



# Analytical legal report 2019

The application of the social security coordination  
rules on modern forms of family

Written by Grega Strban (coordinator), Bernhard Spiegel, Paul Schoukens  
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## **MoveS - Free movement of workers and Social security coordination**

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## **EXECUTIVE SUMMARY**

Many social security systems provide benefits to members of a family in the event of a specific social risk, such as sickness, parenthood, family, old age or long-term care. It is therefore essential to establish which persons comprise a family unit and which persons of a family unit are entitled to or can receive social benefits.

Owing to the interdependence between national and EU law, definitions at the national level are essential in the application of EU law. However, these definitions vary, with considerable diversity across the legislative (and practical) landscape. Such definitions may sometimes derive from national family law, but they most often rely on the specific stipulations set out under each social security branch. While some social security schemes in Member States are residence-based, establishing a definition of a family and members of a family in cross-border situations may be required.

National rules reflect distinctive historical and cultural elements, including ideological convictions, which may subsequently influence policy choices and legislative acts. Perceptions of the family and members of the family may change over time, may differ in certain places or might be conditioned by the promotion of mobility within the European Union. Today, families do not simply consist of just (biological) parents and children, and assumptions like this, including certain notions reflected in Social Security (Minimum Standards) Convention, 1952 (No. 102) of the International Labour Organization, are clearly outdated. More modern types of families must also equally be considered.

Member States recognise that people can live together in variety of compositions. Such compositions include adoptive families, foster families, families with same-sex parents, single-parent or lone-parent families, reconstituted families (comprising a couple with (a) child(ren) from previous relationships and any children that a couple may have together (also described as step-families, blended families, patchwork families or recomposed families)). Other forms of sharing a life together may also exist, such as being together but living in separate homes, or being married but living permanently apart. In the field of social security, having more than one father or mother, i.e. 'father plus' or co-mothership, is not a new concept. The main focus should always be on the child living in such family units and what is in his/her best interests. This focus should equally apply in EU social security (coordination) law.

Article 1(i) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security system sets out several elements to establish a member of the family. However, the elements covered in the Regulation do not provide for a solution to recognise family member relationships that may be recognised in one Member State but not another, as it is usually the legislation of the competent Member State that is recognised as applicable. Problems may arise if the national legislation of one Member State does not recognise situations that are recognised in another Member State.

Any solutions put forward should therefore not be taken in the interests of maintaining the status quo, and there is a myriad of possibilities that could be undertaken to avoid this. Experience shows that it may be difficult to amend the Coordination Regulations, so a more dynamic interpretation of existing legal rules may be a possible solution. By way of example, the Coordination Regulations do not establish the notions of a 'child' or 'spouse'. Instead of a static interpretation that encompasses what the legislative body at the time of the adoption of the act had in mind, a more dynamic interpretation that reflects what is relevant today could be applied.

Another example of dynamic interpretation could be the impact of the assimilation of facts. If a person is recognised as a child or a parent in one Member State, other Member States should also take this recognition into account. It becomes problematic if a particular person is recognised as a child, parent or partner in one Member State, but is not recognised as

such as a result of crossing a national border within the EU. Such interpretations would clearly hinder or even undermine the fundamental principle of free movement within the EU for certain family members. The Court of Justice of the European Union has already ruled on this matter, albeit outside the scope of social security law. Moreover, the fundamental principle of non-discrimination, including on the grounds of sexual orientation, must also be respected within social security (coordination) law, and not just by the European Convention of Human Rights.

However, not all problems can be resolved by interpretative tools. As relationships between different individuals become more complex, there is an increased risk of further problems and misunderstandings. Legislative action in this regard might therefore be necessary. The rule of law, a cornerstone of any democratic society, requires the legislature, both at the Member State and EU levels, to adjust to ever-changing relationships and modern forms of families with normative action. Amendments to the definitions of members of the family in the Coordination Regulations might therefore be required. Moreover, a common, (restricted or broad) EU-wide definition of a family and the members of a family could also be proposed. In any event, the EU is bound to protect the rights of a child, his/her best interests and support families, while taking into account changing living arrangements. This protection should also extend to social security law and its coordination.



## **1 INTRODUCTION**

### **1.1. Relevance of the 'family' for the coordination of social security systems**

Traditionally, social security is a safety-net structure organised by a state or by one or more local entities that offers a level of protection for individuals against the various social risks that they may encounter throughout their lives, such as sickness, maternity, accidents at work or occupational diseases, invalidity, old age, unemployment or a reliance on long-term care. These social risks primarily affect the individual concerned. However, a social security system must offer assistance to people who may also be affected by the situation that the individual concerned finds himself/herself in, such as the costs to support a member of the family, especially children, or if a person should die. The list of potential social risks covered by social security systems traces its roots to the middle of the 20<sup>th</sup> century <sup>(1)</sup> and has not changed considerably ever since <sup>(2)</sup>. This study will focus on the resulting coverage for individuals by social security systems as a result of the social situation of another person. Coverage may occur in almost all circumstances involving a social risk, such as in the following examples.

- If only a gainfully active person is covered against sickness or maternity <sup>(3)</sup>, any dependents will also need to be covered to avoid financial hardship or destitution, either via derived rights or their own individual rights, and taking into account the financial situation of the gainfully active person.
- If a person has acquired a pension right as a result of his/her career as a gainfully active person, it may be necessary to take into account any gaps in the person's career if they cared for another person, such as a child, or if others depend on the pensioner while in receipt of his/her pension, such as minor children or a spouse.
- Periods of interruption of a gainful activity may not simply be traditional periods of unemployment, such as being in between jobs, they may also be periods of time during which the person concerned needed to take care of another person, such as a small child, a severely sick person or a dying relative. An unemployed person may also be responsible for supporting others, which may require an increase in unemployment benefits or an adjustment to the definition of suitable employment.
- Having children to support always creates an additional financial load on a gainfully active person and may require additional resources. Similarly, other family members might be classified as a primary carer or a legal guardian, should the gainfully active person rely on long-term care.
- If a person who had to support (an)other individual(s) dies, it may be necessary for the supported individual(s) to claim social security benefits in order to avoid financial hardship or destitution.

The coverage offered by social security systems of those around the primarily insured person varies greatly and depends on the financial social aims that govern them. Systems that are based on a link to a gainful activity, respect the solidarity principle (among insured

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<sup>(1)</sup> See C102 - Social Security (Minimum Standards) Convention, 1952 (No. 102) of 28/06/1952 of the International Labour Organization concerning minimum standards of social security, or the European Code of Social Security of 16/04/1964 of the Council of Europe. See also Article 34 of the Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012).

<sup>(2)</sup> Although other social risks have been taken into account, such as paternity and reliance on long-term care.

<sup>(3)</sup> Such coverage is usually described as 'sickness insurance' under the so-called Bismarck Model.

persons and their family members) and include certain distributive elements will generally provide more coverage in these circumstances than systems that are based on an individualised approach (e.g. national health systems) or those that mostly rely on economic principles and the equivalence principle (e.g. capitalisation of pension entitlements). Despite these differences, the protection of dependent individuals is reflected in the fundamental rights of many national constitutions and international principles, such as the Charter of Fundamental Rights of the European Union: 'The family shall enjoy legal, economic and social protection' <sup>(4)</sup>. The circle of individuals entitled to such protection under the Charter is indicated by the term 'family', however, a concrete definition of those individuals that comprise a family is not given. Specifying which individuals comprise a family is essential in order to know which individuals out of a group of people have a relationship with the person who is entitled to benefits are considered a member of the family. The focus of this study will be the possible individuals that are classified as members of the family.

Social security schemes across Member States are not harmonised, and there is a wide range of different schemes on offer. They are, however, coordinated for individuals who have a cross-border circumstance, which involve the social security system of more than one Member State. The fundamental pillars for this coordination are enshrined in the Treaty on the Functioning of the European Union (TFEU) <sup>(5)</sup>, in particular the pillars of equal treatment <sup>(6)</sup>, aggregation of periods and export of benefits <sup>(7)</sup>. The Council of the European Union and the European Parliament have set out these general principles in two Regulations (hereafter the Coordination Regulations):

- Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (hereafter Regulation (EC) No 883/2004) <sup>(8)</sup>;
- Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (hereafter Regulation (EC) No 987/2009) <sup>(9)</sup>.

It is crucial to set out the group of individuals to whom these Regulations apply,

These Regulations do not apply to all individuals, and a specific group of persons covered is set out in these Regulations <sup>(10)</sup>. Recital 7 of Regulation (EC) No 883/2004 defines the personal field of application as follows:

*Due to the major differences existing between national legislation in terms of the persons covered, it is preferable to lay down the principle that this Regulation is to*

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<sup>(4)</sup> Article 33(1) of the Charter of Fundamental Rights of the European Union.

<sup>(5)</sup> TFEU, OJ C 326, 26.10.2012, p. 47–390 (consolidated version).

<sup>(6)</sup> Articles 18, 45 and 48 TFEU.

<sup>(7)</sup> Article 48 TFEU.

<sup>(8)</sup> OJEU L 166, 30.4.2004, p. 1–123, most recently amended by Commission Regulation (EU) No 1372/2013 of 19 December 2013 amending Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems and Regulation (EC) No 987/2009 of the European Parliament and of the Council laying down the procedure for implementing Regulation (EC) No 883/2004, OJEU L 346, 20.12.2013, p. 27–28.

<sup>(9)</sup> OJEU L 284, 30.10.2009, p. 1, most recently amended by Commission Regulation (EU) No 1368/2014 of 17 December 2014 amending Regulation (EC) No 987/2009 of the European Parliament and of the Council laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems and Commission Regulation (EU) No 1372/2013 amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 of the European Parliament and of the Council laying down the procedure for implementing Regulation (EC) No 883/2004, OJEU L 366, 20.12.2014, p. 15–16.

<sup>(10)</sup> Article 2 of Regulation (EC) No 883/2004.

*apply to nationals of a Member State, stateless persons and refugees resident in the territory of a Member State who are or have been subject to the social security legislation of one or more Member States, as well as to the members of their families and to their survivors.*

The recital refers to the persons linked to nationals, refugees and stateless persons (who could be regarded as covered by priority) by using the terms 'member of their families' and 'survivor'. These persons are covered by the personal scope of the Regulation, irrespective of their nationality. In other words, third-country nationals are also covered as members of the family or as survivors. This special situation of third-country nationals has lost much of its significance owing to the general extension of the Regulations to third-country nationals <sup>(11)</sup>. Nevertheless, the question of which individuals are classified as members of the family or survivors of another person is particularly relevant when applying the Coordination Regulations.

Before analysing and discussing the entitlements of members of the family in the field of social security, this report will discuss the various definitions of 'member of the family' under numerous social security systems and EU law.

## **1.2. Defining a member of the family under social security systems**

The definition of which individuals comprise a family has changed over time and differs regionally. The Ancient Roman family was a complex social structure that was based mainly on the nuclear family, however, it could also include various other members or combinations thereof, such as extended family members, household slaves and freed slaves <sup>(12)</sup>. In cultures outside the European understanding, a family could include more than one spouse. In Europe and in other countries with comparable cultures, family traditionally meant a nuclear family, comprising two married parents (with the focus on the male as the breadwinner) and their children <sup>(13)</sup>. Recent developments show that this traditional view is no longer valid, as various models of living together or alone have developed. This is the reason for studying the impact of these developments on social security coordination. Reference should also be made to partnerships that are not formally recognised as marriage; same-sex marriage or (civil) partnerships; changing partners within a relationship and step-parents; foster parents; single parents; so-called economic partnerships (persons living together without being intimate); and other forms of living together in the same household, such as a carer and a person in need of care.

As there is no common and stable understanding in Europe to set out which individuals are classified as members of the family, it is essential for relevant legislation to define this notion. Of course, our focus in this study lies on the coordination of social security, however, the definitions used in other fields of law could also be important.

Every nation must define the personal scope of the application of its laws. This is not just the case for national social security legislation, but also for other areas of law, such as tax law or civil (family) law. It is interesting to compare national definitions across Member States, however, in relation to the application of European law, these differences are only

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<sup>(11)</sup> Regulation (EU) No 1231/2010 of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality, OJ L 344, 29.12.2010, p. 1–3.

<sup>(12)</sup> Gardner, J. F., *Family and Familia in Roman Law and Life*, Oxford, Clarendon Press, 1998.

<sup>(13)</sup> According to C102 - Social Security (Minimum Standards) Convention, 1952 (No. 102) of 28/06/1952 of the International Labour Organization, standard beneficiaries for guaranteed protection are defined as 'prescribed classes of employees ... and also their wives and children'.

significant if EU law refers to such national definitions. If EU law has a specific definition, national definitions are no longer relevant.

Regulation (EC) No 883/2004 gives the following definition:

*“member of the family” means:*

*(1) (i) any person defined or recognised as a member of the family or designated as a member of the household by the legislation under which benefits are provided;*

*(ii) with regard to benefits in kind pursuant to Title III, Chapter 1 on sickness, maternity and equivalent paternity benefits, any person defined or recognised as a member of the family or designated as a member of the household by the legislation of the Member State in which he/she resides;*

*2. If the legislation of a Member State which is applicable under subparagraph (1) does not make a distinction between the members of the family and other persons to whom it is applicable, the spouse, minor children, and dependent children who have reached the age of majority shall be considered members of the family;*

*3. If, under the legislation which is applicable under subparagraphs (1) and (2), a person is considered a member of the family or member of the household only if he lives in the same household as the insured person or pensioner, this condition shall be considered satisfied if the person in question is mainly dependent on the insured person or pensioner; <sup>(14)</sup>*

Regulation (EC) No 883/2004 no longer contains any definition for the term ‘survivor’, which is also important for benefits for members of the family of a deceased insured person. For the sake of completeness, Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (hereafter Regulation (EEC) No 1408/71) <sup>(15)</sup> defines a ‘survivor’ as:

*“survivor” means any person defined or recognised as such by the legislation under which the benefits are granted; where, however, the said legislation regards as a survivor only a person who was living under the same roof as the deceased worker, this condition shall be considered satisfied if such person was mainly dependent on the deceased worker; <sup>(16)</sup>*

### **1.3. General remarks on the definition**

The above-mentioned definition of ‘members of the family’ under Regulation (EC) No 883/2004 follows three slightly different concepts:

1. The general rule is that national legislation should define which individuals are classified as a member of the family or member of the household in relation to a specific person (Article 1(i)(1)(i)). However, clarification is needed in regard to which legislation is applicable if more than one Member State is involved. In the event of benefits in kind under Title III, Chapter 1 of Regulation (EC) No 883/2004, the general principle is that it is the legislation of the Member State of residence of

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<sup>(14)</sup> Article 1(i) of Regulation (EC) No 883/2004.

<sup>(15)</sup> OJ L 149, 5.7.1971, p. 2–50, as codified by Council Regulation (EC) No 118/97 of 2 December 1996 amending and updating Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ L 28, 30.1.1997, p. 1–229), and amended by Regulation (EC) No 120/2009 (OJ L 39, 10.2.2009, p. 29–32).

<sup>(16)</sup> Article 1(g) of Regulation (EEC) No 1408/71.

the members of the family that is applicable, and not the Member State competent in which the person exercised such rights. Taking into account that there is no longer a definition for 'survivor', it must be assumed that this notion solely depends on the definitions under the national law concerned.

2. Without changing the general principle, the definition adds an element that goes beyond national definitions. If the national definition covers only individuals living in the same household as family members (as classified under national legislation), then a person who is not living in the same household as the insured person or pensioner, but is mainly dependent on the above-mentioned person, must also be classified as member of the family (Article 1(i)(3)). For survivors, Regulation (EC) No 883/2004 no longer provides for the same classification, i.e. living under the same roof, as is the case under Regulation (EEC) No 1408/71.
3. The third concept is more of an EU definition. If the legislation of the Member State that is relevant does not, as a rule, distinguish between insured persons and the members of their family, or does not define which individuals of a family are entitled to benefits because of their position within then family, then the spouse (understood as a married person) <sup>(17)</sup>, minor children and dependent children who have reached the age of majority, e.g. students or children with working incapacity, must be classified as members of the family (Article 1(i)(2)). The definition therefore introduces a common understanding of members of the family for all Member States <sup>(18)</sup> that must apply this rule, but refers back to national legislation for further clarification. The definition of 'spouse' <sup>(19)</sup>, 'minor child(ren)', and in this context 'age of majority', depends on the relevant national legislation, and owing to the lack of harmonisation of these notions in EU law, may differ between Member States. This last concept needed to be introduced because of national health insurance schemes under which every resident person must be regarded as covered by the scheme and, the position therefore as a 'member of the family' is not relevant under national law.

The definition provided for by Regulation (EC) No 883/2004 is therefore largely based on the principle of national law defining the circle of individuals that belong to a family. There is no harmonised European definition that would provide for a common understanding of this notion across all Member States.

#### **1.4. General questions of interpretation**

Before analysing the impact of the definition of 'member of the family', pursuant to Regulation (EC) No 883/2004, in relation to the different social security risks, it may be of benefit to provide some general remarks on the Regulation. The definitions contain certain elements that are not entirely clear or suggest further topics of discussion.

1. A 'member of the household' seems to have the same value as a 'member of the family'. This would only be relevant if national legislation defined entitlements of or from a person who is a 'member of the household'. It can be assumed that, in principle, a family tie (relationship) is required. A non-related person, such as a

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<sup>(17)</sup> This also seems to be evident across other languages, such as 'conjoint' in French or 'ehegatte' in German. The Court of Justice of the European Union has previously ruled that 'spouse' refers only to a marital relationship (See judgment of the Court of Justice of 17 April 1986, *Netherlands v Reed*, C-59/85, ECLI:EU:C:1986:157, paragraph 15).

<sup>(18)</sup> For Regulation (EC) No 883/2004, this is somewhat of a novel concept, as under its predecessor, Regulation (EEC) No 1408/71, every Member State concerned had to define the members of the family for all cases in Annex I, Part II of that Regulation, which led to many more differences than today.

<sup>(19)</sup> 'Spouse' could also be defined as a person in a same-sex relationship if the relevant national legislation has recognised such partnerships as marriage or at an equivalent level.

student working as an au pair or a person who has rented a room in a big flat inhabited by a family, would usually not qualify for social security benefits from another person of the same household <sup>(20)</sup>. This notion might be important in connection with the fictions of being in the same household, pursuant to Article 1(i)(3) of Regulation (EC) No 883/2004. It may be interesting to analyse if 'member of the household' is defined in the same way as 'living under the same roof'. However, as this phrase, as provided for pursuant to Regulation (EEC) No 1408/71 <sup>(21)</sup>, no longer applies, this could be regarded as not relevant.

2. There are numerous questions left unanswered in regard to the fiction that is brought to the fore, pursuant to Article 1(i)(3) of Regulation (EC) No 883/2004, that living in the same household should be substituted by the *main dependence* on the insured person or the pensioner. One key question is if this also covers situations within only one Member State or if there is a need for a cross-border element. By way of example, would this cover a potential situation of a father leaving a family, the mother of which being a frontier worker, and subsequently moves into a new property 200 metres away from the household of his wife in the same city? In such a scenario, according to national legislation, this father may no longer be entitled to benefits. Alternatively, would this fiction only apply when the father moves to another Member State? This element could be construed as covering only cross-border situations, as usually purely domestic situations do not fall under the scope of the Coordination Regulations <sup>(22)</sup>, however, this could be interpreted differently. This example proves how complicated it is to interpret this definition. To date, this question has never been brought before the Court of Justice of the European Union (CJEU).
3. Although various provisions of Regulation (EC) No 883/2004 still use the notion of 'survivor' <sup>(23)</sup>, the Regulation no longer provides for a definition, contrary to Regulation (EEC) No 1408/71 <sup>(24)</sup>. In principle, it therefore falls on national legislation to define the individuals who might claim rights as survivors. As Regulation (EC) No 883/2004 no longer includes the requirement of living under the same roof, in addition to depending on the deceased person, it could be assumed that this fiction no longer applies. The assimilation of facts provided under Article 5 of Regulation (EC) No 883/2004 cannot be regarded as far-reaching to such an extent that it also results in such a fiction.
4. While not to mention certain sector-specific issues <sup>(25)</sup>, which will be discussed in more detail in Chapter 3, in the past, only one general question relating to the situation of members of the family had to be answered by the CJEU: Are these persons covered only for derived rights linked to the situation of the person who is mainly covered or could they also rely on the Coordination Regulation when their individual and own rights are concerned? This was particularly significant as the personal scope <sup>(26)</sup> covered members of the family irrespective of their nationality, while the main beneficiaries (workers or self-employed persons pursuant to

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<sup>(20)</sup> Nevertheless, this is not particularly clear under the national legislation of certain Member States. As an example, in the Netherlands, various forms of living together can be regarded as cohabitation in a joint household for social security purposes. Why these persons live together is irrelevant (an affectionate or sexual relationship is not necessary). Purely commercial relationships (e.g. paying a rent to the landlord in whose household a person lives) can be classified as insufficient for social security cohabitation.

<sup>(21)</sup> Article 1(g) of Regulation (EEC) No 1408/71.

<sup>(22)</sup> See *Camille Petit v Office national des pensions*, Case C-153/91, ECLI:EU:C:1992:354.

<sup>(23)</sup> For example, Articles 2 and 38 or Title III, Chapter 5 of Regulation (EC) No 883/2004.

<sup>(24)</sup> Article 1(g) of Regulation (EEC) No 1408/71.

<sup>(25)</sup> See *Claudine Delavant v Allgemeine Ortskrankenkasse für das Saarland*, Case C-451/93, ECLI:EU:C:1995:176, in regard to sickness benefits; or *Romana Slanina v Unabhängiger Finanzsenat, Außenstelle Wien*, C-363/08, ECLI:EU:C:2009:732, in regard to family benefits.

<sup>(26)</sup> Article 2 of Regulation (EEC) No 1408/71 and Article 2 of Regulation (EC) No 883/2004.

Regulation (EEC) No 1408/71 or persons who are/have been subject to the legislation of a Member State pursuant to Regulation (EC) No 883/2004) had to be EU nationals, refugees or stateless persons. As a result, third-country nationals could enter the personal scope of the Coordination Regulations as members of the family or as survivors. This is particularly important when only the equal treatment provision could create entitlements to specific benefits. The CJEU has changed its interpretation in this regard over time.

Some years ago, the CJEU ruled that a person could only be classified as a member of the family pursuant by Regulation (EEC) No 1408/71 in regard to the rights they derived from another person <sup>(27)</sup>. The CJEU later widened this interpretation to include persons who had their own rights, i.e. rights not derived from another person, such as the entitlement to retroactively pay contributions for pension entitlements <sup>(28)</sup>. In cases in which the Coordination Regulations explicitly refer to rights of the gainfully active population (workers and self-employed persons), a third-country national cannot fall under the personal scope of these provisions in the same way as members of the family of a gainfully active person with Union citizenship, such as in regard to rights to unemployment benefits <sup>(29)</sup>.

For Union citizens, the difference between persons covered by priority and members of the family was usually only significant in regard to benefits for non-active persons, as active Union citizens were already covered under their own rights and did not need to rely on rights as members of the family. As discussed above, this was not the situation for third-country nationals. This difference is no longer as significant, as nowadays, third-country nationals are generally included in the personal scope of Regulation (EC) No 883/2004 via Regulation (EU) No 1231/2010. Third-country nationals are now also entitled to benefits according to Regulation (EU) No 1231/2010, however, the difference may be significant for situations arising in which this extension does not apply, i.e. in situations involving Denmark or the United Kingdom. As this concerns only a few cases, this aspect of the situation of members of the family is not discussed in this report. Nevertheless, the question of who is a member of the family still plays an important role in regard to access to benefits as a result of the relationship(s) between different persons, excluding the notion of nationality, and is the focus of this study.

5. Lastly, it should be noted that the default definition of Regulation (EC) No 883/2004 for cases in which national legislation does not provide for a definition does not seem to take into account changes to the composition of families over time; it covers only married spouses and no other forms of cohabitation, such as registered partnerships.

### **1.5. Definition of members of the family in other instruments of Union law**

Regulation (EC) No 883/2004 is not the only instrument of Union law that applies to social security systems in cross-border situations. As social security benefits are classified as

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<sup>(27)</sup> See *Slavica Kermaschek v Bundesanstalt für Arbeit*, Case 40/76, ECLI:EU:C:1976:157, or *Belgian State v Noushin Taghavi*, Case C-243/91, ECLI:EU:C:1992:306. Nevertheless, it seems that before these judgments, the CJEU had a broader understanding that also included children of a migrant worker with respect to the entitlement to benefits for disabled persons that had to be regarded as the child's own right. See *Mr. and Mrs. F. v Belgian State*, Case 7/75, ECLI:EU:C:1975:80.

<sup>(28)</sup> See *Bestuur van de Sociale Verzekeringsbank v J.M. Cabanis-Issarte*, Case C-308/93, ECLI:EU:C:1996:169.

<sup>(29)</sup> See *Urszula Ruhr v Bundesanstalt für Arbeit*, Case C-189/00, ECLI:EU:C:2001:583.

social advantages <sup>(30)</sup>, pursuant to Article 7 of 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 (hereafter Regulation (EU) No 492/2011) <sup>(31)</sup>, it is interesting to note the situation of members of the family according to this Regulation. In contrast to the predecessor of Regulation (EU) 492/2011, Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community (hereafter Regulation (EEC) No 1612/68) <sup>(32)</sup>, contained the following definition for ‘member of the family’:

*1. The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State: (a) his spouse and their descendants who are under the age of 21 years or are dependants;*

*(b) dependent relatives in the ascending line of the worker and his spouse. <sup>(33)</sup>*

This definition does not relate to access to social security benefits, but is rather for determining which individuals belong to the family of the migrant worker who are entitled to reside with him/her. There is no explicit mention of members of the family in relation to access to social advantages. In 2007, the CJEU ruled that members of the family should be included in the equal treatment provision in regard to access to benefits, as they might have a direct impact on the worker:

*A benefit [...], which enables one of the parents to devote himself or herself to the raising of a young child, by meeting family expenses [...], benefits the family as a whole, whichever parent it is who claims the allowance. The grant of such an allowance to a worker's spouse is capable of reducing that worker's obligation to contribute to family expenses, and therefore constitutes for him or her a “social advantage” within the meaning of Article 7(2) of Regulation No 1612/68. <sup>(34)</sup>*

As a result of CJEU case-law, access to social advantages is not limited to members of the family explicitly mentioned in the above-mentioned definition, such as the mother of a migrant worker <sup>(35)</sup> or even a widow after the death of a migrant worker <sup>(36)</sup>, but also includes unmarried companions <sup>(37)</sup>, and therefore goes beyond the scope of the definition concerning residence with the migrant worker.

The rights of members of the family to reside with the migrant worker, including the above-mentioned definition, were omitted from Regulation (EEC) No 1612/68 and transferred into 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 <sup>(38)</sup>. There was no change to the content of

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<sup>(30)</sup> See *María Martínez Sala v Freistaat Bayern*, Case C-85/96, ECLI:EU:C:1998:217; *Gertraud Hartmann v Freistaat Bayern*, Case C-212/05, ECLI:EU:C:2007:437; or *Wendy Geven v Land Nordrhein-Westfalen*, Case C-213/05, ECLI:EU:C:2007:438.

<sup>(31)</sup> OJ L 141, 27.5.2011, p. 1–12.

<sup>(32)</sup> OJ L 257, 19.10.1968, p. 2–12.

<sup>(33)</sup> Article 10(1).

<sup>(34)</sup> See judgment of the Court of Justice of 18 July 2007, *Gertraud Hartmann v Freistaat Bayern*, Case C-212/05, ECLI:EU:C:2007:437, paragraph 26.

<sup>(35)</sup> See judgment of the Court of Justice of 12 July 1984, *Carmela Castelli v Office National des Pensions pour Travailleurs Salariés (ONPTS)*, Case C-261/83, ECLI:EU:C:1984:280, paragraph 10.

<sup>(36)</sup> See judgment of the Court of Justice of 30 September 1975, *Anita Cristini v Société nationale des chemins de fer français*, Case C 32/75, ECLI:EU:C:1975:120, paragraphs 14 and 18.

<sup>(37)</sup> See judgment of the Court of Justice of 17 April 1986, *State of the Netherlands v Ann Florence Reed*, Case C-59/85, ECLI:EU:C:1986:157, paragraph 28.

<sup>(38)</sup> OJ L 158, 30.4.2004, p. 77–123; Article 38(1).



Article 7 of Regulation (EU) No 492/2011 (previously Article 7 of Regulation (EEC) No 1612/68), which again includes the rights of members of the family to social advantages if they have an impact on the (economic) situation of the migrant worker. The CJEU confirmed that the personal scope of Regulation (EU) No 492/2011 had to be interpreted in the light of the definition now contained in Directive 2004/38/EC <sup>(39)</sup>. This definition is therefore relevant for Regulation (EU) No 492/2011 and for accessing social advantages.

The definition under Directive 2004/38/EC is as follows:

*“Family member” means:*

*(a) the spouse;*

*(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;*

*(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);*

*(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);* <sup>(40)</sup>

Therefore, in the application of Regulation (EU) No 492/2011, a European definition has been created, which is rather elaborate and could differ from the definition contained in Regulation (EC) No 883/2004. This difference may not just affect migrant workers, but it could also affect other groups of Union citizens (even non-active persons), as the definition provided for in Directive 2004/38/EC affects social security benefits covered by Regulation (EC) No 883/2004 <sup>(41)</sup>. The relationship between the definition contained in Regulation (EC) No 883/2004 and the scope of the content contained in Directive 2004/38/EC (which is also applicable in such cases according to Regulation (EU) No 492/2011) is not clear. The pending case before the CJEU <sup>(42)</sup> on this issue might provide some clarity in this regard.

Lastly, reference could also be made to Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents <sup>(43)</sup>, as this Directive could be regarded as the counterpart to Directive 2004/38/EC. Any impact on social security benefits covered by Regulation (EC) No 883/2004 cannot therefore be ruled out <sup>(44)</sup>. Council Directive 2003/109/EC <sup>(45)</sup> refers to the definition of family members pursuant to Article 4(1) of Council Directive 2003/86/EC

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<sup>(39)</sup> See judgment of the Court of Justice of 15 December 2016, *Noémie Depesme and Others v Ministre de l'Enseignement supérieur et de la recherche*, Joined cases C-401/15 to C-403/15, ECLI:EU:C:2016:955, paragraphs 52 et seq.

<sup>(40)</sup> Article 2(2).

<sup>(41)</sup> See *Pensionsversicherungsanstalt v Peter Brey*, Case C-140/12, ECLI:EU:C:2013:565; *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*, Case C-333/13, ECLI:EU:C:2014:2358; *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others*, Case C-67/14, ECLI:EU:C:2015:597; *Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna García-Nieto and Others*, Case C-299/14, ECLI:EU:C:2016:114.

<sup>(42)</sup> See *Caisse pour l'avenir des enfants v FV, GW*, Case C-802/18.

<sup>(43)</sup> OJ L 16, 23.1.2004, p. 44–53; Article 16(1).

<sup>(44)</sup> Pursuant to Article 11(1)(d) of Directive 2003/109/EC, equal treatment for the persons covered by this Directive also covers social security.

<sup>(45)</sup> Article 16(1).

of 22 September 2003 on the right to family reunification <sup>(46)</sup>. Directive 2003/86/EC sets out the following:

1. *The Member States shall authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, as well as in Article 16, of the following family members:*

*(a) the sponsor's <sup>(47)</sup> spouse;*

*(b) the minor children of the sponsor and of his/her spouse, including children adopted in accordance with a decision taken by the competent authority in the Member State concerned or a decision which is automatically enforceable due to international obligations of that Member State or must be recognised in accordance with international obligations;*

*(c) the minor children including adopted children of the sponsor where the sponsor has custody and the children are dependent on him or her. ....*

*(d) the minor children including adopted children of the spouse where the spouse has custody and the children are dependent on him or her. ....*

*The minor children referred to in this Article must be below the age of majority set by the law of the Member State concerned and must not be married.*

...

2. ....

*(a) first-degree relatives in the direct ascending line of the sponsor or his or her spouse, where they are dependent on them and do not enjoy proper family support in the country of origin;*

*(b) the adult unmarried children of the sponsor or his or her spouse, where they are objectively unable to provide for their own needs on account of their state of health.*

3. ... *the unmarried partner, ..., with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership ..., and of the unmarried minor children, including adopted children, as well as the adult unmarried children who are objectively unable to provide for their own needs on account of their state of health, of such persons.*

...

4. *In the event of a polygamous marriage, where the sponsor already has a spouse living with him in the territory of a Member State, the Member State concerned shall not authorise the family reunification of a further spouse.*

*By way of derogation from paragraph 1(c), Member States may limit the family reunification of minor children of a further spouse and the sponsor. <sup>(48)</sup>*

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<sup>(46)</sup> OJ L 251, 3.10.2003, p. 12–18.

<sup>(47)</sup> The person who creates the right to family reunification.

<sup>(48)</sup> Article 4.

This is an extremely detailed definition that provides for an EU list of members of the family.

## **1.6. Aim and methodology of the study**

The definition of ‘member of the family’ according to Regulation (EC) No 883/2004 widely respects the autonomy of Member States to decide on the own concept of social security. This could be regarded as a weakness, as this may present complications when national concepts — especially the political decision on how to treat new forms of family — and interpretations differ. This has not just been an issue for cases brought before the CJEU, but also for attempts of the Administrative Commission for the Coordination of Social Security Systems (hereafter the Administrative Commission) to resolve some of the most burning issues where the different approaches of Member States have led to problems for the persons concerned. The aim of this study is to extend the work that has already been carried out to date and to provide recommendations to overcome existing problems. Any solutions put forward should take into account the changing composition of families.

In order to examine the current situation across Member States, a questionnaire was sent to MoveS national experts who tasked with reporting on the national definitions and the problems encountered at both the national level and international levels when the Coordination Regulations are applied. As there was the possibility that the relative importance of members of the family, and the definition thereof, might vary across different social security branches, the questionnaire was segregated accordingly. The answers to this questionnaire are summarised under Chapter 2 of this study, as an overview of the current situation across Member States.

This study focuses on social security schemes that would seem to be mostly likely affected by the definition of members of the family and their impact on the Coordination Regulations. These social security schemes are as follows:

- sickness benefits in kind;
- sickness benefits in cash, e.g. benefits for a person taking care of a child;
- maternity and (equivalent) paternity benefits;
- old-age pensions, in particular the taking into account of child-raising periods, the reduction of the pensionable age when caring for children or increments for pensioners with children;
- survivors’ benefits;
- death grants;
- family benefits.

As it is not possible to analyse all the different aspects of members of the family in the field of social security, the situation of a child in relation to one or more adults will be discussed in detail.

## **1.7. Structure of the report**

After discussing general observations on the definition of family members under various elements of EU law in Chapter 1, this report will provide an overview of the national legislation of Member States in Chapter 2. Chapter 3 focuses on the implications of modern forms of family on social security coordination. The report concludes with possible solutions and recommendations.

Although interesting, several aspects have not been discussed in this report, in particular:

- the impact of members of the family on social security contributions that could result in higher or lower contributions, e.g. if a state takes over contributions for non-active family members or additional contributions are required for non-active members of the family;
- supplements for unemployment benefits for dependent members of the family;
- the impact of members of the family on the amount of special non-contributory cash benefits, with dependent members of the family potentially increasing income thresholds;
- temporary benefits for gainfully active persons who take care of a sick, dying or elderly member of the family, and that should (partially) replace the income that cannot be gained because of the level of care required <sup>(49)</sup>;
- implications on the definition of family members in regard to social security for surrogate mothers.

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<sup>(49)</sup> Such benefits are difficult to qualify, as they may include long-term care benefits for the person in need of care or may include temporary unemployment benefits for the carer. If such benefits and the questions relating to them present problems for some Member States, a special study in this regard is recommended.

## **2 OVERVIEW OF THE NOTION OF THE FAMILY AND ITS MEMBERS UNDER THE NATIONAL LAW OF MEMBER STATES**

### **2.1. Importance of national definitions**

As mentioned above, when defining the notion of 'family', EU social security coordination law refers to the national law of Member States. However, what is crucial is the definition of 'family' according to the legislation under which benefits are provided or according to the legislation of the Member State in which the member of the family resides, such as is the case for sickness benefits in kind <sup>(50)</sup>.

Owing to the interdependence of national and EU law, definitions at the national level are essential in the application of EU law. However, such national definitions might vary. National definitions reflect distinctive historical and cultural elements, including ideological convictions, which go on to influence policy choices and legislative acts. Distinctive definitions may have implications for the coordination of national social security systems, if applied directly. If a common EU definition is required or if existing definitions, as discussed in Chapter 1, need to be modernised, common ground on a contemporary EU-wide definition of 'family' and 'member of the family' is needed. The more diverse the national definitions, the more difficult it might be to come to a uniform and unanimous agreement among Member States.

Furthermore, our way of living is more mobile and international. Although perceptions of the family and members thereof may change over time and may be different in certain places, what is key in today's society is the promotion of mobility within the EU.

Today, families do not simply comprise of just (biological) parents and children, as the definition of a standard beneficiary according to the Social Security (Minimum Standards) Convention, 1952 (No. 102) of 28/06/1952 of the International Labour Organization would seemingly indicate. However, many legal instruments at the national and EU levels are still oriented around this traditional nuclear family.

Nevertheless, less traditional types of family should be considered, such as adoptive families, families with same-sex parents, single-parent or lone-parent families, and reconstituted families. Single parenthood is typically the result of separation, divorce or the death of a parent. Other factors include the absence of a parent for prolonged periods, which may be because of migration, illness or imprisonment (so-called *de facto* single parenthood), as well as unintended pregnancy or the choice to raise a child alone <sup>(51)</sup>. Reconstituted families are families with step-parents and step-children, also known as blended families, step-families, patchwork families <sup>(52)</sup> and recomposed families. These families comprise a couple with (a) child(ren) from previous relationships, in addition to any children that the couple may have together <sup>(53)</sup>.

### **2.2. Overview of the notions in national legislation**

In order to have an overview of the current situation in Member States, national social security law and parts of family law need to be examined. This examination would also reveal similarities and differences in the definitions of a family and the members thereof,

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<sup>(50)</sup> Article 1 <sup>(i)</sup> of Regulation (EC) No 883/2004.

<sup>(51)</sup> Jordan, V., Stewart, K. and Janta, B., *Mechanisms supporting single parents across the European Union*, European Platform for Investing in Children (EPIC), European Union, 2019., p. 2.

<sup>(52)</sup> For the purposes of this report, a patchwork family is understood as comprising multiple units or parts.

<sup>(53)</sup> See also Picken, N. and Janta, B., *Leave policies and practice for non-traditional families*, European Platform for Investing in Children (EPIC), European Union 2019.

and identify potential solutions on how to apply EU social security coordination rules to children living within such families.

### **2.2.1. General or specific definitions**

As reported, only a handful of Member States have a general social security definition for (certain) members of the family. For instance, Ireland has a uniform definition of a 'qualified adult' and a 'qualified child'. The former is a person who is wholly or predominately maintained by the claimant, and this person would generally be the claimant's spouse, civil partner or cohabitant. The latter must be ordinarily resident in Ireland, not currently being detained in a children's detention centre and be under a certain age <sup>(54)</sup>. In Malta, the Social Security Act <sup>(55)</sup> provides for general definitions in respect of family members and family compositions, i.e. 'child', 'father', 'mother', 'parent' (including notions of step-parents and adoptive parents), 'household' and 'single parent'.

Conversely, in other states, national social security law does not provide for general definitions of the notions of 'family', 'child', 'mother', 'father', 'step-parent', 'foster parent', 'same-sex marriage/partnership' or 'single-parent family' that may apply across all branches of social security (such as in AT, BE, BG, CH, CY, CZ, DK, EE, EL, ES, FR, HR, HU, IT, LI, LU, LV, PL, PT, RO, SE, SI and SK) <sup>(56)</sup>.

When there is no general definition, social security law might rely on more general notions as defined by civil family law (such as in AT; BG; CH; DE, although DE family law does not always provide for a specific definition; EL; ES; HR; HU; LI; LT; NL; NO, partially; PL; RO; SE; SI; and SK). For instance, in Austria, 'parents' are defined as 'relatives in ascending order', and 'children' are defined as 'relatives in descending order'. In Switzerland, the Federal Supreme Court of Switzerland considers the Civil Code and family law as a given structure and argues that social security law is built upon this structure <sup>(57)</sup>. For other notions, such as 'marriage', 'child', 'mother' and 'father', and in most social security schemes, Swiss law does not refer to family law expressly but rather implicitly. Some states rely on family law to define notions of 'marriage', 'child', 'mother', 'father', and adoptive and foster family relations, such as Estonia.

Furthermore, some states do not have general definitions set out under social security law, nor do they rely on definitions set out under family law, but rather operate with separate definitions for each social security scheme. However, such definitions might in fact be more or less the same, such as in Belgium. Specific definitions or parts thereof for each social security scheme is commonplace (such as in CH, CY, CZ, DK, EL, FR, LU, LV, NL, NO, PL and SI). Most notably, these definitions can be found in the areas of healthcare, survivor and family benefit schemes, and social assistance schemes.

Based on the above, it would seem that in some states, where social security schemes are residence-based, there is no need to define a family, such as in Estonia and Sweden. Nevertheless, in the event of cross-border situations, the definition of a family might be required, such as in Norway or in Finland, where a family member is either the spouse of a person or the minor child of the person and/or of the spouse <sup>(58)</sup>.

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<sup>(54)</sup> See Social Welfare (Consolidation) Act 2005, as amended, and S.I. No 142/2007 - Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007.

<sup>(55)</sup> Chapter 318, Laws of Malta.

<sup>(56)</sup> It should be noted that, as a rule, social assistance schemes define who belongs to a family or household circle.

<sup>(57)</sup> See ATF 102 V 36 of 23 January 1976 and ATF 112 V 97 of 2 May 1976, Tribunal fédéral suisse.

<sup>(58)</sup> See Section 3 of the Finnish Act on residence-based social security in cross-border situations (16/2019).

### **2.2.2. Differences in defining a marriage and a partnership**

The relationship between a husband and a wife are, as a rule, defined as persons who have stipulated a marriage bond or contract (such as in Austria) or who have concluded a marriage (such as in Slovenia). In some Member States, marriage is reserved for partners of the opposite sex (such as in BG, HR, IT, LT, LV, PL, RO, SI and SK). Many Member States also recognise civil or extramarital unions. In the UK, one of the key concepts of social security law seems to be 'living together as a married couple' (LTAMC), which is applied in particular for means-tested benefits <sup>(59)</sup>. Conversely, Dutch social security law includes the concept of 'married but living permanently apart'. When the marriage partners are permanently separated (including if one partner lives in a nursing home, for example), then they are no longer considered as married, but as single for the purposes of social security, which may influence benefit entitlement. The same people can therefore be classified as married for some purposes and single for other purposes.

Many countries also permit marriages between same-sex partners (such as in BE; DE, since 2017; DK; FI; LU <sup>(60)</sup>; MT <sup>(61)</sup>; NL; NO, since 2008; PT; and UK, in England, Scotland and Wales, but not yet in Northern Ireland <sup>(62)</sup>) <sup>(63)</sup>. For instance, in Switzerland, the notion of a same-sex partnership is set out under social security law by referring to the notion of marriage, which is a concept set out under family law <sup>(64)</sup>. The same applies for Lichtenstein. In Estonia, there has been widespread discussion on how the notion of family should be understood in the context of Article 27(1) of the Constitution <sup>(65)</sup>. To date, these discussions have very much focused on whether the family, in the context of the Constitution, includes same-sex couples and their right to raise a family. On 21 June 2019, the Supreme Court of Estonia, according to Constitutional Court decision 5-18-5/17, ruled that the Constitution protects the right of same-sex couples to lead a family life. In Spain, same-sex marriage and partnerships between same-sex couples and couples of the opposite sex are afforded the same rights as heterosexual married couples and those in non-marital partnerships <sup>(66)</sup>. In Finland, two persons who live in conditions similar to marriage in a shared household are considered comparable to spouses. Since 2010, the notion of marriage in Iceland has been defined as a marriage between two individuals (marriage was previously defined as between one man and one woman). In Sweden, as of 1 July 2019, the parent's partner with whom (s)he lives (irrespective of gender) is treated as a parent for parental benefits <sup>(67)</sup>, therefore a step-parent living with the parent may claim parental benefits. Before this date, the partner was required to have been previously married to or have children with the parent.

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<sup>(59)</sup> Interestingly, UK law recognises polygamous marriages, but not multiple relationships.

<sup>(60)</sup> Same-sex marriage was introduced in Luxembourg by the Loi du 4 juillet 2014 (Mémorial A no 125 of 17 juillet 2014), which amended Article 143 of the Civil Code.

<sup>(61)</sup> The Maltese Civil Unions Act 2014 (Chapter 530 of the Laws of Malta), and the subsequent amendment of the Marriage Act (Chapter 255 of the Laws of Malta) in 2017.

<sup>(62)</sup> In July 2019, legislation passed by the UK Parliament required the Government of the UK to extend same-sex marriage to Northern Ireland by 13 January 2020 if the Northern Ireland Executive had not been restored by 21 October 2019.

<sup>(63)</sup> For an overview, see Picken, N. and Janta, B., *Leave policies and practice for non-traditional families*, European Platform for Investing in Children (EPIC), European Union 2019., p. 4.

<sup>(64)</sup> See Article 13a, 830.1 Loi fédérale sur la partie générale du droit des assurances sociales (LPGA) du 6 octobre 2000.

<sup>(65)</sup> Article 27 of the Estonian Constitution states: 'The family, which is fundamental to the preservation and growth of the nation and which constitutes the foundation of society, enjoys the protection of the government. Spouses have equal rights. Parents have the right and the duty to raise their children and to provide for them. The protection of parents and children is provided by law. The family is required to provide for its members who are in need.' (Translation into English for information purposes only).

<sup>(66)</sup> The right to same-sex marriage (Ley 13/2005, de 1 de julio, que introdujo el matrimonio entre personas del mismo sexo).

<sup>(67)</sup> See Chapter 11, Sections 4 and 5 of the Socialförsäkringsbalk (2010:11).

If same-sex marriage is not permitted, some Member States offer the option of a registered same-sex partnership (such as in AT, CY, EE, HR, HU and SI). The legal position of a same-sex partnership may be regulated by a separate legislative act. In Cyprus, any reference to the word 'spouse' (σύζυγο) in Cypriot legislation must be interpreted as referencing a partner in a civil partnership (offering the same effect as marriage, except in the area of adoption). Similar rules apply in Italy, with assimilation to marriage, except in the area of adoption <sup>(68)</sup>. In Greece, the parties to a civil partnership are fully assimilated to a married couple in the area of social security <sup>(69)</sup>. In some Member States, non-registered partners are afforded the same rights as couples in a non-marital relationship (such as in HR and SI).

Only a few Member States do not provide for any legal recognition of same-sex couples. For instance, the Constitution of Bulgaria and other legislative acts do not recognise same-sex marriage or partnerships. Similarly, no recognition is provided for in Lithuania, Latvia, Poland, Romania <sup>(70)</sup> and Slovakia <sup>(71)</sup>.

### **2.2.3. Differences in defining members of the family**

There are vast differences in how various members of the family are defined across Member States.

As reported, in many Member States, a 'father' is usually a man:

- who is the husband (or the partner (such as in Greece)) of the mother at the date of birth; or if the child was born within a certain period after the dissolution of the marriage and no new marriage has been concluded in this period of time, he is also considered the father (legal presumption of fatherhood, which can be challenged, (i.e. *presumptio iuris*)), such as in AT, BG, DE, FI, HU, NL, PL, SI and SK;
- who has accepted or recognised fatherhood (such as in AT, DE, EL, FI, HU, NL, PL, SI and SK);
- whose fatherhood was legally assessed or determined by a court of law (such as in AT, DE, EL, FI, HU, NL, PL, SI and SK).

Some legislative acts might also regulate a so-called father of choice (such as in Austria, a *wahlvater*), who decides to adopt a child and creates a corresponding agreement with the child.

Similar rules also apply when defining a 'mother', but it is most commonly the woman who has given birth, or sometimes in cases of assisted reproduction the biological mother, (such as in AT, BG, DE, EL, FI, PL, SI and SK), or the woman confirmed as such on the child's birth certificate (such as in PL).

It might be the case that a child has two or more 'fathers' or 'mothers', e.g. a biological parent, a step-parent who leaves the family but supports the child, or a new step-parent. For instance, in Austria, a parent could also be a woman who was the registered partner

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<sup>(68)</sup> Article 1(20) of Legge 20 maggio 2016, n. 76, Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze.

<sup>(69)</sup> See Νομοσ 4356/2015.

<sup>(70)</sup> In October 2018, a referendum was held in Romania on the definition of the family under the Romanian Constitution. The referendum asked voters whether or not they approved of a change to the definition of family to specify that marriage could only be between one man and one woman. The referendum followed a citizens' initiative launched by *Coaliția pentru Familie* (the Coalition for Family) in 2015, which garnered over three million signatures. Turnout was 21.1%, below the required voter turnout threshold of 30%. Following the results of the referendum, in 2019, a proposal was submitted to the Romanian Parliament to regulate civil partnerships, but the proposal was not adopted.

<sup>(71)</sup> Picken, N. and Janta, B., *Leave policies and practice for non-traditional families*, European Platform for Investing in Children (EPIC), European Union 2019, p. 4.



of another woman who underwent a medically supported reproduction within the last 300 days before the date of birth, who accepted parenthood or whose parenthood was legally assessed by a court.

Having multiple fathers or mothers is possible for biological children, adopted children and step-children in some Member States, such as in Austria. In Belgium, a child can have multiple 'fathers' or 'mothers'. This is not the case in Switzerland and Liechtenstein, as a rule, but under some social security schemes, step-children are assimilated to children. In Denmark, an amendment to the legislation on children, or Børneloven (adoption act) <sup>(72)</sup>, provides for co-mothership between two married women. This concept is especially relevant for the use of fertility treatment and surrogacy agreements. However, the concept of co-fatherhood does not exist under Danish law. There is no possibility for the partner/spouse of a father to a child born under a surrogacy agreement to become a co-father. In Estonia, general social security law does not consider multiple parents. However, special branches of law do take into account that such families exist, and the right to claim family benefits is often granted to a person raising the child who may not be biologically related to the child.

In Finland, if the person who has given birth to the child (the 'birth mother') has received assisted fertility treatment, and the child was born as a result of the said treatment, the woman who consented to the treatment, in agreement with the birth mother, can be classified as the second mother of the child, in addition to the birth mother <sup>(73)</sup>. Two fathers might also be recognised alongside two mothers under Finnish law. In France, a child could be linked to more than two adults, e.g. for family benefits. In Croatia, some social security laws broadly protect children within various family types, e.g. for survivors' benefits. In Ireland, the appraisal of entitlement focuses on the persons with whom the child resides and the person who is caring for that child, rather than formal relationships. In Italy, a child can be included in a same-sex civil union, e.g. for family benefits.

In the Netherlands, separate rules apply for children born into relationships between two women or two men. If two women are married or in a registered partnership, and one of them gives birth to a child, they automatically acquire joint responsibility, if there is no lawful father. If two men want to acquire joint responsibility for a child (in the event of one parent and one non-parent) or joint guardianship (in the event of two non-parents), they must submit an application to a family court. If two men adopt a child, they both acquire parental responsibility.

In Norway, the legislation relating children and parents <sup>(74)</sup> sets out definitions for the legal mother and father of a child. It also defines the notion of 'co-mother', i.e. when one woman in a same-sex couple gives birth to a child, the other woman is afforded the legal status of 'co-mother' <sup>(75)</sup>. Under social security law (mainly for maternity/paternity benefits), a 'co-mother' has the same rights and obligations as a father.

It would seem that the concept of multiple fathers or mothers does not exist in all European countries (such as in CZ, no such possibility; DE, at least as a general rule; EL; ES; HU;

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<sup>(72)</sup> See Børneloven (LBK nr 1257 of 07/11/2018). See also the Act on Maternity.

<sup>(73)</sup> See section 3, Moderskapslag (253/2018).

<sup>(74)</sup> Lov 8. april 1981 nr. 7 om barn og foreldre (barnelova).

<sup>(75)</sup> There are certain other conditions, as the child cannot have both a (legal) father and a 'co-mother'. These details are, however, irrelevant for social security law. Furthermore, the concept of 'co-father' does not exist, as a man cannot give birth. This means that for two men who are married to each other, the child always has to be adopted, even if the child was born from a surrogate mother. The reason for this is that Norwegian family law does not recognise fatherhood (or motherhood) conceived through surrogacy. In public discussions, this is in many ways a difficult question with conflicting ethical interests. For the purposes of social security, however, the situation is not complicated, as social security legislation ensures equal treatment between biological and adopted children.

IE; IS; LT; LU; LV; PL; PT; SI, although paternity leave/benefits can also be used by the same-sex partner of a mother, therefore a woman; and SK).

Some Member States assimilate step-parents to parents and step-children to children. In Cyprus, a step-child falls within the definition of a 'child'. In Croatia, and similarly in Hungary and Malta, there is no definition, but a duty does exist to support a minor step-child whose parents have died. In the UK, a step-parent is a person who marries the parent of a child or qualifying young person. It does not matter if the child or qualifying young person was born in/out of wedlock of a previous marriage. It should also be noted that terminology seems to be changing. In Belgium, the term 'father plus' is used rather than 'step-father'. Conversely, some Member States do not set out definitions for 'step-family', 'step-parent' or 'step-child' (such as in Germany and Slovenia).

As a rule, biological parents are classified as 'parents', whereas 'foster parents' may be defined separately. For instance, in Austria, 'foster parents' are defined as persons who educate and foster a child in a relationship similar to biological parents. In Switzerland certain rights to benefits are granted to insured persons that care for the child of a spouse (in relation to family benefits, old-age pensions and survivor benefits). In Germany, 'foster parents' are those individuals who have the foster child in their household, and 'foster children' are defined as individuals living in a long-lasting foster relationship in the household of the foster parents, like children living with their parents <sup>(76)</sup>. In Malta, a '(foster) child' is classified as an individual under the age of 18; and the 'foster carer' is one or more persons approved by the Fostering Board to foster the child <sup>(77)</sup>. In some Member States foster parents are not recognised as such, however, foster care and foster families are recognised (such as in Bulgaria).

'Single-parent families' might be recognised under family law or, more specifically, under social security law. For example, in Cyprus, 'single-parent families' are defined as families in which a parent, without a spouse/partner of either sex, lives with at least one dependent child who was born in/out of wedlock, and who lives alone because (s)he is an unmarried parent, a widow(er), a divorced person or because one of the two parents was declared as missing by a court, or as families family in which a married parent lives alone with at least one dependent child, because the other parent is serving a sentence of more than six months <sup>(78)</sup>. In the latter case, so-called de facto single parenthood is also recognised. In Spain, a single-parent family is afforded a different definition depending on the social security benefit in question, but the single parent must be the sole breadwinner for the family <sup>(79)</sup>. Similar regulations exist in Hungary, Malta <sup>(80)</sup> and Slovenia <sup>(81)</sup>. In some Member States single-parent families (such as in Germany and Slovakia).

In some Member States, certain eligibility conditions for spouses or children may apply. For instance, children are considered as such only until they reach a certain age. Further

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<sup>(76)</sup> See Section 56 of the Sozialgesetzbuch (SGB), Erstes Buch (I).

<sup>(77)</sup> Foster care in Malta is regulated the Foster Care Act (Chapter 491 of the Laws of Malta).

<sup>(78)</sup> For Cyprus, see Section 2 of the Ο Περί Παροχής Επιδόματος Τέκνου Νόμος του 2002 (167(I)/2002). It may be relevant to note that a 'single-parent family' for the purposes of relevant benefits is explored in Case 22/2016, 14 June 2019, Administrative Court, Varnava and Republic of Cyprus via Ministry of Labour, Welfare and Social Insurance.

<sup>(79)</sup> Consolidated text of Spanish social security law, Real Decreto Legislativo 8/2015, de 30 de octubre, por el que se aprueba el Texto refundido de la Ley General de la Seguridad Social, last amended by Real Decreto-ley 8/2019, de 8 de marzo, de medidas urgentes de protección social y de lucha contra la precariedad laboral en la jornada de trabajo.

<sup>(80)</sup> In Malta, a single parent is a parent who is widowed, separated (whether de facto or by right), divorced or unmarried and who is solely and entirely responsible for the care of his or her dependent son(s) or daughter(s) who has/have not yet reached the age of 18.

<sup>(81)</sup> In Slovenia, a single-parent family is defined as a community of one parent and one or several children when the other parent has died or is unknown, and the child is not entitled to maintenance benefits or is entitled to, but does not actually receive, maintenance benefits from the other parent.

conditions might also relate to the child's economic dependency or disability (such as in AT, ES, HR, IE, IS, MT, SE, SI and UK).

It goes without saying that biological and adopted children must be treated equally. The same applies to children born in/out of wedlock. For instance, in Italy, all children are afforded the same legal status <sup>(82)</sup>. Previously, a distinction was made, in terms of status and rights, between so-called legitimate children and illegitimate children. This was a long and laborious process that saw even the Constitutional Court of Italy adopting decisions that went against this outcome.

#### **2.2.4. Modern forms of families**

Many Member States do not incorporate notions of a 'patchwork family', 'recomposed family' or other 'modern' forms of a family in their national legislation. Such is the case in Austria, Bulgaria, Switzerland (at least at the federal level), Czechia, Germany, Greece, Spain, France (although it is recognised that such definitions are required), Croatia, Hungary (although the concept of step-parenthood is similar in meaning), Iceland, Liechtenstein, Lithuania, Luxembourg, Latvia, Malta, Poland, Slovenia, Slovakia, United Kingdom.

However, some Member States are familiar with such notions, such as in Belgium in relation to family benefits. Danish legislation refers to a 'cohabiting partner', 'second-parent adoption' and 'family adoption', therefore providing for, in a manner of speaking, legal recognition of de facto patchwork families <sup>(83)</sup>. Furthermore, legislation recognises that parents do not necessarily live together, such as the Danish family benefits act, which has specific rules on payment in the event that parents do not live together even though they share parental responsibility. In Estonia, some special social security laws indirectly recognise that such modern families exist, such as the Pereküvitiste seadus (family benefits act), which stipulates that family allowances may also be awarded to a parent's spouse who is raising the child and to a person raising the child who is also raising a common child with the parent of the former child <sup>(84)</sup>.

Interestingly, in Finland, the national statistics institution, Statistics Finland, stipulates that a 'reconstituted family' comprises a child under the age 18 who is the child of only one of the spouses, and that not all children under the age 18 in the family are common children <sup>(85)</sup>. Moreover, a 'patchwork family' or a 'recomposed family' is not specifically defined in legal or political documents. However, this Finnish notion (or *uusperhe* in Finnish) is de facto used in preparatory works of bills (e.g. parliamentary committee reports), in written questions by parliamentarians to ministers or in the social security administration system. Although the Italian legal system still relies heavily on the idea of the family being primarily based on biological ties, some judicial decisions have challenged this idea, for instance by permitting the lawfulness of step-child adoption <sup>(86)</sup>.

Reportedly, in 2008, the Latvian Parliament adopted a Resolution on the approval of the concept of family state policy, in which the terms 'family', 'incomplete family' and 'extended family' were defined. However, in 2011, the Constitutional Court of Latvia ruled that this

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<sup>(82)</sup> Legge 10 dicembre 2012, n. 219, Disposizioni in materia di riconoscimento dei figli naturali, and Decreto Legislativo 28 dicembre 2013, n. 154, Revisione delle disposizioni vigenti in materia di filiazione, a norma dell'articolo 2 della legge 10 dicembre 2012, n. 219, which amended, among other things, Article 315 of the Civil Code.

<sup>(83)</sup> See the Adoptionsloven (LBK No 775 of 07/08/2019) and the Bekendtgørelse om adoption (LBK no 905 of 28/09/2009).

<sup>(84)</sup> See Article 25 of the Pereküvitiste seadus.

<sup>(85)</sup> See [http://www.stat.fi/meta/kas/uusperhe\\_en.html](http://www.stat.fi/meta/kas/uusperhe_en.html).

<sup>(86)</sup> See Case 12962 of 22 June 2016, Sezioni Unite, Corte di Cassazione.

Resolution was unconstitutional. It also ruled that the concept of family cannot relate solely to a marriage-based family.

Another interesting phenomenon is the notion of ‘living apart together’ in the Netherlands. It appears that this form of living is becoming increasingly common among the elderly, as they may offer each other support while maintaining as much independence as possible. In Norway, there is a rule that stipulates that a person who changes his or her legal gender retains rights and obligations as a result of paternity, motherhood or co-motherhood. This means that whenever it is relevant for social security, the person who gave birth will always be considered the mother of the child, regardless of legal gender, and vice versa for a father or a co-mother.

Even though notions of a patchwork family, recomposed family or other forms of family are not specifically considered in Portugal, examples of such families can nevertheless be found in a practical guide to social security services, in its explanation of Decreto-Lei No 70/2010 of 16 de Junho <sup>(87)</sup>. The concept is referenced in an extended analysis that is intended not to discriminate, but rather respect and include different types of families.

The definition of ‘family’ is also changing in Sweden. As of 1 July 2019, more family configurations are able to claim parental benefits. Moreover, in preparatory works for a bill (Föräldrapenning för fler familjekonstellationer och reserverad grundnivå, Proposition 2017/18:276) <sup>(88)</sup>, it is noted that the social security system was formed at a time when the nuclear family was the dominant family composition. Today, only seven out of ten families fit that norm. Two out of every ten families consist of a single parent, often the mother, and almost one out of ten families is a recomposed family, in which one or both parents have children from a previous relationship.

#### **2.2.5. Common household**

The notion of a ‘common household’, as also stipulated by the Coordination Regulations, might also be applied to national law, especially in certain social security branches. For instance, in Austria, the criteria for a common household are not defined by law but shaped by case-law. A common household is based on a permanent, common-living and economic activity, and therefore on a common centre of interest. Similarly, in Czechia, a household is understood as a community of natural persons who permanently live together and that collectively cover the costs of their needs. The recognition of people living together is mentioned in the legislation of many Member States. For instance, in Italy, those living at the residence address on a permanent basis are also part of the family unit (or *nucleo familiare*), and since 2016, de facto cohabitation as a non-registered partnership has also been recognised <sup>(89)</sup>. In Malta, the concept of family is enshrined in the term ‘household’, meaning one person who, in the opinion of the Director (of Social Security), is living alone, or two or more persons who, in the opinion of the said Director, are living together as a family. Essentially, this means that the said Director needs to be convinced that the persons living together indeed form a household and are not simply declaring to be living together for fraudulent purposes. The said Director may order unannounced inspections, request financial records etc. as part of the recognition process.

In 1986, in the Netherlands, a uniform rule for the ‘joint household’ (*gezamenlijke huishouding*) was introduced as an equivalent to the formal civil law marriage. Under this rule, two adults living at the same address and sharing the cost of the household are

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<sup>(87)</sup> See [http://www.seg-social.pt/documents/10152/25931/8000\\_condicao\\_recurso/d0211ab2-4f86-4440-8dc2-6e6530510e7c](http://www.seg-social.pt/documents/10152/25931/8000_condicao_recurso/d0211ab2-4f86-4440-8dc2-6e6530510e7c), September 2019.

<sup>(88)</sup> See [https://www.riksdagen.se/sv/dokument-lagar/dokument/proposition/foraldrapenning-for-fler-familjekonstellationer\\_H503276](https://www.riksdagen.se/sv/dokument-lagar/dokument/proposition/foraldrapenning-for-fler-familjekonstellationer_H503276).

<sup>(89)</sup> Legge 20 maggio 2016, n. 76, Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze.

treated as a married couple (only neutral household criteria apply). However, when a purely commercial relationship forms the basis for the household, there is no joint household.

In Norway, two people living in the same house are considered a cohabiting couple, even when they live in their own part of the house. There are exceptions for people living in their own housing units in a house with more than four independent and clearly separated residential units <sup>(90)</sup>.

In Portugal, people living in communion and in the same housing are considered to be acting in a common economy and have established between themselves a common experience of mutual aid and sharing of resources. A 'household' comprises natural persons living together and paying for their needs together.

### **2.3. Overview of modern forms of family under national social security law**

As mentioned in the previous section, many Member States apply more scattered, specific definitions of members of the family for each social security scheme. Therefore, the definitions for each scheme need to be compared among the Member States.

#### **2.3.1. Healthcare**

From a comparative perspective, there is a wide range of healthcare systems. The various healthcare systems reflect different concepts and goals, perceptions of equity and legitimacy, economic and social conditions, and tradition. However, there are generally two types of public healthcare systems; a national health service, which can be centralised or decentralised; and mandatory health insurance. The latter might provide healthcare, such as medical and related services in kind, or reimburse an individual for the costs of healthcare. Additionally, private health insurance might provide supplementary, additional, parallel or substitutive coverage <sup>(91)</sup>. However, the discussion on private health insurance systems and the relationship between the public and private systems of healthcare is outside of the scope of this report.

Regulating the legal position of members of the family might be more important for mandatory health insurance than for national health services. It should be noted that the EU founding Member States perceived social insurance as the main path to a guaranteed right to social security. Under a social health insurance system, family members of an insured person are also covered in order to disburden such an insured person in the event of sickness or injury of a family member. Insurance might therefore be derivative, but it is independent during its existence. In some Member States family members can claim healthcare in their own right. However, this is not always the case, such as in Austria, as the insured person is the only person who can claim and receive reimbursement of costs for treatment of a member of the family by a non-contracted service provider, even when these family members are adults. Similar situations can also be found in systems based on primary reimbursement of costs (such as in Belgium, France and Luxembourg) <sup>(92)</sup>. The

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<sup>(90)</sup> In Norway, this rule clarifies whether or not a person is eligible for single-parent benefits and additional family benefits. It was adopted in the NIA about 10 years ago, after the Supreme Court of Norway had to rule on whether the mother of a child was eligible for single-parent benefits and the family benefit supplement for single parents, as long as the father lived in the same house (a four-section house), albeit in another flat. The children 'moved freely' between the parents. This kind of solution has become increasingly popular, as it is often to the benefit of the children when their parents part ways.

<sup>(91)</sup> More in Strban, G. (ed), Berki, G, Carrascosa Bermejo, D., Van Overmeiren, F., *Access to healthcare in cross-border situations*, FreSsco Analytical Report 2016, European Union 2017.

<sup>(92)</sup> Secondary reimbursement of costs may exist, if permitted, e.g. when there is a shortage of doctors, and a private doctor is required, or if Directive 2011/24/EU of the European Parliament and of the Council of

insured person is considered to be responsible (and paying) for the healthcare of the family member. The insured person should therefore be reimbursed. Tackling the issue of data privacy, with healthcare data being some of the most sensitive personal data, is outside of the scope of this report.

#### **2.3.1.1. Partners**

As a rule, a spouse and children are covered as family members. In some cases, other persons can be assimilated to spouses, such as non-marital partners, if the union has lasted for a certain period of time (such as in Austria or Slovenia), or (non)-registered same-sex partners (when same-sex marriage is not recognised) <sup>(93)</sup>. In some Member States even a divorced partner might be covered when maintenance is due (such as in Hungary and Slovenia), or when (s)he is disabled or taking care of children (such as in Hungary or Slovakia). In Malta, married couples, members of a civil union and same-sex partners are covered as members of the family, but legally registered cohabitants do not enjoy a derived right for healthcare and must be insured in their own right. In Poland, only a spouse, i.e. a person in a formal relation with the insured person, can be insured as a partner.

Certain additional conditions may apply for a partner to be insured. It is most often the case that to ensure the partner is not insured on their own (under any national or international health insurance schemes), the partner's income must not exceed a certain level (such as in Belgium, EUR 2 517.74 per quarter as of October 2018; Germany, EUR 445 per month as of 2019; Romania, a dependent partner with no income), the partner must be caring for a child under a certain age (such as in Estonia, Hungary and Lithuania) or the partner becomes a dependant several years before reaching pensionable age (such as in Estonia).

In Belgium, there is a special rule for a spouse who is living separately, but is not divorced. In order to be insured, the partner must be taking care of a child that is classified as a member of the family, be in receipt of maintenance support, or receive a pension awarded to a divorced spouse by virtue of a statutory obligation. Moreover, if a person, such as a life partner, lives together with the insured person, the spouse of the insured person who is a beneficiary should not live under the same roof with the insured person.

#### **2.3.1.2. Children**

Adoptive, foster and step-children may be assimilated to biological children. For instance, in Austria, even if the marriage or registered partnership between a parent and a step-parent is dissolved, a child is still considered to be the step-child of the insured person. The scope of children covered may be very broad and may also include grandchildren or any resident child, if the child(ren) can be related to an insured person, e.g. in Belgium, all dependent children; in France, nephews and nieces; in Hungary, all children without parents; and in Malta, all children for whom the insured person has legal custody. Conversely, step-children may also not be covered, such as in Norway.

Moreover, certain conditions might apply for children, especially relating to age. As a rule, children are covered until they reach the age of 18. Their coverage might be extended if they continue with their academic studies (19 in EE without paying social tax; 21 in CY and LU; 23 or 25 in DE; 24 in EL; 25 in BE and PT; 26 in ES, HR, PL, RO, SI; 27 in AT; 30 in SK; until they have completed their academic studies in HU, LT, LU, MT). Children might also be insured for a longer period if they are sick or incapable of working and depend on

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9 March 2011 on the application of patients' rights in cross-border healthcare (OJ L 88, 4.4.2011, p. 45–65) is required.

<sup>(93)</sup> The latter is covered in countries that recognise same-sex marriage or partnerships (see previous section).

the insured person. Additional conditions might also apply for children who depend on the insured person, but are unemployed or are self-employed.

If a child is covered based on more than one relationship, such an overlap must be resolved, as the child can only be covered once. In some cases, a free choice might be an option, or there may be rules that govern such circumstances, such as in Belgium, where if there is a disagreement between the insured persons, the child is registered as a family member of the oldest insured person. The same applies in Luxembourg if the child's health insurance can be derived from more than one person.

### **2.3.1.3. Common household**

For more remote family members, which may also include step-children, grandchildren or even persons without a family relationship to the insured person, a common household condition might be required, such as in Austria, where non-relatives must have managed the household free of charge and live with the insured person for at least 10 months in order to be covered. A common household seems to be required for all derivatively insured persons in Luxembourg.

The condition of a common household, which may feature alongside the condition of dependency and insufficient means, may apply to members of the broader family of an insured person, such as parents (father, mother, step-father, step-mother and adoptive parents), grandchildren, grandparents, brothers, and sisters (such as in Croatia, Hungary and Slovenia).

The common household might also be relevant if the child is covered as a family member of two insured persons who do not reside at the same address. In such a scenario in Belgium, the child is preferably registered as a family member of the insured person with whom (s)he lives in the same household.

### **2.3.1.4. Direct coverage**

In some Member States all insured persons seem to be covered directly and in their own right (such as in BG; CZ, where the state pays contributions for children; EE; LT; LV; and RO). Moreover, public health insurance systems in some Member States might rely more on the principle of residence. For instance, in Switzerland, every person residing in the country is required to take out insurance under the scheme, and parents are required to do so for each of their children. Every family member is insured individually and must meet residence conditions. Each family member pays an individual premium. Since 2019, children under the age of 18 and young people under the age of 26 pay reduced premiums<sup>(94)</sup>. Moreover, the cantons are required to subsidise the premiums of those on low incomes

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<sup>(94)</sup> There are no specific rules under Swiss social security law that would depart from the family law rules concerning parental responsibility. According to the Swiss Civil Code, both parents have joint parental responsibility. The principle of joint parental responsibility is anchored in Article 296(2) of the Civil Code. It applies to married and unmarried parents. Even if the parents are separated or divorced, they retain joint parental responsibility, unless the assignment of sole parental responsibility is necessary to safeguard the child's best interests (Article 298(A<sup>ser</sup>)(1)). If the two parents have joint parental responsibility, they are jointly responsible to register their child with a health insurer. They represent their child in all dealings with the insurer (Article 304). One of the parents may process the registration individually, and the insurer should trust that this parent has the power to represent the child (Article 304(1)(a)(2)). The power of representation covers all dealings with third parties, including payments (Article 32 of the Swiss Code of Obligations; Article 7 of the Civil Code). The two parents are solidary responsible to pay the premiums (ATF 125 V 435 of 22 December 1999, Tribunal fédéral suisse; Eugster in BSVR, third ed. Basel 2016, p. 799). The power to represent the child is limited to the extent of parental responsibility (Article 304). If one parent therefore has sole parental responsibility, (s)he has the power to register the child and pay the premiums. This parent should be the only person responsible to pay the premiums to the insurer (Eugster in BSVR, third ed. Basel 2016, p. 799), but the other parent might be obliged to financially support the child, according to the arrangement made by the parents or the decision of the judge. All legal transactions between the insured child and the insurer, however, must be carried out by the parent with

(<sup>95</sup>). In Liechtenstein, no premiums for children under the age of 16 seem to be required. In the Netherlands, every resident is insured and required to join a private health insurance scheme (for children (minors), this responsibility falls on the child's legal representatives or guardians).

Under the new Cypriot system, which is planned to be fully rolled out by June 2020 (<sup>96</sup>), all residents in Cyprus will benefit from healthcare services. The right to healthcare in Denmark is similarly residence-based (<sup>97</sup>), which is mainly provided in kind and financed through general taxation. The right to healthcare is therefore an individual right granted to each person, and in principle, there are no derived rights. Estonia, Finland, Italy, Norway, Portugal, Sweden and the United Kingdom also have residence-based national health systems. Iceland also has a similar system, although residency during the past six months seems to be a requirement. In Ireland, a medical card granting healthcare coverage can be issued to ordinary residents whose income falls below a certain threshold.

Of course, for all residence-based healthcare systems, EU social security coordination rules must also be observed.

### **2.3.1.5. Difficulties**

As reported, in most Member States, there is no relevant case-law, and no specific problems with the personal scope of application have been encountered (such as in AT, CY, CZ, DK, EE, EL, ES, FI, HR, IE, IS, IT, LI, LT, LU, LV, MT, NL, NO, RO, SE and SK).

Nevertheless, it seems that in Belgium, the elaborate and complicated rules in regard to the definition of a 'member of the family' (<sup>98</sup>) under healthcare insurance (benefits in kind) often create difficulties for the legislation to be applied smoothly. In Switzerland, the paying of premiums for each family member places a significant financial burden on families with children. To avoid such financial burdens, subsidies from the canton of residence and lower premiums for children were introduced. In the case-law in France, a nephew was considered as a dependant of his uncle, as the uncle was providing for his education, and they had been living together for many years and strong emotional bonds had been established (<sup>99</sup>). In Hungary, the Constitutional Court of Hungary found the definition of 'family' too narrow/restrictive (<sup>100</sup>). In Portugal, difficulties were reported owing to distinctive concepts used under social security law and tax law. In Slovenia, problems might arise when establishing an extramarital relationship when one of the partners or both partners are foreign citizens, e.g. from a third country (non-EU country). In such cases, if there is no written proof from a foreign country, a written statement is taken by the Zavod za zdravstveno zavarovanje Slovenije (Health Insurance Institute of Slovenia (HIIS)).

### **2.3.2. Sickness cash benefits**

Defining a member of the family might also play a role in relation to sickness cash benefits for a person taking care of a sick child or another member of the family. In some Member States such benefits exist when an insured person cares for a sick child. Adopted, foster

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parental responsibility. In general, it should not matter which parent is dealing with the insurer. The child is the insured person and is entitled to benefits by his/her own rights.

(<sup>95</sup>) See ATF 145 I 26 of 22 January 2019, in which the Federal Supreme Court of Switzerland ruled that the cantons had to ensure that families with children that fell within the thresholds of low to medium income households had access to subsidies, as the cantons administered such subsidies.

(<sup>96</sup>) See Ο Περί Γενικού Συστήματος Υγείας Νόμος του 2001, Ν. 89(I)/2001.

(<sup>97</sup>) In Denmark, a stable relationship is assimilated to marriage for residence rights.

(<sup>98</sup>) See Loi relative à l'assurance obligatoire soins de santé et indemnités coordonnée le 14 juillet 1994 (dans sa teneur modifiée au 2 juillet 2019).

(<sup>99</sup>) See Case 10-19278 of 10 November 2011, Cour de cassation.

(<sup>100</sup>) See Case 43/2012, XII. 20 of 23 November 2019, Magyarország Alkotmánybírósága.



or step-children may be assimilated to a biological child. Such benefits exist in Austria, Bulgaria, Czechia, Denmark, Estonia, Spain, Finland, Croatia, Hungary, Iceland, Lithuania, Luxembourg, Latvia, Poland, Portugal, Romania, Sweden, Slovenia and Slovakia.

Moreover, sickness cash benefits might also be provided for insured persons caring for a (severely) sick (immediate) family member, such as a spouse, registered partner or companion in life or even other family members (such as in AT, BG, FI, HR, LT, PL, SI and SK). Estonian law does not define the members of the family that the insured person may take care of, or what their relationship should be. In practice, an actively working grandmother could take care leave to care for a young child.

In some Member States, a common household stipulation might also be required. Further conditions might similarly be required, such as the age of a child (10 years in CZ; 12 in EE, NO and PT; 14 in LV and PL; 16 in FI; other age limits in HR, LU, RO, SI), the qualifying insurance period (such as in RO) or the length of time that the sickness cash benefit can be granted for (such as in DK, HR, LU, NO, PT and SI).

Conversely, in some Member States a sickness cash benefit is not provided in order to care for a sick family member (such as in CH, CY, EL, FR, LI, MT and NL). In other states, other benefits might be provided instead, such as in Belgium (a time credit), Germany (assistance in the household), Ireland (a carer's benefit) and the UK (a carer's allowance), if certain conditions have been met. In Italy, a compensation indemnity for an accompanying person (*indennità di accompagnamento*) can be granted to help to care for a disabled child. In Switzerland, no cash benefits in the event of sickness are provided and no resolution has been forthcoming, which has been recognised as a problem. Similarly, in Malta, the idea of introducing a sickness cash benefit to care for a child has been raised several times over numerous years, and discussions with employers and social partners have taken place, albeit with no conclusive results. The burden of such a vacuum falls on families, which have to find alternative solutions to care for a sick child (possibly resorting to a regular sickness cash benefit).

In general, not many court cases or problems have been reported. Where courts of law do take a decision, it seems to be in favour of the family and more 'modern' forms thereof. Conversely, the Austrian Supreme Court of Justice originally stated that the definition of 'close members of the family' cannot be extended by interpretation, and the entitlement to paid leave cannot be used to care for an employee's step-child<sup>(101)</sup>. In response, the Austrian legislature changed the law in 2013 and explicitly included step-children into the definition of 'members of the family'.

In Spain, the Supreme Court ruled in favour of granting benefits to a divorced mother or custodial parent when taking care of seriously ill children<sup>(102)</sup>. If the other parent loses their job and (s)he is able to care for the child, the parent is no longer entitled to the benefit. Therefore, in order to be entitled to this benefit, parents or legal guardians are required to be working. If one of them is not working, it is assumed that (s)he has time available to care for the child. Moreover, this does not cover single-parent families, which seems unfair and creates further complications.

In Italy, the Constitutional Court declared that the exclusion of the partner in a non-registered union from the list of persons that have the right to obtain a work permit to care for a disabled person violated the Italian Constitution<sup>(103)</sup>. In Lithuania, the District Court of Alytus ruled that a disabled person under custody (guardianship) is a member of the

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<sup>(101)</sup> See OGH 9 ObA 2091/96g of 15 May 1996, Oberster Gerichtshof.

<sup>(102)</sup> See STS 2471/2018 of 12 June 2018, Sala de lo Social, Tribunal Supremo.

<sup>(103)</sup> See Case 213/2016 of 5 July 2016, Corte Costituzionale.

family in regard to entitlement to sickness cash benefits <sup>(104)</sup>. In Poland, the District Court of Wrocław ruled that an insured father could receive financial support, as post-operative care was required for his two children, both aged three, even though their uninsured mother lived with the children <sup>(105)</sup>.

### **2.3.3. Maternity and paternity benefits**

With regard to modern forms of family, one of the most socially sensitive fields of social security is maternity and paternity benefits. Owing to biological distinctions and the possibility of giving birth, maternity benefits/allowances are generally provided to the biological mother. However, other individuals can claim maternity benefits after a child is born, e.g. a father or any other person caring for the child if the mother is incapable of doing so (such as in SI, BG, CZ, DK, IE, LV, PL and SI).

It should be noted that reportedly, the Supreme Court of Spain set out that parents of surrogate children are entitled to maternity benefits (now called benefits for birth and care of the child) irrespective of their sex, arguing that the benefit is in the greater interest of the child, who is already de facto part of the family of the applicant.

Certain rules may also be amended in regards to paternity benefits to cover new forms of family. For instance, in Austria, fathers, adoptive fathers and permanent foster fathers may be entitled to the 'family time bonus', as introduced in 2017. Moreover, a woman who is considered a parent according to family law is legally recognised as a 'father' for this bonus. In Belgium, when there is no right to paternity allowance, a birth allowance might also be provided to a person married to the mother, such as a married co-mother. In Germany, benefits may also be provided to same-sex partners. In Denmark, the father or the co-mother has the right to two weeks' leave in his/her own right following the birth of the child. Similarly, in Norway, a co-mother in a same-sex marriage may also claim entitlement.

In Spain, when the biological mother is married to another woman, the spouse may be classified as a parent in the Civil Registry and will be classified as a parent to the extent of being able to claim the 'birth and care of the minor benefit' (formerly paternity leave). In Finland, the mother's spouse, cohabiting partner or registered partner, irrespective of their sex, may be entitled to paternity and parental allowances. In Ireland, paternity benefits may also be claimed by a nominated spouse in a same-sex married couple to act as the applicable parent. In Slovenia, paternity benefits may also be used by the mother's same-sex partner; the same applies to paternity allowances in the UK.

Conversely, in 2014, the Federal Supreme Court of Switzerland <sup>(106)</sup> ruled only mothers could claim maternity benefits, and a father could not claim such benefits by relying on the notion of equal treatment.

Adoptive parents/adopted children may be assimilated to biological parents and children (such as in BE; BG; CY; CH, at the discretion of the cantons; DK; EE; ES <sup>(107)</sup>; MT, irrespective of their sex; FI <sup>(108)</sup>; FR; HR; IE; IS; IT; LT; LU; LV; NO; PL; PT; and SI). The same may also apply to foster parents/children (such as in BE, ES, IS and IT). Similarly, step-parents might be assimilated to parents and step-children to children (such as in BE, BG, CY, FI and LT).

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<sup>(104)</sup> See Case 2-1803 of 25 November 1997, *Alytaus apylinkės teismas*.

<sup>(105)</sup> See Case XU-488/13 of 22 October 2013, *Sąd Rejonowy dla Wrocławia*.

<sup>(106)</sup> See ATF 140 I 305 of 15 September 2014, *Tribunal fédéral suisse*.

<sup>(107)</sup> See STS 5370/2010 of 15 September, *Sala de lo Social, Tribunal Supremo*, on maternity benefits in favour of the adoptive mother married to the biological mother, when the adopted child and adoptive mother have lived together.

<sup>(108)</sup> In Finland, if two men adopt a child together, only one is entitled to paternity allowances.

Some problems may occur when recognising parenthood according to civil (family) law, which may apply to social security benefits. In Belgium, for example, this is particularly noticeable when the rules on private international law have to be applied. In Cyprus, in February 2019, the President of the Republic and the House of Representatives consulted the Supreme Court on whether partners of mothers who were not married or had not concluded a civil partnership agreement and lived together were entitled to paternity benefits. The Supreme Court took note of the position of EU law, which does not require Member States to grant paternity leave or paternity benefits to couples that are not married or who are not in a civil partnership. The Court held the view that the amending laws were contrary to Article 80(2) of the Constitution as the latter provision required bills stemming from the legislative power not to place a burden on the state budget. In Denmark, problems may also occur in regard to surrogacy agreements, as only the mother who gives birth to a child can claim maternity benefits.

#### **2.3.4. Old-age pension**

In regard to old-age pensions, any potential children may be taken into consideration when establishing the minimum qualifying conditions for obtaining an old-age pension or when calculating its level. Child-raising periods might therefore be assimilated to pension/insurance periods (such as in AT, BE, BG, CH, CZ, DE, EE, FI, FR, HR, HU, IE, LI, LT, LV, MT, NO, PL, PT, RO, SK and UK). They may also be used to lower the pensionable age (such as in BE, CZ, EE, LV, RO, SI and SK).

Periods of time spent raising adopted children, foster children or step-children may be assimilated to periods of time spent raising biological children (such as in AT, DE, EE, FR, LI and PL) <sup>(109)</sup>, or children of a same-sex partner (where recognised). Such children might also be taken into consideration when calculating an old-age pension (such as in BE; CH; CY; DE; EE; ES, only biological and adoptive children <sup>(110)</sup>; FI; LU; MT; NO; HU; RO; SE; and UK).

The status of children may be less relevant when the old-age pension in the applicable state is based on residence and not on previous work (such as in Denmark, Iceland and the Netherlands).

#### **2.3.5. Survivors' benefits**

With its roots based on the single breadwinner model, any income lost as a result of the death of an insured person should, to a certain extent, pass automatically to surviving family members, in particular children. While biological and adoptive children are recognised in most Member States, some also extend entitlement to step-children and other children (e.g. AT; CH <sup>(111)</sup>; CZ, also any children taken into care; DE; EL; FI; HR; HU; IS; LT; MT; NL; PL; PT). Interestingly, in Austria, the Higher Regional Court of Vienna <sup>(112)</sup> ruled that the scope of a survivor's pension was not to substitute maintenance, and

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<sup>(109)</sup> However, the Supreme Court of Latvia, in its decision of 22 March 2019, Case SKA-231/2019, ruled that taking care of a step-child (either a biological child of a spouse's child), even if in the same household, does not provide the right for entitlement to early retirement. Similarly, the Higher Labour and Social Court of Slovenia (decision Psp 405/2018, 20/02/2019, VDSS:2019:PSP.405.2018) overturned the decision of the first instance social court by arguing that a step-child is not a child. It did not recognise the right to a widow's pension, although the wife of the deceased had a maintenance obligation towards her step-child (child of the deceased). A review was filed by the claimant, and a decision by the Supreme Court of Slovenia is pending at the time of writing.

<sup>(110)</sup> In Spain, two preliminary rulings have been referred to the CJEU relating to male parents who claim that the application of the pension supplement to women only could be discriminatory on the grounds of gender. See Labour Court of Girona No 3, auto, 21-6-2018 (*Juzgado de lo Social nº 3 Girona 21-6-2018*); and ATSJ ICAN 6/2018 of 7 December 2018, Sala de lo Social, Tribunal Superior de Justicia, Las Palmas de Gran Canaria.

<sup>(111)</sup> In Switzerland, the Federal Supreme Court of Switzerland ruled that when a step-parent dies, the step-child is entitled to an orphan pension if the step-parent acted as a foster parent (ATF 122 V 182 of 28 June 1996).

<sup>(112)</sup> See 8Rs222/96t of 11 October 1996, Oberlandesgerichte Vienna.

set out that a step-child could receive a survivor's pension, even if the child was entitled to maintenance payments from a biological parent.

Children may be entitled to survivors' benefits until they reach the age of 18 or older, or if they are still in education or have a disability (such as in AT, BG, CH, CY, DE, EE, ES, HR, IT, LV, PL and PT).

Other members of the family may also be entitled to survivor benefits, such as spouses (such as in BE, BG, CY, CZ, DK, EE, EL, ES, FI, FR <sup>(113)</sup>, HR, HU, IE, LI, LT, LU, LV, MT, NL, NO, PL, PT, RO, SE, SK and UK), divorced spouses, same-sex partners (where recognised) or parents (such as in BG, IT, LU, PL and SI).

In the UK, the Supreme Court ruled that refusing the Widowed Parent's Allowance to a survivor of an unmarried couple was incompatible with the European Convention on Human Rights (ECHR) <sup>(114)</sup>.

In Spain, the Supreme Court <sup>(115)</sup> ruled that, according to civil legislation, if there were family relatives that were obligated to or could possibly provide food, the requirements for entitlement to a survivor's pension in favour of a family member would not be met.

### **2.3.6. Death grant**

In some Member States surviving (and dependent) members of the family may be entitled to a death grant. This person may be the child (in some cases, a step-child), spouse or parent of the deceased person (such as in BG, CZ, DE, FR, IS, IT, PT, RO and SK). Some Member States do not regulate or have abolished death grants (such as in BE, as of 2013; CH; EE, state grant as of 2018 and now the responsibility of local communities; IE; LI; MT; and SE), or have reshaped them into social assistance benefits (such as in HU and SI).

The scope of those who may be entitled to a reimbursement of funeral expenses might be rather broad, and include (same-sex) partners, step-children, siblings or even anyone who arranged the funeral (such as in AT; CY; DK; EE; ES; FI; HR; LT; LU; LV; NO, means-tested; PL; SI; and SK).

### **2.3.7. Family benefits**

#### **2.3.7.1. A range of family benefits**

Owing to their diversity, family benefits may be one of the most complex fields of social security coordination law. They can take the form of periodical payments to persons who have completed a pre-determined qualifying period (if required) or payments intended for food, clothing, housing, holidays or domestic help to raise children. They may be provided in cash or in kind, provided by social insurance and financed by contributions or by general taxation. They may even be considered part of the social assistance scheme or linked to it.

A further distinction can be made between child benefits, which may vary depending on the number of children, their age and the family's income; child-raising allowances,

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<sup>(113)</sup> Before same-sex couples were able to marry, French legislation reportedly discriminated on the grounds of sexual orientation. As the law now distinguishes between marriage and partnership (with partners not entitled to survivors' benefits), it is argued that the difference in treatment based on the couple's status (married/not married) could be unlawful discrimination on the grounds of family status.

<sup>(114)</sup> Application by *Siobhan McLaughlin* for Judicial Review (Northern Ireland), [2018] UK Supreme Court 48 of 30 August 2018; on appeal from: [2016] NICA 53.

<sup>(115)</sup> See STS 5561/2015 of 15 October 2015, Sala de lo Social, Tribunal Supremo.

classified in some Member States as maternity/paternity benefits; and child-care allowances, such as subsidies for day care.

Many Member States provide birth and adoption grants, supplements for single parents and other benefits, such as accommodation and housing allowances. Special family benefits are available to disabled children or their carers, with such benefits linked to invalidity or reliance on long-term care. Many Member States provide advances on maintenance payments when a parent or other responsible person is unable to make payments on time. Some Member States include tax relief and social services for families within family benefits <sup>(116)</sup>.

For this study, distinguishing between the person who creates benefit eligibility, those who are entitled to benefits and those who receive benefits may be of particular interest. Family benefits are awarded to a family in order to cover the costs or part thereof of raising a child or children. Without a child, there is no family, and therefore no entitlement to family benefits. In such cases, the child is the person who creates entitlement. However, if (s)he has not reached the age of majority, the child does not have the capacity to act in a legally valid manner. The person who is therefore legally entitled to the applicable family benefit is an adult, such as a parent. However, the person who actually receives the family benefit may be another person, such as another parent, a (same-sex) partner or the person who is taking care of the child <sup>(117)</sup>.

#### **2.3.7.2. Entitling children**

For some family benefits, foster children and the step-children of a (same-sex) partner may create entitlement to family benefits, in addition to biological or adoptive children (such as in AT, for family allowances; BG; CY; CZ; DE; DK; FI, for child benefits; HR, including all children without parents; IE; IS; MT; and NL<sup>(118)</sup>). In Belgium, for a person to be entitled to family benefits, a child does not have to be a biological relative. The only condition is that the person is financially responsible for raising the child. In Switzerland, the entitling persons may be: children that have filiation with the entitled, children of the spouse of the entitled, foster children, and the siblings and the grandchildren of the entitled if s/he is the main person of being financially in charge of those children.

In Malta, Article 76(1) of the Social Security Act specifies that 'it shall be the right of every child ... to have an allowance paid out in his respect'. This implies that, for the purposes of child-raising benefits, even a child who is not the biological child, adopted child or step-child of the head of the household is entitled to a child allowance, provided that there is a legal arrangement for the child to form part of the same household.

#### **2.3.7.3. Entitled persons**

As a rule, biological parents, adoptive parents, foster parents or sometimes step-parents are entitled to a family benefit <sup>(119)</sup>. However, those who are entitled may be broader. For instance in Austria, if no other person is entitled, a person who does share a common household with the child can claim family allowances if (s)he is mostly responsible for the financial costs of maintaining the child (see also Chapter 3.8.3). In Belgium, everyone who is financially responsible for the raising of a child may be entitled and receive family

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<sup>(116)</sup> Strban, G., *Family Benefits In The EU – Is It Still Possible To Coordinate Them?*, Maastricht Journal of European and Comparative Law (MJ) 2016, 5, p. 776.

<sup>(117)</sup> See above, p. 776.

<sup>(118)</sup> The Algemene Kinderbijslagwet does not set out when a child is classified as a 'step-child'. For the purpose of the Algemene Kinderbijslagwet, the implementing institution assumes that a child is a step-child when the child is the own child or a foster child of the person to whom a person is married or is considered to be married on the basis of a registered partnership or a joint household.

<sup>(119)</sup> In some states, single parents might be entitled to specific benefits or supplements to family benefits (such as in CY, EE, ES, LI and NO).

benefits. In Czechia, for the purposes of parental allowance, a parent is also a person who is permanently taking care of the child and therefore replacing the care provided by the parent(s). In Germany, the child him/herself may be entitled if the parents are unknown or if another person is not considered as the parent of the child.

In Denmark, a person having parental responsibility may be eligible for child and young person allowances. In Estonia, a person who actually takes care of the child may be entitled to child-care allowance. A child's guardian may also be entitled to financial allowances for a dependent child. Similarly, in Finland, a guardian, or in some cases, another person who predominately looks after the child and lives in the same household, may be entitled to child home care allowances. Similarly, in Lithuania and Latvia, a guardian (as an individual or legal person) may be entitled to family benefits.

In France, family benefits are provided to any natural person who is responsible or who is permanently looking after one or more children <sup>(120)</sup>. Similarly, in Slovenia, those who protect and care for the child may be entitled to certain family benefits. In Czechia, another person may also be entitled to child allowances on the basis of a decision of the competent authority. An adult child who does not have both parents and is in regular schooling may be entitled in his/her own right. Similarly, in Lichtenstein, orphans who have lost both parents are entitled to family benefits. Upon reaching the age of majority, a child can claim certain family allowances in Luxembourg and Poland.

In Sweden, in regard to parental benefits, there is an expanded definition of the term 'parent' that applies to the spouse/partner living with the parent <sup>(121)</sup>. In the UK, other people who are responsible for bringing up a child may be entitled to child benefits.

#### **2.3.7.4. Other recipients**

Family benefits may also be received by (or paid to) a wider circle of persons caring for the child, whereby, sometimes, a common household is required. For instance, in regard to child-raising cash benefits, the Austrian Supreme Court of Justice recently ruled that a common household could be established for only two months, if the parents live apart and the child changes their place of residence for two months to live temporarily with his/her father <sup>(122)</sup>. Moreover, the Federal Supreme Court of Switzerland ruled that an ex-wife who lived in France and took care of the children was entitled to receive benefits from the Swiss authorities directly <sup>(123)</sup>.

In general, the person claiming a benefit may also have the right to receive the said benefit. In addition, in Estonia, for instance, a person may ask to transfer the family benefit to the bank account of a third person, unless the law establishes an obligation to pay the benefit to the beneficiary in person only. Additionally, if a child has been appointed a guardian, family allowances may be transferred to the bank account of the child on the basis of a court ruling. However, if a guardian is a legal person, allowances may be paid to the bank account of the guardian

In Ireland, child benefits are payable to the parent with whom the child resides most of the time. If the child resides half of the time with each parent, child benefits are paid to

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<sup>(120)</sup> In France, a child is dependent on a person when education duties and everyday life financial costs are borne by this person and where emotional bonds exist. The assessment of the state of dependence relies on factual elements and is irrespective of the existence of a formal family relationship. Family benefits can therefore be paid to a third person who takes care of the child. Moreover, children who live in a recomposed family can be in a state of dependence (Circular CNAF 2010-015 of 15 December 2010).

<sup>(121)</sup> In Sweden, it was recently acknowledged that the term 'parent' must be interpreted even more widely taking into account the changes in family compositions. As of 1 July 2019, the provisions on parental benefits were changed to include the parent's partner. The possibility of others being entitled to parental benefits, such as grandparents, is currently under consideration.

<sup>(122)</sup> See OGH 10 ObS 17/19a of 26 March 2019, Oberster Gerichtshof.

<sup>(123)</sup> See BGE 144 V 35 of 20 December 2017, Tribunal fédéral suisse.

the mother of the child. In the Netherlands, if divorced parents share the upbringing of the children (co-parenting), the child benefit payment is split between both parents.

The most frequent problems encountered in Malta seem to be the payment of benefits to families who are currently separating. In such situations, it is imperative that the parties agree on a single recipient for the benefits. If they cannot agree, the benefits are withheld pending the resolution of the legal proceedings on the effective care and custody of the child.

### **3 IMPLICATIONS OF MODERN FORMS OF FAMILY FOR SOCIAL SECURITY COORDINATION**

#### **3.1. Social security coordination — Horizontal remarks**

The Coordination Regulations clearly stipulate that members of the family must be determined according to the legislation of the applicable Member State. As a result, this creates problems when national law does not contain any relevant definitions or if the definitions provided are not sufficiently clear. There are also significant differences across the different types of benefits. The implications thereof on social security coordination will be discussed in more detail in the following sections.

##### **3.1.1. Problems owing to different concepts among Member States in regard to a person's status**

There are also numerous horizontal issues that transect all types of benefits and are explained in more detail in the reports submitted by the national experts. Even if national definitions are clear (e.g. biological children of a person or of a married couple are entitled to benefits), there may be problems when foreign legal concepts are involved. A good example can be drawn from the Netherlands. In the past, it was common practice for the social security institutions to check if the concepts more or less corresponded to those found under Dutch family law. However, in 2005 the Dutch court of last instance in social security matters decided that private international law alone was decisive and, therefore, the comparability test with Dutch family law was no longer required <sup>(124)</sup>. In that particular case, Ghanaian family law, which follows quite different approaches in regard to the definition of 'own' children, was therefore applied. Under this principle, any valid marriage also has to be considered as a marriage under Dutch law.

It would seem that other Member States follow different approaches. As an example, German social security legislation explicitly requests that the relationship corresponds to the principles of German family law <sup>(125)</sup>. The same seems to apply in Malta. Another example can be found in Sweden, where social security benefits partly depend on registration in the population register. In one particular case, of the two women registered as parents of a child in Iceland, only one could register as a parent when they moved to Sweden, as Swedish legislation in such cases allows only one person to register.

Special reference was also made to Danish legislation, which stipulates that biological mothers cannot be classified as the mother of the child in the event of surrogacy agreements. In such cases, only women actually giving birth to the child are classified as the mother of the child (the surrogate mother). The Ankestyrelsen (national social appeals board) decided that this was also true if the biological mother was classified as the mother for social security purposes and under the legislation of the state that applies to her.

For coordination purposes, situations in which a family relationship is created in another state could also be relevant in many cases. It must be assumed that the national legislation on the recognition of such situations and their interpretation is also applicable for states outside the scope of application of EU law (e.g. children recognised in Ghana). For the purposes of this report, it is important to note when these different national concepts can be applied to situations in other Member States or if EU law gives a clear indication on how to proceed.

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<sup>(124)</sup> Case 00/744 AKW of 15 April 2015, Centrale Raad van Beroep.

<sup>(125)</sup> See Section 34(1) of the Sozialgesetzbuch (SGB), Erstes Buch (I).



### **3.1.2. Can a solution be found in the Coordination Regulations?**

It should be noted that in the field of social security, EU law does not provide for an obligation to harmonise national systems, and so the different national approaches to social security, including the question on which individuals are protected (i.e. who is classified as a member of the family), remain unaffected. Nevertheless, national legislation must respect EU law, in particular its fundamental principles (<sup>126</sup>).

Regulations (EC) No 883/2004 and (EC) No 987/2009 must firstly be analysed to assess if these secondary law instruments already contain a rule that could solve any potential issues. Of course, the definition of 'member of the family' pursuant to Article 1(i) of Regulation (EC) No 883/2004 contains some elements. However, these do not provide a solution for the recognition of family member relationships in other Member States, as it is usually the legislation of the competent state that is classified as decisive, and as discussed, problems can arise if this national legislation does not recognise situations that are recognised in another Member State.

This therefore begs the question of whether the provision on assimilation of facts of Article 5(b) of Regulation (EC) No 883/2004 provides a possible solution. Under this provision, and where under the legislation of the competent state legal effects are attributed to the occurrence of certain facts or events, and like facts or events occurring in any other state, these facts or events will be taken into account as though they had taken place in the first state. Should a marriage (between same-sex partners) therefore be regarded as a fact or an event? Would a marriage be classified as a 'like fact or event' if the competent Member State only recognises marriages between men and women? Based on the judgment of the CJEU on the interpretation of this Article, it could be concluded that the comparability of facts and events depends on the aim underpinning national legislation (<sup>127</sup>). When there is a clear political and societal decision not to treat a same-sex partnership as a marriage, it seems doubtful that this assimilation of facts may lead to a general recognition of such family relationships that are only recognised in another Member State.

It could therefore be concluded that Regulations (EC) No 883/2004 and (EC) No 987/2009 do not provide a clear answer on these issues.

Of course, this does not mean that Article 5 of Regulation (EC) No 883/2004 is not relevant for decisions on which individuals are classified as a member of the family. If facts have been established under the legislation of another Member State, e.g. a custody decision, then this decision must be respected by other Member States as custody decision attributed under its own legislation. Nevertheless, it seems that this argument is not entirely accepted by the Member States and could be further analysed to gain clarity and legal certainty for all Member States, as well as persons and their family members who exercise their right to free movement.

### **3.1.3. Lessons to be learned from CJEU judgments in regard to a person's status**

The lack of directly applicable provisions under the Coordination Regulations cannot be understood as being exhaustive. There is also the question of whether the fundamental principles under the TFEU, in particular the free movement principle, could be relevant in this regard. A judgment has not yet been handed down by the CJEU on the recognition of

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(<sup>126</sup>) See judgment of the Court of Justice of 28 April 1998, *Raymond Kohll v Union des caisses de maladie*, Case C-158/96, ECLI:EU:C:1998:171, paragraphs 17–20.

(<sup>127</sup>) See judgment of the Court of Justice of 21 January 2016, *Vorarlberger Gebietskrankenkasse and Alfred Knauer v Landeshauptmann von Vorarlberg and Rudolf Mathis*, Case C-453/14, ECLI:EU:C:2016:37, paragraph 34.

family relationships in the field of social security law. Nevertheless, some rulings in other fields of law could be used as guidelines.

As handed down by the CJEU, a same-sex marriage under Belgian law had to be respected by Romania for the residence rights of a same-sex partner, even though Romanian family law explicitly forbids same-sex marriage <sup>(128)</sup>. In a similar notion to decisions on social security, the CJEU noted that Member States are competent for a person's status, and there is therefore no need for applicable harmonisation. Nevertheless, as noted in the judgment in the above-mentioned case, Member States were required to respect the free movement principle <sup>(129)</sup>. The CJEU concluded that the non-recognition of the marriage in this case, which would result in the same-sex husband not being granted the right to permanent residency in Romania, could restrict the partner's right to free movement <sup>(130)</sup>. As was further noted, this restriction on free movement could not be justified on grounds of public policy and national identity, as referred to in Article 4(2) TFEU, as the recognition in these specific cross-border cases cannot undermine the institution of marriage in Romania <sup>(131)</sup>.

Before drawing conclusions from this judgment, it may be interesting to look at further rulings. The CJEU has also had to rule on a person's status, not just in relation to the right to reside, but also in relation to the name of a person. This can be considered another field in which national legislation differs between Member States and where problems can arise in cross-border situations.

In one particular case, the CJEU ruled that Belgium had placed a de facto restriction on freedom of movement as Belgium did not allow Spanish nationals to apply Spanish family name composition rules (i.e. double surnames), as provided for under Spanish law <sup>(132)</sup>. In a later judgment, the CJEU ruled that although the obligation of one Member State to use another name than the name that is officially recognised in the Member State of birth can be regarded as a restriction on freedom of movement, it could be justified based on public policy (national identity) <sup>(133)</sup>. The latter case was in regard to a title of nobility that was an integral part of the name recognised in Germany that could not be used in Austria owing to a special law that abolished the nobility. However, public policy may be relied on only if there is a genuine and sufficiently serious threat to fundamental societal interests <sup>(134)</sup>. In contrast to this judgment, the CJEU ruled that a different spelling of the name of the husband and wife under the registers of the two Member States of nationality of these two individuals could create disadvantages for them, but would not place a restriction on free movement <sup>(135)</sup>. Even if regarded as a restriction, such a restriction could be justified to protect the official language of the Member State, on the condition that that refusal does not give rise, for those Union citizens, to serious inconvenience in their interaction with the administrative, professional and private spheres <sup>(136)</sup>. If changes to the name are at the disposal of the person concerned, and this change is the consequence of a voluntary decision, the Member State of nationality of that person is not obliged to recognise this new name, if it runs contrary to the national law of this Member State, for example if it

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<sup>(128)</sup> See judgment of the Court of Justice of 5 June 2018, *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, Case C-673/16, ECLI:EU:C:2018:385.

<sup>(129)</sup> See above, paragraphs 37 and 38.

<sup>(130)</sup> See above, paragraph 40.

<sup>(131)</sup> See above, paragraph 45.

<sup>(132)</sup> See judgment of the Court of Justice of 2 October 2003, *Carlos Garcia Avello v Belgian State*, Case C-148/02, ECLI:EU:C:2003:539.

<sup>(133)</sup> See judgment of the Court of Justice of 22 December 2010, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, Case C-208/09, ECLI:EU:C:2010:806.

<sup>(134)</sup> See above, paragraph 86.

<sup>(135)</sup> See judgment of the Court of Justice of 12 May 2011, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, Case C-391-09, ECLI:EU:C:2011:291.

<sup>(136)</sup> See above, paragraph 94.

contains elements of nobility not accepted by this Member State <sup>(137)</sup>. Member States are entitled to take measures designed to prevent their nationals from attempting, under cover of the rights created by the TFEU, to improperly circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of EU law <sup>(138)</sup>. Free movement precludes a Member State from rejecting a correction of the name of a national of another Member State if national law stipulates that only corrections during residence in the Member State of nationality can be recognised <sup>(139)</sup>.

#### **3.1.4. Application of fundamental principles to social security**

It would seem that the CJEU, in principle, considers that the non-recognition by a Member State of a situation concerning a person's status that is recognised by the legal order of another Member State, is a restriction on free movement that must be justified according to EU law. No elements in the above-mentioned judgments demonstrate that this principle cannot be applied to social security. In the field of social security, this could mean that both a marriage/partnership recognised in one Member State or a child recognised as a person's own child under the legal order of one Member State must be recognised by other Member States in order to respect the principle of freedom of movement in relation to the person, unless the non-recognition can be justified, such as on grounds of public policy. To date, there has been no cases involving such a justification in the field of social security. Based on previous CJEU judgments, justification would only be possible if the issue involved posed a serious threat to the fundamental interests of a society. This therefore begs the question of whether the (constitutional) protection of the notion of marriage of being between one man and one woman in Member State A would be sufficient to exclude the same-sex partner of a deceased insured person from a survivor's benefit, if applicable under the legislation, if the same-sex marriage took place under the legislation of Member State B before the deceased person had made use of his/her right to freedom of movement. It is very difficult to predict rulings of the CJEU on these matters.

#### **3.1.5. Decisive element: A person's age**

The age of a person could also be relevant, especially in regard to children and until what age a child is considered a member of the family in order to receive derived healthcare coverage or entitlement to family benefits. Once again, such a question falls under national legislation to decide on such matters. In 2008, the CJEU handed down a judgment on a question of competence in this regard. The judgment stipulated that Regulation (EEC) No 1408/71 could not preclude a non-competent Member State from applying a higher age limit, as provided for under its own legislation, if a child had already surpassed the relevant age limit in a competent Member State <sup>(140)</sup>. Of course, such differences have an impact on the question of who can be classified as a member of the family, however, the solution provided for by the CJEU was clear.

Problems may also occur when different ages are applied to the same person under the legislation of two Member States. This therefore begs the question of which age limit is applicable, especially in regard to the duration of entitlements as a member of the family under the legislation of one Member State. This question seems to be comparable and related to the question in regard to a person's status. It might be assumed that such differences do not occur very often, especially taking into account constant developments in accuracy of registration and digitalisation. However, the CJEU has already ruled in this regard. The dispute arose in a case about a certified correction of a birth date in Greece,

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<sup>(137)</sup> See judgment of the Court of Justice of 2 June 2016, *Nabiel Peter Bogendorff von Wolffersdorff v Standesamt der Stadt Karlsruhe and Zentraler Juristischer Dienst der Stadt Karlsruhe*, Case C-438/14, ECLI:EU:C:2016:401.

<sup>(138)</sup> See above, paragraph 57.

<sup>(139)</sup> See judgment of the Court of Justice of 8 June 2017, *Proceedings brought by Mircea Florian Freitag*, Case C-541/15, ECLI:EU:C:2017:432.

<sup>(140)</sup> See judgment of the Court of Justice of 20 May 2008, *Brigitte Bosmann v Bundesagentur für Arbeit - Familienkasse Aachen*, Case C-352/06, ECLI:EU:C:2008:290.

which was not recognised under German social security law, which stipulated that, in principle, only the first date certified to the German social security institution was relevant. The CJEU ruled that in proceedings to determine entitlements to social security benefits of a migrant worker who is a Union national, the competent social security institutions and the courts of a Member State must accept certificates and analogous documents relative to personal status issued by the competent authorities of other Member States, unless their accuracy is seriously undermined by concrete evidence relating to the individual case in question <sup>(141)</sup>.

As already discussed in relation to a person's status, the CJEU once again seems to limit the possibilities of a Member State to not recognise, under the legislation it applies, legal effects concerning this status under the legislation of another Member State, whenever free movement has been exercised by the person concerned. Of course, it could be argued that the recognition of a corrected birth certificate falls explicitly under the binding effect of documents issued for social security purposes by the authorities of another Member State pursuant to Article 5(1) of Regulation No 987/2009. However, after a judgment from the CJEU in 2018, it would seem that such binding effects can only be created by European documents and not by national decisions or certificates <sup>(142)</sup>.

It could therefore be argued that the ruling on the correction of the Greek birth certificates still has value. If one Member State is bound by amendments concerning a person's date of birth by another Member State, then entitlement of a person to social benefits as a member of the family must also be taken into consideration, inasmuch as there are no serious doubts based on concrete evidence. It is not clear that if in such a case (when there is no binding effect pursuant to Article 5(1) of Regulation (EC) No 987/2009) a dialogue procedure pursuant to Article 5(2) to (4) of that Regulation is necessary (based on the obligations pursuant to Article 4(3) of TFEU), or if another Member State can apply its own national law to ignore this correction, if the conditions outlined by the CJEU have been met.

### **3.2. Sickness benefits in kind (healthcare)**

#### **3.2.1. Coordination Regulations: Defining members of the family and members of a household**

The coordination rules in relation to healthcare make a distinction between primarily insured persons and (their) family members. The category of primarily insured persons refers mainly to professionally active persons or persons who have been professionally active and who now receive benefits, and who, owing to their cross-border movements, make use of the coordination rules to safeguard their access to healthcare. For such a purpose, the coordination rules for healthcare <sup>(143)</sup> are largely grouped around three eventualities: a situation in which the insured person is residing in a Member State other than the competent Member State; a situation in which the insured person is temporarily staying in another Member State and is in need of necessary healthcare; and a situation in which the insured person receives authorisation from his/her competent institution to receive treatment in another Member State.

Family members who accompany the insured person abroad or who remain in the country of origin while the insured person is (working) abroad can also make use of the coordination rules for cross-border healthcare. Moreover, some rules that are adapted to the specific

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<sup>(141)</sup> See judgment of the Court of Justice of 2 December 1997, *Eftalia Dafeki v Landesversicherungsanstalt Württemberg*, Case C-336/94, ECLI:EU:C:1997:579, paragraph 21.

<sup>(142)</sup> See judgment of the Court of Justice of 6 September 2018, *Salzburger Gebietskrankenkasse and Bundesminister für Arbeit, Soziales und Konsumentenschutz v Alpenrind GmbH and Others*, Case C-527/16, ECLI:EU:C:2018:669, paragraph 75.

<sup>(143)</sup> See Title III, Chapter 1, Articles 17–35 of Regulation (EC) No 883/2004.

needs of family members have been established, and under which the country of residence plays a key role. In most cases, family members often remain in the country of residence and do not accompany the insured person who is working abroad and subject to a foreign social security system. Family members will, on behalf of the (foreign) competent state, receive healthcare benefits in the country of residence, from the institutions of the place of residence, according to its own legislation, as though they were insured under the said legislation <sup>(144)</sup>.

Furthermore, the Member State of residence retains an essential role when family members requests authorisation for treatment abroad <sup>(145)</sup>. While the treatment abroad will be covered by the competent Member State of the insured person, the assessment of whether authorisation must be granted, pursuant to Article 20(2) of Regulation (EC) No 883/2004, is made by the Member State of residence according to its own legislation <sup>(146)</sup>. The Member State of residence will subsequently submit the request to the competent Member State <sup>(147)</sup>. In exceptional circumstances, where the family member needs urgent, vitally necessary treatment and the conditions for issuing the authorisation have been met, the Member State of residence will grant authorisation on behalf of the competent Member State <sup>(148)</sup>.

In regard to the healthcare coordination rules for pensioners (Articles 23 to 30 of Regulation (EC) No 883/2004), the residence of the family members has a specific role to play when allocating the responsibilities to refund treatment sought abroad. Article 26 of Regulation (EC) No 883/2004 guarantees entitlement to healthcare benefits to the family members of a pensioner who are residing in a different Member State to the pensioner. This entitlement occurs in the Member State of residence of the family members, according to the legislation of that state (on the account of the state in which the pensioner resides).

Taking into account this central position of the Member State of residence in order for both the insured person and the family members to benefit from healthcare abroad, it is not surprising to see that the definition of the concept of 'member of the family' for the purposes of healthcare relies upon the legislation of the country of residence (Article 1(i)(1)(ii) of Regulation (EC) No 883/2004):

*"member of the family" means*

[...]

*with regard to benefits in kind pursuant to Title III, Chapter 1 on sickness, maternity and equivalent paternity benefits, any person defined or recognised as a member of the family or designated as a member of the household by the legislation of the Member State in which he resides;*

An EU definition is applied for Member States that do not distinguish between primarily insured persons and members of the family <sup>(149)</sup>. This is especially the case in universal healthcare systems (otherwise known as national health services) that, in principle, do not

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<sup>(144)</sup> See Article 17, Regulation (EC) No 883/2004.

<sup>(145)</sup> See Article 20, Regulation (EC) No 883/2004.

<sup>(146)</sup> 'The authorisation shall be accorded where the treatment in question is among the benefits provided for by the legislation in the Member State where the person concerned resides and where he/she cannot be given such treatment within a time limit which is medically justifiable, taking into account his/her current state of health and the probable course of his/her illness.' Article 20(2), Regulation (EC) No 883/2004.

<sup>(147)</sup> Article 26(2), Regulation (EC) No 987/2009.

<sup>(148)</sup> Articles 26(3) and (8), Regulation (EC) No 987/2009.

<sup>(149)</sup> Referring to the spouse, minor children and dependent children who have reached the age of majority (in application of Article 1(1)(2) of Regulation (EC) No 883/2004).

make any distinctions between residents. As reported <sup>(150)</sup>, many Member States have implemented a universal healthcare system of some kind <sup>(151)</sup>. Other states have healthcare systems that are work-related or social insurance-based, where the primarily insured person (worker) is distinguished from his/her dependent family members <sup>(152)</sup>. Work-related or social insurance-based systems will therefore predominately apply national definitions of the country of residence of the family member.

As discussed previously, an EU-wide definition has some conceptual problems of its own. Although the definition introduced a common Union understanding of who is and who is not classified as a member of the family, the applied concepts of 'spouse' and 'minor child' (and 'age of majority') within the EU definition in turn depend on the relevant national legislation. Owing to a lack of harmonisation of concrete definitions, the concepts can differ across the Member States (see Chapter 1.3 and Chapter 2).

A specific type of problem relates to universal healthcare systems, which for the application of certain rules, have several categories of insured persons. By way of example, in relation to the financing or level of coverage, the system may distinguish between primarily covered persons and family members. In Cyprus, personal scope principally refers to persons who are residents and have contributed to the system for at least three years and do not have an annual income above a certain threshold <sup>(153)</sup>. The level of the threshold depends on whether an individual belongs to a family and has dependent children under his/her care. In some other universal healthcare systems, the scope is extended to persons who do not yet have permanent residence, but do work in the country, as well as members of the family of these workers, such as in Czechia. The concept of primarily insured persons and/or dependent family members is similarly important in some (universal) healthcare systems, such as in Ireland, in regard the level of health coverage, when contributions are to be paid when treatment is sought or for defining the level of the contributions to the healthcare system.

This therefore begs the question of what type of definition is to be applied for these rules: the EU definition (because of the involvement of a universal healthcare system) or the national definition (as the concrete application rules differentiate between primarily and secondarily insured persons). Another key question is what solutions are to be sought if the definitions differ between the applicable rules. From the logic applied under Article 1(i)(1)(i) of Regulation (EC) No 883/2004, it would seem that national definitions are to be applied whenever a distinction is made between primarily insured persons and dependent persons. As handed down by the CJEU in 1995 <sup>(154)</sup>, a distinction may have to be established between entitlement (affiliation) rules and application rules.

### **3.2.2. Concurrent definitions of a different kind: distinguishing entitlement and application rules (*Claudine Delavant v***

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<sup>(150)</sup> Mutual Information System on Social Protection (MISSOC), *Comparative Tables. Table II Health Care*, European Commission, Brussels, consulted on 12 July 2019.

<sup>(151)</sup> BG, CY, DK, EE, FI, IS, IE, SE, CH, NL, UK, IT, LV, LI, MT, NO, PT, RO and SK.

<sup>(152)</sup> AT, BE, ES, HR, FR, SI, DE, EL, HU, LT, LU and PL. Many of these systems also guarantee universal coverage for the entire population, such as in France, Belgium, Spain, Croatia, Slovenia and Lithuania. In order to offer universal coverage, the residual group of persons not (primarily or secondarily) covered by primarily covered persons are assimilated to the same level, and the state guarantees the financing of healthcare in a subsidiary manner.

<sup>(153)</sup> Such as persons without dependants, with an annual income that does not exceed EUR 15 400.00; members of families with an annual income that does not exceed EUR 30,750.00, increasing in thresholds of EUR 1 700.00 for each dependent child.

<sup>(154)</sup> See judgment of the Court of Justice of 8 June 1995, *Claudine Delavant v Allgemeine Ortskrankenkasse für das Saarland*, Case C-451/93, ECLI:EU:C:1995:176.

***Allgemeine Ortskrankenkasse für das Saarland, Case C-451/93)***

To date, the classification of members of the family by the country of residence in regard to the application of the healthcare coordination rules has generated (only) one major CJEU case that related to Regulation (EEC) No 1408/71 <sup>(155)</sup>. The facts were as follows: Mrs C Delavant, a French national, worked in France. She was socially insured in France but lived with her husband and two children in Germany. The German healthcare institution had refused to refund the costs of hospital treatment for one of Mrs Delavant's children owing to the level of her husband's income. Social health insurance in Germany is based on an income threshold; if the insured person has a professional income above a specified threshold (as was the case of Mrs Delavant's husband), (s)he is directed to the private sector in order to take out private health insurance. The refusal of the German healthcare institution to refund/cover the healthcare of the child was based on, among other things, Articles 1(f) and 19 of Regulation (EEC) No 1408/71 (now Article 1(i) and 17 of Regulation (EC) No 883/2004). The German healthcare institution reasoned that the Member State of residence was to determine the conditions and level of health coverage for the family members, when the Member State of residence differs from the competent Member State where the insured person works. Similarly, the Member State of residence determines who is classified as a dependent family member or member of the household. However, the question put forward was whether the income level of her husband (in Germany) had a role to play in determining access to healthcare (in Germany) when the insurance of the family members depended on the social insurance of Mrs Delavant (in France, the competent state).

The CJEU made a distinction between the entitlement (social insurance) conditions and the level of (healthcare) coverage. According to the coordination rules (Article 17 of Regulation (EC) No 883/2004), members of the family of the (migrant) worker are subject to the legislation of the Member State in which that person works in regard to entitlement conditions to receive a social benefit. Once entitlement has been recognised, the person has the right to receive, at the expense of the competent state in which the migrant works, benefits in kind provided by the institution of their place of residence within the limits set out in and according to the legislation administered by that institution. In other words, Mrs Delavant's children were generally entitled to healthcare (insurance) on the basis of the health insurance of their mother in France, and not on the basis of the private healthcare of the father in Germany. The eventual level of the refund was, however, based on the regulations of the Member State of residence (Germany).

However, the question remained of whether the children were classified as dependents of Mrs Delavant or her husband. According to the interpretation of some national authorities, the Member State of residence determined the concept of dependent family member, and therefore the German definition was to be followed, linking the children to the father and not to the mother, pursuant to Article 1(f)(i) of Regulation (EEC) No 1408/71. However, the CJEU did not accept this interpretation:

*Article 1(f) of the regulation does not deal with the conditions of affiliation or of entitlement to social security benefits for members of the family of a worker, but merely refers to the legislation under which benefits are provided for determining the persons considered to be family members. <sup>(156)</sup>*

In other words, a distinction was made between the social insurance of the migrant (worker), and the possibly related (co-)insurance of the dependent family member, and the resulting level and conditions for coverage. Whereas the former falls under the scope

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<sup>(155)</sup> See above.

<sup>(156)</sup> See above, paragraph 18.

of the legislation of the competent Member State, the latter falls under the scope of the legislation of the Member State of residence of the family members.

The distinction that the CJEU put forward in this case between, on the one hand, the social insurance position of the migrant worker and related (co-)insurance of the dependent family member, and on the other hand, the conditions for coverage and level of protection, has never been explicitly translated into the coordination rules (for healthcare). Yet as the relevant wording has been maintained in the revised Coordination Regulation <sup>(157)</sup>, it could be argued that the CJEU judgment in the above-mentioned case is still relevant for the current coordination rules (in other words, implicit confirmation of the ruling through interpretation by analogy) <sup>(158)</sup>.

### **3.2.3. Diverging definitions and free movement**

Except for the above-mentioned CJEU case, the ever-diverging definitions of 'member of the family' across Member States do generate problems of their own, such as the question of how to proceed when the definition of 'member of the family' in the competent Member State, which is relevant for delineating the co-insurance of the member of the family, differs (profoundly) from the definition in the country of residence, which is relevant for delineating the level of coverage for the treatment <sup>(159)</sup>.

As reported by the national experts of Estonia, Poland and Romania, a potential future problem was noted in relation to same-sex households as a result of the (ever-more) diverging approaches across Member States. In some Member States, same-sex couples have the legal right to enter into a marriage or registered partnership, whereas in others, this is not legally accepted. If the couple resides in a Member State where same-sex marriage/partnerships are not legally recognised, this could create problems in regard to the access to healthcare benefits of the partner who depends on his/her primarily insured partner for his/her insurance. The dependent partner may not be entitled to sickness benefits in kind, pursuant to Article 1(i) of Regulation (EC) No 883/2004, if the host country, or this Member State of residence, does not recognise these persons as members of the family according to its legislation.

Even if Article 1(i) of Regulation (EC) No 883/2004 is clear on the issue, it is hard to defend a legal outcome whereby the (competent) Member State that is eventually responsible for the payment of the healthcare treatment and that accepts same-sex marriage would not have to pay for treatment owing to the fact that the Member State of residence applies a relatively more restricted family concept in which same-sex marriage is not legally recognised. This therefore raises the question, in line with the principle of favourability (as applied in Case C-24-75, *Teresa and Silvana Petroni v Office national des pensions pour travailleurs salariés (ONPTS), Bruxelles*, and Case 352/06, *Brigitte Bosmann v Bundesagentur für Arbeit - Familienkasse Aachen*) of whether the Member State that is competent for the healthcare refund can rely on the more restricted definition of the Member State of residence in order to be exempted from the financial responsibility to pay for/refund healthcare treatment. Such an issue is compounded by the fact that if the same-sex partner would be residing in the competent Member State, (s)he would have enjoyed access to healthcare as the partner of the insured person. The fact that (s)he resides in another Member State, which in application of the Coordination Regulations governs the scope of the definition, would result in the partner no longer being entitled to access to

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<sup>(157)</sup> Compare Article 1(f) of Regulation (EEC) No 1408/71 with Article 1(i)(1) of Regulation (EC) No 883/2004.

<sup>(158)</sup> See Jorens, Y., Roberts, S. et al. (eds), *Analysis of selected concepts of the regulatory framework and practical consequences on the social security coordination*, trESS, Ghent, 2010, p. 30–31.

<sup>(159)</sup> See *Caisse pour l'avenir des enfants v FV, GW*, Case C-802/18, where one Member State requires a family link between the dependent child and the parent, and the other Member State, only requires maintenance to be demonstrated (see Chapter 1.6. for further information).



healthcare. However, in contrast, a member of the family could be entitled, pursuant to Article 1(i)(1) of Regulation (EC) No 883/2004, in a situation in which the competent Member State does not accept a same-sex marriage, but where the legislation of the Member State of residence does.

Another line of reasoning in supporting the above-mentioned view can be found in case C-451/93, *Claudine Delavant v Allgemeine Ortskrankenkasse für das Saarland*, where social insurance was separated from the level of coverage <sup>(160)</sup>. Based on an interpretation of the case, it would be the competent Member State that determines the conditions of insurance, and therefore same-sex partners could enjoy shared insurance; the Member State of residence would only intervene in the level of coverage (accepting the status of a co-insured family member). An interpretation of Articles 1(i) and 17 of Regulation (EC) No 883/2004 along the lines of this case could therefore have addressed this issue.

Lastly, a diverging definition of the concept of 'member of the family' by the Member State of residence and the competent Member State creates a problem of a more fundamental nature: the possible obstruction of the free movement of people/workers. The question that must be addressed is whether a worker would be moving while fully aware that his/her partner or member of the family would not be entitled to healthcare coverage, as a result of the relatively more restrictive definition of 'member of the family' in the Member State of residence. As previously discussed, there are possible arguments to believe that this is the case, however, further clarification may be provided when the CJEU hands down its judgment on Case C-802/18 (*Caisse pour l'avenir des enfants v FV, GW*) <sup>(161)</sup>.

Overall, the above discussion demonstrates that there is a sufficient number of arguments underpinning a potential interpretation of Article 1(i) of Regulation (EC) No 883/2004 in that members of the family should be granted access to healthcare in the Member State of residence when the person qualifies as a member of the family in the competent Member State, regardless of the relatively more restrictive definition applied in the Member State of residence.

### **3.3. Sickness cash benefits**

Sickness cash benefits are based on two aspects: the establishment of work incapacity by a medical professional; and an income-replacement cash benefit. The responsibility of providing such a cash benefit may be split between the employer (and its duty to provide sick pay) and the social security (social insurance) institution that is competent for providing sickness cash benefits <sup>(162)</sup>.

Situations may become more complex when a migrant worker becomes sick or injured, and labour law rules are governed by the legislation of one Member State, while social security law rules are governed by another Member State. This may be the case with simultaneous employments or postings, the duration of which may differ according to labour law and social security law. Labour law and the obligation of the employer to provide sick pay are not coordinated across the EU, whereas social security law and the obligation of social security institutions to provide sickness cash benefits is coordinated across the EU <sup>(163)</sup>.

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<sup>(160)</sup> As suggested in Jorens, Y., Roberts, S. et al. (eds), *Analysis of selected concepts of the regulatory framework and practical consequences on the social security coordination*, trESS, Ghent, 2010, p. 28.

<sup>(161)</sup> See Chapter 3.1.3 of this report.

<sup>(162)</sup> For an overview, see Spasova, S., Bouget, D. and Vanhercke, B., *Sick pay and sickness benefit schemes in the European Union*, Background report for the Social Protection Committee's In-depth Review on sickness benefits (17 October 2016), European Social Policy Network (ESPN), European Union, Brussels 2016.

<sup>(163)</sup> For further information, see Lhernould J., Strban, G., van der Mei, A., Vukorepa, I., *The interrelation between social security coordination law and labour law*, FreSsco Analytical Report 2017, European Union 2017.

Nevertheless, contrary to sickness benefits in kind, for sickness cash benefits <sup>(164)</sup>, there is only one competent Member State. According to the general rule of *lex loci labori*, or applying to the law of the country in which a worker is employed, this would be the Member State of (self-) employment (with possible deviations from this rule) <sup>(165)</sup>. Even if an insured person and/or members of his/her family reside or stay in a Member State that is not the competent Member State, they are still entitled to cash benefits provided by the competent institution according to applicable legislation <sup>(166)</sup>.

Diversity across Member States in setting out definitions of members of the family and defining entitlement and scope of the sickness cash benefits granted for the care of a sick family member may lead to some unwelcome outcomes. For instance, a parent (or person recognised as such) may not be entitled to sickness cash benefits to care for a sick child (or other family member) residing or staying in another Member State. Moreover, this could also be the case if an insured person him/herself is residing and staying with his/her family member outside of the competent Member State, and the condition of common residence or household is met, if required. This situation also applies the other way around.

Of course, moving within the EU is not necessarily neutral or more beneficial for the social security status of a moving person <sup>(167)</sup>. Nevertheless, freedom of movement should be promoted and not hindered. The CJEU seems to be promoting rights (in favour) of children <sup>(168)</sup>. In such cases, the children could benefit from both worlds, i.e. the laws of both Member States, according to the international standard of 'the best interests of the child' <sup>(169)</sup>. Children should be entitled to what is provided for in the Member States involved as a minimum (compared to the coordination of family benefits, see Chapter 3.8).

Moreover, if a person is recognised as a parent or as an entitled person in one Member State, it would be logical to also recognise this parent or entitled person in another Member State. In regard to personal status, it might be somewhat difficult to comprehend in regard to personal status that if in one Member State a person is classified as a child, parent or spouse, and upon moving to another Member State, (s)he is no longer classified as such <sup>(170)</sup>. The current definition set out under Regulation (EC) No 883/2004 could be viewed with a dynamic (rather than static) interpretation of the notion of 'spouse' to include more

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<sup>(164)</sup> This report does not focus on distinguishing between a benefit in kind and a benefit in cash. For instance, as reported in Sweden, the Ankestyrelsen (national social appeals board) stipulated that as a family was resident in Sweden, the father could not claim the reimbursement of the additional costs for taking care of a sick child under the Serviceloven, even though the father was working in Denmark. The father had claimed that such cover was a benefit in cash, which should be paid by the country of employment, or in this case, Denmark. Conversely, the board stipulated that, according to EU law, cover for such additional expenses was a sickness benefit in kind, and benefits in kind had to be paid by the country of residence according to its own rules. Access to benefits in kind for frontier workers on behalf of the country of work was restricted to those situations where the benefit is provided in the country of work. For family members, access was further restricted to help that is necessary on medical grounds when staying in the country of work. The municipality was therefore not obliged to cover the additional costs linked to the day care of a sick child of a frontier worker residing in Sweden. The board did not refer to any case-law of the CJEU (see: <https://www.retsinformation.dk/Forms/R0710.aspx?id=164226>).

<sup>(165)</sup> See Title II Determination of the legislation applicable, Regulation (EC) No 883/2004.

<sup>(166)</sup> See Article 21 of Regulation (EC) No 883/2004.

<sup>(167)</sup> See judgment of the Court of Justice of 16 July 2009, *Petra von Chamier-Glisczinski v Deutsche Angestellten-Krankenkasse*, Case C-208/07, ECLI:EU:C:2009:455.

<sup>(168)</sup> See judgment of the Court of Justice of 20 May 2008, *Brigitte Bosmann v Bundesagentur für Arbeit - Familienkasse Aachen*, Case C-352/06, ECLI:EU:C:2008:290; see judgment of the Court of Justice of 12 June 2012, *Waldemar Hudzinski v Agentur für Arbeit Wesel — Familienkasse and Jaroslaw Wawrzyniak v Agentur für Arbeit Mönchengladbach — Familienkasse*, Joined Cases C-611/10 and C-612/10, ECLI:EU:C:2012:239; and see judgment of the Court of Justice of 8 May 2014, *Caisse nationale des prestations familiales v Ulrike Wiering and Markus Wiering*, Case C-347/12, ECLI:EU:C:2014:300.

<sup>(169)</sup> See Article 3 of the United Nations Convention on the Rights of the Child (1989).

<sup>(170)</sup> For instance, in Hungary, the issue is problematic when the competent institution for the child nursing sickness payment defines the concept of 'parent'. Important eligibility conditions are the 'parent status' and the common residential address/common household. However, the 'legal parent status' does not include a step-parent.

than just married persons of the opposite sex across all Member States. Nevertheless, it seems that some states would (to a certain extent) recognise such status from another Member State, at least for social security coordination purposes (such as in CY, under Regulation (EC) No 883/2004 and its interpretation; IS <sup>(171)</sup>; MT <sup>(172)</sup>; NO <sup>(173)</sup>; and somewhat more restricted in RO <sup>(174)</sup>).

In practice, certain issues may be encountered when parents (including persons recognised as such) live in different Member States and share equal custody of a child. For instance, a parent insured in Finland has the right to a special care allowance when taking care of a sick child <sup>(175)</sup>. According to the rule on assimilation of events, the Finnish special care allowance may also be granted for the parent when the treatment or rehabilitation for the child is provided abroad.

### **3.4. Maternity and equivalent paternity benefits**

Regulation (EC) No 883/2004 explicitly regulates maternity and equivalent paternity benefits as a separate category <sup>(176)</sup>. However, this category contains no specific rules for coordination. These benefits are subject to the same rules as sickness benefits <sup>(177)</sup>. Compared to other benefits, it would seem that the definition of 'member of the family' and any applicable entitlements under Regulation (EC) No 883/2004 do not lead to any problematic scenarios. This was confirmed by the replies of the national experts, with only a handful of issues being provided. As explained under Chapter 1.3, the national definition is applicable for maternity and equivalent paternity benefits. It should generally not be problematic to define the 'mother' and who is entitled to maternity benefits, i.e. the biological mother and a woman who adopts a baby, as these benefits relate to motherhood during a short period after the birth of the child. The same applies to paternity benefits, as such benefits are also linked to a short period after the birth of the child and are usually aimed at the (male) partner living in the same household as the child <sup>(178)</sup>. As a rule, the

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<sup>(171)</sup> As reported in Iceland, social insurance is based on residence, and the Tryggingastofnun (social insurance administration) also keeps a special insurance file about cross-border persons. The institution would recognise family members if they were recognised in the Member State that issues the confirmation of insurance, with limitations presumably on the number of spouses or cohabiting partners.

<sup>(172)</sup> In Malta, the family composition is the only determining factor in the event of a working spouse/partner, in which case a different rate of sickness cash benefit is due. In this regard, no particular issues were encountered, given that the details of the family composition are certified by the Member State of residence and therefore are considered as valid for all intents and purposes. In the event that the Member State of residence does not recognise a particular family composition (cohabitation, same-sex marriage, civil union), the legal attestation of such union is evaluated according to national law and, if the same parameters apply, the same rights under national law are granted. In the absence of a legal attestation, the family composition would not be recognised under national law.

<sup>(173)</sup> In Norway, marriage, divorce or adoptions that took place in another country must be legally recognised in Norway by a competent authority. However, for social security coordination, Norway accepts and recognises the information received from a competent institution in another state. If necessary, such as if it is unclear whether a person is the parent or the step-parent of a specific child, Norway would request clarification from the competent institution in the other state.

<sup>(174)</sup> In Romania, if persons are in a relationship documented by the civil institutions of another state, Romanian institutions should recognise the relationship. However, certificates or extracts of civil status issued by foreign authorities on same-sex marriage or civil partnerships concluded or contracted abroad, either by Romanian citizens or by foreign citizens are forbidden (Article 41(7) of Legea 119/1996 cu privire la actele de stare civila, republicata 2012, publicat Monitorul Oficial, Partea I nr. 339 din 18 mai 2012.). For the implementation of the Coordination Regulation, if necessary, the competent institution will request a list of members of the family using e-forms/portable documents, and the competent institution will take into account the information received from the institution of the place of residence.

<sup>(175)</sup> Pursuant to Section 1(2), Chapter 10 of the Sairausvakuutuslaki (1224/2004).

<sup>(176)</sup> Article 3(1)(b) of Regulation (EC) No 883/2004.

<sup>(177)</sup> Sickness, maternity and equivalent paternity benefits, Title III Special provision concerning the various categories of benefits, Regulation (EC) No 883/2004.

<sup>(178)</sup> Recital 19 of Regulation (EC) No 883/2004.

member of the family that creates entitlement for the mother or the male partner is the child/baby.

For the purposes of this study, maternity or equivalent paternity benefits are particularly noteworthy in relation to benefits in cash only. Benefits in kind should not pose any problems in relation to the question of who is a member of the family, as pregnancy and giving birth are only relevant in relation to the mother (from our point of view, there is no room for a paternity benefit in kind <sup>(179)</sup>). Of course, in theory, similar problems as encountered in relation to family benefits could arise, as the purpose of the benefits has comparable elements, as they are linked to a child and very often have an income-replacement function for the person taking care of the child. However, under the sickness chapter of Regulation (EC) No 883/2004, there is an important distinction in comparison to the family benefits chapter of that Regulation.

Maternity or paternity benefits in cash usually have an income-replacement function or are at least meant only for the gainfully active population. Health insurance schemes very often exclude gainfully active persons from the definition of 'member of the family' because they are insured in their own right or at least should have individual insurance. The replies from the national experts confirm this assumption. Very often, the right to these benefits is linked to a period of maternity/paternity-related leave as provided for under labour law, which clearly indicates that these benefits are, as a rule, restricted to gainfully active persons. Such benefits in cash can therefore only be claimed in the Member State that is competent for the person concerned and not in another Member State that is competent for the partner, as could be the case for family benefits. If a family resides in Member State A, with the mother working as a frontier worker in Member State B, and the father working as a frontier worker in Member State C, then the mother can claim maternity benefits under the legislation of Member State B, and the father claiming paternity benefits under the legislation of Member State C. There is no obligation for Member States A or C to examine the mother's entitlement to maternity benefits according to the legislation of the Member States not competent for her, which would be the case for family benefits (see Chapter 3.8). The coordination of maternity and equivalent paternity benefits should therefore not entail any problems in relation to the question of what a member of the family of an insured person is entitled to.

National legislation very often requires that the person claiming a maternity/paternity benefit must live in the same household with the child/baby. This therefore raises the question of whether in such cases, the fiction found under Article 1(i)(3) of Regulation (EC) No 883/2004 would apply, meaning that living in the same household is replaced by the main dependency test (as further explained in Chapter 3.8.3). If this were the case, it could lead to unintended consequences: a biological father who is living separated in a different Member State to the mother could claim paternity benefits under the legislation to which he is subject, even though he may live a significant distance away from his child. Taking into account that living in the same household is very often not the only condition for paternity benefits, as the main purpose is also that the father (or any other entitled person) supports the mother or takes over the responsibilities of the mother for the small child during a short period, it can be assumed that only a person living in the same household can fulfil this additional entitlement condition. There is therefore a difference with the rulings of the CJEU given in relation to family benefits, where only the financial support aspect was decisive, which can also be provided remotely (e.g. in the *Slanina* case<sup>180</sup> about divorced parents).

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<sup>(179)</sup> For instance, if the father faints during the delivery of a child by the mother, any treatment necessary because of his state of health must be classified as a sickness benefit and not a paternity benefit.

Of course, from a theoretical point of view, cases could arise that are not so clear-cut. If there is insurance for an individual person, the rules on suppression of derived rights as a member of the family <sup>(181)</sup> concern only entitlement to benefits in kind and not benefits in cash. It could therefore be problematic for the father if under the legislation of the Member State of residence of the family and under the legislation of a Member State B of gainful activity, individual rights to maternity/paternity benefits are given to every resident, with no income-replacement function. In such a scenario, it could be argued that the mother is entitled to both maternity benefits under the legislation of Member State A (as an individual right) and of Member State B (as a member of the family) at the same time. However, it would seem that this has not caused any problems to date (again, taking into account the nature of these benefits, which are usually not granted as lump-sum benefits to all residents, irrespective of any gainful activity of the person concerned). There is therefore no need for any further action in this regard.

Problems may also occur when the line between maternity/equivalent paternity benefits and family benefits (child-raising benefits) is not clear. The coordination rules for these two types of benefits differ considerably. This is especially problematic if the same benefit starts as a benefit connected to the birth of a child and then continues for a longer period as a child-raising benefit. It is difficult to set the limit on how long coordination under the sickness chapter (individualised approach) must apply and when the coordination under the family benefits chapter (family approach) must begin. However, drawing this line is not a problem specifically linked to the definition and identification of the persons classified as members of the family.

### **3.5. Old age**

#### **3.5.1. Definition and scope**

Family members and, in general, dependent household members are an important element in pension calculations. The fact of having (dependent) family members or rather the fact of taking care of family members may affect the amount of an eventual pension for the insured person. More specifically, this is as a result of the crediting of insurance periods for the eventual composition of the old-age pension, by extending the personal scope for old-age pensions, by giving the possibility to take an early pension and/or by granting a supplement to the pension amount.

As reported by the national experts <sup>(182)</sup>, all states take into account periods of time spent caring for a child when calculating the eventual pension amount <sup>(183)</sup>. Some Member States credit periods of time spent taking care of (sick or invalid) family members, or explicitly include in the personal scope, persons who invest their time in caring for children and/or family members that are in need of care <sup>(184)</sup>. In some Member States, taking care of children and/or other family members does create the right to retire early <sup>(185)</sup>, but in most countries, this leads to a higher pension amount, as the individual is then entitled to supplements <sup>(186)</sup>.

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<sup>(181)</sup> Article 32(1) and (2) of Regulation (EC) No 883/2004.

<sup>(182)</sup> Information complemented by the Mutual Information System on Social Protection (MISSOC), *Comparative Tables. Table VI Old age*, European Commission, Brussels, consulted on 15 July 2019.

<sup>(183)</sup> Reported under either general child-raising periods or under more specific eventualities for mothers raising children, maternity leave, paternity leave and/or parental leave.

<sup>(184)</sup> As reported in Czechia, Germany, Slovenia and Slovakia.

<sup>(185)</sup> As reported in Estonia, Greece and Italy.

<sup>(186)</sup> The following states reported supplements for children: AT; FL; CY; FI; FR (supplementary pension); EL (before 2016); IE (overall for persons dependent upon the insured person); NO (supplementary pension); ES (for the minimum pension; as well as the general pension in the event of multiple children, and only for women entitled to a pension). For the depending spouse, the following countries reported a regulation leading to supplements: BE; CY; MT; IE (overall for persons dependent upon the insured person); NO (supplementary pension); ES (for the minimum pension); and NL (when the spouse has not yet reach pensionable age).

### **3.5.2. Child-raising periods**

To date, there has been much discussion about the recognition of child-raising periods across Member States (pursuant to Article 44 of Regulation (EC) No 987/2009). Article 44(1) defines a 'child-raising period' as any period that is credited under the pension legislation of a Member State or that provides a supplement to a pension explicitly for the reason that a person has raised a child, irrespective of the method used to calculate those periods and whether they accrue during the time of child-raising or are acknowledged retroactively. A significant number of Member States do indeed credit such periods as an insurance record and/or provide a supplement to the (basic) pension amount when the person concerned (pensioner) is or has been responsible for raising one or more children.

Problems may occur when the competent Member State shifts to another Member State that does not recognise such child-raising periods under its legislation. As a consequence, the person concerned risks losing his/her (future) social security entitlements in relation to the child-raising periods. Article 44(2) of Regulation (EC) 987/2009 stipulates:

*Where, under the legislation of the Member State which is competent under Title II of the basic Regulation, no child-raising period is taken into account, the institution of the Member State whose legislation, according to Title II of the basic Regulation, was applicable to the person concerned on the grounds that he or she was pursuing an activity as an employed or self-employed person at the date when, under that legislation, the child-raising period started to be taken into account for the child concerned, shall remain responsible for taking into account that period as a child-raising period under its own legislation, as if such child-raising took place in its own territory.*

Although Member States have diverging opinions on how to concretely interpret this provision <sup>(187)</sup>, there is a shared underlining element: persons entitled to a child-raising benefit as part of his/her pension (i.e. pension credit or supplement) should not lose this entitlement owing to a shift of competency to another Member State in which no such entitlement is guaranteed, as this shift may be as a result of a suspension of professional activities (because of the child-raising period) that could eventually mean that the Member State of residence becomes competent in matters of social security.

The main interpretation issue is when the different 'new' system has a different definition of a child-raising period compared to the definition in the original state <sup>(188)</sup>.

*[T]here is a disagreement among the Member States on the meaning of 'taking into account'. According to eight Member States, this expression means that the legislation of the new competent Member State does not at all take into account child-raising period; other Member States suggest that it means that no child-raising periods accrue in the concrete case. The different interpretations might result in diverse consequences not only for the application of Article 44(2) and for the obligations of the Member States, but also in terms of the rights of the individuals concerned.* <sup>(189)</sup>

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<sup>(187)</sup> See Administrative Commission for the Coordination Of Social Security Systems, *Final report of the Ad-hoc group on the family benefits*, Secretariat, Brussels, 2011.

<sup>(188)</sup> This would not so much be an issue if the other (new) state does not recognise child-raising periods or applicable entitlements. As a result, pursuant to Article 44 of Regulation (EC) No 987/2009, the old system would continue to apply as if the person was still subject to that system.

<sup>(189)</sup> Administrative Commission for the Coordination Of Social Security Systems, *Final report of the Ad-hoc group on the family benefits*, Secretariat, Brussels, 2011, p. 2.

The Administrative Commission did not make a final decision on the matter discussed above, but, as described in the note from the rapporteur <sup>(190)</sup>, the working group came to the conclusion that, in an abstract manner (practically), all Member States have at least one form of child-raising protection measures in place, but such concrete protection varies (enormously) across Member States. Applying an abstract approach to Article 44 of Regulation (EC) No 987/2009 would significantly reduce the practical application of this provision, although only in relation to those Member States that do not recognise child-raising periods at all. However, taking the concrete approach into account from the viewpoint of the individual person, many more applications would emerge owing to the different degrees of protection across the applicable Member States.

Moreover, the working group found that while Article 44 of Regulation (EC) No 987/2009 mainly reflects an abstract approach (and hence has a rather restricted legal value), and where the case-law of the CJEU <sup>(191)</sup> on the matter reflects a more concrete approach, Article 44 does not meet the objective for which it was originally designed, nor does it properly implement the decisions of the CJEU in relation to the matter. The working group was therefore of the opinion that the Article should be amended. The working group also put forward a concrete proposal <sup>(192)</sup>.

It cannot be the purpose of this report to redo the analysis that has already extensively been carried out by the Administrative Commission. However, the above-mentioned analysis should be referred to, and actions implemented as necessary, if new problems in calculating pensions emerge as a result of the diverging national approaches in regard to the definition of 'member of the family'.

Some national experts reported potential problems that could occur in relation to the concept of 'taking into account child-raising periods', partially because Member States have different ways of delineating the relationship between 'child' and 'parent', and partially because it is becoming increasingly difficult to verify whether the applicable conditions have actually been met in the other Member State, especially if a child-raising period took place sometime in the past. Pensions are typically known for their long-lasting insurance records, meaning that sometimes the condition of belonging to the family will have to be verified in the (distant) past. As to the issue of delineation of the relationship, the concept of 'child' can be interpreted differently across Member States. In one Member State, a step-child may fall under the definition of the 'child', whereas in another, it may not. As a result of moving from one Member State to another, the child-raising period would therefore not continue to accrue for the pension calculation. In our opinion, the rule underlying Article 44(2) of Regulation (EC) No 987/2009 could be applied in a similar fashion to the situation in which the child-raising period is no longer guaranteed in the new Member State owing to a relatively more restrictive interpretation of the concept of 'child' if all other conditions for the application of this rule have been met <sup>(193)</sup>.

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<sup>(190)</sup> Administrative Commission for the Coordination Of Social Security Systems, *Note from the rapporteur of the Ad hoc Group on Child Raising Periods*, Secretariat, Brussels, 2013.

<sup>(191)</sup> See judgment of the Court of Justice of 7 February 2002, *Liselotte Kauer v Pensionsversicherungsanstalt der Angestellten*, Case C-28/00, ECLI:EU:C:2002:82; see judgment of the Court of Justice of 23 November 2000, *Ursula Elsen v Bundesversicherungsanstalt für Angestellte*, Case C-135/99, ECLI:EU:C:2000:647; see judgment of the Court of Justice of 19 July 2012, *Doris Reichel-Albert v Deutsche Rentenversicherung Nordbayern*, Case C-522-10, ECLI:EU:C:2012:475.

<sup>(192)</sup> Administrative Commission for the Coordination Of Social Security Systems, *Note from the rapporteur of the Ad hoc Group on Child-Raising Periods*, Secretariat, Brussels, 2013, 13–14.

<sup>(193)</sup> Of course, this also means that taking these periods into account will stop as soon as a gainful activity begins in the newly competent Member State.

### **3.5.3. Issues of non-concordant definitions related to long-term insurance records**

Based on the short comparative overview discussed above, it can be argued that family members and dependent household members have an important role to play in pension calculations in Member States. Family members may affect insurance records (credited periods), pension ages (earlier pension), eventual pension level (supplements and family pensions) and the personal scope (assimilation of persons providing family support to working persons for pension insurance). Calculating an eventual pension may become problematic if handled or composed in a transnational manner. Owing to the 'long-lasting' character of the pension benefit (both in insurance record composition and payment duration), the financial burden of pension benefits for migrants is spread across the countries involved, according to the underlying pro rata approach in the pension coordination rules. It is likely that several national pension schemes, each with their own regulatory framework and logic, will apply to the migrant person. Consequently, the legal position of the family members in the eventual calculation will equally become more complex, especially when the different national pension components use their own definition to establish who is to be considered as a member of the family.

Following the logic of Article 1 of Regulation (EC) No 883/2004, there is the risk that, as pro rata pensions incur the application of several national pension schemes over time, national definitions may make matters even more complicated. Some decades ago, when families were rather comparable in composition across Member States, from the perspective of social security law, the application of national definitions may not have been so problematic. However, with the growing diversity in family compositions, the fact that national systems grant different legal statuses to family members and that families more often fall apart (break down) and are recomposed will complicate matters. This therefore raises the question of whether nation definitions are still workable in cases where benefit is essentially composed in a transnational manner. For situations of conflicting national definitions that are used for the calculation of and establish (pension) entitlement, a more EU-oriented approach in defining the concept of members of the family seems to be key.

## **3.6. Survivors**

### **3.6.1. Definition and scope**

As mentioned above, Regulation (EC) No 883/2004 no longer defines the concept 'survivor', contrary to Regulation (EEC) No 1408/71 which, apart from a definition of its own, also accepted assimilation of facts when the national system required the family member to live in the same household as the (insured) deceased <sup>(194)</sup> person in order to be entitled to the benefit (see also Chapter 1.2). When applying Regulation (EEC) No 1408/71, being economically dependent on the insured person could be assimilated to the 'same household' condition. Regulation (EC) No 883/2004 does not incorporate a common definition or the assimilation element related to the definition. This approach is somewhat problematic, as the concept of member of the family plays quite a significant role, especially in relation to the social risk of survivorship. Essentially, the benefit provides an income to protect dependent members of the family of the insured person when the said person dies. One of the key elements therefore in granting this benefit is the delineation of the concept of dependent members of the family.

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<sup>(194)</sup> Article 1(g) of Regulation (EEC) No 1408/71: "“survivor” means any person defined or recognised as such by the legislation under which the benefits are granted; where, however, the said legislation regards as a survivor only a person who was living under the same roof as the deceased worker, this condition shall be considered satisfied if such person was mainly dependent on the deceased worker”.



The definition of the concept of dependent members of the family is of significant importance in regard to survivor schemes, even more so than under other pension schemes. With the exception of one Member State <sup>(195)</sup>, all states offer (at least some) survivorship protection for the surviving spouse. However, there is significant variation on the definition of 'spouse'. For some states, this definition is limited to the married spouse, and sometimes the protection may cover married same-sex spouses or even divorced spouses. A multitude of countries also include registered partners (including sometimes same-sex partners), but only a minority of countries provide survivorship entitlements to all cohabitants. In some states, children are also entitled to survivors' benefits, however, there is some variation in the delineation of the concept of child. In some cases, coverage also includes adopted children, foster children and grandchildren. Lastly, some states also provide survivors' benefits to parents, grandparents, step-parents, foster parents and even siblings. For family ties beyond the immediate family, i.e. second-degree family members and further), the element of dependency often must be demonstrably stronger.

### **3.6.2. Issues owing to non-concordant definitions**

There is a significant variation across Member States in relation to who precisely is entitled to survivors' benefits, i.e. which members of the family specifically, and how to precisely interpret these underlying concepts, i.e. who is classified as a spouse, child etc. Taking into account that most survivors' benefits are designed as pensions, there is considerable risk in the allocation of this benefit owing to numerous national systems being involved and many resulting diverging concepts. In this regard, one national expert demonstrated the issue in relation to same-sex partners.

As reported, in Spain, a problem could arise in relation to the surviving spouse of a deceased migrant worker, in a marriage between persons of the same sex, who was insured and paid contributions in more than one Member State. In this case, some Member States could deny the widow(er)'s pension to the surviving spouse, if under their national law, same-sex marriage is not permitted. This scenario therefore raises the question of whether such Member States can deny the validity of this foreign marriage for social security purposes. To date, the CJEU has not ruled on this particular issue. In principle, coordination across states would not guarantee an unequivocal solution, but rather a partial solution within each national social security system, taking into account the subjective scope of the coverage granted to their own insured nationals. It would also seem to be the case that the absence of coverage in some Member States could be considered an obstacle to free movement to those who have exercised their right to this type of marriage (something that was recently recognised by the CJEU itself <sup>(196)</sup>). Some protection could potentially be found under the general rule of assimilation of facts, pursuant to Article 5 of Regulation (EC) No 883/2004. This therefore raises the question of whether foreign marriages must be assimilated to national marriages, and if the requested pension must be recognised, even if its own citizens who are in a same-sex relationship do not enjoy such coverage. This obligation could be rooted in the European Convention on Human Rights (ECHR, Article 8), or from the direct application of the protection from discrimination based on sexual orientation pursuant to Article 21 of the Charter of Fundamental Rights of the European Union. In any case, it is clear that it is not possible to apply the protection from discrimination on grounds of sexual orientation, as envisaged in Directive 2000/78/EC <sup>(197)</sup>, to social security, as such measures are only enforceable in relation to certain working conditions. The above-mentioned Directive protects the access of a survivor of a

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<sup>(195)</sup> Latvia (survivorship restricted to children).

<sup>(196)</sup> See judgment of the Court of Justice of 5 June 2018, *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, Case C-673/16, ECLI:EU:C:2018:385.

<sup>(197)</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16–22.

same-sex relationship to a complementary business pension that was considered a salary condition, but the said pension was not a social security pension.

Apart from the potential obstructing effect on the free movement, there may be an issue of infringing on the principle of non-discrimination (based upon sexual orientation). It is remarkable that in regard to survivorship, the issue of a possible conflict with the non-discrimination principle was reported. It must be noted from the outset that such a (potential) conflict is mainly as a result of the national legislations involved; the Coordination Regulations do not impose any restrictive interpretations that may cause an infringement of the principle of non-discrimination. It remains to be seen whether the (EU) fundamental principle in relation to non-discrimination will call for positive action within the coordination rules, and force EU legislation to be in step with the EU approach on accepting the (foreign) status of same-sex marriage in the field of social security.

As with old-age pensions, survivor benefits involve a multitude of systems (and concepts). In a situation in which the national concepts diverge, there is room for significant issues to occur as a result of complications in the coordination of pensions owing to concept divergence. As a result, a more EU-driven approach to define the concept of members of the family for coordination purposes may be necessary.

### **3.7. Death grants**

Around half of EU Member States have some form of funeral benefit in place as part of their sickness scheme (such as in AT, BG, CY, CZ, DK, FR, EL, LV, LT, LU, PT, RO, SI and NL). Some states in general grant this benefit to persons who took overall responsibility for the funeral, especially if they bore the costs of the funeral, and generally regardless of whether they are members of the family. Other states restrict such benefits to family members, sometimes limiting them to the spouse and/or children, and sometimes leaving it open also to other family members.

As it is a one-off payment, the national experts reported very few problems. Generally, it is the competent Member State that pays the benefit, and the normal definition of a member of the family of the competent state is used. In the absence of a national definition, the EU common definition would apply. When family members live abroad, problems may occur as to the interpretation of a spouse (same-sex marriage or partnerships) and/or of children (including children from the new partner), yet this is essentially not too different from the problems reported for other social risks.

However, entitlement conditions for death grants often go beyond members of the family when delineating the group of persons that are entitled to death grants. Instead of a family relation, some Member States focus rather on costs, i.e. any person, regardless of a family relationship, who bore responsibility for the funeral (and advanced the costs) may be entitled to a payment. It is therefore in this difference where some issues may occur, especially when the various social security systems involved focus on different elements, i.e. one system that focuses on members of the family compared to another system that focuses on the compensation of advanced payments. One issue was reported in this regard, a national court case <sup>(198)</sup>, which was resolved by interpreting the concept of residence in a very broad manner. In this case, the deceased person was socially insured in another Member State and did not reside in the Member State that provided a death grant based on compensation for advanced costs. The fact that the insured person owned property in the country was considered sufficient for residence in the latter Member State and for the national system to be applied. It should also be noted that compensatory payments for

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<sup>(198)</sup> See Case A-502-188-12 of 20 February 2012, Lietuvos vyriausioji administracinis teismas.

advance costs borne by non-family members may sometimes occur via legal measures outside the field of social security, i.e. civil law or administrative law.

### **3.8. Family benefits**

#### **3.8.1. General remarks: Who is entitled?**

The question of which individual is considered a member of the family seems to be the most complex and difficult issue to solve in regard to family benefits. Usually, under the other branches of social security, analysing the situation of a person in relation to one other person is sufficient. For family benefits, the relationship to any person who might create entitlement is relevant. In principle, lots of different people create entitlement to benefits, and Regulation (EC) No 883/2004 contains a detailed hierarchy of priority to avoid overcompensation if and when Member States would grant full benefit entitlement <sup>(199)</sup>.

Another important element of family benefits seems to be that the child is very often the focus of benefit entitlement. In practice, this means that the child creates entitlement, and adults are only relevant in relation to who can claim and/or receive the benefit, as the child is not yet considered as having legal capacity <sup>(200)</sup>. This could be regarded as somewhat different to classical derived rights, where the focus is mainly on the insured person who creates entitlement for another person, e.g. a child. It could therefore be said that for family benefits, the focus of who is a member of the family shifts onto adults as opposed to the child, while for other benefits, such as sickness coverage, the focus shifts onto the child as opposed to adults. Of course, this depends on concrete national legislation, but it seems that the systems of many Member States follow this philosophy. Therefore, in this case, and only for family benefits, the notion of a family member relationship is used to cover all situations as neutrally as possible. The tricky question of whether the child is a family member of an adult, or whether an adult is a family member creating entitlements for a child is therefore actively avoided <sup>(201)</sup>.

The Administrative Commission has already examined the concept of members of the family in regard to family benefits in the context of Regulation (EC) No 883/2004. Special reference should be made to a note from the Secretariat to the outcome of a specific meeting of the Reflection Forum on Family Benefits <sup>(202)</sup> and the final report of the Ad hoc group on family benefits <sup>(203)</sup>, in an analysis of the basic principles <sup>(204)</sup>. This report will not repeat the information contained in the above notes but rather build on and complement them.

As already discussed, as a rule, it falls on the Member States involved, according to their own national legislation, to decide which individuals are classified as members of the family. In regard to family benefits, it is always the situation of all these individuals together, irrespective of legislation, which applies to the singular individual involved. A person who is therefore subject to the legislation of another Member State, pursuant to

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<sup>(199)</sup> See Article 68 of Regulation (EC) No 883/2004. Of course, a comparable hierarchy has been established for sickness benefits pursuant to Article 32 of Regulation (EC) No 883/2004, which will be further developed according to the Commission's proposal to reform Regulation (EC) No 883/2004 (Article 1(15) of Procedure 2016/0397/COD). The main difference of this rule compared to the rules on family benefits is that for sickness benefits, there is always only one Member State that is competent for members of the family, while for family benefits, there are theoretically always parallel entitlements.

<sup>(200)</sup> This has been explicitly explained by some of the national experts, such as the national expert for Belgium.

<sup>(201)</sup> See judgment of the Court of Justice of the European Free Trade Association States of 11 September 2013, *EFTA Surveillance Authority v the Kingdom of Norway*, Case E-6/12, paragraph 99. The Court found ruled that the only decisive factor was that the child fell under the personal scope of Regulation (EEC) No 1408/71, even though Norwegian law grants entitlement to the parent and not the child.

<sup>(202)</sup> AC 99/16, Agenda Point C.

<sup>(203)</sup> AC 31/18, Annex II.

<sup>(204)</sup> AC 259/12.

Title II of Regulation (EC) No 883/2004), must be treated as if the legislation of the Member State that is examining entitlement to family benefits, according to its own legislation, was applied to this person, in particular in relation to the right to claim and receive family benefits <sup>(205)</sup>. As Regulation (EC) No 883/2004 applies to any person who is or has been subject to the legislation of one or more Member States <sup>(206)</sup>, it must be assumed that the child himself or herself can create entitlements under the legislation of the Member State in which the child resides, as this legislation is applicable to this child <sup>(207)</sup>. The following example aims at clarifying the consequences of such rules.

A family resides in Member State A. The father works in Member State B as a frontier worker, and the mother works in Member State C as a frontier worker. All three Member States have to examine entitlement to family benefits according to the legislation they apply. Entitlement to benefits depends in principle on the legislation of each one of the three Member States, which have to be applied as if the whole family were subject to the legislation of the Member State that is examining the situation and were residing in the said Member State. This also includes examining whether a family member relationship that would create entitlement exists between the persons concerned (father to child and mother to child), whether there is a right to claim and to receive family benefits, and whether there are any limits that need to be applied to entitlement, i.e. child-age-related limits. Based on the assumption that, after this examination, entitlement to family benefits has been established in all three Member States, the priority rules will begin to take effect, and would set the priority competence of the Member State that provides the higher benefits when compared to Member States B and C (as these two Member States are competent at the same level because a gainful activity is exercised there) <sup>(208)</sup>. Of these two Member States, the State that has lower benefits must reimburse half of the amount of the Member State competent by priority <sup>(209)</sup>. Member State A has to grant a differential supplement when the amount of its family benefits is higher than the amount of Member States B and C <sup>(210)</sup>.

This example is relatively simple as it is based on a 'traditional' family. However, this example does show the complexity of the legal consequences involved. It should be recalled that even in this example, it is not guaranteed that entitlements to family benefits exist in all three Member States. If the assumption is made that, under the legislation of Member State A, a child is covered until the age of 18, in Member State B until the age of 20 and in Member State C until the age of 25, it becomes evident that the legal solution will change over time, as the child is no longer classified as a member of the family. This classification change will firstly occur under the legislation of Member State A, then under the legislation of Member State B and finally under the legislation of Member State C.

As relationships between the different individuals become more complex, it becomes more likely that problems and misunderstandings will occur. It should be recalled that the question of whether a family member relationship exists between the different individuals depends on the national legislation of the Member States involved. Therefore, if a same-sex partnership of two men, who are not the biological fathers of the child, is only

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<sup>(205)</sup> See judgment of the Court of Justice of 7 June 2005, *Christine Dodl and Petra Oberhollenzer v Tiroler Gebietskrankenkasse*, Case C-543/03, ECLI:EU:C:2005:364; and see judgment of the Court of Justice of 22 October 2015, *Bundesagentur für Arbeit - Familienkasse Sachsen v Tomislaw Trapkowski*, C-378/14, ECLI:EU:C:2015:720, paragraph 36.

<sup>(206)</sup> Article 2(1) of Regulation (EC) No 883/2004.

<sup>(207)</sup> See Article 11(3)(e) of Regulation (EC) No 883/2004. If this interpretation is followed, which could be recommended, the construct of not limiting national entitlements, according to the judgment of the Court of Justice of 20 May 2008, *Brigitte Bosmann v Bundesagentur für Arbeit - Familienkasse Aachen*, Case C-352-06 (ECLI:EU:C:2008:290), is no longer necessary, as the child would always create entitlements in his/her Member State of residence.

<sup>(208)</sup> Article 68(1)(b)(i) of Regulation (EC) No 883/2004.

<sup>(209)</sup> Article 58 of Regulation (EC) No 987/2009.

<sup>(210)</sup> Article 68(1)(a) of Regulation (EC) No 883/2004.

recognised under the legislation of Member State A to create entitlement to family benefits for the child, and is not recognised as such under the legislation of Member States B and C, in the above example, entitlement to family benefits would only exist according to the legislation of Member State A.

### **3.8.2. Divorced parents: A unique situation**

As discussed previously, problems could occur when a situation involves divorced couples. Of course, no problem should really occur if the relevant national legislation also recognises a divorced parent, who is living apart from the child, as having a family member relationship that creates entitlement to family benefits. This has seemingly been the case for situations that the CJEU has analysed in regard to entitlement to advances of maintenance payments under Regulation (EEC) No 1408/71 <sup>(211)</sup>. All three cases concerned the Österreichische Bundesgesetz über die Gewährung von Vorschüssen auf den Unterhalt von Kindern (Unterhaltsvorschußgesetz) (Austrian federal law on the grant of advances for the maintenance of children), under which entitlement depends exclusively on the legal right to maintenance payments from another person. In the first case, which involved a divorced family with a German national residing in Austria, the family member relationship was not an issue <sup>(212)</sup>. The CJEU only examined the personal scope of Regulation (EEC) No 1408/71 and ruled that the mother with German nationality living with the child in Austria fell under the personal scope of the Regulation <sup>(213)</sup>. The relationship to the divorced father, with respect to whom the maintenance rights existed, was not relevant for the CJEU. The second case involved a mother with Austrian nationality, who moved to France with her child, while the divorced father, who was obliged to pay maintenance, remained in Austria <sup>(214)</sup>. In this case, the judgment of the CJEU stated:

*Further, it is common ground that, at the material time, the applicant was a "member of the family" of each of her parents <sup>(215)</sup>.*

However, in this case, the CJEU also explicitly referred to divorced parents and their position under Regulation (EEC) No 1408/71:

*Admittedly, as the Swedish Government has pointed out, Regulation No 1408/71 does not expressly cover family situations following a divorce. However, contrary to that Government's argument, there is nothing to justify the exclusion of such situations from the scope of Regulation No 1408/71.*

*One of the normal consequences of a divorce is that custody of children is granted to one of the parents, with whom those children will reside. It is possible, for a variety of reasons (in this case as the result of a divorce), that the parent with custody of a child will leave his or her Member State of origin and become established in another Member State in order to work there. In such a case, the residence of the minor child will also be transferred to that other Member State <sup>(216)</sup>.*

The third case involved a mother and child with Austrian nationality residing in Austria, and a father with German nationality who was obliged to pay maintenance and who was

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<sup>(211)</sup> Under Regulation (EC) No 883/2004, such advances to maintenance payments are no longer covered, if they are listed in Annex I of the Regulation (Article 1(z) of Regulation (EC) No 883/2004).

<sup>(212)</sup> See judgment of the Court of Justice of 15 March 2001, *Vincent Offermanns and Esther Offermanns*, Case C-85/99, ECLI:EU:C:2001:166.

<sup>(213)</sup> See above, paragraph 35.

<sup>(214)</sup> See judgment of the Court of Justice of 5 February 2002, *Anna Humer*, Case C-255/99, ECLI:EU:C:2002:73.

<sup>(215)</sup> See above, paragraph 36.

<sup>(216)</sup> See above, paragraphs 42 and 43.

imprisoned in Germany <sup>(217)</sup> In this case, the CJEU assumed that the family member relationship existed towards the divorced father <sup>(218)</sup>.

The CJEU therefore did not encounter any issues, as the judgment assumed that, under national legislation in regard to advances to maintenance payments, the national system only makes sense if it applies to divorced parents who live separately, so such a national definition, which also covers all cross-border cases, had to be assumed.

### **3.8.3. Analysis of Case C-363-08, *Romana Slanina v Unabhängiger Finanzsenat, Außenstelle Wien***

In Case C-363-08, *Romana Slanina v Unabhängiger Finanzsenat, Außenstelle Wien* <sup>(219)</sup> the CJEU was again confronted with divorced parents, but this time in relation to traditional family benefits (i.e. family allowances) and national legislation (Familienlastenausgleichsgesetz, FLAG (family compensation act)) that also encompassed an alternative condition of living in the same household for the person entitled to the family allowance. As this judgment is crucial for the treatment of divorced parents under the Coordination Regulations, the relevant text should be recalled:

*The term “member of the family” is defined in Article 1(f)(i) of Regulation No 1408/71 as “any person defined or recognised as a member of the family or designated as a member of the household by the legislation under which benefits are provided [...]”; where, however, the said legislations regard as a member of the family or a member of the household only a person living under the same roof as the employed or self-employed person, this condition shall be considered satisfied if the person in question is mainly dependent on that person. [...]”*

*Thus, first of all, that provision makes express reference to national legislation, defining a “member of the family” as “any person defined or recognised as a member of the family or designated as a member of the household by the legislation under which benefits are provided [...]”, that is to say, in the case in the main proceedings, by the FLAG.*

*Secondly, Article 1(f)(i) of Regulation No 1408/71 introduces the proviso “where, however, the said [national] legislations regard as a member of the family or a member of the household only a person living under the same roof as the employed or self-employed person, this condition shall be considered satisfied if the person in question is mainly dependent on that person. [...]”*

*Accordingly, it is for the referring court to establish whether the condition laid down in Article 1(f)(i) of Regulation No 1408/71 is met in the present case, that is to say, whether the child, although not having lived with her father during the period at issue in the main proceedings, could be regarded for the purposes of national law as a “member of the family” of her father and, if that is not the case, whether she could be regarded as being “mainly dependent on” him.*

*It is apparent from the documents before the Court that Ms Slanina’s ex-husband was indeed required to pay maintenance in respect of his daughter Nina. The fact that he has not paid it is irrelevant as regards the issue of whether the child is a member of his family.*

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<sup>(217)</sup> See judgment of the Court of Justice of 20 January 2005, *Nils Laurin Effing*, Case C-302/02, ECLI:EU:C:2005:36.

<sup>(218)</sup> See above, paragraph 39.

<sup>(219)</sup> Judgment of the Court of Justice of 26 November 2019, *Romana Slanina v Unabhängiger Finanzsenat, Außenstelle Wien*, Case C-363/08, ECLI:EU:C:2009:732.

...

*In that regard, it should be noted that the fact that Ms Slanina and her ex-husband are divorced is irrelevant. The Court has already held that although Regulation No 1408/71 does not expressly cover family situations following a divorce there is nothing to justify the exclusion of such situations from the scope of Regulation No 1408/71. One of the normal consequences of a divorce is that custody of the children is granted to one of the parents, with whom those children will reside. It is possible, for a variety of reasons (in this case as the result of a divorce), that the parent with custody of a child will leave his or her Member State of origin and settle in another Member State in order to work there, as in Humer, or, as in the case in the main proceedings here, to take up employment there only some years after establishing his or her residence there. In such a case, the residence of the minor child will also be transferred to that other Member State (see Humer, paragraphs 42 and 43).*

...

*In the light of the foregoing, the answer to the first and second questions is that Article 73 of Regulation No 1408/71 must be interpreted as meaning that a divorced person who was paid family allowances by the competent institution of the Member State in which she was living and where her ex-husband continues to live and work maintains in respect of her child, provided that child is recognised as a “member of the family” of the ex-husband within the meaning of Article 1(f)(i) of that regulation, entitlement to such allowances even though she leaves that State and settles with her child in another Member State, where she does not work, and even though her ex-husband could receive those allowances in his Member State of residence. <sup>(220)</sup>*

The CJEU referred to the definition under Regulation (EEC) No 1408/71, which itself refers back to the national definition. It is therefore interesting to study in more detail the wording of the national legislation, which the CJEU cited:

*Paragraph 2(2) of the FLAG provides that the person entitled to receive family allowances is the person whose household the child belongs to. A person to whose household the child does not belong but who is mainly responsible for the cost of maintaining that child is entitled to family allowances where no other person is entitled to receive them under the first sentence of that subparagraph. <sup>(221)</sup>*

It can therefore be said that living in the same household is not the only condition set out under Austrian legislation. A person may also be entitled if the said person does not belong to the household of the child, but is responsible for the cost of maintaining the child. It could be assumed that under the Austrian law cited above, a person is not only considered a member of the family if (s)he lives in the same household, but also if a national alternative to this condition exists. The logic underpinning this Austrian law seems to be that it is always the person who has the closest link with the child.

It could therefore be expected that it is the definition pursuant to Article 1(i)(1)(i) of Regulation (EC) No 883/2004 that is applicable, and consequently national legislation is applicable, and not the definition pursuant to Article 1(i)(3) of Regulation (EC) No 883/2004, under which the exclusive condition of living in the same household is replaced by the condition of being mainly dependent on the insured person.

It would seem that the CJEU deviated from this understanding. In paragraph 27 of the above-mentioned judgment, the CJEU set out a new hierarchy that is not provided for in

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<sup>(220)</sup> See above, paragraphs 24–32.

<sup>(221)</sup> See above, paragraph 10.

the wording of the definition pursuant to Article 1(f) of Regulation (EEC) No 1408/71. The same also applies to Article 1(i) of Regulation (EC) No 883/2004. Firstly, as it is the national definition, and secondly, when this definition is not met, it is the 'mainly dependent test' that is applicable, and this irrespective of the question if the national legislation sets out the condition of living in the same household.

The CJEU also ignored the fact that the Austrian law does not grant entitlement just to persons living in the same household, so the fiction under the last part of the first sentence of Article 1(f) of Regulation (EEC) No 1408/71 would not be applicable.

Lastly, the CJEU interpreted the 'mainly dependent test' in such a way that a (theoretical) obligation to maintain the child was sufficient to create the family member relationship (see paragraph 28 of the above-mentioned judgment). The CJEU did not provide further analysis to the question of whether some weighting had to be granted to the amount that the divorced parent was paying or would have to pay. This therefore raises the question of whether any amount is sufficient to meet the 'mainly dependent test'.

It should also be noted that this Austrian law provides for a different condition that was not analysed by the CJEU. A person not living in the same household is only entitled to family benefits if this person is 'mainly responsible for the cost of maintaining the child', which is not a correct translation of the original German text of the Austrian law <sup>(222)</sup>. The translation should more correctly read 'mainly bears the costs of maintaining the child'. It would seem that this condition is not so easily met compared to the 'mainly dependent test' established by the CJEU.

For the sake of completeness, it should be recalled that the CJEU also deviated from the understanding of the 'mainly dependent test' as understood by EU law. A clear indication could be drawn from Article 38(2) of Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (hereafter Regulation (EEC) No 574/72) <sup>(223)</sup>, which dealt with this question:

*In the case referred to in paragraph 1, if the legislation administered by the institution in question requires that the members of the family should live under the same roof as the pensioner, the fact that such members of the family who do not satisfy that condition are, nevertheless, mainly dependent on the claimant must be established by documents proving that the claimant is regularly sending them a part of his earnings.*

As the relevant wording has not been changed under Regulation (EC) No 883/2004, this indicates that the 'mainly dependent test' can only be fulfilled if real payments are made and when a pure legal entitlement to payments is not sufficient.

It could therefore be said that the ruling of the CJEU in the above-mentioned case creates a new understanding of the family member relationship (at least in regard to divorced parents), which cannot be deduced from the text of Article 1(f) of Regulation (EEC) No 1408/71 or Article 1(i) of Regulation (EC) No 883/2004:

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<sup>(222)</sup> Original German: 'Eine Person, [...] die jedoch die Unterhaltskosten für das Kind überwiegend trägt.'

<sup>(223)</sup> OJEU L 74, 27.3.1972, p. 1–83, as codified by Regulation (EC) No 118/71 of 2 December 1996 amending and updating Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ L 28, 30.1.1997, p. 1–229 1) and most recently amended by Regulation (EC) No 120/2009 (OJEU L 39, 10.2.2009, p. 29–32).



- The fiction of living in the same household always applies and not only to those national laws that only grant entitlement to benefits to persons living in the same household.
- The details of the national legislation are not relevant.
- The actual payment of the maintenance is not relevant; a legal obligation (even if not claimed before a court) is sufficient.
- As the biological parents are at least under a theoretical obligation to maintain their child, there might be always a decisive family member relationship with their child in regard the entitlement to family benefits <sup>(224)</sup>.
- The amount of the maintenance that is or should be granted for the child is not relevant.

The above-mentioned judgment was 'copied' by the EFTA Court in a case concerning Norway legislation on family benefits <sup>(225)</sup>. This legislation only grants family benefits to members of the family residing in the same household. It could therefore be said that it is national legislation that could start the 'mainly dependent test', as stated by the EFTA Court. It therefore runs contrary to the Regulation when Norway does not check if a child is mainly dependent on a (divorced) person living outside the household of the child. From our point of view, this ruling respects the wording of the definition for 'member of the family', contrary to the judgment in Case C-363-08, *Romana Slanina v Unabhängiger Finanzsenat, Außenstelle Wien*.

It was also reported that in Malta, there was another case in which the judgment in Case C-363-08, *Romana Slanina v Unabhängiger Finanzsenat, Außenstelle Wien* played a role. This case involved a registered cohabitant couple who ended their relationship but continued enjoying joint custody of their child. The father worked on a ship under the Maltese flag while the (non-active) mother resided with the child in another Member State. Under these circumstances, the father created entitlement to Maltese family benefits for his child in applying the above-mentioned judgment. In Sweden, before the judgment in the above-mentioned case, entitlement to family benefits under the Coordination Regulations was conditional on being married or living together. Following the judgment, this was changed, and now it is sufficient that there is a child for which an obligation to pay maintenance exists (which is valid as a rule for both parents).

In another case before the CJEU, dealing also with divorced parents, the CJEU did not further analyse the definition of 'member of the family', as the Court was able to rely on the statement of the referring court:

*However, as the referring court observes, the entitlement to child benefits is granted, in accordance with German law, to the child's first degree relatives, whether or not they are married.* <sup>(226)</sup>

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<sup>(224)</sup> For example, after an adoption, under the legislation of some Member States, the child may still claim maintenance from the biological parents, if the adoptive parents cannot sufficiently support the child.

<sup>(225)</sup> See judgment of the Court of Justice of the European Free Trade Association States of 11 September 2013, *EFTA Surveillance Authority v the Kingdom of Norway*, Case E-6/12.

<sup>(226)</sup> Judgment of the Court of Justice of the European Union of 22 October 2015, *Bundesagentur für Arbeit - Familienkasse Sachsen v Tomislaw Trapkowski*, C-378/14, ECLI:EU:C:2015:720, paragraph 29.

### **3.8.4. Family benefits with an income-replacement function — problems with the family member relationship**

If coordination deals with family benefits on a lump-sum basis, then coordination is not that complicated or difficult to understand as soon as the relevant members of the family have been established. This is not the case if family benefits with an income-replacement function are involved, in particular special child-raising benefits, such as parental benefits. If the same principles as for all other family benefits are applied, and all families are treated under the legislation of the Member State that examines entitlements, then this leads to situations in which one Member State could be obliged to grant family benefits to a person who has no income covered by the legislation of his/her own Member State.

For the CJEU, this seems to be the logical consequence of today's coordination, the Member State in which no income has been gained must treat the person concerned as if he/she had carried out an activity similar to the one exercised previously under the competence of another Member State in its own territory <sup>(227)</sup>. In such cases, being a member of the family could create entitlements that would not exist under the legislation to which the person concerned is subject. From our point of view, this could be regarded as a peculiar result.

As an example, let us consider the situation of a family who resides in Member State A. The father works in Member State A, and the mother works as a frontier worker in Member State B and is insured there. Member State A provides for a parental benefit with an income-replacement function, whereas Member State B has only a lump-sum parental benefit for all residents. As there is no different rule for such benefits according to the Regulation (EC) 883/2004, the mother could claim the parental benefit with an income-replacement function from Member State A (which is the state with priority competence <sup>(228)</sup>), even though she is not covered by that legislation, but rather covered by the legislation of Member State B, under which she would only be entitled to (lower) lump-sum parental benefits. The CJEU recently clarified in Case C-32/18, *Tiroler Gebietskrankenkasse v Michael Moser* <sup>(229)</sup> that the whole family must be treated as if covered by the legislation of the Member State concerned in regard to family benefits. As a result, a member of the family covered by the legislation of another Member State is entitled to such benefits, taking into account the income that he/she actually receives under that legislation. It should be noted that this question does not directly relate to problems relating to the family member relationship, but rather shows the possible effects of being a member of the family.

### **3.8.5. Other problems relating to family benefits**

The national experts also reported other problems relating to the coordination of family benefits, in particular administrative problems. The national expert for Estonia referred to needs-based family benefits. It can be seen as problematic if it takes a considerable amount of time to establish if there is any income received from abroad and subsequently results in retroactive changes of the amount and the necessity to recover overpayments. Of course, this issue becomes more problematic if a family member relationship can only be established for a person creating entitlement after a significant amount of time of investigation. As reported in Hungary, some problems can occur when changes in relationships are notified with some delay. Enhanced cooperation between administrative services could resolve these issues, but very often, key information about the persons

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<sup>(227)</sup> See judgment of the Court of Justice of 15 December 2011, *Försäkringskassan v Elisabeth Bergström, Bergström*, C-257/10, ECLI:EU:C:2011:839, paragraph 52.

<sup>(228)</sup> Article 68(1)(b)(i) of Regulation (EC) No 883/2004.

<sup>(229)</sup> See judgment of the Court of Justice of 18 September 2019, *Tiroler Gebietskrankenkasse v Michael Moser*, Case C-32/18, CLI:EU:C:2019:752.

concerned is required, and the processing of obtaining this information cannot be easily influenced by administrative services.

The national expert for Italy referred to problems concerning third-country nationals who are entitled to equal treatment under one of the residence Directives, such as Council Directive 2003/109/EC. Particular reference was made to a case <sup>(230)</sup> in which the CJEU ruled that Italy was required to grant family benefits to a third-country national holding a single permit residence title, according to Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State <sup>(231)</sup>. However, in this case, the question of who was classified as a member of the family was not the issue under discussion.

### **3.8.6. Conclusion on the status quo**

In conclusion, it could be argued that the family member relationship in regard to family benefits is not just as simple as applying Regulation (EC) No 883/2004. The reference to national legislation causes problems when the different Member States involved follow opposing approaches and set out contrasting definitions. This is particularly the case when the national legislations of the Member States concerned have different concepts of family member relationships for different forms of partnerships, such as unmarried partners or same-sex partnerships. In regard to family benefits, the focus is very much on the child, and not the adults around the child. In the context of cross-border situations, it is therefore very often difficult to identify the individuals who under a national system would be entitled to benefits, such as the person closest to the child, where it can be assumed that the benefit is most probably used for the wellbeing of the child, and the biological or family law relationship is not so significant <sup>(232)</sup>. A prime example of this complexity is divorced parents or other persons not living in the same household, as it seems that the CJEU has gone beyond both national definitions and the text of the definition contained in Regulation (EC) No 883/2004. Any concrete issues as a result of the judgment in Case C-363-08, *Romana Slanina v Unabhängiger Finanzsenat, Außenstelle Wien*, are not yet clear.

This situation also leads to problems for those concerned, as they cannot be sure if, and under what circumstances, they might be entitled to family benefits for another person. It can be difficult to acquire information about the economic situation or location of divorced parents living in another Member State who do not fulfil their maintenance obligations towards a child, and who no longer are in contact with the child or the parent still living with the child. It must be remembered that the economic situation of an individual (being gainfully active or receiving benefits that are treated as exercising a gainful activity <sup>(233)</sup>) is decisive in establishing entitlement to family benefits, as this might be relevant for determining the Member State that is competent by priority. Of course, this is not just a problem for the persons concerned, but also for the administrative services involved. The procedures to determine the Member State that is competent by priority could also take a significant amount of time.

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<sup>(230)</sup> See judgment of the Court of Justice of 21 June 2017, *Kerly Del Rosario Martinez Silva v Istituto nazionale della previdenza sociale (INPS) and Comune di Genova*, Case C-449/16, ECLI:EU:C:2017:485.

<sup>(231)</sup> OJ L 343, 23.12.2011, p. 1–9.

<sup>(232)</sup> This is particularly evident based on the replies received from some national experts ((in particular Belgium, Estonia, Malta and Slovenia) who explained that under their applicable national legislation nearly every person who cares for a child could be entitled to claim/receive family benefits.

<sup>(233)</sup> Under Decision No F1 of 12 June 2009 concerning the interpretation of Article 68 of Regulation (EC) No 883/2004 of the European Parliament and of the Council relating to priority rules in the event of overlapping of family benefits (OJ C 106, 24.4.2010, p. 11–12), some situations have been listed that must be treated as exercising a gainful activity for the purpose of Article 68 of Regulation (EC) No 883/2004.

As an example, reference could be made to a non-active mother, who is supported by her parents and living with her child in Member State A, and when it is not clear where the divorced father lives and if he is exercising a gainful activity (which would make the Member State of employment of the father as the State with priority). As long as this question is not solved, many of the provisions of the Coordination Regulations that aim to avoid situations in which families are left without benefits for a long period of time cannot work. In this scenario, Article 68(3) of Regulation (EC) No 883/2004 or Article 60 of Regulation (EC) No 987/2009 cannot be invoked, as it has not yet been established if there is another Member State that could be competent by priority. This is especially the case if the place of residence of the divorced parent is totally unknown, i.e. if the place of residence is within the European Union or not. Unfortunately, for the persons concerned, the Coordination Regulations do not contain a general rule to stipulate which Member State would have to grant benefits, as long as there is uncertainty about whether another Member State could be involved <sup>(234)</sup>.

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<sup>(234)</sup> Article 6(2) of Regulation (EC) 987/2009 on the obligation to provisionally grant benefits is not applicable as there is no dispute between Member States so long as it is not clear if another Member State may be involved. Also Article 7 of Regulation (EC) 987/2009 is also not applicable when a Member State is of the opinion that it cannot provisionally calculate the family benefit without definitively knowing if another Member State is involved by priority.

## **4 POSSIBLE SOLUTIONS AND RECOMMENDATIONS**

The current definition of ‘member of the family’, as set out in the Coordination Regulations, and its day-to-day application no longer seem to be satisfactory. The definition and its application no longer correspond to social reality. Many uncertainties and unsolved issues have been reported in numerous Member States. Most issues do not just relate to the different recognition of certain relationships across states (e.g. same-sex marriage, other partnerships, notion of own child, recognition of step-children), but also to the impact of Case C-363-08, *Romana Slanina v Unabhängiger Finanzsenat, Außenstelle Wien*. As always, there are multiple possible approaches to resolve these problems.

### **4.1. Acceptance of the status quo**

Taking into account this very complex issue; the uncertainty about what direction the CJEU could go in relation to how to treat any form of partnership recognised by the laws of one Member State, but not recognised in another Member State, for a person who has made use of his/her right of free movement; and the work already carried out by the Administrative Commission, accepting the status quo might be perceived as the most pragmatic approach. Many Member States seem to have found a way to live with these problems, despite the court cases or de facto practices that tend to recognise new forms of family relationships.

Nevertheless, the status quo does not bring progress, and a more active role from the EU legislature should be expected, as opposed to waiting for the next CJEU judgment. The only constant element in social relationships is change, and this equally applies to modern forms of family. We no longer live in larger rural families that could take care of their family members in the event of sickness, injury, invalidity, old age, having additional family members and relying on the care of others. Cultural norms and perceptions about gender roles have changed <sup>(235)</sup>. Living with step-parents/step-children, living together but apart, being married but living apart, living in a same-sex marriage/partnership, living in a single-parent family or being/having a co-mother is nothing new. In a mobile society like Europe’s, it is becoming increasingly difficult to base family relationships on a common household. It might be necessary to follow other links, such as financial or emotional links.

Moreover, the rule of law requires the legislature (both at the EU and Member State levels) to make adjustments to the ever-changing relationships in our societies with its normative actions <sup>(236)</sup>. The EU is bound to protect the rights of a child, his/her best interests and support families, while ‘reflecting the development of living arrangements’ <sup>(237)</sup>.

Nevertheless, as it might still be a difficult endeavour to amend the Coordination Regulations, a more dynamic interpretation of the existing legal rules might be a solution. For instance, the Coordination Regulations do not define the notions of ‘child’ or ‘spouse’. Instead of a static interpretation, i.e. what the legislature at the time of adoption of the legislation had in mind, a more dynamic interpretation, i.e. what is relevant today, could be required.

### **4.2. Solving problems with interpretative tools**

As mentioned above in the section on healthcare (Chapter 3.2.3.), a broad interpretation of the concept of ‘member of the family’ (Article 1(i) of Regulation (EC) No 883/2004) could address the issue of diverging concepts in the competent Member State and in the

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<sup>(235)</sup> See Janta, B., Davies, L. M., Jordan, V., Stewart, K., *Recent Trends in Child and Family Policy in the EU*, European Platform for Investing in Children, (EPIC): Annual thematic report, European Union 2019, p. 28.

<sup>(236)</sup> See decision U-I-69/03-17, SI:USRS:2005:U.I.69.03, Ustavno sodišče.

<sup>(237)</sup> Commission Recommendation of 20 February 2013 Investing in children: breaking the cycle of disadvantage (2013/112/EU), OJ L 59, 2.3.2013, p. 5–16.

Member State of residence. In line with the judgment in Case C-451/93, *Claudine Delavant v Allgemeine Ortskrankenkasse für das Saarland*, and within the logic of the principle of favourability, the rule that the state of residence defines the concept of 'family' should not be interpreted in such a way that it would free the competent state of its financial duty to fund healthcare costs (whenever the family member is granted access to healthcare in this state owing to a family relation with the insured person).

Similarly, a broad interpretation of the concept of family could address the issue of child-raising periods in the cross-border calculation of old-age pensions (Article 44 of Regulation (EC) No 987/2009). In our opinion, this provision should also apply to situations in which the 'new' state applies a stricter definition to the term 'child' and therefore would no longer honour the child-raising period accrued in the former state for pension insurance.

In other words, solutions to certain coordination issues could be found in a broad application or interpretation of current coordination rules/definitions.

Another possibility would be to continue discussing any problems and solutions identified by different Member States and establish best practices and/or a common understanding of the existing legal framework. This should be carried out by the Administrative Commission and could result in a decision, recommendation or a practical guide.

Of course, this option can only be recommended when an interpretation is based on the existing legal framework. As an example, the Administrative Commission could further analyse who should be classified as a 'spouse' or 'child' for the application of the definition pursuant to Article 1(i)(2) of Regulation (EC) No 883/2004. A more 'modern' approach for the interpretation of these terms that covers as many situations as possible could be recommended. Although the term 'spouse' seems to cover only married relationships (same-sex marriage is not excluded), the Administrative Commission could be pro-active and recommend that both heterosexual and same-sex partnerships are treated in the same way as marriage in the state concerned. If Member States are willing to go even further and include any partnership at all, this may require an adjustment to the definition found in Regulation (EC) No 883/2004.

Another good example of an interpretative task for the Administrative Commission could be the impact or non-impact of the assimilation of facts. Of course, this question does require further analysis, as it must be decided which facts and events in one Member State could be regarded as like-for-like facts or events by another Member State. During this examination, an approach that tries to cover all new developments in regard to family structures and compositions as much as possible is recommended. An optimal solution should avoid infringing on an individual's free movement. This approach should also take into account the principles of non-discrimination pursuant to Article 7 (protection of the family life) and Article 21 (non-discrimination, especially sexual orientation) of the Charter of Fundamental Rights of the European Union, which should be the guiding principles. This interpretation could examine the assimilation of the questions of who the mother of a child is, what the relationship of the child to another person is and who the partner or spouse of a person is. It could also address other aspects that could be relevant in determining who is classified as a member of the family according to relevant national law.

Nevertheless, there are issues that cannot be resolved by interpretation. For example, transposing the judgment in Case C-363-08, *Romana Slanina v Unabhängiger Finanzsenat, Außenstelle Wien*, in an interpretative way seems to be very difficult, as the CJEU, in our understanding, deviated from the existing text of the definition pursuant to Article 1(i) of Regulation (EC) No 883/2004. It would therefore be almost impossible to establish guidelines in cases that still have to be considered as members of the family in the event of divorce or separation of the parents, based on an interpretive assessment of that judgment. Adjusting the legal framework might therefore be required.

### 4.3. Adjusting the legal framework

Adjusting the legal framework (amendments to Regulations (EC) No 883/2004 and (EC) No 987/2009) to modern forms of family could be put forward as the best way to ensure legal clarity and achieve a solution that could be applied across all Member States. However, it is not easy to come to an agreement on which aspects should be included in such an amendment and what would be the best solution. Nevertheless, there are several options.

#### 4.3.1. Staying within the philosophy of today's definition (principle: national definition)

If the concept of the definition pursuant to Article 1(i) Regulation (EC) No 883/2004 is retained, the following amendments could be made:

*"member of the family" means:*

(1) (i) *any person defined or recognised as a member of the family or designated as a member of the household by the legislation under which benefits are provided;*

(ii) *with regard to benefits in kind pursuant to Title III, Chapter 1 on sickness, maternity and equivalent paternity benefits, any person defined or recognised as a member of the family or designated as a member of the household by the legislation of the Member State in which he resides;*

(2) *If the legislation of a Member State which is applicable under subparagraph (1) does not make a distinction between the members of the family and other persons to whom it is applicable, the spouse or the partner recognised under any part of the legislation of this Member State, minor children, and dependent children who have reached the age of majority shall be considered members of the family;*

(3) *If, under the legislation which is applicable under subparagraphs (1) and (2), a person is considered a member of the family or member of the household under the condition of living in the same household as the insured person or pensioner, this condition shall be considered satisfied if the person in question is entitled to or actually receives maintenance by the insured person or pensioner;*

This text could 'modernise' the definition pursuant to Article 1(i)(2) as it no longer covers just married spouses, but any relationship recognised by any social security legislation of that state. The recognition of same-sex marriage or any other form of partnership by a state would be sufficient to grant survivors' pensions and to grant the coverage as members of the family in the field of healthcare. This would merely reflect a reality that already exists in most Member States (see Chapter 2.3.5).

The above amendments to Article 1(i)(3) aim to transpose the judgment of the CJEU in Case C-363-08, *Romana Slanina v Unabhängiger Finanzsenat, Außenstelle Wien*, as closely as possible. The amendments would cover situations that involve living in the same household as the exclusive condition under the applicable national legislation, as well as any alternative conditions that may exist under the applicable national legislation. As mentioned in the judgment of the above-mentioned case, entitlement to maintenance would be sufficient; it would not be necessary for maintenance to actually be provided or for entitlement to have already been established, e.g. by a court. The actual payment of maintenance and support of the child should also be sufficient to create entitlement to benefits, even if there is no legal entitlement to this support, which would be a further development in relation to the judgment in the above-mentioned CJEU case.

Nevertheless, this amendment cannot exclude the uncertainty of the obligation or non-obligation to recognise relationships that are not recognised in the Member State concerned. As discussed, it is not possible to predict how the CJEU would resolve such a situation according to the free movement principle if such a case arose in the field of social security. A legal amendment in regard to this issue should therefore be avoided. Of course, as already stated in relation to possible interpretation of today's legal framework under Chapter 4.2, the principle of non-discrimination (including sexual orientation) should be respected.

#### **4.3.2. In search of another solution within the principle of the national definition, as amended by EU law**

A more ambitious amendment would be to consider a solution that corresponds more to economic realities and avoids cases in which there is no longer any relationship between the persons concerned (correction of the judgment in Case C-363-08, *Romana Slanina v Unabhängiger Finanzsenat, Außenstelle Wien*). Such a solution could be a change to the following definition:

*"member of the family" means:*

(1) (i) *any person defined or recognised as a member of the family or designated as a member of the household by the legislation under which benefits are provided and, in addition, any other person who substantially maintains a child;*

(ii) *with regard to benefits in kind pursuant to Title III, Chapter 1 on sickness, maternity and equivalent paternity benefits, any person defined or recognised as a member of the family or designated as a member of the household by the legislation of the Member State in which he resides;*

(2) *If the legislation of a Member State which is applicable under subparagraph (1) does not make a distinction between the members of the family and other persons to whom it is applicable, the spouse or the partner recognised under any part of the legislation of this Member State, minor children, and dependent children who have reached the age of majority shall be considered members of the family;*

~~(3) If, under the legislation which is applicable under subparagraphs (1) and (2), a person is considered a member of the family or member of the household under the condition of living in the same household as the insured person or pensioner, this condition shall be considered satisfied if the person in question is entitled to or actually receives maintenance by the insured person or pensioner;~~

This proposal would focus on the priority of any national definition, and there would not therefore be any restriction on the circle of entitled persons according to national legislation. It would add any other person who in reality contributes substantially to the maintenance of the person concerned. This addition could be restricted to children, however, there is room for discussion on whether it would be necessary or useful to extend it to include any member of the family.

The proposal would not link this extension to the national condition of being a member of the same household. This could lead to a much more synchronised approach for all Member States as it would be a step towards a European definition of 'member of the family' and go beyond national definitions. The term 'substantially' is well-known under the Coordination Regulations, e.g. in the context of job postings <sup>(238)</sup> or pursuit of activities in

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<sup>(238)</sup> Article 14(2) of Regulation (EC) No 987/2009.



two or more Member States <sup>(239)</sup>). The Administrative Commission could further discuss this expression and decide that 25% of the overall maintenance costs of the person concerned is classified as 'substantial' <sup>(240)</sup>. Of course, it could be argued that such an amendment would be burdensome for administrative services. However, as this is already something that institutions have to examine under the rules on applicable legislation, this seems to be a possibility for determining the individuals who have to be treated as members of the family.

#### **4.3.3. In search of a European definition**

Lastly, another approach could be to apply a harmonised definition. In its most extreme form, a definition similar to the one used under Council Directive 2004/83/EC or Council Directive 2003/86/EC (absolute harmonised definition; see below) could be considered. Alternatively, a baseline could be established that applies a minimum level of harmonisation in the application of national concepts. A 'common denominator' approach that uses the national definitions as a baseline could also be considered, but in the event of varying coverage of the personal scope provided for by the national definitions, the common definition applied would be the most extensive definition. This approach has the purpose of ensuring that a similar definition is applied across the various national schemes involved and that individuals would not fall victim to a situation in which they are considered to be a spouse or dependent child, such as for a pension calculation, in one country, whereas in another Member State, they do not fall under the more restrictive definition.

However, the member of the family concerned would need to be entitled (at least partially) to the scheme of the state granting the (extensive) common denominator definition, by applying either national law or EU law. In such an event that three pension schemes are involved in granting an orphan's pension to the child of a deceased person, and only one of the schemes involved provides an orphan's pension to a step-child, the step-child would have to be taken into account under the national definition (of 'member of the family') by the two Member States (with restrictive definitions). Likewise, a survivor's pension would be paid to the same-sex spouse of the deceased person in the event that one of the schemes involved includes same-sex relationships under the definition of 'spouse'.

A more extensive approach would be changing the definition to a 'purely' European definition. As a model, existing texts under Council Directive 2004/38/EC or Council Directive 2003/109/EC could be taken and copied into Article 1(i) of Regulation (EC) No 883/2004. However, it should be noted that this is not very likely to be accepted by all Member States. Firstly, this could restrict more extensive national definitions. It would therefore be necessary to add that more extensive national definitions would remain in place, which would add complexity to the rule and would lead to the same problems as with existing national definitions. Secondly, this might be criticised as going too far when applying the broadest EU definition, while national definitions remain more restrictive. It could also be seen as an attempt to harmonise national social security schemes, which cannot be carried out on the basis of Article 48 TFEU.

Nevertheless, judgments by the CJEU in relation to the question of who a member of the family is in regard to a social security benefit could increase the willingness of Member States to discuss such an EU-wide definition, in particular if based on Regulation (EU) No

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<sup>(239)</sup> Article 13 of Regulation (EC) No 883/2004 and Article 14(8) of Regulation (EC) No 987/2009.

<sup>(240)</sup> As is the case within the rules of applicable legislation where the term 'substantial' is used. See Article 14(8) of Regulation (EC) No 987/2009 or in relation to 25% of the turnover of the employer as discussed in Administrative Commission for the Coordination of Social Security Systems, Practical Guide on the Applicable Legislation in the European Union (EU), the European Economic Area (EEA) and Switzerland, European Commission, Brussels, 2013, p. 9.

492/2011, with the benefit being treated as a social advantage <sup>(241)</sup>, as opposed to being based on Regulation (EC) No 883/2004.

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<sup>(241)</sup> As in the pending case, Case C-802/18, *Caisse pour l'avenir des enfants v FV, GW*.

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