



The Internal, Systemic and Constitutional Integrity of EU Regulation 883/2004 on the Coordination of Social Security Systems: Lessons from a Scandal

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Abstract

The Norwegian social security scandal concerns the right to export sickness benefits pursuant to EU Regulation 883/2004 on the Coordination of Social Security Systems. The Regulation is binding in Norway due to its membership in the EEA Agreement. Nonetheless, the Regulation has been largely disregarded in that country, and thousands of social security claims have been rejected, as Norway's Social Security Act requires continued presence in Norway to retain payable benefits. In this context, some hundred individuals have been sentenced to prison for welfare fraud because they stayed in another EU/EEA State and exported cash benefits in the absence of a prior authorisation from Norwegian authorities.

Yet, legal uncertainty seems to remain, and the exact scope of the scandal is still unclear. The paper discusses the reach and depth of the rights afforded by Regulation 883/2004. It argues that the Regulation's main rules on equal treatment (Articles 4 and 5) and the main rule on free movement (Article 7) provide an unconditional right to export sickness benefits in cash. It also provides an account of the internal, systemic, and constitutional integrity of the Regulation, and the equilibrium between coordination and harmonisation.

Keywords

Coherence, EEA Agreement, exportability, NAV scandal, Regulation 883/2004, social security

1. Introduction and Outline

The Norwegian social security scandal is arguably one of the biggest European law scandals to date.¹ The legal question is simple: do recipients of sickness benefits in cash have a general and unconditional right to free and unrestricted movement within the whole of the European Union (EU)/European Economic Area (EEA)? According to Norwegian statute,² the answer is in the negative. Norway's Social Security Act imposes a condition of continued presence in Norway to retain the benefits.³ The requirement of presence is the basis of a

1. The report of the Expert Commission that was appointed by the Government to investigate the scandal includes a brief summary in English. See *Blindsonen: Gransking av feilpraktiseringen av folketrygdlovens oppholdskrav ved reiser i EØS-området* (NOU 2020: 9) 26–29.

2. Sections 8–9, 9–4 and 11–3 of the Social Security Act ('Folketrygdloven', Lov-1997-02-28-19).

3. On the distinction between requirements of 'past presence' and 'continued presence', see Case C-503/09, *Lucy Stewart*, judgment of 21 July 2011 (ECLI:EU:C:2011:500) para 63.

system of prior authorisation. Recipients who want to travel and, as a necessary corollary, take benefits with them, must apply to the competent authorities in advance, and acquire permission to stay abroad. Permission may be granted if certain criteria are met, provided that the stay abroad is of a 'limited duration'. Stays abroad that exceed the 'limited duration' threshold are prohibited and cannot be authorised.⁴

The conditions have been rigorously applied and, as elaborated below, they are still defended as good law. In a letter of 11 June 2020, the Norwegian Government argues that a requirement of presence and a system of prior authorisation for stays abroad are in conformity with EU Regulation 883/2004 on the coordination of social security systems.⁵ The Government disputes that Norway has failed to fulfil its obligations pursuant to the EEA Agreement by maintaining in force the above-mentioned restrictive national law provisions, and claims that the measures are justified, necessary and proportionate.⁶ The EFTA Court is expected to deliver its ruling on the matter in the first half of 2021.⁷ Until then, the exact scope of the scandal will remain unclear, and perhaps even after. Regulation 883/2004 applies in the framework of the EEA Agreement as within the EU.⁸ Until or unless the European Court of Justice (ECJ) has the occasion to rule on the legal issues underpinning the scandal, they will probably continue to be disputed and controversial in Norway.

The rules laid down in Article 7 of Regulation 883/2004 are crucial to understand the occurrence of the scandal and its scope. The Article applies the fundamental right to free movement within the field of social security. It is often referred to as the principle of exportability,⁹ and has been described as 'one of the cornerstones of the co-ordination system'.¹⁰ The provision reads:

Waiving of residence rules

Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his/her family reside in a Member State other than that in which the institution responsible for providing benefits is situated.

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4. The Social Security Act § 9-4 defines 'limited duration' as eight weeks maximum within a 12-month period.
 5. Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166/1.
 6. See Letter from the Norwegian Ministry of Labour and Social Affairs to the EFTA Surveillance Authority, 11 June 2020, paras 15 and 35 in particular <<https://www.regjeringen.no/globalassets/departementene/asd/dokumenter/2020/svar--esa--own-initiative-case-against-norway-concerning-the-exportability-of-norwegian-cash-benefits.pdf>>.
 7. See also Request for an Advisory Opinion from the EFTA Court by Norges Høyesterett dated 30 June 2020 in criminal proceedings against N (Case E-8/20) <<https://eftacourt.int/download/8-20-notification/?wpdmdl=6691>>.
 8. Cf Case C-431/11, *UK v Council* (ECLI:EU:C:2013:589) para 58: 'nationals of the EEA States concerned benefit from the free movement of persons under the same social conditions as EU citizens'. See also Frans Pennings, *European Social Security Law* (6th ed, Intersentia 2015) 29–30. On the EEA Agreement, see eg Halvard Haukeland Fredriksen and Christian Franklin, 'Of Pragmatism and Principles: The EEA Agreement 20 Years On' (2015) 52(3) *Common Market Law Review* 629–684; Tarjei Bekkedal, 'Third State Participation in EU Agencies: Exploring the EEA Precedent' (2019) 56(2) *Common Market Law Review* 381–416.
 9. Cf eg European Parliament, *Social Security Cover in Other EU Member States* (Fact Sheets on the European Union 2020); Yves Jorens and Filip Van Overmeieren, 'General Principles of Coordination in Regulation 883/2004' (2009) 11(1–2) *European Journal of Social Security* 47–79.
 10. Vicki Paskalia, 'Co-ordination of Social Security in the European Union: An Overview of Recent Case Law' (2009) 46(4) *Common Market Law Review* 1177, 1197–1198.

While cross-border benefit portability has been acknowledged by Norwegian authorities, Article 7 has been interpreted narrowly and antithetically, in a literal and formal manner. By reference to the heading of the provision, read in conjunction with the formal definitions in Article 1, the principle has been applied only to those who permanently move from Norway to another EU/EEA State and change their place of ‘habitual residence’. Article 1(j) and (k) stipulate:

(j) ‘residence’ means the place where a person habitually resides;

(k) ‘stay’ means temporary residence;

Building on the definition of ‘stay’ in Article 1(k), Article 7 has been regarded as inapplicable to individuals that merely ‘stay’ abroad. The argument seems simple: while residence requirements are prohibited, ‘stay’ is not the same as ‘residence’.¹¹ The condition of presence and the requirement of prior authorisation have been applied to those who, according to this narrow interpretation of Article 7, are outside its reach. This is the reason why the scandal only concerns recipients that have stayed abroad temporarily, for instance for holidays.

While the antithetical interpretation of the main rule in Article 7, read in conjunction with Article 1(j) and (k), could indicate that the main principle does not cover individuals that merely ‘stay’ abroad, Article 21(1) provides the opposite. The first sentence of this provision places ‘residence’ and ‘stay’ on an equal footing:

An insured person and members of his/her family residing or staying in a Member State other than the competent Member State shall be entitled to cash benefits provided by the competent institution in accordance with the legislation it applies.

It is at this point that confusion sets in. To solve the Gordian knot, the Government has resorted to a seemingly constitutional interpretation of Regulation 883/2004. In its view, Article 21 must be interpreted by reference to EU primary law.¹² The Article grants a right to free movement *prima facie*, but may be restricted by the doctrine of mandatory requirements and the principle of proportionality.¹³ In its reply to the EFTA Surveillance Authority¹⁴ of June 2020, the Government argued that:

[t]he substantive conditions [under national law] as well as the prior authorisation requirement seek to attain legitimate objectives such as bringing people back to working life and promoting full employment, promoting health as well as ensuring compliance with the conditions designed to attain those aims.¹⁵

11. Cf Written observations by the Government of Norway in Case E-8/20, 9 October 2020, Section 2 <https://www.regjeringen.no/contentassets/8aab38e1224244ab9a22d649983bf462/201022_norges-innlegg-til-efta-domstolen.pdf>.

12. This approach is based on the legal assessment of the Expert Commission (n 1) 46.

13. On this doctrine, see eg Niamh Nic Shuibhne, ‘Exceptions to the free movement rules’ in Catherine Barnard and Steve Peers (eds), *European Union Law* (Oxford University Press 2020) chapter 16.

14. The EFTA Surveillance Authority is the authority entrusted with equivalent powers and similar functions to those of the European Commission within the EFTA pillar.

15. Letter from the Norwegian Ministry of Labour (n 6) para 17.

The Government further noted that:

it should be recalled that Regulation 883/2004, in accordance with its fourth recital and settled case law, only coordinates national laws and does not harmonise their content. Therefore, Article 21 makes export of cash benefits provided by the competent institution subject to the condition that it is 'in accordance with the legislation it [the competent institution] applies'. Insofar as the conditions for export reflect general conditions linked to the justification and objective of the allowance in question, it seems that both the wording and purpose of Article 21 allows such conditions to be maintained also in the export situation. [...] Hence, the Government appointed expert commission tasked with investigating national practice in this field held in its first report that such conditions were compatible with Article 21 of the Regulation.

The logical corollary of that conclusion is that the EEA States must also be able to assess these conditions prior to the stay abroad, i.e. a prior authorisation requirement.¹⁶

While it goes without saying that conformity with the fundamental freedoms must be achieved, this seemingly constitutional interpretation has severe flaws. EU secondary legislation in directives and regulations typically narrows down the justifications that the fundamental freedoms have left to Member States. The resort to the fundamental freedoms disregards the existence of the Regulation and reduces it to a mere reminder. It does not interpret the Regulation 'as such'.¹⁷ The purpose that guides the interpretation of Regulation 883/2004 is the 'establishment of as complete a freedom of movement for workers as possible'.¹⁸ To claim the full justifications that would have applied under the fundamental freedoms without the Regulation deprives it of its purpose and integrity.

The aim of this paper is to apply free movement and the EU constitutional legal method in its true sense. To do so, I rely on the three tenets of constitutional legal method described by Niamh Nic Shuibhne: imagination, fairness and integrity.¹⁹

By imagination, I refer to the fact that the answer to the legal question concerns our vision of Europe (see further section 3 below). If Europe truly is an area without internal borders, the principled view would be that no export of social benefits actually takes place as long as the recipients stay within its borders. Europe is home. Whether and to what extent Regulation 883/2004 pursues such a vision of Europe depends on the reach of the principle of equality in Articles 4 and 5. In particular, Article 5(b) stipulates that:

where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory.

By fairness, I refer to the protection of individual rights: namely, the reach and depth of the right to free movement (see further section 4 below). Whether Article 7 affords protection not only to individuals who habitually reside outside the competent State,²⁰ but also to recipients

16. Ibid, paras 14–15.

17. Cf Case 39/72, *Commission v Italy*, judgment of 7 February 1973 (ECLI EU:C:1973:13), para 17; Case C-431/11, *UK v Council*, judgment of 26 September 2013 (EU:C:2013:589) para 54. See too Article 7(a) of the EEA Agreement. See further Tarjei Bekkedal, 'Understanding the Nature of the EEA Agreement: On the Direct Applicability of Regulations' (2020) 57(3) *Common Market Law Review* 773–798.

18. Case 75-63, *Unger*, judgment of 19 March 1964 (ECLI:EU:C:1964:19), discussed further below.

19. Niamh Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (Oxford University Press 2013) chapter 1.

20. Or permanently moves to another Member State. Cf Article 1(j) of Regulation 883/2004.

that travel and temporarily ‘stay’ in a different Member State than the competent State,²¹ is a matter of reach. Whether the right afforded by Article 7 is absolute, or applies only *prima facie* (ie can be made subject to objectively justified limitations) is a matter of depth.

By integrity, I refer first to the coherence between the main principles of Regulation 883/2004 and Article 21 (see further section 5 below). In section 6, I account for the main findings of the paper through the prism of integrity in its broadest sense.²² I conclude that a condition of presence applied in conjunction with a requirement of prior authorisation is a violation of Articles 5, 7 and 21. To make the justification for the interpretation of the individual rules transparent, I show first how the main conclusion fits with the internal integrity of Regulation 883/2004, and thus ensures coherence among its different rules. Second, I show how the conclusion fits with the systemic integrity of Regulation 883/2004, particularly the coherence between the Regulation and the Citizens Rights Directive.²³ Third, I show how the conclusion fits with the constitutional integrity of Regulation 883/2004, and more specifically how it ensures coherence between secondary law and primary law. Fourth, I show how the conclusion defines the equilibrium between national law and EU law in a manner that underpins the integrity of both.

2. The Scandal

In October 2019, the Norwegian Government made public that it had misapplied Regulation 883/2004.²⁴ Amongst others, the Prime Minister, the Minister of Labour and Social Affairs and the Director of Public Prosecutions unconditionally apologised to all the victims.²⁵ A huge number of individuals who had kept their (former) status as criminals secret, told their stories in public, often in huge detail and with their names and pictures in the press.²⁶

According to the public reports, Norwegian authorities have respected the exportability rights of those who habitually reside in another EU/EEA state or who permanently move to another EU/EEA State.²⁷ The condition of presence and the requirement of prior authorisation had only been applied to those who are outside the reach of Article 7 pursuant to the narrow interpretation accounted for in section 1 above. This is the reason why the scandal only affects recipients who have stayed abroad temporarily.

In the absence of prior authorisation, short-term export of sickness benefits in cash has been regarded as welfare fraud, a criminal offence underpinned by severe sanctions.²⁸ Since Regulation 883/2004 entered into force in 2012, at least 55 citizens have been sentenced to

21. Cf Article 1(k).

22. Cf Nic Shuibhne (n 19) 39.

23. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.

24. Letter of 27 October 2019, ‘Rett til kontantytelser under opphold i EØS’ (in Norwegian only). Cf the chronological list of documents: <<https://www.nav.no/no/nav-og-samfunn/kontakt-nav/feiltolkning-av-eos-reglene/tidslinje-om-navs-feiltolkning-av-eos-reglene>>.

25. Redegjørelse, nr 5 (2019–2020) <<https://www.stortinget.no/no/Hva-skjer-pa-Stortinget/Horing/horing/?h=10004123>>.

26. See eg Atle Sønsteli Johansen, ‘Advarte mot skråsikkerhet allerede i november’ *Rett24.no* (20 February 2020).

27. *Blindsonen* (n 1) 45–51.

28. Letter from the Norwegian Ministry of Labour (n 6) section 2.5.

prison because they travelled to countries within the EU or EEA.²⁹ For the same reason, approximately 1100–1200 citizens have had to reimburse benefits that they had already received, while it is assumed that approximately 5000–6000 citizens have had their claims rejected or suspended.³⁰

As court of last instance, the Norwegian Supreme Court has heard two criminal cases concerning temporary stay in another EU/EEA State, in the absence of prior authorisation.³¹ One of the judgments, delivered in 2017, has been re-opened due to the scandal.³² The crime was that the offender stayed in Italy for 54 weeks during a period of two and a half years. The ‘motive’ was that the offender was forced to sell his house in 2009 and lived with his wife, in the home of his mother-in-law. It is apparent from the judgment that this was quite demanding and that the husband entered into a state of depression. In 2011, some friends offered the couple the opportunity to borrow a house in Italy, and they (or at least he) travelled there frequently.³³ The 64-year-old male did not have a criminal record. He received, and was otherwise entitled to receive, sickness benefits in cash. The only crime committed was that he disregarded the statutory requirement of presence and the requirement of prior authorisation.³⁴ The Appeal Court sentenced the offender to 45 hours of community service.³⁵ The Supreme Court disagreed and considered 75 days of imprisonment to be correct and proportionate, due to ‘efficiency of enforcement’.

According to the legal reasons that accompanied the Government’s announcement in October 2019, the right to free movement granted by Regulation 883/2004 had been violated due to an oversight and/or misinterpretation of Article 21.³⁶ Articles 4 and 5 of Regulation 883/2004 were not mentioned. Seemingly, the principle of equality was regarded as irrelevant to the matter, perhaps because most of the victims were Norwegian nationals. While Article 7 was mentioned, it was taken for granted that the reach of the principle therein is narrow and does not afford free movement rights to those who temporarily ‘stay’ abroad. In the absence of any convincing sources or arguments, the Government concluded that Article 21 of Regulation 883/2004 is the only relevant provision with regard to short-term exportation of sickness benefits in cash. According to the assessment of October 2019, the exportation right that is derived from Article 21 is unconditional: it cannot be made subject to a system of prior authorisation or otherwise restricted.

The Government appointed an Expert Commission to assess the scandal further. In a preliminary legal opinion delivered in March 2020,³⁷ the Expert Commission: (1) completely

29. Letter from the Norwegian Director of Public Prosecutions, 30 June 2020 <<https://www.riksadvokaten.no/document/endrede-direktiver-i-nav-sakene/>>.

30. Letter from the Norwegian Ministry of Labour (n 6) section 2.6.

31. HR-2012-409-A and HR-2017-560-A.

32. The Criminal Cases Review Commission, Case 2019/176.

33. The offender travelled to Italy 13 times throughout the period. The stays amounted to four weeks in 2010, 17 weeks in 2011 and 33 weeks in 2012. According to the judgment of the Appeal Court, the exact dates were 19.05.10–23.05.10, 11.06.10–13.06.10, 15.09.10–08.10.10, 11.02.11–12.02.11, 05.04.11–30.04.11, 17.06.11–02.08.11, 28.10.11–21.12.11, 01.01.12–01.02.12, 03.02.12–06.03.12, 15.03.12–24.04.12, 19.05.12–18.08.12, 31.08.12–22.09.12 and 07.10.12–31.10.12.

34. The offender applied for authorisation to stay in Italy on two of the 13 occasions: 18.9.2010–01.10.2010 and 16.04.2011–27.04.2011. The authorities granted both applications.

35. Agder lagmannsrett, LA-2016-97055. Cf also Nedre Telemark tingrett, TNETE-2015-17-9156.

36. Letter of 27 October 2019 (n 24). Cf Hans Petter Graver, ‘The Impossibility of Upholding the Rule of Law When You Don’t Know the Rules of the Law: The Norwegian Social Insurance Scandal’ (*Verfassungsblog*, 14 November 2019) <<https://doi.org/10.17176/20191114-205952-0>>.

37. Trygd, oppholdskrav og reiser i EØS-området (4 March 2020) <<https://www.regjeringen.no/no/dokumenter/trygd-oppoldskrav-og-reiser-i-eos-området/id2692285/>>.

disregarded the principle of equality in Articles 4 and 5 of Regulation 883/2004; (2) agreed that pursuant to its wording, it is clear that the exportation right afforded by Article 7 does not apply to short-term stays abroad; and (3) rejected the strict interpretation of Article 21 that justified the announcement in October 2019. The Government adjusted its position accordingly, as accounted for in section 1 above. Indeed, as of June 2020, by referring to the legal assessment of the Expert Commission,

the Government respectfully disputes that Norway has failed to fulfil its obligations under the EEA Agreement by maintaining in force [the requirements of presence and prior authorisation] of the National Insurance Act [ie Social Security Act].³⁸

This is a crucial issue. Practically all of the victims of the scandal who were sentenced to prison got into trouble because they did not respect the requirement of prior authorisation before they moved. If eventually a requirement of prior authorisation should turn out to be justified, thousands of victims may have been given false promises by the Government's acknowledgment of the scandal and the unconditional apologies to all the victims by the Prime Minister, the Minister of Labour and Social Affairs and the Director of Public Prosecutions. The turnaround in June 2020 shows a lack of political integrity.

In legal terms, the way in which the authorities have handled the scandal genuinely increases the uncertainty.³⁹ The uncertainty stems from the lack of proper legal method. The Expert Commission assessed Article 21 of Regulation 883/2004 in isolation. Thus, its precise content is anyone's guess.

Due to space constraints, it will not be possible to provide in the present paper a detailed analysis of the final report of the Expert Commission, entitled 'Blindsonen' ('The Blind Spot'). Its main conclusion is that Regulation 883/2004 was overlooked by the entire Norwegian legal community. In other words, 'we are all to blame', or in the words of the Expert Commission:

[w]hilst NAV bears primary responsibility for the misapplication, the Ministry of Labour and Social Affairs, the National Insurance Court, the Norwegian Prosecuting Authority, lawyers, courts and academia carry a considerable responsibility as well. A common denominator is that none of them has devoted sufficient attention to the consequences of EEA law, particularly after the incorporation of the new social security regulation into the EEA Agreement.⁴⁰

Other accounts are possible.⁴¹ The Norwegian Insurance Court found in at least nine decisions that Norwegian law or practice was not compliant with Regulation 883/2004.⁴² Still, the authorities did not change their course. The issue was brought to the attention of the Minister of Labour and Social Affairs. The note to the Minister explains quite cunningly that:

38. Letter from the Norwegian Ministry of Labour (n 6) para 35.

39. Cf written observations by the Government of Norway in Case E-8/20 (n 11) para 209: '[t]he Government is uncertain whether it is compatible with Article 21 of Regulation No 883/2004 to require prior authorisation.'

40. *Blindsonen* (n 1) 26. This is revisionism. The Prime Minister and the Ministry of Labour and Social Affairs were and are responsible.

41. The Expert Commission's framing of the issue as a 'blind spot' should not uncritically be adopted as the point of departure for future analysis.

42. Letter from the Social Security Court to the Ministry of Labour, 28 October 2019 <https://www.trygderetten.no/Content/108986/cache=1572276178000/Brev_ASD_28_10_19.pdf>.

A referral of the case to the EFTA Court involves a certain risk of a judgment that defines our room for manoeuvre even more narrowly, in the sense that the Court not only provides a clarification of the term ‘stay’ but also rules that a system of prior authorisation cannot be sustained. This risk favours a change of practice. If the Social Insurance Court is informed that the Social Security Authority has arrived at a similar understanding of the term ‘stay’ as the Social Security Court and will change its practice accordingly, the Social Insurance Court will probably not refer the cases to the EFTA Court.⁴³

The Minister replied:

This is a difficult issue. This [change of practice] is unfortunate, considering the aim set out in the political platform of the Government [to combat the export of social security benefits]. At the same time I agree that a referral to the EFTA Court is encumbered with risk.⁴⁴

An alternative account of the scandal would be that the Government was well aware of Regulation 883/2004.⁴⁵ It may also seem as though the Expert Commission promotes the Government’s legal view, defends its ‘room for manoeuvre’, and prophylactically distributes responsibilities in case of an eventual loss before the EFTA Court. At the very least, the Expert Commission’s findings that the Government actually interpreted Regulation 883/2004 correctly, that Norwegian law is in conformity with Regulation 883/2004 and the EEA agreement⁴⁶ and that there is a ‘blind spot’ for which everyone is responsible, are irreconcilable.

Be that as it may, everyone acknowledges the integrity of the EFTA Court. On that note, I turn to the legal analysis.

3. The Principle of Equality

3.1 The Vision of Europe and its Citizens

The reach of the principle of equality concerns our vision of Europe. In the field of social security, the European Court of Justice formulated its vision more than 50 years ago. In *Unger*, it observed that:

The establishment of as complete a freedom of movement for workers as possible, which thus forms part of the ‘foundations’ of the Community, therefore constitutes the principal objective of Article 51 [TEC, ie, the legal antecedent of 48 TFEU,] and thereby conditions the interpretation of the regulations adopted in implementation of that Article.⁴⁷

As I return to further on in this paper, this vision points towards a broad and systemic notion of ‘equality’, one according to which every single Member State is equal and constitutes an area without borders within the EU.

43. Note to the Minister of Labour, 20 February 2019, in *Blindsonen* (n 1) 271 (the author’s translation).

44. Reply from the Minister of Labour, 21 February 2019, referred to in *Blindsonen* (n 1) 271 (the author’s translation).

45. I concur with the observations of LO, Letter to the Ministry of Labour, 21 September 2020, section 7 <<https://www.regjeringen.no/no/dokumenter/horing--nou-20209-blindsonen/id2724559/?uid=536a5f6d-68f4-40ce-90bd-36b13f45ee0a>>.

46. Summarised in Letter from the Norwegian Ministry of Labour (n 6) as accounted for above.

47. *Unger* (n 18).

From the perspective of systemic integrity, it is interesting to note that the current Regulation on the coordination of social security systems was enacted on the same day as the Citizens' Rights Directive. In its Communication on the Citizens' Rights Directive, the Commission presents the parallel vision on which the Directive in question rests:

This Directive is being proposed in the context of the new legal and political environment entailed by citizenship of the Union. The basic concept is as follows: Union citizens should, *mutatis mutandis*, be able to move between Member States on similar terms as nationals of a Member State moving around or changing their place of residence or job in their own country. Any additional administrative or legal obligations should be kept to the bare minimum required by the fact that the person in question is a 'non-national'.⁴⁸

Free movement of workers operates within the same legal and political landscape as the Citizens' Rights Directive. At the systemic level, the two instruments constitute a coherent whole. They apply to the same Union and the same citizens. They pursue the same 'basic concept'. The vision that citizens should 'be able to move between Member States on similar terms as nationals of a Member State' is rather similar to the vision of the 'establishment of as complete a freedom of movement for workers as possible'.

At the practical level, the two instruments have different areas of application. The export rights in Regulation 883/2004 address the competent State. In comparison, the Citizens' Rights Directive 'is intended only to govern the conditions of entry and residence of a Union citizen in a Member State other than the Member State of which he is a national'.⁴⁹ The distinction between entry and exit rights derives from primary law. Article 45(b) of the Treaty on the Functioning of the EU (TFEU) establishes that workers have the right to move freely within the territory of the Member States, for the purpose of accepting offers of employment. This condition guides and justifies a right of entry. Exit rights pertaining to social benefits are dealt with in the secondary legislation to which Article 48 TFEU refers. As I return to further on in this paper, the definition of 'worker' has always been particularly broad in this respect. Normally, extensive exit rights will not pose a challenge to the budget of the competent State. If a 'worker' benefits from a national social security scheme in the first place, the cost has already been incurred at the national level.

Entry rights are more controversial. Over time, the right of entry has been broadened. The status that historically was reserved for workers pursuant to Article 45 TFEU⁵⁰ has gradually been expanded to comprise more and more groups, eg recipients and providers of services.⁵¹ The Citizens' Rights Directive distilled a range of existing free movement rights into a general right of entry afforded to all people who 'have sufficient resources for themselves and their family members not to become a burden on the social assistance system'.⁵²

48. Commission of the European Communities, Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2001) 257 final (23 May 2001) section 1.3.

49. Case C-456/12, *O and B*, judgment of 12 March 2014 (Grand Chamber) (ECLI:EU:C:2014:135) para 42.

50. Cf Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L141/1.

51. Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [1973] OJ L172/14.

52. The concept of the Citizens' Rights Directive is not new: it builds on Council Directive 90/364/EEC of 28 June 1990 on the right of residence [1990] OJ L180/26, Article 1.

While the Citizens' Rights Directive provides more extensive entry rights than flows from the text of Article 45 TFEU, the concept of citizenship does not affect the interpretation of Article 48 TFEU, nor does it require a reinterpretation of the latter provision. What it requires, as a matter of systemic integrity, is that the inherent potential in Article 48 TFEU is utilised. If cash benefits are not exportable, workers may in effect be deprived of their entry right, as they will not possess sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host State. From a systemic perspective, the reach of the entry rights of Directive 2004/38 and the exit rights of Regulation 883/2004 must match. In its simplest version, the shared vision with regard to both entry and exit is that European citizens may rightfully consider Europe as home.

3.2 The Vision of Europe as Expressed by Regulation 883/2004

Systemic parallelism and a shared vision of Europe do not mean that the right to export social benefits is derived from the concept of Union citizenship.⁵³ To the contrary, four cornerstones that define its nature confirm the vision of Europe upon which Regulation 883/2004 rests and its autonomous contribution in this respect.

First, it follows from Article 45 TFEU that workers from other States must not be discriminated against on the basis of nationality.⁵⁴ Consequently, as expressed by Article 7, Regulation 883/2004 is constructed upon the State of employment principle (*lex loci laboris*), and not on the State of residence principle.⁵⁵ When the Regulation was drafted, the European Parliament carefully deleted the references to the 'territory' of the Member States that could be found in its predecessor, Regulation 1408/71.⁵⁶ It noted that 'ECJ case C-337/97 Meusen (1990) I-3289 established that the entitlement to certain benefits cannot be denied on grounds of residence'.⁵⁷ The vision of Europe on which this approach rests is that national borders are normatively irrelevant.

Second, it is important to understand exactly how and why the notion of 'worker' in Article 48 TFEU should be understood differently from the notion of 'worker' in Article 45 TFEU.⁵⁸ At the outset, the two provisions share a common purpose: to provide for the greatest possible freedom of movement for workers. However, they differ in the way in which that purpose is realised. Article 48 does not have a direct effect.⁵⁹ Its purpose is achieved through the enactment of coordination measures, such as Regulation 883/2004. The notion of 'worker' in Article 48 is an EU legal concept that due to its context, objective and purpose comprises subjects who actually are covered by national social security schemes, notwithstanding whether they currently have the status of 'worker' pursuant to national law, Euro-

53. Seemingly to the opposite, Karin Fløistad claims that: '[w]ithin EU law, the exportability of social security benefits is founded upon the concept of Union citizenship, not free movement of services' (the author's translation). See Karin Fløistad, 'Nav-saken – svar til Langeland og Graver' *Rettt24.no* (9 October 2020). Fløistad was a member of the Expert Commission appointed by the Government.

54. Compare Regulation 492/2011 on freedom of movement for workers within the Union [2011] OJ L141/1, Articles 7–9 in particular.

55. Cf eg Case C-399/09, *Landtová*, judgment of 22 June 2011 (ECLI:EU:C:2011:415) para 42.

56. Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L149/2.

57. European Parliament, Report on the proposal for a European Parliament and Council regulation on coordination of social security systems (COM(1998) 779 – C4-0137/1999 – 1998/0360(COD)), A5-0226/2003 (17 June 2003), Amendment 5, Article 3, paragraph 1. See too Case C-337/97, *Meeusen*, judgment of 8 June 1999 (EU:C:1999:284).

58. Cf Pennings (n 8) 36–37.

59. Case C-379/09, *Casteels*, judgment of 10 March 2011 (ECLI:EU:C:2011:131) paras 13–16.

pean labour law, or the well-known standard developed by the ECJ in relation to Article 45 TFEU. With regard to the latter provision, the Court observed in *Lawrie-Blum* that the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which they receive remuneration.⁶⁰ With regard to Article 48 TFEU, the Court noted in *Unger* that:

the concept of ‘wage-earner or assimilated worker’ has thus a Community meaning, referring to all those who, as such and under whatever description, are covered by the different national systems of social security.⁶¹

Article 45 promotes free movement by establishing that workers who move must be treated equally to nationals.⁶² Instead, Article 48 promotes free movement by securing that those who actually are protected by national social security schemes are not dissuaded from moving due to a loss of social security advantages.⁶³ The seemingly schizophrenic observation of the Court, that the notion of ‘worker’ pursued by Article 48 TFEU is a concept of Union Law that includes all subjects who are actually covered by the national systems, has a logical explanation. On the one hand, the Member States remain competent with respect to the construction of their national social security schemes: while there is coordination at the European level, there is no harmonisation.⁶⁴ On the other hand, the Member States cannot (partly) shield the schemes that they actually have enacted from coordination at the European level by reference to some narrow definition of ‘worker’. As observed by Pennings:

[...] if a national scheme included particular categories of persons who were not workers in the sense of labour law, these were covered by the regulation.⁶⁵

The aim of the coordination rules to extend the protection that actually exists at the national level to cover the whole of Europe requires a wide understanding of the notion of ‘worker’ that is instrumental to the purpose.⁶⁶ The extension of national rules on social security to include the European dimension rests on the vision that each and every European citizen may rightfully consider Europe as home.

Third, as stipulated by Article 11 Regulation 883/2004, the rules for determining the legislation applicable have exclusive effect. As noted by Pennings, this implies ‘that at any given time the legislation of only one Member State is applicable: in other words no other legislations [*sic*] can be applicable’.⁶⁷ It should be added that the reach of the schemes of the competent State cannot be cut off at the border, as that would create a situation in which no legislation is applicable at all.⁶⁸ The principle that one national system applies at a time rests on the vision that Europe is one.

60. Case 66/85 *Lawrie-Blum*, judgment of 3 July 1986 (ECLI:EU:C:1986:284) para 17. See Pennings (n 8) 149.

61. *Unger* (n 18) (referring to the terms used by the predecessor of Regulation 883/2004 (Regulation 1958/3)).

62. In practice, this is mainly an entry right.

63. Cf Recital 13 of the preamble to Regulation 883/2004 and *Lucy Stewart* (n 3) paras 83–86. In practice, this is mainly an exit right.

64. Cf Recital 4 of the preamble to Regulation 883/2004.

65. Pennings (n 8) 37.

66. Compare Case C-275/96 *Kuusijärvi*, judgment of 11 June 1998 (ECLI:EU:C:1998:279) para 21.

67. Pennings (n 8) 82.

68. Case E-3/05, *ESA v Norway*, judgment of 3 May 2006 (2006 EFTA Ct Rep 102) para 46; Case E-3/12 *Jonsson*, judgment of 20 March 2013 (2013 EFTA Ct Rep 136) para 54; Case E-6/12, *ESA v Norway*, judgment of 11 September 2013 (2013 EFTA Ct Rep 618) para 70.

Fourth, compared to its predecessor, the revolution of Regulation 883/2004 is the introduction of the all-encompassing definitions of persons covered (Article 2) and matters covered (Article 3). This should not come as a surprise. It marks the fulfilment of the vision formulated by the ECJ in *Unger* more than 50 years ago. The use of the full potential of the broad notion of ‘worker’ in Article 48 TFEU grants systemic parallelism between the exit right and the entry right.

Considered as a whole, the four fundamentals above create an advanced system of coordination. In the absence of harmonisation, the content of the applicable social security rules will vary according to the legislation of the competent State. To the individual, the legislation of the competent State becomes the legislation of Europe. There will exist different legal regimes, but no borders, as, put simply, the whole of Europe is considered as Sweden, Denmark, Germany and so on, depending on the designation as competent State. The Regulation does not make ‘exportation’ of benefits possible through the introduction of such a right, but through the imposition of a coherent system of coordination that turns Europe into ‘home’.⁶⁹ The vision of Europe pursued by the coordination measures is that whatever the law of the competent State is, it applies wherever in Europe the relevant individual is.⁷⁰

3.3 The Vision Applied

The protection of equal treatment has been the foundational rule of the coordination measures ever since the enactment of Regulation 1958/3.⁷¹ Article 3 of its successor, Regulation 1408/71,⁷² stipulated that:

Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.

Today, the foundational rule is found in Article 4 of Regulation 883/2004:

Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.

A national requirement of continued presence has discriminatory effects against non-nationals. Work is a part of the public sphere. In periods of recovery from illness, one does not act in one’s professional capacity, but resumes a more private existence. Even if a non-national is resident in the competent State (ie habitually resides there), he or she might have family, friends, doctors, therapists, secondary homes and so on in the State of origin. It is more burdensome for non-nationals to adapt to a requirement of presence than for nationals.⁷³

69. While Article 7 Regulation 883/2004 is often referred to as the principle of exportability, the provision does not use this term.

70. The observation in the Letter from the Norwegian Ministry of Labour (n 6) para 14 that free movement can be restricted because the Regulation ‘only coordinates national laws and does not harmonise their content’ is thus nonsensical. Equally unfounded is the ‘devoid of any purpose’ test advocated by Norway’s Attorney General (n 11) paras 201, 203, 216 and section 11 no 15.

71. Regulation No 3 of the Council concerning social security for migrant workers [1958] OJ 30/561.

72. Regulation 883/2004 replaced Regulation 1408/71, which had previously replaced Regulation 1958/3. See *Penning* (n 8) 20.

73. *ESA v Norway* (2006) (n 68) para 56. *Jonsson* (n 68) para 74. Compare eg *Landtová* (n 50) paras 41–49; Case C-332/05 *Celozzi*, judgment of 18 January 2007 (ECLI:EU:C:2007:35) para 34.

The remaining question is whether the notion of equal treatment offers protection to nationals of the competent State who habitually reside there but would like to stay temporarily in another EU/EEA State; in other words, whether ‘stay’ in another EU/EEA State equates to ‘stay’ in the competent State. The answer depends on how broadly the notion of equality is constructed. Namely, the answer depends on whether such notion merely offers protection in the narrow, subjective sense or constitutes a broader, systemic requirement. A comparison between Article 3 of Regulation 1408/71 and Article 4 of Regulation 883/2004 points in the latter direction. When the latter regulation was drafted, the European Parliament carefully deleted references to ‘territory’.⁷⁴ This adjustment confirms the specific vision of Europe on which the system of coordination rests.⁷⁵

The enactment of a new provision that did not have any counterpart in the old Regulation clarifies the vision of Europe that Regulation 883/2004 pursues. Paragraph (b) of Article 5 Regulation 883/2004 on ‘equal treatment of benefits, income, facts or events’ pursues a systemic notion of equality.⁷⁶ The paragraph stipulates:

where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory.

Clearly, ‘the principles of equal treatment and the assimilation of facts are strengthened’ in Regulation 883/2004 compared to Regulation 1408/71.⁷⁷ In this regard, Jorens and Overmeieren observe that:

Article 5 will enhance equality of treatment in the field of social security coordination, as it will make sure that foreign aspects of a given social security situation will be taken into account. It will provide considerable legal simplification and a clear uniform rule for all Member States.⁷⁸

If a recipient of sickness benefits in cash travels to another Member State, and if the legislation of the competent State pursues a requirement of presence, it attributes ‘legal effects’ to the fact that the beneficiary stayed abroad. It would be a blatant violation of Article 5 if the competent State argues that there is a normative difference between facts that occur in the home State and facts that occur in the host State, and that the crossing of a border makes a difference. The rule expressed by Article 5 is that the EU/EEA States constitute a single area.

If the competent State tries to defend a requirement of presence, it will have to argue that not every ‘fact’ counts as a *fact* pursuant to Article 5(b): that the provision only refers to ‘facts’ in some more specific and qualified sense, eg that periods of aggregation abroad and at home must be assimilated. If Article 5(b) is constructed to comprise *every* fact, the counterargument would be that the notion of equality reaches too far, at the expense of legislative discretion at the national level. Admittedly, there is not much point to a national requirement of presence if presence in some other EU/EEA State must be equated to presence in

74. See section 3.2 above (n 57).

75. Compare the equivalent changes introduced to Article 13(2)(a) of Regulation 1408/71 in Article 11 of Regulation 883/2004.

76. Some authors have noted how Article 5(b) ‘encounters a special technique of coordination, a “legal fiction”’. See Maximilian Fuchs and Rob Cornelissen (eds), *EU Social Security Law – A Commentary on EU Regulations 883/2004 and 987/2009* (Baden-Baden 2015) 130.

77. Commission of the European Communities, Amended proposal for a Regulation of the European Parliament and the Council on coordination of social security system, COM (2003) 596 final (9 October 2003) 3, section 3.1.

78. Jorens and Overmeieren (n 9) 65.

the competent State. But that might of course be the whole idea behind the rules of Article 5(b).⁷⁹

Nothing in the wording of Article 5 indicates that the provision should be subject to a narrow interpretation. To the contrary, Recital 9 of Regulation 2004/883 suggests a dynamic and purposive approach:

The Court of Justice has on several occasions given an opinion on the possibility of equal treatment of benefits, income and facts; this principle should be adopted explicitly and developed, while observing the substance and spirit of legal rulings.

The reach of the principle of equality, and its limitations must be established on objective grounds. The ECJ has on several occasions clarified that any purposive or teleological interpretation of the Regulation cannot go further than the purpose of coordination justifies.⁸⁰ In this regard, Recital 4 of the Regulation stipulates that:

It is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination.

From a practical point of view, it may be argued that if a Norwegian citizen gets sick, is awarded sickness benefits in cash, and goes on holiday in Mallorca for two weeks, no coordination between the Norwegian and the Spanish social security system is required in this respect. Whether he or she can travel to Mallorca and retain his or her cash benefits is solely a matter between that individual and the competent State. Conversely, to nullify the effects of a national requirement of presence would constitute harmonisation, not coordination. However, the argument is not convincing. As explained in section 3.2 above, Regulation 883/2004 does not coordinate national systems in the sense that it merges them.⁸¹ Instead, the Regulation coordinates by giving the legislation of the competent State general application throughout Europe, while ensuring that the European dimension is taken into account. In this regard, Article 5 of Regulation 883/2004 is perfectly in line with the above-mentioned vision of Europe, and makes it operational.

To conclude, Article 5 prescribes a broad, systemic notion of equality. While Article 4 of the Regulation is a straightforward application of the principle of non-discrimination, Article 5 is instrumental and individualistic. A comparison with others is not required. Instead, the situation of the individual who moves is compared with the position of the same individual if he or she does not. Such a systemic approach fuses the right to equality and the right to free movement.⁸² Through its broad, systemic protection of equality, Article 5 provides protection to recipients of sickness benefits in cash that temporarily 'stay' in a different EU/EEA State than the competent State.

79. Compare Case C-430/15, *Tolley*, judgment of 1 February 2017 (ECLI:EU:C:2017:74) para 88.

80. Cf Rob Cornelissen, '50 Years of Social Security Coordination' (2009) 11(1–2) *European Journal of Social Security* 9, 15–18 with further references to settled case-law.

81. It should be remembered that 'at any given time the legislation of only one Member State is applicable'. See *Penning* (n 8) 82.

82. Compare Case C-224/98, *D'Hoop*, judgment of 11 July 2002 (ECLI:EU:C:2002:432) para 30. Similarly, *Lucy Stewart* (n 3) paras 83–86.

4. Exportability – Article 7 of Regulation 883/2004

4.1 Approaches: The Depth of Integration

Article 7 is headed ‘waiving of residence rules’. If a citizen is entitled to benefits pursuant to the legislation of the competent State, the provision of such benefits cannot be subject to alteration only because the citizen habitually resides in another Member State or moves to another Member State on a permanent basis. This section of the paper discusses whether Article 7 also affords rights to beneficiaries who ‘stay’ in another State than the competent State, ie whether Article 7 prohibits national requirements of presence.

Two approaches to Article 7 are possible. One alternative is to regard the provision as an expression of a general principle that addresses residence requirements in particular, but reaches further. The main argument would be that the right to free movement covers any movement across borders, regardless of the length of the stay. Article 7 must be interpreted accordingly.⁸³

Conversely, Article 7 may be interpreted antithetically. It can be argued that, by specifically addressing residence requirements, the provision deliberately excludes the right to temporarily reside abroad (‘stay’) from its scope. The main argument in favour of a narrow interpretation would be that there exist specific socio-economic bonds between beneficiaries who currently receive sickness benefits and their State of residence. A requirement of presence ensures that the recipient remains available to the medical system, the employer and the labour market. An additional concern is that the legitimacy of the welfare system may be negatively affected if those who become sick can also become tourists.

The two different approaches concern not only the reach of Regulation 883/2004, but also the depth of integration. EU primary law provides in any case a right to free movement. However, at the level of primary law, restrictions may be justified, provided that they pursue a legitimate aim, and are necessary and proportionate. The doctrine of mandatory requirements offers some flexibility to the Member States, at least potentially.⁸⁴ In comparison, rights that flow from the Regulation are absolute. Article 7 commences with the words ‘[u]nless otherwise provided for by this Regulation...’. If the Regulation applies, the doctrine of mandatory requirements becomes unavailable. This follows not only from the wording of Articles 4, 5 and 7, but also from the nature of EU Regulations. Regulations are directly applicable and apply ‘as such’.⁸⁵ Any balancing against national legislation and concerns would create legal uncertainty and deprive Regulation 883/2004 of its integrity.⁸⁶

Theoretically, it is possible to interpret the reach of Article 7 ‘as such’ by reference to the principle of proportionality.⁸⁷ One could argue that the provision does not apply to short-term export of cash benefits, not because of the mandatory requirements invoked by a particular Member State in a specific context, but as a matter of EU law. While the approach cannot be excluded, it sits uneasily with the system of the Regulation. Benefits that are closely related to the socio-economic conditions in the country of residence are dealt with in spe-

83. Cf Case C-140/12, *Brey*, judgment of 19 September 2013 (ECLI:EU:C:2013:565) paras 51–52; Case C-287/05 *Hendrix*, judgment of 11 September 2007 (ECLI:EU:C:2007:494) para 52; Case C-331/06, *Chuck*, judgment of 3 April 2008 (EU:C:2008:188) para 32.

84. Cf eg Case C-406/04, *De Cuyper*, judgment of 18 July 2006 (Grand Chamber) (ECLI:EU:C:2006:491). See, however, Case C-499/06, *Nerkowska*, judgment of 22 May 2008 (EU:C:2008:300) paras 44–46; Case C-228/07 *Petersen*, judgment of 11 September 2008 (ECLI:EU:C:2008:494).

85. *Commission v Italy* (n 17).

86. Cf Case 34/73, *Variola*, judgment of 10 October 1973 (ECLI:EU:C:1973:101) paras 10–11; Case 167/73, *Commission v France*, judgment of 4 April 1974 (ECLI:EU:C:1974:35) para 41. Cf too Bekkedal (n 17).

87. Compare by analogy Recital 12 of Regulation 883/2004.

cifically designed exceptions, such as Article 3(5) on social and medical assistance, Article 63 on unemployment benefits and Article 70 on special non-contributory benefits. Such exceptions make a narrow interpretation of the main principle superfluous and somewhat strained.

4.2 Heading and Wording of Article 7

According to Article 1(j) of Regulation 883/2004, “‘residence’ means the place where a person habitually resides’. If Article 7 is interpreted accordingly, the provision has a rather limited reach. It does not provide protection to beneficiaries that merely ‘stay’ abroad, as defined by Article 1(k) of the Regulation. For a more detailed explanation, I refer to section 1 above.

That the distinction between ‘residence’ and ‘stay’ is relevant to the interpretation of Article 7 seems to find some support in *Lucy Steward*. With respect to the similar provision in Article 10 of Regulation 1408/71, the ECJ remarked:⁸⁸

the first subparagraph of Article 10(1) of Regulation No 1408/71 covers residence clauses, as is clear, in particular, from its heading. However, for the purposes of applying that regulation, the word ‘residence’ means, under Article 1(h) thereof, ‘habitual residence’.

However, one should be careful not to derive too much from the term that is used in the heading of the provision. Headings must be kept short. Their purpose is not to make precise prescriptions, but to provide an indication of what a provision contains. The term ‘residence’ is the only word that both definitions in Article 1 share:

- (j) ‘residence’ means the place where a person habitually resides;
- (k) ‘stay’ means temporary residence;

Consequently, it is the most sensible word to pick if one is to draft a short heading of a provision such as Article 7.

In any case, the distinction between ‘residence’ and ‘stay’ would only be relevant to the interpretation of Article 7 and its heading if the terms were equal alternatives that mutually excluded each other when the provision was drafted. That is not the case. The heading signals that residence-based schemes are prohibited. That information is important and makes sense. Conversely, it would not make much sense to stipulate that social security schemes based on the ‘principle of stay’ are prohibited. Such schemes have never existed.

If we turn to the substantive text of Article 7, it is striking that it does not refer to the notions of ‘residence’ or ‘stay’. Instead, it uses the term ‘reside’. The latter term is ambiguous. One understanding is that payable cash benefits cannot be suspended or reduced on account of the fact that the beneficiary ‘habitually reside[s]’⁸⁹ in another Member State than the competent State. However, the word ‘reside’ might also have a more general and generic meaning. Pursuant to a straightforward literal interpretation, the term ‘reside’ includes ‘temporary residence’ in another Member State (eg the definition of ‘stay’).⁹⁰ It is not at all obvious that the formal definitions in Article 1 should inform the interpretation of Article 7, at the cost of an interpretation that applies ordinary language. After all, the European

88. *Lucy Stewart* (n 3) para 72.

89. Article 1(j).

90. Article 1(k).

Parliament applied ordinary language when, in the drafting of the provision, it noted that ‘ECJ case C-337/97 Meusen (1990) I-3289 established that the entitlement to certain benefits cannot be denied on grounds of residence’.⁹¹

4.3 Purpose

The text of Article 7 is ambiguous. We must therefore consider its purpose. The ECJ has on many occasions emphasised that Regulation 883/2004 gives effect to Article 48 TFEU.⁹² The purpose of the provision is to provide for the ‘greatest possible freedom of movement’ for workers.⁹³ This aim guides the application of the Regulation, including the main rule on exportability (Article 7).⁹⁴ On this point, in *Brey*, the ECJ observed that:

[...] it should be borne in mind that Regulation No 883/2004 seeks to achieve the objective set out in Article 48 TFEU by preventing the possible negative effects that the exercise of the freedom of movement for workers could have on the enjoyment, by workers and their families, of social security benefits [...]

It is in order to achieve that objective that, through the waiver of residence clauses under Article 7 thereof, Regulation No 883/2004 provides, subject to the exceptions set out therein, for the cash benefits falling within its scope to be exportable in the host Member State [...].⁹⁵

Recital 13 of Regulation 883/2004 confirms the purpose by the use of the neutral term ‘moving’:

The coordination rules must guarantee that persons moving within the Community and their dependants and survivors retain the rights and the advantages acquired and in the course of being acquired.

The purpose of the Regulation and the Article clearly suggests that the distinction between ‘residence’ and ‘stay’ is irrelevant. Such a distinction will have ‘negative effects’ for the exercise of the freedom of movement for workers, contrary to the constitutional aim. Assessed from the other angle: what would the purpose of the distinction be? From the perspective of national sovereignty, export rights for individuals who permanently reside abroad are more intrusive than export rights for individuals who temporarily ‘stay’ abroad.

4.4 Context

The term ‘reside’ in Article 7 Regulation 883/2004 must be approached as a legal concept that operates within a broader legal context. An obvious reference is Article 21 TFEU on EU citizenship, which establishes that:

Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States [...]

91. European Parliament (n 57).

92. *Chuck* (n 83) para 32.

93. See eg *Hendrix* (n 83) para 52; *Jonsson* (n 68) para 73. On this aim, see eg Niamh Nic Shuibhne, ‘Reconnecting Free Movement of Workers and Equal Treatment in an Unequal Europe’ (2018) 43(4) *European Law Review* 477–510.

94. See eg Case 22/86, *Rindone*, judgment of 12 March 1987 (ECLI:EU:C:1987:130) para 13; Case C-45/90, *Paletta*, judgment 3 June 1992 (ECLI:EU:C:1992:236) para 24.

95. *Brey* (n 83) paras 51-52.

Article 21 TFEU applies the term ‘reside’ in a generic manner that also refers to temporary stays in another Member State. Further, Article 6(1) of the Citizens’ Rights Directive establishes that:

Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

The provision is constructed upon and confirms the right that flows from Article 21 TFEU. It applies the term ‘residence’ for stays ‘up to three months’, ie short-term stays.

Regulation 883/2004 is not founded upon the concept of Union citizenship, and the reference to Article 21 TFEU is not in itself decisive. However, Regulation 883/2004 itself assumes a generic application of the term ‘residence’. Its Chapter 6 concerns unemployment benefits. The principle of exportability is somewhat controversial in this regard, due to the assumption that it is easier for the unemployed to find new employment in their State of residence. Article 63 of Regulation 883/2004 (‘Special provisions for the waiving of residence rules’) modifies the application of Article 7 in this particular regard. Article 64 provides limited rights pursuant to a set of strict conditions for any wholly unemployed who ‘goes to another Member State in order to seek work there’. According to Article 64(1)(c), the ‘entitlement to benefits shall be retained for a period of three months’. Arguably, if Article 7 grants a right of exportation for up to three months even in its modified version in Chapter 6 of the Regulation, the right of recipients to retain their benefits during temporary stays abroad must be a part of the main rule. Not surprisingly, there is parallelism between Regulation 883/2004 and the Citizens’ Rights Directive in this respect.

4.5 The Effectiveness of the Principle Established by Article 7

For the sake of argument, let us disregard the arguments above and assume that the principle established by Article 7 only addresses residence clauses in the strict and narrow sense, ie that benefits cannot be suspended or modified on grounds of *habitual residence*. Importantly, such an antithetical interpretation of the principle must be distinguished from its application. The application of a principle – however its content has been defined at the interpretative stage – must grant its full effect. In other words, if Article 7 Regulation 883/2004 *only* prohibits residence clauses, *that* principle must be granted full effect at the level of application.

While it is possible to separate the notions of ‘residence’ and ‘presence’ at the interpretative level, things are not that simple at the level of application. The purpose of a national requirement of presence is not to launch a new and autonomous concept, eg the ‘country of sickness scheme’. Instead, such a requirement is based on the empirical assumption that most people get sick in their country of residence. The social security scandal in Norway has proven the assumption correct.

Importantly, if a beneficiary is entitled to receive sickness benefits from the competent State, and actually receives such benefits, a requirement of presence will in most cases also constitute a requirement of residence. If a Norwegian is covered by Norwegian social security law and actually receives sickness benefits in cash from Norway, it is difficult to be present in Norway without also being habitually resident there. In other words, any useful application of a requirement of continued presence is dependent on the prohibited concept of residence.

At the level of interpretation, one may sometimes get the impression that ‘stay’ is something less than ‘residence’ and that residence requirements entail a much more serious

hindrance to free movement than requirements of presence. This assumption is overly simplistic. Systemically, residence-based schemes are difficult to combine with the principle of non-discrimination. That is why, as a matter of principle, Regulation 883/2004 eliminates such schemes. Residence-based schemes would not, however, negate free movement. This is not so with requirements of presence. It is impossible to remain present and to move at the same time. In other words, a requirement of presence may occasionally function as a *reinforced residence condition*.⁹⁶ If that is the case, the requirement is caught by the main rule, simply as a matter of application.

The judgment in *Lucy Stewart* provides an example of the ECJ's application of the principle of exportability to requirements of continued presence. The Court observed:

Admittedly, in certain cases, a condition of past presence could be equivalent, in practice, to an habitual residence clause, if, in particular, such condition requires long periods of presence in the Member State concerned *and/or if that condition must be met for as long as the benefit in question is paid*.⁹⁷ (emphasis added)

Requirements of past presence may occasionally be justified before a benefit is granted, to prove that the necessary connection between the beneficiary and the competent State exists.⁹⁸ To the contrary, if the condition of presence must be met for as long as the benefit is paid,⁹⁹ it must normally be equated to a requirement of residence.

4.6 Reinforced Residence Requirements Are Prohibited

The purpose and the context strongly suggest that the Article introduces a broad-reaching principle. There are counter arguments, however. If Article 7 is interpreted by reference to both Article 1(j) *and* (k), requirements of presence would be generally prohibited, under all circumstances. There would be a risk that requirements of past presence, which may occasionally be justified, could no longer be sustained. The latter observation may favour a narrow *interpretation* of the principle. At the level of *application*, however, the principle must be granted full effectiveness. A requirement of continued presence, the objective of which is not to prove that that a link between the beneficiary and the competent state exists, relies on the notion of residence. Such reinforced residence requirement is caught by the main rule, even pursuant to a narrow interpretation of Article 7.

5. Article 21 of Regulation 883/2004

We now turn to Article 21 of Regulation 883/2004. The provision reads:

An insured person and members of his/her family residing or staying in a Member State other than the competent Member State shall be entitled to cash benefits provided by the competent institution in accordance with the legislation it applies.

96. In the same direction, *Jonsson* (n 68) para 72.

97. *Lucy Stewart* (n 3) para 73.

98. Cf eg *Lucy Stewart* (n 3); *Brey* (n 83); Case C-333/13 *Dano*, judgment of 11 November 2014 (ECLI:EU:C:2014:2358).

99. So-called continued presence. While requirements of 'past presence' may be controversial from the perspective of equality, they do not affect export. In comparison, a requirement of 'continued presence' is the negation of export rights.

Pursuant to a straightforward literal reading, Article 21 establishes a general right of exportability, both with respect to those who ‘habitually reside’ and those who ‘stay’ in another State than the competent State. Matters are not entirely clear, however. It may be argued that Article 21 is only ‘applicable where incapacity for work arises while the worker concerned is staying in a Member State other than the competent Member State.’¹⁰⁰ Probably, this was the correct way to understand Article 22(1)(a)(ii) of Regulation No 1408/71. The Court has not yet had the occasion to clarify whether the same limitation attaches to Article 21 of Regulation 883/2004.¹⁰¹

What is clear is that Article 21 concerns the exportability of sickness benefits in cash. As a matter of legal method, the point of departure is to assess the relationship between the more specific rule, and the main principle in Article 7 of Regulation 883/2004. In this respect, it must be noted that Regulation 883/2004 introduced a new system. The principle of exportability in Article 10 Regulation 1408/71 did not cover sickness benefits in cash. As noted by Paskalia:

The principle of exportability is one of the cornerstones of the co-ordination system, and the main provision in Regulation 1408/71 is Article 10(1). This provision, however, only covers long-term benefits, such as invalidity, old age or survivors’ cash benefits, pensions for accidents at work or occupational diseases and death grants. Short-term benefits are covered by specific provisions establishing some limited forms of exportability.¹⁰²

With regard to sickness benefits, Article 22 of Regulation 1408/71 constituted one such ‘specific provision, establishing some limited form of exportability’. The system was changed by the enactment of Regulation 883/2004. The main rule on exportability, Article 7, was given general applicability to include sickness benefits in cash.¹⁰³ Therefore, it seems wrong to make a comparison between Article 22 of Regulation 1408/71 and Article 21 of Regulation 883/2004. The special rule on exportability of sickness benefits in cash (Article 22 of Regulation 1408/71) has been transferred to Article 7 of Regulation 883/2004 and transformed into a general rule.

The revised system affects the interpretation of Article 7. Sickness benefits in cash are short-term benefits. Accordingly, it would be inconsistent if Article 7 would not afford citizens the right to ‘stay’ in another State than the competent State. Indeed, the leading Commentary on Regulation 883/2004 introduces Article 7 with the unequivocal statement:

Art. 7 secures the right to cash benefits for beneficiaries staying or residing in another Member State (including an EEA State and Switzerland) [...] ¹⁰⁴

This view finds support in *Tolley*. The judgment concerned the application of Article 22(1)(b) of Regulation 1408/71. The Court found that the provision:

100. *Paletta* (n 94) para 17.

101. Article 27 of the Implementing Regulation 987/2009 may seem to suggest a narrow reading of Article 21 of Regulation 883/2004.

102. Paskalia (n 10) 1197–1198.

103. Cf Article 3(1)(a) of Regulation 883/2004.

104. Fuchs and Cornelissen (n 76) 130.

prevents a competent State from making retention of entitlement to a benefit such as that at issue in the main proceedings subject to a condition as to residence and *presence* on its territory.¹⁰⁵

The Court noted that such requirement ‘would render that provision entirely devoid of purpose’.¹⁰⁶ Today, the findings in *Tolley* are of direct relevance to the interpretation of Article 7 due to the revised system of Regulation 883/2004.

I now return to the interpretation of Article 21. As previously explained, there is a difference between requirements of past presence and continued presence. The former, but not the latter, may occasionally be justified in order to prove that the necessary link between the recipient and the competent State exists. The main rule in Article 7 must be constructed with some care, so as not to rule out *any* requirement of presence. However, with regard to specific benefits, such as sickness benefits, the qualification criteria in national law will in any case suffice to provide a genuine link. *Then* clarity is possible. Recitals 20 and 21 of Regulation 883/2004 confirm, respectively, that:

In the field of sickness, maternity and equivalent paternity benefits, insured persons, as well as the members of their families, living or staying in a Member State other than the competent Member State, should be afforded protection.

Provisions on sickness, maternity and equivalent paternity benefits were drawn up in the light of Court of Justice case-law. Provisions on prior authorisation have been improved, taking into account the relevant decisions of the Court of Justice.

Article 21 is an explication of the main principle of exportability that does not differentiate between recipients ‘living or staying’ in a Member State other than the competent Member State. The Article provides clarity, as, with regard to the benefits mentioned therein, the introduction of a clear rule is actually possible. The provisions on prior authorisation have been ‘improved’ in the sense that the inclusion of sickness benefits under the main principle of Article 7 invokes the following general rule: the principle of exportability does not allow requirements of prior authorisation.

In sum, this supports the conclusion that ‘benefits in cash are exportable’. Under this heading, Pennings observes that:

Article 21 of the Regulation gives coordination rules on cash sickness benefits. It provides that an insured person and members of his or her family residing or staying outside the competent Member State are entitled to cash benefits by the competent institution of that State. Thus the competent State – the State where the person is insured – has to export these benefits. [...] For instance, if a person who is employed in Spain becomes ill and goes to Germany in order to recover in the house of his or her parents, s/he can claim Spanish sickness benefits in Germany.¹⁰⁷

The strict understanding of Article 21 advocated by Pennings fits neatly with the main principles of the Regulation. It reflects the systemic protection of equality granted by Article 5(b)

105. *Tolley* (n 79) para 89 (emphasis added), compare *Jonsson* (n 68) 72.

106. *Tolley* (n 79) para 88. It is astonishing that the Expert Commission (n 37) (see p 32) and the General Attorney (n 11) (see paras 201, 203, 216 and section 11 no 15) argue that ‘entirely devoid of any purpose’ is a legal standard against which Article 21 of Regulation 883/2004 should be assessed.

107. Pennings (n 8) 184. Compare to the opposite HR-2017-560-A, accounted for in section 2 above.

and the prohibition of reinforced residence clauses in Article 7. Understood in this sense, Article 21 explicates the consequences of the fusion between the two main principles: equal treatment and free movement.

6. Conclusions

Internal integrity

Sickness benefits in cash are exportable. A requirement of continued presence is contrary to Article 5(b). Facts or events occurring in any Member State, eg 'stay', must be treated on an equal footing with facts or events occurring in the competent State. Further, a requirement of continued presence constitutes a reinforced residence requirement, contrary to Article 7. Finally, a differentiation of the right to free movement based on the length of the stay in another Member State is contrary to Article 21.¹⁰⁸ As a whole, these provisions require a comparison of the individual who moves with the position of the same individual if he or she did not. The fusion between the right to equal treatment and the right to free movement constitutes the internal integrity of Regulation 883/2004.

Systemic integrity

European law pursues a vision of Europe as home. Its realisation requires exit rights and entry rights. The export rights in Regulation 883/2004 address the competent State: they are rights of exit. Conversely, the Citizens' Rights Directive mainly concerns entry. Exit rights are less controversial. The construction of the social security system remains a national prerogative. The economic costs occur whether the beneficiaries move or not. If they do, the approach at the European level is to regard cash benefits as the substitute of a 'worker's' income. Thus, the notion of 'worker' in Article 48 TFEU has always been construed widely. The entry right, of which Article 45(b) TFEU is an important guarantor, has been subject to gradual expansion, codified by the Citizens' Rights Directive. Today, parallelism has been achieved. Correspondence between the rights of exit and entry provide systemic integrity and coherence, at the level of secondary law.

Constitutional integrity

EU primary law guides the interpretation of Regulation 883/2004. The purposes that can be derived from primary law have been spelled out in a clear and consistent manner in the case law of the ECJ: eg to establish 'as complete a freedom of movement for workers as possible';¹⁰⁹ to provide for the 'greatest possible freedom of movement' for workers;¹¹⁰ and to 'prevent the possible negative effects that the exercise of the freedom of movement for workers could have on the enjoyment, by workers and their families, of social security benefits'.¹¹¹ These purposes provide a link between the constitutional level and the Regulation. Distinctions at the level of secondary law that do not exist in primary law (eg between 'residence' and 'stay') are difficult to justify to the extent that they hamper the realisation of the constitutional aims. The exclusion of export rights in the event of 'stay' abroad would mark

108. I make one reservation: there does not yet exist a source that authoritatively clarifies whether Article 21 is applicable only where incapacity for work arises while the worker concerned is staying in a Member State other than the competent Member State. Such a finding is possible without compromising the coherence of the provisions in Regulation 883/2004. They will simply have different areas of application.

109. *Unger* (n 18).

110. *Hendrix* (n 83) para 52; *Jonsson* (n 68) para 73.

111. *Brey* (n 83) para 51.

that the freedom of movement is not ‘complete’ and that the Regulation positively rejects the aim of ‘greatest possible freedom of movement’. The Norwegian social security scandal is the best example to prove that the introduction of a distinction between ‘residence’ and ‘stay’ will have ‘negative effects’ for the exercise of the freedom of movement for workers, contrary to the constitutional aim.

While the constitutional principles of EU law guide the interpretation of the Regulation, they also protect its autonomy. Regulations must be applied ‘as such’.¹¹² The link between Regulation 883/2004 and the latter requirement is evident. Articles 4, 5 and 7 all commence with the words: ‘[u]nless otherwise provided for by this Regulation’. Exceptions can only be derived from the Regulation itself. There exist no relevant exceptions with regard to the matters discussed in this paper.

The double manner in which the Regulation relates to EU primary law bolsters its effectiveness as a regulatory tool and grants its constitutional integrity.

The integrity of national law and EU Law

The purpose of Regulation 883/2004 is coordination, not harmonisation. The Regulation makes territory irrelevant, but does not merge different legal regimes. It attributes the status of worker to those who actually benefit from national schemes, but does not specify the substance of the benefits. It requires that at any given time the legislation of only one Member State is applicable, but prohibits its reach to be cut off, eg due to a requirement of presence. There will exist different legal regimes, but no borders, as, put simply, the whole of Europe is considered as Sweden, Denmark, Germany and so on, depending on the designation of competent State. The vision of Europe pursued by the coordination measures is that whatever the law of the competent State is, it applies wherever in Europe a beneficiary is. This equilibrium preserves the integrity of both national law and EU law.

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112. See n 78.