



# Legal Report 2018

Consequences and possible solutions in cases of lump sum payment of pensions, reimbursement of contributions and waiver of pensions in cross-border situations

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*July 2020*



**EUROPEAN COMMISSION**

Directorate-General for Employment, Social Affairs and Inclusion  
Directorate D — Labour Mobility  
Unit D1 - Free movement of workers, EURES  
Unit D2 - Social security coordination

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## **MoveS - Free movement of workers and social security coordination**

This report was prepared under the framework contract No VC/2017/0462 'Network of Experts on intra-EU mobility – Free movement of workers and social security coordination - Lot 1: Provision of legal expertise in the field of free movement of workers and social security coordination and dissemination of knowledge in this field'.

The contract is implemented by MoveS, a network of independent experts from 32 European countries, and coordinated by a consortium composed of Eftheia and Deloitte Consultancy & Advisory with support of the University of Ljubljana and the University of Poitiers.

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Manuscript completed in July 2020

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Luxembourg: Publications Office of the European Union, 2020

PDF 978-92-79-98878-3 doi:10.2767/286392 KE-02-19-021-EN-N

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## EXECUTIVE SUMMARY

As explained in **section 1 – Introduction** of this report, a person who is insured against old-age risk in a Member State<sup>1</sup> should, in principle, receive a pension in that Member State. Receiving a pension may have consequences for other social security rights in the Member State concerned, and it may affect rights in other Member States in which the person was also insured against old-age risk and/or in which he/she or (a) family member(s) reside(s). When a person receives a lump sum payment or a refund of paid contributions, or waives his or her pension, there may be (in)direct consequences for both the migrant person and for the social security institutions of the Member States in which he/she was insured or in which he/she resides.

It is possible to identify several difficulties in this regard, such as the information that needs to be shared between Member States or the distribution of costs between the respective social security institutions. Currently, Union law, including case-law of the Court of Justice of the European Union (CJEU), does not provide for any solutions for the cross-border impact when an old-age pension is waived, converted into a lump sum payment or when contributions are reimbursed.

Discussing and addressing these difficulties involves several provisions of Union law: the principles of freedom of movement (Article 45 and 48 of the Treaty on the Functioning of the European Union (TFEU)); and the pillars of the Regulations on coordinating social security systems (the coordination Regulations), in particular the principles of aggregation, of assimilation of facts and of fair administrative cooperation between Member States. The coordination provisions in the sickness, maternity and equivalent paternity benefits, and the old-age and survivors' pensions chapters of these Regulations are also relevant, notably Articles 23 to 25 of Regulation (EC) No 883/2004 (determining the competent Member State for healthcare coverage) and Articles 50 to 58 of the same Regulation (rules of coordination for old-age pensions). Additionally, the provisions on special non-contributory benefits (SNCBs) in cash (Article 70 of Regulation (EC) No 883/2004) and on family benefits (Article 68 of Regulation (EC) No 883/2004) may also be relevant.

In **section 2 – Overview of national practices**, the report assesses the reality and the nature of problems relating to the payment of a lump sum pension, the reimbursement of contributions and the waiver of pensions, based on a comparative survey of the 32 Member States that must apply Regulation (EC) No 883/2004. Based on national data, it appears that in most Member States, there is no system to reimburse contributions and, where there is one, this system only applies in a specific set of circumstances. Similarly, most Member States ignore the lump sum pension system or, when this does exist, it is only applied restrictively. Most Member States also ignore the waiver of pensions system, and when this system is in place, it is also usually subject to strict conditions.

In **section 3 – Consequences in specific areas of the coordination of social security schemes and possible solutions**, the report presents the practical problems encountered and provides potential solutions for them. One of the main problems is the **aggregation of periods** by another Member State. The issue is sensitive only when contributions are reimbursed, as it is most likely that the periods for which these contributions have been paid have been deleted from the registers of the pension insurance institutions. As Article 5 of Regulation (EC) No 883/2004 cannot be applied in such a way that the periods for which contributions have been reimbursed should be treated as equivalent periods spent in the Member State, it would be worth exploring alternative solutions. Such solutions could involve the periods for which reimbursement of contributions has taken place being considered as periods of insurance for the purposes of aggregation. Moreover, the reimbursement of contributions could be restricted by a common interpretation of existing rules.

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<sup>1</sup> In the present report the term 'Member State' refers to the 32 countries that are part of the EU social security coordination system i.e. the 28 EU Member States, Iceland, Norway, Liechtenstein and Switzerland.

Another key issue is the **impact of the 'non-receipt' of a pension on other social security rights**. This issue involves several social security risks:

- The 'non-receipt' of a pension may have an impact on the question of which Member State is competent for a **person's healthcare coverage**. If a person does not receive a pension from the Member State of residence, it is the Member State that pays the pension (other than the Member State of residence) that becomes competent for their healthcare coverage, including the right to collect healthcare contributions and the granting of benefits in cash. There are various possibilities to improve this situation, which is perceived as unfair, at least from the perspective of the Member State that becomes competent. An interpretative Decision of the Administrative Commission may be appropriate. Closer cooperation and exchange of information between the institutions is recommended.
- The 'non-receipt' of a pension may also affect **minimum pension rights**. A person receiving a pension from the Member State of residence is entitled to the minimum pension that is provided for in accordance with the legislation of this State. For that purpose, all periods of insurance completed under the legislation of all Member States must be taken into account in order to calculate the minimum amount, and the amount of benefits due from other Member States must be deducted. As a result, owing to the 'non-receipt' of a pension in one Member State, another Member State may have to provide a (higher) minimum pension. In order to avoid this, it may be appropriate to amend Decision P1 of the Administrative Commission. One point to amend is the way in which a lump sum payment must be converted into monthly fictitious payments that can be taken into account by another Member State when calculating the minimum pension. Additional clarifications on the interaction between the institutions concerned and the exchange of information are also recommended.
- The 'non-receipt' of a pension might also impact the right to claim **special non-contributory benefits** (SNCBs). One possible consequence of the 'non-receipt' of a pension from one Member State could be that the person would become entitled to a SNCB in another Member State, and **may** also receive additional rights attached to it. In order to avoid such consequences, a decision of the Administrative Commission on the interpretation of Article 70 of Regulation (EC) No 883/2004 may be appropriate. Such a decision would state that SNCBs would continue to be awarded until the person concerned has claimed all possible benefits to which he/she is entitled. Better cooperation and exchange of information between national authorities could also be implemented.
- **Family benefits** could also be affected if a person waives a pension or receives a lump sum payment. Through the 'non-receipt' of a pension, the priority Member State may change. As the 'receipt of the pension' is the decisive factor when it comes to family benefits, the same solutions as those suggested for healthcare benefits could be applicable.

To take into account potential cases of abuse, a definition of abuse, which is potentially applicable to cases of 'non-receipt' of pensions, could also be included in the Regulations.

In **section 4 – Conclusions and policy recommendations**, the report summarises ad hoc solutions to the problems that the 'non-receipt' of a pension may have on different social security schemes.

Taking into account the great difficulties and lengthy procedures for amending legal instruments, the authors of this report have made a preliminary analysis of potential alternative ways to solve the issues at stake.



# 1. INTRODUCTION

## 1.1 Broad contextual elements

The application of national social security provisions in cross-border situations is highly complex. It may entail consequences on the supranational and international levels that national legislatures could not have planned for when such internal provisions were designed and adopted.

Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems<sup>2</sup> and 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<sup>3</sup>, which coordinate national social security provisions at the European level, do not have a harmonising objective and, as a result, do not modify national legislations. However, within the scope of the coordination rules, national legislations do not act as autonomous instruments and require adaptation. National social security legislations operate and work as both communicating vessels and a puzzle in which all pieces must fit together. The EU social security coordination system applies to 32 countries: the 28 EU Member States, EEA countries Iceland, Norway and Liechtenstein and Switzerland. Whenever the term 'Member State' is used in the present report, it refers to the 32 countries that are part of the EU social security system. As domestic legislations often interact when a cross-border situation arises, any decision taken under the legislation of one Member State is likely to have repercussions (both positive and negative) in another Member State, and may result in unforeseen consequences to the advantage or disadvantage of the institutions or persons concerned.

The various consequences of reimbursing contributions, of a waiver of pension or of a lump sum payment of old-age pensions have been discussed among Member States within the framework of the Administrative Commission on various occasions. Several difficulties have been underscored by numerous Member States in the context of pension rights<sup>4</sup> and sickness benefits<sup>5</sup>.

During these discussions, it became clear that further research on these issues was required and that a study by the MoveS network would contribute to the development of solutions suitable to both, pensioners and institutions of all the Member States concerned.

## 1.2 Legal issues and concrete examples

A person who is insured against old-age risk in a Member State should, in principle, receive a pension in that Member State. Receiving a pension may have consequences for other social security rights in the Member State concerned, and it may affect rights in other Member States in which the person was also insured against old-age risk and/or in which he/she or (a) family member(s) reside(s). When a person receives a lump sum payment or a refund of paid contributions, or waives his or her pension, there may be (in)direct consequences for both the migrant person and for the social security institutions of the Member States in which he/she was insured or in which he/she resides.

In order to illustrate the legal issues involved, three examples are given below (more detailed examples are provided in section 3 of this report).

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<sup>2</sup> OJ L 166, 30.4.2004, p. 1-123.

<sup>3</sup> OJ L 284, 30.10.2009, p. 1-42.

<sup>4</sup> See Notes Administrative Commission (AC) 447/15 of 27 May 2015 from the German delegation; AC 110/16 of 9 February 2016 from the Italian delegation; AC 321/16, Minutes of the 346th meeting of the Administrative Commission, Brussels, 9-10 March 2016; AC 356/16 of 3 May 2016 from the Czech delegation; AC 364/16, Minutes of the 347th meeting of the Administrative Commission, Amsterdam, 20-21 June 2016.

<sup>5</sup> See Notes AC 374/15, Minutes of the 343rd meeting of the Administrative Commission, Brussels, 23-25 June 2015; AC 484/15 of 11 June 2015 from the French, Italian, Portuguese and Spanish delegations.

#### Example 1: lump sum payment and health care costs

Mr K is classified as a pensioner in accordance with the legislation of Member State A. He resides in Member State B, a Member State in which he never worked and where he has no old-age pension entitlement. Member State B offers healthcare coverage on the sole condition of residence. Pursuant to Article 25 of Regulation (EC) No 883/2004, even if Mr K is insured in Member State B, his healthcare costs should be borne by Member State A. However, after he claimed his old-age pension in Member State A, he decided, in accordance with the legislation of Member State A, to receive a lump sum payment. Does this mean that Member State B must bear his healthcare costs?

#### Example 2: reimbursement of contributions and pension entitlement

Ms V was insured in Member State A for eight years, in Member State B for five years and in Member State C for three years. Member State A and Member State B provide a pension only after 15 years of insurance. Ms V's contributions were refunded *ex officio* by Member State C. Should Member State C communicate the periods of insurance to Member State A and Member State B?

#### Example 3: waiver of pension and pension supplement

Mr M resides in Member State A. He has completed his periods of insurance in Member State A and in Member State B. He waives his pension from Member State B and, as a result, receives only the pension of Member State A. As the pension from Member State A is below the threshold value, he will receive a differential allowance in order to reach a minimum pension amount in that country. By waiving the pension from Member State B, his financial situation has not deteriorated. On the contrary, it may have even improved, not only because the total pension amount that he receives would not be lower than the amount he would have received if he had not waived the pension from Member State B, but also because other allowances and social assistance advantages are associated with receiving that differential allowance in Member State A (which could be even more if it were not a minimum pension but a SNCB in cash). In this situation, should the waiving of the pension in Member State B be permitted? If so, should Member State A be obliged to shoulder the consequences produced as a result of the waiver of pension?

These examples underscore several difficulties. One difficulty relates to the information that needs to be shared between Member States. Another difficulty relates to the distribution of costs between Member States: a decision made by one individual (as permitted by national legislation without any impact assessment of cross-border consequences) or imposed by a national rule may impact the social security status of that individual in another country, whether it relates to an old-age pension right (entitlement to a pension, calculation of the pension amount, right to a pension supplement) or other social protection rights (sickness benefits in kind, family benefits, minimum old-age pension, non-contributory benefits, social assistance). Another difficulty relates to the justification of waiving the pension: if a person's decision not to receive (or to no longer receive) a pension is a result of purely financial considerations (such as receiving better rights in one country), this raises the question of whether it produces the desired effects in the other country(ies)? It should be noted that under the coordination system, it is incumbent on the person who is entitled to a pension in a Member State to decide to request it from the Member State or, if a pension is paid, to use national procedures in order to waive it, to receive a lump sum payment or to be reimbursed for contributions. That being said, some, if not all, of these consequences (depending on the national legislation involved) could also occur automatically under the applicable national legislation without any influence from the person concerned.

Tackling these sensitive issues involves several provisions of the coordination Regulations: the principles of freedom of movement (Article 45 and 48 of the Treaty on the Functioning

of the European Union (TFEU)<sup>6</sup>); and the pillars of the coordination Regulations, in particular the principles of aggregation, assimilation of facts and fair administrative cooperation between Member States. The coordination provisions in the sickness, maternity and equivalent paternity benefits, and the old-age and survivors' pensions chapters of these Regulations are also relevant here, notably Articles 23 to 25 of Regulation (EC) No 883/2004 (determining the competent Member State for healthcare cover); Articles 50 to 58 of the same Regulation (rules of coordination for old-age pensions); Article 70 (SNCBs); and Article 68 (entitlement to family benefits). It is worth noting several provisions:

- As regards old age:
  - lump sum benefits fall under the definition of a pension: 'pension' covers not only pensions but also lump sum benefits which can be substituted for them and payment in the form of reimbursement of contributions ...' (Article 1(w), Regulation (EC) No 883/2004);
  - *[a]ll the competent institutions shall determine entitlement to benefit, under all the legislations of the Member States to which the person concerned has been subject, when a request for award has been submitted, unless the person concerned expressly requests deferment of the award of old-age benefits under the legislation of one or more Member States* (Article 50(1), Regulation (EC) No 883/2004);
  - *[a] recipient of benefits to whom this Chapter applies may not, in the Member State of residence and under whose legislation a benefit is payable to him, be provided with a benefit which is less than the minimum benefit fixed by that legislation for a period of insurance or residence equal to all the periods taken into account for the payment in accordance with this Chapter* (Article 58(1), Regulation (EC) No 883/2004);
  - *[t]he competent institution of that Member State shall pay him throughout the period of his residence in its territory a supplement equal to the difference between the total of the benefits due under this Chapter and the amount of the minimum benefit* (Article 58(2), Regulation (EC) No 883/2004).
- As regards healthcare benefits in kind:
  - *[a] person who receives a pension or pensions under the legislation of one or more Member States and who is not entitled to benefits in kind under the legislation of the Member State of residence shall nevertheless receive such benefits for himself and the members of his family, insofar as he would be entitled thereto under the legislation of the Member State or of at least one of the Member States competent in respect of his pensions, if he resided in that Member State. The benefits in kind shall be provided at the expense of the institution referred to in paragraph 2 by the institution of the place of residence, as though the person concerned were entitled to a pension and benefits in kind under the legislation of that Member State* (Article 24(1), Regulation (EC) No 883/2004);
  - *[w]hen a person or a group of persons are exempted upon request from compulsory sickness insurance and such persons are thus not covered by a*

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<sup>6</sup> OJ C 326, 26.10.2012, p. 47.

*sickness insurance scheme to which the basic Regulation applies, the institution of another Member State shall not, solely because of this exemption, become responsible for bearing the costs of the benefits in kind or in cash provided to such persons or to a member of their family under Title III, Chapter I, of the basic Regulation (Article 32(1), Regulation (EC) No 987/2009).*

At this stage, the coordination principles and rules do not provide for any solutions for the cross-border impact of when an old-age pension is waived, converted into a lump sum payment, or when contributions are reimbursed. Several cases of the Court of Justice of the European Union (CJEU) could be further studied in this regard, for instance *Van Delft and Others*,<sup>7</sup> *Rundgren*,<sup>8</sup> *Gardella*,<sup>9</sup> *Altun*<sup>10</sup> and *Blanco Marqués*<sup>11</sup>.

### 1.3 Mandate

It is necessary to provide an overview of national provisions and practices, and to explore possible solutions to enable Member States to circumvent the current difficulties relating to lump sum payments, reimbursement of contributions or waiver of pensions. For this reason, this report focuses on three objectives:

1) The report analyses the extent to which it is permitted, under national legislation, to provide one of the following:

- a lump sum payment of a pension
- a reimbursement of contributions
- a waiver of pension.

Where available, statistical data are included on the frequency of such requests and the number of people involved.

2) The report analyses the legal consequences of the three options that lead to the non-payment of an old-age pension on the institutions of other Member States in which the person contributed to that Member State's pension scheme and/or in which the person resided. This analysis also evaluates the consequences on the Member State of residence when one of the above options is chosen (such as payment of a pension supplement pursuant to Article 58 of Regulation (EC) No 883/2004), and on determining the Member State that is competent for bearing the pensioner's healthcare costs.

3) The report explores the possible non-binding solutions to mitigate the consequences of the three options mentioned above for the institutions of other Member States. However, it has to be remembered that if -these non binding solutions appear to be not sufficient or present some legal uncertainty, then in most cases, the clearest and most transparent

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<sup>7</sup> Judgment of 14 October 2010, *van Delft and Others*, C-345/09, EU:C:2010:610: entitlement to/waiving of pensions.

<sup>8</sup> Judgment of 10 May 2011, *Rundgren*, C-389/99, EU:C:2001:264: notion of 'payable pension'.

<sup>9</sup> Judgment of 4 July 2013, *Gardella*, C-233/12, EU:C:2013/449: extensive application of the principle of aggregation.

<sup>10</sup> Judgment of 6 February 2018, *Altun*, C-359/16, EU:C:2018:63: concept of 'fraud' in the context of the coordination Regulations.

<sup>11</sup> Judgment of 15 March 2018, *Blanco Marqués*, C-431/16, EU:C:2018:189: rules against overlapping (suspension of an incapacity supplement in the event of employment or receipt of a retirement pension).

solution for solving unambiguously the problems explained in these pages could be sought through amending Regulation (EC) No 883/2004 and (EC) No 987/2009.

## 1.4 Methodology

### 1.4.1 Key definitions

In this report, the key concepts are defined as follows:

- **Lump sum payments:** the granting of a one-off payment instead of a periodic payment of the pension, which also includes the pension entitlement or pension expectations acquired until the moment of the granting of this lump sum payment. The calculation of this payment may be based on actuarial factors, or another lump sum amount calculation.
- **Waiver of pension:** the person requests that the payment of a pension already granted is stopped.
- **Reimbursement of contributions:** the contributions that the person concerned has made are refunded (including interest, if so provided under national legislation).

### 1.4.2 Guiding principles

The analysis will take into account several key differences between cases in which a person does not exercise his/her rights (for example, the person does not claim a pension), he/she exercises a right conferred by national law (for example, conversion of pension into capital) or a solution is imposed owing to national law (for example, substitution of a small pension for a lump sum payment). The nature of the benefit on which these possibilities might have an impact (old age, family, sickness, etc.) is also crucial.

The proposals will seek to achieve a balance between the interests of the various parties: guaranteeing the individual worker's right to be mobile within European Member States; fairly dividing financial obligations between national social security institutions; and avoid fraud and abuse cases, even if rare.

These different perspectives must always be considered when reading this analysis.

### 1.4.3. Questionnaire filled in by national experts

A questionnaire was sent to the national experts of the 32 countries involved in the coordination system. This questionnaire contained four parts (A, B, C, D) divided into several sub-questions.

#### **Questionnaire sent to national experts**

##### **A) Reimbursement of contributions to the pension scheme**

1. Is reimbursement of contributions envisaged by the legislation of your country?
2. Are contributions reimbursed *ex officio* or is reimbursement proceeded upon request of the person?
3. In case of reimbursement of contributions, does the competent institution of your country communicate to the institutions of other Member States, for the purpose of the aggregation of insured periods, the theoretical periods corresponding to the contributions reimbursed? Or are these periods considered as non-existing or no longer existing?

## **B) Lump sum payment of pensions**

1. Are lump sum payments envisaged in the legislation of your country? Under which conditions?
2. How is the lump sum calculated?
3. Is the lump sum acknowledged and paid *ex officio* or is the request of the person concerned always required?
4. Does the competent institution evaluate in case of acknowledgement of a lump sum the possible disadvantages for a third person or for other institutions (national or from another Member State)?
5. According to the legislation of your country, is the person concerned who received the lump sum considered as a pensioner or similar for the entitlement of other benefits (survivors' benefits, health care, long-term care benefits, family benefits)?
6. How are such persons treated under the Regulations by your country (as pensioners or not)?
7. Do you have statistical data about the frequency of such requests and the number of persons involved (compared to the total number of pensioners in your country)?

## **C) Waiver of pensions**

1. Is waiver of pensions envisaged by the legislation of your country? Under which conditions?
2. Is the competent institution of your country obliged to accept the request for the waiver of pension or do they have the possibility of evaluating the potential disadvantages for a third person or for other institutions (national or from another Member State)?
3. According to the legislation of your country, is the person concerned who waived a pension considered as a pensioner or similar for the entitlement of other benefits (survivors' benefits, health care, long-term benefits, family benefits)?
4. How are such persons treated under the Regulations by your country (as pensioners or not)?
5. Do you have statistical data about the frequency of such requests and the number of persons involved (compared to the total number of pensioners in your country)?

## **D) Consequences of the acknowledgement of a lump sum or the acceptance of the waiver of pension**

1. How would the competent institution of your country react if, as a consequence of the waiver of pension or the granting of a lump sum in another Member State, it is requested that your country had to be considered as competent for bearing the health costs of a pensioner?
2. How would the competent institution of your country react when, as a consequence of the waiver of a pension or the granting of a lump sum in another Member State, it is requested that your country has to pay (a higher) supplement in case of application of Article 58 of Regulation (EC) No 883/2004? How would you treat requests for special non-contributory benefits in case of application of Article 70 of Regulation (EC) No 883/2004 in such cases?
3. How would the competent institution of your country react when, as a consequence of the waiver of pension or the granting of a lump sum in another Member State, Article 68 of Regulation (EC) No 883/2004 has to be applied and it is requested that your country has to be regarded as competent by priority for the granting of family benefits?

### 1.4.4. Report structure

In **section 2 – Overview of national practices**, the report assesses the reality and the nature of the problems relating to the payment of a lump sum pension, the reimbursement

of contributions and the waiver of pensions. In practice, this section lists the Member States in which these options are made available and specifies under which conditions. This section is based on the responses to parts A, B and C of the questionnaire.

**In section 3 – Consequences in specific areas of the coordination of social security schemes and possible solutions**, the report presents the practical problems encountered and the issues that these problems pose in a cross-border situation after the payment of a lump sum pension, the reimbursement of contributions or the waiver of a pension. Several proposals are given in order to address the issues identified, taking into account the interests of the persons and of the social security institutions. In this regard, the report addresses a set of preliminary questions: can solutions be found at the national level? Can solutions be found in existing EU/coordination instruments/principles? If EU action is needed and amending the Regulations is no option taking into account the long time such amendments need, an action based on soft law and administrative cooperation (for example, Administrative Commission (AC) decisions, guidelines, recommendations, etc.) could be envisaged.

**In section 4 – Conclusions and policy recommendations**, the report summarises and hoc solutions to the problems that the 'non-receipt' of a pension may have on the social security schemes analysed in section 3.

## 2. OVERVIEW OF NATIONAL PRACTICES

### 2.1 Reimbursement of contributions

#### 2.1.1 Is reimbursement of contributions envisaged?

The table below provides an overview of the situation in 32 Member States.

Table 1: Reimbursement of contributions: national overview

	Yes/No	Reimbursement on claim / ex officio	Communication towards other MS of theoretical periods
<b>AT</b>	No	N/A	N/A
<b>BE</b>	No	N/A	N/A
<b>BG</b>	No	N/A	N/A
<b>CH</b>	Yes <sup>12</sup>	Upon request	N/A
<b>CY</b>	Yes	Upon request	No <sup>13</sup>
<b>CZ</b>	No	N/A	N/A
<b>DE</b>	Yes <sup>14</sup>	Upon request	No
<b>DK</b>	No	N/A	N/A
<b>EE</b>	No	N/A	N/A
<b>EL</b>	No	N/A	N/A
<b>ES</b>	No	N/A	N/A
<b>FI</b>	No	N/A	N/A
<b>FR</b>	Yes <sup>15</sup>	Upon request	No <sup>16</sup>
<b>HR</b>	No	N/A	N/A
<b>HU</b>	No	N/A	N/A
<b>IE</b>	Yes <sup>17</sup>	Upon request	No <sup>18</sup>
<b>IS</b>	Yes <sup>19</sup>	Upon request	No <sup>20</sup>
<b>IT</b>	No	N/A	N/A
<b>LI</b>	Yes <sup>21</sup>	Upon request	N/A
<b>LT</b>	Yes	Upon request	No <sup>22</sup>

<sup>12</sup> For pensioners who are non-nationals living outside the EU.

<sup>13</sup> Contributions reported as non-existent.

<sup>14</sup> Persons beyond retirement age and who have not met the necessary waiting period for a pension.

<sup>15</sup> Persons who contributed to an old-age scheme for a maximum of 8 three-month periods.

<sup>16</sup> Considered as non-existent. In practice, the problem has never been encountered.

<sup>17</sup> Contributions paid by an employed person or a voluntary contributor whose entry into insurance occurred after turning a given age.

<sup>18</sup> Considered as non-existent.

<sup>19</sup> Reimbursement of non-EEA nationals is permitted when they move from Iceland.

<sup>20</sup> Periods considered as non-existent.

<sup>21</sup> For pensioners who are non-nationals living outside the EU.

<sup>22</sup> Periods considered as non-existent.

	Yes/No	Reimbursement on claim / ex officio	Communication towards other MS of theoretical periods
<b>LU</b>	Yes <sup>23</sup>	Upon request	No <sup>24</sup>
<b>LV</b>	Yes <sup>25</sup>	Upon request	No <sup>26</sup>
<b>MT</b>	No	N/A	N/A
<b>NL</b>	No	N/A	N/A
<b>NO</b>	No	N/A	N/A
<b>PL</b>	No	N/A	N/A
<b>PT</b>	Yes <sup>27</sup>	Upon request	No <sup>28</sup>
<b>RO</b>	No	N/A	N/A
<b>SE</b>	No	N/A	N/A
<b>SI</b>	No	N/A	N/A
<b>SK</b>	No	N/A	N/A
<b>UK</b>	No	N/A	N/A

### 2.1.2 Brief national data analysis

The information collected at the national level is clear. For most Member States, there is no system of reimbursement of contributions, except if there are undue payments.

However, 11 Member States do have a system of reimbursement. In practice, reimbursement occurs only in rare circumstances, such as when the person has only contributed for a very short period, when the person only started to contribute after a certain age (close to retirement age) or when the person is not entitled to a pension. More unusual situations do exist, such as when there is an overlap of several circumstances, for instance when a person is permanently incapacitated without having fulfilled the minimum period of contribution.

The first common denominator between Member States that provide a mechanism of reimbursement of contributions is that it is based on a claim by the contributor. No reimbursement is made *ex officio*. More importantly, the second denominator is that, for all of these Member States, the periods for which the contributions are reimbursed are considered as non-existent. As a result, they are not communicated.<sup>29</sup> In practice, some

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<sup>23</sup> If a person who is 65 years old does not have of at least 120 months of insurance in terms of the old-age pension regime and if he/she does not qualify in Luxembourg or abroad for pension benefits on the basis of the period concerned.

<sup>24</sup> Periods considered as non-existent.

<sup>25</sup> Persons who have joined the state pension insurance scheme voluntarily have a legal right to be refunded for their contributions only if, after reaching pensionable age, they are not entitled to a pension because they have not met the minimum period of insurance of 15 years for a pension.

<sup>26</sup> Periods considered as non-existent. No reimbursement cases whereby another Member State pension is involved have been identified to date.

<sup>27</sup> There are three circumstances here: 1) when the beneficiaries find themselves in a situation of permanent incapacity and have not met the minimum period of contribution to claim invalidity pension (three years); 2) when the beneficiaries are 70 years old and have not met the minimum period of contributions to claim a pension (15 years).

<sup>28</sup> Periods considered as non-existent.

<sup>29</sup> For example, in Luxembourg.

Member States that apply a system of reimbursement underscored the fact that their social security institutions have never encountered a case in which the issue of communicating those periods to other Member States has arisen.<sup>30</sup> Iceland is the only Member State that communicates such periods, but paradoxically, Iceland classifies them as non-existent.

## 2.2 Lump sum payment of pensions

### 2.2.1 Are lump sum payments of pensions envisaged?

The table below provides an overview of the situation in the 32 Member States .

Table 2: Lump sum payments: national overview

	Yes/No	Payment on claim/ <i>ex officio</i>	Assessment of potential disadvantages for third persons/institutions	Pensioner or not?
<b>AT</b>	Yes <sup>31</sup>	<i>Ex officio</i>	No	No
<b>BE</b>	No	N/A	N/A	N/A
<b>BG</b>	Yes <sup>32</sup>	On claim	No	Yes <sup>33</sup>
<b>CH</b>	Yes <sup>34</sup>	On claim	No	N/A
<b>CY</b>	Yes <sup>35</sup>	On claim	No	Yes
<b>CZ</b>	No	N/A	N/A	N/A
<b>DE</b>	No	N/A	N/A	N/A
<b>DK</b>	Yes <sup>36</sup>	<i>Ex officio</i>	No <sup>37</sup>	-
<b>EE</b>	No	N/A	N/A	N/A
<b>EL</b>	No	N/A	N/A	N/A
<b>ES</b>	Yes <sup>38</sup>	On claim	No	N/A
<b>FI</b>	Yes <sup>39</sup>	<i>Ex officio</i> <sup>40</sup>	No	Yes <sup>41</sup>
<b>FR</b>	No	N/A	N/A	N/A

<sup>30</sup> France and Latvia.

<sup>31</sup> Only possible for survivors' pensions and limited to remarriage.

<sup>32</sup> Only as regards the complementary pension insurance – obligatory and voluntary (second and third pillar).

<sup>33</sup> As this person receives a pension under the basic pension insurance.

<sup>34</sup> In accordance with certain bilateral social security agreements, for example, between Switzerland and Canada, a person may request a lump sum if the pension represents less than 10% of a regular pension.

<sup>35</sup> A lump sum is paid at the age of 68 to persons who have not met the insurance conditions to be granted a statutory pension.

<sup>36</sup> For the supplementary pension scheme under certain conditions (if the pension is sufficiently low enough).

<sup>37</sup> It is of no importance for this calculation whether the Union citizen received a lump sum from the other Member State equivalent to this period.

<sup>38</sup> In the event of partial/total permanent incapacity.

<sup>39</sup> If the pension, survivors' pension or full disability pension amounts to less than EUR 20 (EUR 27.82 ind. year 2018) per month.

<sup>40</sup> The lump sum may be paid *ex officio* if the pension amounts to less than EUR 20 per month, or to at least EUR 20 (EUR 27.82 ind. year 2018) per month but a maximum of EUR 50 (EUR 69.55 ind. year 2018). The pension provider may pay the pension as a lump sum if the pension recipient has been informed of the payment of the pension as a lump sum and the pension recipient has not objected to this within a reasonable time frame, as notified by the pension provider.

<sup>41</sup> Finland considers that such a person is a pensioner by virtue of Article 1(w) of Regulation (EC) No 883/2004.

	Yes/No	Payment on claim/ <i>ex officio</i>	Assessment of potential disadvantages for third persons/institutions	Pensioner or not?
<b>HR</b>	No	N/A	N/A	N/A
<b>HU</b>	No <sup>42</sup>	N/A	N/A	N/A
<b>IE</b>	No	N/A	N/A	N/A
<b>IS</b>	No	N/A	N/A	N/A
<b>IT</b>	No	N/A	N/A	N/A
<b>LI</b>	No <sup>43</sup>	N/A	N/A	N/A
<b>LT</b>	No	N/A	N/A	N/A
<b>LU</b>	No	N/A	N/A	N/A
<b>LV</b>	No	N/A	N/A	N/A
<b>MT</b>	No	N/A	N/A	N/A
<b>NL</b>	No	N/A	N/A	N/A
<b>NO</b>	No	N/A	N/A	N/A
<b>PL</b>	No	N/A	N/A	N/A
<b>PT</b>	No	N/A	N/A	N/A
<b>RO</b>	No	N/A	N/A	N/A
<b>SE</b>	No	N/A	N/A	N/A
<b>SI</b>	Yes <sup>44</sup>	On claim	No	No
<b>SK</b>	No	N/A	N/A	N/A
<b>UK</b>	No	N/A	N/A	N/A

## 2.2.2 Brief national data analysis

The information collected at the national level is also clear here. Regarding pension schemes falling within the scope of Regulation (EC) No 883/2004, most Member States ignore the system of lump sum pensions. Eight Member States apply such a one-off payment, and it is only in very specific circumstances that this system is implemented. It is e.g. limited to cases of remarriage,<sup>45</sup> to pensioners in a state of incapacity,<sup>46</sup> to certain civil servants<sup>47</sup> or to second/third pillar pension schemes.<sup>48</sup> Unsurprisingly, the low amount of pension or the absence of entitlement owing to low contributions may explain why a lump sum payment is chosen above a traditional pension.<sup>49</sup>

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<sup>42</sup> A lump sum pension applies for the second pillar private pension scheme.

<sup>43</sup> A lump sum pension applies for the second pillar private pension scheme.

<sup>44</sup> Lump sum payments of funds accumulated under the mandatory additional pension insurance (occupational pension insurance, outside the scope of Regulation (EC) No 883/2004) are possible. Special rules may also apply to soldiers and police officers.

<sup>45</sup> Austria.

<sup>46</sup> Spain.

<sup>47</sup> Slovenia.

<sup>48</sup> Bulgaria.

<sup>49</sup> Cyprus, Denmark, Finland and Switzerland.

As regards the question of whether the lump sum payment is made *ex officio* or upon request, the eight Member States applying lump sum payments are divided. In Denmark, Austria and Finland, the lump sum payment is made automatically when certain conditions are met, whereas this is not the case in Bulgaria, Cyprus, Slovenia, Spain and Switzerland, where the lump sum payment is made upon request.

As regards whether lump sum payment beneficiaries are considered pensioners, the answer is affirmative in Cyprus and Finland.<sup>50</sup> The explanation given by the Finnish authorities is worth noting, as Finland considers that such a person is a pensioner by virtue of Article 1(w) of Regulation (EC) No 883/2004.

None of the eight Member States applying lump sum payments stated that the competent institution evaluated the possible disadvantages for a third person or for other institutions (national or from another Member State) before issuing the lump sum pension.

As shown in the national data, lump sum pensions are unusual. In Cyprus, 6 248 insured persons received a statutory pension (old-age pension) in 2017, while 144 persons received a lump sum payment for a statutory pension (old-age pension). In Finland, 5 217 decisions were made in 2017 on lump sum payments. This is a small number compared to the number of all new pension decisions: the number of new pensioners is approximately 80 000 per year. In Spain, the budget line for lump sum payments in 2017 was 0.035% of the overall budget for pensions. In Slovenia, the number of lump sum pensions claimed is also very low; the frequency of such requests generally amounts to less than 0.1%.

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<sup>50</sup> It is also affirmative in Bulgaria, as Bulgarian nationals are entitled to a first pillar pension.

## 2.3 Waiver of pensions

### 2.3.1 Is waiver of pensions envisaged?

The table below provides an overview of the situation in the 32 Member States.

Table 3: waiver of pensions: national overview

	Yes/No	Compulsory waiving by competent institution	Pensioner
<b>AT</b>	Yes <sup>51</sup>	Not compulsory <sup>52</sup>	No <sup>53</sup>
<b>BE</b>	No	N/A	N/A
<b>BG</b>	Yes <sup>54</sup>	Compulsory	Unclear <sup>55</sup>
<b>CH</b>	Yes	Not compulsory <sup>56</sup>	No <sup>57</sup>
<b>CY</b>	No	N/A	N/A
<b>CZ</b>	No	N/A	N/A
<b>DE</b>	No	N/A	N/A
<b>DK</b>	Yes	Compulsory	N/A <sup>58</sup>
<b>EE</b>	Yes	Not compulsory <sup>59</sup>	Unclear
<b>EL</b>	No	N/A	N/A
<b>ES</b>	No	N/A	N/A
<b>FI</b>	Yes <sup>60</sup>	N/A	No
<b>FR</b>	Yes <sup>61</sup>	N/A	No
<b>HR</b>	No	N/A	N/A
<b>HU</b>	No <sup>62</sup>	N/A	N/A
<b>IE</b>	No	N/A	N/A
<b>IS</b>	Yes	Compulsory	Unclear <sup>63</sup>

<sup>51</sup> Only for public servants.

<sup>52</sup> Margin of discretion by competent institution.

<sup>53</sup> The fact that a person is entitled to a pension is not sufficient, receipt of the benefit is essential.

<sup>54</sup> The pension is suspended in the following circumstance: at the individual's request; if the pensioner has not claimed their pension for more than six months; if it is not required to be paid and is of a more unfavourable amount.

<sup>55</sup> Bulgarian legislation does not explicitly regulate the legal status of a person with suspended pension payments.

<sup>56</sup> The institution must evaluate the potential disadvantage for third parties.

<sup>57</sup> However, if he/she receives a pension from the complimentary pension scheme, he/she should be considered as a pensioner.

<sup>58</sup> Rights mainly depend on residence.

<sup>59</sup> The institution has to assess whether the waiver application is reasoned.

<sup>60</sup> During the period of time that it is still possible to appeal against the decision. The period for appeal is 30 days from the date when the party involved was served the pension provider's decision. However, the pension recipient may, per application, cancel the partial pension within three months of it having been granted.

<sup>61</sup> He/she may renounce their pension when he/she can challenge the decision before the courts.

<sup>62</sup> Deferment of pension is possible.

<sup>63</sup> In accordance with Icelandic social security law, a person needs to receive allowances in order to be regarded as a pensioner, but sometimes a person can be considered a pensioner (when over 67 years old) and not receiving any allowances.

	Yes/No	Compulsory waiving by competent institution	Pensioner
<b>IT</b>	No	N/A	N/A
<b>LI</b>	Unclear	Unclear	Yes <sup>64</sup>
<b>LT</b>	Unclear	Unclear	Unclear
<b>LU</b>	No	N/A	N/A
<b>LV</b>	Yes	Compulsory	Unclear
<b>MT</b>	Unclear <sup>65</sup>	Not compulsory	No <sup>66</sup>
<b>NL</b>	Unclear	Not compulsory	Yes <sup>67</sup>
<b>NO</b>	Yes <sup>68</sup>	Compulsory	N/A
<b>PL</b>	No	N/A	N/A
<b>PT</b>	No	N/A	N/A
<b>RO</b>	No	N/A	N/A
<b>SE</b>	No <sup>69</sup>	N/A	N/A
<b>SI</b>	No	N/A	N/A
<b>SK</b>	Yes <sup>70</sup>	Compulsory	No
<b>UK</b>	No <sup>71</sup>	N/A	N/A

### 2.3.2 Brief national data analysis

Most Member States ignore the system of waiving a pension.

In 11 Member States, this right is clearly provided to pensioners. The right to waive a pension is usually granted under strict conditions. It may be reserved for certain categories of insured persons<sup>72</sup> or specific cases.<sup>73</sup> The waiving request may also have to be presented within a short period of time after the pension is claimed.<sup>74</sup> In some rare cases, such as Switzerland, the waiving of a pension is unconditional and applies to everyone, but the

<sup>64</sup> If he/she receives a pension from the supplementary scheme.

<sup>65</sup> The Maltese Social Security Act does not contain any explicit provision for waiver of pensions. Any such requests are evaluated on a case-by-case basis.

<sup>66</sup> In general, if a person refuses pension entitlement, the status of pensioner is revoked accordingly. However, the pension amount to which the person would have been entitled at the time of the withdrawal of the pension would still be recorded and taken into account, if as a result, the person would be benefiting from an unintended advantage following the withdrawal of such pension.

<sup>67</sup> A person who has applied for a waiver will not be considered a pensioner for the purposes of Title III, Chapter 1, Part 2 of Regulation (EC) No 883/2004 by the competent Dutch healthcare institutions.

<sup>68</sup> In one specific situation: a married pensioner may waive his or her right to a pension for the spouse to receive a supplement to his or her own pension.

<sup>69</sup> Pension deferment is applicable.

<sup>70</sup> Payment of the pension may be stopped at the request of the pensioner no later than the payment of that pension payable in the third calendar month following the calendar month in which the pensioner's application was received by Sociálna poisťovňa (Social Insurance Agency).

<sup>71</sup> A non-time-limited deferment mechanism applies.

<sup>72</sup> Public servants only (Austria).

<sup>73</sup> For example, in Norway, a married pensioner may waive his or her right to an old-age pension for the spouse to receive a supplement to his or her own pension.

<sup>74</sup> France and Finland.

competent institution may have the right to assess the potential disadvantage for third parties. In Member States that apply the right to waive a pension, the institution is either obliged to accept the request or the institution is granted a margin of discretion. No obvious trend between the two options is apparent. However, it is unusual for an evaluation of potential disadvantages for third parties to be included in the justification of such a decision. The waiving of a pension may be reversible.<sup>75</sup>

In four Member States, the existence of a waiving right is unclear, either because there is no provision specifying such a right or there is no provision forbidding it. In those cases, requests for waiver of pension are admissible, but they are not systematically accepted by the competent institution. The lack of domestic regulation could be an obstacle in cases in which persons requesting a waiver are in a European cross-border situation.

In addition, it must be remembered that most Member States allow for the deferment of a pension.<sup>76</sup> By delaying the payment of the pension, the insured person (who continues working while possibly receiving a pension from another Member State) may, in some cases, legitimately increase the pension amount in that country. However, deferment can never lead to a change in healthcare cover, for example.

It should also be remembered that it remains possible for a person who was insured as part of an old-age pension scheme to decide not to claim a pension. No one should be forced to claim a pension. To put this in other words, the payment of a pension is based exclusively on a claim by the insured person.

## 2.4 Intermediate conclusions

It appears from the national replies that in most Member States, there is no system of reimbursement of contributions; a clear majority of Member States ignore the system of a lump sum payment of pensions, and most prefer the waiver system, even if it is applicable in less than half of the Member States. Where applicable, the 'non-receipt' mechanisms are usually subject to strict conditions (see table 4 below for an overview).

For those Member States in which at least one of these systems is applicable, the number of persons who have recourse to them (or must use them *ex officio*) appears to be small. This can be explained by the limitations imposed by each country.

This does raise the question of the degree of choice left to pensioners. The reimbursement of contributions is at the person's request. For a lump sum payment, a person may have a choice (between a lump sum and a periodic pension) or may be obliged to receive a lump sum. A waiver of pensions always takes effect at the person's initiative. Finally, the national replies show that domestic rules may be unclear, and it is not always certain whether there is a right to waive. The lack of crystal-clear national regulation makes it difficult to precisely know which solutions apply.

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<sup>75</sup> In Bulgaria, a waived pension can resume following a written request by the pensioner.

<sup>76</sup> For an accurate comparative view, Missoc Tables: [www.missoc.org](http://www.missoc.org), (see: "View the comparative tables">"VI. Old age">"Benefits">"12. Deferment").

Table 4: Reimbursement of contributions, lump sum payment, waiver of pension: national overview

	Reimbursement of contributions	Lump sum payment	Waiver of pensions
<b>AT</b>	No	Yes	Yes
<b>BE</b>	No	No	No
<b>BG</b>	No	Yes	Yes
<b>CH</b>	No	Yes	Yes
<b>CY</b>	Yes	Yes	No
<b>CZ</b>	No	No	No
<b>DE</b>	Yes	No	No
<b>DK</b>	No	Yes	Yes
<b>EE</b>	No	No	Yes
<b>EL</b>	No	No	No
<b>ES</b>	No	Yes	No
<b>FI</b>	No	Yes	Yes
<b>FR</b>	Yes	No	Yes
<b>HR</b>	No	No	No
<b>HU</b>	No	No	No
<b>IE</b>	Yes	No	No
<b>IS</b>	Yes	No	Yes
<b>IT</b>	No	No	No
<b>LI</b>	Yes	No	Unclear
<b>LT</b>	Yes	No	Unclear
<b>LU</b>	Yes	No	No
<b>LV</b>	Yes	No	Yes
<b>MT</b>	No	No	Unclear
<b>NL</b>	No	No	Unclear
<b>NO</b>	No	No	Yes
<b>PL</b>	No	No	No
<b>PT</b>	Yes	No	No
<b>RO</b>	No	No	No
<b>SE</b>	No	No	No
<b>SI</b>	No	Yes	No
<b>SK</b>	No	No	Yes
<b>UK</b>	No	No	No

### 3. CONSEQUENCES IN SPECIFIC AREAS OF THE COORDINATION OF SOCIAL SECURITY SCHEMES AND POSSIBLE SOLUTIONS

#### 3.1 Introductory remarks

In this section, the problems and questions briefly outlined in the introductory section of this report (**section 1.2. – Legal issues and concrete examples**) will be analysed further in order to provide a more comprehensive picture. These issues will be discussed in the context of numerous practical situations in which reimbursement of contributions, lump sum payments or waiver of pensions could have an impact on other social security rights of the persons concerned. Where necessary, this section will also distinguish between situations in which the person has a choice under applicable legislation and those situations that are a consequence of the national legislation that applies *ex officio*.

Although they are similar in some respects, the situations discussed cannot be solved using solutions that would be effective in each case examined. For this reason, proposals that provide specific suitable answers to the various issues raised were chosen. It was therefore also necessary, in all cases, to strike a balance between the protection of the persons concerned, their freedom of choice and the interests of the competent institutions of the Member States.

In accordance with the TFEU, every Member State is free to establish its own social security system.<sup>77</sup> Therefore, the questions of whether, and under what circumstances, the legislation of a Member State allows for or even provides for automatic lump sum payments, reimbursement of contributions or waiver of pensions must be set by every Member State, taking into account the aims of each State's social policy. The analysis of the national experts' replies to the questionnaire show the various solutions implemented by Member States.

It may become problematic when these national solutions have cross-border implications and an impact on another Member State. This is especially so when such national solutions influence the application of Regulations (EC) Nos 883/2004 and 987/2009, by hindering one or more Member States in applying their own provisions or by obliging them to grant benefits that they would not have to pay otherwise. These aspects should be the subject of further discussion.

The issues analysed in this report (reimbursement of pension contributions, lump sum payment of pensions and waiver of pensions, otherwise known as 'non-receipt' of a pension) will be analysed in detail for each of the situations in which they may have consequences in accordance with Regulation (EC) No 883/2004.

Firstly, aggregation of periods by another Member State could be affected if the periods of insurance are deleted and therefore no longer available to other Member States. Secondly, the fact that a person does not receive a periodic pension payment from one Member State could have an impact on another Member State. This is the case if the national legislation or the coordination Regulations refer to pensions from another Member State that have an influence on certain rights provided for under the legislation of that Member State.

The 'non-receipt' of a pension will be analysed in the context of healthcare benefits for pensioners, as this is a good example to illustrate what is at stake. Many of the issues discussed in the context of healthcare will also apply for other social security branches.

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<sup>77</sup> Out of many CJEU rulings: Judgment of 5 October 1994, van Munster, C-165/91, EU:C:1994:359, paragraph 18.

Therefore, reference will be made to general explanations, and additional clarification will only be provided, if necessary, as regards those minimum benefits granted in accordance with Article 58 of Regulation (EC) No 883/2004, SNCBs in cash and family benefits

All of the situations given will not solely be analysed from a theoretical perspective, but will also be based on the national experts' replies to part D of the questionnaire. The national experts were of the opinion that not all of these situations were clear, and that additional clarification was necessary. Such additional clarification would be relevant for all national authorities and therefore should be made at EU level, for instance, through non-binding acts such as decisions of the Administrative Commission. The report proposes such elements of clarification as recommended solutions. The national experts also underscored the lack of national and international case-law on these issues and the fact that there is almost no academic debate or relevant research. Furthermore, some national experts stated that these questions could not be answered based on national legislation alone, and further details on how national administrative systems function were needed, which were, in some cases, very difficult to obtain.

Potential solutions will necessitate enhanced cooperation between the institutions of Member States. Some experts<sup>78</sup> pointed to the significant practical problems that would occur if a person waived only a specific payment of the pension, then started to receive it, and subsequently waived it again. If this is possible under the national legislation concerned, this could amount to a significant administrative problem for the Member States concerned.

The replies from the national experts also show the need for further analysis on certain aspects that might be considered as problematic under applicable EU principles, such as national practices that stipulate that only their own nationals are entitled to benefits or that only pensions from the Member State concerned allow for entitlement (to SNCBs and not the corresponding benefits from another Member State, for example). These aspects will not be discussed in this report, but may be the subject of further examination, especially when citizens have complained about such practices.

## **3.2 Additional elements to be considered**

### **3.2.1 Elements relating to reimbursement of contributions**

It must be emphasised that, currently, only 11 Member States<sup>79</sup> provide for a system of reimbursement. For most Member States<sup>80</sup>, reimbursement is only granted under certain circumstances, for example, when the person concerned has only contributed for a very short period, started to contribute after a certain age (close to retirement age) and/or is not entitled to a pension.

In the past, reimbursement of contributions may have been a common practice applied by some Member States, for example, for nationals of Member States that were not members of the European Communities when they decided to leave the Member State concerned.<sup>81</sup> These persons, considered as non-EU nationals, were excluded from the personal scope of the coordination Regulations. However, some of these States later acceded to the European Union (EU) and, therefore their nationals, who had previously received a reimbursement

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<sup>78</sup> Estonia, Hungary, Iceland, Italy.

<sup>79</sup> Cyprus, Denmark, France, Iceland, Latvia, Liechtenstein, Lithuania, Ireland, Luxembourg, Portugal and Switzerland. See above points 2.1.1 and 2.1.2.

<sup>80</sup> Except for Cyprus and Lithuania. The other nine countries reported specific situations in which reimbursement can take place (for further details, see the footnotes to the countries concerned in Table 1).

<sup>81</sup> Such rules were contained in German legislation, for example. Another example might be the reimbursement of the contributions for women when they married, as previously was the case under Austrian legislation.

of contributions, cannot enjoy the aggregation of the periods of insurance completed in Member States in which they were employed when claiming their pension rights. Consequently, a situation in the past, when Union law was not applicable, may have a significant impact in the present, when Union law is applicable. This has special relevance considering that, in principle, periods also completed in a Member State before accession must be considered for aggregation (Article 87(2) of Regulation (EC) No 883/2004).

### 3.2.1.1 Reimbursement of contributions under Regulation (EEC) No 1408/71

Before analysing the consequences of reimbursing contributions, it is necessary to discuss those situations in which reimbursement is possible in accordance with applicable legal principles and in particular to estimate the number of cases in which this might be of relevance. In this regard, the effect of Union law will firstly be examined.

As a part of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community<sup>82</sup>, attempts were made to avoid the negative consequences of national legislation allowing for reimbursement of contributions in cross-border situations: '[w]here under the legislation of a Member State reimbursement of contributions is conditional upon the person concerned having ceased to be subject to compulsory insurance, this condition shall not be considered satisfied as long as the person concerned is subject to compulsory insurance as a worker under the legislation of another Member State' (Article 10(2)). As a result, this provision ensured that contributions were not reimbursed for cases in which a change from one job to another in a purely national situation would not have created a right to reimbursement. This is also the only provision in relation to which the CJEU has had to consider the reimbursement of contributions.

In the case *Gerda Jansen*<sup>83</sup> (as regards Regulation (EEC) Nos 3 and 1408/71), the CJEU was confronted with an issue relating to reimbursement of contributions in a Member State when the person concerned had been subject to a social security requirement in another Member State.

Regulation (EEC) No 3 did not contain a provision similar to Article 10(2) of Regulation (EEC) No 1408/71. However, it is worth analysing certain considerations of the CJEU that are still applicable:

*In substance, these ... questions are directed at ascertaining whether a right to reimbursement of social security contributions conferred by national legislation on former members, when they satisfy all the conditions stipulated by law for that purpose, can be restricted on the basis of the objectives pursued by the Community rules, even against the wish of the persons concerned, with a view to maintaining any rights in the process of being created, which could be realised later through the operation of the aggregation rule referred to in Article 51 of the Treaty and put into effect by Regulations No 3 and No 1408/71.*<sup>84</sup>

In this ruling, the CJEU examined the most significant elements and problems of reimbursing contributions: the protection of the persons concerned, the freedom of choice, the need for a concrete provision and the aggregation of periods. The CJEU held the view that:

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<sup>82</sup> OJ L 149, 5.7.1971, p. 2-50.

<sup>83</sup> Judgment of 5 May 1977, *Jansen*, C-104/76, EU:C:1977:72.

<sup>84</sup> Judgment of 5 May 1977, *Jansen*, C-104/76, EU:C:1977:72, paragraph 11.

*Although those provisions ensure that, for the purpose of acquiring and retaining the right to benefit, migrant workers enjoy aggregation of all periods taken into account under the law of the several countries, they cannot however be interpreted, in the absence of express provisions, as preventing persons so favoured from exercising the legal options open to them under the legislation of one or other of the Member States, such as the right of applying in certain circumstances for the reimbursement of social security contributions.*<sup>85</sup>

The opinion (in the same case) of Advocate General Reischl is also significant:

*Thus Article 27 is intended to protect workers who exercise freedom of movement from suffering disadvantages. Although it must be acknowledged that the termination of insurance which reimbursement entails can be described as a disadvantage, the decisive fact is that under German law this is not a necessary legal consequence but depends upon the unfettered decision of the person concerned. In fact, it is almost impossible to say that the protective purpose of Article 27 is so far-reaching that insured persons are intended to be protected from the disadvantageous consequences of their own freely-made decisions. If national law permits the reimbursement of contributions it cannot be deduced from Article 27 of Regulation No 3 that there is an obligation to **maintain acquired rights**.*<sup>86</sup>

However, although not as relevant for the scope of this report, the ruling handed down in the case of *Leguaye-Neelsen v Bundesversicherungsanstalt für Angestellte*<sup>87</sup> on the application of German legislation is also applicable. In this case, the CJEU ruled that:

*... Articles 3, 9, 10(2) and 13(2)(d) of Council Regulation (EEC) No 1408/71 do not preclude legislation of a Member State which, whilst providing for the reimbursement of contributions paid by an employee to a compulsory insurance scheme in the event of affiliation to the special social insurance scheme for civil servants in that State, excludes such reimbursement where the employee enters the public administration in another Member State.*

### 3.2.1.2 Reimbursement of contributions under Regulation (EC) No 883/2004

In accordance with Regulation (EC) No 883/2004, a rule corresponding to Article 10(2) of Regulation (EEC) No 1408/71 was no longer necessary as this principle could be considered as covered by the general provision on assimilation of facts (Article 5(b)), whereby a compulsory insurance scheme in another Member State must be treated as a compulsory insurance scheme in the Member State that applies that rule<sup>88</sup>. Taking this principle into account, the number of cases in which reimbursement of contributions under Union law is permitted, might fall. Nevertheless, such cases cannot be totally excluded. Reimbursement remains possible whenever under the relevant national legislation, in comparable and solely national situations, it is not excluded. As a result, assimilation of facts cannot hinder reimbursement. In this regard, legislation may provide for reimbursement of contributions in cases in which the person concerned has completed short periods of insurance. In such scenarios, Article 5 of Regulation (EC) No 883/2004 cannot be applied to solve the problem.

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<sup>85</sup> Judgment of 5 May 1977, *Jansen*, C-104/76, EU:C:1977:72, paragraph 12.

<sup>86</sup> Opinion of Mr Advocate General Reischl of 31 March 1977, *Jansen*, C-104/76, EU:C:1977:62, paragraph 2(a).

<sup>87</sup> Judgment of 16 December 1993, *Leguaye-Neelsen v Bundesversicherungsanstalt für Angestellte*, C-28/92, EU:C:1993:942.

<sup>88</sup> An aspect which we do not want to discuss further in this context: Is it necessary for the application of this principle that there has to be a switch between compulsory insurances without any period in between or if – taking into account the specificities of cross-border situations – also short periods in between without such a compulsory insurance would not be harmful, as the CJEU has ruled in relation to insurance clauses in case C-482/93, *Klaus*, EU:C:1995:349, paragraph 28.

### 3.2.2 The person's will in the 'non-receipt' process

When analysing the different situations one should also consider whether the person concerned is able to choose and what the reasons for making such a choice might be. National legislation on lump sum payments differs as to the initiator of these benefits, and two different categories of legislation can be defined, and which may also have an impact on the recommendations made: 1) legislation that allows for a choice to be made; and 2) legislation where no choice exists. In the first case, the person concerned can decide whether they wish to receive a periodic pension payment, and in the second case, national legislation sets the conditions under which reimbursement of contributions or lump sum payments must take place and acts *ex officio*. The consequences or the possible responsibilities in either case could sometimes be considered as different, at least theoretically.

Waiving a pension must be understood as a decision by the pensioner, once their entitlement has been determined. As a result, in these cases, it is always an option for the person concerned, and it is not an *ex officio* solution.

Throughout this report, if reference is made to waiving a pension, it should be read as referring also to cases in which no claim is made, as the consequences may be comparable.

Not receiving a pension must be considered at face value as a disadvantage, but this could be counterbalanced by higher advantages through other benefits (as will be discussed later in those sections detailing different social security benefits). As a result, the report not only focuses on the waiver of pensions in the strictest sense, but also includes cases of not claiming (or deferring) pension entitlement.

Regulation (EC) No 883/2004 explicitly addresses the consequences of deferring a pension (see Article 50(1)). The intention of this Article was to avoid cases in which a person who is still gainfully active would be hindered from claiming a pension in one Member State and from deferring the pension in another Member State, either because: he/she simultaneously exercises a gainful activity in a Member State whose legislation does not allow for the receipt of the pension, in addition to exercising a gainful activity; because such a deferment increases the pension amount; or for other reasons.

The possibility of deferring a pension must be incorporated either explicitly or implicitly into national legislation. However, this does raise the question of whether the Regulation also allows for 'deferment' in the sense of not claiming a pension for reasons other than increasing pension entitlement.<sup>89</sup> A definition of deferment is not set out in Article 50(1) of Regulation (EC) No 883/2004, and the Article does not make any reference to the relevance of the person's reasons for doing so. As a result, a similar situation could be faced by those Member States in which a person is entitled to choose between periodic pension payments and a lump sum payment. The reasons behind claiming a lump sum payment or waiving a pension could be to receive benefits granted by another Member State, which would not be granted if the person received a periodic pension. For the sake of completeness, it should be noted that 'not claiming' has until now only been addressed by the CJEU predominantly in relation to family benefits. This is relevant as regards to calculating family benefits in accordance with Article 76 of Regulation (EEC) No 1408/71 by the secondarily competent Member State, if no claim has been made in accordance with the legislation of the Member State that is competent by priority. Before the introduction

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<sup>89</sup> If the national legislation does not grant any bonus for persons who do not claim their pension as soon as there is an entitlement; if the period for granting such a bonus has already expired and the person continues nonetheless not to claim their pension; or if the person no longer exercises a gainful activity but, nevertheless, does not want to claim the pension to which he/she would be entitled.

of a specific rule, which will be explained later in this report (see section 3.7– Impact on family benefits), the CJEU ruled that if no such claim has been made, the other Member State has no possibility to deny or reduce its benefits (or take into account the amount of the family benefits not claimed), as claiming a benefit is a prerequisite for benefit entitlement.<sup>90</sup> Such an explicit rule is not provided for in relation to any other benefits covered by Regulation (EC) No 883/2004. As a result, the Regulation does not provide an explicit answer on how to address waiver of pensions and lump sum payments.

In the following sections, we will analyse if, nevertheless, conclusions can be drawn from other overarching principles for cases in which a person has a choice and uses his/her right to choose a lump sum benefit, or a person does not claim a pension in order to receive other benefit advantages from another Member State, which he/she would not be entitled to if he/she received a periodic pension payment.

### 3.2.3 Potential risks of abuse when waiving a pension, in the absence of a pension claim or when claiming a lump sum amount

#### 3.2.3.1 Situations that could be considered as abuse

In this section, abuse should be understood as any intentional act or omission to act in order to obtain or receive social security benefits contrary **to the objectives** of the law of the Member States or of the Regulations, and that can cause unreasonable prejudice to the interests of the competent institutions.

Waiving or not claiming a pension is always a right, therefore, either option is at a person's own initiative. The same might apply to lump sum payments, although there may be various reasons for requesting a lump sum payment over periodic payments. Typical reasons could be to receive a higher one-off amount that is required at a certain period of time, such as buying a property, or to avoid the continuous payment of rather small periodic amounts. However, such a decision could also be to take advantage of other benefits that could be granted if no periodic pension is paid. Sometimes, it is difficult to know exactly why a person has chosen in a particular way. If it is evident from all available facts that the only reason for such a decision, which is not explicitly forbidden by any rule of Union law (especially not by Regulation (EC) No 883/2004), is the intention to benefit from social security benefits of another Member State, the question should be asked of whether this would comply with any overarching principles of Union law. This also begs the question of whether there are possibilities not only to apply the rules as they are currently worded, but also to strike a balance with the ideas and the purpose of these rules and exclude situations that were not planned for when implementing these rules. Furthermore, would it be possible to not only consider the rights of citizens, but also the impact of these rights on other Member States?

Of course, fraudulent behaviour could be an issue that could be used to ignore the choice of the person concerned,<sup>91</sup> but this is not the case in the situations analysed. Even if a person's decision must not in itself be seen as fraud, and the insured person is only using the opportunities provided for by national law, abuse as established by the CJEU may occur. For this reason abuse has been included in the analysis. In the cases and situations analysed in this report, there is a thin line between abuse and the use of legal possibilities, for which there can be no blame. Therefore, this matter is only one issue out of many that must be considered when proposing changes to existing legal provisions or when interpreting these provisions.

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<sup>90</sup> Judgment of 13 November 1984, *Salzano*, C-191/83, EU:C:1984:343.

<sup>91</sup> In accordance with the general principle of *fraus omnia corrumpit*.

In the case *Cadbury Schweppes and Cadbury Schweppes Overseas*, the CJEU ruled that:

*[i]t is true that nationals of a Member State cannot attempt, under cover of the rights created by the Treaty, improperly to circumvent their national legislation. They must not improperly or fraudulently take advantage of provisions of Community law (Case 115/78 *Knors* [1979] ECR 399, paragraph 25; Case C-61/89 *Bouchoucha* [1990] ECR I-3551, paragraph 14; and Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 24).<sup>92</sup>*

Also, in the case *Altun and Others*, the CJEU ruled that:

*[a]ccording to the Court's settled case-law, such considerations must not, however, result in individuals being able to rely on EU law for abusive or fraudulent ends (see, to that effect, judgments of 2 May 1996, *Paletta*, C-206/94, EU:C:1996:182, paragraph 24; of 21 February 2006, *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 68; of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544, paragraph 35; and of 28 July 2016, *Kratzer*, C-423/15, EU:C:2016:604, paragraph 37).<sup>93</sup>*

In the case *Brennet v Paletta*, the CJEU clarified that:

*... the Court has consistently held that Community law cannot be relied on for the purposes of abuse or fraud (see, in particular, regarding freedom to provide services, Case 33/74 *Van Binsbergen v Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299, paragraph 13, and Case C-23/93 *TV10 v Commissariaat voor de Media* [1994] ECR I-4795, paragraph 21; regarding the free movement of goods, Case 229/83 *Leclerc and Others v 'Au Blé Vert' and Others* [1985] ECR 1, paragraph 27; regarding freedom of movement for workers, Case 39/86 *Lair v Universität Hannover* [1988] ECR 3161, paragraph 43; regarding the Common Agricultural Policy, Case C-8/92 *General Milk Products v Hauptzollamt Hamburg-Jonas* [1993] ECR I-779, paragraph 21). Although the national courts may, therefore, take account – on the basis of objective evidence – of abuse or fraudulent conduct on the part of the worker concerned in order, where appropriate, to deny him the benefit of the provisions of Community law on which he seeks to rely, they must nevertheless assess such conduct in the light of the objectives pursued by those provisions.<sup>94</sup>*

The ruling in the case *Kratzer*, the considerations of the CJEU are of particular interest:

*Moreover, according to settled case-law of the Court, EU law cannot be relied on for abusive or fraudulent ends (see judgment of 13 March 2014 in *SICES and Others*, C-155/13, EU:C:2014:145, paragraph 29 and the case-law cited).*

*A finding of an abusive practice requires a combination of objective and subjective elements (see judgment of 13 March 2014 in *SICES and Others*, C-155/13, EU:C:2014:145, paragraph 31).*

*First, with regard to the objective element, such a finding requires that it must be apparent from a combination of objective circumstances that, despite formal observance of the conditions laid down by EU rules, the purpose of those rules has not been achieved (see judgments of 14 December 2000 in *Emsland-Stärke*, C-110/99, EU:C:2000:695,*

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<sup>92</sup> Judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544, paragraph 35.

<sup>93</sup> Judgment of 6 February 2018, *Altun and Others*, C-359/16, EU:C:2018:63, paragraph 48.

<sup>94</sup> Judgment of 2 May 1996, *Brennet v Paletta*, C-206/94, EU:C:1996:182, paragraph 24.

paragraph 52, and of 13 March 2014 in *SICES and Others*, C-155/13, EU:C:2014:145, paragraph 32).

*Second, such a finding requires a subjective element, namely that it must be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain an undue advantage. The prohibition of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of an advantage (see judgments of 21 February 2006 in *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 75; of 22 December 2010 in *Weald Leasing*, C-103/09, EU:C:2010:804, paragraph 30; and of 13 March 2014 in *SICES and Others*, C-155/13, EU:C:2014:145, paragraph 33).*

*In order to establish the existence of the second element, which relates to the intention of operators, account may be taken, in particular, of the purely artificial nature of the transactions concerned (see, to that effect, judgments of 14 December 2000 in *Emsland-Stärke*, C-110/99, EU:C:2000:695, paragraphs 53 and 58; of 21 February 2006 in *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 81; of 21 February 2008 in *Part Service*, C-425/06, EU:C:2008:108, paragraph 62; and of 13 March 2014 in *SICES and Others*, C-155/13, EU:C:2014:145, paragraph 33).<sup>95</sup>*

The consequences of these rulings are clear. Certain choices can be made by individuals in order to take inappropriate advantage of the provisions of Regulation (EC) Nos 883/2004 and 987/2009. Conditions can therefore be artificially created to obtain these advantages, for example, if a pension is waived or not claimed, which under normal circumstances, a person would not do. The objective of these provisions is therefore distorted. Such practices could be considered as abusive. In this regard, it should be pointed out that the coordination Regulations are mandatory for Member States, and the ability of insured persons to circumvent their objectives by being able to elect, to withdraw or to escape from their intended application, cannot be permitted.

### 3.2.3.2 Recommendations

In the light of the above, a common understanding of the notion of ‘abuse’ is recommended. This understanding could be based on the following wording: ‘[a]ny intentional act or omission to act in order to obtain or receive social security benefits contrary to the objectives of the law of the Member States or of the Regulations and that could cause unjustified prejudice to the legitimate interest of the competent institutions.’

## 3.3 Impact on aggregation of periods for pensions

### 3.3.1 Consequences of reimbursement of contributions, lump sum payments or a waiver of pensions on the aggregation of periods

Pension entitlements usually depend on the completion of a certain (often relatively extended) duration of period of insurance.<sup>96</sup> Whenever necessary, periods of insurance completed in another Member State must be aggregated in order to determine entitlement to pensions.<sup>97</sup> The principle of aggregation is not a mere technical detail of coordination

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<sup>95</sup> Judgment of 28 July 2016, *Kratzer*, C-423/15, EU:C:2016:604, paras. 35 to 40.

<sup>96</sup> There are also additional definitions for ‘period of employment’, ‘period of self-employment’ (Article 1(u) of Regulation (EC) No 883/2004) and ‘period of residence’ (Article 1(v) of Regulation (EC) No 883/2004) that could be relevant in this context. However, for simplicity, these definitions are not discussed in this report.

<sup>97</sup> See Article 6 of Regulation (EC) 883/2004 and the special provisions under Article 51 of that Regulation.

under Regulation (EC) No 883/2004, but a fundamental principle that is also enshrined in Article 48 TFEU. As a result, in order to avoid any disadvantage for migrant workers, a Member State that requires, for example, 15 years of insurance before a person is entitled to a pension<sup>98</sup> must also grant a pension when a person has completed, for instance, only 5 years in accordance with that Member State's legislation and 10 years of insurance in another Member State.

For aggregation, the most problematic matter could be the **reimbursement of contributions**, as, in these cases, it is most likely that the periods for which these contributions have been paid are deleted from the registers of the pension insurance institutions and hence no longer exist.

**Lump sum payments** should not result in any difficulties as they are a more traditional form of 'pension' as defined in Article 1(w) of Regulation (EC) No 883/2004. Therefore, the periods on which such a benefit is based, should, in principle, remain in the register of the applicable pension insurance institution. Communicating these periods to the institution of another Member State for the purpose of aggregation should not be an issue for the first institution. If there are cases in which the lump sum payment results in the deletion of relevant periods from the register of the institution, the same solution as regards reimbursing contributions, and possibly others, could be applicable here.

Finally, the **waiver of pensions** should never lead to the deletion of the relevant periods (or at least the relevant information should be given to the person concerned) and, as a result, should not cause any issues in the context of aggregation.

### 3.3.2 Possible solutions for aggregation of periods under the existing legal framework

The most substantial issue is determining the obligations of the Member State that establishes pension entitlement in accordance with its legislation and that applies the principle of aggregation if, in the other Member State, contributions have been reimbursed. This does raise the question of whether this Member State could rely on the information received from the other Member State (and whether there are any periods available owing to the reimbursement and the deletion of specific periods from the register). Alternatively, would this Member State nevertheless have to apply the assimilation of facts rule and decide, on the basis of the available information, whether the periods for which reimbursement has been received would have been classified as periods of insurance in accordance with its legislation as if completed in that Member State?<sup>99</sup> Furthermore, is the Member State that has reimbursed the contributions required to communicate the periods relating to these contributions to the other Member State?

In today's practice, reimbursement of contributions (if it is allowed, considering the principles of Union law) may imply, as a drawback, the possible non-application of the rule of aggregation of periods. In this sense, the answers to the questionnaire are explicit: the common denominator between Member States that offer reimbursement of contributions is that the corresponding periods are considered thereafter as non-existent. Therefore, in order to apply the rule of aggregation of periods, they are generally<sup>100</sup> not communicated to other Member States.

A definition for 'period of insurance' is established in Article 1(t) of Regulation (EC) No 883/2004 as:

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<sup>98</sup> Such as in the case of Austria in order to be entitled to a 'regular' pension.

<sup>99</sup> This could be deduced from the Judgment of 17 September 1997, *Iurlaro v INPS*, C-322/95, EU:C:1997:410, if interpreted broadly.

<sup>100</sup> Except in Iceland.

*... periods of contribution, employment or self-employment as defined or recognised as periods of insurance by the legislation under which they were completed or considered as completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to periods of insurance.*

Moreover, it is stated in Decision No H6 of 16 December 2010 concerning the application of certain principles regarding the aggregation of periods under Article 6 of Regulation (EC) No 883/2004 on the coordination of social security systems that:

*All periods of insurance – be they contributory periods or periods treated as equivalent to insurance periods under national legislation – fulfil the notion of ‘periods of insurance’ for the purposes of applying Regulations (EC) No 883/2004 and (EC) No 987/2009.*

*All periods for the relevant contingency completed under the legislation of another Member State shall be taken into account solely by applying the principle of aggregation of periods as laid down in Articles 6 of Regulation (EC) No 883/2004 and 12 of Regulation (EC) No 987/2009. The principle of aggregation requires that periods communicated by other Member States shall be aggregated without questioning their quality.<sup>101</sup>*

Therefore, it is incumbent on the Member State that allows and accepts the reimbursement of contributions to consider whether the corresponding periods have any value, and to subsequently inform all other Member States involved accordingly. For this reason, based on national legislation, there cannot be a universal solution for all cases and for all Member States, as this would require harmonisation.

That being said, several elements could be considered.

When no aggregation of periods is made possible, it could be possible to consider applying Article 5 of Regulation (EC) No 883/2004 in such a way that the relevant periods for which contributions have been reimbursed must be treated as equivalent periods spent in the Member State that has to apply the aggregation principle. Unfortunately, it appears that this avenue is a dead end, as Recital 10 of Regulation (EC) No 883/2004 offers no possibilities:

*However, the principle of treating certain facts or events occurring in the territory of another Member State as if they had taken place in the territory of the Member State whose legislation is applicable should not interfere with the principle of aggregating periods of insurance, employment, self-employment or residence completed under the legislation of another Member State with those completed under the legislation of the competent Member State. Periods completed under the legislation of another Member State should therefore be taken into account solely by applying the principle of aggregation of periods.*

It should be noted that the CJEU opened up some room for interpretation with the *Gardella*<sup>102</sup> and *My*<sup>103</sup> cases. In the first case, the CJEU ruled that:

*Consequently, a worker such as Mr Gardella, upon reaching retirement age, must be able to request aggregation of his employment periods in Italy with his employment periods with the EPO in order to confer entitlement to an old-age pension.*

*In the light of the foregoing, the answer to the questions referred is that Articles 45 TFEU and 48 TFEU must be interpreted as not precluding rules of a Member State which do not*

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<sup>101</sup> JOC\_2011\_045\_R\_0005\_01.

<sup>102</sup> Judgment of 4 July 2013, *Gardella*, C-233/12, EU:C:2013:449.

<sup>103</sup> Judgment of 16 December 2004, *My*, C-293/03, EU:C:2004:821.

*allow its nationals employed in an international organisation such as the EPO, established in the territory of another Member State, to transfer to the social security scheme of that organisation the capital value representing the pension rights they have acquired previously in the territory of their Member State of origin, where there is no arrangement between that Member State and the international organisation providing for the possibility of such a transfer. However, where a mechanism for transferring the capital value representing the pension rights acquired previously in a Member State to the pension scheme of a new employer in another Member State cannot apply, Article 45 TFEU must be interpreted as precluding rules of a Member State which do not allow account to be taken of employment periods which a European Union national completed with an international organisation such as the EPO, established in the territory of another Member State, for the purposes of conferring entitlement to an old-age pension.*

However, the CJEU also ruled that:

*It is true that Article 48 TFEU provides for the introduction of arrangements to secure for migrant workers the aggregation of periods 'taken into account under the laws of the several countries' and that Article 18 of Regulation No 1408/71, just like Article 6 of Regulation No 883/2004 subsequently, provides that the periods completed under the legislation 'of any other Member State' are to be aggregated; these do not encompass periods relating to employment with the EPO.<sup>104</sup>*

In the second case, the CJEU ruled that:

*Article 10 EC, in conjunction with the Staff Regulations of Officials of the European Communities, must be interpreted as meaning that national legislation which does not permit years of employment completed by a Community citizen in the service of a Community institution to be taken into account for the purposes of entitlement to an early retirement pension under the national scheme is contrary to those provisions'.<sup>105</sup>*

Unfortunately, the extension of this ruling to the consequences of the reimbursement of contributions does not appear to be easy, as the CJEU also underscored that 'Mr My's situation is not covered either by Article 42 EC or by Regulation No 1408/71'<sup>106</sup> and '... is not covered either by Article 39 EC or by Article 7 of Regulation No 1612/68'<sup>107</sup>.

In both cases, the typical aggregation of periods intended in the coordination Regulations was not possible as the claimants were working for an international organisation or the EU institutions. The CJEU opted for a different kind of direct aggregation close to the principle of assimilation. On the contrary, when typical aggregation is possible, the existing provisions must be applied without creating a new form of aggregation that is similar to the assimilation of facts or events. As the reasoning of the CJEU derives directly from the TFEU, these cases can be considered as cases of assimilation owing to the absence of applicable rules on aggregation. However, this does raise the question of whether they could be extended to the present issue.

### 3.3.3 Recommendations

The rulings examined above could be used to achieve a softer interpretation of Recital 10 of Regulation (EC) No 883/2004, but it must be borne in mind that the solution to the problems of reimbursement of contributions must take into account the application of

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<sup>104</sup> Judgment of 4 July 2013, *Gardella*, C-233/12, EU:C:2013:449, paras. 48 and 49.

<sup>105</sup> Judgment of 16 December 2004, *My*, C-293/03, EU:C:2004:821.

<sup>106</sup> Judgment of 16 December 2004, *My*, C-293/03, EU:C:2004:821, paragraph 36.

<sup>107</sup> Paragraph 43.

Article 6 of Regulation (EC) No 883/2004, under which non-existing periods cannot be aggregated. It does not seem appropriate to extend the concept of periods of insurance as set out in Article 1(t) of Regulation (EC) No 883/2004. Periods of insurance depend on the legislation in accordance to which they were completed or considered as completed. If legislation considers them as non-existent as a result of reimbursement of contributions, it does not seem possible for another Member State, in accordance with the Regulations, to apply the rule of aggregation.

However, this does raise the question of whether it is still possible to explore alternative solutions relating to legislation that does admit the reimbursement of contributions, and whether such legislation could **consider these periods as not deleted or eliminated**. This would be at the discretion of Member States, but the below elements and arguments could be considered:

- In the summary judgment of *Vella and Others v Alliance nationale des mutualités chrétiennes*, the CJEU ruled that:

*Article 1(r) of Regulation No 3 and Article 1(r) of Regulation No 1408/71 must be interpreted as meaning that periods treated as periods of insurance are to be determined solely in accordance with the criteria laid down in the national legislation under which those periods were completed, provided that the national legislation observes the provisions of Article 48 to 51 of the Treaty (see the judgment of 6 June 1972 in case *Murru v Caisse régionale d'assurance maladie de Paris* [1972] ECR 334).<sup>108</sup>*

- In some Member States, reimbursement of contributions takes into account the employee's contributions, but not the **employer's contributions**. This could mean that the periods of insurance are not totally deleted and that they still have a certain value. Considering the ruling *Vella and Others v Alliance nationale des mutualités chrétiennes* mentioned above, these Member States should consider the relationship between their national legislation and the TFEU.
- Each national legislation has its own way of treating the reimbursement of contributions and its consequences. A difference could be made between the concept of 'non-existing periods' and the concept of '**no longer existing periods**'.
- **As defined in Article 1(w) of Regulation (EC) No 883/2004**, 'pension' covers not only pensions but also lump sum benefits which can be substituted for them and payments in the form of reimbursement of contributions'. Therefore, it could be considered that reimbursement of contributions is a kind of pension, the amount of which is calculated taking into account the value of these contributions. Reimbursement of contributions is not considered as a pension in most national legislations, but it is classified as a pension under the coordination provisions. When a traditional pension is awarded in a Member State, the periods of insurance are, of course, not deleted. They can be used by another Member State for the application of the rule of aggregation. The coordination provisions must be applied in the same way by all Member States. In any case, under the existing legal framework, those periods to be communicated must be considered as periods of insurance under the national legislation of the Member State concerned<sup>109</sup> (this might be the case in some Member States that provide reimbursement of contributions, but surely not in all). Therefore, relying solely on the definition of

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<sup>108</sup> Judgment of 7 February 1990, *Vella and Others v Alliance nationale des mutualités chrétienne*, C-324/88, EU:C:1990:54.

<sup>109</sup> This might be the case in some Member States that provide reimbursement of contributions, but not in all.

'pension' pursuant to Article 1(w) of Regulation (EC) No 883/2004 would not provide a solution in relation to all Member States.

- If doubts remain on whether the relevant periods for which the contributions have been reimbursed are periods of insurance or not, it may be more logical for the Member States concerned to present a proposal of **clarification to be included in Annex XI of Regulation (EC) No 883/2004**. It is true that this option generally goes against the idea that 'the principle of aggregation requires that periods communicated by other Member States shall be aggregated without questioning their quality'<sup>110</sup>. However, when communicating relevant periods, national authorities cannot act in an arbitrary way. For this reason, a Member State acting differently from the other Member State should provide an explanation, considering that the coordination provisions must be applied uniformly by all national authorities. Moreover, this explanation could help other national authorities to operate in a similar way.

For those cases in which, despite the different possibilities explained above, periods for which reimbursement of contributions took place cannot be considered as periods of insurance for the purposes of aggregation, another solution could be considered: **reimbursement of contributions could be restricted by a common interpretation** in order to avoid, as much as possible, the issues described in the abovementioned paragraphs.

- In this regard, the **application of Article 5 of Regulation (EC) No 883/2004** could be understood as having a broader scope than Article 10(2) of Regulation (EEC) No 1408/71. It is recommendable for the Administrative Commission to analyse the relation of this provision with the reimbursement of contributions. This means that reimbursement of contributions would have to be applied taking into account not only the national situation, but also possible cross-border situations. By way of illustration, if reimbursement is not permitted if entitlement to a national pension has already been given, this prohibition could also be extended to cases of possible foreign pensions. Alternatively, it could be clarified that national legislation that allows for such a reimbursement only if no pension entitlement exists, also excludes reimbursement if pension entitlement is provided for through aggregation of periods completed in another Member State.

A **decision by the Administrative Commission** is recommended in this field, opening up the possibility or the obligation of a process of consultation and mutual information among competent institutions before accepting reimbursement of contributions. Another solution (at least for future cases) could be to oblige Member States that apply reimbursement of contributions to retain the periods of insurance in their registers so that they can communicate them if so requested by the institution of another Member State or to provide the persons concerned with evidence of these periods.

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<sup>110</sup> As clarified by Decision No H6 of the Administrative Commission.

### 3.4 Impact on healthcare benefits

#### 3.4.1 Consequences of reimbursement of contributions, lump sum payments or a waiver of pensions on healthcare benefits

The 'non-receipt' of a pension might have an impact on the Member State that is competent for a person's healthcare coverage.

- Relevant provisions

It is stated in Article 23 of Regulation (EC) No 883/2004 that:

*A person who receives a pension or pensions under the legislation of two or more Member States, of which one is the Member State of residence, and who is entitled to benefits in kind under the legislation of that Member State, shall, with the members of his family, receive such benefits in kind from and at the expense of the institution of the place of residence, as though he were a pensioner whose pension was payable solely under the legislation of that Member State.*

As a result, only the Member State of residence is competent for providing healthcare coverage for a person receiving a pension from the Member State of residence and from another Member State, if there is entitlement to benefits in kind under the legislation of the Member State of residence. The Member State of residence is the only State that is competent to collect contributions for the healthcare coverage of that person (Article 30 of Regulation (EC) No 883/2004) and, usually,<sup>111</sup> is the only State that grants benefits in cash (especially long-term care benefits, see Article 29 of Regulation (EC) No 883/2004).

If this person does not receive a pension from the Member State of residence, the situation changes. It would fall upon the Member State that pays the pension (other than the Member State of residence) that becomes competent for providing healthcare coverage, including the right to collect healthcare contributions and granting benefits in cash.<sup>112</sup>

- Scenarios in which problems may occur

The issue relating to the meaning of 'a pension received under the legislation of a Member State' for the purpose of the sickness, maternity and equivalent paternity benefits chapter is not, from the authors' point of view, relevant as regards **reimbursement of contributions**, as in these cases, there is usually no connection to a pension that could be granted periodically (although the very broad definition of 'pension', pursuant to Article 1(w) of Regulation (EC) No 883/2004, also covers reimbursement of contributions). However, for **lump sum payments and waiver of pensions**, the granting or potential granting of a benefit is relevant for the sickness, maternity and equivalent paternity benefits chapter. These two situations can be referred to as an aspect of 'non-receipt' of a pension.

However, not all 'non-receipt' cases can be addressed in the same way in accordance with the sickness, maternity and equivalent paternity benefits chapter of the Regulation. When there is no right to a pension in the Member State concerned because the conditions set out have not been met, eg. the case of a person who, even after aggregation of periods,

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<sup>111</sup> However, following the Judgment of 30 June 2011, *da Silva Martins*, C-388/08, EU:C:2011:439, long-term care benefits in cash would also have to be granted by another Member State.

<sup>112</sup> Article 24(2)(a) read together with Articles 29 and 30 of Regulation (EC) No 883/2004. For the sake of simplicity, the report does address situations where someone receiving a pension from more than one Member State other than the Member State of residence, and for which one of these Member States is declared competent under Article 24(2)(b) of Regulation (EC) 883/2004.

has no entitlement, the person concerned cannot be considered as receiving a pension for the purpose of this section. If there were to be entitlement, which no longer exists (either, for example, because the person receives a lump sum payment that does not grant coverage by the healthcare system or the person deliberately waives the pension entitlement), two different situations may arise:

1) No periodic pension is granted *ex officio* as a consequence of national legislation. This could be relevant when examining the consequences of 'non-receipt' of a pension.

2) If **the person has a choice** to either receive the pension or to claim a lump sum payment/waive the pension, the justification for such a choice should be analysed. As regards a lump sum payment, it could be considered as more advantageous to receive a one-off amount rather than smaller monthly amounts. In such cases, the justification does not relate to healthcare. However, a person could also choose a lump sum payment in order to benefit from better rights, for example, 'cheaper' healthcare rights under the legislation of another Member State.

- Consequences of choosing for the person concerned

A person could make a choice owing to, for example, the fact that the Member State of residence makes high contribution deductions for healthcare coverage and does not provide for any long-term care benefits in cash. These benefits could also be considerably lower while the other Member State paying a pension makes deductions for low contributions or no contributions<sup>113</sup> for healthcare coverage and/or provides for a highly developed system of long-term care benefits in cash (which are also exportable to any Member State in which a person resides and is covered by the legislation of that Member State<sup>114</sup>).

In the above example, the switch of competence from one Member State to another would immediately result in a total exemption from paying contributions (or a considerable reduction in these contributions) and result in entitlement to long-term care benefits in cash. It would not lead to any disadvantages regarding benefits in kind in the Member State of residence for the person concerned, as they would have to be granted in any case. The other Member State, which continues to pay the pension, would have to reimburse the benefits.<sup>115</sup> It could even lead to additional entitlements, as the person concerned could potentially choose to receive all healthcare benefits either in the Member State of residence or in the other Member State that is competent because of the granting of a pension.<sup>116</sup> This would not be the case if the Member State of residence remained competent for healthcare coverage.<sup>117</sup> As a result, such a decision could result in a more lucrative situation for the person concerned.

As not all Member States have made use of the possibilities for additional rights pursuant to Article 27(2) of Regulation (EC) No 883/2004 (Annex IV), these differences in

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<sup>113</sup> Because the national healthcare service is financed from general taxation, which leads to no contributions having to be paid in that Member State.

<sup>114</sup> See Judgment of 8 March 2001, Jauch, C-215/99, EU:C:2001:139.

<sup>115</sup> Article 24 of Regulation (EC) 883/2004.

<sup>116</sup> When the competent Member State is listed in Annex IV of Regulation (EC) No 883/2004.

<sup>117</sup> For cases in which the Member State of residence is competent pursuant to Article 23 of Regulation (EC) No 883/2004, benefits in kind outside the territory of that Member State can only be granted in cases in which Article 19 of Regulation (EC) No 883/2004 (medical treatment that becomes necessary (with a European Health Insurance Card)), pursuant to Article 27(1) of Regulation (EC) No 883/2004, has been applied.

entitlements could have an impact on the decision of the person concerned. If the pension paid by the Member State of residence is small, the person concerned could decide, for example, to receive a lump sum payment instead of monthly payments, or, if this is not possible in accordance with the legislation of the Member State paying the pension, to waive the pension. As a result, this person would receive only a periodic pension from a Member State other than the Member State of residence, which could be considered as making this other Member State competent.

The following example could serve to further explain these consequences: Member State A has an insurance-based healthcare system under which 5% is deducted from pensions (including pensions from another Member State<sup>118</sup>). Member State B has a tax-financed healthcare system. Member State A does not grant any long-term care benefits in cash, but grants only long-term care benefits in kind. Member State B provides long-term care benefits in cash, for example, EUR 500. If a male pensioner residing in Member State A receives a pension of EUR 50 from that Member State and a pension of EUR 1 950 from Member State B, and the pensioner's wife is in need of long-term care benefits, Member State A would be responsible for providing healthcare coverage and entitled to ask for healthcare contributions amounting to EUR 100 (5% of the total pension amount, i.e. EUR 2 000; the net amount of the pensions would therefore be EUR 1 900). There would be entitlement to long-term care benefits in kind from Member State A, but not to long-term care benefits in cash. If this male pensioner waives his pension from Member State A, and in so doing, Member State B becomes competent, he can expect to receive the same benefits in kind as in Member State A, but would no longer have to pay any healthcare contributions (his net income would only be the pension from Member State B, i.e. EUR 1 950), and his wife would be entitled to a long-term care benefit in cash amounting to EUR 500.<sup>119</sup> As a result, the family income would increase by EUR 550 per month when compared to a pension from Member State A.

Such consequences not only occur when pensions are received from more than one Member State, but also when a person receives a pension from one Member State, other than the State of residence, and the Member State of residence covers all residents against the risk of sickness (national healthcare system). In such a scenario, waiving the pension of one Member State influences competence and, as a result, makes the Member State of residence competent for healthcare coverage,<sup>120</sup> which could be considered as beneficial for the person concerned.<sup>121</sup>

From the perspective of the Member State that becomes competent after such a decision by the person concerned, this could be considered as unfair. If this were not limited, a person could always choose the best benefits or the cheapest coverage, which

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<sup>118</sup> Contributions can be calculated based on the amount of the pension received from another Member State as long as the total amount of contributions does not exceed the pension amount that would be received in accordance with the legislation of the Member State collecting the contributions. See Article 30 of Regulation (EC) 987/2009, and as clarified by Judgment of 21 January 2016, *Knauer*, C-453/14, EU:C:2016:37.

<sup>119</sup> Of course, this Member State could limit the possibility of receiving long-term care benefits in kind in the Member State of residence the same time by applying the anti-overlapping provision pursuant to Article 34 of Regulation (EC) No 882/2004.

<sup>120</sup> The case would change from falling under the scope of Article 25 of Regulation (EC) No 883/2004 to being covered by national legislation (coverage in the Member State that is competent pursuant to Article 11(3)(e) of Regulation (EC) No 883/2004).

<sup>121</sup> However, these cases might not occur that often, as receiving such a small pension from one Member State would raise the question of how the person finances their daily living. It might be the case that the Member State of residence would also have to grant, for example, its long-term care benefits if another Member State is competent for health care coverage in accordance with the principles set out by the CJEU, for example, in Judgment of 20 May 2008, *Bosmann*, C-352/06, EU:C:2008:290. It is therefore difficult to imagine a real situation in which someone would get actively waive their pension from another Member State.

undoubtedly, is not the aim of the Regulations. Furthermore, from the perspective of the Member State that becomes competent, if a person chose a lump sum amount granted *ex officio* instead of a periodic payment, this could have an unfair impact on the national legislation of the other Member State involved. Therefore, from the perspective of the 'burdened' Member State, both situations (the individual's choice or a lump sum granted *ex officio*) have the same negative results. If this situation is considered from the perspective of possible abusive behaviour, the national legislation that allows for a choice to be made by the person concerned would need to be examined further.

- Further aspects to consider under the existing legal framework

The CJEU has only analysed certain aspects of the possibilities of not receiving a pension, owing to an individual's decision or (automatically) losing pension entitlement, and its impact on healthcare coverage. Cases of interest are those in which the applicable persons received a pension, but tried not to use the healthcare coverage that these pensioners would nevertheless be entitled to in accordance with the Regulations. The CJEU ruled that it is not for the insured persons to renounce healthcare coverage.<sup>122</sup> These rulings did not consider cases in which the healthcare coverage was the main issue, but rather cases in which the pension was omitted. It would seem that the CJEU made a distinction between renouncing healthcare coverage and not receiving a pension, and to apply the rules of the Regulations as regards the healthcare entitlements of pensioners only to persons who receive a pension.<sup>123</sup> Several rulings on this issue are examined in the following sections.

Finally, it is also worth mentioning several complex questions of interpretation of the text of Regulation (EC) No 883/2004. Pursuant to the definition given in Article 1(w) of Regulation (EC) No 883/2004, lump sum payments of pensions must be considered as a pension. It is not clear if this definition means, as a consequence, that when this payment is granted, such a person must be considered, for example, as a person receiving pensions from more than one Member State and, as such, Article 23 of Regulation (EC) No 883/2004 having to be applied at that point (in that month). If this understanding is correct, the switch of competence to the other Member State, which is continuously paying its pension pursuant to Article 24 of Regulation (EC) No 883/2004, would only take place after that point (month). However, it could also be argued that a lump sum amount is not just a pension when it is granted, but also in the future, as long as the pension would have been granted instead of the lump sum amount.

- Situation in the different Member States

The answers from the national experts reveal the different directions which today's practice seems to have taken. In some Member States (according to the replies of the questionnaire), a waiver of pensions would not change the competence that would be given with the receipt of all the pensions involved, as the Member State that would pay the pension without the waiver is still considered as competent in accordance with the sickness, maternity and equivalent paternity benefits chapter of Regulation (EC) No 883/2004.<sup>124</sup> Conversely, a larger number of Member States shared the opposite point of view: if no real pension was received from a Member State (for example, because of a waiver), this

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<sup>122</sup> Judgment of 14 October 2010, *van Delft and Others*, C-345/09, EU:C:2010:610.

<sup>123</sup> Judgment of 10 May 2001, *Rundgren*, C-389/99, EU:C:2001:264, paragraph 47. In this case, however, it was argued that no entitlement to a pension was given in Finland, (taking into account the other income of Mr Rundgren) and the collection of contributions was the issue. As a result, this case could be considered different from a case in which an entitlement existed, but was intentionally stopped because of the payment of a lump sum or a waiver of pension.

<sup>124</sup> Austria, Norway and Spain, and possibly Bulgaria, Liechtenstein and Slovenia. Cyprus would continue to ask for reimbursement of healthcare costs in cases of lump sum payments from another Member State.

Member State cannot be taken into account when determining the Member State that is competent for the pensioner's healthcare, also taking into consideration the judgment of the CJEU in the *Rundgren* case,<sup>125</sup> where the relevant element in accordance with the sickness, maternity and equivalent paternity benefits chapter is the 'real' receipt of the pension and not the mere entitlement to a pension.<sup>126</sup> Several national experts went into further detail. In Germany, in the event of lump sum payment of pensions, 1/120 of the lump sum per month is taken into account to calculate the healthcare contributions (as a result, a lump sum amount would be treated as a continued periodical payment of the pension). In the UK, periodic (weekly/monthly) amounts are deducted and taken into account.

For Estonia, Croatia and Finland, lump sum amounts must be considered as a pension pursuant to the definition of 'pension' given in Article 1(w) of Regulation (EC) No 883/2004 and, as a result, must also be considered as a pension in accordance with the sickness, maternity and equivalent paternity benefits chapter. This is not the case if the pension entitlements have been waived. Malta specifies that only lump sum payments that are granted periodically (for example, a single annual payment) must be considered as pensions. In Lithuania, a more practical approach was suggested: it is for the Member State concerned to certify whether the person is considered as a pensioner; this decision has to be accepted by all other Member States.

One national expert (Spain) made an important reference to the right to reside: if a person waives the pension of another Member State and, as a result, is no longer covered by the healthcare system of that Member State, the Member State of residence is only obliged to cover this person by its own healthcare system (if it is a residence-based system), if this person already has a right to reside there (which would be the case for non-active persons in principle after five years of previous residence).

#### 3.4.2 Possible solutions for the impact on sickness benefits under the existing legal framework

The 'non-receipt' of a pension might have an impact on determining which Member State is competent for a person's healthcare coverage. The term 'non-receipt' encompasses waiver of pension or the substitution of a pension with a lump sum.

Regulation (EEC) No 1408/71 uses the term 'entitled' (entitled to draw a pension) in Articles 26, 27 and 28, which are similar in their content, to Articles 22, 23 and 24 of Regulation (EC) No 883/2004. However, the phrasing used in the latter Articles is different, i.e. 'a person who receives a pension', and implies, at least theoretically, the real receipt of a pension in a continuous way.

Moreover, it must be remembered that the pension received in a Member State does not always grant entitlement to benefits in kind in accordance with the legislation of the Member State that grants this pension.

In the *Rundgren* case, the CJEU ruled that:

*The connection thus established under that system between the competence to provide pensions and the obligation to bear the cost of benefits in kind leads to the conclusion that that obligation is incidental to an actual competence in respect of pensions. Therefore, the cost of benefits in kind cannot be borne by the institution of a Member State which has only a hypothetical competence in respect of pensions. It follows that Articles 27, 28 and*

<sup>125</sup> Judgment of 10 May 2001, *Rundgren*, C-389/99, EU:C:2001:264.

<sup>126</sup> Germany, France, Italy, Latvia, Luxembourg, Hungary, Malta, the Netherlands, Poland, Portugal, Slovakia and Sweden.

*28a of Regulation 1408/71, when they refer to a pension payable, are concerned with a pension which is actually paid to the person concerned.*

*That interpretation is borne out by the fact that Article 33(1) of Regulation No 1408/71 provides, in particular, that in cases in which, by virtue of Articles 27, 28 and 28a of the Regulation, the cost of benefits in kind is borne by an institution of a Member State which is responsible for payment of a pension and which administers legislation providing for deductions from pensions in respect of contributions for sickness and maternity borne by the pensioner, that institution 'shall be authorised to make such deductions ... from the pension payable by [it]'. That implies that the pension in question is actually being paid.<sup>127</sup>*

However, this ruling may also be interpreted in a slightly different way, as Mr Rundgren was not entitled to any pensions in Finland, taking into account the amount of his other income. As a result, the situation is not comparable to cases that are relevant for this report, where an existing entitlement was transferred into a lump sum or waived.<sup>128</sup>

If this rather restrictive approach as regards the CJEU ruling in the *Rundgren* case is not followed, then, in accordance with this ruling, and taking into account that the wording 'a person who receives a pension' in Regulation (EC) No 883/2004 is clearer than the term 'entitled' in Regulation (EEC) No 1408/71, the competence for a pensioner's healthcare benefits seems to depend on continuously receiving a pension, without considering fictitious pensions. Therefore, when a pension is waived or a lump sum is paid in a Member State, Articles 23, 24 and 25 of Regulation (EC) No 883/2004 do not make this Member State competent in accordance with the sickness, maternity and equivalent paternity benefits chapter.

### 3.4.3 Recommendations

There are various possibilities to improve the situations outlined in the previous section, which seems to be characterised by a lack of legal certainty and transparency, and as a result, perceived as unfair.

- An option would be **not to change anything** and to reaffirm that only by receiving a pension competence under the sickness, maternity and equivalent paternity benefits chapter of Regulation (EC) No 883/2004 would be triggered. The following observations could lead to this solution: if it is assumed that only small pensions lead to lump sum amounts and a person subsequently waives or does not claim the abovementioned small pension, it must be considered that only a lower number of healthcare contributions have been made in the past in the Member States concerned, because, for example, the gainful activity exercised in the Member State only resulted in the small pension. Therefore, it could be considered as fair, that in such cases, the other Member State (usually paying a much higher pension) must also bear the healthcare costs for the individual, as this Member State has already presumably received more contributions in the past. As a result, only the national institution of the Member State with the longest periods of insurance would be competent to bear the healthcare costs of the person concerned. Taking into account the clear wording of the relevant provisions another result of a waiver of a pension, would necessitate amendments to the text of the Regulations.
- For the other cases of not-receiving a pension which are examined in this report an **interpretative decision of the Administrative Commission** could be recommended. It would have to clarify the fact that a Member State paying a lump

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<sup>127</sup> Judgment of 10 May 2001, *Rundgren*, C-389/99, EU:C:2001:264, paras. 47 and 48.

<sup>128</sup> See footnote 123.

sum amount or even the Member State that reimbursed the contributions must also be considered as a Member State from which a pension is received, taking into account the definition pursuant to Article 1(w) of Regulation (EC) No 883/2004. In this case, the costs of healthcare benefits would continue to be at the expense of this Member State. Further analysis is necessary as regards the contributions that this Member State might be required to deduct from the lump sum or directly from the person concerned, even though he/she does not receive a periodic payment (if the legislation of that Member State provides that healthcare contributions have to be paid by the pensioner to safeguard his/her coverage).

- Even if no legal amendments or non-binding instruments are expected, **closer cooperation and exchange of information** between the institutions are recommended. It could be suggested that before awarding a lump sum or granting the waiver of pension, the competent institution of a Member State should check the existing possible disadvantages for the said institution, considering the principle of sincere cooperation, with the competent institutions of other Member States. Providing full information to the claimant is crucial.
- **The obligation of sincere cooperation**, which includes closer cooperation between the institutions of the Member States involved, should be emphasised. This could also lead to the denial of a lump sum or the waiving of a pension in the event that national legislation offers the possibility of refusal, if an objection was raised by the institutions of other Member States that would be negatively affected by such a lump sum or waiver of pension. Such a solution would only be applicable in relation to those Member States that provide for such a solution under their national legislation.
- The **definition of 'pension'**, which not only includes all lump sum amounts, but also reimbursement of contributions in accordance with the sickness, maternity and equivalent paternity benefits chapter of Regulation (EC) No 883/2004, could be further analysed.
- If the intention of the person concerned was to receive additional/more advantageous benefits only in another Member State, the suggestions concerning the possibilities to avoid **abusive behaviour** are applicable (see above section 3.2.3). This would not be applicable to lump sum amounts granted *ex officio* or to lump sum amounts that were claimed owing to a different justification.

### **3.5 Impact on minimum pensions under Article 58 of Regulation (EC) No 883/2004**

3.5.1 Consequences of reimbursement of contributions, lump sum payments or a waiver of pensions on the minimum pension of another country

- Legal framework and general considerations

It is stated in Article 58 of Regulation (EC) No 883/2004 that:

*[a] recipient of benefits to whom this Chapter applies may not, in the Member State of residence and under whose legislation a benefit is payable to him, be provided with a benefit which is less than the minimum benefit fixed by that legislation for a period of insurance or residence equal to all the periods taken into account for the payment in accordance with this Chapter.*

As regards, **reimbursement of contributions**, this will not be discussed, as this situation is not related to the periodic payment of a pension and, therefore, cannot have an impact on the granting of a minimum pension by another Member State.

It should be noted that there is a difference between **lump sum payments** that substitute a pension in accordance with the choice of the person concerned and lump sum payments granted *ex officio* (where the person concerned has no choice). In the first case, it is a choice between a periodic payment, for example, every month, and a lump sum payment. Therefore, a typical pension is calculated in accordance with Title III, Chapter 5 of Regulation (EC) No 883/2004. As a result, the amount of the pension is known, although it can be considered fictitious. This amount is substituted for a lump sum calculated in accordance with the amount of the (fictitious or real) pension. In the second case, the person is not in fact entitled to a pension but, generally speaking, Chapter 5 is applied, and a fictitious amount is calculated and serves as a basis for the lump sum. In both cases, a real or a fictitious pension is calculated.

It is stated in Decision No P1 of the Administrative Commission of 12 June 2009 on the interpretation of Articles 50(4), 58 and 87(5) of Regulation (EC) No 883/2004 that:

*[t]he institution which awards a supplement in accordance with Article 58 of Regulation (EC) No 883/2004 shall notify the competent institution of any other Member State under whose legislation the beneficiary is entitled to a benefit awarded in accordance with the provisions of Chapter 5 of the Regulation.*

*The competent institution of any other Member State which provides benefits under Chapter 5 of Regulation (EC) No 883/2004 to the beneficiary shall every January notify the institution paying the supplement of the amount of the benefits it pays to the beneficiary as of 1 January of that same year.<sup>129</sup>*

The possibility of **waiving a pension** may have an impact on pensions from another Member State. This is especially relevant when the granting of a minimum pension in accordance with the legislation of the Member State of residence must be examined (Article 58 of Regulation (EC) No 883/2004). A person receiving a pension from the Member State of residence is entitled to the minimum pension that is provided for in accordance with the legislation of this Member State. For this reason, all periods of insurance completed in accordance with the legislation of all Member States must be considered in order to calculate the minimum amount, and the amount of benefits received from other Member States that must be deducted.

To illustrate this mechanism and the potential issues an example may be clarifying. In accordance with the national legislation of Member State A, a person is entitled to a pension depending on the length of periods of insurance and the amount of contributions paid during these periods, which must be at least EUR 30 per year of insurance. Let us assume that a person has been working in Member State A for 30 years and that he/she resides in this Member State. The pension calculated for the contributions that have been made to date for this person totals EUR 600. This person also worked in Member State B for 10 years, and the pension in Member State B totals EUR 200. If both pensions were granted, Member State A would also have to calculate the minimum amount for all years worked, which amounts to EUR 1 200 (EUR 30 x 40 years). As a result, the person would receive EUR 600 (the pension from Member State A) + EUR 200 (the pension from Member State B) + EUR 400 (a top-up to the minimum amount) = EUR 1 200.

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<sup>129</sup> OJ C 106, 24.4.2010, p. 21-22.

The person could waive his/her pension from Member State B, and nothing would change as regards the amounts received. However, the liability to pay the pension would shift to Member State A only, as it would have to grant its pension of EUR 600 and top it up with another EUR 600 in order to reach the minimum amount.

Whether such a scenario is possible in accordance with the Regulations should be examined further. However, for the person concerned, this could be a simpler solution as only one Member State would grant benefits, which causes no issues as regards to possible overpayment, for example, if adjustments of the pension from Member State B are not reported in a timely manner, or if there are no issues as regards to conversion rates, if not all pensions are paid in euro.

The same applies to persons who lose a pension entitlement automatically *ex officio*. However, in these cases, the person cannot influence the outcome and therefore different consequences could be considered.

- Situations in the different Member States

Again, the replies from the national experts showed different interpretations. Firstly, not all of the national experts were able to give a response, as their respective Member States do not have benefits that fall under the scope of Article 58 of Regulation (EC) No 883/2004. Some national experts reported that if there was no periodic granting of pensions, even if such entitlements did exist, this would not result in entitlements in accordance with the provisions, or at least would reduce the pension supplement accordingly. Other experts stated that the missing payment of pensions cannot be taken into account when the pension supplement was calculated. However, it was also noted that this solution did not seem to be fair.

Italy explicitly referred to cases in which no claim was made for that pension. In such cases, no supplement was granted, as the supplement is only granted until the age in which a foreign pension might be claimed.

As regards lump sum payments, Norway would ask for the monthly amount of the pension payable without the lump sum; if such information cannot be obtained, Norwegian law provides for a transformation of the lump sum into fictitious monthly amounts. In the Czech Republic, only in the month of the payment of the lump sum this amount is taken into account to calculate the (reduced) supplement. For Finland, lump sum payments cannot reduce the supplement.

Very similar consequences could also occur in the application of **rules to prevent overlapping**.<sup>130</sup> A person might not have an interest in receiving a pension from a Member State in order to avoid a pension from another Member State being reduced. Again, the question must be asked if waiving a pension in such a way must be accepted in accordance with the Regulation. A detailed analysis of the complex aspects of the rules to prevent overlapping is not provided in this report.

### 3.5.2 Possible solutions for the impact on minimum pensions under the existing legal framework

As regards **waiver of pensions**, the wording of Article 58(2) of Regulation (EC) No 883/2004 might already contain a solution:

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<sup>130</sup> Articles 53 et. seq of Regulation (EC) No 883/2004.

*The competent institution of that Member State shall pay him/her throughout the period of his/her residence in its territory a supplement equal to the difference between the total of the benefits due under this chapter and the amount of the minimum benefit.*

It could be argued that 'benefits due' also includes those benefits that could be granted but have been waived. This could be considered as significantly different to the provisions of the sickness, maternity and equivalent paternity benefits chapter as discussed before ('receiving a pension'). However, the wording is not clear, and misunderstandings may occur. More clarification would therefore be necessary.

Considering that waiver of pensions is not widely applied among Member States, the solution to amend Article 58 does not seem fully proportionate. However, when rights are affected, legal certainty is needed. Therefore, an amendment to Decision No P1 may be sufficient. This amendment could clarify that if a pension is waived, the notification specified in this Decision would also contain the amount of pensions waived with a fictitious yearly revaluation pursuant to Article 59 of Regulation (EC) No 883/2004.

It must be acknowledged that this solution may be appropriate for the competent institutions, but it entails several drawbacks for the persons concerned. In the event of a lump sum or waiver of pension, the person concerned may not be fully informed about the consequences of his/her claim. For these reasons, this proposal could not be applied to situations before the entry into force of this amendment. At the same time, all national authorities would have to commit to thoroughly inform claimants about all consequences that his/her claim may entail.

As regards national pension schemes falling under the scope of Regulation (EC) No 883/2004, a clear majority of Member States ignore the system of a **lump sum payment**. It is only in very specific circumstances that this system is implemented. Pursuant to the definition in Article 1(w) of Regulation (EC) No 883/2004, a pension ' ... covers not only pensions but also lump-sum benefits which can be substituted for them ... '.

When the lump sum payment is a direct result of an individual's decision, it could be compared, to some extent, to the situation of a beneficiary who waives a pension. It is for this reason that both situations in this section are treated in the same way.

In the event of a lump sum payment granted *ex officio*, full responsibility lies with the institutions and the legislation of the competent Member State, and the beneficiary does not, for different reasons, have the opportunity to receive a normal pension. However, although lump sum amounts granted *ex officio* or upon request could present differences, they could both be considered as being related to periodic pension payments, and their effects on the minimum pension of another Member State are both the same. It is for this reason, that both will be treated in the same way as regards the impact on Article 58 of Regulation (EC) No 883/2004. This could however be disputed.

From the answers to the questionnaire it can be derived that acknowledgement of lump sum pensions is unusual. Additionally, none of the eight Member States that award lump sum pensions stated that the competent institution evaluated the possible disadvantages for a third person or for other institutions (national or from another Member State) before paying the lump sum pension. This should be borne in mind when far-reaching amendments are proposed.

### 3.5.3 Recommendations

- Considering that **lump sum** amounts are an exception, an amendment to Article 58 does not seem fully proportionate. Considering that the text of this provision could also be interpreted as treating lump sum amounts (at least those where the person concerned has a choice between the lump sum amount and the periodic

pension payments) in the same way as periodic pension payments, this solution seems to be less suitable. An amendment to **Decision No P1** may be sufficient. This amendment would clarify that in the event of substitution of the pension calculated in accordance with Title III, Chapter 5 of Regulation (EC) No 883/2004 for a lump sum, the notification to other Member States involved would also have to include fictitious pensions with a fictitious yearly revaluation, pursuant to Article 59 of Regulation (EC) No 883/2004. The same solution could apply to all lump sum amounts without distinguishing between a lump sum granted *ex officio* and upon request. The many advantages and drawbacks mentioned in the previous section could also apply here. Moreover, the advantage of this proposal is that the principles and elements of Decision No P1 in its current form can be followed, and no major recast of the Decision is necessary. The drawback for the institutions would be an increased workload. For the person concerned the drawback is the possible loss of his/her rights owing to the fact that information is usually not complete. As already pointed out, further analysis could examine if this should apply only **to lump sum amounts based on a decision** of the person concerned or if it should also include such amounts granted *ex officio*. In any event, the same also applies to the **waiver of pension**, as in these cases, a pension is classified as a benefit that is due and, therefore must be taken into account in order to calculate the minimum pension. This could easily be added to the revised text of **Decision No P1**.

- One point that could also be clarified in Decision No P1 is the way in which a lump sum amount must be **transformed into monthly fictitious payments**, which can subsequently be taken into account by another Member State when calculating the minimum pension. This undertaking could be handled by national legislation, if such legislation contained answers to this issue, especially if the amount of the periodic pension has previously been calculated. The creation of a European calculation method could also be proposed. The obligation to calculate these amounts should apply to the Member States that have granted the lump sum amount.
- Although the **deferment or absence of claiming a pension** cannot be considered as a waiver of a pension per se, it has already been discussed that such elements could be considered as not receiving a pension. However, it should be analysed whether it is possible to compare a waiver of pension to a person's decision to request a deferment as set out in Article 50(1) of Regulation (EC) No 883/2004, and if the solution proposed in the previous paragraph is transposable to this situation.

It must be borne in mind that 'deferment of the award' does not imply that no calculation is possible. It is stated in Article 50(3) of Regulation (EC) No 883/2004 that '[p]aragraph 2 shall apply mutatis mutandis when the person concerned has expressly requested deferment of the award of old-age benefits'. Therefore, a calculation of a fictitious amount is possible. If this reasoning is pushed further, the question must be asked of what would happen when a person does not claim a pension and Article 58 must be applied? A person cannot be obliged to claim a pension or to have to accept the consequences of this action/omission. However, in both cases, amending Decision No P1, which is already possible when waiving a pension, could seem, for some Member States, insufficient.

- If the decision of the person concerned was to receive additional benefits from another Member State, previous remarks on the possibilities to take into account **abusive behaviour** when interpreting the Regulations could be relevant. This would limit the possibilities of choice, but would exclude lump sum amounts granted *ex officio*.
- **Additional clarification** regarding the interaction and **exchange of information** between the institutions concerned is recommended. It could also be pointed out

that, before awarding a lump sum or accepting the waiver of pensions, the competent institution of a Member State should check the possible disadvantages for the said institution with the competent institution of other Member States involved, considering the principle of sincere cooperation. Providing full information to the claimant is also crucial. Another issue to be examined could be the obligation of sincere cooperation, which might include closer cooperation between the institutions of the Member States involved. This may also lead to the denial of a lump sum or the waiving of a pension if national legislation provides for the possibility of refusal, if an objection was raised by the institutions of other Member States that would be negatively affected by such a lump sum or waiving.

### **3.6 Impact on special non-contributory cash benefits**

#### **3.6.1 Consequences of reimbursement of contributions, lump sum payments or a waiver of pension on the special non-contributory cash benefits of another country**

SNCBs in cash are a safety net when other types of protection systems cannot be used.

- Legal framework and general considerations

The effects discussed in the previous section as regards minimum pensions can also occur in relation to SNCBs. The question to be analysed is whether waiving a pension or not receiving a pension in one Member State could have an impact on SNCBs from the Member State of residence.

To illustrate this point, let us assume that in Member State A, the SNCB for pensioners (a top-up of small pensions) is EUR 1 000. A person receives a pension of EUR 800 from Member State A, and is equally entitled to a pension of EUR 220 from Member State B. Even though the total amount of both pensions would be above the threshold for SNCBs, it could be advantageous to waive the pension from Member State B if other 'fringe benefits' are linked to the receipt of an SNCB, which the person would lose when no such benefit is granted (for example, free medication as opposed to cost-sharing of all persons not receiving an SNCB, a free telephone, a free television, subsidies for housing costs, etc.). As a result, receiving the SNCB could be worth more than the additional pension. Again, this raises the question of whether losing a pension from a Member State must be accepted by the Member State from which an SNCB has been requested.

- Situations in the different Member States

As regards SNCBs, a greater number of national experts referred to national legislation in accordance to which a recipient of such social assistance-type benefits must have exhausted all possible sources of income before the benefit is granted, which entails that any pensions waived must be considered as 'real' income. Germany would treat a lump sum as assets, which are taken into account and as a result, are reducing the SNCB. Other national experts stated that pensions from another Member State cannot grant entitlement to SNCBs that are only granted to pensioners from these Member States and, as a result, the loss of a foreign pension would not have any impact. Conversely, Liechtenstein reported that the SNCB granted to a pensioner from another Member State stopped when the foreign pension was no longer granted. Romania stated that the granting of such benefits would only take place for Romanian nationals. Lithuania stated that only pensions that were categorically granted could be taken into account to reduce the amount of an SNCB, as the municipalities that administer these benefits had to rely on the information of the person concerned and did not share information between the institutions of Member States. Latvia stated that in relation to waiver of pension, no reduction of the SNCB seemed to be possible, while for lump sums, attempts had been made to assign the total amount to monthly rates; if this was not possible, the total amount could only be considered when

granted. This was also the solution applied in Malta. Sweden stated that a lump sum was valid for 12 months, and a waiver of a foreign pension did not affect the amount of the SNCB, although Swedish pensions could not be deferred if the person wanted to receive a Swedish SNCB, which resulted in a better treatment of foreign pensioners.

### 3.6.2 Possible solutions for the impact on SNCBs under the existing legal framework

Article 70 of Regulation (EC) No 883/2004 sets out a conflict rule in paragraph 4: '[t]he benefits referred to in paragraph 2 shall be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. Such benefits shall be provided by and at the expense of the institution of the place of residence'. Therefore, the conditions to award these benefits depend on national legislation, which might require that any possibility to gain income from whatever resource must be exploited, and as a result, any benefits that the applicant waived or did not claim must also be considered. Moreover, national legislation could stipulate that as long as the person concerned has not claimed all possible benefits to which he/she is or would be entitled, SNCBs would not be awarded. In fact, there are several strong reasons to argue that a person who voluntarily waives pensions or other benefits provided in a Member State and claims SNCBs in another Member State is abusing his or her legal right and causing damages to a third part.

In this sense, national legislations often stipulate that before claiming SNCBs or social assistance, the person concerned must exhaust all legal possibilities of receiving social security benefits. In fact, when a Member State takes into account the existence of possible national benefits and does not award SNCBs in the event that some of them are not claimed, the institutions of this Member State could treat possible benefits acquired or situations (waiver, deferment or not claiming) occurring in another Member State in the same way (application of Article 5 of Regulation (EC) No 883/2004).

The scenario is different for **lump sum payments**. In this case, the amount of the lump sum could be taken into account when calculating the amount of the SNCB. If the person concerned had spent the entire amount, national legislation must be analysed with a view to ascertaining whether it could be assumed that nothing is left and the SNCB must therefore be granted. Again, **reimbursement of contributions** does not relate to any periodic payments, and therefore such an amount can be taken into account for the period when it is granted, and for as long as it is available capital for the person concerned (if such capital is taken into account in accordance with legislation of the Member State that must grant the SNCB), but not for any periods afterwards.

### 3.6.3 Recommendations

- The solution proposed for Article 58 of Regulation (EC) No 883/2004 cannot be easily extended to the application of Article 70 of that Regulation. In fact, the person concerned who received a lump sum (if this amount is granted *ex officio* without any possible choice for the person concerned) could have spent the entire amount and find himself or herself in a situation of personal need in the following periods. The legislation of each Member State has its own way to take into account the incomes of the beneficiary and to act accordingly. The lump sum, including what is left of it or what would have been possible if the person received periodic payments instead of the lump sum, is an economic resource that must be assessed by national legislations when awarding social assistance or SNCBs. The same could be applied for the amount that is granted as a reimbursement of contributions. Therefore, the first option could be to **rely on that national legislation** and refrain from any further action at the European level.
- Nevertheless, a **decision of the Administrative Commission** on the interpretation of Article 70 of Regulation (EC) No 883/2004 should be considered appropriate, as it might add legal clarity and avoid disputes with the persons

concerned. It would state that, based on the principles already enshrined in most national legislations, that SNCBs would continue to be awarded until the person concerned has claimed all possible benefits to which he/she is entitled. The added value of such a decision would result in providing guidelines for interpretation for those Member States whose national legislation may not be very detailed.

- Again, **better cooperation and exchange of information** could be an area for improvement. It could be pointed out that, before awarding a lump sum, the competent institution of a Member State should check what the possible disadvantages would be for the said institution or for the person concerned with the competent institution of other Member States involved, considering the principle of sincere cooperation. Providing full information to the claimant is crucial.
- Of course, it is advisable to **aim for more legal clarity and transparency** if Member States advise that this is necessary, despite the few cases in which lump sum payments are made in practice.
- Another issue to be examined could be the **obligation of sincere cooperation**, which might include closer cooperation between the institutions of the Member States involved. This might, perhaps, also lead to the denial of a lump sum if an objection was raised by the institutions of other Member States that would be negatively affected by such a lump sum. This would require a new legal framework.

### 3.7 Impact on family benefits

#### 3.7.1 Consequences of 'non-receipt' of a pension on the family benefits of another Member State

- Legal framework and general considerations

Finally, family benefits could also be affected if a person waives a pension or chooses a lump sum. Although pensioners are not the most quantitatively significant group of persons to receive family benefits, these cases cannot be excluded. The coordination rules for family benefits created a hierarchy of competence under which, for example, the Member State paying the pension has priority over the competence of the Member State of residence, if no pension is received from that Member State of residence. Even if a person resides in Member State A with a child that he/she takes care of, and receives only a very small pension from Member State B, this person is entitled to family benefits from Member State B by priority and Member State A would (only) have to top up these benefits, if its family benefits are higher.<sup>131</sup>

In order to illustrate this point, let us assume that family benefits in accordance with the legislation of Member State B are low and that applying for them is a long and cumbersome process. This may be the case for example because lots of documents have to be presented, entitlements are being checked frequently or problems with monthly payments or the transfer of the amount to the other Member State do occur. This could also give rise to problems with the differential amount of Member State A because if the final amount of the benefits from Member State B are not definitely known, Member State A can only grant advances,<sup>132</sup> which have to be recalculated after the final amounts from Member State B are known. As a result, the pensioner might consider it preferable to stop the competence of Member State B and receive the benefits of Member State A, by way of waiving the pension of Member State B. This would not change the amount of all the family benefits

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<sup>131</sup> Article 68(2) of Regulation (EC) No 883/2004.

<sup>132</sup> Article 60(3) of Regulation (EC) No 987/2009, read together with Article 7 of that Regulation.

granted, but Member State A would be the only Member State that is competent for granting family benefits and, as a result, would immediately have to grant the whole amount of family benefits possible. The loss of the pension from Member State B would not be considered as a disadvantage compared to the advantages of receiving the whole amount of family benefits swiftly. Again, the question must be asked as to whether such a decision of the person concerned can really have an impact on the Member State of residence.

In relation to family benefits, it is important to note that an explicit provision is provided for in Article 76(2) of Regulation (EEC) No 1408/71 in order to avoid disruptions when the person concerned did not claim family benefits in the Member State that would have been competent by priority. In accordance with this provision, '[i]f an application for benefits is not made in the Member States in whose territory the members of the family are residing, the competent institution of the other Member State may apply the provisions of paragraph 1<sup>133</sup> as if benefits were granted in the first Member State.' This provision has not been incorporated into Regulation (EC) No 883/2004 as claims have to be forwarded to any other Member State that might be competent to grant family benefits or a differential amount (Article 60 of Regulation (EC) No 987/2009), and as a result, not claiming in a Member State is not possible. However, similar to healthcare, it is not permitted or possible to waive the rights to family benefits in another Member State, but there is no mention about the preceding fact that triggers such benefits, i.e. the receipt of a pension.

- Situations in the different Member States

Some national experts reported that neither a lump sum payment nor a waiver (although a waiver seems to be less clear than the lump sum, taking into account the definition of pensions) could lead to a shift of competence,<sup>134</sup> while other national experts believed that family benefits had to be granted as if no entitlement to pensions from another Member State existed.<sup>135</sup> Belonging to the latter group, Lithuania and Malta stated that lump sum payments could only be taken into account during the month in which that payment was made. Finally, the Netherlands stated that it depended on the information received from the other Member State whether a person was considered as receiving a pension in such situations.

### 3.7.2 Possible solutions for the impact on family benefits under the existing legal framework

Again, the impact of 'non-receipt' of a pension on the granting of family benefits by another Member State must be examined. As outlined above, this has relevance for the application of Article 68 of Regulation (EC) No 883/2004 concerning the granting of benefits by the Member State that is competent by priority or the secondary competent Member State.

The wording of this Article is as follows:

*1. Where, during the same period and for the same family members, benefits are provided for under the legislation of more than one Member State the following priority rules shall apply:*

*(a) in the case of benefits payable by more than one Member State on different bases, the order of priority shall be as follows: firstly, rights available on the basis*

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<sup>133</sup> Under this provision it is stipulated that entitlement to family benefits of any other Member State, which would have to grant these benefits under the Regulation, are suspended by the amount granted in the Member State of residence of the child, if a gainful activity is exercised in that Member State.

<sup>134</sup> Austria, Croatia, Estonia, Finland, Germany, Greece, Lithuania, Norway, Poland, Slovenia, Slovakia and Spain.

<sup>135</sup> Bulgaria, Czech Republic, Denmark, France, Latvia, Lithuania, Malta, Portugal and Sweden.

*of an activity as an employed or self-employed person, secondly, rights available on the basis of receipt of a pension and finally, rights obtained on the basis of residence;*

### 3.7.3 Recommendations

As the 'receipt of the pension' is the decisive factor when it comes to family benefits, it could be argued that the same applies as under section 3.4.2 on the impact of the different scenarios in which no periodic pension is received as regards healthcare benefits.

The recommendations explained in the sickness, maternity and equivalent paternity benefits chapter of Regulation (EC) No 883/2004 could be applied accordingly to family benefits.

## 4. CONCLUSIONS AND POLICY RECOMMENDATIONS

Reimbursement of contributions, lump sum payment of pensions and waiver of pensions are practices that are uncommon in national social security legislations. Nevertheless, several practical issues have been identified and they must be addressed. Under existing EU law or CJEU case-law, no solutions have been provided for these issues.

As each of the three practices raises specific issues, they must be analysed individually and ad hoc solutions must be provided. The recommendations below consider and balance several elements:

- the person's interest and the provision of free movement between Member States;
- the fair distribution of financial obligations between Member States ; and
- the administrative load and the need for efficient cooperation between institutions.

The recommendations are also commensurate to the problems identified. As these problems are identified in only very specific circumstances, it seems preferable not to start amending the text of the Regulations, but, to try to solve the major issues by way of interpretation and, if needed, by decisions of the Administrative Commission. Only if such attempts cannot lead to the desired results amendments to the text of the Regulations would be needed. As already mentioned, from the authors point of view such amendments would be, nevertheless, the preferred option. Anyhow, amendments to the coordination system must be carefully considered. Any changes to the rules may have unexpected (undesired) side effects, and may undermine the rationale of the coordination system.

The recommendations are as follows:

- As regards the **aggregation of periods for pension entitlement**, the issues relate to the reimbursement of contributions. Instead of inserting exceptions to Recital 10 of Regulation (EC) No 883/2004 or to the concept established in Article 1(t) of this Regulation, it would be worth exploring solutions where periods for which reimbursement of contributions took place would be considered as periods of insurance for the purposes of aggregation; or, if this option is disregarded, the reimbursement of contributions could be restricted by a common interpretation of existing rules. In this regard, applying Article 5 of Regulation (EC) No 883/2004, as well as a decision of the Administrative Commission, could be a solution, which would open up the possibility or the obligation of a process of consultation and mutual information among competent institutions, before accepting reimbursement of contributions.
- As regards **healthcare benefits**, the existing text of Regulation (EC) No 883/2004 and (EC) No 987/2009 request the 'receipt of a pension' which does not allow an interpretation which would allow treating also the waiver of a pension as a continued obligation for this Member State to remain competent for the healthcare coverage of this person. With regard to the other cases of not receiving a pension additional interpretative elements could be useful.
- As regards **minimum pensions pursuant to Article 58 of Regulation (EC) No 883/2004**, it may be sufficient to amend Decision No P1 to clarify the way a lump sum amount must be transformed into monthly fictitious payments that can be taken into account by another Member State when calculating the minimum pension. As regards **SNCBs in cash**, the solution proposed for Article 58 of Regulation (EC) No 883/2004 cannot be easily extended to the application of Article 70 of that Regulation. Instead, a decision of the Administrative Commission on how to interpret that Article could be considered appropriate. Better cooperation and exchange of information could also be implemented.

- As regards **family benefits**, similar solutions as those proposed for healthcare benefits could be implemented.
- In order to take account of **potential cases of abuse**, a common understanding of abuse with the following wording could be recommended:

*Any intentional act or omission to act in order to obtain or receive social security benefits contrary to the law of the Member States or to the objectives of the law of the Member States or of the Regulations and that can cause unreasonable prejudice to the legitimate interest of the competent institutions.*

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