

# EUROPEAN SOCIAL SECURITY LAW

Frans PENNINGS

Fifth edition



intersentia

Antwerp – Oxford – Portland

# CONTENTS

<i>Preface</i> .....	v
<i>Abbreviations</i> .....	xix

## PART I. COORDINATION

### Chapter 1.

<b>Introduction to the Concept of Coordination.</b> .....	3
---	---

1.1. General .....	3
1.2. The Territoriality Principle .....	4
1.3. A Definition of Coordination .....	6
1.4. Tasks of a Coordination Instrument .....	7
1.4.1. Solving Conflicts of Law .....	8
1.4.2. Prohibition of Discrimination on the Basis of Nationality .....	9
1.4.3. Territorial Requirements for Acquiring Benefit Rights .....	10
1.4.4. Territorial Requirements for Payment of Benefit .....	10

### Chapter 2.

<b>The Institutional Context of Regulation 883/2004.</b> .....	13
--	----

2.1. The Requirements for Deciding on a Coordination Regulation .....	13
2.2. The Court of Justice .....	14
2.3. The Legal Basis for the Coordination Regulation .....	15
2.4. Article 48 TFEU directly applied in Coordination Cases .....	17
2.5. A Very Short History of the Coordination Regulations .....	19
2.6. The Structure of Regulation 883/2004 .....	21

### Chapter 3.

<b>The Conditions for Applicability of Regulation 883/2004.</b> .....	25
---	----

3.1. Introduction .....	25
3.2. The Facts of the Case Must not be Restricted to One Member State ....	25
3.3. The Territorial Scope of Regulation 883/2004 .....	27

## Chapter 4.

<b>The Personal Scope of Regulation 883/2004</b> .....	31
4.1. Introduction .....	31
4.2. An Historical Overview of the Personal Scope of Regulations 3 and 1408/71 .....	32
4.3. The Personal Scope of Regulation 883/2004. ....	35
4.3.1. Introduction .....	35
4.3.2. The Requirement of being Subject to the Legislation of a Member State .....	35
4.3.3. The Nationality Condition .....	36
4.3.4. Stateless Persons and Refugees. ....	38
4.4. Third Country Nationals are covered by a Separate Regulation .....	39
4.5. Members of the Family and Survivors .....	42

## Chapter 5.

<b>The Material Scope of Regulation 883/2004</b> .....	47
5.1. Introduction .....	47
5.2. The Term Legislation and the Exclusion of Contractual Schemes .....	48
5.3. The Classification of Benefits .....	50
5.3.1. Introduction: A Limited Material Scope .....	50
5.3.2. The Criteria for Classifying Benefits. ....	51
5.3.3. The Coverage of Benefits which form Part of Schemes outside the Material Scope and the Coverage of Schemes containing Rules not related to Social Security Benefits .....	53
5.3.4. Taxation and the Coordination Regulation .....	54
5.3.5. Liability of Employers and the Scope of the Regulation .....	55
5.4. Benefits for Victims of War or Its Consequences .....	56
5.5. Social and Medical Assistance .....	57
5.6. Special Non-Contributory Benefits .....	60
5.6.1. The Provisions relevant to the Special Non-contributory Benefits .....	60
5.6.2. The Interpretation of the Word 'Reside' .....	61
5.6.3. The Qualification as Special Non-contributory Benefit. ....	62
5.6.4. Revision of the Annex as a Result of the Leclerc Judgment ....	65
5.6.5. Non-exportability of the Special Non-contributory Benefits and Free Movement .....	67

**Chapter 6.**

<b>The Rules for Determining the Legislation Applicable.....</b>	<b>71</b>
6.1. Introduction.....	71
6.2. The Main Characteristics of the Rules for Determining the Legislation Applicable .....	71
6.2.1. The State of Employment Principle .....	71
6.2.2. The Exclusive Effect of the Rules for Determining the Legislation Applicable .....	73
Introduction.....	73
The Right of Member States to Grant Benefit even if the Legislation applies of another Member State .....	75
6.2.3. The Binding Effect of the Rules for Determining the Legislation Applicable .....	78
The Case Law under Regulation 1408/71 .....	78
The binding Effect and Regulation 883/2004.....	79
6.2.4. The Practical Effect Doctrine.....	80
6.2.5. The Inescapability of the Rules for determining the Legislation applicable.....	81
6.2.6. Special Rules for Determining the Legislation applicable for specific Benefits .....	82
6.3. The Legislation applicable for Persons working in one Member State only.....	82
6.4. The Legislation applicable for Persons who ceased working .....	83
6.4.1. The Case Law under Regulation 1408/71 .....	84
The <i>Ten Holder, Daalmeijer</i> and <i>Kuusijärvi</i> Judgments.....	84
The <i>Van Pommerden-Bourgondiën</i> judgment.....	86
6.4.2. Regulation 883/2004 and Post-active Persons .....	87
6.5. The Applicable Rules for Unemployed Persons.....	88
6.6. The Applicable Rules for Non-active Persons .....	88
6.7. Persons Working Simultaneously in Two or More Member States.....	88
6.7.1. Working as an Employee in Two or More Member States .....	89
6.7.2. Working as a Self-employed Person in Two or More Member States .....	91
6.7.3. Working in one State as Employed Person and in the other as Self-employed .....	92
6.8. The Legislation Applicable to Civil Servants .....	94
6.9. The Rules applicable to Special Non-Contributory Benefits .....	94
6.10. The Coordination System for Compulsory and Voluntary Insurance...	95
6.11. Persons Working Outside the Territory of the EU .....	95
6.12. Transitional Rules .....	96

<b>Chapter 7.</b>	
<b>Posting</b> .....	97
7.1. Posting of Employees .....	97
7.1.1. Conditions for Posting .....	97
The Employee is sent to work on that Employer's Behalf .....	98
The Employer normally carries out his Activities in the sending State. ....	99
The Employee is subject to the Legislation of the sending State	100
The Employee is not sent to replace another Person .....	101
The Employee is not sent for more than 24 Months. ....	102
7.1.2. Posting by an Agency for Temporary Work .....	103
7.1.3. Posting and Social Dumping .....	103
7.2. Posting of Self-employed Persons .....	104
The Case Law under Regulation 1408/71 .....	104
Conditions for Posting as Self-employed Person under Regulation 883/2004 .....	106
7.3. The Relevance of a Posting Certificate .....	107
7.4. The Small Border Line between Posting and Working Simultaneously in Two Countries. ....	109
7.5. Agreements on the Basis of Article 16 .....	110
<b>Chapter 8.</b>	
<b>The Non-discriminaton and Assimilation Provisions of Regulation 883/2004</b> .....	111
8.1. Introduction .....	111
8.2. Article 4 of Regulation 883/2004 .....	112
8.3. Assimilation of Receipt of Benefit, Events and Facts (Article 5) .....	116
8.4. Waiving of Residence Conditions (Article 7) .....	117
8.5. Aggregation of Periods (Article 6) .....	118
8.6. The General Rules against Overlapping. ....	118
<b>Chapter 9.</b>	
<b>The Non-discrimination Provision of Regulation 1612/68</b> .....	121
9.1. Introduction .....	121
9.2. The Personal Scope .....	122
9.2.1. Workers .....	122
Job Seekers and former Workers .....	124
9.2.2. Members of the Family .....	125
9.3. The Material Scope .....	126
9.4. The Non-Discrimination Provision .....	127

	Objective Justifications related to Degree of Integration in the Work State: the Geven Judgment .....	128
9.5.	The Relationship between Regulation 883/2004 and Regulation 1612/68 .....	130

## Chapter 10.

### Non-discrimination and Free Movement Provisions of the Treaty .....

10.1.	General .....	133
10.2.	Article 45 TFEU: Prohibiting Discrimination on the Ground of Nationality .....	133
10.3.	Article 45 TFEU: Obstacles to Free Movement are not allowed .....	135
	The <i>Hendrix</i> Judgment .....	136
10.4.	Article 49 TFEU and Equal Treatment of the Self-employed .....	139
10.5.	Article 21: European Citizenship .....	139
	The <i>Martínez Sala</i> judgment .....	140
	The <i>Grzelczyk</i> and <i>Trojani</i> Judgments .....	142
	The <i>Bidar</i> and <i>Föster</i> Judgments .....	143
	European Citizenship and Free Movement: the <i>Tas-Hagen</i> Judgment ..	145
10.6.	Overview of the Relation between Regulation 883/2004, Regulation 1612/68 and Article 18 TFEU .....	146

## Chapter 11.

### Sickness Benefits .....

11.1.	The Meaning of the Term Sickness Benefit .....	149
11.2.	The Distinction between Benefits in Cash and Benefits in Kind .....	151
11.3.	Benefits in Cash .....	152
	11.3.1. Aggregation Rules .....	152
	11.3.2. Benefits in Cash are exportable .....	152
	11.3.3. Claiming and Supervision Procedures .....	153
11.4.	Benefits in Kind for Persons not residing in the Competent State .....	156
	11.4.1. Persons not residing in the Competent State .....	156
	Persons not residing in the competent State are entitled to Benefits in State of Residence .....	156
	Persons not residing in the Competent State are also entitled to Benefits in the Competent State .....	157
	11.4.2. Members of the Family of Frontier Workers .....	157
	11.4.3. Retired Frontier Workers .....	159
	11.4.4. The Relation between Independent and Derivative Rights .....	160
	11.4.5. Pensioners and Members of Their Family .....	160

	The Pensioner receives one or more Pensions and is not entitled to Benefits in Kind under the Legislation of the State of Residence .....	161
	Summary .....	162
	If the Right to Benefits in Kind is not subject to Conditions of Insurance or Employment .....	162
	Pensioners who go for Planned Care to the competent State..	162
	If Family Members do not Reside in the same Country as the Pensioner .....	163
11.4.6.	Levying Contributions on Pensioners .....	163
11.4.7.	Coordination of Care Insurance Benefits in Case of Overlapping of Benefits in Kind and Benefits in Cash. ....	164
11.5.	Stay outside the Competent State: Benefits which become Necessary..	164
11.6.	Planned Care .....	166
11.6.1.	Planned Care and Authorisation.....	166
	The Criterion of the Possibility to obtain Health Care within undue Delay .....	168
11.6.2.	Obtaining Planned Care without Authorisation on the Basis of the Treaty .....	168
	The <i>Kohll</i> and <i>Decker</i> Case Law.....	168
	Applicability to Hospitals .....	170
	Undue Delay.....	172
	Confirmation of the Case law on Non-hospital Care.....	172
	Level of Reimbursement and Travel and Accommodation Costs.....	173
	Summary.....	174
11.6.3.	The Draft Directive on Patients' Rights in Cross-border Healthcare.....	176
	Reimbursement under the Directive .....	177
	Hospital Care and Non-Hospital Care.....	178
11.7.	Reimbursement Rules .....	178
 <b>Chapter 12.</b>		
	<b>Old-Age and Survivor's Pensions .....</b>	<b>179</b>
12.1.	Introduction .....	179
12.2.	Aggregation of Periods .....	180
12.3.	Calculation of the Amount of Benefits .....	182
12.3.1.	Calculation of the Independent Benefit.....	182
12.3.2.	The Pro-Rata Benefit .....	182
	The Theoretical Amount .....	182
	The Pro-Rata Benefit .....	183
12.3.3.	Comparison of the Independent and Pro-Rata Benefits.....	184

12.4.	The History of the Community Rules to Prevent Overlapping: the <i>Petroni</i> Case Law .....	185
12.5.	The Present Rules to Prevent Overlapping .....	186
12.5.1.	Introduction .....	186
12.5.2.	General Principles .....	187
12.5.3.	Overlapping of Benefits of the Same Kind .....	187
12.5.4.	Overlapping of Benefits of a Different Kind .....	188
12.6.	Recalculation of Benefits .....	189
12.7.	Removing Effects of Differing National Schemes .....	190
12.8.	Periods Completed before the Coming into Force of the Regulation ..	192
12.9.	The Relationship between International Conventions and the Regulation .....	192
12.10.	The Coordination of Supplementary Pensions .....	193
12.10.1.	General .....	193
12.10.2.	Directive 98/49 on Safeguarding the Supplementary Pension Rights of Employed and Self-employed Persons moving within the Community .....	194
12.10.3.	Proposal for a Directive on Improving the Portability of Supplementary Pension Rights .....	195
12.10.4.	Conclusion .....	197

## **Chapter 13.**

### **Invalidity Pensions .....**

13.1.	Introduction .....	199
13.2.	Aggregation Rules .....	201
13.3.	A Person has been exclusively Subject to Type A Schemes .....	201
13.4.	A Person Has Been Subject to at Least One Type B Scheme .....	202
13.4.1.	Determining the Incapacity for Work .....	203
13.4.2.	Fiction of Insurance .....	204
13.4.3.	The Calculation of the Amount .....	204
13.5.	Recalculation of Benefits .....	208
13.6.	Transition of Invalidity Benefits to Old-Age Benefits .....	208
13.7.	The Problem of Differences in Waiting Periods .....	209
13.8.	Benefits for Accidents at Work and Occupational Diseases .....	210
13.9.	Special Non-contributory Benefits for Invalidity .....	212

## **Chapter 14.**

### **Family Benefits .....**

14.1.	Introduction .....	215
14.2.	Which Benefit Level: That of the State of Employment or Residence? ..	216
14.3.	Competent State and Overruling of Residence Requirements .....	218



14.4.	Priority Rules .....	219
14.4.1.	Introduction .....	219
	The Relationship between the Rules for Determining the Legislation applicable and the Export Rules. ....	221
14.4.2.	Differential Supplements. ....	222
 <b>Chapter 15.</b>		
	<b>Unemployment Benefits</b> .....	225
15.1.	The Term Unemployment Benefits .....	225
15.2.	Overview of the System of Coordination of Unemployment Benefits. .	228
15.3.	The Unemployed Person resides in the Competent State .....	229
	The Claimant must have lastly completed Periods of Insurance or Periods of Work in Accordance with the Provisions of the Legislation under which the Benefits are claimed. ....	232
15.4.	Frontier workers .....	234
15.4.1.	Introduction .....	234
15.4.2.	The Definition of Frontier Workers .....	234
15.4.3.	The Wholly Unemployed Frontier Workers .....	235
	Is the Wholly Unemployed Frontier Workers' Rule consistent with the Treaty? .....	235
15.4.4.	Partially Unemployed Frontier Workers .....	238
15.4.5.	The Frontier Worker Moves to the State of Last Employment. .	240
15.5.	Persons Other than Frontier Workers Who Do Not Reside in the Competent State .....	241
15.5.1.	The Criteria for Qualification as Non-frontier Worker .....	241
15.5.2.	The Applicable Unemployment Benefits Scheme for Non- frontier workers. ....	242
15.6.	Atypical Frontier Workers. ....	244
15.6.1.	The <i>Miethe</i> Judgment .....	244
15.6.2.	Is the <i>Miethe</i> Judgment still Relevant under Regulation 883/2004? .....	245
15.6.3.	The Proposal for Modernisation .....	248
15.7.	Reimbursement Rules .....	248
15.8.	The Calculation of Unemployment Benefit .....	249
15.9.	Export of Unemployment Benefits .....	251
15.9.1.	The Conditions for Export .....	251
15.9.2.	The Powers to Extend the Export Period .....	252
15.9.3.	The Loss of Remaining Benefit Rights in Case of a late Return	253
15.9.4.	The Present Rules .....	254
15.9.5.	Frontier Workers and Export of Benefit .....	255

**Chapter 16.****The Relation between Regulation 883/2004 and Bilateral Treaties. . . . . 257**

- 16.1. Introduction . . . . . 257
- 16.2. Infringement on Social Security Advantages Acquired on the Basis  
of International Treaties . . . . . 258

**Chapter 17.****EU Agreements with Third Countries containing Coordination Provisions 263**

- 17.1. The Euro-Mediterranean Association Agreements . . . . . 263
- 17.2. Decision 3/80 of the Association Council EC-Turkey . . . . . 265

**Chapter 18.****Some Conclusions on the Development of Coordination Law . . . . . 269**

- 18.1. The Impact of the Coordination Regulation . . . . . 269
- 18.2. Simplification and Modernisation . . . . . 270
- 18.3. Conclusions . . . . . 274

**Chapter 19.****A Brief Overview of Non-EU Coordination Instruments . . . . . 275**

- 19.1. Conventions of the International Labour Organisation . . . . . 275
- 19.2. Conventions of the Council of Europe . . . . . 276

**PART II. SOCIAL POLICY****Chapter 20.****Social Policy Instruments of the European Union. . . . . 281**

- 20.1. General: the Powers of the EU to take Social Policy Initiatives. . . . . 281
- 20.2. The Subsidiarity Principle. . . . . 282
- 20.3. The Instruments of Title X to take Social Policy Measures. . . . . 284
- 20.4. The Open Method of Coordination . . . . . 285

**Chapter 21.****Equal Pay for Men and Women: Article 157 TFEU . . . . . 291**

- 21.1. Introduction . . . . . 291
- 21.2. Article 157 and Occupational Pensions. . . . . 295
- 21.3. Limitation of the Temporal Effect of the *Barber* Judgment . . . . . 297

21.4.	Limitation in Time in the Case of Widowers' Pensions and Age Discrimination.....	299
21.5.	Retroactive Effect in Other Cases of Unequal Treatment.....	301
21.6.	The Meaning of the Term 'Pay' .....	303

## **Chapter 22.**

### **Equal Treatment of Men and Women in Statutory Social Security:**

<b>Directive 79/7.....</b>	<b>305</b>
22.1. Introduction .....	305
22.2. The Personal Scope of Directive 79/7.....	306
22.3. The Material Scope of Directive 79/7.....	311
22.4. The Relationship of Directive 79/7 to Article 157 TFEU.....	313
22.5. The Equal Treatment Rule of Directive 79/7 .....	314
22.5.1. Introduction .....	314
22.5.2. The Direct Effect of Directive 79/7 .....	314
22.5.3. Prohibition of the Effects of a Former Discriminatory Rule ..	316
22.5.4. Procedural Limitations for Realising Equal Treatment .....	320
22.5.5. Indirect Discrimination.....	322
22.5.6. The Article 7 Exception .....	328
22.6. Conclusion .....	331

## **Chapter 23.**

### **Equal Treatment of Men and Women: The Other Directives .....**

23.1.	Directive 86/378 .....	333
23.1.1.	Introduction .....	333
23.1.2.	The Personal Scope of Directive 86/378 .....	333
23.1.3.	The Material Scope of Directive 86/378.....	334
23.1.4.	The Principle of Equal Treatment .....	334
23.1.5.	The Exceptions to the Principle of Equal Treatment .....	337
23.2.	Directive 86/613: Equal Treatment of the Self-employed .....	337
23.2.1.	Introduction .....	337
23.2.2.	The Personal Scope of Directive 86/613 .....	338
23.2.3.	The Material Scope of Directive 86/613.....	338
23.2.4.	The Principle of Equal Treatment .....	338
23.3.	Proposal for a Directive Completing the Principle of Equal Treatment	339
23.3.1.	Introduction .....	339
23.3.2.	The Personal Scope of the Draft Directive .....	339
23.3.3.	The Material Scope of the Draft Directive.....	339
23.3.4.	The Principle of Equal Treatment .....	340

<b>Chapter 24.</b>	
<b>Towards a Social Europe?</b> .....	<b>343</b>
<i>Table of Cases</i> .....	347
<i>Bibliography</i> .....	357
<i>Index on Cases</i> .....	371
<i>Subject Index</i> .....	377