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The application of free movement of workers and social security coordination rules by national courts

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MoveS - Free movement of workers and Social security coordination

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EXECUTIVE SUMMARY

Based on a questionnaire filled out by 10 MoveS national experts, this report provides an overview of the application of free movement of workers and social security coordination rules by national courts.

In most selected countries,[1] national experts have detected **recurring issues** in the field of Free Movement of Workers (FMW). They concern the status of worker (marginally employed persons' right to stay) and of a worker's family member; access to work in the public and private sectors (recognition of qualification and of jobs reserved to nationals); and non-discrimination issues. Also in the area of Social Security Coordination (SSC), nearly every selected Member State is confronted with recurring issues. Regarding applicable law, the main issue relates to posting. Concerning benefits, the majority of domestic cases relate to old-age pensions.

The amount of domestic FMW cases **where national law is considered to be in breach of EU law** is quite low. The number of those cases varies depending on the country. Some countries report no breach at all, whereas the number of cases is substantial for some others. This difference should be interpreted carefully. Even if conclusions are to be made with caution, it can be stated that the topic of discrimination particularly seems to entail the risk of breach of EU law. Indirect discriminations, for instance in the field of professional sports or through various requirements when it concerns access to social advantages, are specifically mentioned Article 45 TFEU is often cited as the EU instrument being violated, as well as Regulation (EU) No 492/2011 (Regulation (EEC) No 1612/68) and Directive 2004/38/EC. The number of SSC cases where the national rulings set aside any piece of national law for being contrary to EU law is marginal. Most countries do not mention any breach of coordination rules, and most of the breaches found by national experts have to do with the interpretation of a national law or of its application to a specific situation, e.g. the possible extension of the export period of an unemployment benefit, or the application of a residence test for means-tested child benefits.

In most FMW cases, **preliminary proceedings are reported as being unnecessary**. This can be explained by various factors: the clarity of the EU solutions applicable; the interpretation already provided by the Court of Justice of the European Union (CJEU) in former cases; and the fact that the matter at stake has already been addressed in former national cases. Where a preliminary ruling is considered as justified by national experts, most courts sent their question(s) to the CJEU. This ratio could demonstrate the existence of an efficient cooperation between national courts and the CJEU. In the SSC field, domestic courts requested a preliminary ruling when it was apparently necessary and did not do so when the EU legislation and/or the CJEU case law was clear, or when the national courts had already referred the matter to the CJEU. Some of the cases listed by national experts deal withthe application of EU law to a specific situation and require a significant degree of interpretation. In some cases the national social security schemes at stake are also quite different from the ones the CJEU has assessed in its case law. Some national courts nevertheless seem to be more reluctant than others to request preliminary rulings.

In a vast majority of FMW cases, **the application of EU law / CJEU case law has not been described as problematic.** Where difficulties are underlined, this is explained by

[1] The report is based on information from 10 representative Member States: France, Germany, Italy, Poland, Spain, Belgium, Hungary, Latvia, the Netherlands, and Finland.

the fact that either the legal issue at stake has not yet been tackled by the CJEU or by the fact that the application of EU law to individual cases is rather complex. For instance, the classification of worker for persons performing a marginal activity or the conditions under which a person can be expelled from a Member State are difficult to assess based on the abstract elements provided by the relevant EU instruments and the case law of the CJEU. In the SSC field, some judgments have been perceived as controversial, also because the topic in question is a subject of public discussion. In other cases, the decisions of the domestic courts were not the expected ones or at least the interpretation of EU law raised doubts. Most cases classified by national experts as difficult, deal with the application of EU law in very specific situations that have not yet been addressed by the CJEU. Also, national courts are confronted with recurrent issues that remain problematic and difficult to deal with, in part because the relevant coordination rules remain difficult to apply.

Some key topics emerge from the analysis. For FMW, the **concept of worker** is at the centre of attention of domestic courts. In particular, national courts are asked if marginally employed persons are "workers" within the meaning of Article 45 TFEU. Students' status is a subject of dispute before local courts. **Family members' status** is brought before national courts for various motives. If the classification of family member is raised, which rarely happens, it is mainly the family members' right to stay which leads to national cases. The right to stay is also explored from its "expulsion side". Some cases expressly deal with the application of the **principle of non-discrimination**, mainly from the perspective of indirect discrimination. In this respect, several domestic courts apply the notion of social advantage. If there is no dominant topic, the usual subjects of dispute in relation to discrimination are access to social aid, to care, old-age pensions entitlement, students' rights, and access to professional sports. A major FMW issue is the **access to work by EU citizens**: jobs reserved to nationals, access to jobs in the public sector, language requirements, and the recognition of diplomas are listed among subjects of dispute by national experts. Concerning the access to regulated professional activities, several cases are cited. Access to employment in the public service could appear to be problematic. Concerning working conditions, the status of public servants having gained experience in another Member State is a subject of dispute. Compared to the abundant CJEU case law on **jobseekers**, national case law remains sparse. Jobseekers' right to stay is however debated before domestic courts. The fact that there is not much case law should not be interpreted as meaning that cross-border jobseekers' rights are well protected. The complexity of EU law in this field and the variety of rules at national level together with the lack of disputes brought before national courts (jobseekers are in a weak situation to initiate court proceedings without trade unions' or NGOs' support) probably hide the reality.

In the field of SSC, there is abundant case law on the subject **of applicable legislation**, in particular on posted persons and persons working in two or more Member States. Five out of the ten Members States analysed judgments on the validity and/or probative value of A1 certificates. Another recurrent topic are letterbox companies. Also the determination of the place of residence is a subject of domestic court disputes. For what concerns **old-age benefits**, cases regarding entitlement to an old-age pension are quite diverse, as they deal with the particularities of each social security system. Cases focusing on calculation matters, in turn, tend to be more uniform across the selected Member States. Regarding calculation, a more transversal topic is calculation of the theoretical amount. Cases on aggregation were found in four out of ten Member States. National judgments on **unemployment benefits** deal with a rather heterogeneous problem: most of the judgments deal with entitlement to the benefit or allowance. The application of the special rules for persons that reside outside the competent Member

State, i.e. Article 65 of Regulation (EC) No 883/2004, is the most transversal topic. The most relevant topic in the field of **family benefits** is the determination of the place of residence for entitlement purposes. Cases on family benefits were found in six of the ten selected Member States, a significant number of which are dealing directly with determining the place of residence of the family or the children. Other topics common to more than one Member State are the determination of whether a family benefit lays within the scope of application of the coordination Regulations and the overlap of family benefits from different Member States.

From a general point of view, several conclusions and recommendations can be made:

i. There are more judgments, recurrent issues and preliminary rulings in SSC than in FMW.

ii. The CJEU judgments have helped establishing transversal criteria that are used by courts of all selected Member States in order to interpret EU law.

iii. There are no preliminary rulings on the validity of EU law, neither in FMW nor in SSC. All analysed preliminary rulings deal with the interpretation of EU law, and all seemed necessary. The intermediate courts, i.e. high or superior courts, apparently request more preliminary rulings than the supreme courts.

iv. The national courts do not always request a preliminary ruling when it is necessary.

v. Some recurring issues are repeatedly brought before the national courts of various Member States. It could be recommended to clarify those issues through EU legislation, instead of relying solely on the interpretation given by the CJEU judgments.

vi. Some recurring issues are repeatedly brought before the national courts of a single Member State. It could be recommended to investigate whether the national competent administration is diligently complying with the applicable EU law.

vii. The domestic courts rarely find national law that is in breach of EU law. However, judgments sometimes result in a modification of the way some national law is interpreted or implemented.

viii. Some national courts have relied on the AC Decisions and on the Commission's practical guide on applicable law in order to interpret EU law when they consider it not to be clear enough, even if those instruments are not legally binding.

ix. In order to obtain a clearer picture of the application of FMW and SSC rules by national courts, a series of annual monitoring studies could be recommended. The present report could serve as the basis to develop a harmonised data collecting methodology.

1. INTRODUCTION

1.1. Background and objectives

A large number of rulings by the Court of Justice of the European Union (CJEU) in the area of free of movement of workers (FMW) and social security coordination (SSC) are based, as a direct result of Article 267 of the Treaty on the Functioning of the European Union (TFEU), on requests for a preliminary ruling received from national courts. Solutions provided by the CJEU are well-known among Union law experts, but their impact on national law, in particular the way the referring national courts apply them, is largely ignored outside the country concerned. National courts also directly apply FMW/SSC rules to domestic cases without referring to the CJEU.

Currently, the Commission does not have any report which takes into account how national courts address issues concerning SSC/FMW when raised at national level. There is no follow-up on CJEU rulings, and no knowledge of domestic SSC/FMW-related cases.

It must be underlined that this report is not intended to be a conformity check of national law or of the application of CJEU rulings to national law: the objective is not to verify whether EU law is correctly applied by national courts, but to understand how national courts address matters when SSC/FMW rules/case law are at issue.

Hence, it would be interesting to assess how FMW/SSC rules (set out in the Treaty, Regulations, Directives) are being understood and applied at national level by domestic courts, irrespective of whether these cases are part of an Article 267 TFEU procedure or not. An analysis will be made of the approach of national courts in dealing with SSC/FMW issues, identifying whether national courts experience any difficulty in applying EU FMW/SSC law and if so, which issues are raised most frequently, or which issues pose particular problems for national courts.

1.2. Scope of the report and methodology

The report will analyse the manner in which litigants at national level raise what might be described as “well-established EU principles” in the field of SSC/FWM, such as the notion of “worker” and “the applicable law”, and the response of national courts. Furthermore, the report will examine possible reasons why in some instances national cases were not referred to the CJEU and explore the risks, if any, that this may pose for the application of SSC/FMW law. It was also considered useful to explore how in some cases, outside preliminary ruling proceedings, national courts applied a possibly controversial or creative interpretation of FMW/SSC rules.

Given the vastness of the subject, the scope of the report is as follows:

(i) national case law from higher and superior courts across all Member States;

(ii) national case law dating back ten years.

Selected topics of free movement of workers (FMW) and social security coordination (SSC) will be covered. The report is essentially based on a questionnaire (see below) sent to MoveS SSC/FMW national experts in the following representative Member States: France, Germany, Italy, Poland, Spain, Belgium, Hungary, Latvia, the Netherlands and Finland.

Given the wide variety of selected topics, the national experts were asked to pay attention to what they consider the most relevant cases[2] where it appeared to be impossible to make an exhaustive list. They were furthermore asked to focus on national case law from higher and superior courts, only taking into account judgments from lower courts if specific circumstances justify it. Save minor exceptions, the national experts only mentioned higher and superior courts' judgments, focusing mainly on supreme court cases.

Questionnaire sent to the 10 national experts

For each national case referring to the FMW and SSC topics below, indicate:

1) Was it a recurring legal issue?

2) Did the national ruling set aside any piece of national law that was found to be in breach of EU law?

3) Would a preliminary ruling have been justified/debatable/unnecessary?
Please justify your answer.

4) Was the application of the EU law / CJEU case law difficult or easy to apply at national level or was it difficult or controversial? Please justify your answer.

FMW topics:

(i) concept of worker
(ii) concept of worker's family member
(iii) workers' and family members' right to stay (legal residence)
(iv) direct discriminations on grounds of nationality
(v) indirect discrimination (and obstacle to free movement of workers)
(vi) access to work, including restrictions to employment in the public service
(vii) working conditions
(viii) access to social advantages
(ix) cross-border jobseeker's status and right to stay for job search purposes

SSC topics:

(i) applicable legislation
(ii) old age benefits
(iii) unemployment benefits
(iv) family benefits

[2] See in Annex I a list of relevant cases per country selected from the questionnaires filled out by national experts.

2. GLOBAL STATISTICAL ELEMENTS

2.1. Free movement of workers

2.1.1. Are there recurring issues at national level?

Almost all selected countries referred to recurring issues being brought before national courts (for an overview, see table 1 below). The topics are diverse: the status of worker and of a worker's family member, access to work (in particular the recognition of qualification and of jobs reserved to nationals), and non-discrimination.

The matter of **access to work** understood in all its dimensions crops up regularly: in particular access to employment in the public sector and access to employment in the private sector (recognition of diplomas) lead to court disputes. The status of persons who either have a "**marginal employment**" or are seeking a job is another topic of judicial interest. Behind the worker qualification lies the crucial matter of access to social benefits.

Discrimination as such is not often cited. However, this fundamental topic is apparent through the matter of access to work and the concept of social advantages.[3] It is also interesting to observe that there is no recurrent dispute concerning migrant workers' working conditions even if, as we will see below in chapter 3, some cases refer to migrant workers who require periods of work which have been completed in another Member State to be taken into account for their career pattern.

In many cases, the **application of EU law** is assessed by national experts as **difficult**. Where a preliminary ruling seems necessary, national courts usually take recourse to this judicial cooperation procedure, but not always. This could be explained by various causes: the case may be difficult but the CJEU has already ruled on the matter; or national courts and/or parties involved in the dispute are not aware of EU relevant rules and their direct implication for the conflict. In some cases, the difficulty encountered by national courts is not due to a lack of clarity of EU law or a good knowledge of it, but due to the challenge of the concrete application of EU law to individual cases.[4]

Table 1: List of recurring issues per country

Country	Topic	No of cases	Application of EU law difficult (D), easy (E) or controversial (C)[5]	No of cases where preliminary ruling was necessary[6]	No of cases where request for preliminary ruling was made
BE	Region-related requirements	2	E (2)	1	1

[3] Which is often cited by national experts.

[4] See, for instance, the concrete application of the concept of worker for persons who perform a marginal activity.

[5] **Easy** means that, according to the NE opinion, applying (clear) EU rules to the individual case was not problematic. **Difficult** means that the NE considered that applying EU law to the individual case was problematic, because of the lack of clarity of EU relevant rules or because of their ill-adaptation to the individual case at stake. **Controversial** refers to cases where, according to the NE opinion, the national ruling may be considered as incompatible with EU law or the legal solution adopted could be described as debatable. The number of cases is indicated between brackets.

[6] According to the national experts.

Country	Topic	No of cases	Application of EU law difficult (D), easy (E) or controversial (C)[5]	No of cases where preliminary ruling was necessary[6]	No of cases where request for preliminary ruling was made
DE	Marginally employed persons' right to stay	7	E (7)	0	0
DE	Employment in public service	1	E (1)	0	0
DE	Jobseekers' right to stay	9	D (2) E (7)	5	2
ES	Workers' right to stay	2[7]I	D[8]	0	0
ES	Family workers' right to stay	3[9]	D	-	3
ES	Discrimination in favour of other EU nationals	1[10]	D	1	0
ES	Recognition of diplomas	2	D	0	0
FI	-	-	-	-	-
FR	Indirect discrimination in professional sports	3[11]	D (3)	0	0
FR	Recognition of diplomas	5[12]	D (5)	1	0
HU	Students' status	1[13]	E (1)	0	0
HU	Right to work	2[14]	D (2)	1	1
HU	Access to work – transitional period	3	E (3)	0	0
IT	Recognition of diplomas	4	E (3) D (1)	4	4
IT	Social advantages	2	E (2)	1	1

[7] The national report indicates that it is a recurrent issue.

[8] Difficult to determine whether an expulsion is based on imperative grounds.

[9] The national report indicates that it is a recurrent issue

[10] The national report indicates that it is a recurrent issue

[11] Lower courts have addressed this matter in series of cases.

[12] Lower courts have addressed this matter in series of cases.

[13] The national report indicates that it is a recurrent issue.

[14] The national report indicates that it is a recurrent issue.

Country	Topic	No of cases	Application of EU law difficult (D), easy (E) or controversial (C)[5]	No of cases where preliminary ruling was necessary[6]	No of cases where request for preliminary ruling was made
LV	Access to work	1[15]	-	-	-
NL	Worker status	3[16]	D (3)	0	0
PL	-	-	-	-	-

2.1.2. Did the national ruling set aside any piece of national law that was found to be in breach of EU law?

Compared to the overall number of cases listed by national experts, the number of cases where national law is considered as in breach with EU law seems quite low (for an overview, see table 2 below). The ratio varies depending on the country. Some of them report no breach at all, whereas the rate is substantial for others. This **difference in ratio** should be interpreted cautiously. It does not necessarily mean that in the countries where the ratio is high EU law is more often violated. On the contrary, it could be a sign of a higher EU law awareness by judges and parties, and a judicial willingness to comply with it. Besides, the non-application of national law is only relevant when its interpretation in conformity with Union law is impossible, for being "*contra legem*".

In some of the cases cited by national experts, national courts rule by disregarding the national regulation that is incompatible with EU law.[17] In other cases, a preliminary ruling highlights the incompatibility of the national law, thereby leading the national court to apply the EU law solution.[18] However, in yet other cases, the EU relevant instrument is not analysed by the national court, potentially leading to a breach of EU law.[19]

Even if conclusions are made with precaution, the topic of **discrimination** seems to particularly concern the risk of breach of EU law. Indirect discriminations, for instance in the field of professional sports[20] or through various requirements,[21] are particularly cited as well as access to social advantages.[22]

An **EU instrument** that is often presented as being **violated**, is Article 45 TFEU. Various reasons can be given for the use of this Treaty provision: its direct effect in employment-related cases, its practical value since many CJEU cases apply it; and its broad material scope which allows to encompass many different concrete topics. Unsurprisingly, two "secondary pillar instruments" of the rules on free movement of workers – Regulation

[15] The national report indicates that it is a recurrent issue.

[16] Lower courts have addressed this matter in series of cases.

[17] E.g. DE.

[18] E.g. IT.

[19] E.g. LV.

[20] FR.

[21] DE.

[22] Article 7(2) of Regulation (EEC) No 1612/68 and Regulation (EU) No 492/2011.

(EU) No 492/2011 (Regulation (EEC) No 1612/68) and Directive 2004/38/EC – also appear as sources of EU law used to establish the incompatibility of national law.

Table 2: National law that was found to be in breach of EU law. Per country

Country	No of cases with breach of EU law	Topic	Nature of instrument found in breach of EU law (topic)	EU legal act breached
BE	0/6	N/A	N/A	N/A
DE	2/30	Indirect discrimination – FMW	§ 1 I Nr. 2 UhVorschG	Reg 1612/68 – Art 45 TFEU
ES	0/19	N/A	N/A	N/A
FI	0/3	N/A	N/A	N/A
FR	6/17	Indirect discrimination – cross-border jobseekers' status	Professional sports regulation – civil servant statutory rules	Art 45 TFEU – Dir 2004/38
HU	3/7	FMW – social advantage	-	Art 45 TFEU – Reg 492/2011
IT	1/6	Social advantage	-	Dir 2003/109
LV	1/2	Access to work[23]	-	Art 45 TFEU
NL	0/20	-	-	-
PL	-	-	-	-

[23] Language knowledge.

2.1.3. Were preliminary rulings referred justified / debatable / unnecessary or would it have been justified / debatable / unnecessary to refer them?

In most cases, preliminary proceedings were analysed by national experts as being **unnecessary** (for an overview, see table 3 below). According to national experts, this can be explained by various factors: the clarity of the EU instrument and the solutions applicable[24]; the interpretation already provided by the CJEU in former cases[25] or in the proceedings at stake; the fact that the matter dealt with in the national case has already been addressed in former national cases.[26]

Where a preliminary ruling is considered as **justified** by national experts, most courts sent their question(s) to the CJEU. This ratio may demonstrate the existence of an efficient cooperation between national courts and the CJEU. In this respect, it must be added that all national reports indicate that CJEU rulings have been fully applied by the referring national court.

Another issue, not addressed by this report, is whether **public authorities** take into account the CJEU preliminary rulings by amending national law where it is needed.

Table 3: Would a preliminary ruling have been justified/debatable/unnecessary? Per country

Country	No of cases	Justified	Debatable	Unnecessary
BE	-	-	-	-
DE	26[27]	1[28]	8	17
ES	19	4[29]	6	9
FI	3			3
FR	17	8[30]	1	8
HU	2	2[31]		5
IT	6	6[32]		
LV	-	-	-	-
NL	20		2	
PL	-	-	-	-

[24] E.g. The right to stay.

[25] E.g. The concept of worker.

[26] E.g. The right to stay for jobseekers, the right to access to work in the field of professional sports, etc.

[27] 4 other cases listed by the national report were not relevant for this table.

[28] Not sent to the CJEU for a preliminary ruling.

[29] 3 have been sent to the CJEU for a preliminary ruling.

[30] 2 have been sent to the CJEU for a preliminary ruling.

[31] All of them were sent to the CJEU.

[32] All of them were sent to the CJEU.

2.1.4. Was EU law/CJEU case law difficult or easy to apply at national level or was its application difficult or controversial[33]?

It is striking to find that in a vast majority of cases the application of EU law/ CJEU case law is **not** depicted as **problematic** (for an overview, see table 4 below). This may be the result of the overall clarity of EU law, and also of the recurrence of the same type of disputes before national courts.[34]

Where **difficulties** are underlined, it is explained that either the legal issue at stake has not yet been tackled by the CJEU or the application of EU law to individual cases is rather complex.[35] For instance, the classification of worker for persons performing a marginal activity or the conditions under which a person can be expelled from a Member State are uneasy to assess based on the abstract elements provided by the relevant EU instruments and CJEU case law.[36] Transitional arrangements applicable in the field of FMW are also difficult to implement at national level.[37]

The fact that EU law/ CJEU case law is sometimes found difficult to apply at national level does not mean that there should be more **preliminary ruling** proceedings. Indeed, as already mentioned, problems often derive from the concrete application of clear and well-established EU law to individual cases.

Table 4: Cases where application of EU law/CJEU case law was difficult or controversial. Per country

Country	No of cases	Difficult	Controversial
BE	6	0/6	1/6
DE	30	5/30[38]	0/30
ES	19	5/19[39]	4/19
FI	3	0/3	0/3
FR	17	7/17	4/17
HU	7	4/7[40]	
IT	6	1/6	
LV	2	1/2[41]	
NL	20		9/20
PL	-	-	-

[33] The words “easy”, difficult” and “controversial are explained in footnote 5. Between brackets is indicated the number of cases.

[34] E.g. the concept of worker.

[35] E.g. rules for having the right to exercise certain professional activities, e.g. ski instructor.

[36] See DE report for illustrations.

[37] See PL report.

[38] Because not settled yet.

[39] Application to individual cases of EU instruments is complex.

[40] Transitional arrangements are difficult to interpret.

[41] EU law was not assessed by national court.

2.2. Social security coordination

2.2.1. Are there recurring issues at national level?

Nearly every selected Member State (MS) has **recurring issues** brought before national courts (for an overview, see table 5 below). The topics vary, however. Regarding **applicable law**, the main issue is, without a doubt, posting; not only the probative value of the A1 certificate, but also the requirements for the certificate to be issued, including conflicts about the existence of a "letterbox company".

Of the **benefits** selected (old-age pensions, family benefits and unemployment benefits), old-age pensions are referred to in the majority of cases. This seems logical, since beneficiaries fight more for lifetime pensions.[42] More or less the same amount of judgments are cited concerning unemployment[43] and family benefits.[44]

In some MSs, it is possible to identify the main recurring topics according to the national experts' opinions and to the number of judgments listed by them. **Applicable law** is the key issue in FR and PL (in PL, 24 judgments were reported on this topic alone). On the contrary, LV does not list any case regarding applicable law. In DE two topics are especially recurring: the jobseeker's allowance for EU migrants and child benefits in cross-border situations. The latter topic is apparently very controversial. Family benefits are especially controversial also in FI and NL.

In other MSs problems regarding SSC are mainly related to **old-age pensions** (ES, IT and HU). The majority concern the calculation of old-age social security benefits, mainly regarding the theoretical amount. Other interesting issues are, among others, the overlapping of an invalidity pension supplement and a foreign old-age pension (ES), the aggregation of foreign contributions in order to calculate miners' old-age pension, and the need to exhaust the foreign unemployment benefit before being entitled to a national old-age pension (HU).

There is no clear link between the activity of national courts and the number of preliminary rulings. There are recurring cases associated with certain preliminary rulings, while other topics are discussed only before national courts. For instance, in PL in only one out of the 24 cases reported on applicable law, a preliminary ruling was requested. In turn, in three of the six cases on old-age pension, mostly on non-recurring issues, a preliminary ruling was requested During the ten-year period analysed (2009-2019) there were 28 interpretative preliminary rulings in the 10 MSs selected, not one regarding the validity of EU law. And while some MSs have not requested any preliminary ruling (LT, IT, FI, HU), in DE there were at least 8 requests, followed by ES (7), PL (4), FR (4), BE (3) and NL (2).

Table 5: List of recurring issues per country

[42] 46 cases are mentioned

[43] 27 cases are mentioned.

[44] 30 cases are mentioned.

Country	Topic	No of cases	Application of EU law difficult (D), easy (E) or controversial (C)[45]	No of cases where preliminary ruling was necessary[46]	No of cases where request for preliminary ruling was sent
BE	A1 probative value	3	E(30)	1	1
DE	Agreements under Art 16 of Reg 883/04	1[47]	E	0	0
DE	A1 certificate	1[48]	E	0	0
DE	Childcare credits when care is provided abroad	2[49]	C	2	0
DE	Subsequent insurance of civil servants	1I[50]	D	1	1
DE	Jobseeker's allowance for EU migrants	14[51]	D	1	1
DE	Non-contributory benefits for EU migrants	2[52]	**D**	2	2
DE	Child benefit in cross-border situations	29 [53]	C	4	4
ES	Validity of A1 in posting situations	2[54]	E	0	0
ES	Letterbox companies	5[55]	E	0	0

[45] The words "easy", difficult" and "controversial are explained in footnote 5. Between brackets is indicated the number of cases.

[46] According to the national experts.

[47] The national report indicates that it is a recurrent issue

[48] The national report indicates that it is a recurrent issue

[49] The national report indicates that it is a recurrent issue

[50] The national report indicates that it is a recurrent issue

[51] The national report indicates that it is a recurrent issue

[52] The national report indicates that it is a recurrent issue

[53] The national report indicates that it is a recurrent issue

[54] The national report indicates that it is a recurrent issue

[55] The national report indicates that it is a recurrent issue

Country	Topic	No of cases	Application of EU law difficult (D), easy (E) or controversial (C)[45]	No of cases where preliminary ruling was necessary[46]	No of cases where request for preliminary ruling was sent
ES	Notional contributions for entitlement to pensions	3	E	0	0
ES	Aggregation	1[56]	E	0	0
ES	Overlapping of an invalidity pension supplement and a foreign old-age pension	5[57]	D C (1)	5	2
ES	Not completed insurance periods for calculation of the theoretical amount	2[58]	D C (1)	2	1
ES	Updating of the theoretical amount	1[59]	C	1	0
ES	Notional contributions for *pro rata temporis*	1l[60]	D	0	0
ES	Application of EU law or bilateral agreement	1[61]	E	0	0
ES	Entitlement to unemployment subsidy	2[62]	C	0	0
FI	Entitlement to residence-based social security	4	E	0	0
FI	Aircrew rule for determining the applicable legislation	1[63]	E	0	0

[56] The national report indicates that it is a recurrent issue
[57] The national report indicates that it is a recurrent issue
[58] The national report indicates that it is a recurrent issue
[59] The national report indicates that it is a recurrent issue
[60] The national report indicates that it is a recurrent issue
[61] The national report indicates that it is a recurrent issue
[62] The national report indicates that it is a recurrent issue
[63] The national report indicates that it is a recurrent issue

Country	Topic	No of cases	Application of EU law difficult (D), easy (E) or controversial (C)[45]	No of cases where preliminary ruling was necessary[46]	No of cases where request for preliminary ruling was sent
FI	Foreign pensions and thresholds for entitlement to national pension	1[64]	E	0	0
FI	Earnings-related unemployment allowance	3	E C (1)	0	0
FI	Family benefits in cross-border situations	6	E	0	0
FR	A1 probative value	8	E (5) C (3)	2	1
FR	Contribution base	4	E (2) C (2)	1	1
FR	Transitory provisions (Art 87(8) of Reg 883/04)	2	E	0	0
FR	Double contributions	2	C	2	0
HU	Aggregation for calculating miners' old-age pensions	1[65]	E	0	0
HU	Compatibility of national old-age pension with a foreign unemployment benefit	1[66]	E	0	0
IT	Professional activity in two or more MSs	2	E	0	0
IT	Theoretical amount of an old age pension and minimum pension	4	E	0	0

[64] The national report indicates that it is a recurrent issue

[65] The national report indicates that it is a recurrent issue

[66] The national report indicates that it is a recurrent issue

Country	Topic	No of cases	Application of EU law difficult (D), easy (E) or controversial (C)[45]	No of cases where preliminary ruling was necessary[46]	No of cases where request for preliminary ruling was sent
IT	Aggregation principle for old-age pensions	3	E (2) C (1)	1	0
LV	Calculation of pension, overlapping of periods in two MSs	1[67]	C	0	0
LV	Entitlement to unemployment benefit and place of residence	1[68]	E	0	0
LV	Totalisation of periods of insurance for amount of unemployment benefit	1[69]	E	0	0
LV	Entitlement to family benefit and place of residence	2[70]	C	0	0
LV	Overlapping of benefits: recovery of payments	1[71]	E	0	0
NL	Entitlement to residence-based social security and marginal activities in another MS (*Franzen*)	2[72]	D & C	1	1
NL	Applicable legislation when working in more than 1 MS	1[73]	D	0	0
NL	Means-tested child benefit (*Zambrano* and *Dereci*)	1[74]	D & C	0	0
PL	Posting requirements. E101 probative value	6	E (5) C (1)	1	0

[67] The national report indicates that it is a recurrent issue
[68] The national report indicates that it is a recurrent issue
[69] The national report indicates that it is a recurrent issue
[70] The national report indicates that it is a recurrent issue
[71] The national report indicates that it is a recurrent issue
[72] The national report indicates that it is a recurrent issue
[73] The national report indicates that it is a recurrent issue
[74] The national report indicates that it is a recurrent issue

Country	Topic	No of cases	Application of EU law difficult (D), easy (E) or controversial (C)[45]	No of cases where preliminary ruling was necessary[46]	No of cases where request for preliminary ruling was sent
PL	Pursuit of activities in two or more MSs	9	E (6) C (2) D (1)	1	1
PL	Denial of A1 posting (letterbox companies)	7	E (6) C (1)	0	0
PL	Award of a supplement according to Art 58 of Reg 883/04	1[75]	C	0	0
PL	Place of residence for entitlement to unemployment benefits	4[76]	C	0	0

2.2.2. Did the national ruling set aside any piece of national law that was found to be in breach of EU law?

The number of SSC cases that have affected national law is **marginal** (see table 6 below). Most countries do not see any breach of the coordination Regulations, and most of the breaches have to do with the interpretation of a national law or of its application to a specific situation, such as those regarding a subsequent insurance of a civil servant (DE), the overlapping of an invalidity pension supplement and a foreign old-age pension (ES), the possible extension of the duration of exportation of the unemployment benefit or the application of a residence test for means-tested child benefits in situations envisaged by Regulation (EC) No 883/2004 (NL), and double contributions (FR).

Table 6: National law that were found to be in breach of EU law – Per country.

Country	No of cases with breach of EU law	Topic	Nature of instrument found in breach of EU law (topic)	EU legal act breached
BE	1/7	Entitlement to tide-over allowance	Interpretation of Art 36 of Royal Decree of 25 November 1991 on unemployment	Art 45 TFEU
DE	1/50	Subsequent insurance of civil servants	Interpretation of Art 8 of social security law	Art 45 TFEU

[75] The national report indicates that it is a recurrent issue

[76] The national report indicates that it is a recurrent issue

Country	No of cases with breach of EU law	Topic	Nature of instrument found in breach of EU law (topic)	EU legal act breached
ES	4/28	Overlapping of an invalidity pension supplement and a foreign old-age pension	Interpretation of Decree 1646/1972	Annex IV, part D, of Regulation 1408/71 and Art 53 of Reg 883/04
FI	0/17	-	-	-
FR	6/31	A1 probative value	Undeclared work regulation[77]	Reg 883/04
		Double contributions	Social security code and tax code	Reg 883/04
HU	0/2	-	-	-
IT	0/11	-	-	-
LV	0/10	-	-	-
NL	2/11	Extension of duration of the exportation of unemployment benefit	Interpretation of national legislation on exportation of unemployment benefit	Reg 883/04
		Applying of Dutch residence test for means-tested child benefit	Applicability of Dutch ordinary residence test in situations when Reg 883/04 is applicable	Reg 883/04
PL	0/37	-	-	-

[77] Is the binding effect of A1 forms extended to labour law, in particular the duty for the employer to make an administrative declaration prior to the recruitment of a new employee?

2.2.3. Were preliminary rulings referred justified / debatable / unnecessary or would it have been justified / debatable / unnecessary to refer them?

In the majority of the cases,[78] domestic courts requested a preliminary ruling when it was apparently **necessary**, and did not do so when the EU legislation[79] and/or the CJEU case law was clear,[80] or when the national courts had already addressed the matter before the CJEU.[81] However, in some cases the decision of the national courts to decline requesting a preliminary ruling could be considered controversial and in other cases requesting a ruling would probably have been justified.

The national experts underline cases where the application of EU law to a specific situation required a significant **degree of interpretation** of said EU law. For instance, some judgments dealt with the entitlement to child care credits when care is provided abroad (DE); one judgment concerned the difficulty to determine the MS of residence for the purpose of entitlement to family benefits (LV); there was a judgment on the fulfilment of the requirement of being insured under the Spanish social security system (Article 14(1) of Regulation (EC) No 987/2009) (ES); and judgments where the AC Decisions were used for interpretative purposes (IT).

In other judgments, the **difficulty** comes from the fact that the national scheme or the benefit at stake differs from those which the CJEU has already evaluated in its case law. For instance, the Dutch means-tested child benefit is part of the minimum social assistance substance package. Therefore, it was debatable whether a preliminary ruling could be necessary to determine if the Judgment in case C-34/09, *Zambrano*, is applicable (NL). Likewise, there are two cases on the entitlement to a Finish means-tested unemployment allowance, one regarding the assimilation of a foreign pension as income for the purpose of entitlement and the other one on the possible aggregation of periods of uninsured work performed in another MS (FI).

Some national courts seem to be more **reluctant** than others to request preliminary rulings. For instance, the Spanish Supreme Court almost never requests preliminary rulings on SSC. More than 20 years ago it requested a ruling on the validity and interpretation of the ad hoc rules for the calculation of the theoretical amount of old-age pensions,[82] and the CJEU ruled out the possible solutions proposed by the Spanish Supreme Court. This topic is still repeatedly brought before domestic courts but the Spanish Supreme Court have not asked for a preliminary ruling.

In Poland, the courts seem in some cases to have interpretation difficulties with respect to the coordination Regulations They however **rarely request** a preliminary ruling. In addition, they often consider the AC Decisions and the practical guide of the Commission for interpretative purposes. They state that the guide is not legally binding, but as a source for interpreting EU law it is of great importance.

In France, even if at least four SSC preliminary rulings were **requested** during the last year, in several other cases it was not requested even if it was justified, or at least debatable. Among them: three cases on the absence of A1 forms; two cases on double contributions (Article 13 and 14 of Regulation (EEC) No 1408/71); and three cases on

[78] According to the national experts.

[79] E.g. Article 87(6) of Regulation (EC) No 883/2004.

[80] E.g. overlapping of periods of insurance.

[81] E.g. C-55/00, Gottardo.

[82] C-153/97, Grájera Rodríguez, on Annex VI.D.4 of Regulation (EEC) No 1408/71.

the entitlement to unemployment benefits according to Article 71(1) of Regulation (EEC) No 1408/71, one regarding a person that had not worked in France, and two regarding frontier workers.

Table 7: Would a preliminary ruling have been justified/debatable/unnecessary? Per country.

Country	No of cases	No of preliminary rulings	Justified	Debatable	Unnecessary
BE	7	3	3	0	4
DE	50	8	10	0	40
ES	30	7	9	6	15
FI	17	0	0	2	15
FR	31	4	7	5	19
HU	2	0	0	0	0
IT	11	0	2	0	9
LV	10	0	0	1	9
NL	11	2	2	1	9
PL	37	4	4	2	31

2.2.4. Was EU law/CJEU case law difficult or easy to apply at national level or was its application difficult or controversial[83]?

In all the MSs analysed, some judgments are perceived as **controversial**.[84] Some of them because the topic in question is a **matter of public discussion**, for instance cases on: child benefits in cross-border situations (DE); rules of calculation of the theoretical amount of old-age pensions (ES); the exportability of old-age pension supplements; the extension of the duration of exportation of unemployment benefits; and the entitlement to means-tested child benefits (PL).

In other cases, the **decision** of the court was **not the expected one**, or the **interpretation** of the EU law **raises doubts** (according to the national expert). For example, in one controversial case the court ruled in favour of a person who was residing abroad and wanted to pay contributions to a supplementary old-age pension scheme and obtain the derived benefits (BE). Other examples are judgments on the entitlement of returned migrants to Spanish unemployment subsidies; a case on the fulfilment of the requirement of being insured under the Spanish social security system (Article 14(1) of Regulation (EC) No 987/2009) (ES); two cases on the entitlement to Finish means-tested unemployment allowances (FI); and a case in which the H6 AC Decision of 2010 on aggregation of periods was used by the court for interpretative purposes (IT).

[83] The words “easy”, difficult” and “controversial are explained in footnote 5. Between brackets is indicated the number of cases.

[84] According to national experts and to the definition of controversial given in footnote 5.

Most cases that were described as **difficult** deal with the **application of EU law to very specific situations** that have not yet been addressed by the CJEU. For instance: a case on subsequent insurance of civil servants (DE); situations where it is difficult to determine the place of residence for entitlement to family benefits; a case on determining whether a supplement for disabled children should be considered a family benefit in the meaning of Article (1)(1)(z) of Regulation (EC) No 883/2004 (PL); or a judgment on the entitlement to residence-based social security for persons performing marginal activities in other MSs (NL).

However, some national courts are confronted with **recurrent issues** that remain problematic and difficult to deal with, in part because the relevant coordination rules are difficult to apply. For instance, judgments regarding the application of national rules preventing overlapping in the case of pensions subject to coordination (ES). Some of these topics have been the subject of preliminary rulings that have partially clarified the issue. Such is the case for jobseekers' allowances (C-67/14, *Alimanovic*) and non-contributory subsistence benefits (C-333/13, *Dano*; C-299/14 – *Garcia Nieto*) for EU migrants (DE).

The national courts apply the existing CJEU case law instead of asking for further clarification. This is the case for judgments on the theoretical amount of old-age pensions in ES and in IT. In the latter MS, during the period analysed, there have been at least four cases on the supplementation of the theoretical amount of the IT old-age pension, in order to reach the IT minimum pension.[85] The judgments refer to cases C-132/96, *Stinco,*[86] and C-30/04, *Koschitzki*,[87] even if the matter in question seems different, and it has to do with cases where the applicant is not residing in IT. In our view the IT supreme court could have asked for a preliminary ruling as there is no judicial remedy after its judgment, but it did not seem to have any doubt about the solution.[88]

Table 8: Cases where application of the EU law/CJEU case law was difficult or controversial. Per country.

Country	Total No of cases	Difficult	Controversial
BE	7	-	1
DE	50	16	32
ES	28	8	6
FI	17	0	2
FR	31	2	11
HU	2	-	-
IT	11	0	2

[85] *Integrazzione all minimo*, a supplement intended to bring the pension to the level of the statutory minimum. The issue arrived before the IT supreme court in 2011, twice in 2012, and again in 2019.

[86] The plaintiffs rely on C-132/96, *Stinco*, which obliged to apply the complement and established that the impossibility to export this II SNCB supplement "was not in any way connected with the question of determining the theoretical amount of a pension". We must keep in mind that the theoretical amount is not a real pension, as it is later affected by the *pro rata temporis*.

[87] The IT social security administration and the national courts underline that the *Stinco* doctrine was later clarified by case C-30/04, *Koschitzki*. In this judgment, the CJEU allowed not to apply the supplement when the income limits fixed by the national legislation were exceeded.

[88] Leaving aside that the migrant asking for a pension does not have to live in Italy, not even in the EU (see C-331/06, *Chuck*), it could be argued that this different treatment by the IT administration could hide an indirect discrimination on grounds of nationality. The cases mentioned do not appear to provide the necessary guidance to solve this question.

Country	Total No of cases	Difficult	Controversial
LV	10	2	2
NL	11	2	4
PL	37	-	5

3. ANALYSIS PER TOPIC

3.1. Free movement of workers

3.1.1. Personal scope: concept of worker and of a worker's family member, right to stay

The **concept of worker** is at the centre of attention (for an overview, see table 9 below). As national reports confirm, beyond the classification of worker the real issue is the right to stay and the entitlement (under the principle of equality of treatment) to social benefits.

In particular, national courts have been asked if **marginally employed persons** are "workers" within the meaning of Article 45 TFEU.[89] This question is raised in different circumstances: the application of the association agreement with Turkey (DE); persons who for many years receive an average monthly wage of € 200-300 (DE); someone who works three and a half hours per week and who gets board and lodging by social assistance (DE), for a person who works between six and ten hours per week for a limited duration (DE). What about the sale of magazines by homeless people? These persons are not classified as workers since there is no employment relationship with the association (no remuneration, no enforceable obligations, no direction) (DE). On the contrary, a person who works in the framework of a programme aiming to foster insertion of unemployed workers is a worker under the meaning of Directive 2004/38/EC, the national court insisting on the extensive conception of the notion of worker developed by the CJEU and on the necessity for the administration to take it into account in its assessment of the situation (FR).

An isolated case, nevertheless, worth mentioning, underlines the non-application of EU free movement rules to a **purely internal situation** (ES).

Students' status is also an interesting subject of dispute before courts. Is a **doctoral student with a scholarship contract** (including occasional performances such as group meetings) a "worker" within the meaning of Article 45 TFEU? The answer from one national court was negative: since the receipt of a scholarship is not subject to social security payments / taxes, there is no personal subordination link and no obligations linked to and typical for scholarships (DE). In other cases, the **status of a student exercising a side job** was debated: the student arrived in FI in order to study and was therefore not granted a student aid pursuant to the national legislation. However, s/he had also started to work and therefore studying was not his/her only ground to stay in FI. The national court ruled that the student should be granted the study aid (if the other conditions for granting the benefit are fulfilled) because s/he is considered to be a worker (FI). The NL report points out several cases of that kind. For instance, 56 hours can be regarded as satisfying the requirement of effective and genuine work. On the contrary, a student who mainly pursues his professional activity in the country of origin was not considered a worker. The NL report also refers to a case where **an intern** was reclassified as a worker.

[89] E.g. DE.

The **status of family member** is brought before national courts for various motives. If the **classification of family member** is raised, which rarely happens,[90] it is mainly the **family members' right to stay** which leads to domestic cases, in particular when they are third-country citizens. For instance, a mother's right to stay has been affirmed because of the forthcoming birth of her child (DE). It has also been ruled that the right to stay for family members does not require that they live in the same household as the person who is directly entitled to the freedom of movement (DE). A third-country national spouse's right to stay does not depend on living together with the spouse: it is sufficient that the Union citizen resides in the host Member State (MS) (DE). The application for a residence card of a third-country family member of a Spanish citizen was denied due to a lack of evidence of compliance with the sufficient economic means requirement, as established in Article 7 of Royal Decree 240/2007 and Directive 2004/38/EC, the matter of the application of this Directive in this context being subject to further discussions before national courts (ES).

The **right to stay is explored from its "expulsion side".** For instance, it has been held that the expulsion of a Romanian citizen, working and residing in Spain for more than ten years, who was sentenced in several gender-based violence cases, is justified since the personal conduct of the appellant constituted a real, current and sufficiently serious threat, as required by Royal Decree 240/2007 (transposition of Directive 2004/38/EC), the expulsion decision being based on imperative grounds (ES). A domestic court held that EU citizens who were not considered as employed persons, self-employed persons, jobseekers or students, who in addition relied on the social benefits immediately after their arrival in FI and without interruption, could be rightly expelled by application of Directive 2004/38/EC (FI). The NL report also highlights cases where the derived right of residence of third-country nationals is discussed. For instance, national courts held that the residence of third-country nationals, ex Article 10 of Regulation (EU) No 492/2011, should not be taken into account for the purpose of establishing permanent residence ex Article 16 of Directive 2004/38/EC. One last example concerns a family member of an EU national who, after having worked in another MS, cannot claim residence because the relationship only materialised after the EU worker returned to his home country or because the family member (unmarried partner) never lived with the EU worker in another MS (BE) prior to the return. In another interesting case, the NL court ruled that a child does not lose the status of family member (for purposes of student financial aid) when the parent acquires the nationality of the host State.

[90] See, however, the original German case where the court was asked to determine whether a pregnant lady can qualify as a family member of a "not yet born child".

Table 9: Main subjects of dispute

Subjects	No of countries concerned	Overall No of cases	Application of EU law difficult (D), easy (E) or controversial (C)[91]	No of cases where preliminary ruling was necessary[92]	No of cases where request for preliminary ruling was sent
Right to stay	1 (BE)	1	**E** (1)	1	1
Concept of worker	3 (DE, FI, FR)	17[93]	**E** (13) **D** (4)	0	1
Family members' right to stay	3(DE, ES, NL)	12	**E** (11) **D** (1)	4	3
Consequence of long period of stay in another MS	1(HU)	1	**E** (1)	0	0

3.1.2. Direct and indirect discrimination and obstacles to free movement

This is a sensitive topic (for an overview, see table 10 below). There are many subjects of dispute, principally in the field of social benefits understood *lato sensu*: social housing, social aid, and access to care and to social security benefits/insurance.

Some cases expressly deal with the application of the **principle of non-discrimination**. For instance, it was held that a BE public social action centre cannot decline to grant social aid to non-Belgian EU workers and their family members during the first three months of their stay and to grant maintenance aid until they obtain a permanent residence, since this is an unlawful discrimination (BE). Furthermore, the fact that a person's right to reside was registered does not mean that s/he should be granted the basic social assistance on the same grounds and to the same extent as the FI citizens in the corresponding situation, because s/he had resided in FI for over three months but less than five years and s/he was dependent on its child support and was not economically active (FI).

From a different perspective, the perspective of **discrimination in the context of working conditions**, a quite interesting case dealt with a train conductor who had acquired seniority with the Belgian railway company and who was a few years later recruited by the French railway company. For the courts, which apply Article 45 TFEU and Regulation (EEC) No 1612/68, the French train company must take into account the seniority gained at the Belgian train company when determining the worker's remuneration (FR). Similarly, a national court considered that a decree which excludes taking into account periods of work in another MS, whereas similar periods of work on the national territory would have been considered, is a violation of the free movement of workers (FR). However, the FR administration does not have to take into account (for

[91] The words "easy", difficult" and "controversial are explained in footnote 5. Between brackets is indicated the number of cases.

[92] According to the MoveS national experts.

[93] Cases deal with persons with a marginal activity and doctoral students.

promotion purposes) periods of work accomplished in Poland before the accession of this country to the EU (FR).

Direct discrimination can still be brought before national courts: one court held that a real estate tax subject to a different rate for non-Latvian citizens was discriminatory on the grounds of nationality (LV).

Indirect discrimination is a source of issues in the field of professional sports. In particular a regulation requiring that a certain number of players has been trained in the country can be ruled as discriminatory (FR). However, the deliberation of the French national Rugby League concerning players' participation to professional championships and increasing the number of players trained in national training centres who must participate in games is compatible with the rules on the free movement of workers, since it is justified by the general interest (training and promotion of young players (FR). In this case, the FR court neglected to apply the proportionality test, however.

The category of **social advantages**, which covers work-related and non-work-related advantages, is sometimes brought before national courts. It was ruled that German law which makes the right to alimony advances for children dependent on the permanent residence of the children in Germany is not in line with Article 7(2) of Regulation (EEC) No 1612/68. The residence requirement was held as going beyond what is necessary to attain its objectives, for it would be sufficient to make the receipt of alimony advances dependent on having worked in Germany for more than a negligible extent since this reflects sufficient integration of the parent and the children into German society (DE). The fact that a housing subsidy is qualified as a social advantage entails that a document issued by another MS stating that the person does not own any property with a certified translation into Hungarian must be granted the same effect as an equivalent document issued by Hungarian authorities. Disregarding the document issued abroad and translated into Hungarian is an indirect discrimination (HU). The question was asked whether a Dutch national can rely on Article 7(2) of Regulation (EU) No 492/2011 to claim compensation for costs of adoption of his child who has joined the Thai mother to Germany. It was ruled that this is not possible, because the Dutch law concerned only provides compensation in the case of adoption, not in the event that a child joins its mother to an EU MS (NL). The following interesting question was also raised: can Article 7(2) be relied upon to challenge a national rule that prescribes a lowering of old-age pension for periods of residence abroad? (NL).

Concerning **obstacles to the free movement of workers**, the following cases are worth being highlighted. It was considered a violation of Article 45 TFEU that persons are excluded from the entitlement to a retirement pension under the civil servants' scheme when leaving the civil service and taking up a position in another MS (DE). On the contrary, the BE legal requirement to show willingness to learn Dutch in view of being eligible to access social housing was not considered contrary to the freedom of movement for workers (BE). However, a Community of a federal MS cannot adopt provisions which allow only persons residing in its territory as well as EU nationals employed in that territory and residing in another MS to be insured under and covered by a social security scheme, since this limitation affects nationals of other MSs or nationals of the MS concerned who have made use of their right to freedom of movement within the European Union (BE). Nor can, when a young player is transferred to another club, a national professional football regulation set an excessively high amount that is due to the former club in order to compensate for the cost of the player's training (FR). Does Article 45 TFEU preclude a NL rule that does not allow NL nationals returning to the NL to participate in voluntary old-age insurance? The answer is no: while such a rule may

constitute indirect nationality discrimination or an obstacle to free movement, it can be justified by the need to ensure solidarity in the system and to avoid 'calculating behaviour' of the persons concerned (NL).

Table 10: Main subjects of dispute

Subjects	No of countries concerned	Overall No of cases	Application of EU law difficult (D), easy (E) or controversial (C)[94]	No of cases where preliminary ruling was necessary[95]	No of cases where request for preliminary ruling was sent
Access to social housing	1 (BE)	1	**E** (1)	1	0
Social aid	3(BE, HU, IT)	3	**E** (2) D (1)	1	1
Access to care	2(BE, NL)	1	**E** (1)	0	0
Old-age pension entitlement	2(DE, NL)	3	**D** (3)	2	2
Social advantages	3(DE, FI, NL)	6	**E** (6)	0	0
Students' rights	1(HU)	1	**E** (1)	0	0
Mobile workers' rights	1(HU)	1	**D** (1)	1	1
Access to professional sports	1(FR)	3	**D** (3)	1	1
Insurance for diplomatic staff	1(NL)	1	**E** (1)	1	1

3.1.3. Work relationships: access to work and working conditions

Another topic at the MoveS national experts' centre of attention are work relationships (for an overview, see table 11 below).

One main issue is the **access to work by EU citizens**: jobs reserved to nationals, access to jobs in the public sector, language requirements to have access to certain jobs, and the recognition of diplomas are listed as subjects of dispute by the national experts. Several examples are worth mentioning. For instance, according to LV regulation a person employed or working in a particular profession or post must possess a particular level knowledge of the official language (Latvian) and use it: a citizen of another EU MS who was appointed by the municipality had been imposed an administrative fine by the State Language Inspection for not possessing the knowledge of the Latvian language and refusing to use it in the daily work at the municipality. The court rejected the claim submitted by the citizen contesting the administrative fine as ungrounded and claiming full compliance with national legal requirements on the use of the official language. It must be underlined that the court did not assess the compatibility of the situation from

[94] The words "easy", difficult" and "controversial are explained in footnote 5. Between brackets, the number of cases.

[95] According to the MoveS national experts.

the perspective of EU law, although the applicant raised the argument that s/he was discriminated against as an EU citizen (LV).

What about **family members' access to work**? It was ruled that the Turkish spouse of a DE national working in the NL can rely on Article 23 of Directive 2004/38/EC to get access to work, even when both spouses live in Germany (NL).

Concerning the **access to regulated professional activities**, several cases were cited. For instance, according to a French court, the fact that a lawyer has acquired experience at the European Commission and not in the French administration justifies that he cannot become a lawyer in France[96] (FR). Access to the profession of specialised nurse is not entirely free: a French court considered that there is no violation of Directive 2005/36/EC, which does not require the automatic recognition of the titles of specialised nurses (FR).

Access to employment in the public service remains problematic. For instance, a court considered that the employment as tax inspector in the FR tax administration is not open to EU nationals from other MSs (FR). Another interesting case dealt with a Spanish national who was a civil servant in a hospital in FR and who wanted to take part in a Spanish public procedure selecting officers for the national police force. The national court ruled that there is **no automatic recognition of the condition of civil servant** at an EU level and that EU law does not recognise civil servants a right to access directly public service positions in other MSs. The court held that due to the fact that this person is a Spanish national, EU Law preventing discrimination of nationals of an EU MS does not apply in this case (ES).

Concerning **diploma recognition**, a domestic court dismissed the appeal of the Spanish Official Association of Nurses, which claimed that the professional skills and training requirements of general care nurses could not be regulated by a Directive (ES). A citizen from NL who had the qualification required for obtaining an authorisation to practice as a lawyer in NL (a degree and a master's degree in law) but who did not have an authorisation to practice as a lawyer in NL was not authorised to work as a lawyer in ES. the national court established that in order for an EU or EEA national to practice as a lawyer in ES, it is not sufficient to have the required qualification in the MS of origin; it is also required to have an equivalent authorisation in the said MS, as established in Article 13 of Directive 2005/36/EC. Therefore, this person must either obtain an authorisation in ES or in another MS in order to practice as a lawyer in ES (ES). A Spanish court also rightly established that Directive 2005/36/EC did not apply to an Italian citizen who had the title of doctor specialising in psychiatry from the Universidad Central de Venezuela (ES). What about a ski professor who does not hold a degree from a ski school of the country where s/he wants to work? According to the court, there was no violation of EU law since the national rule does not affect the recognition of titles or diplomas (FR). The fact of having no diploma at all for being a ski professor prevents from exercising such activity in a MS (FR).

Concerning **working conditions**, a subject of dispute is the status of public servants having gained experience in another MS.[97] It is recalled that teachers are not employed in the public service within the meaning of Article 45 (4) TFEU (DE).

[96] On the same issue a preliminary question is pending (case C-218/19).

[97] E.g. FR.

Table 11: Main subjects of dispute

Subjects	No of countries concerned	Overall No of cases	Application of EU law difficult (D), easy (E) or controversial (C)[98]	No of cases where preliminary ruling was necessary[99]	No of cases where request for preliminary ruling was sent
Access to public/regulated jobs reserved to nationals	4 (DE, ES, FR, IT)	4	**E** (2) **D** (2)	3	2
Recognition of professional qualifications	3 (ES, FR, IT)	15	**E** (6) **D** (9)	10	5
Work permit (transitional period)	1(HU)	3	**D** (3)	1	1
Language requirements	1 (LV)	1	**D** (1)	1	0
Career pattern	1 (FR)	3	**E** (2) **D** (1)	1	0
Tax-related matters	3 (ES, FR, LV)	several	**E/D**	1	0
Access to work for family members	1(NL)	1	**E** (1)	0	0

3.1.4. Jobseekers' status

Compared to the abundant CJEU case law on jobseekers, national case law remains sparse (for an overview, see table 12 below). Only few cases have been brought before national courts, principally about the right to stay and entitlement to social benefits.[100] Surprisingly,[101] these cases are usually considered as easy to rule.

Jobseekers' right to stay has been the subject of debate before courts. For instance, a migrant was denied the status of jobseeker, since s/he made insufficient efforts to find a new job (presentation of one newspaper ad, one completed contact form of a bakery, two pieces of paper with addresses and telephone numbers of stores; one application), and participation in training measures were insufficient as well (DE). The fact of residing in the country for several years without having found work speaks against seriously seeking employment or having a genuine chance of being engaged (DE). Being in contact with the job centre is not sufficient (DE). It is also recalled that persons who have worked in the country for less than one year only retain the status of worker for six months (DE). A jobseeker was considered having a right to stay notwithstanding the fact that the last employment contract was a fixed-term contract of less than a year since he had worked

[98] The words "easy", difficult" and "controversial are explained in footnote 5. Between brackets is mentioned the number of cases.

[99] According to the MoveS national experts.

[100] See also SSC cases on jobseekers' entitlement to unemployment benefits and Special Non-Contributory Benefits in section 3.2.3.

[101] Because of the complexity of the rules applicable.

in France for more than a year under a series of fixed-term contracts before becoming unemployed (FR). In another case, the plaintiff is a German citizen, residing in Austria (close to the German border) who worked in Germany. After losing her job and receiving unemployment benefits, she applied for the German Arbeitslosengeld II (social benefits for job seekers). Her application was dismissed because § 7 I 1 Nr. 4 SGB II requires habitual residence in Germany. This requirement has been held justified by application of Article 7(2) Regulation 1612/68. For, the benefit is closely linked to the socio-economic context of Germany. Moreover, no specific circumstances were present justifying a duty to allow exporting the benefit. Habitual residence within the meaning of § 7 I 1 Nr. 4 SGB II requires residing in Germany under circumstances which indicate that a person is not only staying temporarily in Germany (DE).

The **right to register as a jobseeker** lead to an original case. It was ruled that Bulgarian nationals could not register as a jobseeker and rely on Articles 1 and 5 of Regulation (EEC) No 1612/68 during the transitional period following accession, since those provisions were not applicable during that period. Therefore, a work permit was still required (NL).

After **loss of employment**, can the person retain worker status? The answer requires the competent authorities to sufficiently check whether the person concerned did look for new employment (NL).

The fact that, all in all, there is not much case law concerning mobile jobseekers should not be interpreted as meaning that cross-border jobseekers' rights are well protected. The complexity of EU law in this field and the variety of rules at national level[102] together with the lack of disputes brought before national courts (jobseekers are in a weak situation to go to court without trade unions' or NGOs' support) probably hide reality.

[102] See for instance "*Assessment of the impact of amendments to the EU social security coordination rules to clarify its relationship with Directive 2004/38/EC as regards economically inactive persons*", FreSsco report, 2015.

Table 12: Main subjects of dispute

Subjects	No of countries concerned	Overall No of cases	Application of EU law difficult (D), easy (E) or controversial (C)[103]	No of cases where preliminary ruling was necessary[104]	No of cases where request for preliminary ruling was sent
Right to stay	2 (DE, FR)	4	**E** (3) **D** (1)	0	0
Social benefits entitlement	1 (DE)	7	**E** (3) **D** (4)	0	0
Registration as jobseeker	1(NL)	1	**E** (1)	0	0
Retention of worker's status	1(NL)	1	**E** (1)	0	0

3.2. Social security coordination

3.2.1. Applicable legislation

The main topics of dispute before the national courts regarding applicable legislation are **posting** (Article 12 of Regulation (EC) No 883/2004) and **working in two or more MSs** (Article 13 of Regulation (EC) No 883/2004) (see table 13 below). Posting of workers is a topical subject in Europe, both regarding the probative value and validity of A1 forms, and regarding the existence of letterbox companies that try to take advantage of free movement in order to pay less social security contributions. In the case of persons who work in more than one MS, in some cases it is not always easy to identify the MS of residence, while in other cases the work performed in one of the MS is considered a marginal activity.

In five out of the ten MS analysed, judgments deal with the **validity and/or probative value of A1 forms**. In some cases, questions arose on whether the A1 forms have a binding effect regarding certain labour law requirements (FR, DE). There is even a pending preliminary ruling on the topic requested by a French court[105]. Some MSs' public administrations have challenged the validity of A1 forms issued in other MSs due to fraud or due to how and where the work is performed, but in general the courts have sustained the validity of foreign A1 forms for social security matters, without questioning that they could be disregarded within the framework of a possible criminal offence judgment (BE, FR). Questions about what happens when there is no A1 form, or when the form is retroactively issued, have also been brought before court (FR, ES). And in some cases, questions were raised on whether it is possible to prove posting by any other means different from the A1 form or whether providing the A1 is mandatory when the person is working in two MSs[106] (FR).

[103] The words "easy", difficult" and "controversial are explained in footnote 5. Between brackets is mentioned the number of cases.

[104] According to the MoveS national experts.

[105] C-17/19, Bouygues travaux publics and others

[106] This is not a posting case.

Posting has also been problematic in the MS of origin (ES, PL), regarding possible fraud by means of **letterbox companies**, i.e. companies that commit fraud in the posting of workers. In the event of such fraud insurance under the social security of the MS of origin and the subsequent A1 form are considered void. Some cases follow an inspection by the labour inspectorate and question whether the company has any relevant activity in the MS of origin, once the workers are already posted. In PL, the administration and the courts often apply the requirements laid down in the Commission's practical guide on applicable legislation. Other cases were the result of a claim by the posting company when the social security administration of the MS of origin refused to issue the A1 form. Yet other cases dealt with the consequences of the fraud committed by the letterbox company, i.e. the third-country worker losing his/her authorisation to work, and the loss of the contributions paid by the posting letterbox company (ES). The question is whether the fraud should affect the weakest link, i.e. the worker, as it is not at all guaranteed that s/he will be insured in the MS of work. Finally, there have been judgments regarding the fulfilment of the previous insurance requirements of employees hired in order to be posted (Article 14(1) of Regulation (EC) No 987/2009) (ES).

In three out of the ten MSs analysed (IT, PL, NL), there were cases regarding persons who were **working in two or more MSs**, especially in PL, where ten cases are explicitly about this situation. In order to determine the applicable legislation, questions were raised such as: Which is the MS of residence? Was work actually performed in both MSs? Is the work performed in one of the MSs considered ancillary?

Disputes about the applicable legislation when it is unclear what the place of residence is are common in **FI** (where social security is residence-based). Cases are about family members, and the application of special rules for aircrew or people residing simultaneously in more than one MS.

Table 13: Main subjects of dispute

Subjects	No of countries concerned	Overall No of cases	Application of EU law difficult (D), easy (E) or controversial (C)[107]	No of cases where preliminary ruling was necessary[108]	No of cases where request for preliminary ruling was sent
Posting: A1 validity	5 (BE, DE, ES, FR, PL)	21	**E** (16), **C** (5 - ES, FR, PL)	4 (BE, FR)	3 (BE, FR)
Posting: letterbox company	2 (ES, PL)	11	**E** (10), **C** (1 - PL)	0	0
Persons performing their activity in two or more MSs	4 (FR, IT, PL, NL)	16	**E** (9), **C** (3 - FR, PL), **D** (4 - PL, NL)	3 (FR, NL, PL)	1

[107] The words "easy", difficult" and "controversial are explained in footnote 5. Between brackets is mentioned the number of cases.

[108] According to the MoveS national experts.

3.2.2. Old-age benefits

Most national experts list judgments dealing with the entitlement or calculation of **old-age pensions** under the coordination Regulations. One reason for this may be that pensions are lifetime benefits, so beneficiaries are more likely to litigate for their rights.

Cases regarding the **entitlement to an old-age pension** are quite diverse, as they deal with the particularities of each social security system. For example, there were cases regarding the possible aggregation of notional contributions for the purpose of entitlement to a specific pension based in contributions paid before 1967 (ES), or a judgment linked to C-589/10, *Wencel*, on whether a person can simultaneously have two habitual residences in two different MSs for the purpose of SSC (PL). However, some judgments on entitlement share the feature that they deal with Article 45 TFEU on **non-discrimination** due to free movement, and the feature that they require a preliminary ruling relatively frequently. For instance, the judgment linked to C-187/15, *Pöpperl*, challenges the restrictions for civil servants to access a pension, which may discriminate against persons who left the public administration to work abroad (DE). The pending joined prejudicial rulings on cases C-398/18, *Bocero Torrico*, and C-428/18, *Bade* (ES),[109] deal with the fulfilment of entitlement requirements for early retirement that must exceed a minimum: should similar *pro rata temporis* pensions received from other MSs be considered in order to fulfil it?

There was also a case regarding a residence-based social security system, questioning if the exclusion from insurance of nationals working abroad and the inclusion of residents who pay neither taxes nor contributions could be discriminatory for those who exercise their right to free movement (NL).

Regarding the **overlapping of pensions**, cases were identified in five out of the ten analysed MSs (ES, FR, FI, LV, PL). In general, cases on overlapping are not assessed as complicated by national experts. They do not require a preliminary ruling as Article 5 of Regulation (EC) No 883/2004 is applied. The national reports do not mention the specific and complicated EU rules on overlapping of pensions. The exception could be the many cases regarding the compatibility of a Spanish invalidity pension supplement and foreign old-age pensions, which were finally clarified by the preliminary ruling in C-431/16, *Blanco Marqués.*[110]

Cases on **aggregation** are found in five out of ten MSs (ES, FR, IT, PL, HU). There are five cases in FR, for instance regarding the application of the *Gottardo* principle, where the periods completed by a UK citizen in Monaco were aggregated for the calculation of the FR pension[111]; Article 45 of Regulation (EC) No 1408/71; or the applicability of aggregation to supplementary retirement schemes. The MoveS national experts identify several cases on the aggregation of contributions paid in a third country (ES, FR, IT), and the aggregation of notional contributions (ES, IT). There was also a case on the aggregation of foreign contributions for calculating a HU special old-age pension scheme

[109] There was a previous request for a preliminary ruling: C-7/18, *Jardón Lamas*, which was withdrawn by the national court when the social security administration desisted. See order of the President of the CJEU of 26 April 2018.

[110] The Supreme Court later adopted a much simpler doctrine by ruling that the anti-overlapping national legislation is not applicable as far as it is not an *external anti-overlapping rule*, according to Article 53(3)(a) of Regulation (EC) No 883/2004.

[111] Because the contributions would have been aggregated in the case of a French citizen by the application of the France-Monaco social security bilateral agreement.

for miners, where the aggregation was initially denied by the administration, but later granted by the court (HU).

Cases dealing with calculation matters, however, tend to be more uniform across MSs. The more transversal topic within this area is the calculation of the **theoretical amount**. There were some cases on incomplete insurance periods (ES, FR) and others on theoretical amount thresholds (maximum pension in ES and minimum pension in IT). The calculation of the theoretical amount is especially controversial in ES, as many times applying the specific rules included in Annex XI of Regulation (EC) No 883/2004 result in very small pensions for migrants who worked full-time during long periods. This issue was in some cases solved by adapting the Spanish old-age calculation system[112] or by applying more beneficial bilateral agreements with other MSs. On the other hand, there is only one case that focused on the *pro rata temporis* principle, trying to determine if certain notional contributions were periods completed before materialisation of the risk (ES).

Other topics that produced rare cases include the award of a **supplement to reach the minimum pension** (Article 58 of Regulation (EC) No 883/2004) (ES, PL); the exportation of pensions (NL); C-517/16, *Czerwiński*, on whether a certain benefit should be considered preretirement or an old-age pension (PL); and the need to exhaust the foreign unemployment benefit before being entitled to the national old-age pension, as far as those benefits would not be compatible if both were Hungarian benefits (HU).

Table 14: Main subjects of dispute

Subjects	No of countries concerned	Overall No of cases	Application of EU law difficult (D), easy (E) or controversial (C)[113]	No of cases where preliminary ruling was necessary [114]	No of cases where request for preliminary ruling was sent
Non-discrimination due to the exercise of free movement	3 (ES, DE, NL)	4	**E** (2), **C** (1), **D** (1 - DE)	3 (ES, DE)	3 (ES, DE)
Overlapping of pensions	5 (ES, FR, FI, LV, PL)	10	**E** (4), **C** (2 - ES, LV) **D** (4 - ES)	3 (ES)	2 (ES)
Aggregation principle	5 (ES, FR, IT, PL, HU)	13	**E** (11), **C** (2 - FR, IT)	3 (FR, IT, PL)	2 (FR, PL)
Calculation of the theoretical amount	3 (ES, FR, IT)	8	**E** (1), **C** (5 - ES, IT), **D** (2- ES)	3 (ES)	1 (ES)

[112] See C-282/11, *Salgado González*.

[113] The words “easy”, difficult” and “controversial are explained in footnote 5. Between brackets is mentioned the number of cases.

[114] According to the MoveS national experts.

Subjects	No of countries concerned	Overall No of cases	Application of EU law difficult (D), easy (E) or controversial (C)[113]	No of cases where preliminary ruling was necessary [114]	No of cases where request for preliminary ruling was sent
Supplement to reach the minimum pension (Art. 58 Reg. 883/04)	2 (ES, PL)	2	**E** (1), **C** (1 - PL)	1 (PL)	0

3.2.3. Unemployment benefits

National judgments on unemployment benefits concern rather heterogeneous problems. Most of the judgments deal with **entitlement** to the benefit or allowance. The application of the **special rules for persons residing outside the competent MS**, i.e. Article 65 of Regulation (EC) No 883/2004,[115] is the most transversal topic. Eleven cases were found in five different MSs (FI, FR, NL, LV, PL), most of them dealing with the determination of the beneficiary's centre of interest, a recurrent issue in three MSs (FI, LV, PL[116]) and a non-recurrent one in NL. In this NL judgment, it seems that the court decided not to apply C-236/87, *Bergemann*, and to base its ruling on the merit of the facts, rather than on strictly legal arguments. The other two cases had to do with the assimilation of foreign conditions of ending of a working relationship to national conditions, in the case of frontier workers (FR).

All 16 cases by DE have to do with the same complicated topic: whether **legal residence of inactive persons[117]** can be required for the purpose of entitlement to different types of special non-contributory unemployment benefits and allowances. All cases follow up on a CJEU preliminary ruling, either C-67/14, *Alimanovic*, on entitlement to jobseekers' allowance, or C-333/13, *Dano* and C-299/14, *Garcia Nieto*, both on entitlement to non-contributory subsistence benefits. No cases were found on this topic in the rest of MSs.

The rest of the cases are, as mentioned above, rather diverse. There are some cases on the **determination of the competent MS** for entitlement purposes, dealing with issues such as access to an unemployment subsidy when the person enters into a special agreement for returned migrants but stopped working and paying contributions in another MS (ES), or the entitlement to an unemployment benefit of a person who resigned from a job in another MS in order to reunite with her spouse (FR).

Some of these non-recurrent cases, which concern very specific issues of interaction between EU and national law could have required a preliminary ruling, normally because it is not clear how EU law and national law interact, or there is a conceptual problem as it happens with residence determination under the Regulations.

In some cases, it was indeed **requested**: in C-367/11, *Prete*, on entitlement to a tide-over allowance for young people looking for a first job. Pursuant to the CJEU judgment

[115] The judgments usually refer to the analogous Article 71 of repealed Regulation (EC) No 1408/71.

[116] In PL, the courts considered that the objective criteria envisaged in Article 11 of Regulation (EC) No 987/2009 have preference over the subjective ones. In one of the judgments, the court considered that the criteria included in AC Decision No U2 should have been applied.

[117] Article 7 of Directive 2004/38/EC.

the allowance was granted, because the national requirement of six years of studies in Belgium goes beyond what is necessary to determine if there is a **real link** between the beneficiary and the Belgian labour market (BE). Likewise, C-551/16, *Klein Schiphorst*, dealt with the refusal to **extend the exportation** of an unemployment benefit beyond the period of six months (NL).

In other cases, however, the preliminary ruling was **not requested** although it could have been helpful. For instance, in a case determining whether the beneficiary of unemployment benefits had moved abroad or not, the CJEU could have helped clarify the notion of residence under Regulation (EC) No 883/2004 for the purpose of **maintaining the right** to unemployment benefits (IT).*Table 15: Main subjects of dispute*

Subjects	No of countries concerned	Overall No of cases	Application of EU law difficult (D), easy (E) or controversial (C)[118]	No of cases where preliminary ruling was necessary [119]	No of cases where request for preliminary ruling was sent
Entitlement: special rules for persons that reside outside the competent MS	5 (FI, FR, LV, NL, PL)	11	**E** (11)	0	0
Entitlement: determination of the competent MS	2 (ES, FR)	2	**C** (2- ES, FR)	0[120]	0

3.2.4. Family benefits

The most relevant topic in the field of family benefits is the **determination of the place of residence for entitlement** purposes. Cases were found in six different MSs[121] (DE, ES, FI, FR, LV, NL), a significant number of these dealing directly with determining the place of residence of the family or the children (DE, FI, FR,[122] LV). Half of the judgments, however, are follow-up cases of C- 611/10, *Hudzinski*, on receiving the benefit in the **MS of temporary stay** different from the granting MS (DE).

There were also some cases on **more specific issues**, such as the request of a registration certificate as proof of legal residence of an EU citizen (ES), the liability of the public administration that denied family benefits because the children were moving abroad (FR), or the impossibility of applying the national residence test for means-tested child benefits when Regulation (EC) No 883/04 applies (NL).

Other topics repeated in more than one MSs were the determination of whether a family benefit lies within the scope of application of the coordination Regulations (FI, LV, PL) and the **overlapping** of family benefits from different MSs (LV, NL, PL), with issues such

[118] The words "easy", difficult" and "controversial are explained in footnote 5. Between brackets is mentioned the number of cases.

[119] According to the MoveS national experts.

[121] Whereas 7 MSs mentioned cases on family benefits, PL being the only MS that refer to cases in this field but none regarding the determination of the place of residence for entitlement purposes.

[122] Difference between residence and stay.

as determining if the benefit received is the same (NL), establishing the priority rules (PL), or determining what happens when the parents are separated (LV).

Finally, there was a controversial case on the application of C-34/09, *Zambrano*, and C-456/11, *Dereci*, to income-related child allowances, assessing whether the rejection of the allowance jeopardises the right of the EU national child, born to third-country nationals, to stay within EU territory (NL).

Table 16: main subjects of dispute

Subjects	No of countries concerned	Overall No of cases	Application of EU law difficult (D), easy (E) or controversial (C)[123]	No of cases where preliminary ruling was necessary[124]	No of cases where request for preliminary ruling was sent
Entitlement: place of residence	6 (DE, ES, FI, FR, LV, NL)	23	**E** (18), **D** (1 - LV), **C** (4 – LV, NL)	1	1
Overlapping of family benefits	3 (LV, NL, PL)	4	**E** (4)	0	0
Consideration of family benefit for coordination purposes	3 (FI, LV, PL)	3	**E** (1), **D** (1 - LV), **C** (1 - PL)	0	0

[123] The words “easy”, difficult” and “controversial are explained in footnote 5. Between brackets is mentioned the number of cases.

[124] According to the national experts.

4. CONCLUSIONS: TRANSVERSAL ELEMENTS OF ANALYSIS AND SOME RECOMMENDATIONS

From a general point of view, the following conclusions can be reached, completed by some recommendations:

i. There are more judgments, recurrent issues and preliminary rulings in SSC than in FMW. In both fields, only a minority of the judgments were suspended in order to request a preliminary ruling before the CJEU.

ii. The CJEU judgments have helped to establish transversal criteria that are used by courts in all MSs in order to interpret EU law. National courts often base their judgments on CJEU case law that originated in another MS.

iii. There are no preliminary rulings on the validity of EU law, neither in FMW nor in SSC. All analysed preliminary rulings deal with the interpretation of EU Law, and all seemed necessary. The intermediate courts, i.e. high or superior courts, apparently request more preliminary rulings than the supreme courts.

iv. The national courts do not always request a preliminary ruling when it is necessary. This can be particularly problematic for decisions against which there is no judicial remedy, such as supreme court rulings.

v. Some recurring issues are repeatedly brought before the national courts of various MSs. It could be recommended to clarify those issues at EU level, instead of relying solely on the interpretation given by the CJEU judgments. The Commission could draft methodological guides, fiches or notes explaining and/or completing EU relevant provisions as well as relevant CJEU case law.

vi. Some recurring issues are repeatedly brought before the national courts of a single MS. It could be recommended to look into whether the national competent administration is diligently complying with the applicable EU law if measures are taken to prevent repetition of these misapplications, and which remedies are applicable. This process could involve the new European Labour Authority.

vii. The domestic courts rarely find national law that is in breach of EU law. However, judgments sometimes result in a modification of the way some national law is interpreted or implemented.

viii. Some national courts rely on the AC Decisions and on the Commission's practical guide on applicable law in order to interpret EU law when they consider it is not sufficiently clear, even if said instruments are not legally binding.

ix. In order to obtain a clearer picture of the application of FMW and SSC rules by national courts, a series of annual monitoring studies could be recommended. This report could serve as the basis to develop a harmonised data collecting methodology. Since the Commission is the guardian of the Treaty, these reports would allow to assess the conformity of national case law with EU law.

x. The Commission could compile a catalogue of the main national case law and link them with the relevant EU FMW/SSC provisions.[125]

Regarding FMW, the following should be highlighted:

[125] The compilation of such a catalogue for SSC had started under the first trESS contract.

i. The **concept of worker** is at the centre of attention of domestic courts. In particular, national courts were asked if marginally employed persons are "workers" within the meaning of Article 45 TFEU. Students' status is also a subject of dispute before local courts.
ii. **Family members' status** is brought before national courts for various motives. If the classification of family member is raised, which rarely happens, it is mainly the family members' right to stay which leads to national cases.
iii. Some cases expressly deal with the application of the **principle of non-discrimination**, mainly from the perspective of indirect discrimination. In this respect, several domestic courts apply the notion of social advantage. If there is no dominant topic, the usual subjects of dispute in relation to discrimination are access to social aid, to care, old-age pensions entitlement, students' rights, and access to professional sports.
iv. A major FMW issue is the **access to work by EU citizens**: jobs reserved to nationals, access to jobs in the public sector, language requirements, and the recognition of diplomas are listed as subjects of dispute by the MoveS national experts. Concerning the access to regulated professional activities, several cases are cited. Access to employment in the public service remains problematic.
v. Compared to the abundant CJEU case law on **jobseekers**, national case law remains sparse. Jobseekers' right to stay is however debated before some domestic courts.

Regarding SSC, the main conclusions[126] are the following:

i. **Applicable legislation** seems to be brought more frequently before the national courts of the analysed MSs. **Posting** situations seem to be the more problematic issues.

ii. Cases before the courts in the sending MSs usually deal with the **refusal to issue the A1 form** or with its validity, often as a result of actions of the labour inspectorate of one of the affected MSs in connection with possible letterbox companies. The cooperation between the MS' relevant bodies (eg. labour inspectorates) will probably be enhanced when the European Labour Authority starts functioning. Cases before the courts of the MSs of work usually deal with the limits to determine the **validity of a foreign A1 form** and with the possible consequences.

iii. Regarding the benefits analysed, judgments on **old-age pensions** were most frequent and the origin of more preliminary rulings. The application of CJEU case law by the courts of MSs with a different social security system does not always seem easy. Some of these prejudicial rulings are based directly on non-discrimination due to free movement,[127] instead of referring to the complicated rules of the coordination Regulations. The national courts underlined the fact that migrant workers should not face non-favourable situations which sedentary workers do not suffer.

iv. National judgments on **unemployment benefits** also face rather heterogeneous problems. For instance, only in one MS were cases brought before the courts which dealt with the legal residence of inactive persons as a requirement to be entitled to special non-contributory unemployment allowances; they were the origin of

[126] It should be reminded that healthcare and family benefits were not within the scope of the report, which has a strong impact on the overall conclusions.

[127] Article 45 TFEU.

three media-exposed preliminary rulings. The most recurring issues are the interpretation of the special rules for persons who reside outside the competent MS and the determination of the MS of residence.

v. In the field of **family benefits**, the main issue is the determination of the place of residence, of the beneficiary or of the children, for entitlement purposes. Other rulings also dealt with the overlapping of family benefits from different MSs and the application of the priority rules.

Annex I selected list of the most relevant cases

A. Free movement of workers

1. Belgium:

- Cour Constitutionnelle, 5 March 2015, n°24/2015 (the legal requirement to show willingness to learn Dutch in view of being eligible to access social housing is not contrary to the freedom of movement for workers)
- Cour Constitutionnelle, 30 June 2014, n°95/2014 (the Public Social Action Centre cannot decline to grant social aid to non-Belgian EU workers and their family members during the first three months of their stay and to grant maintenance aid until they obtain a permanent residence right)

2. Germany

- Landessozialgericht Berlin-Brandenburg (Social Court of Second Instance), 22 June 2017, L 31 AS 848/17 B ER (a person who works 3.5 hours / week and earns 122 € / month is not a worker)
- Hessisches Landessozialgericht (Social Court of Second Instance), 14 October 2009, L 7 AS 166/09 B ER (Sale of magazine by homeless people is not sufficient to classify the person as a worker)
- Bundessozialgericht (Federal Social Court), 30 January 2013, B 4 AS 54/12 R (Affirmation of the mother's right to stay because of the forthcoming birth of the child)
- Bundesverwaltungsgericht (Federal Administrative Court), 28 March 2019, 1 C 9/18 (The (TCN) spouse's right to stay does not depend on living together with the spouse (UC). It is sufficient that the Union citizen resides in the host Member State)
- Bundessozialgericht (Federal Social Court), 18 January 2011, B 4 AS 14/10 R (the right to Arbeitslosengeld II (social benefits for job seekers) dependent on a permanent residence in Germany is consistent with Article 7 (2) Regulation 1612/68)
- Bayerischer Verwaltungsgerichtshof (Administrative Court of Second Instance), 11 February 2014, 10 C 13.2241 (Requirements of the right to stay for job search purposes / "evidence that [jobseekers] are continuing to seek employment and that they have a genuine chance of being engaged")

3. Spain

- Judgement of the Administrative Chamber of the Superior Court of Valencia, 2 November 2018, ROJ STSJ CV 4971/2018 (A Spanish national who is civil servant in a Hospital in Bordeaux wants to take part in a Spanish public procedure to select officers for the National Police. This person is excluded arguing that he does not fulfil the requirement of being a civil servant in a public Administration. The Court dismisses the appeal: the court considers that due to the fact that this person is a Spanish national, the EU Law preventing discrimination of nationals of an EU Member State does not apply in this case)
- Judgement of the Administrative Chamber of the Supreme Court, 11 December 2018, ROJ STS 4366/2018 (A citizen from the Netherlands has the qualification required for obtaining an authorization to practice as lawyer in the Netherlands (a degree and a master's degree in law) but does not have an authorization to practice as lawyer in the Netherlands. Subsequently, he is not authorized to work

as a lawyer in Spain. This person must either obtain an authorisation in Spain or in another MS in order to practice as lawyer in Spain).

4. Finland

- VakO 3913/2013, The Insurance Court (A arrived to Finland in order to study and therefore he/she was not granted a student aid pursuant to the national legislation. However, he/she had also started to work and therefor his/her only ground to stay in Finland was not studies. The Court rules that he must be granted the study aid since he is a worker)
- KHO 2015:173, the Supreme Administrative Court of Finland (the fact that a person´s right to reside was registered did not follow that he should be granted the basic social assistance on the same grounds and to the same extent as the Finnish citizens in the corresponding situation, because he had resided in Finland for over 3 months but less than 5 years and he was not economically active. He also was dependent on his child support)

5. France

- Conseil d'Etat, 24 July 2019, n°417572 (The administration refused to deliver a residence permit to a EU national and ordered that he leaves the French territory, since that person, working in the framework of a program to foster insertion of unemployed workers, could not be considered as a worker. The claimant considers this is a violation of free movement of workers. The Court refers to the EU law (treaty, directive 2004/38 and the case law of the ECJ) to annul the decision. It insists on the extensive conception of the notion of worker developed by the ECJ and on the necessity for the administration to take it into account in its assessment of the situation).
- Cour de cassation, 11 March 2009, n° 0840381 (The case follows the refusal by the French train company (SNCF) to take into account seniority gained at the Belgian train company, when determining the worker's remuneration. On the gounds of Article 45 TFEU and Reg. 1612/68, the Court affirms the need to take into account experience in another Member State)
- Conseil d'Etat, 19 February 2019, n° 417021 (The case concerns the refusal to pay social assistance benefits to a jobseeker, on the ground that he has no right to stay on the territory. The Court considers that the jobseeker has a right to stay: the lower court misinterpreted EU law in considering that due to the fact that the last work contract was a fixed-term contract of less than a year, he only had a right to stay for the next 6 months (although he had worked in France for more than a year under a series of fixed term contracts before becoming unemployed).
- Cour de cassation, 28 March 2017, n° 1487597 (The claimant was convicted, under French criminal law. He considers that the conditions to develop his activity (ski club) in France are a violation of free movement of workers (French law requires the employment of workers with a certain qualification. The Court considers that French requirements of qualification are justified by general interest purposes).

6. Hungary

- 4.M.583/2011/5. Szám, Labour Law Court of Kecskemét (The question concerned whether the Romanian workers found on the asparagus fields in 2008 are either employed, or they are posted, or they work as individual workers based on work contract. The Court ruled that work permit should not be required because of providing services, the applicant

therefore had no obligation to report the number of Romanians to the authority, the national labour inspectorate should have controlled only the minimum requirements (hard core) of the Directive No 96/71)

7. Italy

8. Latvia

- Regional Administrative Court's decision in case 143/AA43-1185-13/19, 18 January 2013 (According to Latvian normative acts a person employed or working in a particular profession of a post must possess particular level knowledge of official language (Latvian) and use it. The citizen of another EU member state was elected to municipality and was fined (administrative fine) by the State Language Inspection for not possessing knowledge of Latvia language and refusal to use it in daily work of a municipality. The court rejected the claim.

9. The Netherlands

- ECLI:NL:RBOVE:2014:5101 (Can a student who mainly pursues economic activities in the State of origin acquire work status (and claim student financial aid) in the Member State of studies? No since in casu most work is performed by the student in UK. He did not work at least 32 hours a week (as required at the time) in the NL).
- ECLI:NL:RVS:2010:BN6683 (Residence of family member of EU nationals who, after having worked in another Member State return home - Can a family member of an of EU national who, after having worked in another Member State, claim residence? No because *in casu* the relationship only materialized after return of the EU worker to his home country)
- ECLI:NL:CRVB:2013:CA1167 (Does Art.45 TFEU preclude a Dutch rule that does not allow Dutch nationals returning to the NLs to participate in voluntary old-age insurance? No. While such a rule may constitute indirect nationality discrimination or an obstacle to free movement, it can be justified b the need to ensure solidarity in the system and to avoid 'calculating behaviour' of the persons concerned
- ECLI:NL:RVS:2015:2506 (Can the Turkish spouse of a German national working in the NLs rely on Art.23 Dir. 2004/38 to get access to work, even both spouse live in Germany? Yes. Art.23 does not require that the worker or the spouse resides in the State of employment)

10. Poland

B. Social security coordination

1. Belgium

- Cour de Cassation, 20 November 2017, S.17.0003.N. Which Member State (sending or host) is competent to handle an extension request of a PD A1 (E 102) for an additional period of 12 months? The extension request must be filed through the relevant authorities of the Member State where the work is actually performed).
- Cour de Cassation, 19 June 2018, P.15.1275.N. (A1 probative value - fraus omnia corrumpit. Can an A1 form be annulled or disregarded by a national

court other than that of the sending Member State if the facts which are submitted for assessment by it support the conclusion that the form was fraudulently obtained or relied on? Yes, under certain conditions, i.e. when a request for review and withdrawal has been made to the institution that filed the A1 form and that institution does not adequately address the request. Application of CJEU case: Ömer Altun and others/ Openbaar Ministerie, C-359/16).

- Cour de Cassation, 6 March 2017, S.12.0147.N (Is an EU national who does not reside in Belgium and who remains subject to the social security scheme of his Member State of residence entitled to benefits derived from Belgian supplementary pension schemes, which are not considered as legislation, according to European coordination rules? Yes. Even though supplementary pension schemes are not considered as legislation, their related contributions fall within the scope of EU coordination rules and are therefore subject to the principle of "unity" of applicable legislation. Application of CJEU Judgment on case Rijksdienst voor Pensioenen/ Willem Hoogstad C-269/15).
- Cour de Cassation, 8 avril 2013, S.10.0057.F (May a provision of national law lay down that entitlement to tideover allowance for a young European Union national, who has completed secondary studies in the European Union but not in Belgium, is conditional upon the young person in question having previously completed six years' studies at an educational establishment in Belgium, if that condition is exclusive and absolute? Considering CJEU Judgment Déborah Prete/ Rijkdienst voor Arbeidsvoorziening C-367/11), the national Court concluded that criteria such as residency, citizenship, grounds of relocation, have to be taken into account to determine whether an individual has a real connection with the Member State concerned and is subsequently entitled to "tideover allowances").
- Cour de Cassation, 31 October 2016, S.15.0024.F (Entitlement to unemployment benefits. Is a Czech national entitled to Belgian full-time unemployment benefits after having performed full-time working activities in Czech Republic and part-time working activities in Belgium afterwards? Yes, since the worker concerned, after having performed full-time working activities in Czech Republic, has performed employee activities under Belgian legislation).
- Cour de Cassation, 18 April 2017, P.14. 1858.N (PD A1 form. Definition of simultaneous employment. In case a worker performs accessory professional activities in a Member State, do these activities qualify for a case of simultaneous employment? No. Simultaneous employment is defined as a situation where a worker usually performs – significant and principal - activities in two or several Member States).

2. Germany

- Bundessozialgericht of 16 August 2017, B 12 KR 19/16. (Can an agreement based on Art. 16 be claimed by an enterprise? No. There is a broad discretionary power for the Social Security relevant institutions).
- FG Düsseldorf of 27 June 2013, 16 K 4510/12 Kg. (Additional child benefit by home country in case of posted worker. A follow-up to ECJ of 12 June 2012, in Hudzinski and Wawrzyniak, C–611/10 and C-612/10).
- Bundesverfassungsgericht 1. Senat 1. Kammer of 06 March 2017, 1 BvR 2740/16. (Childcare credits only in case of care in Germany. Possible conflict with ECJ of 19 July 2012 C-522/10 – Reichel-Albert).
- Bundessozialgericht of 12 December 2013, B 4 AS 9/13 R. (Limits in providing job-seekers allowance to EU Nationals coming to Germany from other MS. Preliminary ruling ECJ C-67/14 Alimanovic).

- Sozialgericht Leipzig of 03 June 2013, S 17 AS 2198/12. (Limits on non-contributory benefits for EU Nationals. Preliminary ruling ECJ of 11 November 2014, C-333/13 Dano).
- Finanzgericht Baden-Württemberg of 17 May2018, 3 K 3144/15 (Currency conversion for child benefits. Decision Nr. H3 of 15. October 2009, there is a pending preliminary ruling before ECJ).
- Bundesfinanzh of of 08 May 2014, III R 17/13 (Child benefits. Application of Art. 60 Subs. 1 Sentence 2 Regulation 987/09 in cases of Art. 67 and 68 Regulation 883/04 and legally separated parents. There was a preliminary ruling ECJ C-378/14 Trapkowski).
- Bundesfinanzhof of 21 October 2010, III R 35/10 (Possibility for child benefit to be granted by the Member State in which the temporary work is carried out, but which is not the competent State. There was a preliminary ruling C- 611-10 Hudzinski).

3. Spain

- Judgment of the Administrative Chamber of the Superior Court of Andalucía, 3 October 2013, ROJ: STSJ AND 13154/2013. (Posting: A1 validity. Posted workers only have to pay contributions at home member state, to avoid double contribution. The fact that some A1 were issued after the inspectorate control does not detract the Court from the conclusion that they were posted workers insured abroad.
- Judgment of the Administrative Chamber of the Superior Court of Islas Baleares, 5 April 2016, ROJ: STSJ BAL 246/2016. (Letterbox company without substantial activity in Spain. The Court established that both, the authorisation to reside and work in Spain for Third Country National workers and the insurance under the Spanish Social Security, are null and void).
- Judgement of the Social Chamber of the Superior Court of Castilla y León,13 June 2018, ROJ: STSJ CL 1895/2018 (Overlapping of an invalidity pension supplement and a foreign old age pension. The court ruled that the Spanish supplement and the Swiss pension are compatible, following the criteria established by the CJEU - C-431/16, Blanco Marqués-, as according to the coordination Regulations there is an overlapping of pensions of the same kind).
- Judgement of the Social Chamber of the Superior Court of Galicia, 12 July 2018, ROJ: STSJ GAL 3198/2018. (Old age pensions calculation. Theoretical amount: special agreement contributions. Following ECJ ruling -C-2/17, Crespo Rey- the Court established: that the theoretical amount should be calculated as follows: a. The last actual contribution paid before migrating should be updated in line with inflation. b. The result would be the maximum contribution bases the migrant is entitled to choose. c. If the migrant chooses this updated contribution bases, he must pay the due difference in contributions. Said amount can either be paid directly or through deductions in the pension. The Court reminds the migrant pensioner that, should it be more beneficial, he could choose to have his pension calculated by minimum bases, pursuant the bilateral social security agreement between Switzerland and Spain).
- Judgement of the Social Chamber of the Superior Court of Galicia, 15 March 2013, ROJ: STSJ GAL 2533/2013. (Theoretical amount: not completed insurance periods -*lagunas de cotización*-. Considering ECJ ruling - C-282/11, Salgado González- the Spanish court recalculated the regulatory basis of the Spanish pension, taking into account the actual period of payment of contributions in Spain during the reference period).
- Judgement of the Social Chamber of the Supreme Court 13 February 2019, ROJ: STS 606/2019. (Theoretical amount: not completed insurance periods -*lagunas de cotización*-. The Court established that, according to the Spain-

Switzerland bilateral agreement; The reference period can be placed right before the legal retirement age. The 'not completed insurance periods' -*lagunas de cotización*- should be filled with minimum contribution bases -*bases mínimas*-.

- Judgement of the Social Chamber of the Supreme Court, 29 April 2009, ROJ: STS 4269/2009. (Old age pensions calculation. Application of Social Security bilateral agreement. The court rules in favour of the plaintiff considering that the application of the bilateral agreement -between Spain and the Netherlands- is more beneficial for the migrant pensioner than the coordination Regulations).
- Judgement of the Social Chamber of the Supreme Court, 24 January 2012, ROJ: STS 974/2012. (Unemployment benefit. entitlement requirements and competent Member State. The Court ruled that the migrant was not entitled to Spanish unemployment subsidy. Considering that he does not fulfil the requirement under Art. 67.3 of Regulation 1408/71, i.e. he did not pay his last contribution for unemployment benefit in Spain).

4. Finland

- Insurance Court 31.8.2018, No. 2232/2018/3410. (Determination of the legislation applicable, residence-based social security, Reg. 883/2004, article 11(3) e. Is the person concerned covered under the residence-based social security legislation in Finland? The Insurance Court held that the person concerned had been living and insured in Estonia for a long period and therefore had closer ties to Estonia than to Finland).
- Insurance Court 14.2.2018, No. 2514/2017/850. (Old age pensions. The Insurance Court held that the ABP-pension paid from the Netherlands had to be taken into account as an income. The person concerned was not entitled to the national pension because the income limit for the national pension exceeded).
- Insurance Court 15.1.2019, No. 2671/2018/254. (Earnings-related unemployment allowance. Unemployed persons who resided in a Member State other than the competent State. The Insurance Court held that the facts (i.e. family, house) indicating that the centre of interests of the person concerned is in Estonia are weightier than the facts referring to Finland (employment). Hence, the person must be habitually resident in Estonia. The person concerned is not entitled to earnings-related unemployment allowance from Finland).
- Insurance Court 30.11.2018, No. 3936/2017/5091 (Family benefits, Members of the family residing in another Member State, Priority rules in the event of overlapping. A differential supplement does not need to be provided for children residing in another Member State when entitlement to the benefit in question is only based on residence.

5. France

- Cour de cassation, 6 Novembre 2015, Nº 14-10182. (Absence of PD A1. Can posting be established by a document other than the A1 form? Posting cannot be established with another document).
- Cour de cassation 11 March 2014, Nº 12-81.461 (PD A1 probative value. If it appears that the "posted" employees have a stable and permanent activity in France, should A1 certificates be disregarded for the purpose of the application of criminal law (undeclared work)? The presumption attached to A1 forms is rebuttable before criminal courts.
- Cour de cassation, 29 May 2019, Nº 18-13679. (Is a worker who was insured by mistake to the French social security can be retroactively subject to the Swiss legislation by application of transitory rules? Transitory provisions

Reg 883/2004 Art. 87.8 are not applicable in a case where a worker who has been subject by mistake to the legislation of Switzerland under Reg. 1408/71 claims the retroactive application of French legislation under Reg. 883/2004).

- Cour de cassation, 21 January 2014, Nº 12-28833. (Frontier workers unemployment benefits entitlement. Is a frontier worker who resigned from his job -after the employer stopped paying his salary- entitled to unemployment benefits in France -country of residence-? The ruling of the Court of appeal denying entitlement is reversed for the reason that the Court failed to verify if the condition of involuntarily loss of job such as defined by French law was compatible with the law applicable to the employment contract).
- Cour de cassation, 29 October 2013, Nº 12-22303 (Unemployment benefits. Is a worker who terminated his employment contract by agreement with the employer entitled to UBs in the country of residence? The ruling of the Court of appeal denying entitlement is reversed for the reason that the Court failed to assimilate the procedure of breach of labour contract by mutual agreement applicable in Belgium to the one applicable in France).
- Cour de cassation, 4 November 2010, Nº 09-17149 (Family benefits. Are French social security institutions liable for misapplication of coordination rules -they denied family benefits to a person who worked in France for the reason that his children had transferred their residence in Spain-? Yes. According to the law, French social security institutions have the duty to rightly inform insured persons on their rights. They should have mentioned the application of Article 73 of Reg. 1408).

6. Hungary

- Case Mfv. III. 10.655/2017. Judgment of the Kuria (Supreme Court) (Old age pensions. Application of the equal treatment principle for miner who worked in the Spanish Mine Enterprise aggregation of miner's insurance period in Spain and in Hungary. The Court ordered to aggregate the two service periods (Spanish and Hungarian) to calculate the pro rata pension of the miner).
- Case Mfv.III.10.130/2017. Judgment of the Kuria (Supreme Court) (Old age pensions. A German freelancer IT expert self-employed worker who did not pay any pension insurance contributions in Germany but the stand-by contribution in Hungary (jogfenntartó járulék). The basis of standby contribution was very low and if this amount was taken into consideration when calculating the pension, he would obtain a very low one. He asked for excluding these "bad" stand-by contribution years from the calculation. The Kuria (Supreme Court) rejected the plaintiff's claim).

7. Italy

- Corte di Cassazione Civile, Sent. Sez. L Num. 15432 Anno 2016, judgment of 27 June 2016 (Application of the aggregation principle, old age pensions. The judgment concerned the case of a Romanian worker challenging the decision of Italian authorities not to consider a bonus for heavy occupations obtained in Romania when considering his application for early retirement. The Corte di Cassazione held that Italian authorities were correct in rejecting the application for early retirement in so far, the applicant did not fulfil the requirements set by the Italian legislation).
- Cassazione civile sez. VI, n. 3611, judgment of 7 March 2012. (Calculation of the theoretical amount of the odl pension The key question was whether the INPS should include in the calculation of the theoretical amount of the pension of a person that worked in different EU Member States also a supplement ('integrazione al minimo') even though the person did not fulfil all the

requirements set by the Italian legislation The Corte di Cassazione replied in the negative, arguing that the supplement is to be included only if all the requirements set by the Italian legislation are satisfied).

- Corte Appello Bolzano, n. 126, judgment of 13 October 2018 (Unemployment benefits and the notion of 'residence' under Regulation 883/2004. The key question was whether Italian authorities were right in imposing a fine upon a seasonal Slovakian worker that returned in Slovakia at the end of a period of work in the Province of Bolzano and, by so doing, it violated the provincial legislation on unemployment benefits according to which the unemployed person has to have a stable domicile in the Bolzano Province in order to receive the benefit. The Appeal Court found against the Italian authorities, holding that the fact that the worker made return in Slovakia for a short period cannot be taken as proof that she had lost her right to obtain the unemployment benefit. In so doing it relied extensively on the notion of 'residence' contained Regulation 883/2004 Article 65).

8. Latvia

- Supreme Court Case SKA – Nº 137/2016. (Calculation of early old age pension in favour of a Latvian National after work in hazardous jobs, with service years in the USSR in the territory of occupied LT. Pension was calculated only for periods accumulated in Latvia -Regulation 883/2004 Article 52, point 5 and Annex VIII-. The beneficiary withdrew her pension from LT, requesting pension to be recalculated according to LV national rules exclusively. The Court rules that the higher amount should be granted -according to national legislation exclusively-. The Court refers to recital 28 of the R 883/2004).
- Supreme Court Case SKA – Nº 424/2010. (Entitlement to unemployment benefits and place of residence. Is Latvian citizen, lastly employed in the UK, who quitted her job in order to move to Latvia to live with her family, is entitled to Latvian UBs. (Art.71.b (ii) of R 1408/71)? Latvia continued to be a place of residence while person was working in the UK, because her family stayed in Latvia and there was a clear intention to return).
- Supreme Court Case SKA- Nº 490/2013 (Totalisation of periods of insurance when calculating the amount of Unemployment Benefits. Person employed in Latvia part of his insurance record has completed in the UK, these periods were taken into account for entitlement but not for calculation. The Court rules that periods of employment in the UK should be taken into account when calculating the amount of the UB).
- Supreme Court Case SKA- Nº 730/2010 (Is a Latvian national living with her partner and child in the UK, employed in the UK (informally) entitled to birth grant, child care and family benefits from Latvia as resident of Latvia for the period before family benefit has been granted by UK to the father, UK national, living and employed in the UK? The Court rules, that mother is entitled to Latvian benefit because: she was employed in the UK without registration, has no official status of permanent resident in the UK, not married to the father of child and had her declared place of residence in Latvia.
- Supreme Court Case SKA-Nº 731/2010 (Are two LV nationals studying in AT entitled to LV family benefits for their child born in AT that continues to live with their parents there? The Court rules, that family is entitled to family benefits in Latvia because their declared place of residence still is Latvia).
- Supreme Court Case SKA- Nº 486/2017 (Scope of term "family benefits" Should the supplement for disabled child to universal family benefit be considered as family benefit in the meaning of Article 1 point 1 z) of Regulation 883/2004? Yes, as purpose of the supplement is to meet family expenses).

9.The Netherlands

- Supreme Court 2 February 2018. ECLI:NL2018:126. (Applicable Law under Regulation 883/2004 Title II on residence based national scheme when the beneficiary performs marginal activities in other member state -Germany- where he is not insured. Does the ruling of the CJEU in Franzen imply that Dutch residence remain insured for the Dutch old age pension act when a Netherlands resident carries out marginal activities in Germany, where they are not affiliated to the social security system? Deferred pending an outcome of new preliminary questions in the same case of Franzen).
- Central Appeal Tribunal (Centrale Raad van Beroep), 12 August 2018, ECLI:NL: CRVB:2016:3050. (Applicability of residence-based schemes under Regulation 883/2004 Title II, when the beneficiary performs marginal activities in another member states but in this case was insured under German social security scheme. This case was outside the scope of application of CJEU in Franzen case-law. But since *in casu* the German old age pension was very low there was still an issue related to CJEU in Hudzinski C-611/10. The Court ruled that there was not insurance for the Dutch old age pension scheme).
- Central Appeals Tribunal (Centrale Raad van Beroep) 28 February 2019 ECLI:NL:CRVB:2019:852. (Applicable national social security Law when work is carried out in more member states -Regulation 883/2004 Art. 13(1)-. How can/must it be determined that a person is carrying out a substantial part of his employment in the country of residence? The SVB was right, it must consider the situation of employees in principle as a whole on the basis of the facts and circumstances presented by the employees concerned and their employers, or otherwise known to be relevant, if an employee works around 25% in his State of residence. A certain discretion in determination methodology can be justified because the EU legislator attaches importance to rapid decision-making and avoiding too many fluctuations in the insurance position of employees due to, for example, sickness and leave).
- District Court Haarlem (Rechtbank Haarlem) 3 April 2012, ECLI:NL:RBHAA:2012:BW0665. (Exportability of new addition to old age pension on grounds of AOW Extra supplement for old age pensioners on ground of AOW with fiscal background, exportable under Regulation 883/2004? The Court considered them exportable).
- Central Appeals Tribunal 26 July 2018 CLI:NL:CRVB:2018:2260. (Final decision on CJEU in Klein Schiphorst (C-531/16) dealing with the extension of the duration of export of unemployment benefits to six months. Is there right to an extension of the duration of exported unemployment benefit to six months on grounds of Regulation 883/2004? The extension of the exportation was rejected).
- Administrative Court Council of State (Afdeling Bestuursrecht Raad van State) 6 November 2013 ECLI:NL:RVS:2013:1846. (Is the rejection of child allowances to the irregular staying parents of child with EU member state nationality a relevant factor in assessing whether the right of child to effectively stay on EU territory is made impossible? Application CJEU Zambrano C-34/09 and Dereci C-456/11 case law; the allowances were rejected).
- Central Appeals Tribunal 24 October 2018. ECLI:NL:CRVB:2018:3319. (Is the Dutch requirement of ordinary residence the same as the residence test for the purposes Title II of Regulation 883/2004 (art. 11(3) a-d)? The decision of the social security administration- SVB- was overturned. The Court considered that under Regulation 883/2004 the beneficiary must be considered to be a resident in the Netherlands).

10. Poland

- Supreme Court, 29.12.2009, III AUa 667/09. (E101 Probative value -posting condition not meet-. Application of Art. 14.1a of Reg. 1408/71. How to establish a substantial part of activity in the Member State? Establishing substantial part of activity under conditions mentioned in EU rules. The Practical guide is not a source of law; however, it is of great importance as interpretation of EU law).
- Supreme Court, 13.05.2010, II UK 379/09. (E101 Probative value -posting condition were not meet- Application of Art. 14.1a of Reg. 1408/71. Can a person be treated as a posted employee if the company in the posting Member State (employer) carries out only purely internal management activities in that state? Performing substantial activities by the employer in the posting Member State is required).
- Supreme Court, 6.06.2013, II UK 333/12. (Application of Art. 13.3 of Reg. 883/2004. ZUS assessment of an employment relationship concluded abroad (Slovakia). Polish institution issued a decision that the person concerned was subject to Polish legislation according to lex loci laboris rule as in fact he had been only a self-employed in Poland.The Court turned the case back to Polish institution for reconsideration. However, the Court was of the opinion that the evidence submitted by the person was sufficient to determine Slovak legislation applicable).
- Supreme Court, 04.06.2014, II UK 550/13. (Application of Art. 12.1 of Reg. 883/2004. Letterbox companies. Lower turnover than 25% cannot be balanced with other criteria as they are different in kind. The court settled the required turnover at 25%, which is slightly different interpretation that the one provided in the Practical guide (where turnover of approximately 25% of total turnover in the posting state could be a sufficient indicator, but cases where turnover is under 25% would warrant greater scrutiny).
- Supreme Court, II UK 503/16, 27.07.2017. (Application of Art. 12.1 of Reg. 883/2004; (lack of) significant activity in a posting state. Polish institution declined to issue a PD A1 to a worker of temporary work agency as the company's turnover of the company declined during years. Not only the turnover is important, but the overall assessment of the case shall be done. Especially where the turnover is less than 25%).
- Supreme Court, I UK 392/17, 16.01.2019. (Application of Art. 13.3 of regulation 883/2004. Marginal activity. A self-employed worker in Poland is also employed abroad, however with very limited salary and working hours. Polish institution decided that the activity abroad was marginal and Polish social security legislation applicable. An assessment from the competent institution of the member state where the employment activity is performed, is decisive for knowing if the activity was marginal. No reply from foreign institution shall be recognized as a "silent consent" to the legislation determined by Polish institution).
- Court of Appeal in Gdańsk 11.09.2018, III AUa 815/15. (Was a Polish bridging pension an old age pension or a preretirement benefit in the meaning of regulation (EC) 883/2004? After a preliminary ruling -CJEU 30.05.2018, C-517/16, Czerwiński- the national court concluded that a benefit such as that at issue in the main proceedings must be regarded as an 'old-age benefit' within the meaning of Article 3(1)(d) of Regulation No 883/2004).
- Court of Appeal in Bialystok 25.09.2013 of the, III AUa 830/10. (Application of Judgment CJEU 16.05.2013, C-589/10, Wencel, interpreting Article 10 of

Regulation (EEC) No 1408/71: a person cannot have simultaneously two habitual residences in two different Member States)

- Dictrict Court in Tarnów 28.04.2016, VII U 813/15 (Old age pension and supplement according to art. 58 regulation 883/2004. Can competent institution settle the supplement for past years backwards and deduct it from current benefits? The competent institution cannot settle the supplement for past years backwards and deduct it from current benefits).
- Supreme Administrative Court, I OSK 1497/13 NSA (Determination of place of residence for the purposes of granting unemployment benefits. The court has decided that subjective criteria -listed in Regulation 987/2009 Article 11.(2)- of determining the place of residence are secondary to the objective ones (listed in paragraph 1 of the said Article) This judgement shares the views presented in the judgement I OSK 687/13 and other subsequent similar judgments. However, in this ruling the Court confirmed that the term 'place of residence' within the meaning of EU Regulations cannot be interpreted in the same manner as the term 'place of residence' appearing in national law. Moreover, in this judgment the Court stated that the AC Decision No U2 should have been applied by the court of first instance).
- Supreme Administrative Court (I OSK 1702/13 NSA). (Determining the priority for payment of the family benefits. The court rejected the complaint and supported the position of the first instance Court that in the case there could be no payment of the same benefit in both countries at the same time to the same family member, in accordance with the prevention of overlapping of benefits).

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