



Conference Report

Modernized EU Social Security Coordination –

Preparation for the Application of the New
Regulations on the Coordination of Social Security

Stockholm, 25th – 27th of November 2009



*The conference is co-funded
by the European Commission*



Försäkringskassan
Swedish Social Insurance Agency

Foreword

There has been a great need to modernise regulations related to coordination of social security benefits within the EU. We have reached the end of a long process with the new Regulation 883/2004 and Implementing Regulation 987/2009.

This conference, held here in Stockholm, 25th – 27th of November 2009 during the Swedish EU Presidency, marked the completion of the fundamental effort to draft the new regulations, and we must now prepare for coming challenges in connection with their implementation on the first of May 2010 and the transition period through May 2012 that is ahead of us.

The aim of the conference was to bring to the fore and discuss several key areas of importance as we approach the first of May 2010. The value of information was discussed, and how we can best reach out to European citizens to make sure that the people who are affected gain access to accurate information about their rights and obligations.

Some of the most central topics were the transition period we are facing in the technical area, where a new system for electronic transfer of documents among the Member States must be up and running by May 2012, along with legal challenges involved in interpreting the new regulations.

We also discussed the higher demands for improved and expanded partnership among the Member States, which will be necessary to ensure that citizens do not get trapped between different systems, while greater responsibility will be imposed on the States to ensure that disputes are resolved. Finally, we had the pleasure of hearing an outsider's perspective and ideas about future challenges.

This report is a summary of the topics presented and discussed during the conference and we hope it will be a useful basis for continued discussions in the relevant areas.

I would like to express my appreciation for the smooth cooperation with the European Commission, which co-funded the conference, as well as the Swedish Ministry of Health and Social Affairs. My sincere thanks as well to everyone else involved for your valuable contributions.

Stockholm, February 2010

Adriana Lender

Director-General
Swedish Social Insurance Agency

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The information contained in this publication does not necessarily reflect the position or opinion of the European Commission.

This Conference Report was written by Filip Van Overmeiren, European Social Law Unit, Ghent University.

Opening of the Conference

This report reflects the presentations, panel discussions and general debate during the Stockholm Conference on Modernised EU Social Security Coordination held 25th–27th November 2009. It is a highly detailed reproduction of the entire contents of the conference, but cannot be regarded as verbatim quotations of the speakers. The present tense is used only in the interests of readability.

The opening remarks were those of Mrs Cathy SMITH, journalist, who was the moderator of the conference. She emphasised the importance of a conference on legal instruments that affect a great many people in the EU and revealed that the historical and political background of the reform, the legal complexities and the future EESSI system would be key issues during the meeting. She then handed over the floor to the host of the conference.

The three-day conference on the modernisation of social security regulations was officially opened by Mrs. Adriana LENDER, Director-General of the Swedish Social Insurance Agency, who welcomed the participants to Stockholm and to the conference organised by the Swedish Social Insurance Agency and the Swedish Ministry of Health and Social Affairs. The conference was part of the programme of the Swedish Presidency in 2009 and co-funded by the European Commission. She continued with some introductory remarks.

Social security and social insurance are priorities in all EU Member States and the importance of efforts to coordinate these systems is unquestioned. The conference was centred around the introduction of the two new coordination regulations, the Basic Regulation 883/2004 and the Implementing Regulation 987/2009, which will both become applicable on 1st May 2010. Diverse aspects of implementing the coordination regime are analysed at this conference: opinions of the European Court of Justice (hereinafter: ECJ), academics, social partners and even from an outsider of the European Union. The making of the new regulations has taken a fairly long time; numerous experts were involved and many meetings and discussions were held before a result could be reached. The origins of the new framework and the views and needs of citizens will be debated on the first day of the conference. Although the institutions applying the regulations on a day-to-day basis are important stakeholders, it should never be forgot that citizens are the actual target group of this legislation. The rules are merely tools for facilitating the free movement of persons. In this context, a new feature should be announced. The Swedish Social Insurance Agency administers about 45 benefit and allowance schemes covering family, sickness, disability and old age pensions. A new agency, merging the pension department of the Swedish Social Insurance Agency and the Swedish Premium Pension Authority, will take over responsibility for old-age pensions as of 1st January 2010. Unemployment benefits are also administered by a separate

agency. The heavy workload of the insurance agencies accentuates the need for increasing efficiency at the administrative level. However, not all administered benefits fall within the substantive scope of the regulations and the vast majority of beneficiaries both live and work inside the borders of Sweden. Nonetheless, there is a very real need for greater administrative efficiency with regard to international cases for which the new regulations, which introduce the EESSI project, will become the standard. Implementation of the new framework will probably be a demanding task for all national administrations: drafting guidelines, handling processes, citizens' information, IT systems and National Access Points are a few examples of current concerns. However, work needs to be done at the EU level: Structured Electronic Documents (hereinafter: SEDs), business flows, Portable Documents (hereinafter: PDs), the Transitional Period, etc. Questions surrounding several new legal concepts will also need to be addressed: new definitions, the extension of the personal scope, the transitional provisions, the extension of the posting period, etc. Expert discussions are needed to try and solve the interpretation problems. Last but not least, good cooperation between national administrations will be a key issue, especially during the Transitional Period. Good personal networks are likely to prove essential. The conference is meant to stimulate expert discussion on these diverse topics.

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Mrs. Cristina HUSMARK PEHRSSON, the Swedish Minister for Social Security, gave her outlook on the new social security coordination regime as a legislative reform to the benefit of citizens. She was aware that the audience have and are still playing a key role in the reform of social security coordination for persons exercising their freedom of movement. The free movement of persons is a cornerstone of the European Union and social security coordination plays a major role in making this a reality. Access to social security is essential for people who want to work or study in another country. The new rules have created better conditions for eliminating the negative effects of crossing borders in relation to social security. The modernisation and simplification of the rules has been debated for a long time, as evident in the 1996 Stockholm Conference's critical analysis of this domain. Many issues raised then were considered as the new rules were drafted. But the political process and its outcome are only the first phase and can only be realised through the day-to-day application of the rules by national administrations. They are now facing an arduous transition period before the new framework will be fully functional. The Minister has great expectations that attention will be focused on citizens and solutions found in each individual case. The possibility of provisional decisions and conciliation are pioneering developments that will lead to real and positive change for citizens. Extension of the personal scope to include all EU citizens and extension of the material scope with new benefits will further contribute. The possibility to keep unemployment benefits for a period up to six months to find a job in another Member State will be equally beneficial and lead to concrete improvements for citizens. The same can be said about the assimilation of facts.

The simpler, more transparent rules will make the system more accessible and easier to understand in the future. This will lead to better and clearer information to citizens. Indeed, lack of information could prevent individuals from moving to another country. All in all, a common understanding of the rules is necessary for a good cooperation between Member State institutions. Furthermore, implementation of electronic exchange of information will be an adjustment to modern society's possibilities and create opportunities for more efficient administration. This conference, a result of previous thematic seminars, is an initial process towards reaching a common understanding of the new framework, but not all the answers to the pending questions will be provided here. But politicians also have a duty to further improve legislation on the coordination of social security. New problems in this area must be addressed. Compromises are sometimes difficult to reach, although the new rules in the Treaty of Lisbon are meant to facilitate swifter decision-making processes. As an example, efforts to implement the new coordination regime for third country nationals must continue.

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Several future challenges of the modernised regulations were presented by Mr. Georg FISCHER, Head of Directorate E, Social Protection and Social Inclusion of the European Commission's Directorate-General for Employment, Social Affairs and Equal Opportunities. He began by thanking everyone who has made it possible for the modernisation of social security coordination to come so far. The European Commission, national administrations and the European Parliament played important roles in getting the new framework adopted. This conference is a good time to take stock of where we are now, to see that much has been done but also that work remains to be done in order to prepare for the actual application in May 2010. This legislation is fundamentally linked to the free movement of workers and other citizens in the European Union. However, it is also a very old exercise and an old example of the fundamental precepts of Europe, since the legislative framework for coordination has been in place for 50 years. As mentioned, these instruments must primarily serve citizens, which can be perfectly illustrated by some data. In a recent Eurobarometer survey (2009), citizens were asked to identify what the EU meant to them personally and more than 40 percent answered that the EU offers them the freedom to move around to travel, study or work in the European Union. Additional figures confirm the importance of free movement: 6 million people are working in another Member State, including 1 million frontier workers; 1.6 million people over the age of 65 reside in another Member State; 40,000 unemployed people are looking for jobs in another Member State and 1.8 million people are seeking medical care in another Member State. We expect these numbers to increase in the future. We can certainly expect more elderly people to cross borders, related to the imminent ageing issue in the European Union. Regarding the economic and technical outlook and the aspect of globalisation, we will also see people moving for reasons of work, not least because our economy will be forced into mobility. One would also wish that the number of mobile students will rise. So, we have to realise that the coordination of social security will become more important rather than

less, and providing protection for all these people is the reason for the reform.

In this context, the European Commission adopted a Consultation document on 24th November 2009 on the outlook of Europe 2020, trying to provide a picture of where the European Commission would like to see the European Union in 2020. Mobility and the protection of mobile persons is an important issue in this document. Coordination of social security has an internal market side and a social policy side, and coordination reconciles these two aspects. The coordination rules facilitate free movement and create better conditions for achieving internal market goals, but do so by ensuring social and health protection in another Member State. Thus, it is also a good example of flexicurity: encouraging people to be mobile, but in a way that they are well-protected. People need this security to become mobile and the coordination system is thus a good example of a modern Europe with a strong social dimension. The Social Protection Committee (SPC), in which the European Commission and the Member States work together to advise the Council and the Commission, recently published a document in which it describes major social trends. In this document, the SPC emphasises how important social protection is for Europe to sustain macro-economic performance and stability throughout the crisis period, and how social security coordination is an important part of this. The new challenges for social protection mentioned in this report are dealing with the problem of an ageing population in the EU and the development of activation policies, but in order to stimulate people to engage in these policies they need to be sure that they will enjoy social security protection..

However, the coordination regime might also need further modernisation. Although the rules and procedures have been subjected to a modernisation process, the world did not stop during the 11 years during which this work was done. The European Union has increased its members from 15 to 27, thus integrating new systems, ideas, problems and opportunities. New benefits, such as paternity benefits, have been included in the material scope and, out of the extension, the specific situation of some of the mandatory privately funded pension schemes is reflected. Several important ECJ cases were also integrated into the regime. Of course, application of the regime will also be profoundly modernised and cooperation improved among the key actors in the field, that is, the social security institutions (more than 50,000 institutions throughout the EU) who act on behalf of citizens. Improvement of interagency cooperation should be regarded as the third priority of the modernisation process, embodied in the forthcoming EESSI system for electronic exchange of information. It should be mentioned that the Council and the European Parliament have declared the EESSI system as a project of common interest in terms of pan-European e-government services, taking the lead in European cooperation between administrations. The European Commission is grateful for the work done thus far by all the experts, but admits there is still some work to do to prepare for 1st May 2010. This includes training, explanation, information to the civil servants working in national administrations and investing in national data systems. The European Commission will assist and support this preparation and agrees with the Administrative Commission that everyone involved should

act with pragmatism and flexibility. The European Commission also has some work to do, such as providing the Master Directory, which should normally be finished by 1st December 2010. With respect to the EESSI, all national systems should be fully EESSI enabled by 1st May 2012 and all data between institutions will be exchanged electronically. This conference is not only the end of a process of modernisation, but also the beginning of a new phase in social security coordination.

The Making of the New Regulation

Mr. Jérôme VIGNON, Former Head of Directorate of Social Protection and Social Inclusion of the European Commission's Directorate-General for Employment, Social Affairs and Equal Opportunities, is in good position to provide an overview of the genesis of the new regulations, since he was involved in drafting the Basic Regulation 883/2004. Coordination of social security is one of the oldest pieces of legislation in the EU, with Regulations 3/58 and 4/58 dating back to immediately after the signing of the Treaty of Rome. They were replaced by Regulations 1408/71 and 574/72, known as a masterpiece of complexity in terms of architecture with a Basic Regulation, an Implementing Regulation and Annexes to both. The specific language is also characteristic: "competent Member State", "necessary care", "third country nationals", etc. Very contradictorily, this complex regime touches most upon the lives of ordinary citizens and generates a lot of inquiries and letters to the Commission. About one third of the infringement work of the European Commission and one quarter of the case law of the ECJ is related to this area of law. The complexity of the instrument is due to the fact that it must be precise; it is based on coordination, not harmonisation, and must be implemented under the provision of equal treatment, which is intertwined with the key values of the EU but is not an easy principle to work with.

The Commission found it necessary to modernise and simplify because the number of Member States had more than doubled, adding to the heterogeneity of the coordinated systems based on workplace or place of residence. The material scope had to be adapted to benefits such as pre-retirement benefits and paternity benefits. The extension of the regime to third country nationals and new provisions for the posting of workers in Directive 96/71 had to be taken into account as enriching but complicating the implementation of the coordination rules. The complexity delayed deliverables and sometimes caused delays in reimbursement and generated a vast amount of paperwork, now at its peak. Finally, the development of the national social protection systems, often translated into the annexes to the regulations, exacerbated the difficulties. The problems surrounding special non-contributory benefits are a good example. The Commission was also motivated to take the initiative by the common European Employment Strategy.

In connection with the initial proposal, which coincided with pension reforms in many EU Member States, the European Commission opted for a parametric reform, rather than a systematic one, with a view to addressing the main shortcomings. This cautious approach was directed only at reviewing 1408/71 and adding, on a case-by-case basis, certain reforms in the various chapters in line with what appeared to be modernised or simplified solutions. One might well question the Commission's cautious approach. The first proposal made no attempt to revise based on across-the-board principles for reform, but merely tried to alter the scope of the Basic and Implementing Regulations in order to increase flexibility for future adapta-

tions. It did not incorporate the possibility of electronic exchange of information, since this was seen as an issue separate from the substantive provisions. It did not draw preliminary conclusions from the ongoing spontaneous convergence between residence-based and work-based national social security systems. However, if any of these developments had been addressed at the time, the result would have been a breakdown of the unanimity-driven process. Since choosing other options would have caused anxiety in the Member States, the parametric reform chosen then still seems the most rational choice. But this pragmatic approach also resulted in little progress in negotiations until 2001. Matters such as “the competent Member State for unemployment or family benefits” or “the exemption of social assistance” were typical examples of material that resulted in the impasse. The difficulties were not overcome until during the 2001 Belgian Presidency, by seeking consensus on certain basic principles – known as the “Parameters for Reform” – before starting the more detailed discussion. Thereafter, things moved very quickly and the new Basic Regulation was adopted in 2004.

Finally, the division of labour between the three institutions, the Commission, the Council and the European Parliament, should be mentioned. The three had the difficult task of working towards unanimity in such a complex setting as social security coordination, which succeeded thanks to a spirit of cooperation and openness between all parties. In this regard, it should be noted that when the then European Constitution was in drafting, the social security coordination experts on the European Commission were not keen on replacing unanimity with majority voting in their field, which put the spirit of alliance between all Member States at risk, leaving the Commission and the European Parliament to contribute individually to the common approach. So, whether the removal of the unanimity requirement from the Treaty of Lisbon in this area will have purely positive impact is an open question. The alliance of the institutions facilitates the aim of establishing clear and accessible rights for mobile persons, although each institution adds its own flavour. The European Parliament was supportive of the rights of mobile persons, whereas the Council was more concerned with the costs for the Member States and the administrative burden for the national institutions. The European Commission encouraged each Presidency to make use of its capacities, acted as a facilitator and was responsible for the smooth articulation between the Social Affairs Working Group and the Administrative Commission. Special mention should be made of the deliberate role played by the European Parliament, especially Mrs Jean Lambert, who was the perfect translator of the shared convictions aimed at creating a common spirit from West to East.

In conclusion, this difficult and complex exercise has succeeded on the strength of unified political commitment to the fundamental freedom of movement and equal treatment in the EU, in a spirit of cooperation between all institutions involved. Moreover, the academic community has always played an important role in building bridges between the European context and the national context. Finally, representatives of the national authorities are included in this “knowledge community” and social partners should play a greater role in the future. It is to be hoped that the new framework for

electronic exchange of information will improve the quality and scope of the coordination regime, bearing in mind that the previous modernisation process could not include the development of the overall convergence of social protection systems in Europe, which could ultimately humanise, modernise and simplify the coordination regime.

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An important role in the drafting of the new framework was played by the former Belgian Minister for Social Affairs and Pensions Frank VANDEN-BROUCKE, now a member of the Flemish parliament, who succeeded in unlocking the negotiation process during the 2001 Belgian Presidency. The reform was needed due to the increasing complexity of coordination legislation and the evolution of national social security systems (new types of benefits, new ways of financing) as well as the inclusion of non-Bismarckian welfare states. Significant change in labour markets and labour market mobility, shifting from blue collar workers moving to certain industrial zones in Europe to work and living there permanently until retirement to mobility of all categories of workers, both short term and long term. Nowadays, mobility is more than mobility of workers; it also refers to mobility of students, pensioners, tourists and others, which raises questions as to the former personal scope. Finally, simplification became an urgent matter given the impending enlargement and considering that reaching unanimity with 25 Member States would have complicated the matter. Contrary to Mr Vignon's remarks, the Commission's initial proposal could be called ambitious, but we can strike a compromise by calling it "cautiously ambitious". The hurdles causing the impasse were related to the procedure. The proposal would be discussed, chapter by chapter, article by article, with a progress report at the end of each Presidency.

Discussions continued through four successive Presidencies and there were many disagreements, which resulted in a slow process with very limited progress. The outcome was a 2001 resolution by an irritated European Parliament. There were various reasons for this stalemate: the unanimity requirement, exacerbated by tedious technocratic methodology that conferred nearly exclusive authority on a limited number of experts (knowing full well what the existing rules brought to their home front) on understanding the regulation, with rather conservative and national approaches. But at the Stockholm European Council in March 2001 the Belgian Government and the Swedish Presidency agreed a mandate to the Belgian Presidency for the modernisation of Regulation 1408/71 "*... to agree parameters ...*" by the end of 2001. The Belgian Government had a discussion with the other Member States to identify the main difficulties and prepare the ground for consensus on the parameters. Thereafter, discussions within the Working Party on Social Questions lead to a first formal proposal on parameters for the Council meeting in October 2001. Success at that moment was probably due to the focus on the essential political issues (instead of technical legal problems) as well as the "anticipation approach" as the preparatory work began immediately after the Stockholm Council. Thorough consultation, bilaterally (tour of capitals) and with the EP rapporteur, the Commission

and the Council Secretariat was also crucial and created a spirit of compromise.

Mr VANDENBROUCKE subsequently reviewed the important steps taken starting in July 2001 (initial proposals) and through September (first proposal in Council) until December 2001 (final Council meeting) with regard to the parameters for reform. There was one main objective for the modernisation of social security systems: simplification for the citizen without disproportionate complication for administrations. The other objective was reform of the present coordination regime, which must serve to improve the regime in the interests of citizens. With respect to the personal scope, the first formal proposal stated: “In principle coordination should apply to any person who is or has been subject to the social security legislation of one or more Member States”, in which the term ‘person’ was used subject to the outcome of the Council's discussions on extending the scope of the regulation to persons who are nationals of non-Member States. Two main issues were at stake. First of all, the shift from a regulation related to workers to a regulation covering all insured persons, which was not only a matter of principle (“Europe for Citizens”), but also a key to simplification given the economisation of complex definitions. The second issue was the wish to cover all third country nationals, following the 1999 Tampere European Council conclusions to fully integrate third country nationals in the social and economic life of the EU. The first issue was regarded as jeopardising the financial balance of the social security systems of some Member States, namely those with residence-based social security systems, opening the door to welfare tourism. However, coverage of all insured persons was retained, with one important proviso: “However, it has been observed that some Member States are encountering difficulties in accepting all the consequences resulting from such a personal scope of coordination (...) as regards extension to those who are not working. Therefore, it is important to find a solution (...) that takes account (...) of any constraints which may be connected with the special characteristics of systems based on residence, while constantly striving for simplification”. This has been used by the Scandinavian residence-based systems to introduce specific residence requirements, for instance for the Danish social pension. With regard to nationals of non-Member States, an extremely sensitive subject for some Member States, the discussion on extension was held in parallel with the discussion on modernisation, in accordance with the instructions from the Tampere European Council. This political solution was found in a legal argument, namely that the instrument for third country nationals could not be based on Article 42 EC, but could be based on Article 63 (4) EC later on. With the possibility of an opt-in, it was tacitly agreed with the reticent countries that they would opt in. The end result was Regulation 859/2003. This manoeuvre must now be repeated for 883/2004.

The Commission was very ambitious with its proposal on the material scope, as an open material scope was proposed. This was manifestly impossible for the Member States and it was decided that the list of branches of social security to which the coordination regime applies must be exhaustive and cover the areas now included as well as pre-retirement schemes (not fully coordinated). Paternity benefits were added afterwards. Consequent

upon the refusal to open the material scope of the regulation, long-term care cannot now be integrated in the regulation as a separate benefit. The parameters on exportability and applicable legislation were uncontroversial. The export of benefits had to be guaranteed while permitting duly justified and precisely defined exceptions. As to the determination of the applicable legislation, persons are subject to the legislation of a single Member State, which is in principle, for those who are economically active, the State in the territory of which they are carrying out their activity and, for persons who are not economically active, the State of residence. On the precedence of the regulation vis-à-vis bilateral agreements, the presidency was forced to back down somewhat on the principle that the coordination regulation takes precedence over agreements reached between Member States. It was added that existing agreements may be applied when their result is more favourable for the person concerned or if they concern specific historical circumstances and their effect is limited. Assimilation of facts was not in the initial papers of the Belgian presidency but was proposed as a parameter by a group of Member States with specific interests in this principle.

Moving to the specific coordination chapters, it was initially proposed for sickness benefits that a system for reimbursing benefits in kind between institutions had to be provided for, based on actual costs. This was later mitigated by adding “except for Member States (...) which have legal and/or administrative difficulties in applying reimbursement on the basis of actual costs”. In the end, these Member States could opt for reimbursement on a flat-rate basis, as a political solution to guarantee equitable distribution of the financial burden. In addition, the Belgian presidency wanted to do something for frontier workers and stated that a retired frontier worker on a pension must be eligible for sickness and maternity benefits in kind within the territory of the Member State where he formerly worked. The final parameter was that a retired frontier worker on a pension must be allowed to continue any treatment begun in the territory of the Member State where he formerly worked (e.g. cancer treatment). Finally, the Council had to examine whether it would be appropriate to adapt the regulation in light of ECJ case law concerning the freedom to provide (health) services. Here the parameter was substantially weakened, resulting in the very modest incorporation of case law. Unfortunately, the two methods, one based on the treaty and one on the regulation, have been thus consolidated, which is a missed opportunity. With regard to the unemployment chapter, the Commission wanted to extend the exportability period up to six months to look for work in another Member State with a view to activating inactive persons. It was immediately agreed that this had to be reduced to “a period of at least three months under simplified conditions”, as this was very problematic for some Member States. Luxembourg in particular was in a special situation with its vast numbers of frontier workers and its position can easily be related to Mr Vignon’s remarks about the unanimity rule. In this kind of severely disproportionate situation, even the smallest Member State needs some kind of protection of its interests by being able to exercise its veto. This feeling of protection for every Member State may be key to maintaining a good spirit of cooperation. For the coordination of family benefits, specific clauses were again introduced to safeguard the interests of Member States with residence-based systems.

In conclusion, one might argue that the merit of the compromise must be judged on the stronger principles of good administration (especially in the Implementing Regulation), personal scope (no dramatic change, but simplified), material scope (only paternity and pre-retirement), legal simplification, clarification and thus legal certainty, inclusion of case law (to an inadequate extent), equitable financial burdens, improvements for frontier workers and other concrete cases and robustness vis-à-vis future challenges “from outside” (e.g. Treaty-based court rulings). For the future, it will be useful to keep in mind that the methodology and the clear political mandate have unlocked the debate and that the value of very good advisers to politicians cannot be overestimated.

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As mentioned, the European Parliament worked in a spirit of alliance with the other institutions. The rapporteur for both the Basic and the Implementing Regulation was Member of the European Parliament Mrs Jean LAMBERT, of the British Green party. When the Treaty of Amsterdam entered into force, the European Parliament commenced a co-decision procedure for the coordination regulation, with unanimity in Council. So, given the complexity of the subject on its own, this dossier could not be called “straight-forward”. As to that said about unanimity, a known consequence of this is that most discussions are held between the Member States. The Parliament sees only part of the real action and is mainly being told what not to do, which was the case, for instance, with respect to the incorporation of ECJ case law on patient mobility. Certainly in the first years it was very hard to find out what was actually happening in Council. As an MEP, you were often dropped into an exclusive meeting of high-level experts from the Commission and the Member States without really knowing the rules. A very sensitive topic indeed was the inclusion of third country nationals in the regulation, the end result of which was the separate Regulation 859/2003 in order to reach the required political consensus. The European Parliament was not satisfied with this solution, as it did not tally with the conclusions of Tampere 1999 on more vigorous integration policy. Parliament thus wanted to renew that link with the new Regulation 883/2004, as it found there is no simplification in establishing two sets of rules. This is part of a whole set of policies, such as the Blue Card or Single Permit initiatives, and should be kept in mind by Member States having various objections. Another notable point is that when Member States’ representatives argue that “this is going to cost a lot”, they usually have no idea exactly how much it would cost, since they have no figures. Nevertheless, the role of the Belgian Presidency in the legislative process of the new regulation should not be underestimated, as they took the bull by the horns and made ministers understand that a political perspective on the topic was required.

A strong call for self-education is needed in this kind of subject and this has been the case with the European Health Insurance Card and is certainly the case for other health care issues, since the close link between health and social security is not understood well enough in many Member States. Health matters linked more to public health issues and not strongly enough

with payment, social security and equality. The link between social security coordination and topics like ‘social services of general interest’ or the ‘residence directive 2004/38’ should also become clearer. There is a need to place the regulations in the broader context of related European law. The Parliament is trying to monitor the needs of the administration and certainly of the persons concerned, who are not always citizens. This approach was summed up in an EP amendment incorporated in Article 2: “For the purposes of the Implementing Regulation, exchanges between Member States’ authorities and institutions and persons covered by the Basic Regulation shall be based on the principles of public service, efficiency, active assistance, rapid delivery and accessibility, including e-accessibility, in particular for the disabled and the elderly”. For the European Parliament, communication with the individuals involved is essential because it can also reduce workloads, since people stop asking about their cases once they have been informed. Protection of personal data was another issue of great concern for MEPs, as can be concluded from the extensive amendments related to this issue. Tribute should be paid to the European Commission, given the work they did together with certain members of the European Parliament in explaining everything and talking people through this, which was very important throughout the legislative process.

The EP also hopes that electronic data exchange will speed up the delivery of responses, etc. Deadlines on delivery of information were difficult, as some Member States simply do not have internal deadlines to be respected. A recital encourages these Member States to introduce them. Unfortunately, until now, a concept like “without delay” was not clearly defined. The biggest concern was to give a signal that solutions should be found more swiftly and, at least, before the persons concerned die, as this has cynically already occurred in some cases with regard to pensions. The EP also wanted to link this to better delivery of information in the framework of the Posting Directive 96/71, which there is pressure on the Parliament to revise. In conclusion, the highest aspiration is for people to know their rights when they move within the European Union and a way must be found to disseminate that information, e.g. via social partners or other channels. However, it should not be forgot that the European Parliament can also play a helpful role by guiding people towards the information they need by posting information on existing websites, appealing to national networks of MEPs, etc. The Parliament would be delighted to play a role in making people aware of their rights.

Video on Regulation 883/2004 provided by the European Commission

The audience was shown a video on the modernised social security rules. Segments presented the work of the Administrative Commission; coordination of diverse national systems; follow-up of mobile citizens throughout their life; the EU as a pioneer in protection of social security rights for mobile persons; concrete examples of coordination cases with regard to family benefits; export of unemployment benefits; calculation of old-age pensions; the EESSI-project; the extended personal scope of all insured EU citizens; increasing information and coordination; and the goal of free movement in a secure environment.

SESSION 1: Coordination as seen by citizens and their need for information

Chaired by Mrs Cathy Smith, journalist

Panel:

Mrs Cecilia Calais, Head of Global International Assignments, Ericsson

Mrs Bernadette Ségol, Regional Secretary, UNI europa

Mrs Caroline Boström, Board Member, Swedish Student Organization (SFS)

Mr Jörg Tagger, Head of Sector, DG Employment, Social Affairs and Equal Opportunities and Secretary of the Administrative Commission

Mr. Jacques Scheres, Euroregional Coordinator, Euregion Meuse Rhine

The first panel session was chaired by Mrs Cathy SMITH, journalist. She announced that the session would deal with needs of citizens for information. This is a very important topic, as making people aware of their rights not only makes life easier for citizens, but also for social security institutions. She introduced the panellists and then yielded the floor to the first speaker.

Mrs Cecilia CALAIS, Head of Global International Assignments for Ericsson, presented an employers' perspective on social security coordination. Ericsson, a global leader in telecommunications, does business in more than 175 countries and has more than 82,000 employees. A large percentage of the workers are "foreign local hires". The company works extensively with international assignments, during which workers are sent for temporarily to another Member State than the one where they normally work. There is a distinction between long-term assignments (more than 12 months) and short-term assignments (between 2 and 12 months). As to long-term assignments, the number is now 1,500 in 110 countries (20% in the EU), for which there is a common global policy. They are considered to be employed by their host organisation. People on short-term assignment remain on the home company payroll and are considered to be on an extended business trip. In 2008, there were 233 short-term assignments outside of Sweden (53 within the EU, 50 of which with an E101) and 949 coming into Sweden from different countries. Due to the complexity of the rules (including Member States' national legislation) and the lack of resources at the national social security offices, the employer has to act as an interpreter to inform employees about the rules and their consequences. You cannot assert your rights unless you are informed and there is a lack of direct contact between the citizens and the national social security offices. The employers see an

urgent need to reduce processing times. Short-term assignments are often initiated at short notice and the processing time at the national social security offices falls short of expectations. In Sweden, it takes 1–2 months to process an E101, which must be regarded as comparatively swift. Another concern relates to the possibility of extending the posting period. If the possibility to get extensions beyond 24 months is reduced, which already has been indicated, employers will have to find private arrangements – at additional cost – to secure the continuity of pension earnings (as nationals of some Member States categorically refuse to leave their system). In conclusion, improved administration is crucial to inspire confidence in the system and a dedicated website with on-line applications, approval and tracking functionality as well as archiving, would be warmly welcomed.

The trade union perspective was defended by Mrs Bernadette SÉGOL, Regional Secretary of UNI europa. The domain of social security, for which they want more and better results, is a capital sector for the trade unions. Greater courage in this field is expected from the Commission and the Member States. The trade union movement represents both workers in a relatively stable employment relationship and workers in less stable situations, often called “atypical workers” (posted, interim, mobile, posted interim, freelance, etc.) although this atypicality is relative. These are the workers who bear the consequences of their job mobility, mobility of contract type and geographic mobility. The three main questions for mobile workers relate to their wage and labour conditions, social security situations and tax situations. For workers it is definitely not an easy task to find their way towards the right answers to these questions. A perfect example can be drawn from the real life of workers in the live performing arts. A Belgian performance company will, for one artistic project, perform 10 times in Belgium and 20 times in other EU Member States. The company employs 10 dancers, 7 musicians and 3 technicians. Some dancers are Russian, other Chinese. Others come from France, Italy and Germany. The musicians are from Hungary and the United Kingdom. Some have permanent performer status, others work on a freelance basis. In this very complex configuration, the company must find a reasonable solution with regard to the social security situations of these people and has a hard time finding people who can help them. Contacts with the national institutions do not always guarantee the right information to deal with the legal issues at stake. Sometimes the information in the host Member State differs from that given in the Member State of origin. Other times, social security coordination is confused with the rules on applicable labour law, which also results in flaws in the information process. This lack of information often produces a loss of rights for the mobile worker concerned. Accordingly, clear and accessible information is crucial for the workers to enjoy their rights to the fullest. The trade unions are convinced that they can play a crucial role in the dissemination of information, as there are already trained unionists on this issue in the framework of EURES, and even more can be done.

As students have also become more mobile, the particular needs of students were clarified by Mrs Caroline BOSTRÖM, Board Member of the Swedish Student Organisation (SFS). Students cannot be regarded as a homogeneous bloc as some are from the EU and others are third country nationals. Some

are not easy to track as mobile citizens, since they apply to the same courses as national students and thus miss out on a lot of information. This is different for exchange students, who are in “the system” and thus known to be mobile, which gives them an advantage as regards information provision. However, most of the time, the situation with regard to social security rights is much too complex for students, as their first concern is normally finding a place to live in the new Member State. It is often not easy for them to find out what they will have to do when they get sick or what they are entitled to when they have brought their family. What they would need is very precise information in the form of a “To Do” list (registrations, entitlements to family benefits, sickness benefits, etc.). In many situations, language can be a problem, for instance in case of an appointment with a local general practitioner.

To obtain a clear picture of the specific needs of border regions with a lot of frontier workers, Dr Jacques SCHERES, Coordinator at the Euregion Meuse-Rhine, was invited to speak about experiences in the Meuse-Rhine region between Belgium, The Netherlands and Germany. The Euregion Meuse-Rhine accounts for 3.7 million inhabitants in five partner regions, bringing together three different national law systems (B, G, NL), three languages (G, F, NL) and four cultures (G, Flemish, Walloon, NL). For coordination purposes, it is interesting to know that there are 25,000 frontier workers, of whom 50% are atypical, meaning they have moved due to lower real estate prices in the other country, but keep working in their home country. The regions are home to 100,000 university and high school students, many of whom are from abroad. There are more than 30,000 scientists, six universities and three university hospitals. Many multinational corporations are established in the Euregion. All of these stakeholders have explicit ‘Euregional’ policies and strategies. In the Euregion Meuse-Rhine, the new coordination framework is very much welcomed because it facilitates mobility of people and provides active assistance to citizens in asserting their rights when they move. It also provides broader coverage and much better information. However, work remains to be done, since the process is still incomplete in certain areas and aspects. In modern times, life and work are rapidly changing (cohabitation forms, teleworking, etc.), and so are national social security systems. The difficulties of incorporating gay marriages recognised in some countries in the coordination regime is one good example. Naturally, an internationally oriented area like a Euregion is even more confronted with the consequences of these legal and social developments. Two examples can be given of situations where coordination rules will play a major role. First, some people in the region work in three countries (B, NL, G), in proportions that vary periodically (truck drivers, for instance) and their situations under the coordination rules could be very complex. An upcoming project will also be very demanding with regard to social security coordination, as the university hospitals of Aachen (G) and Maastricht (NL) and their 20,000 employees intend to merge and become the first European cross-border university hospital. There is a great need for information and capacity for solving individual problems in the next few years, especially in active border areas. Member States should consider setting up special bilateral and multidisciplinary information points in border areas. A model for this (Task Force cross-border workers, back

office and front office) is already working in the Euregion with bilateral teams of tax and social security experts. Another noteworthy issue in the field of social security coordination is the Draft Directive of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare' which also prescribes similar national information/contact points for cross-border care (reimbursement, quality, liability, rights). One might consider combining such information structures in border areas.

The European Commission's view on the responsibilities for dissemination of information about the new rules was translated by Mr Jörg TAGGER of the European Commission's Directorate-General for Employment, Social Affairs and Equal Opportunities. The previous speakers representing employers, workers, students and the special group of frontier workers must be considered the main clients of the regulation. The regulations are first and foremost about the rights of the citizens. As mentioned, this legislation is complex and when it is to be simplified, the simplification obviously has its limits. Given this complexity, this should be dealt with by providing the right information, and some tools have already been developed in that respect for the previous regulations, such as websites and guides. With the new regulation, dealing with the degree of complexity of those rules by disseminating information has two main thrusts: electronic exchange of information and the enhanced cooperation between national administrations which includes the duty to provide adequate information. In various provisions of the new regulations, national administrations are encouraged to provide active assistance to citizens and inform them about their rights under the coordination regime.

Two prominent Articles in this respect are Article 3, par. 4 IR: "To the extent necessary for the application of the Basic Regulation and the Implementing Regulation, the relevant institutions shall forward the information and issue the documents to the persons concerned without delay and in all cases within any time limits specified under the legislation of the Member State in question" and Article 2, par. 1 IR: "For the purposes of the Implementing Regulation, exchanges between Member States' authorities and institutions and persons covered by the Basic Regulation shall be based on the principles of public service, efficiency, active assistance, rapid delivery and accessibility, including e-accessibility, in particular for the disabled and the elderly", which also sets the standard for information provision. But there are several other Articles that also relate to the information duty (Article 76, par. 4 on responding to requests within a reasonable time and Article 89, which requires the Administrative Commission to provide information to citizens). At present, this is being done under the current regulation with the so-called "small guide", which will be repeated for the new regulation. However, the information obligations in the new regulation are not a one-way street, since citizens are also obliged to provide the necessary information (such as changes in their personal or family circumstances). One important example can be mentioned with regard to the changes in the specific coordination chapters, namely with respect to pensions. Currently, there is the concept of the 'investigating institution', normally the institution of the Member State of residence, which receives the claim, processes it and functions as a kind of letterbox, forwarding the

claim and receiving the answers. Under the new regulation, this institution will become the ‘contact institution’ and a number of tasks will be linked to this new status, e.g. the supply, on request, of information about the Community aspect of the investigation and keeping citizens informed of all progress.

The challenges before us are that the formal rights that have been incorporated in the substantive legal framework must be invigorated and thus must become “real rights”. This means they have to be applied properly, that their use must be guaranteed and that people know about them. A particular challenge is the Transitional Period between the two regulations, since we currently have 31 countries with a variety of social security systems applying the regulation. Citizens will want to know how this change affects their individual cases and whether they stand to lose or gain. So, the main task is to inform citizens and how to accomplish this is one of the main concerns of the institutions in all Member States. There are the classical tools like the Commission’s website, which will contain a lot of new information about the new regulation (copies of paper SED’s, the PDs, Master Directory, etc.), the national websites of the Member States, the guides, explanatory notes of key precepts in the new regulations. In the thematic seminars there were also innovative suggestions for dealing with dissemination, such as ideas about individual coaching or helpdesk assistance with individual requests. It could also bring added value to a Member State to look over the border at what a neighbouring Member State is doing. For its part, the Commission is currently finalising a financial instrument to support projects and initiatives of a bilateral and multilateral nature in 2010 that are aimed at enhancing information about the new regulations. Information is thus a key element for effective implementation of the new rules and for citizens to be aware of, enjoy and assert their rights. This will require a joint effort at all levels to transform the current formal rights into real rights.

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Following this presentation, debate was opened on the information of citizens. Mr H. LOURDEL declared that he had to object to the initial remarks of Mr Tagger of the European Commission, who talked about the “clients” of social security coordination. He was of the opinion that in the context of social security, a person is not a client, but a beneficiary. He went on to say that the new regulation is a splendid instrument and genuine progress, but that there is room for improvement. He cannot understand why the European Health Insurance Card (EHIC) still has to be requested and why it cannot be distributed automatically, e.g. by putting it on the back of national insurance cards. He wondered whether that would be too difficult or too costly. He also wanted to know whether it could be considered realistic to be able to find a job in the short period of three months that is still the standard period for the exportability of unemployment benefits, certainly given the current economic situation. The moderator, Mrs Cathy SMITH, opened these questions by linking the EHIC information campaign to what has to be done on the new regulations. Mr J. TAGGER answered that there is general information about the EHIC on the Commission’s

website through a link to the EHIC website where all the necessary information can be found. As to the automatic distribution of the EHIC, one must consider that the Member States have different social security systems, so the conditions for obtaining an EHIC will still depend on the Member States, since this goes hand in hand with the national health insurance systems. This means that differences in issuance will also be found under the new regulations. Dr J. SCHERES intervened by stating that, if one wants to give the EHIC automatically, it must be noted that this is feasible if it were put on the reverse of the card received by the national health insurance institution. He was also convinced that a general campaign about the new regulations would not be enough to inform efficiently, as there are specific categories of persons covered with very diverse and complex individual situations. In a general campaign you can raise awareness and tell people where to go, but there is also a need for “clearinghouses” where people can go for a personal approach. Mrs B. SEGOL agreed on the necessity for personalised and tailor-made information, since there is a variety of types of insured persons involved. Mr J. TAGGER was of the opinion that there is a need to make a FAQ available to the public, but there is already a very useful e-learning tool on the trESS website, along with a glossary explaining the main precepts of the regulation. Raising the broad issue of how to reach the target group, one should analyse the role of intermediaries, such as social partners, frontier workers’ organisations, the European Parliament, etc. An investment there could create a snowball effect, making it much easier to reach the target group. Mrs C. BOSTRÖM agreed with the moderator that some students lose out on social security rights simply because they are not adequately informed. Even if the system itself is simplified, people need to get correct information in order to get what they are entitled to. For students, this information could be incorporated in the orientations for exchange students organised by the universities. And then there is still the language barrier, not in the least because “social security English” is not “regular English”, so it would be good if the information were provided in all EU languages. Mrs C. CALAIS interjected with an example of an Ericsson employee on long-term assignment who had a relatively simple problem but was nonetheless referred from one office to another. He spent about one full working day to solve the problem, equalling a cost for the company of +/- 1,500 euros. This should be avoided, considering the contributions paid by a company.

Mr D. COULTHARD took the floor and started by saying that the UK Government’s website is first class when it comes to providing correct and readable information in a user-friendly and accessible way. That may be the case, but the problem is making the connection between this fantastic provision of information and the people who need it. In that respect, intermediaries like employers or students’ associations are indeed crucial. Another point to be made is that most people go abroad to work, and not to take their benefits to another Member State. So, since they are working in the host Member State, they are and remain subject to that scheme and are treated like nationals of that Member State until they return as a pensioner to their Member State of origin, so the need for information on the coordination rules for these workers might not be as high as sometimes believed. Professor S. ROBERTS contributed to the discussion with the simple

suggestion of reaching mobile people by mounting a poster campaign in airports and railway stations to raise general awareness. Mrs C. DENAGTERGAL also wanted to have her say on the problems with regard to information, which is still one of the main restrictions to mobility, along with training. This problem has existed for many years already, and not only for workers but also for pensioners. Alongside information of citizens, training of civil servants is another concrete problem in this area. Furthermore, greater use should be made of existing information networks like trESS but also the perhaps not well enough known EURES network connecting public employment services and social partners in the border regions of the EU. The trade unions are already asking for 10 years to establish a similar network with national administrations. Other very specific problems to be mentioned are those related to the return of migrant workers and those related to the refusal of unemployment benefits in some border regions. Mr J. TAGGER replied that the EURES network naturally has a place in the framework of the coordination of social security and there is also MISSOC. With regard to more active information provision, Mrs C. CALAIS suggested that one should perhaps consider thinking the other way around and raise awareness among citizens that they should inform themselves, and then of course make sure that they can contact the right information points. It is very important for migrant workers to be able to talk to someone about their specific case. Mrs J. LAMBERT stated that the European Parliament has been trying to put more money into the EURES system to keep up with the increased demand. However, there is a limit to what can be expected from the European level, since a lot of these issues are Member State to Member State business. People need to be aware and need to know where they can go for individualised information. Dr J. SCHERES talked about his experience in the border region of Meuse-Rhine and specifically in the hospital where he works, where about 30% of the nurses live in another Member State. His experience is that young people come for reasons of higher salaries. They do not think about other consequences or complexities. He was also very open to a poster campaign to reach out to migrant citizens and make them aware that they should inform themselves when working abroad. Then they can contact specialists in the field, such as the bilateral teams of experts in the Meuse-Rhine region. Mrs B. SEGOL remarked that people working in a multinational company like Ericsson are in a relatively favourable situation, since they are well guided by their employer when working abroad, but many workers do not enjoy this kind of guidance. It should also be kept in mind that websites are useful but very often cannot manage the complexity of individual workers' situations, so personalised information at specific contact points is indispensable. Mr K. LEA was thinking – outside the box – about the fact that, when someone arrives in another Member State, he immediately receives an automated message from the telecom network in that country and he wondered whether this could not be done with information about social security coordination. As regards training of national civil servants, the responsibilities lie at the national level and the European level can only support and supplement these efforts.

On the involvement of the trade unions, Mrs B. SÉGOL was not surprised that they are not highly involved, since their main focus is still on issues like working conditions and unemployment policy and not as much on social

security, which is sometimes too complex for national trade unions to invest in specialised knowledge. There might be a case for providing better training (to give information or to point workers in the right direction) in this domain in professional sectors with high mobility. Furthermore, the coordination of social security benefits is good legislation for convincing EU citizens that the EU really provides added value, certainly in an era in which the EU's popularity is not at its highest. It is the ideal proof of a social Europe, but this perspective can be destroyed by lack of information or poor implementation. Mrs C. CALAIS informed the audience that Ericsson has briefing programmes for expats in which people from the Swedish Social Insurance Offices have already been involved and that this cooperation works very well. However, it is more complicated in some countries than in others to find the correct information. Mrs Ph. WATSON objected to the statements of the trade union representatives and found that their role is too minimalist, whereas they could be most useful in providing information and assistance to workers as the closest point of contact for them and their families. They work on a European level and have a certain legitimacy to represent their workers. Mrs B. SÉGOL reacted that the unions are confronted with a lot of problems nowadays and do not have the financial means to play an important role. But wherever the unions can, they will help disseminate the information. Mrs Ph. WATSON was not convinced and thought that this kind of information could be incorporated in the legal advice already given by the unions without too much extra cost or other difficulties. It would even suffice to help people find out where they can find information. Mr H. LOURDEL guaranteed that the trade unions do make efforts to inform migrant workers, e.g. by providing them documentation on their rights in the new country. However, one cannot expect the trade unions to do better than national administrations. But there is certainly room for better training of the national unions in this field and there we can look at the European Commission to see what kind of cooperation is possible. He also wanted to know from the Commission what is going to be done with the coordination of the new benefits under 883/2004 for third country nationals if there is no equivalent to Regulation 859/2003. Mr J. TAGGER replied that the discussion of extension of 883/2004 to third country nationals has been delayed. The Commission also hopes that this discrepancy will not last too long.

Mr J. MORIN agreed that the role of intermediaries is very important in bringing the information to the target group and that the Commission hopes that the social partners will also become the ambassadors of social security coordination. The financial instrument being prepared in the Commission is intended to help intermediaries. Professor S. ROBERTS returned to the role of trESS, a project that not only has a website with useful information but that also organises annual national seminars on social security coordination in every Member State of the EU. He found it striking that it seems very difficult in many Member States to attract trade union representatives to these seminars and wanted to know what the reason might be for their absence. Mrs C. DENAGTERGAL answered that she has known trESS since before its inception, and the trade unions want to be involved but the problem is that trESS seminars are not free. It would be better to forge a stronger link between trESS and the EURES network, since they are quite

similar. Mrs B. SÉGOL added that she had never heard of trESS seminars before, but that such general seminars are probably not suited to the specific questions trade unions have in their specific professional sector. Mrs H. MICHARD reconciled the views and said that the dissemination of information about the new rules is a responsibility for all levels and organisations involved. A very good practice in the Euregions that should be mentioned is the hiring of specialists who work on very concrete problems and situations in the border region. Building knowledge is essential in this field. At any rate, the first point of information for the worker is certainly the employer, but everyone has a role to play. Professor Y. JORENS intervened by saying that everyone should share lessons learnt in getting information out to citizens and, also speaking for the trESS-network, close cooperation is needed with the social partners. The network wants to involve the trade unions and one of Mrs Denagtergal's points must be corrected: trESS seminars are always free, since fees are contractually forbidden by the Commission.

In conclusion, Mrs C. SMITH summed up by saying everyone has to make an effort and a general information campaign is a good start to raising awareness, but good training is required, as is the human touch, since every individual case is different. The social partners could play an important role as intermediaries.

The Regulations as seen by the ECJ

The review by Mr Sean VAN RAEPENBUSCH, a judge of the European Union Civil Service Tribunal, focused on the influence of case law of the European Court of Justice (ECJ) in the specific domain of determining applicable legislation in social security coordination, which is a key principle for eliminating restrictions to free movement in the EU. It is essential that European law in this field only plays a coordinating role and does not interfere with the content of the national social security systems, which is still the exclusive competence of the Member States. They do this in accordance with the territoriality principle (residence) or the personal principle (contributions or activities). The differences between the social security systems generate positive and negative conflicts of laws. Like Regulation 1408/71, Regulation 883/2004 also sets up a regime for determining applicable legislation with a main principle (Art. 13) and special provisions (Articles 11 to 16). Specific conflict rules with regard to specific benefits can also be found in chapter III of the regulation. The new regulation is certainly not revolutionary compared to its predecessor. The goal of these rules has been reiterated by the ECJ on many occasions, namely that they must prevent persons from becoming subject to multiple social security systems or, conversely, falling between the cracks and having no protection at all.

The main aspects of these rules are the following. The general principle is that the law is applicable to the Member State where the worker performs his activities. This is known as the precedence of *lex loci laboris*. Also, persons receiving benefits related to a professional activity are assimilated with the group of workers, but this is not the case for long-term benefits such as invalidity or old-age pensions. There is still no distinction between full-time or part-time work. But 883/2004 tempers the precedence *lex loci laboris*, since application of the law of the Member State has been put forward as the subsidiary rule, moving away from ECJ case law, which had put forward the law of the work state as that applicable in the absence of specific statutes. The law of the Member State of residence becomes the safety net.

A second principle is the peremptory character of the choice of applicable law, stemming from the supremacy of Community law. There is no free choice in this respect for the insured persons or for the Member States. Choice would require the worker to be able to figure out which legislation is the most advantageous and there is risk of pressure by the employer. So, the choice of applicable law for particular situations is fully and entirely up to the coordination rules. This has been confirmed by the ECJ with regard to unemployment benefits for frontier workers in the Member State of residence in the *Miethe* case, where the Court held that the coordination rules

depart from the idea that the worker has a better chance of finding a job in the Member State where he resides. The new regulation maintains this rule, but takes an important step away from the *lex loci laboris* principle, since it stipulates that the person receiving unemployment benefits under the law of the Member State of residence is generally subject to the law of that state.

The third main principle is that of the uniqueness and exclusivity of applicable law, probably the most interesting aspect to investigate. One law applies and only this law can apply, which is fundamental to avoiding conflicts of laws. There is a series of infringement cases in which the Commission acted against Member States levying contributions when they had no jurisdiction to do so. But one must consider whether application of the law of a Member State that was not determined as the applicable law under coordination rules should always be avoided, certainly in light of the EC Treaty provisions, which have direct effect. If the Treaty can easily respond to restrictions of freedom of movement, the ECJ does not hesitate to put secondary Community law aside. This is exactly what happened in two recent cases, those of *Bosmann* and *von Chamier-Gliszcinski*. In previous case law, the Court was very strict about the exclusivity of applicable law, although it had already, in 1960, authorised the simultaneous application of laws if the result was greater social protection. In the two recent cases, the ECJ again has switched to greater flexibility. *Bosmann* lost her residence-based child benefits in Germany as soon as she started working in The Netherlands, where her son had unfortunately reached the maximum age (18 years) for receiving child benefit, which left her with no benefits at all. The Court found that the Member State of residence could not be prevented from granting benefits to which she was entitled by her mere residence in the country. In this way, the Court actually turned its back on the rules on applicable law in the regulation and based its decision directly on the Treaty, stating that the free movement of workers implied that workers cannot lose out on social protection due to movement. Although this may be a source of perplexity for experts, since it departs from the principles of coordination, an explanation can be sought in the fact that there was no accumulation of benefits or any other complication due to the application of more than one law. *Von Chamier-Gliszcinski* concerned sickness benefits, specifically long-term care benefits, and Articles 19 and 22 of Regulation 1408/71. According to these Articles, these benefits are provided in the Member State of residence/stay according to that State's laws, and the latter is reimbursed by the competent Member State. Here as well, the Court held that the coordination rules could not prevent a person from still being granted benefits under the law of the competent Member State. In both cases, the Court directly refers to primary Community law in certain cases where secondary legislation does not guarantee full effectiveness of the free movement of persons. So, the fact that national law is in conformity with the regulation can never preclude it from running counter to Treaty provisions having direct effect. Analogies can be found in patient mobility case law (*Kohl*, *Decker*, etc.), in which the Court has created a system of cross-border care parallel to the regulation system, based on the free movement of goods and services in the Treaty. The direct application of the Treaty is certainly not new, but it is interesting that these recent cases directly concern the determination of applicable law.

Next to the three main principles, there is a series of special rules. Exceptions to *lex loci laboris* find their justification in the fact that, in some circumstances, its application would generate obstacles for the worker and/or the employer and/or the social security institutions. Here as well, the new regulation introduces no drastic changes. In chapter III, specific rules were drawn up due to the nature of the work, of the granted benefits or due to social considerations or merely practical effectiveness. First of all, there is the subsidiary nature of the law of the Member State of residence when no other provisions apply. For posted workers, the posting period was extended to 24 months without the possibility of extension, and the non-replacement rule was maintained. Much of ECJ case law has been incorporated in the Basic and Implementing Regulations. Some restrictions have been introduced, such as that someone who was employed to be posted to another Member State can only invoke this exception if he was already subject to the law of the sending Member State. Other aspects of case law in *Fitzwilliam* have been introduced, for instance with regard to good cooperation and the legal value of the E101. This was incorporated in Article 5 of the new Implementing Regulation, which will certainly become a masterpiece Article for the day-to-day handling of posting cases in Community law or, rather, Union law, since the Treaty of Lisbon will give the “European Union” legal personality, entirely replacing the “European Community”. Another interesting change concerns someone working as an employed person in one Member State and as a self-employed person in another, in which case he will be subject to the law of the Member State where he works as an employed person with no derogation, since the current Annex VII will be abolished.

The main question is now whether these rules on determining applicable law have to be modified and if so, to what extent. Especially with regard to new forms of work and mobility in the EU and technological developments, this can be questioned. Two reasons can be found for maintaining the *lex loci laboris* rule. First, from an economic point of view, the *lex loci laboris* rule is consistent with the fact that benefits are paid by the Member State in which the worker has contributed due to his activities there, and this non-economically neutral choice is still valid, even after the accession of several countries with non-Bismarckian systems. From a legal point of view, this regulation is still predominantly set to remove obstacles to the free movement of workers as envisaged by Article 42 EC. But the precedence of the *lex locis laboris* principle does not preclude specific rules for certain forms of mobility or work, which can be met by application of Article 16 of the Basic Regulation. However, the emergence of Union citizenship in particular, and the free movement of citizens established by Article 18 EC puts several question marks after the previous arguments *pro lex loci laboris*. The *Elsen* ruling is a good first example of this, since in that case, the Court established for the first time that Regulation 1408/71 should be regarded as an instrument that also serves the free movement of citizens, regardless of any economic activity. The ECJ has confirmed, very soon after its introduction, the fundamental character of the status of Union citizenship for nationals of the Member States. Several rights are attached to this status, of which the right to equal treatment is essential. So, equal treatment is preserved both under the law of the Member State of economic activity (worker) and

under the law of the Member State of residence or stay (citizen), depending on the qualifications of the person concerned. For the free movement of citizens, the connection of the granting of social benefits to residence requirements is problematic, since predominantly nationals of other Member States will be disadvantaged by such requirements. But if the discrimination is not direct, it can be justified by reasons of public interest if the requirement is proportionate to the intended aim. In several cases, the ECJ has examined these national conditions and their justifications. In the *Collins* ruling, the Court considered a residence requirement for the granting of a jobseeker's allowance to be justified in order to establish a genuine link between the person and the labour market of the host Member State. The remarkable thing here was that the Court did not consider Regulation 1408/71, even though the concerned jobseeker's allowance was listed as a special non-contributory benefit that can be granted to anyone residing in the national territory. This would have required investigation of whether the person's centre of interest was in the host Member State and the Court has preferred to rely directly on Article 39 EC. The same has occurred in other cases concerning other benefits, such as *Ioannidis* (condition of having obtained secondary education certificate in Belgium was too general and exclusive in light of establishing a link with the Belgian labour market), *Tas-Hagen*, *De Cuyper* and the very recent ruling in *Gottwald*.

Obviously, the Court has never hesitated to apply the Treaty provision directly in any circumstance where it was possible and necessary because the derived legislation was not effective to remove obstacles to free movement or direct and indirect discrimination. The Court creates a "*va-et-vient*" between secondary legislation and primary law, but this is inevitable, since Treaty provisions have direct effect and persons can invoke them before the national courts. In this regard, loyal cooperation between national administrations will prove very important, since they will have to apply their national laws and the regulation not strictly to the letter, but rather in light of the Treaty objectives of free movement. This was clearly evident in the recent case *Leyman*, in which the specific circumstances obstructed a too literal interpretation of national law.

SESSION 2: Modernised Regulations in the Legal Environment

Main features of the new regulations

Mrs H. MICHARD, Deputy Head of Unit Free Movement of Workers and Coordination of Social Security of the European Commission's Directorate-General of Employment, Social Affairs and Equal Opportunities, provided an introduction to specific features of the upcoming modernised legal framework. This modernisation relates to a Community acquis of over 50 years of social security coordination. In the modernised coordination, there are more less-detailed provisions and even general rules of coordination within the Implementing Regulation. The modernised coordination is Regulation 883/2004 as amended by Regulation 988/2009 (a consolidated version will soon be available) and Regulation 987/2009. Both these regulations are of equal legal value and you cannot apply one without the other. A lot of clarification for implementation can be found in the new Decisions of the Administrative Commission, which are a revision of existing decisions. Attention should be directed to Decision H1 on the transition from 1408/71 to 883/2004 and Decision A1 on the new dialogue and conciliation procedure. All this material will be available on the circa website and the Commission website. The "old" coordination and the modernised coordination rely on the same principles and pursue the same aim. The key elements of the reform are modernisation, simplification, clarification, increased flexibility and improved protection of citizens' rights. In this overview, the main features, in general, of titles I and II of both the new regulations will be dealt with, as well as the key innovations in the financial provisions of title IV of the regulations. In conclusion, the governance of the modernised coordination will be touched upon.

Modernised coordination is not so much about providing new rights, but rather about making existing rights effective. Therefore, a balance had to be sought between the rights and obligations of the main stakeholders, citizens and institutions. This means that adequate tools had to be established to provide better services to citizens. One important tool will be the introduction of better communication via electronic exchange of information between institutions. The role of "contact institution" for pensions is illustrative in this respect. But there will be counterparts for the citizens, like their access to the Master Directory containing details of the institutions dealing with coordination. The possibility of provisional application of the law and the granting of provisional benefits in cases of uncertainty will also be very beneficial to the citizens' situation. But this means that, alongside the institutions, streamlined reimbursement procedures between the Member

States and the efficient recovery and offsetting of claims by individuals are indispensable.

The key features of reimbursement procedures between the Member States can be found in the financial provisions of Title IV of both regulations. An important concern was the fair allocation of costs between the Member States with relation to sickness benefits (Article 63 (3) IR) and unemployment benefits (Article 70 IR). Increasing the transparency of procedures for calculating costs, especially fixed amounts, was also a key point during the negotiations (Article 64 IR) along with improving the efficiency of the procedures and achieving better cooperation. Finally, incentives were introduced to speed up payments between Member States (Articles 67 and 68 IR). The fair share of the burden of sickness benefits was sought according to a very clear mandate, or even a demand, from the Council. The same goes for unemployment benefits, although without a similar mandate. The logic followed by the Commission was that the Member State of the last employment would always remain the competent Member State. There was no agreement there, which explains the complexity of the chapter, e.g. the remaining difference between fully and partially unemployed persons. But the reimbursement between the two states involved is an illustration of the need for rebalancing the burden between the Member States. Greater transparency was achieved by a clearer process to establish the costs of sickness benefits. To give one very concrete example, Article 41 (benefits in respect of accidents at work and occupational diseases) states that reimbursement shall be made on the basis of actual costs and one might wish that this method were the only one, since it is the most objective way of sharing the costs. But the ruling principle is actual expenditure and, in certain situations (administrative or legal structure of the system of the Member States concerned), an option to reimburse at fixed amounts (Article 35 (2) BR), but these should be as close as possible to the actual expenditure. To get closer, the calculation method was adapted by adding age groups. This exercise resulted in the establishment of three age groups. The Administrative Commission is tasked with establishing implementing provisions for calculating fixed amounts, with the support of the Audit Board. The Member States that are currently applying fixed amounts are listed in Annex III IR.

As to increasing the efficiency of procedures and achieving better cooperation, several initiatives were taken, since this has serious consequences for individuals and is not only a matter exclusively between Member States. There are known cases in which citizens did not receive medical care abroad because the local health provider previously did not get reimbursed. This was achieved by the inclusion of stricter deadlines for the introduction and settlement of claims, which is not new as such. However they are still not satisfactory, especially in light of the future electronic exchange possibilities. The latter make deadlines of 36 months quasi-mediaeval. So a review clause was incorporated (Article 86 IR) and the efficiency of the time limits will be assessed. It should however be noted that \pm 90% of cases are dealt with in time, but the other 10% should also be managed. The role of the Audit Board is very important, especially in cases where settlement of claims is impossible within the conciliation mechanisms (Article 67 (6) and

(7)). Interest on late payments and down payments were seen as good incentives, rather than sanctions, to make the system work better.

As to the offsetting of unduly received benefits (Article 72 IR) and provisionally paid benefits in cash or contributions (Article 73 IR linked to Article 6 BR), these are the settlement consequences of better service to citizens. Offsetting is the preferred technique, since it is an established technique in the coordination regime, in which there is compensation between the amounts overpaid and the arrears owed to the individual. Here, informing the institutions involved is a key factor and this will generate an arduous duty of cooperation. Hard work will be required to make this a routine and without troubling the individual. Concerning provisionally paid benefits (Article 73 IR), there is a time limit of three months to draw up a statement of amounts provisionally paid. The regulation is not only about granting benefits, but about granting them to the right persons for the right reasons. If this is not the case due to error or fraud, recovery must be possible. For the recovery of social security claims in a cross-border situation mutual administrative assistance is essential. Effective recovery is also a means of preventing and dealing with abuse and fraud and a means of ensuring the sustainability of social security schemes. A source of inspiration for these provisions was found in Directive ex 308/76 (codified in Directive 55/2008) in the tax field. In this regard, there is no fundamental difference between social security and taxation. However, difficult discussions arose on the limits of mutual assistance between the Member States. For instance, is one Member State entitled to put an attachment on a house owned by someone who has social security debts in another Member State? The final provisions are rather open, as it is up to the Member States to decide what is worth dealing with. The recognition of enforceability titles and the validity of certain legal documents also inspired lively legal discussions. Currently a threshold related to the amount that can be set as a level for which cases will be dealt using mutual assistance procedures, is being discussed.

In conclusion, an overview was provided of the multilevel governance in social security coordination, with different levels and stakeholders. There is the national level (competent institutions, social security institutions, citizens, expert networks). The laboratory level: Commission in cooperation with national experts (cf. ad hoc groups to provide day-to-day knowledge not available in the Commission), Administrative Commission with related bodies like the Technical Commission, the Audit Board and the Conciliation Board (the Court's message to settle the disputes in the Administrative Commission that needs to be brought to life). The statistical tasks of the Administrative Commission are also very important. Finally there is the legislative level: Council, European Parliament, the ESEC and the European Data Protection Supervisor (sensitive in the EP, but the regulation passed the rigorous test of this entity). As to further modification, the Treaty of Lisbon will govern in the future, with a qualified majority for employed and self-employed workers, possibly isolating non-active people from the more flexible decision-making process. All in all, the rules and tools are all there and it is up to everyone involved to implement them correctly.

The regulations as seen by academics

Professor Danny PIETERS, University of Leuven, reflected on the new rules from an academic point of view and tried to discern whether the new coordination regulations are a step forward. He chose to give a critical view, stepping back somewhat from the political feasibilities and current fashion. In order to answer the principal question, we have to ask ourselves what the initial goal of the reform was. By 1992, the Edinburgh European Council had already called for the coordination rules to be simplified. The Commission organised a conference in Stockholm in June 1996, which constituted the launching of this process. In 1997, the Commission took the initiative of supporting the organisation of national conferences on the implementation of the coordination regulations, one in each Member State. These 15 conferences were also tasked with arriving at suggestions for overcoming the difficulties encountered and simplifying the coordination regime. The conclusions were published in a report in 1999. Those conclusions can be used as a yardstick to evaluate what was achieved through the new coordination regulations, so twelve focus areas will be explored.

A first goal was overall simplification and modernisation. First of all, most participants at the various conferences of the late 1990s agreed to label the coordination Regulations 1408/71 and 574/72 as complex and complicated. Has the situation improved? First, it can be noted that nowadays the earlier goal of ‘simplification’ has been abandoned and it is now preferable to talk about ‘modernisation’. To a certain extent one might see in Regulation 883/2004 a clearer and more readable text than in the earlier 1408/71. But is this not mere surface appearance? The reality is that Regulation 883/2004, much more than Regulation 1408/71, must be read together with its Implementing Regulation 987/2009 and their Annexes, in order to understand what is going on. Moreover, something that will nevertheless handicap coordination in the future is that the unanimity requirement was replaced by an almost equally difficult decision making procedure. And this decision procedure will differ substantially from the one which is to be used for the coordination of social security of non-workers, the latter still requiring unanimity and having to pass a subsidiary test. The new coordination regulations also seem to leave greater scope for bilateral arrangements between Member States and to exceptions in Annexes. However, the appeal of solving concrete problems through bilateral agreements entails a risk of gradually departing from the multilateral coordination mechanism and replacing it with a multitude of (different) bilateral arrangements. The result cannot be anything other than increasingly complicated coordination.

The new coordination regulation somewhat further widened the personal scope of application. The regulation is extended to the category of non-active persons who actually, other than students and family members, do not fall under the personal scope. However, stipulating that the coordination regulation is applicable to all citizens will not mean that no definitions are provided as to who must be considered an employee, self-employed, civil servant, family member, etc. As different coordination rules are still being stipulated across the categories, it still matters for the coordination regulation itself to know whether the concerned person is an employee, self-

employed person, civil servant, etc. As we will see further on, the rules indicating the competent state, for example, differ from category to category. Article 2 refers to EU nationals and hence excludes third country nationals from its personal scope. One can only be astonished by this restriction, knowing that the extension of Regulation 1408/71 to third country nationals finally became a reality in 2003, one year before the new regulation was approved. In order to make the new coordination Regulation 883/2004 and its Implementing Regulation also applicable to third country nationals, a similar measure must be taken on the basis of Article 63 EC, although the correctness of this legal basis can be questioned. If this is not done, Coordination Regulation 1408/71, even after 883/2004 becomes applicable, will remain – via Regulation 859/2003 – applicable to third country nationals.

With regard to the principle of equal treatment, European lawmakers reinforced the equal treatment principle by adding a new article to the coordination regulation that guarantees the assimilation of facts and events. This is a very good development. No fundamental changes with regard to the material scope took place with the approval of the new coordination regulation. Regulation 883/2004 still works with the limited list of traditional social security branches, although the Commission in its original proposal suggested working with a non-limitative description of social security schemes, thus enabling the inclusion of new emerging benefits that cannot be linked to the listed traditional risks. But some new schemes were added to the final version of the new coordination regulation. Since these have been integrated into the list in Article 3: paternity benefits (attached to maternity benefits) and benefits in case of early retirement or early withdrawal from the labour market. Surprisingly enough, no corresponding specific coordination provisions have been developed in Title III of the regulation. The States themselves have to explicitly announce in an Annex to the regulation under which chapter the pre-retirement benefit should be coordinated (old-age or unemployment), which can hardly be called the best solution. The new regulation also failed to explicitly include care benefits in the material scope, arguing that the Court of Justice had brought them in as sickness benefits. It would have been better to create a new category in the scope.

With regard to determining applicable legislation, the structure of the designation rules has been simplified. First of all, the new regulation had to foresee in a general designation principle for people who are not professionally active, so these persons are linked with the country of residence. For the rest, the regulation sticks to the *lex loci laboris* principle, which can be questioned on political and financial grounds for e.g. sickness benefits and family benefits, which are universal in most countries and financed from the public purse. A very well known problem area with regard to implementation of the old coordination regulations related to rules on posting and called for clear solutions. With regard to posting, the rule that made it possible to extend a (one-year) posting has been abolished, but the maximum period for posting was simultaneously extended from one year to two years. Furthermore the regulation now explicitly states that companies that hire personnel in order to send them immediately to another state, should have significant activities in the country from which they post people, which is a good

measure to combat fraud. A self-employed person can only be posted when he performs, in the country to which he wants to be posted, similar activities as the ones in the sending state. In other words, a self-employed farmer cannot be posted to perform activities as a construction worker in another country. The designation rules dealing with the simultaneous performance of activities in different countries have been redesigned as well. The state of residence can only become competent when significant activities are performed in this state. With respect to both posting and the issue of simultaneous activities in more than one state, we believe that more creative solutions could have been added to the measures already taken. Indeed, it is still no easy task to verify the claims of persons who say they are posted or, more generally, working in one Member State but under the social security of another Member State. Some Member States have therefore taken independent measures to register all workers on their territory, as did Belgium with its LIMOSA project. Yet this LIMOSA approach is now under scrutiny by the Commission as constituting an infringement on free movement. This may or may not be the case, but setting up a registration system on a European level is what needs to be done, not so much hindering Member States to apply the rules correctly.

The new coordination regulation reinforces the exportability principle somewhat by generally stipulating now that it is applicable to all cash benefits. However, the principle is still not to be fully applied to unemployment benefits and special non-contributory benefits. With regard to special non-contributory benefits, attempts are made to delineate the concept more strictly. Although the criteria give some guidance in the definition of the concept of these special benefits, it must be acknowledged that much uncertainty still surrounds the practical application of these criteria, and this category of benefits may lead to continuous interpretation problems. Consequently, countries will go on being confronted with a kind of ‘gamble’ situation when introducing a new benefit: introduce it as social assistance and say nothing about it, with the risk it will later be qualified as social security; or declare the new benefit as a ‘a special non contributory benefit’. For the principles of aggregation and apportionment, no major changes can be discerned in the new version of the coordination regulation. The principle of aggregation has, however, been incorporated in the first chapter of the regulation (Article 6) making it a general rule applicable to all contingencies listed in the coordination regulation (except for legal early retirement).

We should take a quick look at the way the various benefits are dealt with by the new coordination regulations. As far as unemployment benefits are concerned, we can first observe that the entire coordination chapter becomes fully applicable to self-employed people. Unemployed persons can also look for a job in another state and take their benefits with them. Whereas the current regulation foresees in this possibility for a maximum of three months (and hence restricts the principle of exportation), the states can now (but are not obliged) extend this period to six months, which seems like an ‘à la carte’ situation. Under the old regulation, a distinction was drawn between family benefits and family allowances, but the new regulation fortunately unifies both concepts. Also very positive is that the rules in relation to the combination of invalidity benefits of type A and B were

overcome. In the new coordination regulation, the pro-rata rule will always be applied, i.e. whatever the type of the invalidity scheme (A or B). However, countries can still opt for calculation along the lines of coordination for sickness benefits, if they list the scheme for this purpose in the Annex to the coordination regulation. The question is also what will happen if they do not, and a migrant worker, as a consequence of pro-rata, ends up with a lower benefit than would have been the case if no coordination regulation existed. The ECJ will probably intervene here.

The issue of greatest concern is the persisting difficulty the new regulations seem to have with statutory pension arrangements partly or entirely set up as funded or capitalised schemes. Neither the old nor the new coordination regulations exclude funded statutory pension schemes; both provide special, almost impenetrable rules in this context. One can only agree with H. Verschueren that “it remains to be seen whether these specific and technical provisions will be able to respond to both the coordination problems typical to such funded schemes and to the objective of not creating disadvantages for the migrant persons concerned.” One could go a step further. The case seems to illustrate of the weakness of the present European decision makers in addressing in a modern, efficient and not exceedingly complicated way, the diversity of presently existing social security schemes, in this case pension schemes. One may be in favour of funded schemes or not, that is not the issue. But is it acceptable, that when a substantial number of Member States have some element of capitalisation in their statutory pension arrangements, that the European Union is not able to integrate this new reality into a European coordination system that protects rights when people decide to move within the Union? Sooner or later the European Court of Justice will intervene here, to make the breakthrough which the political level is not able to reach.

Taking health care as a separate subject, one must first observe that the new coordination regulation failed to harmonise the coordination procedures and Kohll-Decker procedures for medical treatment abroad. Both continue to exist side-by-side. However, the criteria developed in *Kohll-Decker* case law with regard to the authorisation procedure, and which the European Court of Justice has also begun to apply to interpret Article 22, par. 2 Reg. 1408/71 have been taken over in the new coordination regulation. The question of whether and how to get social coverage of health care received in another Member State remains open. There is complex and evolving case law based on the basic principles of the free movement of goods and services. There are coordination regulation rules which are themselves under pressure by these constitutional freedoms. The result of all this are: patients who abide by the letter of the coordination regulation will not move. Patients who are well informed and have the patience and, above all, the money to sue in court for better health care coverage abroad, will get reimbursed. This is two-speed coverage of health care abroad that leads to discrimination. Otherwise, we should observe that the new regulation also introduced some new rules on health care coverage for frontier workers and also foresees the necessity of anti-accumulation rules for care benefits.

The use of IT is another important point. The exchange of E-forms as they exist now generated a great deal of comment and criticism during the national conferences in the late 1990s. The new coordination regulations have indeed introduced electronic data communication and IT to an important extent. As I could already express earlier at a conference held about one year ago in Paris, IT has indeed been introduced, but mainly as it was done at the very beginning, that is, transforming paper flows into electronic flows. What should have been done first and did not happen, was to rethink the procedures, rethink the data flows, rethink the needs and then take maximum advantage of the opportunities provided by modern technology. This might be a missed opportunity given the modern possibilities of IT.

Already in the national conferences of the late 1990s, many expressed their concern that alongside the coordination regulations, we can see the emergence of all kinds of (partial) coordination mechanisms alongside the two coordination regulations. One had indeed to assess that elements of national social security systems were being coordinated by virtue of the Treaty itself. The driver of this evolution was certainly the European Court of Justice. But some will also see the Commission and Council following this path, e.g. with the 1998 directive on occupational pensions and, tomorrow, perhaps for health care services. This trend has certainly not stopped since. The most salient illustration of this certainly constitutes an ambivalent approach to the possibility of getting health care coverage for treatment in another EU country. There is also the fear that parallel coordination rules may emerge from a wrongly understood ‘European citizenship’ concept. Coordination should be the work of the coordination regulation and if they have to be adapted, let that be the case. At any rate, Member States should not be cheated by overly creative interpretations of Treaty Articles.

Finally, does the new coordination mechanism still meet the needs of today’s migration reality? This question mainly affects the solutions provided in the area of posting, the rules in relation with the designation of the competent country (questioning the *lex loci laboris* principle, especially for health care, family benefits and similar non work-related benefits), as well as the need for better information about the numbers of workers and other persons who are moving to another Member State, disregarding completely the coordination rules (keeping the original social security affiliation or simply working without any social security cover or duplicate cover). Do we have greater opportunities today than under Regulations 1408/71 and 574/72 to really regulate most intra-community work and travel? Or do we accept today, as we did yesterday, that in reality many persons live and work in other Member States without ever realising or experiencing the effects of the coordination mechanism? It is up to the audience to evaluate the work done. And anyway, whether you consider the new regulations a success or rather a failure, we must agree that they are a work in progress.

The New Legal Environment – Main Outcome from the Thematic Seminars

Chaired by Mr Yves Jorens, Professor Doctor, Ghent University, Belgium

Panel:

Mr Jörgen Gyllenblad, Head of International Affairs, Swedish Unemployment Insurance Board

Mr Herwig Verschueren, Professor, University of Antwerp, Belgium

Doctor Bernhard Spiegel, Head of Division, Federal Ministry for Labour, Social Affairs and Consumer Protection, Austria

Mrs Philippa Watson, Barrister, Essex Court Chambers London, Professor, City Law School, London, England

The chairman, Professor Yves JORENS commenced with a SWOT analysis of the new coordination rules to briefly reflect the overall outcome of the thematic seminars on the new legal environment. The European Commission organised five thematic seminars related to the different chapters of the regulation, for which questionnaires were sent to the participants identifying several horizontal and specific legal issues: cooperation between administrations, information to citizens, modifications in the new regulations and an overview of some legal issues and challenges. Electronic exchange of information is regarded as the main and most important achievement of the new framework. There are slightly fewer rules now, more flexibility, a clearer division of tasks and better rules of priority. Weaknesses are the number of basic rules in the Implementing Regulation and the transitional provisions. Opportunities are the involvement of the citizens, smoother cooperation, training of experts and a duty to provide information. Threats are the remaining and new interpretation problems and administrative cooperation.

As far as the determination of applicable legislation is concerned, the rapporteur, Professor Yves JORENS, Ghent University, stated that the provisional application of legislation raises a lot of concerns. The principle itself may give rise to procedural difficulties related to reimbursement and funding should an institution that has provisionally paid cash benefits turn out not to be the competent institution. As the provisional application can be requested by the migrant worker, some Member States ask how the information and facts submitted by the person concerned, the employer or the foreign institution, should be checked or verified. Several Member States expect practical problems with the retroactive determination of applicable law. It is feared that an employer or business partner might even wish to avoid possible administrative complications and consequently cancel a contract or business partnership. Member States are asking for more information about the manner in which the institution of the country whose law is provisionally applied should inform the competent institutions of the other involved Member States and the interested persons. Should there be a PD, already in the situation when the decision is provisional so that the individual can have the document to attest his or her situation? Will there be

a new PD after the decision is final? Should the other Member State always send its reply to the institution of the country whose law is provisionally applied? What kind of proof will be supplied to the employee?

The rules on simultaneous employment were a second important element in the debate on applicable law. The introduction of the condition that if someone is working for one employer in more than one Member State, the law of the State of residence will only become applicable if the person concerned pursues a substantial part of his activities in that State is a welcomed concept. And although criteria are provided to define what should be understood under “a substantial part of the activities”, many Member States are asking further questions about how these criteria should be understood. Some fear that this provision will be unworkable in certain situations, in particular with regard to airline employees, but also more generally, where employees often work across many countries and where the pattern of duties might not be known at the point of application. In particular, employers suggest that they would not be able to give the state of residence a list of the Member States of activity. They would have difficulties in dealing with the Member State of residence if they themselves had no presence in that Member State. It was also still a puzzle how the two criteria of working time and/or remuneration interrelate. If one criterion exceeds or equals 25%, is it also mandatory to consider the other? If yes, should there be an average rate, depending on the number of criteria considered, derived from the sum of the criteria? These and other questions of interpretation in this area remain unanswered.

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The results of the thematic seminars on unemployment benefits were presented by Mr Jörgen GYLLENBLAD, Head of International Affairs of the Swedish Unemployment Insurance Board. In these seminars, discussions centred mainly on four legal issues and two horizontal issues: the period of export and its extension, direct payments to jobseekers abroad with retained benefits (implying the involvement of two institutions and thus the need for close cooperation), jobseeking in two Member States with benefit paid by the state of residence, reimbursement claims between Member States (reimbursement to the state of residence by the former state of employment), cooperation between institutions and information to citizens. As to the export of unemployment benefits, Article 64(1)(c) of the Basic Regulation states that entitlement to benefits is retained for a period of three months when a jobseeker goes to another Member State to look for a job. The competent institutions or services may extend this period up to a maximum of six months. There is a legal difference between the periods, so it is advisable to consider them separately. The first period of three months for exporting unemployment benefits can be granted to the jobseeker only if the conditions for export are met. The competent institutions or services may extend the basic period of three months up to a maximum of six months. There is no provision in either the Basic Regulation or the Implementing Regulation stipulating that this period must be extended. It thus seems clear that the jobseeker cannot, as with the basic export period, claim a right to

extension. It is up to the competent institutions to consider this. The challenges and problems with extending the export period can be considered from two standpoints. The first is the procedure for handling this extension. Here, there are a lot of questions as to whether the extension should be dealt with in a general or individual way. Is there a legal possibility to deny extension generally or should anyone applying for it receive an individual decision? Should jobseekers all have the same extension period or can there be individual decisions based on different criteria? If so what are these criteria? Can a jobseeker apply for extension after the basic three-month period? The other problem with extending the export period is what can be termed the job search period. Can a jobseeker go to more than one Member State? Can you go abroad more than once if you do so within the stipulated period of three or six months? How should situations in which jobseekers move to avoid national control procedures be handled? Most Member States were not in favour of extension.

Another main issue was claims for reimbursement between Member states for jobseekers who reside in a Member State other than the state of last employment. The latter has to reimburse the institution of the place of residence the amount of benefits paid to the unemployed person during the first three or five months. One common issue in this context is the question of identifying which cases can be reimbursed, for what period and in what amount. The provisions state that the amount reimbursed may not be higher than the amount payable in the case of unemployment in the former state of employment. Is it relevant whether the jobseeker was entitled to receive unemployment benefit in the state of employment? Such a scenario would mean that the conditions for qualifying for benefit in the former state of employment directly affect the obligation to reimburse. A Member State with low thresholds for benefits would be obliged to pay more than a Member State with strict conditions for benefits, even though the jobseeker never applies for benefits in the former. And if the reason behind the reimbursement procedure is to share the burden of the cost of unemployment, is it then reasonable to reimburse if the jobseeker only worked for a short period of time in the state of employment?

Finally, there were numerous comments from the institutions on poor cooperation between the institutions of the Member States. Replies to requests for information were delayed or not forthcoming at all. The comments also pointed to the syndrome of ‘shared responsibility’, where there are different institutions involved and no one seems to take responsibility for the issue.

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The rapporteur for the seminars on the sickness chapter was Professor Herwig VERSCHUEREN, University of Antwerp. He first listed the various issues of interpretation dealt with in the redrafted legal provisions: definition of “member of the family”, stay outside the competent Member State (European Health Insurance Card), authorisation to receive appropriate treatment outside the Member State of residence (scheduled care), special rules for retired frontier workers, prioritising of the right to benefits in kind,

overlapping of long-term care benefits, contributions by pensioners and the simplification of reimbursement procedures between institutions. Some further comments are to be provided on scheduled care and the authorisation procedure in that respect. The provisions concerning persons travelling to another Member State for the purpose of receiving sickness benefits in kind have been redrafted. The prior authorisation is issued by the competent institution. If an insured person does not reside in the competent Member State, he must request authorisation from the institution of the place of residence, which must forward it to the competent institution without delay. The latter institution must take a decision according to the rules laid down in Article 26(2) IR. Many questions were raised on the procedure to be followed by the relevant institutions in cases where the insured person resides outside the competent State and requests authorisation to receive health care in a third Member State. The final sentence of Article 26(2) IR stipulates that in the absence of a reply within the deadlines set by the law of the competent state, the authorisation shall be considered to have been granted by that institution. But how will the institution of the place of residence of the insured person be informed of the deadlines set by the law of the competent institution? What if there are no deadlines set by that law? The concept of “vitally necessary treatment” in Article 26(3) IR remains unclear. This should probably be assessed by doctors in the first place and not by lawyers. To some institutions it is also unclear what is meant by the words “medically appropriate to supplement the treatment” in Article 26(5) IR. The way in which the Vanbraekel supplement is calculated under Article 26(7) IR seems not to be clear to all institutions, for instance in the event that the law of the competent state does not provide for reimbursement rates. Practical examples could help clarify this provision. Understandably, the institutions are quite worried about the interplay between the conditions and procedures for scheduled care under the new regulations on the one hand and case law of the ECJ on the free movement of patients and the forthcoming directive on the other. This may institutionalise a “three-speed” solution for cross-border care.

A second dominant topic of concern was the special rules for retired frontier workers. Article 28 of the Basic Regulation provides special rules for retired frontier workers (and members of their family) guaranteeing, under certain conditions, entitlement to receive benefits in kind in the Member State where they pursued their activities. It was observed that the rights of retired frontier workers under Article 28 BR are rights on top of the rights they might already have under Article 27 BR (in case of stay in a Member State other than the competent Member State or even in case of stay in the competent Member State), so Article 28 BR is not the only legal base they can appeal to. Some concepts also need clarification, since the institutions wonder, for instance, how it will be possible to assess whether a given treatment fits the definition of “continuation of treatment”, meaning “continued investigation, diagnosis and treatment of an illness”. How will the Member State which must bear the costs of this treatment obtain the necessary information on the nature and the duration of the treatment? Is this provision also applicable to the treatment of chronic diseases and therefore possibly guaranteeing rights for a very long period, perhaps for the person’s whole life? What if new illnesses occur that are directly or indirectly linked

to pre-existing conditions? Is this provision also applicable to the treatment of injuries not considered to be an illness? Under Article 28(2) of the Basic Regulation pensioners (and members of their families), who, in the five years preceding the effective date of the pension have been pursuing an economic activity for at least two years as frontier workers in a Member State, shall be entitled to benefits in kind in that Member State if both that Member State and the competent State are listed in Annex V. Article 28(3) confirms comparable rights to members of the family and survivors, provided they were previously entitled to benefits in kind in the Member State in which the former frontier worker was active. The latter would not be the case if this Member State were listed in Annex III. Several delegations highlighted the complexity of these provisions, so accurate and targeted information is absolutely necessary.

Finally, well-produced and targeted information to citizens about their rights and obligations in social security coordination is of utmost importance to ensure coverage for mobile citizens. Especially regarding the right to sickness benefits, Article 22 of the Implementing Regulation obliges the competent authorities and institutions to ensure that all necessary information is made available to insured persons regarding the procedures and conditions for the granting of benefits in kind where such benefits are received in the territory of a Member State other than that of the competent institution. Most responses argued in favour of targeted information to specific categories of persons to whom the innovations in the new regulations apply. General information about the new regulations is more likely to cause confusion or could even be counterproductive. A crucial target group are health care providers, who are neglected all too often in this field. They should be informed accurately about the rights and procedures related to the EHIC and to scheduled care, in order to avoid not only misunderstandings and disregard for the rights of insured persons, but also administrative complications in the payment, reimbursement or billing of care provided.

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Mr Bernhard SPIEGEL, Head of Division in the Austrian Federal Ministry for Labour, Social Affairs and Consumer Protection, delved into the most important legal uncertainties with regard to the pension chapter. For this chapter, the exchange of information is crucial and is needed on a day-by-day basis in order to apply the coordination rules. A great deal of expertise is required and cooperation is already well-advanced, but of course there is always room for improvement. As to the content, not a great deal has changed in the pension chapter. A first set of difficulties relate to the cooperation between the institutions. In the procedures for pensions there is a great need for information. This is clear when looking e.g. at the role of the “contact institution” who has to take insured persons by the hand and guide them through the process. This is good, but generates a tremendous need for training, as the clerks will have to adjust to these new needs. Also the need to explain delays for what happened in another state may prove difficult if there is no good communication. A main question of the institutions is how

to get the information and what to do if the wrong information is provided about foreign law, which is a question of liability.

A second aspect relates to issues of interpretation. Although this is one of the core principles of Art. 42 EC, a lot of questions have nonetheless been raised about aggregation of periods. The “value of periods” was one of the outstanding issues. Experts still wonder whether it is allowed to distinguish between periods which count only for entitlement, periods which count only for the calculation of a pension and periods which count for both purposes. A final decision on this question is vital for the functioning of pension calculation via EESSI. The standpoint of the Commission was very clear on that issue, namely that there is no legal base to distinguish between periods, even if they might have a different value under the relevant national law. In the SEDs this distinction is missing, so differentiation is impossible if there is no corresponding field for the purpose. Another important question concerns the meaning of the words “to the extent necessary” in Art. 6 of the Basic Regulation. Discussions in the Administrative Commission gave these words a new meaning especially in relation to the provisions of Art. 12 of the Implementing Regulation on overlapping of periods. Due to this discussion many of the detailed provisions of Art. 12 are no longer that important, since these rules only apply if the period has a weaker effect under national law than the overlapping period under the law of another Member State.

Another problematic issue is the taking into account of child-rearing periods. Some pension systems have the intention to inform the persons covered at any time about their entitlements. The new provision allows decision as to whether or not a Member State that is not competent under Title II of the Basic Regulation must take into account child-rearing periods, only when claiming a pension. Therefore in cross-border situations, the promised immediate information cannot be given. It seems to be preferable to inform the persons concerned as soon as possible about the provisional nature of the information about insurance periods in cross-border situations. The taking into account of child-rearing periods is unnecessary if the law of another Member State is or becomes applicable due to gainful employment. How should a case be dealt with where e.g. under the law of this newly competent Member State such gainful activity is pursued only for a very short period? Example: Member State A, competent at the time of birth due to performance of gainful activity, provides for child-rearing periods of 48 months after birth; the person concerned moves after 12 months to Member State B, where gainful activity is pursued for 3 months – is Member State A obliged to re-start taking into account periods of child-rearing after these 3 months for the remaining 33 months? Another question concerned the condition that the new competent Member State does not take into account periods of child-rearing. Does this mean that this Member State does not recognise child-rearing periods at all, or does this only mean that in the concrete case that no child-rearing periods are taken into account. One expert raised the question of how this provision would apply in relation to a Member State that has become competent based on residence (Art. 11 (3) (e) of the Basic Regulation) and which has only a residence-based system.

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A final thematic report dealing with family benefits coordination rules was presented by the rapporteur Mrs Philippa WATSON, Barrister, Essex Court Chambers London and Professor, City Law School, London. The concept of family member amongst the competent institutions is very broad and extends beyond blood relatives to, for example guardians, foster parents and stepparents or the child's primary caregiver. In the face of evolving changes in the patterns of family composition and family life, some Member States have adopted a pragmatic approach, looking at the factual circumstances of the child and the claimant in order to determine to whom and on behalf of whom benefits should be paid. This approach appears to have been adopted in Article 1 of Regulation 988/2009 which adds Article 68a to Regulation 883/2004, the objective of which is to ensure that family benefits are granted to the natural or legal person who is in fact maintaining the family members in question.

With regard to time limits within which a response had to be provided by the competent institution to queries from claimants or potential claimants, it is difficult to gauge with accuracy the time frame within which administrations must work, since they are very variable. It should be noted that Article 76 (4) of Regulation 883/2004 imposes an obligation on the institutions covered by the regulation to respond to all queries within a reasonable period of time, and to provide persons with any information required for exercising their rights under the regulation. Extreme delays could have legal consequences. These provisions on family benefits represent a considerable simplification of the coordination rules. There are fewer provisions and responsibilities are clearer. The concept of family allowances is abolished. Priority rules have been established to determine the responsibilities of the relevant competent institutions and a duty of cooperation has been placed on the competent institutions to ensure that those priority rules are respected, regardless of the wishes of the claimants, thereby focussing on delivery of benefit entitlement according to the priority rules. In addition to these provisions dealing specifically with family benefits there are a number of other general principles and rules articulated in both regulations which are relevant to the area of family benefits. Examples of these include the cross-border recognition of facts and events, the general prohibition on the overlapping of benefits and the criteria for establishing residence.

There are several challenges that can be pinpointed with relation to these changes in the regulation. Article 60 (2) and (3) of Regulation 987/2009 were seen as problematic. It was believed that determining the identity of the competent institution could prove difficult and costly. Whilst it is true that the identification of the competent institution under the new regulations will become the responsibility of the Member State administrations as opposed to the claimants themselves, which is the case under regulation 1408/71, the difficulties in doing so can be overcome by cooperation between the administrations, in particular by the establishment of a common and regularly updated Community-wide directory of competent institutions and responsible persons within them. As to costs, whilst it may be true that there will be initial costs, these ought to be recouped over time as a consequence of efficiency improvements.

The priority rules were welcomed by the Member States as providing clarity as to their respective obligations. The main problem was seen to be the failure of a claimant to apply for family benefits to the competent institution, which under the priority rules has primary responsibility for those benefits. If such a claim was not made how could the Member State of secondary responsibility calculate its liabilities? After some discussion it was agreed that the solution to this problem lay in Article 60 (2) and (3) of Regulation 987/2009. A Member State to which an application is made which does not believe that it is the competent institution by priority, must forward the application to the competent institution of the Member State of priority right and inform the claimant that it has done so. The latter institution must take a position on the claim within two months. Even if national law requires that a claim has to be made by the claimant, Articles 60 (2) and (3) must be read as permitting a claim to be made by a competent institution in another Member State. The claim must be assumed to have come from the parent or responsible family member even if transmitted by the competent institution. If the position were otherwise, the system of priority rules would collapse. The Member States welcomed this interpretation. Whilst under Regulation 1408/71, if a claimant was refused benefit, he or she had to pursue the claim before another competent institution, under Regulations 883/2004 and 987/2009 the relevant competent institutions are under a duty to sort out the claimant's entitlement between themselves. That entitlement must be established as between the responsible institutions regardless of the wishes of the claimant. During discussion, the point was raised as to what a competent institution should do if a claimant refused to cooperate? Attention was drawn to Article 76 (4) of Regulation 883/2004 which imposes a duty of mutual information and cooperation on "institutions and persons covered by this regulation". Persons concerned have a duty to inform the competent State and the Member State of residence of any change in their personal and family situation which affects their right to benefits under the regulation.

With regard to the calculation method for the differential supplement, per child or per family unit, it appears that both systems prevail and sometimes within the same family benefit system, with some benefits being paid on a per-child basis and others to the family as a unit. It was agreed that there should be a unique solution to this issue. In the case of those systems where benefits were paid on a family basis, it would be extraordinarily difficult to compare the value of benefits with a system where benefits were paid on a per-child basis. Given the absence of any solution within the Council to this question, it was suggested by the rapporteur that the matter should be dealt with by the Administrative Commission. Otherwise it could be brought before the national courts, possibly ending up in the ECJ, which might provide a solution that one might not like.

Cooperation between national administrations was a highly debated topic in the seminar on family benefits. Article 10 EC Treaty imposes a general duty of cooperation on the Member States to ensure the fulfilment of the objectives of the Treaty. In the recent ruling of the European Court of Justice in *Leyman* it was held "...the principle of cooperation in good faith laid down in Article 10 EC requires the competent authorities in the Member States to

use all the means at their disposal to achieve the aim of Article 39 EC.” Cooperation between the competent institutions takes numerous forms. Countries that border two or more other Member States and consequently have a large concentration of frontier workers have the most institutionalised systems of cooperation, consisting of regular contacts with their counterparts at other competent institutions by telephone or e-mail. Regular meetings were also common. Dedicated offices deal with cross-border claims. Cooperation between Member States which do not have large numbers of frontier workers is less systematic. Contact is generally on a case-by-case basis between individual case managers and is conducted on paper with the postal services being the normal method of delivery. Following the accession of ten Member States to the European Union in 2004, a number of Member States experienced large inward flows of workers from Eastern Europe. From a situation where there had been little or no movement between certain countries there has been an exponential growth in movement. This has led to a situation where the volume of claims has grown rapidly and institutions which previously had little or no contact with each other found themselves struggling to achieve the level of mutual understanding and cooperation required to process an unprecedented number of claims. Two Member States in particular reported that they had organised face-to-face meetings to establish working methods and achieve agreement on levels and standards of service provision. In both cases administrators from the Member State of inward movement visited that of outward movement. In each case the meetings were successful in the sense that they facilitated the establishment of an effective working relationship, thereby reducing the time and effort required to process claims. It was generally agreed that a country by country list of competent institutions and a contact list of responsible administrators within them would be desirable. It was suggested by some that such lists should be established by the EC Commission. The rapporteur disagreed, deeming such a task to be more appropriate for the Member States themselves since they were best placed to gather the relevant information accurately and speedily and to undertake the necessary regular updating. Face-to-face meetings were acknowledged to be useful and to be encouraged by the Member States themselves. On a Community level it was felt that multilateral meetings, organised on a regional basis or between Member States which had common problems or issues, could be fruitful.

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The debate was opened with the general question how all these interpretative problems should be tackled. Dr. J. SCHERES was in favour of bilateral teams solving the specific problems in a region, not only for individuals but also for problems between the institutions. Mr D. COULTHARD already made a plea in the 1990 for bilateral relationships at a working level and not in the form of formal agreements, but simply by sitting around the same table with foreign colleagues. He wondered why that is not a more common practice. Mrs C. DENAGTERGAL wanted to emphasise the concerns of the trade unions with regard to the creation of a three-speed cross-border health care framework. In this respect, trade unions take their responsibility to

caution decision makers, if one remembers e.g. the Bolkestein Directive, from which health issues were removed thanks to the trade unions in cooperation with the European Parliament. As a final point, it should be remembered that the Commission and the Council have lately been advocating more for the free movement of services than for the free movement of workers, as the latter was blocked by the transitional arrangements after the accession of the new Member States. The trade unions moreover believe that the vagueness surrounding the rules on applicable legislation with regard to posted workers is intentional. New forms of mobility are another problem yet to be solved. Mrs E. RENTOLA remarked that bilateral cooperation between administrations is the key to realise things to the benefit of the citizens. In the Nordic countries this has been the case for a long time, e.g. by means of informal meetings of Finnish clerks with their Estonian colleagues, which is the only way to provide good guidance to the clerks dealing with cases. An example is joint training for Finnish and Estonian clerks on the new regulations involving real cases, real amounts of money and real families. The same will be done with Swedish colleagues. The bilateral approach is the best way to find tailor-made solutions between Member States.

Mr B. SPIEGEL agreed that national administrations should have trouble-shooters who can pick up the phone and solve problems bilaterally. This brings the example to mind of what was discussed during the thematic seminars on pensions. There, the practice was raised of payment of the pension not directly to the person concerned but to the liaison body. In addition, you always have the possibility to make bilateral agreements on these issues. However, one should be very careful, because in principle bilateral agreements should be made only if they are in the interest of the person concerned and only if they do not take away rights granted under the regulation. In this particular case, it is hard to imagine how payment via a liaison body would be better for the worker than direct payment. So, bilateral agreements are ok if they are meant to speed up things, but become problematic if they tend to disadvantage or confuse citizens with regard to their rights. Mr J. TAGGER pointed to the fact that the delegations at the thematic seminars were disappointed that the answers were not provided there, but added that the search for these answers was the common responsibility of the European Commission and the national delegations in the Administrative Commission. This has been included in the work programme of the Administrative Commission and will be one of the major tasks in coming months. Concretely, there will be a meeting in December 2009 during which a strategy to deal with the main questions raised in the thematic reports will be discussed. Naturally, the Administrative Commission cannot perform miracles, since it has limited time and resources, but a priority list will be drawn up in order to identify the issues that really must be dealt with before the date of first application of the new regulations. Mr M. KAISER will have to sell the new regulations in Switzerland in the coming weeks. The message will be that this is an imperfect instrument and there are many challenges to be overcome, but the project is also quite ambitious and everyone is working hard to solve the existing problems. Dr J. SCHERES added that the new regulation provides for evaluation after five years as to whether modifications are necessary. This evaluation could

start immediately in the Administrative Commission, based on the data received from EESSI.

SESSION 3: New Administrative and Technical Environment: EESSI, Portable Documents, SEDs and the Transitional Period

The EESSI project

Mrs Carin LINDQVIST-VIRTANEN, Deputy Director General of the Finnish Ministry of Social Affairs and Health, had the challenging task of explaining to the audience what the EESSI project on electronic information exchange is all about: why, who, how and when? EESSI is a huge project and it is certainly not easy. With EESSI, the intention is to create the technical infrastructure of the 21st century at the point in time when it can and should be done. The political argument is that it is to speed up benefit processing by electronic information exchange, but that is politics. What it certainly will do is make the process more transparent and more accurate, since IT is less flexible than paper as to the data entered. In concrete terms, this will result in fewer spelling errors and less incomplete/faulty information. It will also give a better overview and control of processes and a better identification of bottlenecks. As to what has to be built up, there is a division of responsibilities between the Commission and the national level. The Commission will build the centralised system and the motorways between the national Access Points through a Coordination Node. This is the smaller part of the tasks to be allocated. One has to look at it metaphorically: we have to deal with a package at one terminal, which is picked up by a lorry that brings it to a container which makes its way over the motorways before it is unloaded at another terminal. The Commission is responsible for the containers and the motorways between the terminals, but also for the Master Directory with all the data on the social security institutions in the Member States. The Member States will do the rest of the work. They have to build the Access Points as instructed by the Commission. They are responsible for being able to read the Master Directory and will have a copy of it. The Member States have to be sTesta-connected, which is the secure motorway that is already up and running. They are also responsible for deciding how far they will integrate, as the only requirement in the regulation is that the Member State must be able to send something from one Access Point to another Access Point. This will depend upon the current status of centralisation or decentralisation of national systems. They will have to analyse what is feasible. But in the long run, every Member State will probably try to integrate as far and deep as possible. At any rate, we must sit down and think about what can be accomplished before 2012.

Legal questions on data security (for instance archives) will also have to be dealt with, as well as SEDs and business flows (checks, integration to national system) and national business flows between institutions and Access Points. As to the timeframe, there is time to put things up until 1 May 2012 but this is extremely short considering the work that has to be done. The architectural planning should already be in progress and the Access Point should be ready for testing in 2011, but the pilot countries should be ready earlier. In Finland, the basic decisions have been made on the national architecture and on how far the institutions are going to be integrated in the first phase. They have decided to have one common Access Point, one common archive and one central responsible institution for EESSI international. A Reference Implementation Document should be received at the end of 2009, which is the initial basis for actually starting the technical planning. Resource budgeting for 2010 also had to be done, estimating the work requirement and when it will be done. The Master Directory must be ready for testing in the next few months. The EESSI Commission part should be fully operational within a year from now, namely the Master Directory and the central Coordination Node. End-to-end testing with partner Member States will be required to see whether the actual information that has to be received, is actually received correctly. One thing has to be kept in mind in this context: when something looks like magic, it has taken years of work for the magician to make it look that way.

Practical Information Regarding Technical Aspects

The centralised part of the EESSI (Electronic Exchange of Social Security Information) project will be built up by the European Commission, as was explained by Mrs Silvia KERSEMAKERS, EESSI project manager of the European Commission's Directorate-General of Employment, Social Affairs and Equal Opportunities. EESSI is a core element in the new regulations, as it enables institutions to exchange information electronically under a common secure network. The data transmitted through the network are kept confidential, a requirement that is quite high on the priority list of the Member States. It gives effect to the principle of enhanced cooperation between the Member States. The legal framework for this system can be found in Article 78 BR and Article 4(2) and 88(4) IR. The first challenge for the Commission will be to have the Master Directory up and running by 1 May 2010, as this is a legal obligation for the Commission. In the past, there was a feasibility study in 2006 and in 2007 all Member States collectively agreed on the EESSI High Level Architecture. A call for tender was advertised in 2008 and the contract was won by Siemens, which is building it now and will finish it by the end of 2010. Then the Member States will have to start their work, which should indeed not be underestimated. EESSI will have to be fed and this requires identification of the business and therefore the paper SEDs have been drawn up and are now under review. They have to be validated before May 2010 so that they can be used in the pre-EESSI environment. The institutional data will have to be uploaded to the Master Directory.

When identifying the business flows, one must look at the regulation that specifies when and what information has to be sent. This is the identification of the business scenario, after which the business flows can be defined. After that, there is the identification of Structured Electronic Documents (SEDs), which are the messages that will be sent, and the identification of data in these SEDs. This process has been ongoing since 2007–2008 in the working groups that published reports and concluded with the drafting of the paper SEDs. This is a very temporary instrument and in the real EESSI, they will have a much more sophisticated look. As to the review of the SEDs, expert groups were set up for all sectors and they will analyse the change requests received from the Member States. They will also give their opinion to the Task Force that will manage a horizontal approach. All SEDs must be translated by 1 May 2010. The template of the Master Directory is already being reviewed in close cooperation with the Member States. The future “bulk upload” will be the major upload of all validated data into the system. The whole process is dynamic and further changes will be implemented. These further changes will have to be done coherently, which is provided for in the Change Management Procedure for the Directory Services, both for the SEDs and PDs and for the institutional data. The implementation of the EESSI Project is a coordinated effort between the Commission and the Member States, since the Commission must take into account the national issues while setting up the international system. The EESSI project is a particularly complex IT integration project with many actors involved, so coordination and close cooperation with the Member States are essential to making the project a success. Coordination of the efforts at the EU and Member States levels is guaranteed in the framework of the Administrative and Technical Commission, as well as in the Task Force. This will continue in the next years to come. Structured communication channels are already available through a functional mailbox (EMPL-EESSI-CONTACT@ec.europa.eu). Other crucial methods of cooperation are the appointment of central contact persons in the Member States and the appointment of Access Point project managers for each Access Point (at a later stage). A FAQ and a Business Glossary can be expected from the Commission. Documentation on the various parts of EESSI project is posted on the circa website and an EESSI newsletter that will be sent out regularly.

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Since EESSI is a complicated IT system, some additional background information was provided by Mr Eric BRUYNEEL, Managing Director of TelMa. The exchange of social security information has already been ongoing for a very long time. What is going to change is that it will now be done electronically, as provided in the new regulations. Therefore, the Commission will set up the motorway for the system, but most of the work will have to be done by the Member States. In EESSI, there is a central part and a peripheral part that will supply information to the central part. In the central part, there is the sTesta network. This is surrounded by the national network. Each participating state operates one or more National Networks to which the IT systems of Competent Institutions are connected. In the centre there is the backbone. The sTESTA backbone, which will be used for

EESSI, is a safe and secure network (that will gain an extra safety layer in EESSI) connecting National Networks to each other and the EC Data Centre. The connections between the centre and the periphery are the “Access Points” operated by the Member States and accessible both via the National Networks and sTESTA. Also in the centre is the “Coordination Node” encompassing all EESSI systems deployed in the Data Centre and operated by the EC. The information in the national network will go to the Access Point and there it will enter the EESSI system where it will be sent to the Coordination Node where a number of processes are performed, such as routing. It is then sent to the destination Access Point, which is where the work of the central infrastructure ends.

The services offered in the central part are monitored by the European Commission. One of the services is the Master Directory, of which each Member State has a local copy, but there is also internet access to it. The Member States will feed data through a local interface to the Master Directory, which will be updated accordingly and a general system replication will be performed and sent to the local directories and the public directory. It will be the Member States’ responsibility to send updated data to the system. Both civil servants and citizens will have internet access to this directory for three types of queries, including a structured query but also Google-like free text searches, such as “health care Germany”. All details with regard to the institutions should be available there. With regard to changing directory entries, there will be two types of changes. Minor changes (that do not impact routing, such as address, phone/fax number, URL, etc) can be made directly without notification, and major changes (that do impact routing, such as the competence of a Competent Institution) which must be communicated to the Administrative Commission before they are made. For changing the list of codes for qualifying institutions, a change request can simply be sent in the form of a CASSTM note to the Administrative Commission. After approval of the Administrative Commission, the change requests will be periodically incorporated into the list of codes. The coordination node offers a whole range of services for the exchange of information, including monitoring, routing and statistics.

In order to differentiate between national and international activities, the Access Point concept was developed to conceal the social security institutions from others and be the link between standard national technologies and the international system. The Access Point has two parts, one that serves national needs and one that serves the international side of the network (implementing the international protocol and bringing information in line with national system requirements). This is going to be a lot of work and it should start immediately at the national level. The line between the national and the international parts of operations must be clearly defined, which will require very good cooperation between the Commission and the Member States, since this line of demarcation is a very sensitive issue. In the international part of the Access Point, there will be message validation, security processes, fragmentation, re-assembly and permanent storage. The national part will be developed by the Member States and promote functionalities like SED conversion and transformation, authentication against nationally deployed schemes, etc. Also the Web Interface for Clerks (WEBIC) will be

developed there. This is where the central part helps the national part in order to deliver the information in a proper way. The WEBIC will provide an email-like user-friendly interface for preparing, sending, receiving and storing SEDs and will be deployed, configured and managed as a standalone application in the Member States. It is however more intelligent than a regular mailbox, because it knows what business it is processing. It can be installed locally on the Access Point or remotely (as many as wished). The WEBIC is a local application with its own database for storing encrypted SEDs that will be connected to the Access Point. It will be characterised by an overview approach for guiding the clerks.

Six Member States volunteered to play the role of testing countries: Austria, Bulgaria, Finland, Germany, Italy and The Netherlands. As of January 2010, these Member States will start testing the EESSI directory service according to the rehearsal testing methodology. Starting in mid September 2010, they will participate in a campaign of integrated tests of the RI, WEBIC and EESSI DS. The objective is to make sure that all EESSI functionalities are tested at least once. As of 2011, they will assist the Commission in supporting/assisting the other Member States to join EESSI by becoming privileged partners for the other Member States to share lessons learnt and good practices. The Directory Service is being tested until December 2009 and from then on the volunteering Member States will launch a two-month test. Afterwards, all Member States will have to upload the national data and the objective is to be ready for the application of the new regulations. After summer 2010, the different components will be installed and testing will begin for all Member States. After training, in December 2010 we will have a fully operational system, which is when the work of the Member States will really start, since they will have to integrate EESSI within their national systems.

The Transitional Period and the SED's

Before the EESSI system is fully up and running, the Member States will be facing the arduous preparations during the Transitional Period, which will not be unproblematic according to Mrs Gabriela PIKOROVA, Head of Coordination of the Social Security Unit of the Czech Ministry of Labour and Social Affairs, who focused her presentation on the Transitional Periods for the electronic exchange and SEDs. Electronic exchange of standardised electronic documents will in principle be the only way to exchange information between institutions of Member States, as provided in Art. 4 par. 2 IR. The only exceptions are the "PDs", which will still be issued in paper form, mainly to meet the needs of the persons concerned. We expect faster exchange of information. Paper forms will be replaced by "Standardised Electronic Documents", or SEDs. This is not merely a replacement of one method of transmission for another. SEDs are not only electronic copies of the old e-forms, since the new approach is much more interactive. However, we must admit that instead of about a hundred E-forms, we have many more SEDs (for example, in the unemployment sector, four E-forms are replaced by twenty SEDs). Extensive preparations must be undertaken on the European and national levels. As regards the EU level, the environment for the

EESSI must be created and both the reference implementation and the SEDs must be ready. For the Member States, it is crucial to create their national parts and train clerks to use EESSI. These two levels (EU and Member States) are interdependent and unless the EU level is ready, it will be impossible for the individual Member State to be ready. We have experience with the establishment of new national schemes involving the creation of a new electronic environment and new applications. It always takes longer than initially expected, and there are always unexpected delays and problems.

Bearing all of this in mind, the Council has introduced the possibility of a Transitional Period for electronic exchange. According to Art. 95 IR, every Member State may use the 24-month period from the date of application of the IR. Furthermore, it is also provided that in case of the delay in preparations for EESSI, the Administrative Commission is authorised to extend the Transitional Period. Even though we would all hope that the Transitional Period would be only a theoretical option, it is now clear that the majority of Member States will avail themselves of this option to some extent. It follows that solutions had to be found in the first place for the exchange of information between all the Member States during this period (for cases when communication takes place between Member States that are EESSI enabled, and Member States using the Transitional Period, or between two Member States using the Transitional Period). A second set of rules relates to joining EESSI during that period. Various options were deliberated in discussions amongst the Task Force and Technical and Administrative Commission. The results of the discussions are summarised in the decision of the Administrative Commission. The main principle is that a Member State that uses the Transitional Period will exchange information on paper SEDs. However, some Member States are currently using electronic applications to produce E-forms that cannot be changed quickly, and using paper would be a step back. Consequently, such automatically produced E-forms are still usable under the new regulations. A last important point that needs to be made relates to the claims that were lodged under the old regulations, since they will continue to be administered via old E-forms. It is clear that at any given time and for the same situation, the institution may receive an electronic message from EESSI enabled Member States, a paper SED from another Member State and automatically produced E-forms from another Member State, along with the E-forms related to EEA countries or old 1408 cases. Thus, one of the main principles of cooperation between Member States during this period needs to be flexibility and pragmatism and above all, the protection of the rights of the citizens. We must not lower the level of protection due to the transition from one method to another. For this reason, institutions must accept the relevant information on any document, even if it is outdated.

As regards the gradual accession to EESSI, Member States may start to exchange information via EESSI at any time during the Transitional Period, all at once or sector by sector. Once a Member State joins, it must be able to communicate electronically to other EESSI-enabled Member States. At the same time, it must send paper SEDs or automatically produced E-forms to Member States that are not yet ready. This means that before sending a document to another Member State, institutions must make sure whether the

addressee is EESSI-enabled or not according to Master Directory or the circa website. Member States' institutions will have to cope with the various ways of communication: some Member States will use E-forms, some will use paper SEDs and some will use electronic communication. At the same time paper SEDs are more interactive than old E-forms. To handle one case, more exchanges of information are necessary than with the E-forms. This may be more demanding on the clerks and also more time-consuming. From the point of view of citizens the main aim is protection of their rights, even during this difficult period of time.

The Technical Environment – Main Outcome from the Thematic Seminars

Chaired by Mr Erik Engström, Senior Advisor International Affairs, Swedish Social Insurance Agency

Speaker: Mr Derek Coulthard, Technical Manager, DWP International Pension Centre, Great Britain

Panel:

Mrs Carin Lindqvist-Virtanen, Deputy Director General, Ministry of Social Affairs and Health, Finland

Mrs Silvia Kersemakers, EESSI project manager, DG Employment

Mrs Gabriela Pikorova, Head of Coordination of Social Security Unit, Ministry of Labour and Social Affairs, Czech Republic

Mr Derek Coulthard, Technical Manager, DWP International Pension Centre, UK

Mr Wim Vervenne, Policy Advisor International Affairs, Sociale Verzekeringsbank, The Netherlands

An overview of the main outcomes of the thematic seminars on the technical environment was provided by the rapporteur, Mr Derek COUTLHARD, DWP International Pension Centre in the UK. In each thematic seminar, there was a legal session in the morning and a technical session in the afternoon on all five subject sectors. Those attending from the institutions were senior managers, front line staff, IT specialists and some policy advisers or lawyers from the Competent Authorities. The majority of the feedback on these seminars was positive, although there were some negative reactions from IT staff. During the seminars, there was a general presentation of EESSI, a presentation of the principles to be applied during the Transitional Period, a practical presentation of the tools available, a presentation of the SEDs related to that sector and an interactive session. During this interactive session, the participants addressed questions raised beforehand, volunteer delegates were interviewed and delegates were invited to address specific issues and present their findings on e.g. Transitional Periods, PDs, training and other management issues. First of all, in all seminars some time was dedicated to general questions about EESSI, SEDs, PDs, the Transitional Period, etc. The comments submitted before the seminars had

already revealed that most challenges will probably be encountered in the sickness chapter.

As to applicable law, there is more work to be done on the legal end than on the technical side. What was remarked across the sectors, was that the paper SEDs do not look very user-friendly. Also the retention of the name of “E101”, a powerful ‘brand’, was advocated to a large extent. In the meantime, it has been decided that it will be called the “A1”. In the unemployment benefits seminar, the number of SEDs was deemed contrary to the goal of simplification. However, the number of SEDs represents the flows that are also present under e.g. an E303. The sickness benefits seminar was the most challenging in terms of the issues raised. One particular issue was that people did not like how the new PDs looked like in their printed form, but the reactions were positive when they were viewed on screen. Remarks on the content of the PDs were also discussed. Security issues were raised with regard to medical records or bank account details, which was also the case in the pensions seminar. Security is a high priority for all Member States. A final issue in this seminar was the absence of a standard format for attachments to be sent to other institutions who would probably not be able to open them. In the pensions sector, there is only one PD, namely the accompanied note with a summary of the decisions. This is the E211, which is almost never issued under the current system, but the Commission wanted to keep it. In the family benefits chapter, there are no PDs foreseen. Whereas Member States will probably keep on using the E-forms instead of paper SEDs in many cases, experts agreed that this would not be suitable for the new provisions on family benefits so they will probably move immediately to paper SEDs. This could be regarded as a best practice for the other sectors, to simply bite the bullet and move directly to the paper SEDs even if it requires extra paperwork.

In conclusion, the rapporteur observed that the institutions are only now becoming better informed about EESSI, so adequate time for staff training and providing customer information is of paramount importance. There are serious concerns over the time available to train staff to use SEDs (and PDs), assuming they will be ready in good time. Finally, the Transitional Period will need very careful management by institutions, especially the varied receipt of E-forms and SEDs. The association of the new PDs and corresponding SEDs needs clear guidelines, especially in the pensions and unemployment sectors. Many institutions seem not to have decided yet whether to continue using E-forms or paper SEDs. Security remains a concern and there is great support for further seminars.

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The panel discussion was chaired by Mr Erik ENGSTRÖM, Swedish Social Insurance Agency. He started by presenting Mr Wim VERVENNE, from whom he wanted to know how the institutions will handle all the different paper forms during the transitional period. Mr Wim VERVENNE, Policy Advisor International Affairs in the Dutch Sociale Verzekeringsbank said that The Netherlands are in a privileged position with regard to the new developments in EESSI, because they already have something similar on the

national level. There is a central coordination node routing the messages between the Dutch social security institutions, which is working very well. A second advantage is that The Netherlands will be one of the testing Member States, implying that it will be involved in an early stage. EESSI provides the opportunity to think ahead in the national system about how to deal with these developments. The study of business flows in the Netherlands has already started and, surprisingly, some existing business flows could not be traced. For instance, when the rights to a pension change, this may also bring about changes in health insurance cover. This information must be exchanged, but the respective business flow could not be found. Furthermore, one cannot take for granted that the current business flows at the national level will also work in EESSI. During the Transitional Period, The Netherlands will keep working with automatically produced E-forms until the switch to the electronic exchange. The clerks first have to be prepared for the new rules of the new regulation and then trained to use the new system for electronic exchange. With regard to the SEDs, The Netherlands will make a lot of remarks with a view to their revision, seemingly like many other Member States. With good communication and the necessary flexibility, the Member States must be able to work their way through this reform. However, we must consider the very difficult task the national clerks are facing, since a new system always has growing pains. At any rate, the end target of better administration and better service to the clients must be kept in mind.

Mrs G. PIKOROVA added that the comments on the SEDs will indeed be numerous and it will be hard work for the Commission to digest all these comments, but it will certainly be beneficial to the end result. In the end, the enlargement to Bulgaria and Romania also brought some change and there as well, problems were solved with a flexible attitude when data were missing. Mr D. COULTHARD repeated that some institutions were inclined towards using paper SEDs, which was certainly noticeable for the family benefits sector. Also for the UK, which will continue using automatically produced E-forms, it cannot be ruled out that some institutions will switch to paper SEDs. The Commission would like to see the institutions switch, considering the work that has been put into making these new documents, but Decision E1 is pretty clear that E-forms can still be used. Mrs S. KERSEMAKERS was of the opinion that revision of the SEDs will be a huge effort, but that it is better to get it over with now than to wait until they are already uploaded into the system and more technicalities are involved. The paper SEDs can play a good role for smoothing the Transitional Period for clerks and good preparation for the start of the electronic period. Mr D. COULTHARD reacted immediately and said that the response to the paper SEDs of people who were not involved in the project from the beginning is very negative, because they find them badly designed. At first, he had a very defensive attitude about these remarks, but he has given up on that as they were approved this way and will have to be worked with this way. Mrs C. LINDQVIST-VIRTANEN observed that these reactions are not surprising and one should remember that the people who will be dealing with these forms have only very recently been confronted with them for the first time. The comments will probably be similar in most of the Member States. Alongside this, it should be remembered that there was a clear choice for the

continuation of the use of automatically produced E-forms, but the switch to the paper SEDs will probably depend on the magnitude of changes in the specific chapter of the regulation. The family benefits sector will probably switch to SEDs because there are so many changes in the law. Since these changes also require extensive modifications to the software used to produce the E-forms, a switch to paper SEDs may be the simplest solution. But the decision is fully up to the Member States.

Mrs S. KERSEMAKERS referred to the 'Correlation Tables' that are drawn up for all the sectors to be worked with in the Ad Hoc groups. These tables provide information on the flows in each of the sectors and which SEDs have to be used in these flows, with a link to the relevant Articles to which the exchange is related and to where you can find the equivalent in the current E-forms. They can be found on the circa website, where all the change requests for the paper SEDs will also be made available to avoid duplicate work. One of the next things to be worked on is the guidelines for the new PDs, since one PD can relate e.g. to an A and B side of a current E-form, so guidance will be necessary. Continuing on the subject of the PDs, the first visible results of the new regulations for the citizens, Mr D. COULTHARD related that he had received all comments from all Member States and the end result must be a document worthy to be given to the EU citizen. The forms were designed by a marketing and communications firm with the surplus funds from the EHIC campaign. A final version will be available for the next meeting of the Administrative Commission in December 2009.

The chairman asked the panel whether they were in favour of using WEBIC for electronic exchange since it will be available to all Member States by 1 May 2011 at the outside. Mrs S. KERSEMAKERS found it difficult to say what the advantages and disadvantages would be for Member States of switching to the WEBIC application, considering the differences in the national systems and the diverse ways of dealing with the national flows. At any rate, the decision is up to the Member States whether or not to use this new tool when it becomes available. It could be a good introductory help for clerks to get acquainted with the use of electronic information exchange. However it must be admitted that for large flows of information you might want a tool that is more sophisticated than WEBIC. Of course, a sector-by-sector approach is always possible for every Member State. Speaking for his sector (pensions), which will not undergo a lot of changes, Mr W. VERVENNE added that his department will not use WEBIC because they already work with automatically produced E-forms, which is more practical than filling out the WEBIC forms again. What will be done is an assessment of whether it is feasible to insert the final versions of the SEDs into the Dutch system, thereby skipping the step of WEBIC and going directly to exchange of electronic SEDs.

The chairman asked the panel for their views on the mix and match situation. At a certain date, some Member States will be ready to exchange information electronically while others will not yet be able to do so. The prohibition of mix-and-match of paper and electronic forms will require sharp attention, Mrs C. LINDQVIST-VIRTANEN said, since in the Transi-

tional Period some rules of conduct will be necessary even if the general attitude in the Member States should be one of flexibility and pragmatism. There was the choice between a big bang and a phase-in strategy and the latter was chosen. You can phase-in sector by sector, but not institution by institution, when “you are ready”, i.e. when you can send and receive information electronically. However, two Member States should not mix paper and electronic exchange in the same sector. But that does not mean that the same Member States cannot operate differently with other Member States. Mr D. COULTHARD agreed on this analysis and added that, in the beginning of the discussions, every Member State was against the big bang theory because all of them would then have to proceed in pace with the slowest, but now we will probably be confronted with a big bang on 30 April 2012 after all.

Finally, the chairman finally invited questions from the audience. Mr F. TERWEY had learnt from the discussion that there was a tremendous need for more information and cooperation between the social security institutions and wondered whether the ESIP (representing 40 social security organisations) could play a role as facilitator between social security organisations when it comes to implementing the new rules. Mr E. BRUYNEEL wanted to return to the subject of the quality and design of the SEDs and stressed that the SED was developed for electronic exchange, so it should be no surprise that it is not very attractive or user-friendly when printed on paper. The best way of using the SEDs is in WEBIC, where they are and remain electronic messages. A representative of the German liaison office for health insurance agreed that the SEDs should be fine-tuned and reminded everyone of the fact that cooperation between the Member States should be better, but has its limits. With a neighbouring Member State, it is easy to pick up the phone and call a colleague or write an e-mail to solve an individual case. With other Member States, this is not as easy because there is often a language barrier. This makes it essential that the SEDs are self-explanatory and extremely complete, but also to get rid of redundant data on the forms. This would increase acceptance amongst clerks and reduce the need for additional requests for information. Without looking too much to the past, the old E-forms can serve as a good benchmark to figure out precisely what data are needed. A reduction to the necessary is essential to increase acceptance amongst those who have to exchange the information and this would promote smooth transition. Mrs S. KERSEMAKERS replied that all the SEDs will be translated into all languages, so the clerks will be able to compare foreign SEDs with their versions and know what is on the form. In the current version of the SEDs, some of the long labels (a description of the data that have to be filled out) are missing and those will certainly help the clerks once they are inserted. But this test was done with experts and the data requested on the SEDs are the data needed in 80% of the cases. It might always be that a certain Member State does not need this information, but this should be disregarded in order to serve the needs of the vast majority. Mrs D. COULTHARD reiterated, as a reaction to Mr. Bruyneel’s interjection, that there is no use being defensive with regard to the design of the paper SEDs and we should accept that we have to live with them with a view towards real electronic exchange in the future. It should be rethought what can be used for the clerks for the next two years, otherwise

the system will not work. The representative of the German liaison office for health insurance was satisfied with Mrs Kersemakers' answer, but repeated that when data are not required for all Member States, they should be added to the forms as optional information.

SESSION 4: Enhanced Cooperation between National Administrations

Introduction and the Role of the Commission

Mr Jackie MORIN, Head of Unit Free Movement of Workers and Coordination of Social Security of the European Commission's Directorate-General of Employment, Social Affairs and Equal Opportunities provided a comprehensive overview of the cooperation aspects within the regulations, its challenges and means of supporting it, but also of the possibility of cooperation outside the regulation framework. He first reiterated the main goals and principles of the coordination of social security and held that all these principles rely on cooperation between the Member States and between the national and the European levels. It can be considered as a fifth principle, but also as the link between the two universes at hand: the diversity of the national systems and the European level. The objective of cooperation is more than simply a tool for facilitating smooth administrative cooperation, but has a higher aim, that of guaranteeing rights and appropriate services to citizens. Cooperation is also one of the basic principles of the EESSI transition. It is not only an administrative challenge, but has a multi-stakeholder dimension: for citizens, better service and respect for time limits, for national authorities and institutions, greater support, higher efficiency and fewer errors. References to cooperation in the texts can be found in Article 10 of the Treaty (principle of loyal cooperation), Article 76 BR, the Preamble of the IR, second paragraph ("Clear and more effective cooperation between social security institutions is a key factor in allowing the persons covered by Regulation (EC) 883/2004 to access their rights as quickly as possible and under optimum conditions") and in various provisions of the regulations.

There are different levels of cooperation in the coordination framework. First of all, there is the level of the Administrative Commission for dealing with all the administrative questions or questions of interpretation and for promoting further cooperation between the Member States. Secondly, the level of the national authorities, who must lend one another their good offices and work together in an atmosphere of mutual trust. Thirdly, the institutions and persons covered by this regulation have a duty of mutual information and cooperation to ensure correct implementation. Each of these levels is indispensable for the smooth functioning of the other levels. For the institutions and the national authorities, the coordination rules provide obligations with regard to administrative mutual assistance (as a rule, free of charge) for controls and assessments in other Member States. There is the principle of good administration, including the obligation to give informa-

tion and provide direct communication. In all of this, dialogue must be open. The Administrative Commission plays a crucial role as far as cooperation is concerned. An important element of its role is the interpretation and guidance on the coordination rules by adopting Decisions and Recommendations, as well as by exchanging best practices. The texts of the Administrative Commission are always the very product of cooperation between all the Member States. Although these texts are not legally binding, their value has already been acknowledged in ECJ case law. This work will continue to be essential for clarification of the new coordination rules, thereby facilitating the uniform application of Community law. Another important aspect is the task of fostering and developing cooperation between the Member States. It must also deal with the improving efficiency in cooperation and encouraging the use of new technologies. Finally, dialogue and conciliation will be a major task for the future. The dialogue and conciliation procedures are incorporated in 6(3) IR, which prescribes them in the event of doubts about the validity of a document or the accuracy of the facts, when there are differences of opinion concerning determination of applicable law, and when there are differences of opinion about which institution should provide the benefits in cash or in kind. It should, however, be emphasised that dialogue is not at all new as a concept in the womb of the Administrative Commission. In June 2009, Decision A1 was taken on the three phases of the procedure: phase 1 for a dialogue between the institutions (max. six months), phase 2 for a dialogue between the competent authorities (max. six weeks) and phase 3 (optional) for conciliation by the Conciliation Board in the Administrative Commission (max. six months).

Finally, one cannot talk about cooperation in the regulations without mentioning the EESSI project, which had already been thoroughly introduced. Perhaps worthy of additional mention is the Master Directory, accessible to the institutions and citizens. Looking at the various actors involved, one can easily see that the EESSI project is in itself a challenge in terms of cooperation. Cooperation is promoted through EESSI by setting up a common language (cf. SEDs), introducing efficiency pressure (speed is possible) and reducing errors. Cooperation costs time and money, since the diverse national systems will have to be aligned, which leads to complexity. Alongside the ever increasing number of national systems, there is also the linguistic problem. At any rate, one must keep in mind that although cooperation may imply huge costs, the costs of lack of cooperation are much higher. Trust between the Member States is a crucial element here.

One final question that can be asked in this regard is whether the high number of Court cases related to the coordination of social security should be related to the high interest of the citizens or to problems in the field of cooperation. One way of improving this situation could be to prevent citizens ending up before the ECJ by improving cooperation between the Member States. Quality indicators regarding cooperation, leading to a number of statistics (on response times, problem solving times, number of unsolved cases, etc) could be an option to qualify the cooperation aspects. The European Commission is trying to support cooperation efforts by sharing expertise in the trESS network (cf. European reports, national seminars, glossaries, database) or e.g. through the new financial instrument

in 2010 aimed at supporting initiatives or cooperation between institutions (exchanges, conferences, training, etc.) and information on citizen's rights (practical guides, etc.) by providing a subsidy of up to 80%. The idea here is to develop the "knowledge community" already mentioned. In conclusion, cooperation also requires expansion and articulation. In the framework of the Administrative Commission, we talk about EESSI, dialogue and conciliation, mutual assistance and statistics. But some cooperation lies outside the regulation framework, such as efforts related to the consequences of the crisis or the sustainability of pensions in the Social Protection Committee that should also foster cooperation within the regulation. These various aspects should be brought together. The exchange of expertise on some topics is very important in this context. The Directors of Social Security would be the perfect group in which this synergy between cooperation inside the regulations and cooperation outside the regulations could be articulated.

Example of Cooperation between Institutions

Mrs Hilde OLSEN, Director of the Directorate of Labour and Welfare of Norway, was asked to give an example of cooperation between social security institutions and the achievements reached this way. The Nordic countries have a long history of cross-border cooperation to resolve social security and labour market questions with focus on free movement of persons. This cooperation has a long history, including for political reasons due to similar cultural and linguistic backgrounds. When formal social security and labour market regulations were gradually implemented, the need for rules concerning cross-border movement arose. But we see that a comprehensive set of regulations gradually emerged, starting early in the last century. Cross-border cooperation accelerated in the years after WW II. The Nordic passport union and the free labour market were central elements, of course, which consequently presented an increasing need for enhanced coordination of social security benefits. The Nordic countries have had a long history of political and institutional cooperation before the EEA agreement entered into force in 1994 and EU regulations took over. These are now applied in cases of cross-border movement between the Nordic countries.

Based on the legal framework, a need for practical cooperation between the institutions arose. There is well-established and comprehensive cooperation, covering various levels and policy areas. There are regular meetings between the Directors-General and between the liaison bodies, such as the designated working groups devoted to respective benefits, a separate working group on ICT and electronic exchange, and a yearly Nordic Social Security Training Course for social security employees. This is the basis for a lively and useful informal network. If any problems in connection with a particular case arise, one knows whom to contact. You are informed of changes in the law in neighbouring countries, and it is easy to set up an ad hoc working group to assess a common challenge. Relatively extensive cooperation is needed to integrate cross-border regulations as a natural part of the total. The concept as such and the importance of preventing the loss

of rights for people who move between countries has to be understood and valued. To make this a reality, staff need to be familiar with the regulations, how they are supposed to be executed and how to cooperate with institutions in neighbouring countries as far as actual applications are concerned. Last but not least, consumers have to be informed both about their rights as well as the limitations of the regulations.

There are no formal evaluations of the effects of inter-institutional cooperation as such, but movement between the Nordic countries is relatively extensive. Labour market mobility is important, but mobility for educational or family reasons is quite common as well. From the Norwegian perspective, movement between Norway and Sweden is the most extensive, but during some periods and in some regions there has also been relatively considerable movement of labour between Norway and Denmark or Finland. The main driving factor is probably labour market conditions, but also the possibility of moving relatively easily across borders without losing social security rights motivates people to move to neighbouring countries. Due to well established and close cooperation between the institutions, people do not hesitate as much before deciding to cross the border. To maintain the confidence of the persons insured within the national systems, cooperation needs to be further developed. On the Nordic agenda in recent years, one key element has been improved information to the public. Various information projects aim to cover the need for information in certain regions or on specific topics. A Nordic Social Security Portal was established last year as a common initiative between the Nordic countries. It is operated cooperatively by the social security institutions. The gateway is directed at persons who move, take up work or study in another Nordic country. It provides guidance on the laws to which a person might be subject. It also provides information on how to find the right authority for the country in question. The number of visitors to this portal gives an indication of the need for easy available and updated information on the rights of people crossing borders.

The new coordination regulation requires improved cooperation between institutions in order to reach its aim of increasing mobility. To realise this ambition, information about social security rights must be facilitated. Smooth and correct handling of cases and applications through the correct interpretation and use of the regulation must be ensured. General cooperation between institutions on provisional decisions on applicable law and on non-active persons will be needed, thus reducing the need for appeals to the Conciliation Board.

Good cooperation is indispensable to implement EESSI, particularly for ICT development/testing between the Member States. The new regulation will affect all institutions in all countries. It will also change how institutions cooperate and to some degree the internal interactions within institutions. Established networks are important elements of enhanced cooperation. They are necessary to reach the objectives of the new regulation. At the same time they must be expanded to include new dimensions, and perhaps new institutions, in order to meet the requirements.

The Need for Cooperation between National Administrations

Chaired by Mr Herwig Verschueren, Professor, University of Antwerp, Belgium

Panel:

Mrs Mechthild Schenk, Expert International Law, Federal Agency for Employment, Germany

Mrs Ivonne Eijkhout, Legal Advisor, UWV, the Netherlands

Mrs Lena Malmberg, Deputy Director, Ministry of Health and Social Security, Sweden

Mrs Hilde Olsen, Director, Directorate of Labour and Welfare, Norway

The chairman, Professor Herwig VERSCHUEREN, kicked off this session by stating that good cooperation is obviously essential, since it is the fuel that makes the coordination machinery work. It is primarily there to serve the citizen and institutions should work proactively in this respect. Sincere cooperation is all about mutual trust between the institutions and they should maintain good relationships with each other. He presented the panellists and yielded the floor to the first speaker.

Mrs Mechthild SCHENK, German Federal Agency for Employment, gave her view on the need for cooperation between national administrations. She first stressed that cooperation is essential to make the coordination system work. Under the current, old framework, the need for more and better cooperation is certainly obvious. As an example of good practice, it should be mentioned that Germany has very recently worked together with Denmark to update reimbursement procedures and that a few e-mails and telephone calls were all it took to reach an agreement. However, there are also opposite examples, as one Member State in particular ('not Iceland', sic) has had extreme problems with reimbursement procedures and there are no answers to questions, let alone any flows of money. With another Member State there are problems contacting the liaison bodies, which ultimately affects the rights of insured persons, whom the German authorities referred to the SOLVIT network. The latter is a good safety net when there is no movement between the liaison bodies, although the ideal situation is of course that the bodies resolve these issues between themselves. Cooperation will become more important in the future considering the decisions to be made on the content of SEDs, which should lead – during the Transitional Period – to a perfect document to be exchanged electronically. The new rules also require close cooperation between the Member States in the case of placement, namely in the efforts to reintegrate people into the labour market. It is important that the export of unemployment benefits will be linked to the institution where the search is performed, which will have to provide feedback to the competent institution. This especially concerns Germany with its several neighbouring countries. Germany works closely with many Member States' liaison offices and local institutions. For certain benefits, the responsibilities and competencies in Germany are sometimes of

a complex nature, which sometimes endangers good cooperation with other countries. The lack of knowledge in local institutions can also be problematic. At any rate, it is certainly essential to know whom you can contact, what should be sent and to understand the response you receive. The future Master Directory will be a great help in this context. So, there is a great deal that can be sorted out between the Member States, but good and clear primary and secondary legislation is needed as a starting point. The major guidelines for the future should be laid down by the Administrative Commission and should not be sought in numerous bilateral agreements. Things like unemployment benefits for the self-employed or the comprehensive storing of insurance data are examples of such issues that still need to be resolved. Finally, it must be stressed that direct personal contacts with foreign colleagues in a common language always works best for cooperation.

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Mrs Ivonne EIJKHOUT, Legal Advisor at the Dutch UWV, explained how cooperation will look like in the near future in the field of invalidity pensions. Under Regulation 1408/71, Dutch invalidity pensions are A-type benefits, so the aggregation of periods is only needed when people have B-type systems in their 'labour histories'. Ninety percent of the caseload of the UWV concerns the neighbouring countries of Belgium and Germany, so the focus is on good communication with these countries. Belgium also has an A-type system (last insured in NL: NL pays the benefit; last insured in B: B pays the benefit; no matter how long the worker has worked in the other Member State), but Germany has a B-type system. Every two years there are major conferences with these partners to talk about the state of affairs and the challenges in the field, during which a great deal of important information is exchanged (e.g. changes in national law). There are very good relationships between the border region institutions, sometimes even with in-office visits of clerks. No major problems were expected with the introduction of 883/2004, since the only major change is that the Dutch invalidity pension will not be included in Annex VI and will be regarded as a B-type system for calculation of benefits. The same goes for Belgium. But given the experience of Belgium and The Netherlands with the German B-type system, no problems were expected. However, according to the transitional provisions of the regulation, the person concerned can ask for a recalculation of his benefits as of 1 May 2010 (Article 87). So, hypothetically every Belgian with an invalidity pension and a Dutch 'labour history' can request recalculation. Although a recalculation will probably prove not to be beneficial to the individual, a sort of preliminary calculation seems necessary to inform the client what to do or not do. Thus, all kinds of data should be requested from Belgian institutions about "Belgians unknown in the Dutch system" and Belgium will have the same problem with Dutch pensioners. Good communication between the institutions and with the clients will thus be crucial to good practical arrangements. This is a perfect example of how small changes in the rules can result in huge changes with respect to cooperation between national administrations.

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Two main challenges for cooperation were presented by Mrs Lena MALMBERG, Deputy Director of the Swedish Ministry of Health and Social Security. The first is to deal with the Transitional Period efficiently and the second is to develop the capacity to cooperate within Member States to solve conflicts. The main principles of the exchange of information and cooperation have already been mentioned several times. In Decision E1 the practical details are described: paper SEDs, e-mails and other sources of information will have to be dealt with. The administrations have tremendous responsibility here. Cooperation between the Member States starts at the national level, e.g. with respect to how incoming information is administered. Flexibility will be needed. Case managers will receive a great many questions. Old and new rules will be used. The national laws and the laws of neighbouring countries must be known, etc. The work of the staff must thus be facilitated, especially for front-line officers. Back-office experts are also essential. The second challenge lies in cooperating efficiently when conflicts arise. New provisions to deal with them are provided in the regulations. This will be difficult, but it also provides room to manoeuvre and an avenue towards constructive solutions. These skills should be developed hand-in-hand between all the Member States in a bottom-up process. The new Conciliation Board at the level of the Administrative Commission will also play a decisive role in this regard, but it should be hoped that this Board does not have to solve too many issues, since this should be done between the institutions with the better tools and skills provided in the new rules.

To start the discussion on cooperation between national administrations, Mrs H. OLSEN commented on the short presentations of the other panelists. She had the impression that the other countries have similar experiences as in the Nordic countries, with well-established cooperation networks between neighbouring countries. This means that there is a good basis for broader cooperation with all the Member States of the EU, which will be very useful to the implementation of the new rules. However there is still a lack of cooperation between non-neighbouring countries and a great need for broader information supply between the Member States and across the EU by linking up all national information now provided only on national websites in the national language. Mr D. COULTHARD interjected by saying that enhanced cooperation under the new system is very self-evident and obvious, since it will be vital to implement the changes under the new rules. However, it should be remembered that cooperation between the administrations already exists and works. There are two main reasons why cooperation problems are brought to the forefront and to a higher level. The first is because there is a high volume of cases and the second is because there are some bottlenecks in coordination. Then the cases rise up the ladder. In those cases, there is probably no real substitution for face-to-face contacts. However, one must also be modest and realistic, since a lot of (long-standing) problems in cooperation can be solved “at meetings”, but after a couple of weeks they reappear as easily as they were overcome. Finally, it is also clear that there is sometimes a lack of good communication within one Member State, for instance between the competent authority

and the institutions (cf. the distribution of a document like Decision E1). Mrs C. LINDQVIST-VIRTANEN added a good practice of cooperation for the smaller cases that are not always dealt with and remain “long-standing issues”. In the Audit Board, there was the possibility of organising small bilateral meetings, which could be used to speed up the resolution of small but annoying problems by sitting down for 15 minutes (e.g. by asking face-to-face for a bank account number for reimbursement).

Mrs M. SCHENK added that language is still a problem for good cooperation. English is usually not a problem, nor the language of a neighbouring country, but if the documents are in another unknown language, they must be translated by the institution. The time required for translation, sometimes two or three weeks, can cancel out all the speediness introduced by a system like EESSI, so this remains a major problem. A common language for dialogue and cooperation would be very practical. Professor D. PIETERS wanted to draw attention to the fact that better knowledge and understanding of the laws of other Member States may also contribute to better cooperation and coordination, since questions from other Member States are better understood when you know their system and its specifics. Mrs I. EIJKHOUT replied that her institution always tries to clarify a request for information by adding a little note in English with information on what the request is exactly about. Mrs H. OLSEN said that the Transitional Period can also be used to improve contacts with institutions in other Member States. A final interjection came from Dr J. SCHERES, who wanted to know whether the Nordic countries deal with the Transitional Period together or as separate countries. Mrs. H. OLSEN replied that there are individual projects and timetables, but the Nordic network will naturally be used for the implementation of the new rules and for the introduction of EESSI. Mrs L. MALMBERG answered that the Nordic Convention (2003) will be replaced by a new one to be adopted according to 883/2004. In this exercise, not as much attention will be given to the substantive provisions of the social security coordination, but rather to cooperation between the countries involved.

EU Coordination viewed by an outsider

The transition from the old framework of social security coordination to the new regulations was commented on by Professor Masahiko IWAMURA, University of Tokyo in Japan, as an outsider to the European Union with knowledge about the coordination system. He did not go into the legal analysis, but focused on his overall impressions. The speaker started his research on social security in Japan as almost the only one dealing with social security. In this research, he got acquainted with some international social security instruments, such as the ILO Conventions. In 1985, he heard for the first time about Regulation 1408/71 during a social security and social protection course in Lyon, France. That is why this regulation is closely linked to his first visit in Europe and brings back fond memories. In the second half of the 1990s he even went to visit the European Commission's Directorate-General of Employment and Social Affairs to interview them about the coordination of social security, as the first Japanese researcher with such a request. Social security coordination in the EU is very interesting to him for a variety of reasons. Social security is primarily a national issue. In the past, Japan did not even have bilateral agreements on social security. Secondly, the *Pinna* case before the ECJ was a very interesting case during his stay in Lyon, considering its consequences for the equal treatment principle in 1408/71.

The introduction of new regulations was necessary. Regulation 1408/71 has become very complex, due to its architecture, the insertion of case law and all the derogations and even derogations to derogations. All the modifications have made it very burdensome to read and understand. Regulation 883/2004 contains only 91 Articles, so it is much simpler to read and it will be easier to understand the standards and the rules of the coordination regime. The elaboration of the new text must have been very arduous, considering the diversity of social security systems in the EU Member States. The number of Member States has also greatly increased, compared to the situation in 1971. The coordination of the diverse systems of 27 states, with different social and economic conditions, is something wonderful for an outsider. The situation in Japan is totally different. The first bilateral agreement on old-age and invalidity pensions was made with Germany in 2000 after long and difficult negotiations. Nowadays, such agreements already exist with ten countries, seven of which are EU Member States: Germany, UK, Belgium, France, Austria, The Netherlands and the Czech Republic. Agreements have already been signed with Spain and Italy, and negotiations are in progress with Ireland. Preliminary negotiations have begun with Hungary, Sweden, Switzerland and Luxembourg. Japan has agreements with the non-EU states of the US, Canada and South Korea. Negotiations are ongoing with Brazil. These agreements are predominantly made with European countries and deal only with old-age and invalidity

pensions. The coordination with non-European countries is much more difficult and coordination of all branches of social security is not foreseeable for Japan. This would be hardly imaginable in East Asia and Southeast Asia. There is an agreement between Japan and South Korea, which has a comparable and expansive social security system. However, this is not the case for other East Asian and Southeast Asian countries, including China. They do not have comparable systems and their currency is much weaker, so there is no interest from the Japanese side. Moreover, Japanese policy is very restrictive concerning economic migration from other Asian countries, since the government fears a massive inflow. So, the European situation is very different: the Member States have diverse but comparable and expansive systems, free movement of EU citizens is encouraged even from poorer to richer countries and, finally, the European coordination rules have accumulated 50 years of experience in this subject. The EU has a strong will to eliminate obstacles to freedom of movement of European citizens that might stem from national social security systems, which is why the EU has not only been coordinating old-age and invalidity benefits but has established an overall coordination regime for all branches of social security.

In conclusion, from the perspective of a Japanese researcher, the coordination of social security systems is a wonderful system. It is something that would be difficult to envisage in Japan and its neighbouring countries. In the near future, there will be a modernised and simplified system. For foreign researchers, this is a great opportunity as it will be a wonderful tool towards better understanding of the mechanisms of coordination at the European level. All those who have cooperated in its making should be congratulated on this endeavour.

FINAL SESSION: Future Challenges and Conclusions of the Conference

Challenges for the Future from a Member State's Perspective

Since Spain will take over the EU Presidency from Sweden in January 2010, Mr. Fidel FERRERAS ALONSO, Director General of the Spanish National Institute of Social Security (INSS), was invited to take the floor to inform the audience about the plans for the future. He used his time to summarise the basic principles of social security coordination. First of all, the free movement of persons is one of the pillars on which the EU is built. The vision of social security coordination is to prevent workers from losing out on social security rights due to movement. The legal instruments to reach this objective are coordinating national social security laws to the dynamics of which they have to be adapted. These instruments are often criticised as too long and too complex, but it should not be forgotten that, despite the concept of a 'European social model', extremely diverse national laws must be coordinated. This is why these instruments are also considered one of the most perfect tools ever developed by the European Commission. All the coordination instruments are the cornerstone on which national laws should be built. The territorial enlargement of the coordination with the EFTA countries and the various enlargements of the EU have also made the task of coordination more difficult. But enlargement was not the only influential factor; expansion of the personal scope was crucial. Regulation 883/2004 will probably come into force during the Spanish EU Presidency in May 2010, which makes one think back to the resumption of negotiations on this instrument during the Spanish EU Presidency in 2002.

The new regulations have a dual objective. First of all, simplification and consolidation of coordination standards to make them clearer and more accessible. The basic principles had to be strengthened and underlined, as there has never been a need to change them. For example, the personal scope has been extended to all EU citizens ever insured in one of the Member States. As to the material scope, the situation is more difficult and must be understood from the national standpoint on developments in national laws stemming from the social, cultural and historical backgrounds of the Member States. The coordination of new benefits is not easy and is often criticised. However, even if they are developed within the national context, new social security benefits should be included in the scope of the coordination regime, as is the case now with paternity benefits and pre-retirement benefits. The latter are a result of policy failures in the 1960s and 1970s, of

which we are now bearing the consequences when confronted with the current demographic situation. But they exist and they need to be coordinated to the benefit of the movement of these “young retirees”. Long-term care benefits are a similar recent issue in the field of coordination, something that in the past no one thought would ever exist. It is the inevitable consequence of the demographic trend in the Member States and these also need to be coordinated, even though they are very difficult to define. Cash long-term care benefits should certainly be exportable. In several countries, including Spain, there is a tendency to qualify benefits differently than how they are in reality. However the ECJ has ruled that the decisive issue is not classification or definition, but the content and purpose of the benefit for its qualification on the EU level. As to the general principles of coordination, equal treatment was and is a cornerstone of the EU. According to the ECJ, it does not matter where you contributed to the system, but how much you contributed and for how long. In the new regulation, this is taken one step further with the assimilation of benefits, facts and events. But this cannot interfere with the aggregation of periods nor with the determination of applicable law and it cannot lead to results which are not justifiable. At any rate, it is an extension of the ‘fairness principle’, which is crucial in the system. With regard to the export of benefits, special non-contributory benefits are a difficult topic. As labour costs are not only borne by employers, some Member States are transferring portions of the labour costs to the general taxation system. Spain believes it should be a coordination principle that funding should determine whether a benefit is exportable or not. In particular, if benefits are exclusively funded through state collected taxes, they should not be exported. But there is a risk that states would always try to qualify benefits as social assistance benefits. However, the list of non-exportable benefits has constantly been reduced.

In conclusion, new rules demand new coordination principles and they require good cooperation between the Member States. Coordination will fail if there is a lack of good cooperation. We cannot transfer this responsibility to other institutions who are not the competent institutions paying the benefits. The new regulation may not be the ideal instrument, but it is certainly the best result that could be achieved for coordinating 31 national systems. This coordination regime is unique and required hard work. We should not be too modest about it, as the national institutions in the EU are very experienced. This experience will be very useful when implementing the new rules in 2010. It should finally be mentioned that on 15th and 16th of February 2010, a Spanish Presidency event will be dedicated to this topic, funded by the Spanish government and the EU.

View of the Social Partners

The outlook on the future of social security coordination from the perspective of the trade unions was presented by Mrs Claude DENAGTERGAL, Advisor at the European Trade Union Confederation. She wanted to emphasise some basic principles that are crucial for the unions. Amongst the other freedoms of movement, the freedom of workers is unfortunately still confronted with a number of obstacles in the field of labour conditions, social

security and taxes. Frontier workers in particular are still confronted with numerous problems in these areas. Apparently, cooperation will be improved, but this remains an area of concern. The unions are concerned about the fact that the European Commission combines talk about promoting mobility with talk about flexicurity. The main concern should be that workers are fairly treated as far as labour law is concerned, but they should also benefit from social security coordination and bilateral agreements on taxes. Mobility should be secure and ensure the rights of workers and their families. In the field of social security, we can say we have come a very long way and we have a unique system, even at the global level. This is certainly one of the pillars of the European Social Model. This brings us forward, despite globalisation, ageing problems, privatisation, etc. We should be very proud of this but should also continue fighting for the solidarity character of the national systems. The unions were involved in the SLIM process on the former Regulation 1408/71. Two points should be touched upon. One of the issues is that existing rights have been made more effective. This is necessary as in some cases, existing rights have not yet become reality. In the economic crisis we are facing, Member States are leaning towards protectionism again. In this area, access to existing rights is very important. Another essential point is effective cooperation and good and accessible information to citizens when they want to move within the EU. Here, it should be remembered that not everybody has internet access yet, whether due to financial resources or mentality. Administrations thus have a key role to play in informing citizens and front-line workers should be prepared. The trade unions, representing 16 million EU and non-EU workers, must be included in this information process. But current efforts must also be continued and new strong networks and direct contacts must be established. Looking ahead, several challenges can be highlighted. New forms of work (e.g. teleworking) and mobility and the variety of atypical workers/contracts will press the need for adaptation of the rules. Luckily, the Commission is working on this. Besides this, the rights of third country nationals should be taken into account and political will should be generated to continue the efforts to arrive at solutions in order to share the advantages of the EU and not remain a fortress.

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Mrs Louise VAN EMBDEN ANDRES, Chair of Business Europe's Social Protection Working Group, gave a clear presentation on the employer's perspective on the future of coordination. European business has always been a great supporter of European cross-border mobility for the working population, since it is one of the cornerstones of the internal market in the European Union and because geographical and professional mobility are key elements for the right allocation of workers. However, the level of mobility is still too low in the view of the employers. In this regard, European employers welcome the finalisation of the modernisation process of coordination of social security in the European Union. But the process of reform has not ended yet and there are still several challenges for the future, of which three should be emphasised. A first challenge is the difficulties that could be caused by the introduction of the new rules for the international

transport sector (transport of goods or persons by road, rail, air or inland water). It often happens in this sector that workers live in a Member State other than the one where the company is established. The competent Member State then depends on the routes, lanes or flights the worker is following and since routing schedules can change, applicable law will change along with them. This is not in the best interests of the worker or the employer. This regular change of legislation will cause a ‘yo-yo effect’, under which the applicable law will change according to the routes. One possible consequence could be that the workers concerned would refuse other routing schedules to avoid the negative effects of the changes in applicable law, which would be an unworkable situation for employers. A good solution should be found here. A second challenge is the new forms of work and the diversity of locations where work is performed (cf. trade representatives, engineers, consultants, etc.). These forms of work could also be constrained by the new rules and specifically by the introduction of the concept of “substantial part of the activities”, the benchmark for the application of the law of the Member State of residence of the worker or the Member State where the employer is established. The threshold of 25% has been introduced and is understandable, but some flexibility will be necessary to prevent a similar ‘yo-yo effect’ for flexible workers. A final challenge is the need to reduce the administrative burden on companies. Preventing the previously mentioned ‘yo-yo effects’ is already one thing, but companies could also profit from the electronic exchange of data that will be set up. This will accelerate the processes and lighten the administrative burden for employers.

Summary of Three Days of Conference

Professor Yves JORENS, Ghent University, was tasked with summarising all the interesting speeches, interjections and sessions in less than half an hour. The past, present and future were covered during the conference. We are somewhere at an important moment. Indeed, we are celebrating an important event here in Stockholm, the final adoption of one of the most important European instruments. Fifty years have passed since the initial instrument of coordination, Regulation 3/58, entered into force. And as many speakers have said, the wonderful city of Stockholm plays an important role. In 1996, we celebrated the 25th anniversary of the regulations here. It was at that conference that the limits of the regulations were discussed and the need for reform was stressed. Now, 13 years later, we are celebrating the 50th anniversary of this regulation, but more importantly, the birth of a new instrument. We have new regulations and new numbers to memorise. Everybody was waiting, almost as eagerly as children, to find out the new number of the Implementing Regulation: 987, an easy number to remember. Are 883 and 987 also going to be numbers as important as 1408/71? For the big family of “1408-people” but also for other people, it may be difficult to remove this number from mind and get used to the new number 883. Although some of us might be happy, knowing that 1408 is also a dangerous number, the title of a horror movie based on the novel of the famous American writer, Stephen King. Let us hope that 883 is not to become a horror movie either. If one googles to find out something particular on 883, one

finds no traces. But you should be aware of the fantastic definition that can be found on Wikipedia: “883 is the natural number following 882 and preceding 884”. Moreover, Wikipedia also teaches us that we already have our first 883 follower, a true fan of the regulation: the American actress Penelope Cruz, who is said to have the number tattooed on her right ankle, because of her belief in numerology. The number 987 is even less popular, except for the French with a new period of history (King Hugo Capet) or in the German version, where it refers to the model number of a sports car. Let us see whether it will drive as fast as that car.

The opening speeches by Mr Vignon, Mr Vandenbroucke and Mrs Lambert have shown how difficult it was to come to agreement and how important the close collaboration between the three institutional partners, the European Commission, the European Parliament and the Council was. More than 10 years have passed between the proposal of the Commission and the adoption of the final texts. Under national law, one would not be happy about such a period. And, as Mr Vandenbroucke has made clear, if there had not been a sudden switch of methodology and approach, away from the technocrats, we might still be faced with the same regulations. This should perhaps be also seen as a warning and an important lesson can be drawn from this experience, with respect to the actual pending issues on the regulation, such as the extension to third country nationals or other forthcoming changes. History repeats itself.

The regulation is proof of the concrete influence of a fundamental instrument on all of our day-to-day lives. Indeed, the coordination might have been established as a tool to help the 50,000 social security institutions all over Europe to coordinate the different social security systems. In that respect, it is only a tool, as Mrs Lender said, and not an aim in itself. However, it is not the social security institutions or the Member States that are the primary addressees of the regulations, but European citizens. They are the focal point of the entire framework. The regulation is a translation and the expression of the desire to protect European citizens and encourage their mobility. I think we all share the feeling that this coordination regulation is indeed an effective instrument and plays an important role in realising the aim of free movement in contributing to the development of the concept and the reality of European citizenship. The regulations provide a fundamental contribution in the realisation of free movement. It is difficult to imagine the Union without movement. As the Minister Mrs Husmark Pehrsson pointed out, access to social security is essential in the choice to take up work and residence or work in another Member State. Mr Fisher also called attention to these issues and made it very clear that this is exactly what Europe is about for most of us. In a European survey it was asked what the European Union personally means to citizens. Forty percent of the people mentioned freedom of movement; six million people working in another Member State; one million frontier workers; 1.6 million people over 65 residing in other Member States; 40,000 unemployed people looking for work abroad and 1.8 million people who seek medical attention in other Member States are convincing figures.

So, there is no legislation closer to the everyday needs of people than the regulation. But there is perhaps no legislation equally complex either, or in such constant need of interpretation. As Mr Vignon pointed out, this regulation is the closest to the citizen but also generates most of the complaints sent to the EC. So there was a momentum to modernise and simplify. These are two antagonistic words. What were the reasons for this modernisation and simplification? The number of Member States doubled, we got new types of benefits, we had an extended personal scope, we had Directive 1996/71 on posted workers and we have the existence of new types of migration. Several speakers have shed light on the improvements of these new regulations. As H Michard emphasised, the new regulatory framework has five overarching features: modernisation, simplification, clarification, flexibility and improved protection of citizens' rights. Modernised coordination is not so much about creating new rights, but rather about making existing rights more effective. What is more, we do not limit ourselves to meeting citizens' demands, we also provide the institutions with the tools to implement those rights. Focus is on enhanced cooperation, with provisions for structured dialogue and conciliation processes.

However, Danny Pieters pointed out that emphasis is perhaps more on modernisation than simplification and that the initial "cautiously ambitious" ideas have been translated in a very cautious regulation framework, where simplification is far away. Have these ambitions really been realised? It seems to be that from time to time simplification has been sacrificed on the altar of unanimity and has led to the situation where deviating provisions and bilateral agreements have become accepted. So one could conclude that there is a lot one can be proud of and grateful for, but that there is still a lot to do. It is a work in progress, as Professor Pieters pointed out. The regulations introduced important changes and, as always, changes bring uncertainties. Different sessions have indicated some of these important challenges: the spread of information, the outstanding interpretation problems, the importance of the electronic exchange of data and administrative cooperation.

One of the main challenges will indeed be the diffusion of information to the citizens. There are new rules, and it is necessary to vitalise the rights, that is, to make them real and make sure that citizens know their rights. Information to citizens is of enormous importance because, without if they are not informed, people are likely to lose rights. Several questions arise. How do we find "the migrant worker"? This is a very difficult task, as we must not forget that it is up to the administration to find them and it is not migrant workers who will come to their office. General information sometimes has difficulties reaching its destination, especially because migrant workers often do not know that they belong to the target group. But who are these migrant workers? They are complex group. Certain members of the panel and the audience indicated the difficulties of defining this group. For the trade unions, mobile workers have three main questions: What are my rights with regard to wages and working conditions? Where do I pay taxes? What are my social security rights and where do I pay my contributions? For students, housing is the main issue. For employers, costs are paramount. The Ericsson company indicated that the average cost of dealing with the

social security affairs of a mobile worker is 1,500 euros. The example was given that employee nationals of certain Member States refuse to leave the (pension) system of their Member State of origin. In this case, employers are obliged to supplement that with private insurance. In a session of a working group in the Administrative Commission, one even saw that for certain employers this implies something very like ‘à la tête du client’ treatment, where the rules of the regulation are not always followed. For employers, improved administration is crucial and a single website for requests, approvals and monitoring online would be very useful. The difference of interests between the various groups also shows us that general information alone does not help and that is better to organise targeted campaigns. We must connect with the people who need it. But how do we do this and who must do it? Giving information is everyone’s responsibility, not only that of the European Commission but also the Member States and all other groups that deal with migrant workers: trade unions, employers, EURES, etc, as well as the trESS-network with its annual seminars in every Member State. Several ideas were launched, such as adaptation of the information on the website, of the guides in the national languages, a public awareness campaign/posters in airports and railway stations, and an orientation at university, which could be a good solution for students. The importance of contact points was also stressed. It should be concluded that there is a need for continuous and targeted diffusion of information and for contact points.

After this, we analysed the legal problems that the administrations can expect upon application of the new regulations. It is remarkable, and to some extent frightening, how much legal ambiguity still remains. The different reports from the thematic seminars mentioned a litany of articles and rules, about which there is still uncertainty. If one believes that the new regulation will finally bring clarity, one is on the wrong track. Even the mere introduction of a definition under the new regulation, could lead to interpretation problems. These problems are not always consequence of the new rules. From the contribution of B. Spiegel, for instance, it appeared that even very old basic principles such as the aggregation of insurance periods are still cause for debate. One might ask to what extent the new regulation provides solutions to the problems we are familiar with from Regulation 1408/71. Other problems result – as with sickness benefits for instance – from the fact that medical concepts are included in a legal text and get a “legal translation”. However, the last report revealed another danger: the fact that other legal instruments also create rules for coordination. Such development is the more dangerous of the two, if these different instruments are not coordinated with each other. Different speakers mentioned that one must regard the regulations as the first natural instrument for coordination. A typical example is the expected adoption of the Health Services Directive, which could lead to a three-track policy (regulation, directive and treaty), to which citizens could appeal for entitlement to benefits. Above all, where these are not coordinated with each other, one could expect many legal problems. Another example is the proposal for a directive on the transportability of supplemental pensions. Subsequently, one might ask how one will solve these concrete problems of interpretation. Is there a “work plan” and who will take charge? The Commission or the Administrative Commission?

In this regard, one could once again underline the importance of organising seminars attended by people working with the application of the regulation on a daily basis. In so doing, people will better understand the interpretation problems and the social security institutions will be involved (the Administrative Commission consists only of representatives of the Member States) in order to interpret concrete cases, but they will also get to know their direct colleagues. Problems are often solved on a bilateral level through direct contacts. A “who’s who” guide or a telephone booklet with contact persons could be useful. The various and pleasant social activities organised at this conference in the last few days have also contributed to it and we should be also grateful to the organisers. But although bilateral cooperation is crucial, the principle of legal certainty and the avoidance of situations in which Member States would bilaterally solve the problems differently, make it necessary to direct attention to interpretative rules at the right level. Within the Administrative Commission, a list with terms that require clarification is being drafted. This method has another advantage, which is to be the first decision-maker. One could imagine a continuous race... Will lawmakers succeed at taking the first initiative? Or will the ECJ win the race, with possibly unwanted consequences?

The European judge, Mr Van Raepenbusch, has shown us that ECJ case law on social security coordination is extremely expansive and includes well over 500 preliminary rulings, making the coordination regulations arguably the most “successful” or most contentious piece of Community legislation. These cases are the result of a dialogue between national judges and the Court of Justice. The role of national judges cannot be overestimated. It is they who supply the Court with references for preliminary rulings. The European Court of Justice has indeed been in the driver’s seat when it comes to the development of the social security coordination acquis. For the past 40 years, it has consistently interpreted the regulations’ provisions in a dynamic and constructive way. The ECJ has clearly favoured a teleological interpretation, always taking into account the objectives of the regulations and their rationale – which ultimately is to foster the free movement of persons. This role is today perhaps even strengthened as the Court, by relying increasingly on the general “constitutional” principles of the Treaty (free movement of workers, services... and European citizenship), is not only making it clear that the regulation is no longer the only instrument that deals with the social security situation of migrant workers, but also calling into question some of the political options of this regulation. This is an important issue one should pay particular attention to. One of the difficulties the regulations will be confronted with is how to translate and incorporate the interpretations and advances in case law into this regulation. This is an important but arduous task, since it is a matter of making rights accessible to European citizens. In that respect, European law must not forget that precisely the free movement of person as interpreted by the Court of Justice does not provide a wide variety of options; on the contrary, it provides rather limited scope for working out the coordination framework.

The electronic exchange of information was discussed. Introduced in the Basic Regulation and further elaborated in the Implementing Regulation, the electronic exchange forms one of the major innovations of the new coordi-

nation framework and was an opportunity to step into the 21st century that could not be missed in this reform process. The goal of the EESSI system is clear: it should enhance cooperation between the Member States and greater transparency, greater efficiency, and greater accuracy should make the exchange system work better and faster, to the benefit of the institutions involved and ultimately to the benefit of citizens. The two main actors in this titanic reform are the Member States, working on the national level, and the EU, working on the international level. Both parties still have a lot of work ahead of them and will have to be constantly in communication with each other. Whilst the Member States are responsible for preparing everything on the national level by making sure that their architecture is built and integrated in an adequate way to store their information and lead it to the national access points, the EC is responsible for the motorways to deliver the information to the right place. But behind this rather metaphorical picture of the responsibilities, a lot of legal discussions (for example, about data protection, which is a very sensitive issue for all Member States) as well as administrative discussions (for example, on resource budgeting and choosing the level of integration) and technical discussions (concerning, for example, decisions on national architecture) must be held and a great deal of training and testing must be organised. The time is short given the amount of work still to be done and so the agreed Transitional Period until 2012 was warmly welcomed. During this period, flexibility and pragmatism will be the key attitudes for the national authorities, since they will be confronted with different sorts of information flows, such as E-forms, paper SEDs and, here and there, the first real electronic flows. Good contacts between the competent national institutions will be vital to success and are needed to protect the rights of citizens. It should also be taken into account that people who will have to work with this regime in the future are only very recently becoming informed about it and careful management during the Transitional Period will be indispensable. However, the end results look promising. Alongside the final outcome of full electronic exchange of information, very useful and innovative services seem to be accompanying the introduction of the new system, whose Master Directory will be accessible to citizens in a Google-like way, which is a perfect example. Naturally, it remains to be seen how everything will work in practice and it seems that, although the option of “phasing-in when prepared” was chosen, there might be a Big Bang after all, at the end of April 2012. Every speaker agreed that there is still a huge amount of work to be done at all levels, but they also agreed on the fact that it is certain that the new system will be very beneficial for the coordination regime when everything is up and running.

Administrative cooperation is another issue. As Mr Morin put it, cooperation is the missing link between the national level and the European level. The objective of this cooperation is more than just a tool for facilitating smooth administrative cooperation, but has a higher aim, that of guaranteeing rights and appropriate services to citizens. All the actors, national administrations, European institutions and citizens, should work together in an atmosphere of mutual trust. In that respect, the important and strengthened role of the Administrative Commission and the Conciliation Board was emphasised. And although this cooperation might further imply huge costs, one must not forget that the costs of non-coordination are also considerable.

Mr Morin also stressed the important support that the EC is planning to give in that respect during the next year. The opportunities of this cooperation were stressed. International coordination requires good national coordination, which can be a major challenge, especially in strongly decentralised countries. It also implies good communication between all institutions. The bilateral meetings already emphasised the day before were confirmed as an important method, not least in order to bring case managers together. But cooking costs money. National institutions therefore welcome the anticipated initiatives from the Commission.

We have emphasised the important role the regulations are currently playing in achieving the fundamental objective of realising the free movement of persons, while still respecting the diversity and specificity of Member States' various systems. A huge task is still expected from all of us. It has been mentioned that there is still a lot of work to be done and that rights now have to be realised, that empty boxes have to be ticked. Only then the sapling grows into a large tree heavy with red fruit. However, ladies and gentlemen, there is one warning. There is risk that people will relax the moment these boxes are ticked and believe their work is done. On the contrary, lawyers always know that there is one problem with law: reality is always faster than the law and we cannot ignore that many more challenges lie ahead (activation, coordination with other EU instruments, etc.). Thus, this entirely new form of the coordination framework should not be considered even a temporary culmination. It remains essential that the coordination rules keep pace with the evolving legal and social contexts in which they are operating and that the process of modernisation and simplification is advanced. Many more challenges lie ahead of us, and only if we keep that in mind can the European coordination regulations further play their role in forthcoming decades as one of the most important instruments of European integration and the glue that holds European citizens together on their journey towards an ever closer social union. Perhaps this is the topic for a next conference in Stockholm.

Challenges for the Future from the Commission's Perspective

Mr Vladimír SPIDLA, European Commissioner for Employment, Social Affairs and Equal Opportunities, explained the Commission's view on the future of the coordination of social security by means of a video message. The modernisation of social security coordination is a crucial step, on which President Barroso has put great emphasis when presenting the future challenges for the next EU Commission. Rights of citizens cannot remain virtual, but must become reality as they are central to the European project. Besides this, we should be proud of the pioneering efforts that we have made the past 50 years. This system has always been able to adapt to the needs of citizens and this process continues. The Commission will stand by the side of the Member State for the implementation of the new regulations. It has launched several initiatives concerning citizens and social security institutions: a new website, the organisation of thematic seminars and the creation of a new financial instrument to finance information initiatives and

the establishment of EESSI. This will result in faster provision of benefits to citizens and easier exchange of information amongst national administrations. But the story will not end on 1 May 2010. The challenges linked to mobility and the form it takes are both continuously evolving. The adjustment of the coordination regime is indispensable, especially during the difficult period we are experiencing. In this regard, the Commission will publish in 2010 a Communication on new forms of mobility, since all citizens must be able to live and work freely within the EU. We can be confident that the current efforts will ensure that the challenges of coordination will be dealt with efficiently.

Closing of the Conference

Some final remarks were made on behalf of the Swedish EU Presidency by Mrs. Bettina KASHEFI, Swedish State Secretary to the Minister for Social Security. Implementation of the regulations is essential to the free movement of persons and a key issue for realising the EU internal market. The efforts being made are convincing enough to believe that they will be an actual improvement for people moving in the EU. Key persons at various levels have contributed to this conference and everyone involved should be thanked and congratulated. We heard the views of national experts, EU outsiders, social partners and the academic world. Special thanks should go to Professor Iwamura for broadening our perspective with an analysis from the outside. This conference has shown that our work has only just begun. There are several questions and challenges ahead, but we will find common solutions as the work continues. It will continue for all stakeholders and not least for politicians, since they have to keep the ball rolling to the benefit of migrant citizens in the EU. The modernisation and simplification of the coordination of social security for third country nationals is a matter of great importance. Academics and social partners should follow the process and should put pressure on and assist the politicians to continue improving the system in favour of citizens. This conference, along with the earlier thematic seminars, is the beginning of enhanced cooperation between the Member States in a modernised way. Valuable contacts and important networks have been established during the preparatory work and they should be used. Hopefully, this conference and its conclusions will help national administrations with their questions and tasks. The Swedish Presidency has one month of intense work left to do before the Spanish Presidency takes over. We can be confident that the work will continue and we wish our Spanish colleagues all the best with it. Finally, special thanks should be given to the Swedish Social Insurance Agency for the superb organisation of this conference, as well as to the European Commission for their fine support and cooperation.

The closing remarks were spoken by Mrs Birgitta MÅLSÄTER, Director of the Department of Insurance Processes of the Swedish Social Insurance Agency. This is the end of a conference that has touched upon a wide range of aspects with regard to the new regulations: the legislative framework, the administrative and technical developments and the need for good information and cooperation. We have heard the views of academics, the ECJ, social partners, etc. We have also discussed future challenges, of which the legal framework is certainly a good example of an ongoing process in that respect. Personally, the speaker is a bit troubled about the Transitional Period which will put great pressure on national administrations. The main principles during this period will, according to the Administrative Commission, be good cooperation, pragmatism and flexibility. Good cooperation is always important, no matter the strength of legislative or technical tools. So, hopefully this conference has also been a good platform for establishing

new and valuable contacts that can be useful in the future. We can see a constant rise in the number of people moving within the EU, especially young people. This increase will call for greater administrative efficiency, in which EESSI should play an important role. It is hoped that it will be up and running by May 2012. As pointed out, good information to citizens is an important responsibility for the institutions. It has tremendous value, since knowledge about rights when moving can reduce the risk of misunderstandings between citizens and institutions and the administrative burden on all concerned. The speaker thanked all the participants for their contributions and the discussions. She also expressed her gratitude to the European Commission and the Swedish Ministry of Health and Social Affairs. Special thanks were also given to Cathy SMITH, the superb moderator, and Nina BJÖRESTEN, the excellent coordinator for the conference organisation, and to interpreters, technical staff and everyone else who contributed to the outcomes of the conference. The conference was declared closed.

Mrs Cathy SMITH reminded the audience that all information related to the conference will be made available later on and participants will be sent links the relevant documentation by e-mail.