Jansen and Janssen dismissed in the Netherlands:
A European perspective
Coordination of unemployment benefits systems

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1 Hergé, *Les aventures de Tintin: le secret de la licorne* (Casterman, Tournai 1954), p. 34.
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Jansen and Janssen are two very common family names in Belgium, exploited by Hergé in his comic strip *Kuifje* for the characters of two police officers. At the time of their creation, at the beginning of the thirties, these names were spontaneously presented as typically Belgian while some variations were found in the neighbouring countries. Some decades later, with the opening of the borders, the “Jansen” and “Janssen” were free to work and, later on, establish themselves in other States of the European Union. The common frontier shared by Belgium and the Netherlands and the use of the same language have favoured the movements between those two countries.

The free movement of people within the European territory is one of the fundamental principles of the Union. The continuous concern to avoid any impediment to that freedom has justified the adoption by the European institutions of an impressive set of rules, notably in the social security related matters. The need of coordination of the social security systems of the Member States was already recognized in the Treaty of Rome and was firstly established in regulations in 1958 already\(^2\). These have been replaced since then by Regulation 1408/71\(^3\) and recently by Regulation 883/2004\(^4\). This last text that was designed to modernize, simplify and shorten the coordination instrument entered into force in May 2010\(^5\).

In one year of application, that Regulation has already raised a number of issues, among which the question whether the former jurisprudence of the Court of Justice on Regulation 1408/71 should be transposed to the new text. That discussion is particularly lively with regard to the coordination regime of unemployment benefits. Besides, the particular situation of the frontier workers, complex because of the different dimensions juxtaposed (i.e. labour law, social security, and fiscal issues) and the intervention of legislators from different levels (Union, national and regional law), justified a regime of exceptions to the coordination rules generally applied. The interpretation and application of these provisions is thus especially significant.

Given the interest for the study of both the coordination of unemployment benefits and the situation of frontier workers, this paper focuses on the consequences, on social security, of the dismissal of “Jansen” and “Janssen” living in Belgium and working in the Netherlands, by comparison to the situation of the workers residing in the Netherlands while being employed or self-employed in Belgium.

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\(^3\) Regulation (EC) no 1408/71 of the Council on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community [1971] OJ L 149 (hereafter: Regulation 1408/71).


To examine that issue, this paper follows the subsequent structure. First and foremost, we will delimit the research question as far as its context and its content are concerned (First Part). Then, before studying further the national social security structures, we will present the European framework dealing with unemployment benefits, taking into account both the European Regulation and the case-law of the Court of Justice (Second Part) since we have already emphasized the important role the last institution played in the construction of the mechanism of coordination. In a Third Part, the focus is put on the short presentation of the Belgian and the Dutch national systems, both with regard to labour law and social security law. This will give us the tools to highlight, in a fourth part, the possible frictions appearing between the mechanisms of the two States studied. Finally, the ultimate purpose of this paper is to present possible improvements to the current situation, through different interventions at the bilateral or European level (Fifth Part). The conclusion is then devoted to the assessment of the Regulation 883/2004 and of the improvements proposed in the final part of this paper.
FIRST PART: CONTEXT AND DELIMITATION OF THE RESEARCH QUESTION

This first chapter aims at determining the framework of the discussion on two different levels: the external context of the research question and its intrinsic delimitation. With regard to the context, the first chapter attempts to present the competences of the European Union in the social field shortly and the method exploited (Chapter 1). In a second chapter, the research question will be limited with regard to its content, to focus only on the unemployment benefits of the frontier workers (Chapter 2).

CHAPTER 1: CONTEXT OF THE RESEARCH QUESTION

It is important to fix, very briefly, the philosophy underlying the European social policy in general, and the European approach to social security issues in particular. This will depend on the one hand on the competences the European Union retains in that field (Section 1), and, on the other hand, on the method adopted (Section 2). Those features are useful to understand the following developments of this paper.

SECTION 1: Competences of the European Union in the Social Field

The fathers of the European Union put the emphasis on a European Economic Community, while the other fields of actions were deliberately subordinate to this avowed aim: the freedoms of movement of goods, capitals, services and, back then, workers as economically active citizens were only dealt with as long as it was part of the economic development of the newly created structure.

In that context, the social security issue has rapidly been under the attention of the institutions because it was seen as a sine qua non condition for exercising the right to free movement of workers. Later on, it remained a topical matter, illustrated by the numerous amendments of Regulation 1408/71 that justified the adoption of a new regulation recently.

Through the years, the field of intervention of the Community has expended over several other domains, and some argued about the creation of a European Labour market. Since economy cannot be artificially separated from social issues, it was indeed difficult to ignore the impact of the growing economic and monetary integration on the labour market. Furthermore, it has been accepted that certain matters are not efficiently tackled at the national level.

In 2009, the Lisbon Treaty brought some new elements to the discussion. Under the impulsion of the trade unions, it mentions as an express purpose: “the sustainable development of Europe based on a highly social market economy, aiming at full employment and social progress” (emphasis added, Article 3, 3° TEU). Furthermore, the Treaty adopted the qualified majority voting procedure as a main rule, and recognized the value of the Charter of fundamental rights of the European Union as equivalent to primary law (more precisely, in this context, the

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8 However, it is important to note that the competences of the European Union under the current treaty would not permit such an initiative.
consecration of article 34 on the right to social security). Although the significance of those modifications is uncertain, one can notice the renewed focus placed on social issues.

The official recognition of a European Labour market and the full exploitation of the competences the European Union owns in that field, as extended by the Lisbon Treaty, would be without any doubt a major step in more equitable Europe, respectful of the social standards. Waiting for that consecration, we have to take into account the particularities of every national system, still existing after the limited intervention of the European Union.

SECTION 2: Method used by the European Union

The method chosen by the European Union is the so-called “coordination” of the social security systems of the Member States. This section aims at exposing shortly the principle of coordination (§1) and the different regulations adopted in the field of social security (§2).

§1 Principle of coordination

Since the beginning of the European integration, a harmonization of the social security systems of the Member States was judged impossible given the huge differences in the national structures and the differences in the socio-economic fields across the Member States. The path chosen was rather a coordination of the existing systems.

The Union provisions thus do not replace the various national arrangements. Accordingly, substantive and procedural differences between the social security systems of individual Member States are unaffected by the regulations coordinating social security. In spite of this, the European Union managed to establish a regime of coordination of the national rules aiming at ensuring that migrant workers are not insured twice (positive conflict of law) or precluded from insurance (negative conflict of law) by making clear which Member State’s legislation applies to them.

Such conflicts of law occur because of the presence of a cross-border element (i.e., for the topic of this paper, persons living in a different Member State than the one of employment). In order to avoid impediments to the free movement of persons, the general idea is thus that the people exercising their freedom to move should have sufficient social security protection and should not be placed in a worse position than those who have resided and worked in one single Member State and never moved.

To guarantee that it is effectively the case, the coordination measures are based upon four main principles: equal treatment, aggregation of periods, export of benefits and determination of the applicable legislation of a single State. Some authors add a fifth principle to

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12 For more details about that element, please read Chapter 2, Section 1, §2 of this paper.
14 The limited number of pages consecrated to this article asks for some restrictions of content. For further details on the principles of coordination of social security systems, please consult: J.-Y. Carlier, La condition des personnes dans l’Union Européenne, (Larcier, Bruxelles, 2007), pp. 120 and seq.; C. Barnard, EC Employment Law (Oxford University
the ones mentioned: the good cooperation and administration.\textsuperscript{15} It’s interesting to consider that at such an early stage, the unemployment system is already constructed as an exception to one of those principles: the export of benefits. Consequently, that policy area is subject to a lower level of coordination.\textsuperscript{16}

\section*{2 Presentation of the Relevant Regulations}

As mentioned earlier, the European institutions have been concerned with the coordination of social security systems since the very beginning. The first regulation dealing with this issue dates from 1958.\textsuperscript{17} Regulation 1408/71 replaced it with a more complete text, at least as complete as it could be in the beginning of the seventies. However, it quickly appeared that the said regulation left lots of issues open, especially because of the multitude of national particularities that were not taken into account, or were introduced after the adoption of the European legislation. The Court of Justice then played a key role to fill in the gaps left by the legal text. Beside the jurisprudence, the Administrative Commission for the coordination of social security systems also came into play to interpret the original regulation.

After twenty years of application, the text was not readable anymore, given the numerous sources to be consulted to interpret it. The European Council, at the Edinburgh Summit in 1992, mandated the European Commission to simplify the EU-legislation on social security.\textsuperscript{18} The latter institution then submitted a proposal of modification in December 1998, reducing the number of articles of the provision, and simplifying the original mechanisms substantively.\textsuperscript{19}

Following intense discussion between the Member States, the text finally adopted to replace Regulation 1408/71 is very similar to the original text. The principles underlying the coordination of unemployment benefits for frontier workers have remained unchanged\textsuperscript{20}, given that most of the proposals from the Commission were rejected by lack of consensus.\textsuperscript{21} Nevertheless the new Regulation 883/2004 deserves attention as long as it codifies to some extent the different sources used until then when speaking about coordination of social security systems, and introduces some new elements to the old picture.

As far as the structure of the new regulation is concerned, it has not changed since Regulation 1408/71. It is mainly separated into three parts. It first provides some dispositions about the scope of the legal text, before dealing with the rules to solve the conflict of laws applicable, and finally focusing on particular social security benefits.

\begin{thebibliography}{10}
\bibitem{16} Ibid p. 49.
\bibitem{19} Some of the solutions exposed in the Commission’s proposal will be further developed in the fifth part of this paper.
\bibitem{20} The difference between partial and whole unemployment, and the States competent is each of those situations remain the same.
\bibitem{21} Unanimity was required by article 42 TEC.
\end{thebibliography}
Shortly, fall within the scope of the Regulation all insured nationals of a Member State and members of their family as long as there is an element of extraneity.\textsuperscript{22} The regulation states exhaustively the list of benefits forming the material scope of the disposition in article 3. Among those are the unemployment benefits and, since recently, the pre-retirement benefits. These two are relevant for this paper.

Regarding the method to solve the conflict of laws, the legislator made a distinction between the active persons (for whom the \textit{lex loci laboris} is applicable) and the non-active ones (subject to the \textit{lex domicilii}).\textsuperscript{23} We will see that the solution adopted for unemployed persons stands somewhere in the middle of those two regimes.

Finally, whether the new regulation is indeed a simplification of the original system is discussed. We will see along this paper that a lot of issues are still left open, and that some more complications arose, in particular about unemployment benefits.

\textbf{CHAPTER 2: DELIMITATION OF THE RESEARCH QUESTION}

The domain of social security is large, as regards its personal scope as well as its material field of application. The choice has been made to limit this paper to the study of the situation of the frontier workers (Section 1), when they become unemployed (Section 2).

\textbf{SECTION 1: Frontier Workers}

According to Article 1(f) of Regulation 883/2004, a frontier worker is ‘any person pursuing an activity as an employed or self-employed person in a Member State and who resides in another Member State to which he returns as a rule daily or at least once a week’. Two elements can be highlighted: the person needs to pursue an economic activity (§1) and to fulfil a geographical criterion (§2).

It is worth noting that whether or not a worker is a frontier worker as defined by the regulation is at last to be decided by the national court\textsuperscript{24}, given the material facts available.

\textbf{§1 Personal Element: “Worker”}

Following the Regulation, any person (nationals of a Member State\textsuperscript{25}, stateless persons and refugees residing in a Member State) pursuing an activity as an \textit{employed} or \textit{self-employed} person in a Member State, and subject to the legislation of one or more Member States in the social security field, falls within the scope of the regulation.\textsuperscript{26} Moreover, for European law to be applicable, one needs an additional external element. Since this paper focuses on frontier workers, the presence of a cross-border component is evident (see §2).

One of the innovations of Regulation 883/2004 is the general extension of the coordination to self-employed persons. So far, the scope of the coordination had indeed been

\textsuperscript{22} Article 2 §1 Regulation 883/2004.
\textsuperscript{24} Case 227/81, Francis Aubin v Union nationale interprofessionnelle pour l’emploi dans l’industrie et le commerce, ECR [1982], I-1991, § 15.
\textsuperscript{25} The EFTA countries and Switzerland are assimilated to the Member States in this context.
\textsuperscript{26} Article 1 f) and 2 §1 of Regulation 883/2004.
extended to the self-employed but with a noticeable exception for the unemployment benefits. Only the article on the conditions and limits for the retention of the right to benefits was open for both employed and self-employed workers. Since the entry into force of the new regulation in May 2010, the self-employed persons are now taken into account in the unemployment schemes. However, it is interesting to know that only few Member States provide unemployment benefits for self-employed people. Such benefits do not exist in the Netherlands, and only exist to a limited extent in Belgium.

As far as the concepts of “employed” and “self-employed activity” are concerned, their meaning is defined by reference to social security legislation of the Member State in which such an activity exists. Similarly, the concept “worker” is to be understood as “all those who, as such and under whatever description, are covered by the different national systems of social security.”

It is thus the national law that defines who is recognized as a person pursuing an employed or self-employed activity, and who comes within the scope of Regulation 883/2004 because of this qualification.

§ 2 Territorial Element: “Frontier”

The central element of the definition of “frontier worker” is obviously his frequent trip from the Member State of employment to the State of residence. Article 1(f) of Regulation 883/2004 provides clearly that to be a frontier worker, the person pursuing an economic activity in a Member State has to reside in another Member State to which he returns as a rule daily or at least once a week.

To facilitate the presentation of that geographical element, two questions can be distinguished: (A) what does “residence” mean? And, secondly, (B) what does the move from one State to another imply?

A. Concept of Residence

Regulation 1408/71, as well as Regulation 883/2004, defines “residence” as “the place where a person habitually resides”, by opposition to “stay” meaning “temporary residence”. Given the incomplete legal definitions, the Court of Justice has had the difficult task to precise further the concept of residence. As a first observation in this respect, and contrary to what the legal text seems to express, the concept of residence would not necessarily exclude non-habitual residence in another Member State.

28 Ibid Article 44.
29 European Commission (DG for Employment, Social Affairs and Equal Opportunities), MISSOC: Social protection in the Member States of the European Union, of the European Economic Area and in Switzerland (Office for official publications of the European Communities, Luxembourg, 2004).
30 See further, third part of this paper, the Belgian system. Consequently, the whole paper is to be understood as dealing mainly with employed workers. When there are some particularities for self-employed workers, it will be expressly mentioned.
31 Article 1, a) and b) of Regulation 883/2004.
33 Article 1 (j) and (k) Regulation 883/2004.
34 Case 102/91, Doris Knich v Bundesanstalt für Arbeit, ECR [1992], I-4341, §22.
To determine the place of residence of a worker, the Court takes into consideration the place where the habitual centre of the workers’ interests is situated. Regulation 987/2009 codified the criteria highlighted by the judicial authority in order to identify that centre of interests. The relevant elements are: “(a) the duration and continuity of presence on the territory of the Member States concerned; (b) the person’s situation, including: (i) the nature and the specific characteristics of any activity pursued, in particular the place where such activity is habitually pursued, the stability of the activity, and the duration of any work contract; (ii) his family status and family ties; (iii) the exercise of any non-remunerated activity; (iv) in the case of a student, the source of his income; (v) his housing situation, in particular how permanent it is; (vi) the Member State in which the person is deemed to reside for taxation purposes.”

Above those material data, where the consideration of the various criteria does not lead to an agreement between the competent institutions, the person’s intention to give to his place of residence a stable character, especially the reasons why the person moved, will be decisive.

It’s for the national administration and/or national courts to assess all available information relating to relevant facts and to apply the criteria to the case.

B. Move from one State to Another

The central element is thus, for the employed or self-employed, the coming back to the State of residence at least once a week. Consequently, a worker who, after transferring his residence to a Member State other than the State of employment during a period of leave, no longer goes back to the latter State for the purpose of working there is not to be regarded as a frontier worker. The same applies for the person who moves to a second State after the end of his employment contract.

Are included in the notion of ‘frontier worker’ not only the labour mobility while the residence is statis, but also the so-called “reverse frontier worker”, meaning the workers who initially worked and resided in a single Member State, and who, after the transfer of their residence abroad, become migrant workers. Under Regulation 1408/71, those workers could be targeted as “atypical frontier workers”. Although they satisfy the criteria of frontier workers, those won’t be considered as such with regard to unemployment systems because they have maintained in the State of last employment personal and business links of such a nature to give them a better chance of finding new employment there. The introduction of this “reverse” situation is rather important given that the principle guiding the European legislator to determine the law applicable

36 Ibid §§21-23.
37 Article 11 (1) of Regulation (EC) no 987/2009.
39 Article 11 (2) of Regulation 987/2009.
was that the frontier worker had stronger links with the State of residence. The atypical workers thus ask for an adaptation of the general regime.

Finally, it is important to notice that, by opposition to the first European regulations adopted in this field, it is not required anymore for the present European social security model that the place of residence is situated nearby the frontier. It’s not required either that the Member States have a common border. A person working in Copenhagen and flying back to Brussels every week-end where his actual residence is, can be considered as a frontier worker, despite the fact that Belgium and Denmark do not have any common frontier.

**SECTION 2: Unemployment Benefits**

The Regulation, while detailing some types of benefits in its first article, does not give any definition of “unemployment benefit”. As far as the Court is concerned, it defined the concept broadly as “the allowance intended to replace the remuneration which a person has lost by reason of unemployment and thereby provide for the maintenance of that person”. Frans Pennings precises further the concept of “unemployment” as the “reduction, cessation or suspension of the remunerative activities”. Both partial and whole inactivity are thus taken into account. To identify further the hard core of the unemployment systems, and make a clear distinction with other advantages, one can follow the jurisprudential elements presented hereafter.

First, the grant of the benefit does not depend on an individual assessment of the claimant’s personal needs but is granted to recipients on the basis of a legally defined position. The only elements taken into account to determine the amount of benefits granted need to be based on an objective and legally defined criterion which gives entitlement to the benefit without the competent authority being able to take other personal circumstances into consideration. Such relevant elements for unemployment benefits are, among others, the income of the former worker, his past as an employee (e.g. the length of duty and number of hours worked) and his personal and familial situation. This first set of characteristics permits to draw a distinction between the unemployment benefits and the social advantages which presuppose a factual evaluation of the necessity of the

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49 Case 102/91, *Doris Knoch v Bundesanstalt für Arbeit*, ECR [1992], I-4341, §44.
54 The social advantages are defined as “meaning all advantages which, whether or not linked to a contract of employment, are generally granted to national workers because of their objective status as workers or by virtue of the mere fact of their residence on the national territory, and whose extension to workers who are nationals of other
worker and his family. However, some regimes of unemployment benefits are very similar to social advantages. For example, “a benefit which takes the form of a single payment to agricultural workers whose contract of employment has been terminated is to be classified as a social advantage”\(^{55}\). In case of doubt, Regulation 883/2004 takes precedence over the Regulation 1612/68 on social advantages.\(^{56}\) That amounts in practice to examine first whether a particular problem falls within the scope of unemployment benefits, and, only when it has been confirmed that it does not, then the question linked to social advantage can be raised.\(^{57}\) Let’s note anyway that, even if a benefit is qualified as social advantage, the frontier workers\(^{58}\) are protected against discrimination based on nationality by Regulation 1612/68 (article 7)\(^{59}\).

Secondly, the benefit is limited to unemployed workers\(^{60}\). Consequently, the entitlement to the unemployment benefits ceases once the person concerned reaches the statutory retirement age\(^ {61}\), or ceases to exist as a result of the claimant’s engaging in paid employment\(^ {62}\). At this stage, it is interesting to underline that, since May 2010, certain pre-retirement benefits\(^ {63}\) are caught by Regulation 2004/83 as an individual branch of social security to be distinguished from unemployment benefits.\(^ {64}\) Other principles of coordination than the ones of the unemployment benefits are then applicable to those pre-retirement benefits.\(^ {65}\)

Thirdly, an unemployed worker is entitled to benefit only if he satisfies certain conditions aimed at his re-integration into working life. That notion of re-integration was first defined by the Court as namely the fact that the former worker registers as a job-seeker with the employment agency, seeks paid employment so far as he is able and accepts a suitable job.\(^ {66}\) From a later case it appeared however that the availability condition should not be interpreted too strictly. Some schemes exempting certain

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55 Case 57/96, H. Meints v Minister van Landbouw, Natuurbeheer en Visserij [1997], ECR I-6689, §§ 41 and 42.
57 Ibid.
58 Understood only as the employee, and not the self-employed, given the limits of the personal scope of Regulation 1612/68.
61 Ibid.
62 Preamble of the decision U3 of the administrative commission for the coordination of social security systems [2009] OJ C106/45, (5); Case C-406/04, Gérald De Cyper v Office national de l’emploi [2006], ECR I-6947, § 27. As the Court emphasized, “The assessment of whether or not an employment link exists, or is maintained, is based entirely on the national legislation of the State of employment”.
64 The pre-retirement benefits are understood as all cash benefits, other than an unemployment benefit or an early old-age benefit, provided from a specified age to workers who have reduced, ceased or suspended their remunerative activities until the age at which they qualify for an old-age pension or an early retirement pension, the receipt of which is not conditional upon the person concerned being available to the employment services of the competent State; “early old-age benefit” means a benefit provided before the normal pension entitlement age is reached and which either continues to be provided once the said age is reached or is replaced by another old-age benefit, article 1 (x) Regulation 883/2004.
65 That regime will be exposed shortly in the third part of this paper and discussed in the fourth part of this paper, Second chapter, third section.
categories of beneficiaries (e.g. the elderly persons) from the obligation to seek work still do not lose their characteristic of unemployment systems. The Court ruled that this exemption in no way affects the fundamental characteristic of the allowance 67, but, at the same time, it does not free the claimant from his obligation to remain available to those services so that his employment and family situation can be monitored.68 Following this case, the Court adapted its jurisprudence and the third criterion proposed here has been modified from “seeking paid employed” to “being subject to monitoring by the employment services”.

Fourthly, the fact that the system is financed by the public authorities is not pertinent, as long as Article 3 §2 of Regulation 883/2004 expressly states that the coordination applies to non-contributory schemes.69

Concerning the substance of the right, the unemployment benefits cover different realities, from the proper money the unemployed person receives as a compensation for the absence of revenues from employment, to some reintegration schemes (understood as schemes that provide training or allow unemployed persons to work while remaining in receipts of benefit)70 or the assistance to seek work. Furthermore, the Court ruled that the expression “unemployment benefits” also takes over assistance for vocational training which concerns persons who are still in employment but are actually threatened by unemployment.71 It’s up to the national judge to assess the real danger, for people asking for such a scheme, of becoming unemployed. It’s only if such a danger is effective that the measures applied to workers can be considered as unemployment benefits.72

Since recently, the development of some new social security schemes, on the one hand mixing proper social security measures with social advantages, and on the other hand dealing with some financial help as well as practical support, has blurred the picture. To determine how one should deal with those packages, one should determine what prevails in it73: the social advantages or the unemployment benefits, knowing that the qualification given by the national legislator is not relevant for the qualification of the benefits at the European level.

Finally, the global system is even more complicated since the extension of the scope of those dispositions to self-employed persons, who can benefit from very specific schemes at the end of their activity.74

67 Case C-406/04, Gérald De Cuyper v Office national de l’emploi [2006], ECR I-6947, § 30.
68 Ibid § 31.
71 Case 375/85, Angelo Campana v Bundesanstalt für Arbeit [1987] ECR 2387, §12.
73 Ibid p. 128.
74 See further, third part of this paper, for more explanations about the Belgian system.
The approach to the coordination of the unemployment benefits systems is clearly linked to the free movement of persons and the basic idea ensures “that migrant workers receive unemployment benefit in the conditions most favourable to the search for new employment.”\(^75\) Those conditions include the supervision of the worker in his search for a job. Therefore, in order to identify the State better placed to assist the worker, the Regulation draws a distinction between wholly unemployed and partially unemployed frontier workers.

Before dealing with the rules determining the applicable law, the first chapter will define the concepts used (Chapter 1). Follows then the announced distinction between partially unemployed persons (Chapter 2) and wholly unemployed persons (Chapter 3). Finally, one cannot study the regulation without dealing with the rulings of the Court of Justice on the topic (Chapter 4).

**CHAPTER 1: DEFINITION OF “PARTIAL” AND “WHOLE” UNEMPLOYMENT**

Although it is crucial to determine if a person is partially or wholly unemployed, neither Regulation 883/2004 nor Regulation 987/2009 define what is meant by these terms.\(^76\) It was left to the Court to answer this question and, later on, to the Administrative Commission for the coordination of social security. Given the need for coherent application of EU law, a uniform Community criterion must indeed be applied in order to determine whether a frontier worker is to be regarded as partially unemployed or wholly unemployed within the meaning of the Regulation. That assessment may logically not be made on the basis of criteria drawn from national laws.\(^77\)

The Court defined the wholly unemployed worker as the worker who has no longer *any link* with the competent Member State.\(^78\) The Administrative Commission clarified that absence of link by making reference to “any *contractual employment link*” that either does not exist or is not maintained anymore between the parties.\(^79\) This can come e.g. from the termination or the expiration of the contract link.

*A contrario*, when such a contractual link remains, although the person is unemployed, the worker will be considered as a partially unemployed worker. As a result, the fact that the contract is suspended is regarded as partial unemployment as long as the worker can return to his post at any time.\(^80\) The duration of any temporary suspension of the worker’s activity is not further relevant for the determination of the nature of unemployment.\(^81\) Moreover, a person who has passed from full-time employment to part-time employment by virtue of a new contract with the

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\(^{76}\) F. Pennings, *European Social Security Law* (Intersentia, Antwerpen, 2010), p. 238


\(^{79}\) Decision U3 of the administrative commission for the coordination of social security systems [2009] OJ C106/45, point 1.

\(^{80}\) Ibid point 2.

\(^{81}\) Ibid preamble (6).

\(^{82}\) Ibid point 1.
same undertaking is to be considered as partially unemployed, even if he remains available for work on a full-time basis.\(^{83}\) This can be explained by the ties the worker keeps with the State of employment. As long as there is still such a link with the State of employment, that State should remain competent.

The existence of contractual links has to be evaluated by the national judge\(^{84}\) and this can create some difficulties while applying the European jurisprudential criteria to original national constructions. Because it asked for further developments, those questions will be dealt with in the fourth part of this paper.

Referring to the self-employed persons, another criterion had to be found. The existence of a “contractual link” is replaced by the fact to “carry out a professional or trade activity in the Member State of activity”. In the absence of such an activity, the self-employed shall be regarded as wholly unemployed.\(^{85}\) The European authorities do not provide for any precision on the signification of partial unemployment for self-employed persons. Although only few Member States provides in practice for such schemes, it remains that, as long as the legislator makes such an important distinction in the regulation coordinating the social security systems, criteria should be provided in order to identify what is meant by “whole” and “partial” unemployment.

**CHAPTER 2: THE PARTIALLY UNEMPLOYED PERSONS**

As far as the partially unemployed workers are concerned, the general principle of coordination of social security systems is applicable: the *lex loci laboris*, the law of the Member State of last employment, is the relevant one. This solution is an expression of the idea that “a migrant worker should have the same rights in the Member State where he works as national workers in that State”.\(^{86}\)

The preference of the European legislator for the State of employment is also based on the consideration that it is best placed to evaluate what kind of second job could be combined with the first one already existing (and executed or suspended). It’s very probable that finding another suitable job in the State of last employment is logistically easier for the worker.

Additionally, nothing prevents the worker from looking for a job in the State of residence, or in any other State, according to the disposition of Regulation 883/2004 on exportability (Article 64). This right is however bound by strict conditions laid down in the latter article and limited in time. In principle, the person retains the entitlement to benefits for a period of three months. This period can be extended by the Member States up to 6 months, but this has not been

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\(^{84}\) In case of disagreement between the institutions of two or more Member States about which institutions should provide the benefits, the State of residence shall provide with them, on a provisional basis (Article 6 (2) Regulation 987/2009).


done in the Netherlands, and has only been allowed on the basis of exceptional circumstances in Belgium.\textsuperscript{87}

The benefits are granted according to the law of the State of last employment. To avoid the problems raised by the condition of residence in a Member State in order to be entitled to benefits, the coordination created a fiction of residence in the State of employment.

\textbf{CHAPTER 3: THE WHOLLY UNEMPLOYED PERSONS}

Article 65 (2) of the Regulation states that “a wholly unemployed person who, during his last activity as an employed or self-employed person, resided in a Member State other than the competent Member State and who continues to reside in that Member State (…) shall make himself available to the employment services in the Member State of residence”. He shall receive benefits in accordance with the legislation of that State as if he had been subject to that legislation during his last activity as an employed or self-employed person (fiction of employment).

In practice, the principle of aggregation will ensure that the Member State of residence takes account of periods of insurance completed in other Member States when calculating whether the claimant has satisfied the necessary qualifying periods of insurance imposed by the legislation of the Member State of residence.\textsuperscript{88} Furthermore, the competent institutions shall take into account the salary or professional income received by the person concerned in the Member State of last employment or activity.\textsuperscript{89}

The logic underlying the choice of the lawmaker is that the frontier worker, once he loses his job, probably goes back to his State of residence. The European legislator deemed that it would then be easier for him to find a job in the State of residence given the particular ties the worker has with that State. Some criticize this solution as too rigid saying that nothing proved that the unemployed person benefits in reality from more chances to find a work in his State of origin.\textsuperscript{90} It is indeed true that the person who is used to working in a determined country is familiarized with the system of employment of that country (e.g. institutions, regulations, or labour customs), and it could be easier for that person to find a new job there rather than in his country of residence.

This observation is even more relevant given the new concept of reverse frontier worker. At the beginning of the European mobility, the model was that people moved to another country because of work related motives (according to the concept of free movement of economically active persons). Nowadays, the reasons motivating those moves are also dictated by personal reasons (e.g. family interests) or social, economic and financial reasons. One even speaks of “financial” or “social” shopping. It is thus not unusual that a whole family moves out from State

\textsuperscript{87} The European legislator didn’t explain what was to be understood by “exceptional circumstances” and should thus be defined according to a semantic interpretation (Arbeidshof van Antwerpen, 22 februari 2006, N-20060222-1). If the person does not fulfill the procedural requirements for a prolongation, and does not come back in the competent state within the 3 months, he will lose his benefits (Cour du travail de Mons, 18 mai 1994, F-19940518-5).
\textsuperscript{88} Article 61, §1 Regulation 883/2004.
\textsuperscript{89} Article 62 §3 Regulation 883/2004.
A to live in State B while the parents still work in State A. In this case, the workers probably have more ties with the State of employment than with the State of residence. That evolution is the reason of an important modification in Regulation 883/2004.  

Since 2004, “a wholly unemployed person may, as a supplementary step, make himself available to the employment services of the Member State in which he pursued his last activity as an employed or self-employed person.” Article 65 creates a clear priority order between the States where the person has to seek work, given that the second option is only open “as a supplementary step”.

As a matter of principle, the unemployed person is entitled to benefits only in the State of residence, even if he also seeks work in the country of the last employment. He is thus subject to the control procedure organized by the authorities of the State of residence and must adhere to the conditions laid down under the legislation of that Member State (including the condition of availability to employment services).

Moreover, if the worker makes the choice to exploit the “supplementary step”, he shall inform the institution and employment services of the State of residence and shall additionally comply with the obligations applicable in the State of last employment. In case of conflict between the fulfillment of certain obligations or job-seeking activities, the ones of the Member State of residence prevail.

If it is true that this new possibility for the wholly unemployed frontier workers to look for a job in the State of last employment solves the dilemma of the European legislator that had to decide arbitrarily which is the country the person has the strongest link with, it should not make us forget that this is an improvement and not a complete solution. Indeed, the unemployed persons are subject to double obligations (from the State of residence and the State of last employment) which can be pretty heavy, and are still deprived of the rights they acquired by virtue of the legislation of the last State of employment because the benefits are exclusively paid by the State of residence.  

**CHAPTER 4: THE INTERVENTION OF THE COURT OF JUSTICE**

The Court of Justice added some elements to the general framework presented until now. Among the extensive jurisprudence of the Court, two will be kept in mind: the case of atypical

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91 Another consequence of this observation in the ruling of the Court of Justice in the Miethe case; See the fourth chapter of this part for more explanations on this ruling.
94 Point 13 preamble of Regulation 987/2009.
96 In practice, this possibility seems to be rarely used, except in the framework of a global restructuring of undertaking, like “Opel Antwerpen”. The limited success of Article 65 §2 seems to be caused by the lack of information provided to the workers about this new possibility. This will certainly be improved after some time of application of the new Regulation.
97 Article 56 §1 Regulation 987/2009.
99 Article 56 §2 Regulation 987/2009.
100 These rights could indeed be higher and/or longer than those of the State of residence. To be complete, one should mention that the contrary can benefit the frontier worker. The situation is thus not systematically disadvantageous. F. Pennings, *European Social Security Law* (Intersentia, Antwerp 2010), p. 235.
frontier worker (Section 1) and the case of the frontier worker moving to his State of last employment (Section 2).

**SECTION 1: The Atypical Frontier Worker**

As mentioned earlier, some workers, although they fulfill the criteria to be recognized as frontier workers, will not be considered as such given the particular ties they have with the State of last employment. Those are then called “atypical frontier workers”.

In the Miethe case, the applicant was a German national who had always resided and worked in Germany. Because of family reasons, i.e. the fact that his children attended a Belgian school, the decision was taken to move their residence to Belgium while he continued working in Germany where he could stay with his mother-in-law. When he became unemployed some years later, he started seeking work in Germany, and applied for unemployment benefit in the same country. A strict application of the rules of Regulation 1408/71 would have provided for those benefits in Belgium (State of residence) instead of Germany (State of employment) as he was wholly unemployed. He would then have been supposed to look for a job in Belgium (according to the system of Regulation 1408/71 which did not offer the possibility of a “supplementary step” in the State of last employment yet). However, the applicant did not desire the application of those frontier workers’ rule. He rather asked for the application by analogy of the then Article 71(1)(b)(i) of Regulation 1408/71 (offering a choice in the law applicable to workers other than frontier workers).  

The question was raised before the Court of Justice because a strict application of Article 71 was seen as unsatisfactory. The Advocate general argued about a “depart from predetermined typical cases in order to ensure by appropriate means that the purpose pursued by the rules in question is achieved”\(^\text{101}\). The Court adopted this theological interpretation and ruled that “the objective pursued by article 71 (1)(a)(ii) [i.e. that the migrant workers received benefits in the conditions most favourable to the search for new employment] cannot be achieved where a wholly unemployed person, although satisfying the criteria as a frontier worker, had, in exceptional circumstances, maintained in the State of last employment, personal and business links of such a nature to give him a better chance of finding new employment there. Such a worker must therefore be regarded as a worker ‘other than a frontier worker’\(^\text{103}\), and benefits, under Regulation 1408/71\(^\text{104}\), from an option on the application either of the law of the State of residence, or of the law of the State of last employment, since he was in the best position to know what the possibilities of finding new employment in each country are.\(^\text{105}\)

That ruling created some difficulties in its implementation. First, there were doubts about the administrations competent to decide whether the person was an atypical worker: was it those of the State of residence or the ones of the State of last employment (where the worker finally wanted to be entitled to benefits)?\(^\text{106}\) Second, it was unclear whether the administration should verify automatically if the worker was “atypical” or whether it should do it only on demand of the

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\(^{102}\) Ibid p. 1843.


\(^{104}\) This option doesn’t exist anymore. Article 65 Regulation 883/2004 states unilaterally which State is competent.

\(^{105}\) Case C-454/93, *Rijksdienst voor Arbeidsvoorziening v Joop van Gestel* [1995], ECR I-1707, § 23.

person concerned. Finally, the terms “personal and business links” were not further defined by the Court, and it was left to the national authorities to determine whether an employed person who resides in a State other than that in whose territory he is employed, nevertheless continues to enjoy a better chance of finding new employment in that State. At last, those links were often mixed up in practice with the nationality of the worker.

The interpretation of that case-law varies from Member State to Member State, and it rapidly appeared that the fear expressed by the representative of Germany before the Court became reality. The recognition of a status of atypical frontier workers indeed gave rise to “problems in regard to the administrative application of the systems and to a danger of abuse, with the result that an excessive financial burden was placed on the institutions of the State of employment”\(^{110}\). Nowadays, as it will be exposed further in the fourth part of this paper, the application of that case is still uncertain.\(^{111}\)

**SECTION 2: The Frontier Worker Moving to the State of Last Employment**

Beside the atypical frontier workers, there was another particular situation not foreseen in the Regulation 1408/71 and left to the discretion of the Court of Justice: the case of the frontier worker moving to the State of last employment.

In the Huijbrechts judgment, the Court repeated that the Member State of residence is responsible for paying those benefits “as though” it was the State where the person was at last employed. Surprisingly, the institution then introduced a legal fiction which suspends the obligations of the State where the unemployed person was last employed for so long as the person continues to reside in another Member State, as Article 71 does not have the effect of extinguishing them.\(^{112}\)

Consequently, “where an unemployed frontier worker, after receiving unemployment benefit in the State in which he is resident, settles in the Member State in which he was last employed, the derogation ceases to apply, with the result that the State in which he was last employed must begin, or begin afresh, to assume its obligations under the Regulation in relation to unemployment benefit”\(^{113}\). The unemployment benefits are thus not exportable from the State of residence to the State of employment.\(^{114}\) This has, as a dangerous consequence, that the worker can change his legal status by moving from one country to another.\(^{115}\)

The question arises whether this case law is still relevant for Regulation 883/2004. It’s important to note that, once again, the Member States do not agree on the relevance of this jurisprudence since the entry into force of the new Regulation. These difficulties will be exposed in the fourth part of this paper.

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107 This is questionable with regard to the principle of equal treatment which is one of the cornerstones of European law. Ibid p. 220.
111 See the fourth part, first chapter, fourth section of this paper.
113 Ibid §28.
114 See also Case C-145/84, *Cochet v. Bestuur van de bedrijfsvorming voor de gezondheid, geestelijke en maatschappelijke belangen* [1985], ECR I-801.
Because Union law provides for coordination and not for harmonization, the Member States retain their power to organise their labour law regulations and social security schemes.\(^{116}\) Nevertheless, common features can be recognized, especially between Belgium and the Netherlands. The reasons therefore are based on the one hand on the common historical background and, on the other hand, on the intrinsic characteristics of the labour relationships and the social security systems based on insurance.

Although the systems are to a certain extent similar, differences can be found from country to country because labour and social security regulations are strongly linked to particularities of those States (e.g. political system, influence by the social partners, financing possibilities, demographical elements, and economic realities).\(^ {117}\) The idea of this chapter is to present the different labour and social security systems of those countries shortly but clearly, in order to identify the conflicts between them. A first chapter is devoted to the study of the Belgian system (Chapter 1), while the second chapter is devoted to the Dutch system (Chapter 2).

**CHAPTER 1: THE BELGIAN SYSTEM**

It has been recognized for long that labour law in general and more precisely the law dealing with dismissal and resignation have an important influence on unemployment law. One cannot study unemployment benefits without having a look at the pertinent labour law. This is the purpose of the first part of this chapter (Section 1).\(^ {118}\) In the second part, the national security system of Belgium is shortly presented, as far as the unemployment benefits are concerned (Section 2).

**SECTION 1: Belgian Labour Law**

As announced earlier, the relevant labour regulations are mainly the ones dealing with dismissal and resignation. There are, on the one hand, general grounds for dismissal (§1), and, on the other hand, specific dismissal motives, often linked to the economic difficulties of the employer, and that justifies the introduction of adapted mechanisms (§2).

**§1 General Grounds for Dismissal**

Belgian Labour law accepts a broad range of ways to put an end to an employment contract. It’s possible under the common civil law rules\(^ {119}\) (mutual consent of the parties, nullity of the employment contract, death of one of the parties and *Force Majeure*), but the most frequent form is without any doubt the termination by notice meaning that one of the parties to the

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\(^{117}\) J. Berra, *La structure des systèmes de sécurité sociale* (Université de Lausanne, Lausanne, 2000), pp. 711 and seq.

\(^{118}\) For that purpose, the self-employed are left aside for the First Section of the next two Chapters.

employment contract notifies the other party the unilateral termination of the contract under certain specific formal requirements.\textsuperscript{120}

At the end of his employment contract, the employee receives his so-called “C4” certificate from his employer.\textsuperscript{121} With that document proving the unemployment of the ex-worker, he can introduce a request for unemployment benefits before the competent administration.\textsuperscript{122} That document enables the authority to check if the employer respected the forms and the times prescribed by the law to dismiss.\textsuperscript{123} It also mentions the exact reason for the loss of employment. These pieces of information are precious for the administration given that the unemployment needs to be involuntary to give rise to benefits. If the worker leaves his job or stops it with the agreement of his employer, without legitimate reasons, he will not be entitled to receive any benefit.\textsuperscript{124}

\section*{§2 Specific Grounds for Dismissal}

Beside those common cases of dismissal, there are some more specific grounds, linked to the restructuring of enterprises, that are used to put an end to an employment contract. Among these, one can mention the collective dismissal and the bankrupt. Most of those situations have been regulated at the European level: Directive 98/59 EC of 20 July 1998 concerning the adaptation of the legislations of the Member States regarding collective dismissal\textsuperscript{125}, and Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer.\textsuperscript{126}

“Collective dismissal” is understood as any dismissal which affects a relatively large number of employees within a limited period of time.\textsuperscript{127} In that case, two adaptations of the general system presented in the first paragraph are to be mentioned. First, the employer has to respect strict forms before dismissing.\textsuperscript{128} Secondly, beside the unemployment benefits\textsuperscript{129}, the

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{120} P. Humblet and M. Rigaux, \textit{Belgian employment Law} (Intersentia, Antwerp, 2010), p. 161; V. Vannes, \textit{Le contrat de travail: aspect théoriques et pratiques} (Bruylant, Bruxelles, 2003). There are some particular reasons valid for contract concluded for a limited time (the contract then ends by itself at the end of that period if the parties do not prove that their will has changed) and for contract concluded about a defined mission (ends by itself once the mission is complete).
\item\textsuperscript{122} Article 87 Arrêté Ministériel du 26 Novembre 1991 portant les modalités d’application de la réglementation du chômage, M.B., 25 janvier 1992, p. 1593.
\item\textsuperscript{123} Loi du 3 juillet 1978 relative aux contrats de travail, M.B., 22 août 1978, p. 9277. There are a number of imperative dispositions prescribed with the view to protect the worker. Please consult: K. Salomez, “Opzeggingstermini en opzeggingsvergoedingen – de grenzen van de wilsautonomie verkend”, in M. Rigaux and P. Humblet (ed.), \textit{Actuele problemen van het arbeidsrecht 6} (Intersentie, Antwerpen, 2001), pp. 601 and seq.
\item\textsuperscript{124} At least not immediately, but the person could receive benefits again after a waiting period. J.-F. Funck, \textit{Droit de la sécurité sociale} (Larcier, Bruxelles, 2006), p. 211.
\item\textsuperscript{127} P. Humblet and M. Rigaux, \textit{Belgian employment Law} (Intersentia, Antwerp, 2010), p. 200.
\item\textsuperscript{128} A.-V. Michaux, \textit{Elements de droit du travail} (Larcier, Bruxelles, 2010), pp. 396 and seq.
\item\textsuperscript{129} J. Peeters, “De individuele werknemer en het collectief ontslag”, in M. Rigaux and W. Rauws (ed.), \textit{Actuele problemen van het Arbeidsrecht 8 – Actualia van het ontslagrecht} (Intersentia, Antwerpen, 2010), p. 842.
\end{enumerate}
\end{footnotesize}
workers can claim a top-up benefit from the employer thanks to a collective agreement signed at the national level. As far as the bankruptcy is concerned, the Belgian authorities created a fund in case of closure of undertaking. Its mission is to pay the salary unpaid by the employer and the advantages already owed by the employee according to collective agreements. Consequently, the worker that becomes unemployed following the bankruptcy of his employer can claim unemployment benefits despite the money he receives from the fund. The money is indeed the compensation of earlier debts of the employer and cannot be considered as current employment revenue.

Additionally, because of the economic crisis that Europe faces, two mechanisms have been very popular for some months. The first one is rather new and consists in a crisis premium the blue collar workers can claim if they are dismissed during the period of application of such a premium. It is paid either by the sole national employment office (Rijksdienst Voor Arbeidsvoorziening, Office National de l'EMPloi or Landesamt für Arbeitsbeschaffung) or by both that office and the employer. The second mechanism has existed for more than 35 years: the pre-retirement benefits.

The pre-retirement scheme has been created by a collective agreement in 1974 and confirmed by a Royal decree. Its structure is rather original as it is presented as a complement to the unemployment benefits. The dismissed workers older than 55, who are entitled to unemployment benefits and who can prove a certain work experience in the enterprise can claim from their employer a complement to the unemployment benefits if the latter signed a collective agreement in that sense.

SECTION 2: Belgian Unemployment Benefits

The requirements to be entitled to benefits are laid down in a Royal Order of 1991. This legislation provides, on the one hand, “admissibility conditions” understood as the conditions

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133 However, the efficiency of that fund is discussed given its slowness to interfere. M. Beliën and C. Deneve, “Enkele toepassingsproblemen bij de werkloosheidsuitkeringen voor grensarbeiders: een Belgische kijk”, in Y. Jorens (ed), Grensarbeid : Sociaalrechtelijke en fiscaalrechtelijke aspecten, (Die Keure, Brugge, 1997), p. 201.
134 Those measures are extended until March 2011 (loi du 1er février 2011 portant la prolongation de mesures de crise et l'exécution de l'accord interprofessionnel, M.B., 7 février 2011, p. 9648), with a possibility to be extended until 31 May 2011 by a Royal Decree (and this has been done by Arrêté royal du 28 mars 2011, prolongeant l'application des mesures prévues aux chapitres Ier et II du titre Ier de la loi du 1er février 2011 portant la prolongation de mesures de crise et l'exécution de l'accord interprofessionnel, M.B. 1er avril 2011, p. 21614, Article 1).
136 The requirements are only applicable for employed workers; the regime of self-employed is presented at the end of this section. Arrêté Royal du 25 novembre 1991 portant réglementation du chômage, M.B., 31 décembre 1991, p. 29888.

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allowing the person to enter into the scope of the system, and on the other hand, “conditions of granting” meaning the conditions the person has to fulfil at the moment of his request to receive benefits, and during the whole time he takes advantages of the system.\(^{137}\) Indeed, the Belgian system provides in principle for unlimited benefits, as long as the person fulfils the conditions to receive them and remains subject to monitoring by the employment services.

The *admissibility conditions* are linked to the idea that the unemployment benefits are based on an insurance system, and the person should have worked and paid contributions during a certain period before being entitled to benefit from this regime. The Belgian legislator adapted its system to take into account the studies and internship coupled with a waiting period\(^{138}\) to allow benefits even if those persons have never worked.\(^{139}\) Among the conditions to fulfil to be entitled to that kind of benefits are the end of the studies (knowing that the degrees received in another Member State are also taken into account if they were delivered by an institution recognized in Belgium\(^{140}\)) and the availability to the labour market.

The *conditions for granting*, which have to be fulfilled by both the ex-worker and the student claiming benefits, are explicitly mentioned in the Royal Order: the involuntary loss of work and remuneration, the availability on the labour market, the aptitude to work, some conditions related to the age of the person, and the obligation to seek work actively.\(^{141}\) The law also mentions the obligation to reside in Belgium but, as seen earlier, a legal fiction permits the partial unemployed frontier worker to fulfil that requirement without living on the national territory.

If those conditions are fulfilled, and if the person makes the appropriate steps towards the administration (RVA, ONEM or LfA), then he is entitled to benefits amounting from 55% up to 60% of the average daily remuneration\(^{142}\), for an unlimited period of time\(^{143}\). For the person entitled to benefits but who has never worked, his benefits are fixed on a set basis by the authorities.\(^{144}\)

Self-employed persons do not qualify for unemployment benefits. They can however benefit from specific bankruptcy insurance since 1997.\(^{145}\) Thanks to this insurance, the self-employed can receive, once in his career, a monthly benefit after his bankrupt, under strict


\(^{142}\) That amount is slightly adapted according to the family situation of the claimant. J. Van Langendonck, *Handboek socialezekerheidsrecht* (Intersentia, Antwerpen, 2011), p. 607.

\(^{143}\) As remarked earlier, this is true as long as the person fulfils the conditions to receive the benefits effectively. Moreover, the benefits granted on the basis of studies are limited to persons younger than 30 years old. Article 36 Arrêté Royal du 25 novembre 1991 portant réglementation du chômage, M.B., 31 décembre 1991, p. 29888. Moreover, after some time, the amount of benefits is reduced up to 40% of the daily remuneration.

\(^{144}\) For the last rates, please consult: <http://www.rva.be/frames/frameset.aspx?Path=D_opdracht_VW/Regl/Reglementering/ToegangVw1/&Items=1/1/2/3&Language=NL> accessed 10 May 2011

conditions: the person should exercise his activity as self-employed in Belgium, should have contributed to that social security scheme and should further fulfil the requirements of the Royal Order 1996 linked to his economic situation.

CHAPTER 2: THE DUTCH SYSTEM

The structure of this chapter is similar to the one of the first chapter. The labour law of the Netherlands will be examined in a first Section, while the pertinent social security dispositions will be exposed in a second Section.

SECTION 1: Dutch Labour Law

Again, in order to make the comparison between the national systems easier, the same structure as the one used for Belgium is followed: the general grounds for dismissal are presented in a first paragraph, while the specific grounds are dealt with in a second paragraph.

§1 General Grounds for Dismissal

By opposition to what happens under Belgian law, the Dutch employers are not free to dismiss a worker. The general principle is rather the ‘ontslagverbod’ (prohibition of dismissal) coming from the ‘Buitengewoon Besluit Arbeidsverhoudingen’ of 1945. It can be explained according to the historic context of that statute: back then, it was part of social policy to support the continuity of the economy after the Second World War. Many years later, although it is much discussed, this principle remains. Only its scope has changed because of the numerous exceptions introduced to the original principle.

Given this general prohibition, an employer in the Netherlands needs either the approval of the “Directeur van het Regionaal Bureau voor de Arbeidsvoorziening” (administrative approval) or a decision of the “kantonrechter” (judicial approval) to end an employment contract. If the dismissal does not respect the forms prescribed by law, it is voided. In practice, given that the employment relationship has already been broken, the employer owes the employee an extra financial compensation. The unemployment benefits are available after the “opzegtermijn” (period of notice), real or fictive because of its replacement by a financial compensation by the judge.

The intervention of the administration or the judge to assess the responsibility of the parties in the end of the employment contract is also very important for the employees since the persons should not be at the origin of their loss of work to be entitled to unemployment benefits.

§2 Specific Grounds for Dismissal

Beside those general cases, the Netherlands is also bound by the European directives on restructuring of undertakings presented earlier. Those rules have been transposed at the national level.

In case of bankruptcy, the employee who does not receive his salary anymore can claim for benefits from the UWV (Uitvoeringsinstituut WerknemersVerzekeringen). The entitlement to those benefits ends with the notice of termination because, like what happens in Belgium, the fund only compensates for the non-respect of the employer’s obligations. As far as the dismissal of the worker is concerned, the “ontslagverbod” is not applicable if the employer is bankrupt. A simple declaration on the economic situation of the employer is sufficient to prove that the dismissal has not been caused by the employee and to entitle him to unemployment benefits at the end of the notice.

The Dutch legislation does not provide for such an exception to the ontslagverbod in case of collective dismissal. The employer has thus to follow the normal procedure requiring the agreement of the authorities, even if, in practice, the need of the dismissal will easily be proved. By opposition to the Belgian system, there is no top-up benefit for collective dismissal foreseen and, so far, there is no crisis premium either.

Finally, based on the same motivations as their neighbours, notably making room for young workers, the Dutch authorities established an arrangement for early retirement, known as the “VUT” (Vervroegde Uittreding), based on collective agreement and financed by a solidarity mechanism within the enterprise: the current workers pay the VUT of the older ones. In the last nineties, a second mechanism has been introduced: the pre-pension arrangement (“prepensioen”) for which the employees save for themselves with the financial help of their employer. The structure of those two systems is, contrary to what happens in Belgium, not seen as a supplement to unemployment benefits. As far as the VUT is concerned, the person retiring remains an employee and still builds up pension rights. On the contrary, once an employee uses the prepensioen arrangement, his employment contract ends automatically. In case the pre-retirement benefits

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154 This is presently discussed and there is a proposal to modify the Buitengewoon Besluit so far as the collective dismissal could become an exception to the ontslagverbod (Voorstel van wet melding collectief ontslag in verband met de uitbreiding van de reikwijdte en ter bevordering van de naleving van deze wet, 24 Maart 2011, <http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2011/03/30/wetsvoorstel-wijziging-wet-melding-collectief-ontslag.html> accessed 10 May 2011.)
156 There have been many debates about this system, since the young workers are not sure to benefit from the VUT scheme once they attain the relevant age because it depends whether that « temporary » system in force since the seventies will still be applicable. Moreover, if the employee changes of employer, the prospect to the VUT can be lost totally. C.H.C.W. Baeleman, R.C. Duikers and C. Weber, Levensverzekeringen en pensioenen, (Kluwer, Deventer, 2007), p. 125.
158 Ibid.
are lower than the unemployment benefits the worker is entitled to, the brut amount of preretirement benefits is deducted from the level of unemployment benefits, and the UWV will pay for the remaining difference.

SECTION 2: Dutch Unemployment Benefits

In order to be entitled to unemployment benefits, a Dutch claimant needs to satisfy the requirements provided for in the *Werkloosheidswet* (Unemployment Benefit Act). Those are very similar to what is provided in the Belgian law: loss of salary, loss of working hours, availability for the labour market (including both the completion of unemployment administrative formalities and the active search for a job), having worked during a certain period and not being subject to any of the grounds for exclusion. The residence condition imposed by the law doesn’t create any difficulty for frontier workers given the fiction of residence for partially unemployed people in the State of last employment.

If the claimant satisfies to those criteria, he has to declare himself unemployed to the “Centrale organisatie werk en inkomen” and make himself available to the UWV. The substance of the benefits varies from what has been seen for Belgium. In the Netherlands, the unemployment benefits last between 3 months (minimum) and 38 months (maximum) and the length of it is determined according to the employment past of the worker. The amount of the benefits is fixed at 75% of the daily salary during the first two months of unemployment, and 70% of the said salary for the following months. Similarly to what happens in Belgium, the amount also slightly varies according to the personal and familial situation of the person.

The Dutch system does not provide for any unemployment benefits for self-employed persons stopping their activity. There is no special mechanism for young people after their studies either.
FOURTH PART: EXPLANATION OF THE CONFLICTS REMAINING DESPITE THE COORDINATION

Despite the mechanism of coordination, every country remains sovereign in the adopted law. That creates unavoidable frictions between the different rules for individuals having contacts with various legal systems, like the frontier workers. The origins of those difficulties are various: it can either come from the system of coordination itself (Chapter 1), or from substantive differences between the national systems (Chapter 2).

The perspective taken for the assessment of those frictions is still the relations between the Belgian and Dutch systems as presented in the third part of this paper.

CHAPTER 1: CONFLICTS COMING FROM THE SYSTEM OF COORDINATION

Some divergences are, as already explained, inherent to the system of coordination. Among those conflicts, only the most important issues are emphasised hereafter: the difficult definition of partial and whole unemployment (Section 1), the problems coming from the differences in the benefits granted (Section 2), the mechanisms of compensation between the Member State receiving the contribution and the one paying the benefits (Section 3), and the development of the ruling Court beside the coordination regulation, that somehow complicates the whole picture (Section 4).

SECTION 1: Definition of Partial and Whole Unemployment

Since the decision of the Administrative Commission providing more universal criteria than the ones of the De Laat case, the discussions on the definitions of partial and whole unemployment are less and less lively. However, there are still questions that remain unsolved.

On the one hand, frictions, caused by some national original constructions, exist in case of partial unemployment. As a matter of illustration, the Belgian legislator makes a further distinction between the partially unemployed, the wholly unemployed, and the partially unemployed maintaining their rights as wholly unemployed.\textsuperscript{167} Given that this distinction does not exist in most of the other Member States, and especially does not exist in the Netherlands, it can create some difficulties. At first sight, the Belgian authorities could indeed consider that special framework as whole unemployment and decline their competence as State of last employment, while the State of residence, \textit{in casu} the Netherlands, would deny his competence given that this framework is seen, from its point of view, as partial unemployment.\textsuperscript{168} However, since the Administrative Commission has provided for the “contractual link” criterion, it is clear that, at the European level, the partially unemployed maintaining his right as a wholly unemployed is to be considered as partially unemployed given the persistence of the contractual link with an employer in Belgium.


On the other hand, for wholly unemployed frontier workers, the interpretation of the links with the competent State also creates problems especially in case of interaction of other schemes of social security (e.g. sickness benefits). For example, the Dutch jurisprudence takes into account the real perspective of resumption of work with the same employer. If such a perspective is inexistent (given, for example, the seriousness of the sickness of the claimant), the worker is considered as a wholly unemployed person, despite the link that could still exist with the State of employment. This particular interpretation could be different from the one of other countries applying the criteria provided by the Administrative Commission strictly.

SECTION 2: Difference among the Member States in the Benefits Granted

The conditions and the level of benefits are set according to the legislation of the State from which the benefits are owed, taking into account, for the wholly unemployed workers, the salary or professional income they actually received in respect of their last employment or self-employment in the Member State where they were working immediately prior to becoming unemployed. The revenues taken into consideration are limited to the ceilings imposed by the State paying the benefits.

Under that ceiling, the amount of the benefits is determined by the legislation of the State paying for them. While in Belgium it is around 60% of the daily remuneration, in the Netherlands it is sensibly higher (70%). The length of the benefits also varies from Member State to Member State, and is generally longer in Belgium.

Additionally, one should take into account the possible top-up benefits (like the recent crisis premium introduced in Belgian law, and the compensation in case of collective dismissal). Considered as social advantages, they complete the traditional unemployment benefits and can be claimed by the frontier workers as well as by the nationals who live and work in the frontier worker’s country of employment. However, there can be a difference in treatment between the national and the frontier workers in practice since one should take into consideration the fact that those top-up benefits can be proportional to the unemployment benefits received. The fact that a worker is entitled to benefits in another country (i.e. country of residence) will thus have an impact on the amount of advantages that should be paid, in casu, by the authorities or the employer of the State of last employment.

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169 Ibid p. 75.
174 Those measures are extended until 2013 by the loi du 1er février 2011 portant la prolongation de mesures de crise et l’exécution de l’accord interprofessionnel, M.B., 7 février 2011, p. 9648.
175 There are indeed not “intended to replace the remuneration lost by reason of unemployment” or “provide for the maintenance of the unemployed person” (Case 102/91, Doris Knob v Bundesanstalt für Arbeit, ECR [1992], I-4341, §44). Instead, they are additional financial compensations given the particular circumstances of the dismissal.
This leads to the unavoidable application of different standards. Some, in the Netherlands, tried to foil this consequence of the coordination system by the conclusion of collective agreements guarantying the frontier workers the profit of extralegal complements to unemployment benefits.\footnote{M.L.H.A. Pechholt, C. Douven and G. Essers, \textit{Als verhuizen emigreren is – wonen in België en werken in Nederland}, (Kluwer, Deventer, 2007), p. 224.} This is however limited to particular sectors of activity, and strongly weakened by the fiscal regimes that remain different from Member State to Member State.

\textbf{SECTION 3: Compensation Mechanisms}

It is clear that the fact of having to pay contributions in more than one Member State at a time may discourage persons from making use of their right to free movement.\footnote{European Commission, \textit{“Free movement of workers – achieving the full benefits and potential”} (Communication), COM (2002)694, 11 December 2002, p. 15.} As a matter of principle, only the Member State where the professional activity is pursued may claim social security contributions.\footnote{A tax is to be considered a social security contribution under Union Law if it actually serves to directly finance branches of the social security system (Case C-169/98 \textit{Commission of the European Communities v French Republic} [2000] ECR I-1049; and C-34/98 \textit{Commission of the European Communities v French Republic} [2000] ECR I-995).} This means that if a person pursues a professional activity in one Member State, which is then competent for social security benefits, but resides in another Member State, the State of residence may not claim social security contributions.\footnote{European Commission, \textit{“Free movement of workers – achieving the full benefits and potential”} (Communication), COM (2002)694, 11 December 2002, p. 15.} However, it can have to pay benefits (e.g. for the wholly unemployed persons). It’s thus not always the Member State paying the benefits that received the contributions.

This then requires compensation mechanisms between the Member States concerned. The Regulation encourages the Member States to conclude an agreement about the modalities of the compensation\footnote{Article 70 of Regulation 987/2009.}, whereas it proposes a system of compensation for the countries that, like Belgium and the Netherlands, didn’t consent about such a text. In that last case, the reimbursement is limited to the benefits provided during the first three months (extensible to five months)\footnote{The 3 months are extended to 5 months when the person concerned has, during the preceding 24 months, completed periods of employment or self-employment of at least 12 months in the Member State to whose legislation he was last subject.}, with a ceiling fixed at the amount payable, in the case of unemployment, under the legislation of the competent Member State.\footnote{Article 65 §6 and 7 Regulation 883/2004.}

One can only regret the shortness of the period covered by the reimbursement.\footnote{Y. Jorens, B. De Schuyter and C. Salamon, \textit{Vers une rationalisation des règlements de coordination en matière de sécurité sociale ?} (Academia Press, Gent 2007), p. 254.} Despite a good cooperation between the Member States, the system is anyway unattractive to the State of residence, as the compensation is limited to three/five months, whereas it is now confronted with the expenses for the benefit as long as the person fulfils the criteria to receive it (meaning, on average, for a period longer than 3 months)\footnote{In Belgium, the landslide majority of the unemployed workers take more than one year to find a new employment, while in the Netherlands half of the unemployed persons benefit from the unemployment benefits for less than 6 months. The difference in these statistics can notably be explained by the limited length of rights in the Netherlands (see third part of this paper for more details about the national systems of both States).}. The problem is even bigger for countries like Belgium that provide for unemployment benefits unlimited in time. Moreover, the costs of the
activation measures are to be added to the expenses of the State providing the benefits, and no participation of the other State is foreseen about that particular expense.

The imbalance is even more important when it is clear that there are more moves from one country to another than the contrary. It is for example the case between Belgium and the Netherlands, where more persons residing in Belgium work in the Netherlands than the contrary.\textsuperscript{186}

\textbf{SECTION 4: Relevance of the Case-Law of the Court of Justice}

One of the most central questions raised because of the new regulation is whether the former case law of the Court of Justice under Regulation 1408/71 is still applicable. In principle, the jurisprudence of the Court remains valid, including for new regulations, except if the new text makes clear that the old case-law is not relevant anymore.\textsuperscript{187} The renunciation to a case-law comes either from an express disposition of the regulation in that sense, or from the fact that the application of the case-law is materially not possible anymore.

Two rulings are particularly important with regard to unemployment benefits of frontier workers: the Miethe case (§1) and the Huijbrechts case (§2).

\textbf{§1 The Miethe Case and the Atypical Workers}

The so-called “Miethe-jurisprudence” has been explained earlier in this paper. At that moment, the problem of the different interpretations of this ruling has already been highlighted. The issue became even more intricate with Regulation 883/2004 because some countries decided to keep on applying that ruling, while others decided that it was not necessary anymore, given the new possibility provided for by Article 65 allowing the wholly jobseeker to make himself available in the country of last employment as a supplementary step.

The Belgian administration takes the view that the Miethe-jurisprudence is no longer relevant.\textsuperscript{188} This ensues from the new “supplementary step” introduced by Article 65, but also from the preamble of Regulation 987/2009. The Dutch authorities share that opinion\textsuperscript{189}, building their reasoning more precisely on points 12 and 13 of the preamble. While point 12 expresses the idea that the relevant case-law of the Court has been incorporated in the Regulation, point 13 reiterates the idea that the wholly unemployed frontier workers are entitled to benefits only in the State of residence. The Meithe case would then de facto not be applicable anymore.

Another underlying reason to reject the application of the Miethe case is the large amount of workers who claimed for the application of the Miethe ruling, while the Court presented that

\textsuperscript{186} There is a clear disbalance between the frontier workers living in Belgium and those living in the Netherlands. It seems that there are on average three times more workers crossing the border to the North every morning than the contrary. For further details, please consult the appendix to this paper.


case as exceptional. For host countries like the Netherlands, the extension of the Miethe case was not desirable.

But not everyone agrees with that view. Frans Pennings pleads for the application of the Miethe jurisprudence beside the new choice offered to the frontier worker. Indeed, according to Article 65, the benefits would still be paid by the State of residence. The hypothesis of Article 65 (2) does thus not completely match the Miethe case which makes the State of last employment completely competent, including for the payment of the benefits.

The European Commission is also in favour of keeping the two structures in parallel. This dissociation permits frontier workers who are not in a position to invoke the Miethe judgment to benefit from job-seeking activities and assistance in the State of their last occupation thanks to the supplementary opportunity introduced by Regulation 883/2004. The Miethe case would then still be relevant, beside Article 65.

The controversy over the application of Miethe ruling is still lively. The Member States are aware of the position of the Commission, and still the Netherlands and Belgium, among others, decided not to apply Miethe case anymore. An authoritative decision of the Court of Justice on this issue would be welcome. As a secondary step, if the Miethe ruling has to be applied, an intervention of the European institutions would be welcome to provide a community meaning to the wording “personal and business links” and a common procedural framework to follow to deal with the Miethe cases (e.g. determining the competent authority and deciding whether it is an automatic control or a control on demand).

§2 The Huijbrechts Case and the Export of Benefits

Following this ruling, the unemployment benefits are not exportable to the State of last employment. So in case of move from the State of residence to the State of last employment, the latter should take on its obligations that had only been suspended while the ex-worker was living abroad. It’s important to notice that, contrary to what was applied in the Netherlands during a couple of years, article 69 of Regulation 1408/71 on export of benefits (now article 64 of Regulation 883/2004) still remains applicable for frontier workers in general. The exception introduced by the Court only deals with the strict case of the frontier worker going back to his State of last employment.

As announced, the relevance of this ruling is nowadays discussed. The introduction of 11(3)(c) in the Regulation 883/2004 seems to launch the debate about the relevance of the Huijbrechts case-law. That article fixes as a principle that the “persons receive unemployment

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193 Case C-311/01 Commission of the European Communities v Kingdom of the Netherlands [2003] ECR I-13103, § 32.
benefits in accordance with Article 65 under the legislation of the Member State of residence” (emphasis added). The same idea is expressed in the preamble of Regulation 987/2009.

The Dutch authorities, as far as they are concerned, consider that the Huijbrechts case is not applicable anymore given the already mentioned Article 11, 3, (c) prescribing as a principle the application of the law of the State of residence. The worker may leave the State of residence to go back to the State of last employment on the unique basis of export of his benefits for a limited period of 3 months (application of Article 64 Regulation 883/2004).

The Belgian authorities took another decision, following the arguments exposed by Rob Cornelissen. For the author, the new disposition means that the State of residence “bears the entire costs for the unemployed persons concerned, i.e. sickness and maternity benefits, invalidity benefits and family benefits, and this State also has to take into account unemployment periods for the purpose of the calculation of pension rights” Article 11, (3) (c) would not have any other meaning than the one just exposed. Consequently, the case-law discussed is still applicable. Some arguments strengthen this position: the wording of article 65 (2) targets the unemployed persons who “resided in a Member State other than the competent Member State and who continues to reside in that Member State” (emphasis added). Moreover, article 65 (5) of Regulation 883/2004 still contains a legal fiction similar to what one could have found in Regulation 1408/71: the wholly unemployed person receives benefits in accordance with the legislation of the State of residence as if he had been subject to that legislation during his last activity as an employed or self-employed person. Thus the focus remains on the State of last employment, while the State of residence remains competent in general for the benefits annexed to the unemployment benefits and, by exception, for the unemployment benefits of wholly unemployed frontier workers as long as they live on its territory.

CHAPTER 2: CONFLICTS COMING FROM DIFFERENCES BETWEEN THE BELGIAN AND DUTCH SYSTEMS

Although the Belgian and Dutch systems are based on the same structure, one saw earlier that there are still slight differences between the two national legislations. The purpose of this chapter is to highlight the touchiest issues a frontier worker could experience because of those frictions. Three will be kept in mind: the Belgian insurance for self-employed (Section 1), the Belgian waiting allowance (Section 2) and the pre-retirement benefits (Section 3).

SECTION 1: Insurance for Self-Employed

Before the entry into force of the new Regulation, the chapter on unemployment benefits was not open to self-employed workers and the Belgian insurance for self-employed people against bankruptcy could only have been considered as a social advantage, falling outside the scope of Regulation 1612/68. This has changed since the scope of the regulation on coordination of unemployment benefits has been opened up in order to include the self-employed workers in its field of application, in May 2010.

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The insurance for self-employed has been recognized as part of a social security scheme without too many difficulties. The Court ruled that the “distinction between benefits excluded from the scope of Regulation No 1408/71 [now: Regulation 883/2004] and those which fall within its scope is based essentially on the constituent elements of each benefit, in particular its purposes and the conditions on which it is granted”\(^{197}\). On the one hand, the purpose of the unemployment benefit is “to replace the remuneration lost by reason of unemployment and thereby provide for the maintenance of the unemployed person”\(^{198}\). On the other hand, the objective conditions to fulfil in order to be entitled to the benefit should be laid down in a legal text \(^{199}\). The insurance for self-employed workers meets those features, and the fact that the system is limited in time and submitted to strict conditions related to the economic situation of the claimant do not influence the conclusion that the benefits presented here are part of the social security scheme for self-employed.

Before exploring further the situation of frontier self-employed persons, a first general remark is pertinent: this scheme only applies to self-employed persons who are adjudged bankrupt and thus have ended their activity.\(^{200}\) The sole wholly unemployed self-employed persons are targeted by those provisions. Furthermore, in order to benefit from the scheme studied, the self-employed should exercise his activities in Belgium and should have subscribed to the self-employed insurance scheme.

Considering these remarks, the frontier worker living in the Netherlands, but working in Belgium and who contributed to the Belgian social security system, will not be entitled to benefits because his State of residence, competent State in case of whole unemployment, does not know this system.\(^{201}\) It is indeed well-known that the competent State has to apply its own legislation when dealing with social security, despite the possible cross-border element. As the Commission emphasises “in such a situation, unlike for employed persons, the transfer of the responsibility for the payment of unemployment benefits from the Member State of last activity to the Member State of residence is not possible as the legislation of the latter Member State does not provide for unemployment benefits for self-employed persons.”\(^{202}\)

There is, pending, a proposal of modification of the Regulation 883/2004 precisely on “the situation where a self-employed person has been insured for unemployment in the Member State of last activity and, once unemployed, returns to his/her Member State of residence which does not have any unemployment insurance for self-employed.”\(^{203}\) The European Commission bases its motives to modify the regulation on several elements: the right of the frontier self-

\(^{197}\) Case 57/96, H. Meints v Minister van Landbouw, Natuurbbeheer en Visserij [1997], ECR I-6689, §23.
\(^{198}\) Case 102/91, Doris Knoch v Bundesanstalt für Arbeit, ECR [1992], I-4341, §44.
\(^{201}\) The frontier worker who lives in Belgium but does not exercise his activities in Belgium, but in the Netherlands, and does not contribute to the insurance system, does not fulfil the requirements to be entitled to this insurance for self-employed.
\(^{203}\) Ibid p. 7.
employed workers to return to their State of residence and seek work there while avoiding the restriction of their right to social benefits, and the right of property laid down in article 1 Protocol 1 of the European Convention on Human Rights.204

The Commission proposed thus to introduce in paragraph 5 of Article 65 a point (b)205 written as following “Where the legislation of the Member State of residence does not provide insurance for self-employed persons against the risk of unemployment, the unemployed person (…) who was insured in the Member State of his last activity as a self-employed person against unemployment shall receive benefits in accordance with the legislation of the latter Member State”.206

SECTION 2: Waiting Allowance

This is another Belgian originality: the authorities also provide unemployment benefits for persons who have just finished their studies and who have never worked.207 Again, one agrees to consider that the scheme falls within the scope of Regulation 883/2004. Several arguments stress this position. First, the benefit is granted to unemployed persons who are actively seeking paid employment and who fulfil a number of objective conditions laid down in a national statute. Then, even if the national qualification of the benefits is not relevant, it is worth mentioning that the conditions to benefit from this regime are laid down in the national regulation dealing with traditional unemployment.208

One could argue that the unemployment following the studies is not a consequence of the “involuntary loss of employment” but it is rather a solidarity mechanism to cover the risk of not finding an employment at the end of the studies. To answer this argument, one can best come back to the essential purpose of the unemployment scheme which is to compensate the absence of revenue from employment. In this context, the person who lost his employment and the person who has never had any are in the same position. At this point, it’s worth noticing that the Regulation also takes into account non-contributory systems. The fact that the students have never paid contributions is thus not relevant to identify the nature of the benefit.

Besides, the Court of Justice ruled that the student who did not fall within the scope of Regulation 1408/71 could then rely on the provisions of Regulation 1612/68 in order to be protected against unjustified discrimination based on nationality.209 Though, this hypothesis is

205 The current point (b) would then become (c) according to the proposal.
207 Those cannot be a fortiori considered as frontier workers because they have never worked. However, it is difficult to ignore this regime because the benefit to this regime is often claimed by family members of a frontier worker. In practice, it thus represents a real issue.
209 Case 94/84, Office national de l'emploi v Jozsef Deak [1985], ECR I-1873.

We highlighted earlier the two types of requirements imposed by the Belgian system to be entitled to unemployment benefits: the “admissibility conditions” and the “conditions of granting”. For the students, sole the admissibility conditions have been modified (mainly by adapting the requirement of prior contributions to the scheme during an employed activity), while the conditions of granting, including the requirement to reside on the Belgian territory, remain the same.

Two conditions generally raise problems. On the one hand, it is unclear whether the residence condition can be ignored. On the other hand, it seems that the requirement creating most difficulties is the equivalence between the Belgian diplomas and the diplomas obtained in another European country. Both could give rise to indirect discrimination given that these provisions are “intrinsically liable to affect migrant workers more than national workers and there is a consequent risk that it will place the former at a particular disadvantage”\footnote{Case C-278/94, Commission of the European Communities v Kingdom of Belgium [1996], ECR I-4307, §20.} The Court of Justice nevertheless understands that a link between the applicant for that allowance and the geographic employment market concerned is legitimate given that the waiting allowance “aims to facilitate for young people the transition from education to the employment market”\footnote{Case C-224/98, Marie-Nathalie D’Hoop v Office national de l’emploi [2002], ECR I-6191, §38.}. The scope of application of this principle is nevertheless very limited by the preamble of Regulation 883/2004. It could not lead to “objectively unjustified results” and “can in no way render another Member State competent or its legislation applicable” (points 11 and 12 of the preamble).\footnote{The scope of application of this principle is nevertheless very limited by the preamble of Regulation 883/2004. It could not lead to “objectively unjustified results” and “can in no way render another Member State competent or its legislation applicable” (points 11 and 12 of the preamble).}

With regard to the residence clause, it is unclear, and doubtful, that it could be removed. Thanks to the principle of assimilation of facts\footnote{Case C-278/94, Commission of the European Communities v Kingdom of Belgium [1996], ECR I-4307, §20.}, it is arguable for a person living abroad to claim for the waiting allowance as long as he fulfils the requirements to be entitled to such a scheme and, following the logic of the Court, keeps a real link with the Belgian employment market. This could be the case for the family members of a frontier worker living in the Netherlands but working in Belgium, who looks for a job in Belgium. Furthermore, Article 64 of the Regulation could be used as a legal basis for the export of benefits, as long as one considers that the waiting allowance is an unemployment benefit in the sense of the Regulation.

As far as the recognition of diplomas is concerned, it is interesting to note that the whole system is based on the idea that the foreign school delivering the certificate should be recognized in Belgium, and not the diploma itself. This leads to the surprising conclusion that Belgium refused to recognize diplomas for the purpose of the waiting allowance on the basis of the fact that the foreign school was not recognized by one of the Belgian Communities, while, at the same time, the same secondary school diploma had been considered as equivalent to a Belgian one with regard to the access to Belgian colleges and universities\footnote{Cass. 28 Juin 1990, Pas. p. I-1088.}. Beside this anecdote, the Court of Justice sanctioned the Belgian requirements stating that “a single condition concerning the place where the diploma of completion of secondary education was obtained”\footnote{Case C-258/04, Office national de l’emploi v Ioannis Ioannidis [2005], ECR I-8275, §30 ; Case C-224/98, Marie-Nathalie D’Hoop v Office national de l’emploi [2002], ECR I-6191, §39.} was too general and exclusive in nature and that this element “is not necessarily representative of the real and effective
degree of connection between the applicant for the tideover allowance and the geographic employment market” 216, while all other representative elements are excluded from the examination. It therefore goes beyond what is necessary to attain the objective pursued217 and cannot justify an inequality of treatment between the nationals and the EU citizens.

The Belgian legislator, after several calls to order, slightly changed its legislation218 in order to meet the European requirements. It is nonetheless doubtful whether the completed list of the diplomas taken into account is sufficient to bring Belgian law in conformity with the requirements of the European principle of free movement.

**SECTION 3: Pre-Retirement Benefits**

Finally, differences can also arise with regard to the pre-retirement benefits that are traditionally seen under Belgian law as a complement to the unemployment benefits for dismissed elderly workers, while it is independent from the unemployment system in the Netherlands as long as the pre-retirement benefits are higher than the unemployment ones.

None of these benefits are caught by Regulation 883/2004 as they are not laid down in a statute219, but they are considered as social advantages under Article 7 §4 of Regulation 1612/68 which takes into account the provisions laid down in collective or individual agreements. On that basis, they are available for the frontier workers as well as for national workers, without discrimination.

In practice, if one can be pleased by the possible export of benefits, it should be kept in mind that the Belgian *brugpensioen* and the Dutch *prepensioen* are proportional to the amount of unemployment benefits granted. This can thus lead to difficulties of application, and asks for a good coordination between the countries concerned.

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216 Ibid.
217 Ibid.
219 Required by article 3, §1 of Regulation 883/2004 and article 1(1).
FIFTH PART: PROPOSED SOLUTIONS TO REMEDY THE CONFLICTS

Finally, the purpose of the paper is to propose some solutions to the conflicts between the national systems that can imperil the free movement of workers. The proposals can take different forms: a bilateral agreement (Chapter 1), the improvement of the coordination system (Chapter 2) or the establishment of a harmonized system for Europe (Chapter 3).

Each of the proposals presented hereafter is inspired by the difficulties raised when examining the conflicts between the Belgian and the Dutch systems. However, given that the coordination of the social security systems is done at the European level, this chapter logically formulates broader considerations than the ones just focused on the relationship between the two countries studied.

To assess any of those possibilities, one should keep in mind the general objectives of free movement of workers, and the constraints coming from the institutional framework of the Union (competences, but also voting procedure and political will of the Member States).

CHAPTER 1: VIA A BILATERAL AGREEMENT

The lack of cooperation and trust between the Member States has been emphasized several times within this paper. The first obvious shortcoming is the absence of agreements between Belgium and the Netherlands on the compensation mechanisms (Article 65 §6 and 7). Moreover, one could imagine more cooperation between the Member States on the follow up of job-seekers when the State financing the benefits is not the State where the person is looking for a job. Given the important exchange of workers between the two States studied, such a convention could be useful.

On the other hand, one should assess whether it is pertinent, or even justifiable, to conclude such bilateral agreement, when a European action could be more efficient. There is a clear risk of non-uniform application of EU law in the presence of various bilateral (or even multilateral) agreements and it could lead to discrimination between nationals. Some engagements only make sense on a higher scale, preferably on the European level.

CHAPTER 2: VIA THE IMPROVEMENT OF THE COORDINATION MODEL

This chapter focuses on the possibilities to improve the present coordination Regulation. At first, we will shortly come back to the proposal that the Commission presented in 1998 in order to simplify Regulation 1408/71 (Section 1). Secondly, having highlighted the reasons why that first text has not been adopted, we will propose other improvements to Regulation 883/2004 (Section 2).

SECTION 1: A Seemingly Single Competent State

As already mentioned, the European Commission, had proposed a deep revision of Regulation 1408/71 in order to simplify the coordination of social security systems in 1998. The unemployment benefits would have been provided by the competent institution (in most of the

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cases the State of last employment) in accordance with the provisions of the legislation of that State, as though the person insured was available to the employment services of the said State. Besides, the Commission strangely imposes, without any distinction between partial and whole unemployment, that the unemployed person makes himself available to the employment services of the State of residence.\textsuperscript{221} The consistency of the last provision is to be found in the continuous argument of the European institutions that the unemployed persons have their best chances of finding work in that State, and that the control of job-seekers is materially easier in the State of residence. If the unemployed person decided to move to the State of last employment, he would simply make himself available to the employment services of that State, without any change in his benefits already paid. The Huijbrechts case-law would be voided.

This proposal was not uninteresting. The system proposed was not only easier, but it would have also solved part of the problems raised by the Regulation 1408/71. First it permitted the continuity in the social security status of the insured person who, after losing his job, would continue to receive social security benefits from the State of last employment that already could have burdened other benefits (e.g. sickness benefits). This is also more consistent for the benefits to top up unemployment benefits (e.g. crisis premium and collective dismissal compensation) because they are usually paid by the State of last employment (generally on the basis of a collective agreement or redundancy scheme).\textsuperscript{222} Furthermore, the Commission extended the period of export of the unemployment rights to 6 months.\textsuperscript{223}

The proposal also offers a better and fairer system to share the burden between the Member States, given that the benefits would then have been paid by the correct country, i.e. the country which received the contributions. It is also advantageous for the worker since the amount of benefits is proportional to the salary received by the worker while he was still exercising an economic activity, according to the ceilings imposed by the State of last employment. The differences between the standards of the various Member States (e.g. amount and length of the benefits) are thus also controlled.

Finally, the cancelation of the difference between partially and wholly unemployed frontier workers, by declaring the \textit{lex loci labori} principle always applicable, permits to avoid the whole discussion on the application of the De Laat judgment.

However, the proposal also contains some drawbacks. The first one certainly concerns the conservation of the old idea that the Europeans have more chance to find a job in the State of residence. This created two difficulties. First, it would have forced the partially unemployed worker to make himself available in the State of residence. Secondly, it ignores the phenomenon of “reverse frontier worker”. As a matter of principle, the tighter links with the State of last employment have been consecrated in the proposal (because it is where you receive benefits), but with a noticeable exception concerning the place where the worker should be available.

\textsuperscript{222} R. Cornelissen, “The new EU coordination system for workers who become unemployed” (2007), European Journal of social security, vol. 9, n°3, p. 208. This is for example the case of the Belgian top-up benefit in case of collective dismissal.
Another important issue that dissatisfied the Member States was the idea that they would have had to pay out benefits while other Member States merely had to check that the persons concerned were actually seeking work. Since the general mistrust among the Member States, the State of employment could fear that the State of residence would not be adequately stringent in supervising those seeking work when they are not liable to pay benefits.

Furthermore, some host Member States felt very threatened by this new system because a sudden change to the present rule could have some substantial financial consequences for them. In the relationship Belgium—the Netherlands, the Netherlands would suddenly face an increased amount of benefits to pay.

Given that unanimity was required, the text finally adopted was not the proposal of the Commission, but something more similar to the dispositions of Regulation 1408/71. In addition to the political considerations that lead some Member States to refuse the proposed text, it seems that the text might have been simplified too much, and has not been properly scrutinized in terms of practical implementation problems.

**SECTION 2: A Real Single Competent State**

In its proposal to simplify the coordination model, the Commission keeps two competent States: the State of residence (availability to the employment services) and the State of last employment (payment of the benefits). Other critics were addressed to the proposed text: e.g. the conservation of the idea that the State of residence is anyway best placed for the unemployed worker to seek work and the financial consequences of a radical change in the rules applied until now.

It is of course ambitious to try to solve all those problems at once. The task, without more integration, even seems unrealistic. However, some punctual proposals could help to clarify the unemployment coordination system. Therefore, we take the position that the improvements of the present systems should be based on the one hand on the establishment of a single competent State (for the payment of the benefits and the monitoring of the job), and, on the other hand, on more cooperation between the Member States when speaking about export of the benefits.

Here are several suggestions to determine one single competent State (§1). As announced, those propositions will not be effective without a better cooperation between the Member States in case of export of benefits (§2).

**§1 The Determination of the Competent State**

Once one agrees with the idea of a single competent State, the whole question then becomes: which one? One could confirm the general application of the *lex loci laboris* principle (A.), could rather leave the choice to the frontier worker (B.), or even try to find an equitable

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225 This would amount to approximately three times more than what it actually pays for the current time. See further details in the appendix.
226 Cfr Article 42 Treaty on the European Community.
criterion determining the competent State unilaterally (C.). It is worth noticing that a combination of some of those proposals is also possible.

A. General Lex Loci Laboris Principle

In practice, there are numerous proponents of the confirmation of the principle of *lex loci laboris* included for the wholly unemployed frontier worker. The State of (last) employment would thus be competent for both the payment and the supervision of the job-seeker, and for the whole as well as for the partially unemployed worker.

The conflicts of law would then be solved: the State that has received the contributions would now pay the benefits according to its own standards (including the possible top-up benefits) and its own particularities (e.g. the insurance for the self-employed). Consequently, a mechanism of compensation would not be needed anymore. The Miethe and Huijbrechts cases would also become voided, and the same is valid for the discussion on the definition of partial and whole unemployment.

However, the unconditional application of the law of the State of last employment, and especially the fact that the worker should make himself available in that State, would certainly slow down the free movement of workers. A worker would be reticent about the possibility to work abroad if it implies such a drastic change in his social security situation. This is even emphasized if the *lex loci laboris* principle has been applicable for the first day of work onwards, and if it implies that the person should seek employment in that State.

Only a very good mechanism of export of benefits could compensate for the consequences to be subject to the system of a foreign State. In that case, the unemployed person could then go back to his State of residence to look for a job there, while receiving benefits in the State of last employment. These considerations will be dealt with in the second paragraph of this section.

B. Open Choice for the Frontier Worker

The workers living in a State different from the State of employment, but who were not considered as frontier workers, had the choice, under Regulation 1408/71, to determine themselves which State would be competent (between the State of employment and the State of residence). They were indeed the ones who could best decide where they had more chance to find a new job.

We could imagine opening the same option for partially and wholly unemployed frontier workers, knowing that once the choice has been made, they would be subject to that State as well for the payment of benefits as for the monitoring of job-seekers. This would put an end to the dilemma of the European institutions to determine, unilaterally and without taking into consideration the particular situation of the worker, in which State the person would find an employment easily. This would also avoid the use of unclear criteria (e.g. personal and business links) given that the choice would not necessarily need to be motivated.

It is self-evident that the worker could then choose the most favourable State with regard to his benefits. There is however a clear limit to the choice offered: the claimant could only be entitled to sorts of schemes he contributed to and that could, if the need arises, be subject to
compensation mechanisms. Consequently, this option would, for example, not allow the self-employed person working in the Netherlands to be entitled to the Belgian insurance.

Moreover, this system presents more drawbacks than the precedent one. First, as just mentioned, it asks for a mechanism of compensation between the Member States if the chosen State is not the State of last employment. This also recalls the problem created by the different standards applied in the Member States. But the most serious issue this solution would raise is the real danger of cherry picking and financial imbalance created for the States providing for a favourable social security system.

C. Introduction of a Period of Insurance as a Criterion to Determine which State is Competent

The complete freedom of the workers to choose their competent State seems rather risky as it endangers the social security policy of the Member States. A half-way solution would be to introduce an undisputable criterion to determine the competent State. This proposal does not deal with subjective links the workers have with the competent State (i.e. we do not take into account the criteria used by the Court in the Miethe case), but rather with the length of employment in the State studied. To evaluate the length of employment, one could best rely on the period of insurance completed in that State.

That State could then be either competent automatically, or could be an optional choice for the worker according to the freedom one would leave to the person concerned.

If the State is competent automatically, the assumption of the competence of its institutions is based on the idea that the person has worked for several years in the same State and is thus integrated in the State of (last) employment. One could then guess that it would be easier for him to find a new, or a complementary job, in that State.

If the person can chose, the same idea remains, with an additional element: the person is free to determine if the several years spent in the State of last employment gave him more chance to find a job in that country, or if his search for a job would rather be more efficient in his country of residence. In that last option, a compensation mechanism is still needed.

One question remains: should that criterion, and the possible choice, be open for every unemployed frontier worker, or should it be offered only to the wholly unemployed persons. As far as we are concerned, we do not see any reason to limit these possibilities to a specific category of unemployed persons. On the contrary, giving that possibility to any unemployed person would mean the end of the discussion on the signification of the concepts “partial” and “whole” unemployment, which is more than welcome.

§2 Cooperation in Case of Export of the Benefits

The idea to determine a single competent State for the benefits and the control is only applicable as long as it is possible for the worker to export his rights to the State of his choice in order to seek work. This is part of the free movement of (also non-economically active) persons within the European Union. For frontier workers, this State could be the State that was not designated as competent, but where he has worked or lived.

228 This hypothesis has been introduced following an interesting interview of Ger Essers on 14th April 2011.
However, dealing with the export of the benefits reintroduces the dichotomy between payment and control. The best answer to this problem is brought by the new means of communication. The national administrations encourage the recourse to internet, on the one hand, to apply for jobs abroad for the persons remaining in the competent State, and, on the other hand, to control that the necessary steps to find a new job are indeed fulfilled for the persons who exported their benefits. To simplify those steps, one can be inspired by the system of portable documents already existing to transfer information between the Member States and create a comparable form available to the unemployed person to prove the active steps accomplished abroad to find a new employment.

Moreover, in order to have an effective system of export, the period during which such an operation is possible should be extended. Nevertheless, it is precisely one of the points that justified the refusal of the Member States to adopt the Commission proposal while it only proposed an export period of six months. While waiting to obtain an agreement on the general exportation of unemployment benefits, one could expect that the Member States would be keener to accept the extension of the export period only in limited hypotheses: a longer period of export of benefits could be allowed for the frontier workers who wish to exploit that possibility with regard to the State of residence or the State of last employment.

Finally, it is worth mentioning that exportability is a right not an obligation, and those who want to make use of it should accept the circumstances of their choice. This means that imposing further requirements on the workers who wish to export their rights is not incompatible with the free movement of job-seekers within the Union.

**CHAPTER 3: A HARMONIZED EUROPEAN SYSTEM**

It would be unfair not to mention the old dreams of some authors to establish a harmonized social security system at the European level. While some argue about such a system parallel to the national systems, available for the migrant workers exclusively, others are much more ambitious and would like to replace all the national systems definitively by one single European system.

If one can appreciate such a trust in further European integration, it seems more realistic for the moment to think about alternative solutions, given the absence of political will, and logistic means, to achieve a complete harmonization in this field.

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As announced in the introduction and repeated at several occasions in this paper, the main objective of the European legislator with Regulation 883/2004 was to modernize, simplify and shorten the coordination instruments. One can, on the one hand, wonder whether that aim has been achieved so far by the current provisions of the Regulation, and, on the other hand, one can question the proposed improvements with regard to the same triple goal.

After refusing the proposal of the Commission to modify Regulation 1408/71, the Member States found a consensus on the text of Regulation 883/2004. A first observation is obvious: the provisions on unemployment have not been shortened, on the contrary. The pertinent articles are now more numerous and much more detailed. One could argue that it was done to the benefice of the dimension of modernization. The new legal text indeed tends to reflect changes in Member States’ national social security legislations. This attempt can however be seen as unsuccessful since, among others, the Belgian insurance for self-employed and the pre-retirement benefits are not properly coordinated. With regard to the simplification of the coordination mechanisms, Regulation 883/2004 at least contributed to codify the various legal instruments and case-laws the European institutions had adopted on the basis of the former Regulation. Despite that important effort of rationalisation, questions remain on the current relevance of these rulings. Besides, the Regulation keeps the distinction between partial and whole unemployment, the dichotomy between control and payment, and, in general, the various exceptions to the general principle of lex loci laboris that require an efficient mechanism of compensation.

As far as the proposal of solutions to remedy the frictions between the national systems are concerned, the path of bilateral agreement or harmonization has already been identified as unsatisfactory, and it was agreed that the right procedure to follow was the improvement of the coordination model. The guideline was to identify a single competent State in order to avoid the conflicts of national order as identified in the former regulations and in the Commission proposal in 1998. This would, visibly, bring a clear simplification compared to the current system. In theory, any of the proposals to coordinate the unemployment benefits would also shorten the current set of rules thanks to the general application of a single principle combined with an efficient mechanism of export of benefits. At this point, one can wonder if the propositions are not too modern in the sense that the Member States are not ready yet to give away their sovereignty in the social field and to trust each other unconditionally.

The construction of a coherent coordination mechanism of the unemployment systems, taking into account the evolution of the national structures and the new forms of mobility, seems to be a never-ending task. Moreover, beside the questions raised in the social security field, the differences among the national fiscal regimes and the absence of a European labour market are other difficulties to overcome. While new proposals aiming at modifying the legal text are already on the table, the Court of Justice has a key role to play in order to fill in the unavoidable gaps left by Regulations 883/2004 and 987/2009, read in useful combination with Regulation 1612/68, with a single concern: guarantee the effective free movement of persons within the Union without discrimination. The actors in the social fields also take part in the development of the coordination instrument by pointing the practical shortcomings of its application.
“Jansen” and “Janssen”, who are theoretically free to move within the European Union, are thus likely to meet serious practical difficulties in the implementation of their rights certainly when considering unemployment benefits in the presence of a cross-border element. Indeed, even in the presence of a common framework combining European and national regulations, it appears to be really difficult to provide general rules for situations that are often atypical.

In that matter, as in many others, compromise, creativity and daring will be required from the Member States to go on building a united modern Europe.
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See also: http://www.rva.be/

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**APPENDIX**

**Appendix 1: Number of self-employed frontier persons between Belgium and the Netherlands**

![Bar Chart](image)

Source: Eurostat (unreleased)

No value available about the number of self-employed frontier worker residing in the Netherlands and working in Belgium for 2008.

**Appendix 2: Number of employed frontier persons between Belgium and the Netherlands**

![Bar Chart](image)

Source: Eurostat (unreleased)

Remark: The definition of frontier workers used by Eurostat does not match completely with Regulation 883/2004. These results should then not be taken strictly, but they help have a global view of the situation at the Dutch and Belgian common border.