EU, and the creation of the internal market. Any Member

States regulation that constituted an obstacle to the free movement of workers had to be abolished. There could be no requirements for working permits and the like on the internal market, and to this end the Regulation (EEC) No. 1612/68 of 15 October 1968 on freedom of movement for workers within the Community was introduced. But the design of national social security schemes was also thought to impede free movement.<sup>72</sup> *The constitutional base for the coordination of the social security schemes of the different Member States, and thus of the Regulation 1408/71, is found in the Articles on the free movement of workers* and more specifically Article 42 (former Article 51) EC, an Article which requires unanimity.<sup>73</sup> Against this background, the ECJ in its decisions has applied the Regulation on an individual-case basis and with an instrumental view to promote the free movement of workers.<sup>74</sup>

The Regulation does not aim to harmonise social security schemes within the internal market, only to coordinate them. It thus does not contain any substantive minimum rules on the coverage and/or contents of social security schemes as such. Nevertheless, co-ordination rules on applicable legislation – though mainly based on the instrumental interest of integration/mobility – also have a *normative basis per se*. *Lex loci laboris* is the fundamental principle of the Regulation (Article 13(2)). This principle can also be said to harmonise with the fundamental normative values of the initial social security schemes to be coordinated (mainly work- and contributions-based) and with the more theoretical condition of social security as a complement to wage work on a labour market. More difficult to cope with in the light of later developments is the fact that in line with the initial systems to be coordinated, families are protected through derived rights.

However, as was already indicated the *lex loci laboris* principle is also generally compatible with the primary and fundamentally *instrumental goal* of the Regulation, to guarantee/promote the free movement of workers. It can also be placed in the context of social dumping. There was always a fear that the realisation of the internal market would imply a ‘race to the bottom’. Thus the fundamental aim of a general improvement of living standards was elaborated in the Maastricht and Amsterdam Treaties.<sup>75</sup> The normative estimation that competition as regards work(ers) shall in principle take place on the terms applicable to the market where a job is performed was also subsequently expressed in the Council’s Directive 96/97/EC on the Posting of Workers.<sup>76</sup> Generally speaking, the *lex loci laboris* principle seems to be compatible in this context, too.

The basic function of the Regulation is to break the old solidarity circles of national social security schemes to promote integration. To that end, the equal-treatment principle is another fundamental principle of the Regulation.<sup>77</sup> It ‘outlaws’ nationality as a criterion of belonging in regard to national social security schemes. As a consequence of the application of the concept of indirect discrimination, residence criteria of belonging may also easily contravene the Regulation.<sup>78</sup> Another fundamental principle of the Regulation, the aggregation principle, consists in eliminating national rules requiring qualifying periods of residence and/or work within the territory to come under the different social benefits schemes.<sup>79</sup> The exportability principle is directed towards that part of the territoriality principle which says that leaving the territory (or not residing there in the first place, as is the case with commuters) exempts you from the right to social benefits (Article 10). Together with the *pro-rata-temporis* principle, it allows you to take accrued social rights with you when you move within the EU. All four

principles can thus be said to be functional with regard to the elimination of traditional criteria of belonging in order to enhance integration. – Finally, the single-state rule (Article 13(1)) and the idea of a single competent state are fundamental to the Regulation and its functions.<sup>80</sup> At the present juncture, it is enough to say that it makes the application of the Regulation and its basic rules all the more rigid and less dynamic.

The integrative aspects of the Regulation as such are, however, hampered by the restricted applicability of the rules. As was already indicated, the free movement was initially restricted to workers (and service, capital and goods, the four freedoms).<sup>81</sup> In 1981 the Regulation was widened to comprise the self-employed,<sup>82</sup> in 1998 extended to the special schemes of public servants<sup>83</sup> and in 1999 it came to include students.<sup>84</sup> Nevertheless, the Regulation's scope of application does not cover all EU citizens.<sup>85</sup> According to Article 2, at present the Regulation applies to 'employed or self-employed persons who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors'.<sup>86</sup> It is not a requirement to have made use of the right to free movement in the sense of really having worked in another Member State to claim to be covered by the Regulation, but it is necessary to have crossed a border. Nor is it a requirement to actually be a worker; it is enough to have been covered by the legislation of a Member State. The employee concept is Community-law based and also covers persons in flexible employment.<sup>87</sup> The social benefits covered are defined in Article 4 and include, among a number of benefits, old-age benefits. The special rules on pensions are found in Chapter 3 of the Regulation (see further the following sections).

Since Maastricht, the Treaty on the European Union states that one of the objectives of the Union is to 'strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union'. The introduction of citizenship of the Union under Articles 17 and 18 EC now confers on each citizen of the Union a primary, individual right to move and reside freely within the territory of the Member States. This right is, however, still the subject of considerable constraints as regards non-active citizens and their family members. Union citizens' right to move and reside is currently governed by a complex corpus of legislation made up of no less than two Regulations and nine Directives, apart from the case law of the ECJ.<sup>88</sup>

So far, the integrative aspirations of the EU stop at EU citizens. Provisions do not, at present, extend to third-country nationals.<sup>89</sup> At present, they mainly rely on bilateral or multilateral agreements with their countries of origin.<sup>90</sup> According to the Tampere summit in 1999, it is an objective for the Union to ensure comparable treatment of EU nationals and third-country nationals who reside legally on the territory of its Member States.<sup>91</sup> Moreover, according to the Presidency conclusions of the Laeken meeting, there is now the necessary political agreement on extending the coordination of social security systems to third-country nationals, and one may expect some progress in this area in the near future since the Council was called upon to adopt the necessary provisions as soon as possible.<sup>92</sup> The Commission has now presented its proposal for a new regulation extending the scope of application of Regulation 1408/71 to all third-country nationals who are legally resident in one Member State and are (legally)

moving to another Member State.<sup>93</sup> The proposal is based on Article 63(4) EC, and among the objectives of the initiative are helping the integration of third-country nationals by providing rights and obligations comparable to those of EU citizens and encouraging mobility of workers, including non-EU nationals.<sup>94</sup> It is felt to be important both to ensure respect for the fundamental rights of third-country nationals and to remove obstacles to worker mobility and labour-market participation. The new Regulation as such will not confer any entitlement to enter, stay or reside in a Member State, or to have access to its labour market. The Commission has, however, also put forward a draft directive on 'The Conditions of Entry and Residence of Third-country Nationals for the Purpose of Paid Employment and Self-employed Economic Activities' in another Member State.<sup>95</sup>

The constitutional base for harmonising social security has changed substantially post-Amsterdam. Taking into consideration the principle of subsidiarity, it is now – according to Articles 136–145 – also expressly possible to harmonise social security by means of minimum-directives.

There may be said to be a general consensus to the effect that the rules of the Regulation are due for reform, but that is where the consensus ends. Already at the Edinburgh summit in 1992, the Council gave the Commission the mandate to simplify the rules on coordination.<sup>96</sup> In the general debate, proposals have been numerous. Three different approaches may be identified: piecemeal reform, a European scheme for migrants and a simplified unified system of coordination. The proposal put forward by the European Commission simplifying Regulation 1408/1 (see further below) is the most prominent example of piecemeal reform. One version of a European scheme was offered by Pieters and Van Steenkiste in 'The Thirteenth State'.<sup>97</sup> The crucial point is to create a European social insurance system specially designed to protect migrants. The question is, however, whether there is a legal basis for the creation of such a system.<sup>98</sup> The third way would be to maintain the actual substance of coordination law, but find 'a more understandable and more elegant means of expressing it'.<sup>99</sup> The goal would be to define coordination in terms of general principles. Sakslin has argued that there is no genuine choice between the first and the third approach in the sense that unless there is a sufficient level of generality to any reform that might be introduced, the Regulation must be continually patched up with minor amendments.<sup>100</sup> There are also proposals according to which there should be a *pro-rata* scheme for all benefits<sup>101</sup> and a move towards the *lex loci domicilii*,<sup>102</sup> as well as a recommendation that *lex loci laboris* and *lex loci domicilii* should both be observed in parallel.<sup>103</sup> Moreover, Pieters has suggested that legislation applicable to benefits compensating for loss of income and to benefits compensating for costs should be governed by different principles.<sup>104</sup>

For some years now, a Commission proposal intended to simplify the Regulation has existed.<sup>105</sup> The proposal is only one third of the size of the Regulation 1408/71. This proposal is based on the Articles 42, 18 and 308 EC and has a considerably wider scope as regards the persons covered than the actual Regulation. 'Person' is the relevant concept (not employee, family member, etc.). The proposal thus encompasses the development from migrant workers to EU citizens within Community law and also covers third-country nationals legally resident in a Member State. The proposal touches on many highly sensitive political issues.<sup>106</sup> Social assistance remains outside the Regulation's scope.

The Commission's proposal seemed to be 'stuck' in the process for a long time. After Amsterdam any decision must not only be unanimous; the Parliament has powers of co-decision, too. Lately, however, reform is back on track. At the Laeken summit in December 2001 parameters for the modernisation of Regulation 1408/71 were presented, and a proposal for an amended Regulation is due by the end of 2003.<sup>107</sup> There are 12 parameters defined as the basic options for adoption by the Council in the light of which the Regulation is to be modernised: seven general parameters and five that are specific to the various categories of benefit. The document contains some differences in comparison with the Commission's 1998 proposal. The broader personal scope is maintained and early retirement included, although within an exhaustive list. The period of jobseeking in another Member State with unemployment benefits is set to 'at least three months'. – However, as Schulte and Jorens have put it, 'A harmonisation of national social security systems is not on the agenda for the near future. Instead, more convergence in the field of social protection is aimed at by the so-called "open method of coordination" which has been practised successfully in the field of economic policy and, most recently, in that of employment policy and which has now been extended to the areas of social exclusion and old age pensions and subsequently, in 2002, will apply to health care as well'.<sup>108</sup>

Finally, the EU Charter on fundamental rights 2000 addresses social security and social assistance issues in its Article 34, stating that the Union recognises and respects the right to social security and social assistance in accordance with the rules laid down by Community law and national law and practices.

#### 4.2 The Traditional Migrant Worker

The traditional migrant employee is the typical *Gastarbeiter*, a male manufacturing worker taking up work on a more fortunate labour market in another Member State than the one in his original state. After having worked there for a considerable time (possibly reaching retirement age), he often moves back to the state of origin. This is the person for whom the rules of the Regulation are really intended. So how do the rules actually work?

According to Article 13(2)(a) and 13(2)(b) the legislation of the Work State applies, i.e. the *lex loci laboris* principle. With regard to earnings-based (and normally contributory) pension rights, this means that our traditional migrant worker earns his pension on an equal treatment basis with the national workers of the relevant labour market. Earnings-based pensions are normally the pension rights at issue in the cases concerned here, the fundamental reason for migration being precisely higher earnings.

Once active wage work is over, the question is how to 'take the pension home'. As we deal with 'earned' pension rights, these are typically exportable – also according to national rules – as accrued vested rights. Normally, you will not lose anything when moving back. According to most statutory pension schemes, there is no requirement that says you must be insured at the time of the materialisation of the risk (when the retirement occurs), and pensions will be paid out once pensionable age is reached. Often enough, the rules on coordination need not even be applied. However, Article 45 contains rules on the aggregation of qualification periods (minimum periods of contribution/earning) that may be required according to national systems for the acquisition of pension rights. Article 46 deals with the award of benefits. Every country makes its own calculation. First, there is the

question of the amount of pension rights according to national rules only, disregarding also Article 45. In comparison a calculation according to Article 46(2) must be performed. If there is no right to a pension according to national rules, Article 46(2) is directly applicable.<sup>109</sup> As regards earnings-related schemes, the difference between the two alternatives is normally not very great. Lengthy qualification periods according to the national scheme may privilege the second alternative, though.<sup>110</sup> If the person concerned has not worked as a *Gastarbeiter* all his life, his pension rights will have to be calculated according to Articles 45 and 46.

As was pointed out above, characteristic of these cases is that pension rights exceed minimum levels, at least in the state of origin. The special issue of basic pension schemes and other guarantees for a minimum living standard will therefore be dealt with in Sec. 4.3 below.

There is also the question about the family, and with regard to retirement especially the position of the wife. We have to consider two alternative main scenarios: the family either migrated with the worker, or they stayed in the state of origin. In both cases, the worker is entitled to any additional provider benefits or the wife to any derived rights. The wife may also be entitled to a basic pension of her own, with the special problems that may arise in connection with the relevant criteria of belonging (see further Sec. 4.3 below). Then there is the possibility that the wife has had a job of her own. Her rights as a worker – probably a flexible one – are dealt with in the following section.<sup>111</sup>

Our traditional migrant worker is thus ‘taking home’ the typically higher pension/living standard of the land of work.<sup>112</sup> From the substantially normative point of view, this seems appropriate – he has worked and contributed at this level all his life. He has ‘earned’ the standard he is now allowed to live at – the pension constitutes accrued/vested rights of a property character. Typically, such an order of things must also be said to promote the free movement of workers, thereby enhancing the internal market and European integration. Apart from causing envy among fellow citizens in the country of residence after retirement when it is the state of origin, this should also encourage other persons there to make use of the freedom of movement.

The same goes for some ‘additional’ benefits to be paid by the Work State, like sickness benefits in kind (Articles 28 and 28a of the Regulation) and child allowances (Article 77(2) of the Regulation), despite such benefits frequently being solidarity benefits requiring residence under the national scheme. Such benefits can be seen as a payment of a non-resident relief on behalf of the Work State to persons residing in another Member State. This does, of course, also promote mobility. From a more substantial normative point of view this may seem less convincing, though.<sup>113</sup>

### 4.3 The Flexible Migrant Worker

Current working careers are thus typically more heterogeneous than the ‘traditional’ one with regard to the number of both employers and modes of employment. They may also represent a mix of employment, self-employment and periods in education or unemployment. Parallel part-time employment and/or other economic/educational activities also become more frequent.

Such heterogeneous working careers may well be the reality not only of more precarious workers, but also of *highly-skilled* ‘knowledge workers’. In fact, highly-skilled workers are known to be over-represented in some flexible modes of

employment. They are also known as being the new migrants. It is true that many of these workers are transferred by their own companies/employers. Their situation will hence be dealt with in Section 4.5 below. There is also, however, a considerable – and increasing – extent of individual migration in these groups. Such migration may be induced by the classic motive of better working conditions, but it may also be due to more non-economic motives such as individual career-building and personal development. Generally speaking, these cases involve the earnings-based pension in any pension scheme (and the non-statutory pillars of the pension system are as important, or rather more important, than statutory schemes!).

The *lex loci laboris* principle at first seems to work well in these cases, too. Many workers in these groups, however, might be even more tempted to try temporary migration if it did not imply a change in the social security regime. A possibility to opt for the social security scheme of the state of origin might be an alternative with regard to such temporary migration. Another possibility is to regard this as a case of commuting, the temporary migrant worker being seen as normally employed in two (or more) Member States and (still) a resident of the Work State of origin (compare below Sec. 4.4).<sup>114</sup>

However, flexible working-patterns are frequently supposed to be linked to more *precarious* working conditions in low-quality and poorly paid jobs. Here, one should first note that more insecure working patterns are an obstacle to mobility themselves. If there seems to be a rather limited interest in intra-European migration in general, the interest in migrating when what is offered is an insecure and maybe part-time position can generally be supposed to be even poorer. Such events are outside the scope of the Regulation, though. However, even if it is likely – especially in the light of future enlargement of the EU – that migration for the ‘traditional reason’ of better conditions will take place in the future as well, life-long careers is nothing we can expect, and flexible working arrangements are increasingly likely to be the ones offered. As was already indicated (see above under section 3), the design of statutory pension schemes is crucial to these new working-careers. There was also supposed to be a need for distributory elements in the statutory pension schemes for purposes of education, the care of family members, etc. Persons in these groups are also more likely to be dependent on basic pension schemes and other minimum living-standard benefits when coming of age. – Women workers deserve a special mention here. Of course, there are some women workers among the highly-skilled new migrants we dealt with initially. In general, though, women are over-represented among part-timers and other flexible workers in the more precarious groups.

Here the *lex loci laboris* principle has its weaknesses. Work is no longer solely a relevant criterion of belonging. For instance, the principle of territoriality inherent in national social security schemes demands residence as an additional or alternative criterion of belonging.<sup>115</sup>

However, of special interest in respect of flexible workers is their more frequent dependency on basic pension schemes and even supplementary social assistance. Here residence as the relevant criterion of belonging comes to the fore. Benefits are no longer based on vested rights, but on social justice and an adequate living standard for all. They are hence solidarity benefits. As long as our flexible worker stays on in the state of residence after retirement age, he or she will, of course, benefit from the schemes available in that country. Article 50 of the Regulation

provides a right to a supplement in case the total of benefits payable under the legislation of various Member States does not amount to the minimum laid down by the legislation in the State of residence. – Moreover, both earnings-based and residence-based pensions are possibly exportable *pro rata*. Since 1992 there are, however, special provisions on so-called hybrid benefits in Article 10a of the Regulation, exempting them from the principle of exportability. Such special non-contributory benefits based on residency shall be notified to the Commission and are listed in Annex IIa to the Regulation.<sup>116</sup>

Under the current circumstances, though, the freedom of movement for such a ‘non-self-sufficient’ pensioner is somewhat reduced. According to the Council’s Directive 90/365/EEC regarding the right of residency of salaried employees and the self-employed who have ceased to perform professional activities<sup>117</sup> there is in principle a right to move freely and reside in any Member State, provided you hold a medical insurance and have sufficient resources. These restrictions can be called into question and the general right for Union citizens as provided for in Article 18 EC can be relied upon.<sup>118</sup> As Community law stands today, however, it seems nevertheless to leave the ‘old poor’ in double dependency; their freedom to move outside their Work State or State of origin depends on the design of the social security system in the Host State – whether basic protection is provided within or outside the scope of the Regulation (or not at all).<sup>119</sup> – It may be said that these particular groups of people are not so likely to migrate post-retirement. But then again, why should they not do so? A more mobile second generation may make such mobility increasingly adequate for the elderly, too. If we really want an integrated Europe for all its citizens this should be an option, and if integration succeeds it could very well become a demand.<sup>120</sup>

Whether migrating pensioners are invited/induced to take on – probably some kind of flexible – employment could to a large extent be due to the rules contained in the corresponding pension schemes.

Migrant students pose a special problem in the scenario of flexible employment. According to the Regulation, the state of origin remains the competent state with regard to a student studying in another Member State. However, if the student takes on an employment in the Host State, the *lex loci laboris* principle immediately applies and the Work State becomes the competent state. If the work at issue is of a diminutive (part-time or short-term) character, this rule may seem rather inadequate. Maybe a rule based on ‘the most significant activity’ (student or worker), or at least ‘significant activity’<sup>121</sup> or activity above a certain threshold,<sup>122</sup> should apply. On the other hand, why should they not receive benefits according to their work? May be what should be given up in these cases is the single-state rule! Nevertheless, many schemes leave short-term employees and part-timers out anyway.<sup>123</sup> The current regulation on applicable legislation in these situations thus leaves students with the risk of no (real) protection in the Work State and no protection in the State of origin.

#### 4.4 The Cross-Border Commuter/Frontier Worker

As was already indicated in Sec. 2 above, cross-border commuting is a type of migration on the increase within the EU. As can be expected, though, the geographical origin of cross-border commuters is very uneven. 83% come from only four countries: France, Germany, Belgium and Italy.<sup>124</sup>

According to Article 13(2)(a), the legislation of the Work State also applies when the employee resides in another Member State. Article 13(2)(b) contains the corresponding rule with regard to the self-employed. Article 14(2)(b)(i) and 14a(2) can be seen as adding *lex loci domicilii* as a secondary, complementary rule to the *lex loci laboris* principle in cases where a person is normally employed or self-employed in the territory of two or more Member States.<sup>125</sup> This is known to cause a great deal of confusion and problems in practice,<sup>126</sup> and the question is whether it can be regarded as effective as concerns the instrumental goal of mobility.

In the Commission's proposal for an amended Regulation, the special rules on frontier workers are omitted. With regard to persons working in two Member States, however, the legislation of the Member State of residence is applicable only if the person pursues *substantial activity* in that state. The proposed rule may be said to further reinforce the *lex loci laboris* principle.

Pennings has suggested setting a threshold for the application of rules such as Articles 14(2)(b)(i) and 14c(a) determining the legislation applicable to 10 hours a week (or long enough to be insured under the national system).<sup>127</sup> He also considers a rule with the effect that persons already covered under a social security scheme can opt to continue to fall under that scheme as long as the new job in another Member State does not comprise more than 10 hours a week.

Such a rule would 'bridge' situations with insignificant employment/work in another state than the originally competent one and the situations regulated in Article 13(2)(f). There is no doubt that the situation of commuters and non-continuous working careers (and also, for instance, national rules on periods of non-work giving entitlement to pension rights stating additional criteria of belonging) draw attention to the Regulation's Article 13(2)(f).<sup>128</sup> A person to whom the legislation of the former competent state ceases to be applicable (according to national legislation), without the legislation of another Member State becoming applicable, shall be subject to the legislation of the state of residence (in accordance with the provisions of that legislation alone).

However, this may be the place to invoke the discussion on giving up the single state rule and accepting the underlying normative logic of different benefits schemes, applying both the *lex loci laboris* and the *lex loci domicilii* principle within their respective fields of application.<sup>129</sup> Frontier workers – whether economically active in only one or in two or more Member States – are precisely the group which calls for such considerations.

#### 4.5 The Pan-European Management 'Migrant' Worker

The posting of employees and self-employed persons constitutes an increasingly important instrument in the international labour markets. Van Zeben and Donders put it as follows: 'In fact, the term migration is really no longer appropriate (migration figures have been steadily decreasing for years). What we see nowadays is more properly referred to as short-term international mobility and, within its confines, posting is gaining increasing importance.'<sup>130</sup>

Article 14 in the Regulation contains the rules on *posting*. A person who is *normally* attached to an undertaking or self-employed in one Member State and who is sent/undertakes to perform work in another Member State shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of that work does not exceed 12 months (and that he is not sent to replace another person who has completed his term of posting).<sup>131</sup> There is

a possibility to extend the rule for another 12 months, if the States concerned consent to this. Moreover, Article 17, which contains the possibility of common agreement between two Member States to exemptions from the general rules, is frequently used to extend the period accepted in posting cases.<sup>132</sup>

In the Commission's proposal to simplify the Regulation, posting is regulated in Article 9. The text says that 'a person pursuing an activity as an employed person in the territory of a Member State and who goes to the territory of another Member State to perform work on behalf of his employer who habitually employs personnel in the territory of the first Member State shall continue to be subject to the legislation of that State, provided that the anticipated duration of that work does not exceed twelve months and that he is not sent to replace another person who completed his term of posting'. The difference in relation to today's rules does not seem to be significant, apart from the fact that the (permissive) rule on prolongation is missing.<sup>133</sup> As regards self-employed persons, though, the proposed rule requires that the work normally pursued in the country of origin is 'the same' as that performed during posting.<sup>134</sup> In the subsequently adopted parameters for the modernisation of the Regulation, the Commission's proposal is labelled 'a good starting point' for discussion of the future rules.

Posting can be seen as a special case of pan-European management, implying that a company posts its workers to another Member State or that a self-employed worker uses his freedom to provide services to pursue activities in another Member State than the registered place of business. *Pan-European management* may also imply, though, that an employer puts workers to use within the proper activities in other Member States than the state of origin. Employees working in one Member State but for a company whose activities are extended to two or more Member States are covered by the legislation in the country where the company is seated, not necessarily where the work takes place (Article 14(3)).<sup>135</sup> When the employers differ – although maybe within a 'family' of related companies – we are dealing with a situation of 'transitory-career', like the ones reviewed in sec. 4.3 above. The application of the Regulation's rules to this kind of short-term mobility highlights the importance of a clear and unambiguous content of concepts like '*normally* employed in the territory of two or more Member States' in Article 14(2) and 'residence'.

In the case of posting and company activities 'straddling' frontiers, the Regulation contains an exception to the general principle of the coordination regulation – *lex loci laboris* – stating that the legislation of the origin Work State/company-registration state is applicable. We might call this 'the *lex laboris* II principle'.<sup>136</sup> With regard to pan-European company workers this principle simply replaces that of *lex loci laboris*. As regards posting, the *lex laboris* II principle is an exemption to the *lex loci laboris* rule, accepted only within restrictions.

These restrictions reflect the suspicious attitude towards posting as 'typically' related to social dumping. The social-dumping issue is partly addressed by the Council's Directive 96/71/EC on Posting, requiring that where working conditions are concerned the *lex loci laboris* principle shall prevail.<sup>137</sup> As regards social security costs, however, 'social dumping' can be said to be accepted within the restricted rules of the Regulation. This can be credited to the instrumental goal of enhancing mobility/integration even where there is a price to be paid for it, and, it may be the fastest way to 'genuine integration' in the terms of harmonised social conditions throughout Europe.

The posting of self-employed persons from the UK and Ireland, for instance, has frequently been considered in terms of dumping, and it causes considerable concern.<sup>138</sup> However, as was initially indicated, it is too simplistic to see the hiring out – and in many cases posting – of employees as a purely precarious endeavour. The swift providing of manpower may also be a legitimate business aim, performed as ‘quality work’. Such cases are in fact parallel to any pan-European management case, and easing up the Regulation’s restrictions on posting may further the European internal market.<sup>139</sup> It might well be in the interest of an employee who undertakes work in a country with *inferior* social security protection as compared to the Work State of origin to be able to retain the ties to the old social security scheme – and be posted. As regards the posting of the self-employed, this is an even more evident ‘borderline case’ in between social dumping and the freedom to provide services.<sup>140</sup>

To recapitulate: in the case of posting as well as in the case of cross-border companies, the *lex laboris* II principle must be considered to be functional with regard to the free movement of workers/freedom to provide services. An obligation to change social security status for a more or less limited period would deter people from migration and thus impede the mobility of labour. This also makes an argument for preferring the Work State of Origin to remain the competent state in other cases of short-term international mobility as well – especially within a ‘company family’, but Castell’s Network Society should also be taken into consideration in this perspective.<sup>141</sup> (In these cases posting of the employee appears to be the relevant strategy, given today’s rules.) The posting rules may be criticised, though, for not being flexible enough and for not responding to the needs of cross-border-active international companies and their personnel.<sup>142</sup> In these cases people are no longer migrating in order to receive better conditions in the traditional sense – internationally integrated business is the driving force. An unlimited right to post employees might be a better thing when ‘integration’ comes naturally. National labour law in most Member States contains the necessary restrictions on temporary work agencies and the hiring out/in of manpower as such.<sup>143</sup> ‘After all, it is the need for mobility that is behind the increase in the number of postings. Administrative impediments obstruct this type of mobility and create obstacles to free movement’.<sup>144</sup> I will not deny, though, that the social-dumping issue is still relevant, especially in the view of enlargement. Here, however, it is relevant to recall Schulte’s criticism of the general view on social dumping.<sup>145</sup>

## 5. Conclusions

In this report I have chosen to scrutinise the coverage, design and criteria of belonging within statutory pension schemes as well as the adequacy of the rules on applicable legislation in the Regulation (EEC) No. 1408/71 from the viewpoint of current changes in the labour market, and in society as a whole.

An important point of departure is that statutory social security is a ‘system’ complementary to labour markets, the latter being the dominant system for (re-)production and distribution.

All statutory pension schemes in Europe are affected by certain challenges, such as the increase in life-time expectancy, low birth rates and a normative attitude (in social security and labour law) that makes the pension a social right as well as an obligation at a certain age. In labour markets we have technological developments

and the 'Knowledge Society', globalised markets, the flexibilisation of work and the spontaneous and institutional exclusion of the elderly. These developments put pressure on statutory social security. Sustainable pensions and sustainable employment demand the non-marginalisation of the elderly, the integration of workers post-retirement, the integration of women, schemes open to flexible working careers and socially valuable 'non-work' and guaranteed basic and socially justified living conditions for all.

As regards the coverage and design of statutory pension schemes developments may be said to imply a change towards schemes based on longer earnings periods or life-long average earning with higher or no fixed pensionable age (Sec. 3.2). The integration of women calls for individualised rights open to flexible working careers and 'socially earned' benefits such as child years (Sec. 3.3). Flexible work, the integration of the elderly and women in wage work and – as a consequence – less consistent pension schemes stress the need for 'inner' guaranteed basic levels in statutory pension schemes and/or otherwise rights to basic living standards for all in society (3.4).

Represented in the normative field of social security law, the situation may be depicted in the following terms.<sup>146</sup> As has been demonstrated in a number of studies,<sup>147</sup> legal solutions in the area of the social dimension may be said to oscillate between three basic normative patterns – or poles – in a normative field. These patterns can be described as the pattern protecting the established position, the market-functional pattern and the pattern of just distribution or social justice. Within social security/pension schemes, the pattern protecting the established position has an important exponent in the income-replacement principle intended to secure a maintained living standard after retirement. The market-functional pattern has an exponent in rules on how to define benefits based on more actuarially orientated principles. Benefits based on need or otherwise implying a mainly solidarity-based redistribution of resources represent the pattern of just distribution. It is obvious that the current/needed changes in statutory pension schemes, switching from defined-benefits to defined-contribution schemes and benefits based on longer qualification periods or life-long average earnings, draw the solutions closer to the market-functional pole<sup>148</sup> and away from protection of the established position. One might even say that flexible work and its reflection in statutory social security schemes imply that positions are no longer all that established. On the other hand, the development of complementary solutions in the form of basic social security – whether inside statutory pension schemes or as hybrid pensions or as social assistance – represents a movement towards the pattern of just distribution. The aggregated result can be described as a socially and politically legitimate balance between these conflicting normative patterns.<sup>149</sup>

# The Normative Field of Social Security Law

Life-long average-earnings schemes

## Just Distribution

Basic subsistence schemes

## The Market -Functional Pattern

Accrued rights and  
Actuarial principles

## Protection of the Established Position

Replacement of lost earnings

/figure 1./

In any *national* social security scheme there is an inherent principle of territoriality. As regards criteria of belonging, the EU and European integration put pressure on this inherent territoriality principle. Nationality is thus no longer a permitted criterion of belonging. Instead, social (security) benefits are generally work-based or residence-based (or 'mixed' – primarily work-based, but with residence as an auxiliary additional criterion of belonging). Such criteria can be said to reflect the substantial normative basis for the benefits at issue, thus defining the relevant 'solidarity circle'.

Regulation 1408/71 contains rules on coordination to secure the freedom of movement – and thus European integration – and there is no intention of harmonising social security schemes as such. The Regulation thus offers rules on the applicable legislation particularly when workers move within the EU. The *lex loci laboris* principle is a fundamental principle to this effect. Basically, it seems instrumentally effective as regards the goals of mobility and integration; it also harmonises with the Community's normative policy with regard to 'social dumping'. The principle is also substantially adequate in respect of social rights as mainly work-based and a complement to wage-work on labour markets.

Part and parcel of the Regulation's integrative aspirations is its function of breaking up the old solidarity circles of national social security schemes and the territoriality principle inherent therein. To this end there are the fundamental

principles of equal treatment, aggregation of qualification and insurance periods, exportability and *pro-rata temporis* as regards vested rights. There is also the single state rule.

The Regulation contains complex rules on different situations, implying both exemptions from the single state rule and deviations from the *lex loci laboris* principle.

Our traditional migrant worker (Sec. 4.2) 'takes home' the typically higher pension/living standard of the Work State when he – at the end of his working life and a 'traditional' working career – moves back to his state of origin. Such an order of things must typically also be said to promote the free movement of workers and thus enhance the internal market and European integration. The Regulation also gives room for some non-resident relief payments on behalf of the State of Work as regards sickness benefits in kind, etc.

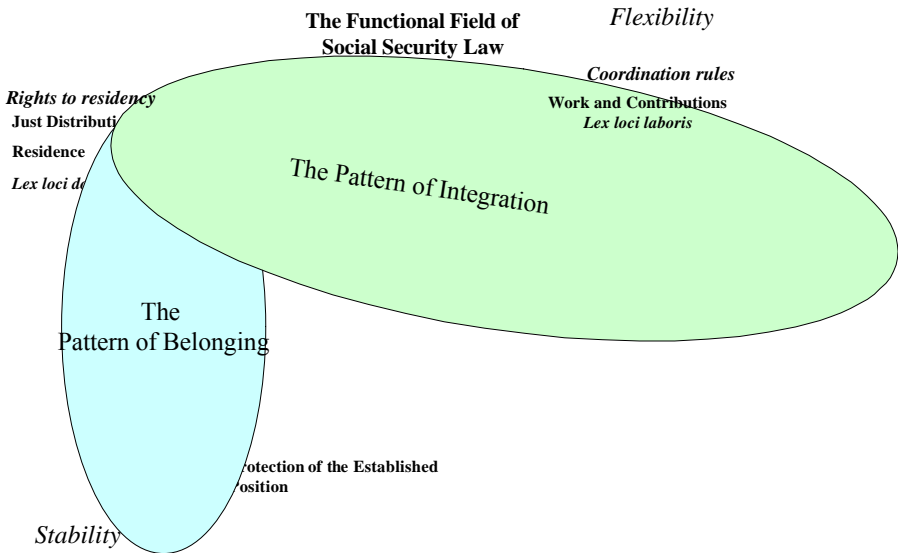
With regard to the flexible workers (Sec. 4.3) the picture is more complex. Concerning the highly-skilled 'knowledge workers' the *lex loci laboris* principle seems to work very well, too. Many workers in these groups, however, might be even more tempted to take the step of temporary migration if it did not imply a change in the social security regime. A possibility to opt for the social security scheme of the state of origin might be an alternative with regard to such temporary migration, but also to treat it as commuting. Such preferences may also to a certain extent be satisfied within the rules of posting. However, flexible working-patterns are frequently supposed to be linked to more precarious working conditions in low-quality jobs. The (re)designing of statutory pension schemes is crucial to these new working-careers. Persons in these groups are also more likely to become dependent on basic pension schemes and other minimum living standard benefits. Here the *lex loci laboris* principle is flawed. This is recognised in the Regulation's rules on hybrid benefits and is also reflected in the benefits left outside its scope. The situation brings issues regarding exportability of different pension rights as well as the right to basic protection in general into focus. Moreover, flexible working careers and non-work-based pension rights foreground Article 13(2)(f) and its future application. Ultimately, however, mobility and effective integration will dwindle to the scope of the freedom of movement principle expressed as the right to residency.

With regard to the cross-border commuter (Sec. 4.4), the rules in Article 14 of the Regulation can be seen as adding *lex loci domicilii* as a secondary rule to the *lex loci laboris* principle in case work is performed in the two Member States. This does not always seem normatively adequate or instrumentally effective as regards mobility. The Commission has suggested that the secondary rule *on lex loci domicilii* should apply only if the person pursues substantial activity in that state. Such a rule can be said to reinforce the *lex loci laboris* principle. An option to choose to remain under the social security scheme that was originally applicable is an alternative as long as activities in another state are not substantial. In case it is work in another Member State than the state of residence that is temporary in character the rules seem adequate, though. These rules even seem useful as regard short-term temporary assignments in other Member States without the 'migrant' worker actually commuting on a regular basis. In the longer run, however, the case of commuters is the one in particular calling for considerations to give up the single state rule and apply both *lex loci laboris* and *lex loci domicilii*.

The pan-European management migrant worker (Sec. 4.5) follows the employer's or the company's state of origin – what I have chosen to call the *lex laboris* II principle. As regards pan-European company workers, this principle simply replaces the *lex loci laboris* principle. In respect of the special case of *posting*, the *lex laboris* II principle is an exemption from the *lex loci laboris* rule, accepted only within restrictions. The restrictions reflect the suspicious attitude referred to above towards posting as 'typically' related to social dumping. The social-dumping issue is partly addressed by the Posting Directive, which requires that as regards working conditions the *lex loci laboris* principle prevail. As regards social security costs, however, social dumping can be said to be accepted within the restricted rules of the Regulation. Even so, the posting rules may be criticised for not being flexible enough and for not responding to the needs of cross-border-active international companies and their personnel. An unlimited right to post employees might be a better thing when 'integration' comes naturally. Labour-market needs are the dominant and dynamic aspect for sustainable economy and employment. Temporaries, cross-border commuters and pan-European management are crucial to labour market development, and to European integration.<sup>150</sup> Are the co-ordination rules on applicable legislation really adapted to them?

The description of the rules on applicable legislation in the Regulation started out from the assumption that any *national* social security scheme comprises an inherent principle of territoriality and from the stipulation of European integration as the instrumental aim of the Regulation itself. The EU, European integration and the reality of migration as such in a global perspective has long banned nationality as a relevant criterion of belonging. Instead, social (security) benefits are based on work or residence. Such criteria may be said to reflect the substantial normative basis for the benefits at issue, thus defining the relevant 'solidarity circle' according to the function of each benefit. We may envisage this as the *pattern of belonging* pertaining to national social security law and – in the normative field of social security – situate it over the pole of established position and just distribution. The pattern of belonging includes the profound willingness, but also the obligation, of the 'established group'<sup>151</sup> to share with (but only with) people who are already in some way associated with the benefits of society. This traditional notion does not naturally include the integration of foreigners, nor does it include the equal treatment of any individual.

It is the goal of European integration policies, and thus the goal of the Regulation, to break this traditional conception of belonging and to further a broader scope. We can speak of the widening of normative circles, of inclusion and integration – of change. I have chosen to illustrate this with the *pattern of integration*, which covers not only the market-functional pattern but also the pattern of social justice/just distribution.



/figure 2/

As regards the rules on applicable legislation, I would mainly place them behind the market-functional pattern. It is only natural that a legal scheme which challenges the traditional concepts of belonging and established positions tends to lean towards the flexible pattern of the market-functional pole. Since the overarching goal is integration, the 'stability' of this normative pattern is in principle incompatible with the protection-of-established-position pattern. The *lex loci laboris* principle can be said to represent a market-functional attitude, as can a rule entailing pension rights based on work and contributions as vested rights.<sup>152</sup> However, as was already indicated above, current developments within labour markets and social security schemes also tend to give more room to the pattern of just distribution. This is necessary to create 'legitimacy'. Here the Regulation's rules on applicable legislation are not necessarily effective and adequate. There is a restricted – and over time growing – scope for residence and *lex loci domicilii* as a relevant criterion of belonging within the Regulation. *Lex loci laboris* as the single state rule makes residency a prohibitive criterion of belonging.<sup>153</sup> The acceptance of non exportable hybrid benefits as well as Article 13(2)(f) and accompanying case law give room for new developments. Moreover, crucial social benefits – such as social assistance – representing the pattern of just distribution do not come under the scope of the Regulation at all. Here, what is required is not primarily an amendment of the rules *guaranteeing* the freedom of movement (the Regulation) *but a widened scope for the freedom of movement principle itself*. What is required is a change in the rules on the right to residency within the Union. Such a change may imply to EU citizens only, or it may include third-country nationals and acquire a whole new meaning in view of the process of enlargement.<sup>154</sup>

The circumstances reviewed above call for an analysis of the concept of European integration. This is, of course, not the place to undertake such an analysis in any proper sense, but some indications for further discussion might be offered.

Work – and thus the *lex loci laboris* principle – is certainly crucial in the process of *creating* the internal market. But is this what still applies? With regard to social cohesion and genuine European integration, other normative values of solidarity/criteria of belonging might be more important. Students, short-term temporary ‘migrants’, commuters and pan-European ‘migrant’ workers – at least – do not necessarily pursue integration in the traditional sense.<sup>155</sup> But maybe in a new one?

In the nineties, globalisation and ‘transnational’ aspects of migration gained increased importance in migration studies.<sup>156</sup> Traditionally migration was a one-way movement – an occasional (and temporary) exemption from a normal situation of habitual residence and long-term belonging. Lately, migration and transnationality are increasingly becoming a ‘normality’. It seems natural to bring the concepts of assimilation (a static concept of one-way integration) and multiculturalism (an open-ended dynamic concept for truly integrated cultures/societies) into comparative discussions of the migration concept.<sup>157</sup> As national belonging becomes less important, EU citizenship becomes the more adequate category.

There is no doubt that we still need to promote individual migration. But as we look at ‘really integrated’ undertakings, workers and EU citizens, do they not appear to require more ambitiously conceived solutions? A rule on *lex loci domicilii* as well as the *lex laboris* II principle might be such solutions. Giving up the single state rule and accepting a mix of work and solidarity benefits, accordingly applying both the *lex loci laboris* and the *lex loci domicilii* within different fields of application may constitute another. Such a rethinking of the normative basis of social benefits seems to be a requirement in the long run in the overall process of European integration. After all, the social and political rights following from EU citizenship are not based on work. ‘Integration’ means that social assistance cannot really be outside the scope of Community law.<sup>158</sup> On the other hand, *in the process* of furthering residency rights, the existence of non-resident relief payments on behalf of former Work States may be instrumentally effective.

Of course, enlargement is accompanied by special problems. Social cohesion seems a much more distant vision, and not even the instrumental goal of enhancing the movement of workers is unambiguous – rather, it is feared. Maybe for those who will nevertheless be allowed to move, other normative values geared to including them in social benefits than the instrumental goal of mobility will come to the fore, such as equal treatment and the normative logic of the relevant social benefit scheme.

Once the patterns of belonging are changed and those who are to be integrated have been ‘established’, an era has had its day, however. As natural as it may be in a first phase to concentrate on market-functional patterns to further mobility, it is equally natural to go on to furthering a more integrative concept of just distribution and solidarity,<sup>159</sup> and finally to favouring stability<sup>160</sup> in the form of Union-wide harmonised ‘quality’ social security schemes.

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## Notes

- 1 See the Presidency Conclusions of the Barcelona European Council 15 and 16 March 2002 p. 33 and further the Presidency Conclusions of the European Council Meeting in Laeken 14 and 15 December 2001 and the conclusions of the Council (Employment and Social Policy) on the proposal for a Regulation on the coordination of social security systems: Parameters for the modernisation of Regulation (EEC) No. 1408/71.
- 2 This can be said about the Regulation too; see further Sec. 4 below.
- 3 The labour-law flexibility discourse often stresses labour-market segmentation and the division of workers into core-groups of workers and marginalised workers. The discussion has frequently focused on the tension between traditional employment and employment protection on the one hand and so-called *New Forms of Work* or *A-typical Work* on the other. There is no absolute consensus as regards these concepts, but New Forms of Work or A-typical Work can be said to connote all arrangements entailing work that falls outside *traditional* employment, i.e. full-time work as an employee hired on a contract of indefinite duration for work at the employer's. An early model – and maybe still the best-known one – of the new way of organising labour is Atkinson's model of 'The Flexible Firm' (Atkinson 1984). Labour-market developments and the increased need for allocative flexibility have generally been perceived as forming a trend towards an increase in the peripheral and distanced workforce. This entails an increase in part-time work, fixed-term work, temporary agency work and other unstable employment relationships – further on referred to as 'flexible work'. Though generally pictured as 'precarious' these new forms of employment are not necessarily for the 'marginalised' workers – they may also be characteristic and functional for 'qualitative work' in knowledge society. See further, for instance, van den Berg et al. al and Schömann et al but also Numhauser-Henning 2001 and Rönmar 2001.
- 4 Sarfati and Bonoli 2002.
- 5 See also the Commission's communication on 'A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development', COM(2001)264 final. As regards the concept 'sustainable' this is generally referred to as defined by the Brundtland Commission in 1987: 'Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.
- 6 COM(2002) 9 final.
- 7 See the Commission's social policy scoreboard for the Barcelona summit.
- 8 See the report of the Social Protection Committee and the Economic Policy Committee on 'Quality and viability of pensions – Joint report on objectives and working methods in the area of pensions'.
- 9 See the Presidency Conclusions p. 33. For the Action Plan, see COM(2002) 72.
- 10 The Task Force was established in June 2001 as a consequence of the Commission's Communication on New European Labour Markets, endorsed by the Spring Stockholm European Council, COM(2001) 116.
- 11 Table 5, p. 42. In fact, the main component of population change in the EU during 1995–2000 was positive net migration, which added 0.2% per year to the population of the Union; see Chart 68, p. 42.
- 12 Table 5, p. 42.
- 13 Ibid. p. 43.
- 14 In the last ten years 38% of EU citizens changed residence. 21% moved to another region in the same Member States – only 4.4% moved to another Member State. Mobility levels between Member States remain consistently below the higher levels of the 50's and the 60's. Commuting, however, continues to grow. See the High Level Task Force report p. 12.
- 15 Employment in Europe 2001, Table 15 p. 51. – In the case of Belgium in 1999, there were 19,062 commuters of French origin and 6,200 from the Netherlands. In the case

- of Luxembourg, too, the French were the largest group (41,500) followed by the Belgians (22,100) and the Germans (14,800). As regards the Netherlands, the commuters came from Belgium and Germany in about equal shares (16,740 and 16,534, respectively). Germany also has a high number of cross-boarder commuters, mostly from France, Austria, the Netherlands and Belgium. As for these figures, see the Action Plan for Skills and Mobility, Annex II, Statistical Annex p. 31.
- 16 Employment in Europe 2001 p. 50.
- 17 Ibid.
- 18 Ibid. p. 40 f.
- 19 Compare, for instance, the High Level Task Force report: 'Over the last decade the single job for life has become the exception rather than the norm' (p.7).
- 20 Vanpoucke gives us an example from the French/Belgian border, where the 'classic' Belgian blue-collar workers commuting into France have decreased from <sup>over 16,000 in the mid-</sup>seventies to some 5,000. However, different modernisation/reconversion of industry strategies and outcomes have also led to a spectacular increase in the number of French blue collars taking on employment in Belgium since the late eighties. At the same time, there is a small but modestly growing group of young cross-border professionals from Belgium to France. Vanpoucke 2001.
- 21 Employment in Europe 2001 Report, Table 24 p. 72. Europeans tend not to change jobs frequently: in 2000, on average, only 16.4% had been with their employers for less than 1 year (to compare with 30% in the US); see Action Plan for Skills and Mobility, Annex II, Statistical Annex, p. 22.
- 22 Employment in Europe 2001 Report, Table 12 p. 50.
- 23 Ibid. pp. 45 f.
- 24 Action Plan for Skills and Mobility p. 10.
- 25 [http://europa.eu.int/comm/employment\\_social/news/2001/mar/54\\_en.html](http://europa.eu.int/comm/employment_social/news/2001/mar/54_en.html) 2001-05-08.
- 26 Quotation from Christensen's paper for the ISLLSS XVI World Congress, Jerusalem 2000. See further also Christensen 2002. This section of my report draws heavily on this article of Christensen's, which supplies a comprehensive description and overall analysis of labour-market change and pension reform in Europe. For a detailed presentation of pension reforms, see also for instance Whiteford 1996, Pieters 2000 and Hughes and Stewart 2000. Bonoli 2000 examines the implications of different political institutions in shaping pension scheme reforms, in particular in Britain, Switzerland and France. For the special problem with accrued pension rights in relation to pension-scheme reform, see Eliasson 2001.
- 27 Christensen 2002. Concialdi has drawn the conclusion that the major challenge facing the European economy in the future is its potential to absorb available labour, rather than a relatively slight decrease in the number of working-age people; Concialdi 2000.
- 28 When the Bismarckian system was introduced in Germany at the end of the nineteenth century, the age for retirement was settled at 70 years. Not many workers lived so long. Among the pensions paid out in 1913, less than 10 percent were old-age pensions. Besides, the level of old-age pension was low. In 1891, the average pension amounted to a mere 18 percent of normal wages. The old-age pensions that were introduced in other European countries in the beginning of the 20th century followed the same pattern; see Christensen 2002.
- 29 The basic idea behind the big pension reform that began to be prepared when the German boom was set in motion – and carried through in 1957 – was to alter the function from a pension in the form of a subsidy to a pension that maintains a certain standard of living, Christensen 2002. – Compare the common objective as to the 'adequate social objective' of pension schemes underlying the Pension Process described above.
- 30 See, for instance, Schulte 1999 p. 21. Ben Israel uses the metaphor of the 'three-tired system' instead; see Ben Israel 1994. Not all countries have these 'multiple' systems, though; see, for instance, Augusztinovics 1999 pp. 355 f, who criticises this way of categorisation in other ways as well.

- 31 Several Member States, among them Germany, have begun to reduce the importance of statutory social security schemes (and the Regulation No. 1408/71) by replacing them with supplementary – occupational or private – schemes which fall outside the Regulation’s system of coordination; see Schulte and Jorens 2001 p. 14. On the development of occupational pension schemes, see also Whiteford 1994 and Eliasson 2001.
- 32 See the Council Directive 98/49/EC on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community, Communication from the Commission ‘Towards a single market for supplementary pensions, results of the Green Paper on supplementary pensions in the single market’, COM(1999) 134 final, the Proposal for a Directive on the activities of institutions for occupational retirement provision, COM(2000) 507 final and Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee on the elimination of tax obstacles to the cross-border provision of occupational pensions, OJ 2001 C165/4.
- 33 There is, however, not necessarily a sharp divide between defined-benefit schemes and defined-contribution schemes. Many schemes contain elements from both models, such as indexation clauses in defined benefit schemes.
- 34 See, for instance, Numhauser-Henning 1998. In the new Swedish statutory pension scheme, for instance, there is a part that is pre-funded.
- 35 See, for instance, Christensen 2002 and Numhauser-Henning 1998.
- 36 See further Eliasson 2001.
- 37 Residence has thus come to replace nationality in an increasingly ‘mobile’/integrated world. Even so, nationality is still crucial with regard to rights to residence and work within a nation’s territory! Work as the relevant criterion has its explanation in the character of social security as complementary to wage work with the labour market as the dominant system, and the character of social security schemes as increasingly income-related.
- 38 Union citizenship is, however, a still rather novel and most relevant criterion of belonging as regards EU and Community law. The detachment of third-country nationals from Community law, including the Regulation No. 1408/71 remains an unsolved problem, see further Sec. 4 below.
- 39 See further Malmstedt 2002. The discrimination issue is also elaborated in Christensen 2001 and Christensen and Malmstedt 2001. Compare also the *Gaygusuz* judgment where the Court rules that unequal treatment in social security on the sole ground of nationality may constitute a violation of Article 14 of the European Convention on Human Rights, unless it is justified by substantial reasons, *Gaygusuz v. Austria* (16 September 1996, ECtHR, 39/1995/545/631).
- 40 See, for instance, the judgment in the ECJ’s case C-85/96 *Martinez Sala* [1998] ECR I-2691, the explanatory memorandum to the Commission’s proposal for a Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2001) 257 final, and further on below Sec. 4.1 and 5.
- 41 See further, for instance, Cornelissen 1996.
- 42 See further Sec. 4 below.
- 43 On the concepts *work-based* and *solidarity* benefits, see further Christensen and Malmstedt 2000.
- 44 Sarfati and Bonoli 2001. See further also Sarfati and Bonoli (eds.) 2002.
- 45 For an overview of Member States’ pension schemes, see Appendix to the Commission’s Communication on The Future Evolution of Social Protection from a Long-Term Point of View: Safe and Sustainable Pensions, COM(2000) 622 final.
- 46 Christensen 2002. Christensen discerns such a trend also in respect of occupational schemes, too. See further also Eliasson 2001. – The new statutory *Swedish* pension system, introduced in 1998, is a good example of a system adapted to the new challenges. It is a defined-contribution scheme. An amount equivalent to 18.5% of

pensionable earnings is transferred to the pension system. 16% of this amount goes to the pay-as-you-go system, whereas the remaining 2.5% are invested in individual accounts in a pre-funded system. There is no fixed pensionable age within the earnings-based system, apart from the fact that pension rights cannot be claimed before the age of 61 years. The system is extremely flexible and a person who goes on working after 'normal' pension age continues to accumulate new pension rights. On Italian pension reforms towards an actuarially fair and defined-contributions system with a flexible pensionable age, see Augusztinovics 1999. – A gap between the number of years required for a full pension and the actual length of people's working careers erodes the normative core of the defined-benefit principle, compare, for instance, French pension reforms in the nineties.

47 See, for instance, Engblom 2001 and Schoukens 2000.

48 See further Sec. 4.

49 For an argument favouring flexible qualification and employability as a more relevant 'touch-stone' in respect of labour law than employment protection and modes of employment, see Numhauser-Henning 2001. See also Rönmar 2001.

50 See also the Commission's proposal for a Directive concerning working conditions for temporary workers, COM(2002) 149 final.

51 A Swedish example might be illustrative. According to the 1982 Employment Protection Act, employment protection in open-ended employment ends – and there is a duty to leave if the employer so requires – when the employee retires according to the applicable collective agreement, usually at 65 years. For years the Government has tried to persuade the social partners to reach an agreement which raises the pensionable age in collective agreements to 67 years, but without success. As of 1 September 2001, the 1982 Act contains a compulsory rule on a right for the employee to stay on until he or she reaches 67 years of age. (As of 1 January 2003, this rule applies despite the contents of also established collective agreements, something that has made trade unions turn to the ILO, arguing a possible breach of the Conventions 98 and 154 on collective bargaining.) The background of the reform is the new statutory pension scheme, which does not set a fixed pensionable age, and the need for the elderly to work more for the long-term sustainability of the system. The critics argue that it would be better to relax employment protection after 61 years of age, when there is an entitlement to the earnings-based pension under the new scheme. On the trade-union side, on the other hand, the reform has been seen as an attempt to undermine 'the right to retire'. Despite its design as a (voluntary) right to stay in employment until the age of 67, they fear a developing *duty* to work until this age for a 'normal' pension. And this is of course the heart of the matter – where do sustainable pension schemes and working careers meet? 'Early retirement' and the abolition of employment protection after 61 years of age would clearly make room for a new segmentation of labour markets along the lines of protected 'primary' and unprotected 'secondary' working careers. Any 'real' pensionable age is set by schemes of alternative ways to finance living costs. Once such systems are mainly based on life-long earnings, there is no inherent argument whatsoever for having them related to employment protection. For a discussion along those lines, see further Numhauser-Henning 2000.

52 See further Christensen 2001.

53 Christensen 2002.

54 All European countries introduced widow's pensions. They are now disappearing – or are at least on the decrease. For a detailed description of recent reforms as regards widow's pensions in Sweden and Germany, see Eliasson 2001.

55 The traditional way of calculating pension benefits only on the basis of 'the best years' may favour women, though. Child-rearing years and years spent doing part-time work will not enter into the calculation of benefits. However, this presupposes that women meet the qualification-years requirement for a pension in the first place.

56 In *Germany* the number of child years entailing pension rights has been increased from one to three, and the amount of pension is calculated in a more favourable way.

- Compare the *Elsen* judgment, C-135/99 [2000] ECR I-10409. – According to the new *Swedish* pension scheme from 1996 a parent who takes care of a child under four is credited with pension rights corresponding to her/his earnings before the child was born or to 75% of national average earnings. The rules were introduced mainly in order to avoid women's pensions being lower in the new system than in the previous one. (Part-time work did not affect the amount of pension in the old scheme, since pension rights were calculated on the basis of the best 15 years.) The rules are, however, constructed in a formally gender-neutral way. The parents decide for themselves which of them should be credited with the child-care years. If they do not, the rights are awarded to the parent with the lower income, mostly the woman.
- 57 C 43/75 [1976] ECR 455.
- 58 OJ 1979 L6/1.
- 59 C-171/88 [1989] ECR 2743.
- 60 C-102/88 [1989] ECR 4311.
- 61 Case 30/85 [1987] ECR 2497.
- 62 C-226/91 [1992] ECR I-5943.
- 63 OJ 1986 L225/40, and corrigendum OJ 1986 L283/27.
- 64 OJ 1997 L 46/20.
- 65 This applies even to 'contracted out' occupational schemes, i.e. schemes replacing an otherwise mandatory statutory scheme (Barber case – C 262/88 [1990] ECR 1889). See also case C-7/93 *Beune* [1994] ECR I-4471. – Other outcome, case 19/81 *Burton* [1982] ECR 555.
- 66 See, for instance, the *Bilka-Kaufhaus* case, case 179/84 [1986] ECR 1607, which concerned indirectly discriminating rules on the lack of occupational pension rights for part-timers. The *Kowalska* case, C-33/89 [1990] ECR I-2591, involved differential treatment of part-timers concerning redundancy payments. See also the cases C-189/91 *Kirshammer-Hack* [1991] ECR I-6185, C-167/97 *Seymour-Smith and Perez* [1999] ECR I- 623 and C-322/98 *Kachelmann* [2000] ECR I-7505.
- 67 Schulte 1999 p. 13. See also Vonk on the very concept of 'social security', Vonk 2001 p. 318.
- 68 In Sweden the former basic pension, the folkpension, was previously awarded in full to all residents. When the Regulation 1408/71 became applicable the basic design was changed by making the amount of pension proportionate to the number of residence years. Forty years of residence came to be required for a full pension. The 'inner tier' of the new Swedish Pension System, the Guaranteed Pension, has the same design. This change will result in lower pensions for those who settle in Sweden rather late in life and choose to stay in Sweden after pensionable age. Now these migrants are only entitled to a reduced Guaranteed Pension. To meet the legitimate claims for decent living standards for all, the statutory pension scheme has recently been complemented by a new benefit, the Elderly-Support Benefit (*Åldreförsörjningsstöd*). Here we are dealing with a means-tested scheme applicable to people of 65 years or older, designed as a residence-based complement to other income.
- 69 Augusztinovics 1999. The study also showed, however, that more than half of public expenditure was absorbed by life-cycle redistribution, around one third by risk insurance, and less than 10% by support for the genuinely weak (with the exception of Britain, where the last share was higher).
- 70 Schulte 1999 p. 16 with further reference to Ferrera.
- 71 Compare Schulte and Jorens 2001 p. 10.
- 72 Compare Sec. 3.1 above on the criteria of belonging/the principle of territoriality inherent in national social security schemes.
- 73 See also Articles 43 (on the freedom of establishment of the self-employed) and 49 (on the freedom to provide services). – Predecessors of the Regulation were the Regulations 3 and 4 dated as early as 1958 and based on very much the same principles. Complementing the Regulation 1408/71 is the Regulation 574/72 on its application.

- 74 The Treaty and its Article 42 forbid the application of national legislation which causes losses to persons who want to extend their activities to another Member State; Case C-443/93 *Vougioukas* [1995] ECR I-4033. Schulte and Jorens 2001 p. 18: the rights based on the Regulation cannot harm the rights that a migrating worker already possesses by virtue of national legislation, (the Petroni-principle, case 24/75 *Petroni* ECR [1975] 1149). Compare also the notion of vested rights and the *Gaygusuz* judgment (16 September 1996, ECtHR 39/1995/545/631).
- 75 Articles 2 and 3 EC.
- 76 OJ 1997 L 18/1.
- 77 Whether the equal treatment principle as such (and not only as a tool to promote integration/freedom of movement) may be the normative basis for claims to social rights under community law is an issue *per se*; see further Malmstedt 2001. Commentary by Pennings 2001. See also the *Martínez Sala* judgment, case C-85/96 [1998] ECR I-2691. On the relation between the general ban on nationality discrimination in Article 12 EC and the more particular provisions of Articles 39 and 41, see further Becker 1999.
- 78 As will be described in the following, however, residence has also come to supply the *lex loci laboris* principle with regard to the Regulation in a number of situations and is the general rule with regard to some 'special non-contributory benefits', so called hybrid benefits, which are not exported (Article 10a(1)). The exemptions from the *lex loci laboris* principle are to be found in Articles 14-17.
- 79 See further, for instance, Becker 1999.
- 80 However, the Regulation No. 3/58 did not contain such a rule; see for instance the case 92/63 *Nonnenmacher* [1964] ECR 281. There are still exemptions to the single-state rule, Article 14(c)(b) and Annex VII. As for the future, in the 'Parameters for the modernisation of Regulation (EEC) No. 1408/71' the importance of the single-state rule 'for clarity' is especially stressed under the general parameter 5, p. 15.
- 81 Such a restriction also complies with the competence for coordination rules according to Article 42 EC.
- 82 Regulation No. 1390/81 based on Article 308 The Treaty of Rome.
- 83 Regulation 1606/98. Compare also case C-443/93 *Vougioukas* [1995] ECR I-4033.
- 84 Regulation No. 307/99.
- 85 However, Article 22(1)(a) and 22(1)(c) does apply to all citizens insured in one of the Member States, Article 22a.
- 86 As regards family and survivors, there is in principle only the right to derived benefits and not to rights which apply only to workers; see case 40/76 *Kermaschek* [1976] ECR 1669 and C-308/93 *Cabanis-Issarte* [1996] ECR I-2097.
- 87 Case 75/63 *Unger* [1964] ECR 177 and C-2/89 *Kits van Heijningen* [1990] ECR 1755.
- 88 Compare Christensen and Malmstedt 2000, who are questioning the compatibility of these 'EC Settlement Directives' and the Treaty rules on EU citizenship. See also Carlier 1999 and Fillon 1999.
- 89 With the exceptions of stateless persons or refugees residing within the territory of one of the Member States, as well as the members of their families and their survivors; compare above. For an interesting discussion on migration policies and the social security of third-country nationals, see Vonk 2001.
- 90 See further the report of Professor Sagardoy to this Congress.
- 91 Presidency Conclusions pp. 18 and 21. The Commission initially proposed this in 1997, COM(1997) 561 def., a proposal which has now been withdrawn (COM(2002)59 final); see further in the following.
- 92 Presidency Conclusions, European Council Meeting in Laeken 14 and 14 December 2001 p. 29. See also Conclusions of the Council (Employment and Social Policy) on the proposal for a Regulation on the coordination of social security systems: extension of Regulation (EEC) No. 1408/71 to third-country nationals (legal basis) submitted to the meeting.
- 93 COM(2002)59 final.

- 94 Compare the *Khalil* case, C-95/99 [2001] ECR I-7413.
- 95 OJ C 240 E, 28.12.2001, p. 79.
- 96 The 'Action Plan to Improve the Freedom of Movement of Workers'.
- 97 Pieters and van Steenkiste 1993.
- 98 Compare the *Khalil* case, C-95/99[2001] ECR I-7413.
- 99 Eichenhofer 2000.
- 100 Sakslin 2000.
- 101 Ojeda Avilés 1997.
- 102 Greve 1997.
- 103 Sakslin 1997 as well as Christensen and Malmstedt 2000.
- 104 Pieters 1997.
- 105 Proposal for a Council Regulation (EC) on coordination on social security systems COM(1998)779 final.
- 106 See further Penning 2001.
- 107 Conclusions of the Council (Employment and Social Policy) on the proposal for a Regulation on the coordination of social security systems: Parameters for the modernisation of Regulation (EEC) No. 1408/71.
- 108 Schulte and Jorens 2001 p. 9. Compare the parameters p. 6. See also Sec. 1 above. For a plea for a European social *acquis*, see Marino 1999.
- 109 First there is the theoretical amount of pension according to national rules, calculated as if all periods of insurance had been completed under the national scheme (46(2)(a)). The total amount shall then be calculated in accordance with the ratio of duration of the insurance-covered periods or residence periods completed under national legislation (46(2)(b)). The claimant is entitled to the highest pension according to Article 46(1)(a)(i) and Article 46(2) respectively (Article 46(3)).
- 110 Differences also generally occur when an Annex IV pension is involved.
- 111 In relation to pension schemes with derived rights, a wife who works/has worked represents a kind of 'dual nature' where the coordination rules of the Regulation are concerned. First she is a worker in her own right and then a family member of a worker entitled to existing derived rights. The outcome in the Swedish Supreme Administrative Court of the famous *Kuusijärvi* case (C-275/96 [1998] ECR I-3419) shows that she might not only be a dual but even a 'mixed' nature. This case concerned parental benefits/family benefits, though. According to the ECJ, Mrs Kuusijärvi was, as a migrant worker, not entitled to Swedish parental benefits once she had ceased all employment in Sweden and returned to her homeland. However, as the wife of a migrant worker – who was still working in Sweden – she had a right to family benefits. However, in this case the benefits should, according to the national court, be paid out not at the guarantee level but in accordance with her own former income in Sweden!
- 112 There might be a difficulty with regard to differences in pensionable age. Normally, however, in our case the land of work has the higher age of retirement. Should our migrant worker choose to return home at the lower age of retirement of his land of origin, he will have to wait for his pension from the work-land to materialise. Whether or not he is entitled to a pension in his land of origin is decided with reference to the rules on coordination (and the rules of the national scheme). Moreover, it should be noted that not all pensions are subject to retirement from work. The new Swedish old-age pensions, for example, are not. A person who performs work in another country can therefore continue to draw a Swedish old-age pension and the basic guaranteed pension to which he or she may be entitled.
- 113 'The solidarity norm can never justify that the beneficiary gets a better position than other persons', Christensen and Malmstedt 2000.
- 114 The question of a possible reference period as regards the application of Article 14(2)(b)(i) is discussed in Penning 2000 p. 334, suggesting such a period of twelve months. Here it should be mentioned, that the Regulation contains a special rule in Article 48, prescribing that a Member State is not required to award pension benefits

- in respect of periods completed under its legislation not amounting to one year.
- 115 Compare the *Elsen* case, C-135/99 [2000] ECR I-10409.
- 116 In the Commission's proposal of 1998 (COM(1998) 779 final) there is a rather more narrow description of which benefits that can be treated as hybrid benefits; being benefits 'closely linked to a particular economic and social context' and which are either granted after means-testing or are intended to afford specific protection for the disabled. Compare, however, also the *Jauch* and *Leclere* cases, case C-215/99 [2001] ECR I-1901 and C-43/99 [2001] ECR I-4265, respectively.
- 117 And, possibly, also the so-called Residuary Directive 90/364 EC regarding the right of residency.
- 118 See further Christensen and Malmstedt 2000 and also Carlier 1999 and Fillon 1999.
- 119 Fillon argues, however, that special non-contributory benefits in the host State (in case they exist) is to be taken into account when it comes to the fulfilment of the condition of minimum resources according to the Directive, Fillon 1999 p. 58.
- 120 Compare Fillon: 'We would have a ridiculous situation in which most of the nationals of the richest States could live in any of the other States, whereas most of the nationals of the less rich States could not live anywhere else.' Fillon 1999 p. 72.
- 121 Compare the new rule with regard to persons working in two Member States according to the Commission's proposal for a new Regulation, Article 10(1)(a) (COM(1998) 779 final).
- 122 Compare Pennings 2000 p. 344f.
- 123 As regards a future scenario, note the possible implications of the equal-treatment principle laid down in the Part-time Work Directive and the Fixed-term Work Directive, respectively.
- 124 Data derived from a memorandum to the Aachen conference, 22 November 2001; Johan ten Geuzendam, *EURES helps cross border commuters*.
- 125 The rules mentioned are only the main rules, and in addition to them the Regulation contains a number of detailed rules for more or less specific situations. Article 14(c)(a) regulates the situation of persons who are simultaneously employed in the territory of one Member State and self-employed in the territory of another Member State. Here – in principle – the Employment State is regarded as the competent state. Annex VII to the Regulation, however, enumerates different situations where the single state rule does not apply. Instead, both the legislation of the Employment State and the one in which the person concerned pursues self-employed activities apply. For a discussion as regards the justification of differentiated coordination rules with regard to the self-employed, see Pieters 2000b.
- 126 Pennings mentions finding a job in the state of residence when employed in another Member State and starting to work as an employed person in one state when one works as a self-employed person in another State as two out of four (the other two situations being posting by agencies for temporary work and as a self-employed person, respectively) main possibilities to manipulate the facts related to the Regulation; see Pennings 2000.
- 127 Pennings 2000 p. 344.
- 128 As for earlier solutions, see case 302/84 *Ten Holder* [1986] ECR 1821 (the Work State continues to be the competent state also when a person has ceased working), case 140/88 *Noij* [1991] ECR I-387 and 245/88 *Daalmeijer* [1991] ECR I-555 (13.3(a) does not apply when a person has definitely ceased working – no conflict of rules), C-215/90 *Twomey* [1992] ECR I-1823 (but it does apply to those who have only temporarily ceased working). Article 13(2)(f) applies to a person who has ceased 'all employment' – but not necessarily definitely ceased working in a longer perspective; see *Kuusijärvi* [1998] ECR I-3419.
- 129 Compare Christensen and Malmstedt 2000, but also Sakslin 2000. This would call for a Community law concept of residency which serves as a coordination rule on applicable legislation, see further Christensen and Malmstedt, *ibid*.
- 130 van Zeben and Donders 2001 p. 108.

- 131 ECJ case law and decisions of the Administrative Commission (though not legally binding) have added to these requirements in the Regulation. During the period of posting, organic ties must remain between the company and the person posted, the posting-company must carry out regular activities in the country from which it sends the posted workers and the employee or self-employed person must be subject to the social security system of the country from which he is posted. A self-employed person must be deemed to carry out significant activities in the country of origin in terms of aspects such as payment of contributions and taxes, etc. In these cases a posting certificate – Form E101 – is issued, which necessarily implies that the social security system of the receiving country does not apply. See, among others, the *Fitzwilliam* and *Banks* cases, C-202/97 [2000] ECR I-883 and C-178/97 [2000] ECR I-2005.
- 132 On these practices, see for instance Jorens and Schulte 2001 pp. 242 ff.
- 133 The new Article 13, however, provides for agreed prolongations, as is the case with the current Article 17.
- 134 As regards the present situation, compare the *Banks* case (C-178/97), according to which judgment ‘work’ in the host state can be of a different type and even have been performed as an employee.
- 135 The same goes for a self-employed person in an undertaking straddling the common frontier of two Member States; see 14a(3).
- 136 Compare Vonk, who speaks about the practice of continued membership of the social security system of the country of origin as the ‘international secondment regime’, designed to ensure that workers are not constantly confronted with changes in legislation when they work temporarily in other countries, Vonk 2001 p. 328.
- 137 As for a discussion on possible difficulties to draw the line between working conditions and social security devices, see Bercússon 2000 pp. 80f.
- 138 Such a person is to be regarded as self-employed according to the law of his land of origin, despite the fact that he may be regarded as an employee in the Work-State. This is the background of the *Banks* case, C-178/97. See further for instance van Zeben and Donders 2001 but also Schulte and Jorens 2001 pp. 19f.
- 139 Compare van Zeben and Donders, commenting the ban on replacement in Article 14(1)(a): ‘In light of the purpose for which it was included in the Regulation, its elimination would seem to be a better response to the current need for mobility in business and industry’, van Zeben and Donders 2001 p. 111. Pennings, however, seems to support further restrictions and suggests, that the posting of a worker should only be permitted once he has been employed by his employer for at least six months; see Pennings 2000 p. 344.
- 140 On the dual character of the self-employed ‘workers’, see further Engblom 2001. Note here also the special difficulties concerning how to distinguish the posting of a self-employed person from the simultaneous pursuit of several activities into two or more Member States regulated in Article 14a, see further Pieters 2000b pp 146 f.
- 141 Castells 1996. Network organisation of business activities can be seen as a part of the flexibilisation process, implying an easy adaptable group of cooperating companies not necessarily organically linked together.
- 142 Jorens and Schulte 2001 p. 242 f. and Schulte and Jorens 2001 p. 21.
- 143 Compare also the Commission’s draft directive on working conditions for temporary workers, COM(2002) 149 final. The stated aim is to improve the quality of temporary work by ensuring that the principle of equal treatment is applied and to establish a suitable framework for the use of temporary work to contribute to the smooth functioning of the labour and employment market (Art. 2). An improvement in the minimum protection for temporary workers as proposed in the draft directive is supposed to enable any restrictions or prohibitions which may have been imposed on temporary work to be revised and, possibly, lifted (Art. 4) if they are no longer justified on grounds of the general interest regarding, in particular the protection of workers.
- 144 van Zeben and Donders, p. 116.

- 145 The term 'social dumping' is criticised by Schulte on the grounds that in trade theory one speaks of dumping only if suppliers abroad sell at lower prices than at home (or ask prices that are below their average cost). It is thus 'not just *differences* (italics added) in social costs but the efforts to reduce them to conform with European social legislation that distorts competition', Schulte 1999 p. 35.
- 146 The theory of normative/legal development as the balancing of basic normative patterns in a normative field was developed by the late Professor Anna Christensen and myself. See Christensen 1997, 1999 and 2000 as well as Numhauser-Henning (ed.) 2001 and 1993. The theory is based on the contention that different basic normative patterns can be distinguished in the multitude of legal norms. The basic normative patterns are held to reflect normative practices functional to society and human relationships. They thus reflect – and codify – social normative conceptions and practices aimed at making long-lasting human relationships and sustainable societies possible, and they are closely related to societal conditions.
- 147 See further the Norma Research Programme Website, [www.jur.lu.se/forskning\\_norma](http://www.jur.lu.se/forskning_norma).
- 148 Whereas *pro-rata* work/contributions-based pensions and pension rights pictured as accrued rights can, in principle, be seen as exponents of the market-functional normative pattern, it might be worth noticing that the construction on a pay-as-you-go basis connects pensions with the situation of the future paying generation (even living in another country!) and thus with just distribution and elements of solidarity.
- 149 See further Christensen 2002 for a more comprehensive analysis of current developments, but also Christensen 1997.
- 150 'Instruments used in the past, such as Regulation 1408/71 on the coordination of social security, are no longer tailored to the mobility patterns presently taking shape in the Union'; see van Zeven and Donders 2001 p. 108 f.
- 151 Compare the notion of derived rights!
- 152 The *lex laboris* II principle applicable to the cases of pan-European management and posting may to some extent be said to reflect protection of the established position, though. Notwithstanding, in the case of posting (but maybe also to some extent pan-European management) there is (but not always) an element of social dumping which makes the market-functional pattern relevant.
- 153 Compare Sakslin 2000. 'It is problematic that the ECJ has repeatedly found the condition of residence discriminatory even where this is used as a condition for insurance in residence-based schemes, whereas in the case of a scheme based on employment, insurance or contributions, the national conditions for insurance in respect of employment or contribution payment have never been regarded as discriminatory. The ECJ does not make a distinction between, on the one hand, residence in a county as a condition for being covered by a scheme and, on the other, residence as a condition for the granting of a benefit.' See also Becker 1999.
- 154 Compare the Commission's proposal for a Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2001) 257 final; the proposal 'in keeping with new developments in mobility, working arrangements and lifestyles less tied to a single place' introduces a right to residence for six months without formalities irrespective of whether they pursue a gainful activity or not; thereafter and for the first four years of residence they continue to be subject to their having sufficient resources and sickness insurance; after four years of continuous legal residence a new right to permanent residence is introduced. – The 'Parameters for the modernisation of Regulation (EEC) No. 1408/71' stress that the Treaty guarantees free movement of European citizens within the EU, but only 'subject to the limitations and conditions which it lays down' (p. 5). The scope of the Regulation as such is set to 'any person who is or has been subject to the social security legislation of one or more Member States', including the economically active as well as non-active persons and third-country nationals; but the need 'to find a solution which takes account of any constraints connected with the

special characteristics of systems based on residence' is specially articulated (p. 11). In regard to the export of benefits ('waiving of residence clauses,') it is clearly stated that as it is essential to comply with the basic principles of Community law, 'duly justified and precisely defined exceptions' must be allowed, in particular with regard to 'mixed-type non-contributory benefits' (p. 14). – On the compatibility with Treaty provisions, see further Carlier, Fillon and Becker 1999.

155 As regard students, compare Anne Pieter van der Mei 2001 p. 195.

156 Basch et al 1994 and Vertovec 1999.

157 Castles and Miller 1998.

158 Compare Carlier 1999, suggesting a European 'citizen's wage' common to all Member States.

159 Compare Christensen and Malmstedt 2000: 'at a certain stage in this process (of integration, my remark) the member countries will put an end to the cumbersome system of non-resident relief.

160 The discernible trend towards a new scope for the *lex laboris* II principle can be seen as a sign of such a development.