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Fitting national social security benefits into European categories:

Are long-term care benefits exportable within the framework of Regulation 883/2004?

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1. Introduction

While in theory there is the right to free movement within the European Union for EU citizens, in practice, this right is said to be restricted by the territorially organized social security schemes of the member states. It is not always given that by changing one's residence to another member state, all social security benefits of the prior state of residence can be kept. To partially overcome this obstacle, the legislature adopted Regulation 883/2004.[1] This piece of legislation coordinates social security systems across the EU in order to ensure that at least some rights to social security could be retained upon movement across borders. The regulation covers a limited number of social security branches such as sickness benefits, invalidity benefits, or old-age benefits.[2] For all of these branches the benefits granted therein are governed by different coordinating rules. The classification of national social security benefits into one of these categories, therefore, leads to the application of certain coordinating rules. The distinction between these branches might be relatively clear in respect of traditional social security risks such as sickness, to the extent that those traditional benefits are 'similarly structured in many Member States'.[3] The situation looks different for risks, which have only recently been recognized as independent social security risks, such as the danger of 'reliance on care'.[4] Though this danger of becoming dependent was by no means *new*, it was only in the 1970s - 1990s that several member states considered institutionalizing it as an independent risk.[5] *Several* does of course not mean all. In some member states the risk is not insured separately but forms part of other social benefits and does hence not have a stand-alone character.[6] It might be because of all these factors that this risk is not specifically mentioned in the regulation.

Against this background, it becomes particularly important to answer the questions of whether long-term care (LTC) benefits are nevertheless covered by the scope of the Regulation 883/2004, and what implications this would have for the exportability of these

[1] Regulation (EC) No 883/2004, 29 April 2004, [2004] OJ L 166/1; Verschueren 2012, p. 178.
[2] Regulation (EC) No 883/2004, 29 April 2004, [2004] OJ L 166/1, article 3(1).
[3] Jorens *et al*. 2011, p. 9.
[4] Martinsen 2005, p. 105.
[5] Ibid, pp. 105, 106; See for the Dutch, Austrian and German system: Mot *et al.* 2010, p. 9; EURES 2013, p. 2; Eichenhofer 2010, p. 207, 209; MISSOC Comparative Tables Database.
[6] Eichenhofer 2010, p. 209.

types of benefits. These are not only theoretical questions but were indeed posed to the Court on several occasions.[7] In the absence of particular guidance from the legislature, it was for the Court to answer them.

The aim of this paper is, therefore, to see how the Court decided the matter. This will be achieved by addressing the coverage of LTC benefits by the regulation in three chapters. Chapter two will firstly elaborate on the relevant legal instrument, Regulation 883/2004, before the focus will shift to the Court's jurisprudence. It will be considered how the Court treated LTC benefits as of 1998[8] and how it evolved this treatment until now: 2017.[9] It will become apparent that the treatment of LTC benefits within the regulations is not very evident, due to semi-transparent distinctions with so called *special non-contributory benefits* or distinctions between benefits in kind and cash benefits. Chapter two will conclude in clarifying how LTC benefits are treated under the regulation and under which circumstances they can be exported.

As will be shown, the current situation is not without problems. This is why in late 2016 the Commission launched a proposal for an amendment of Regulation 883/2004 to address these problems particularly encountered in the coordination of LTC benefits. This will be the subject matter of chapter three. This chapter will elaborate on how long-term care is currently addressed in the regulation, which changes the Commission proposes and which implications these changes might have on the coordination of LTC. In the final chapter, a conclusion will be drawn from all these findings to answer the research question posed of whether long-term care benefits are exportable within the framework of Regulation 883/2004.

[7] See e.g.: Case C-160/96 *Molenaar*, [1998] ECLI:EU:C:1998:84; Case C-215/99 *Jauch*, [2001] ECLI:EU:C:2001:139; Case C-286/03 *Hosse*, [2006] ECLI:EU:C:2006:125; Cases C-502/01 and C-31/02 *Gaumain-Cerri and Barth*, [2004] EU:C:2004:413.
[8] Case C-160/96 *Molenaar*, [1998] ECLI:EU:C:1998:84.
[9] Case C-430/15 *Tolley,* [2017] ECLI:EU:C:2017:74.

2. The coordination of LTC benefits in the EU

2.1. Legal instrument

It has never been in the Union's competence to harmonize national social security systems, let alone establish one common system.[10] However, it has been very early realized how different schemes might deter persons from making use of their right to free movement. Article 51 of the EEC Treaty already required the Council to 'adopt such measures in the field of social security as [were] necessary to provide freedom of movement for workers'.[11] Based on this provision, Regulation No. 3 and 4 were adopted in 1958 and formed the first coordinating regulations in the field of social security between the, by then six, member states. [12] The objective was to promote free movement by coordinating the national social security systems in a manner that would maintain social security rights for persons exercising their free movement rights.[13]

In 1971, Regulation 3 and 4 were replaced by Regulation 1408/71 and Regulation 574/72 to take account of Court of Justice's case law, as well as changes that had occurred in the meantime in national legislation.[14]

Regulation 1408/71 was based on four core principles: equal treatment, aggregation, the principle of a single applicable law and the principle of exportability.[15] Equal treatment contains the idea that the migrant is to be treated in the same way as regards matters of social security, as the national of the host state is treated. The second principle guarantees that for the calculation of benefits, periods of work, insurance or residence spent in another member state are taken into account by the host state.[16] According to the principle of a single applicable law, the person should only be subject to the legislation

[10] See e.g.: Case C-238/82 *Dupbar and Others v Netherlands State*, [1984] ECLI:EU:C:1984:45, §16; Case C-18/95 *Terhoeve*, [1999] ECLI:EU:C:1999:22, §33.
[11] Pennings 2009, p. 4.
[12] Regulation (EEC) No 3, 25 September 1958, [1958] OJ No. 30, 16.12.1958; Regulation (EEC) No 4, 3 December 1958, [1958] OJ No. 30, 16.12.1958; Pennings 2009, p. 3, 4.
[13] Pennings 2009, p. 4; Van der Mei 2003, p. 63.
[14] Regulation 1408/71 establishes the substantive rules of coordination, while Regulation 574/72 establishes administrative and implementing rules. Regulation (EEC) No 1408/71, 14 June 1971, [1971], OJ L 149/2; Regulation (EEC) No 574/72, 21 March 1972, [1972] OJ L 74/160; Van der Mei 2003, p. 63.
[15] Schmid-Drüner 2017, p. 2.
[16] Ibid.

of one member state. This ensures that the individual only pays contributions in one country and at the same time is only entitled to benefits from one country. The last key principle, the principle of exportability, prevents the payment of benefits from being subject to a residence requirement that is to say 'social security benefits can be paid throughout the Union'.[17]

Since its adoption in 1971, the regulation had been amended on many occasions. In 2010, it was eventually replaced by Regulation 883/2004 to modernise and simplify the system and to take account of the Court's case law and the changes in national legislation, once more.[18] The introduction of this regulation, however, did not change the underlying principles,[19] nor did it affect the coordinating rules of the regulation.[20] It neither changed the treatment of LTC benefits for the purpose of the regulation,[21] as will become evident in the course of this paper.

As regards the scope of the regulation, this has been slightly altered over the years. Article 2 of Regulation 1408/71, which concerned its personal scope, originally only covered workers.[22] In particular, it covered workers who were nationals of one of the member states and who were or had been subject to the legislation of one or more Member States.[23] This was subsequently extended to also cover self-employed persons,[24] civil servants,[25] students[26] and third country nationals. The latter were covered in as far as they were not already covered by those provisions solely on the ground of their nationality and 'provided [that] they [were] legally resident in the territory of a Member

[17] Ibid.
[18] Regulation (EC) No 883/2004, 29 April 2004, [2004] OJ L 166/2, Preamble Recital (3).
[19] Jorens & van Overmeiren 2009, p. 78. The principle of equal treatment is now to be found in articles 4 and 5 of Regulation 883/2004, the principle of aggregation remained in article 6, the principle of a single applicable law can be deduced from article 11 and the principle of exportability is laid down in article 7.
[20] Jorens & van Overmeiren 2009, p. 78.
[21] Ibid.
[22] Notably, a worker for the purpose of the regulation is a person who is covered 'even if only in respect of a single risk, […] by a general or special social security scheme […] irrespective of the existence of an employment relationship' (Case C-516/09 *Borger*, [2011] ECLI:EU:C:2011:136, §26). This definition is to be distinguished from the concept of worker for the purpose of article 39 EC, which is more restrictive in that it is focused on economic activity. See to this effect Case C-208/07 *von Chamier-Gliszczinski*, [2009] ECLI:EU:C:2009:455, § 69, citing Case C-66/85 *Lawrie-Blum*, [1986] ECLI:EU:C:1986:284, §16, 17: '[t]he essential feature of an employment relationship, […], is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.'
[23] Regulation (EEC) No 1408/71, 14 June 1971, [1971], OJ L 149/2, article 2, which also covered stateless persons and refugees, members of their families and their survivors.
[24] Regulation (EEC) No 1390/81, 12 May 1981, [1981] OJ L 143/1.
[25] Regulation (EC) No 1606/98, 29 June 1998, [1998] OJ L 209/1.
[26] Regulation (EC) No 307/1999, 8 February 1999, [1999] OJ L 38/1.

State and [were] in a situation which [was] not confined in all respects within a single Member State'.[27] In Regulation 883/2004 article 2 has been changed to only refer to nationals of a member state residing in a member state who are or have been subject to the legislation of one or more member states.[28] In its new version the provision thereby omits any reference to a gainful activity and to third country nationals.[29] The actual impact of this change is only a minor one.[30]

As regards the territorial scope, the Regulation 883/2004 applies irrespective of whether the EU national resides in the territory of a member state, as long as he is or has been subject to the legislation of a member state. [31] This could be the case, when the employer is also established outside the territory of the EU and sends his employee outside European territory for a certain time.[32]

Lastly, it should be mentioned that as a general principle of EU law, there needs to be a cross-border element for the regulation to apply.[33] This should somehow be obvious, since the regulation intends to coordinate social security systems between member states, and with only one system being applicable, there is little to coordinate.

The material scope of the regulation is to be found in article 3. According to article 3(5), the regulation does not apply to medical assistance and social assistance, as opposed to social security. The distinction between a benefit of social security and one of social assistance is hence crucial, since the latter does not fall within the scope of the regulation.[34]

The so-called *saga of special non-contributory benefits* best illustrates this rather problematic distinction. Special non-contributory benefits (SNCBs) are benefits which are somewhere between social security and social assistance. Social security benefits have been defined as those which are 'granted, without any individual and discretionary

[27] Regulation (EC) No 859/2003, 14 May 2003, [2003] OJ L 124/1.
[28] Regulation (EC) No 883/2004, 29 April 2004, [2004] OJ L 166/1, article 2.
[29] Ibid; Jorens & van Overmeiren 2009, p. 53.
[30] Jorens & van Overmeiren 2009, p. 53.
[31] Pennings 2003, p. 31, 32; Verschueren 2011, p. 29.
[32] Verschueren 2011, p. 29.
[33] Ibid, p. 30.
[34] Regulation (EC) No 883/2004, 29 April 2004, [2004] OJ L 166/1, article 3(5), according to which medical assistance is equally excluded from the scope of the Regulation.

assessment of personal needs, to recipients on the basis of a legally defined position and provided that [they concern] one of the risks expressly listed in Article 4(1) of Regulation No 1408/71[what is today article 3(1) of Regulation 883/2004]'.[35] On the other hand, social assistance includes 'all assistance introduced by the public authorities, […], that can be claimed by an individual who does not have resources sufficient to meet his own basic needs […] and who, by reason of that fact, may become a burden on the public finances of the host Member State during his period of residence […]'.[36] There are, however, those hybrid benefits which have characteristics of both, social security 'in that they create legally-defined rights connected to a social security benefit, and they also have links with social assistance, in the sense that they are not dependent on periods of work or contributions and that they are intended to relieve a clear financial need'.[37]

Without further guidance, it was for the Court to decide whether those benefits still fell within the ambit of, by then, Regulation 1408/71 or not. In the 1970s and 1980s the Court found them to be covered by the regulation, which consequently also meant - they were exportable.[38] Reacting to this case law, the legislature amended the Regulation 1408/71 in 1992.[39] It firstly introduced the term special non-contributory benefits for these kinds of hybrid benefits and accepted that some of them were covered by the regulation and exportable.[40] At the same time, the legislature introduced a restriction and excluded others which were to be listed in Annex II, and thereby not exportable.[41] The Court in turn did not accept that a benefit, which was included in the Annex, was automatically a non-exportable SNCB. It found that for a benefit to fall within the exception, it did not only have to be listed in the Annex but indeed needed to be 'special' and 'non-contributory'.[42] In several cases, the Court did not accept national benefits listed in the Annex to have

[35] Case C-160/96 *Molenaar*, [1998] ECLI:EU:C:1998:84, §20.
[36] Case C-140/12 *Brey*, [2013] ECLI:EU:C:2013:565, §61.
[37] Verschueren 2009, p. 218.
[38] Ibid, p. 219.
[39] Regulation (EEC) No 1247/92, 30 April 1992, [1992] OJ L 136/1, which introduced Article 4(2a), 4(2b) and article 10(a); Verschueren 2011, p. 18.
[40] Namely those that fulfilled the criteria of article 4(2a): '[…] where such benefits are intended: (a) either to provide supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in paragraph 1 (a) to (h), or (b) solely as specific protection for the disabled.'
[41] Article 4(2b): 'This Regulation shall not apply to the provisions in the legislation of a Member State concerning special non-contributory benefits, referred to in Annex II, Section III, the validity of which is confined to part of its territory.'
[42] Case C-215/99 *Jauch*, [2001] ECLI:EU:C:2001:139, §20 - 22.

fulfilled those criteria.[43] This is why, in 2005, the legislature had to alter these provisions again to its latest wording as to be found in article 3(3) in connection with article 70 of Regulation 883/2004.[44]

SNCBs are now called special non-contributory cash benefits and have to fulfil three cumulative conditions in order to be classified as such.[45] Firstly, they must provide supplementary, substitute or ancillary cover against the risks covered by the branches of social security listed in article 3(1). They also must guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned.[46] In alternative, they would equally be considered SNCBs where they were solely aimed at the specific protection for the disabled.[47] Secondly, the financing of these benefits must derive exclusively from compulsory taxation intended to cover general public expenditure. The conditions for granting and calculating of the benefit must not depend on any contributions.[48] Lastly, the benefit must be listed in Annex X.[49] If those criteria are fulfilled, the benefit falls within the ambit of the regulation,[50] but is based on article 70(3) and (4) not exportable - it is only to be received in the state of residence.[51]

While these legislative amendments clarified the matter to a certain extent, it is still not fully obvious when all these criteria are fulfilled and the benefit constitutes a SNCB. In a couple of cases, the Court has now accepted national benefits to fall within the ambit of the exception.[52] It accepted for instance the Dutch *Wajong* as a benefit 'guaranteeing a minimum income to a socially disadvantages group (disabled young people) […], based on the minimum wage and the standard of living in [the Netherlands] […] to be classified as a special benefit'.[53] Equally, the mobility component of the British *DLA* discussed in *Barlett* was approved as a benefit solely intended to promote 'the independence and social

[43] See e.g. Case C-215/99 *Jauch*, [2001] ECLI:EU:C:2001:139, § 22 - 34; Case C-43/99 *Leclere and Deaconescu*, [2001] ECLI:EU:C:2001:303, §34 – 36.
[44] Regulation (EC) No 647/2005, 13 April 2005, [2005] OJ L 117/1; Regulation (EC) No 883/2004, 29 April 2004, [2004] OJ L 166/1, article 3(3), 70, Annex X.
[45] Verschueren 2009, p. 224, 225; Regulation (EC) No 647/2005, 13 April 2005, [2005] OJ L 117/1, article 2(1).
[46] Regulation (EC) No 883/2004, 29 April 2004, [2004] OJ L 166/1, article 70(2)(a).
[47] Ibid.
[48] Ibid, article 70(2)(b).
[49] Ibid, article 70(2)(c).
[50] Ibid, article 3(3).
[51] The exact same rules can be found in article 3(3) and article 70 of Regulation 883/2004.
[52] See e.g. Case C-160/02 *Skalka*, [2004] ECLI:EU:C:2004:269; Case C-154/05 *Kersbergen-Lap and Dams-Schipper*, [2006] ECLI:EU:C:2006:449; Case C-537/09 *Bartlett and Others*, [2011] ECLI:EU:C:2011:278.
[53] Case C-154/05 *Kersbergen-Lap and Dams-Schipper*, [2006] ECLI:EU:C:2006:449, § 31 – 34.

integration of the disabled person and […] [which] is closely linked to the social environment of that person in [the United Kingdom]'.[54] In other cases, which concerned benefits covering additional expenses encountered by disabled, the Court did not accept those to be of *special* nature.[55] This shows that it is not always possible to 'draw a clear line between those benefits covering extra expenses for care and those covering expenses linked to integration into society'.[56]

The SNCB saga not only shows, how hard it can be to determine whether a certain benefit is to be seen as a social security benefit, a benefit of social assistance or a SNCB, but also how crucial this distinction is since the two latter are not exportable under the regulation. What can further be concluded from this saga is the very abstract and, to a certain extent, theoretical distinction between the three categories.

Having established a benefit as one of social security, the categorization does not just stop there. Article 3(1) of the regulation lists ten different branches of social security, which are covered by the regulation. Those include (a) sickness benefits; (b) maternity and equivalent paternity benefits; (c) invalidity benefits; (d) old-age benefits; (e) survivors' benefits; (f) benefits in respect of accidents at work and occupational diseases; (g) death grants; (h) unemployment benefits; (i) pre-retirement benefits and (j) family benefits. All these benefits fall within the scope of the regulation irrespective of whether they are of general or special social security schemes, and whether they are contributory or non-contributory.[57] The list of branches is exhaustive, which means a benefit not falling into any of these categories is excluded from the scope of application.[58] Notably, the national qualification of a benefit is irrelevant for the categorisation under this regulation. The benefit will be solely classified based on 'its purpose and the conditions on which it is granted'.[59] While this may sound relatively simple, in fact, it can be rather difficult to 'determine which category a specific benefit belongs to'.[60] Benefits of long-term care, which are put under scrutiny in this paper, are not as such listed in article 3(1). Therefore,

[54] Case C-537/09 *Bartlett and Others*, [2011] ECLI:EU:C:2011:278, § 27, 28.
[55] Case C-299/05 *Commission v Parliament and Council*, [2007] ECLI:EU:C:2007:608, §60 – 62.
[56] Verschueren 2009, p. 231.
[57] Regulation (EC) No 883/2004, 29 April 2004, [2004] OJ L 166/1, article 3(2).
[58] Verschueren 2011, p. 15: not covered by those branches are for instance housing allowances or study grants.
[59] Case C-160/96 *Molenaar*, [1998] ECLI:EU:C:1998:84, §19.
[60] Pennings 2003, p. 55.

the question arises and did arise before the Court, whether benefits of long-term care are covered by the regulation or not.

2.2. Jurisprudence

2.2.1. Are LTC benefits covered by the scope of the regulation?

One of the first cases that concerned the question whether benefits of long-term care were covered by the regulation arose in 1998 in the case of *Molenaar*. This case forms the beginning of a line of case laws that try to locate the risk of reliance on care within the system of coordinated social security systems.

The case concerned a German-Dutch couple residing in France, while being employed in Germany. With the introduction of the German *Pflegeversicherungsgesetz* (Care Insurance Law) in 1995, they were forced to contribute to this insurance scheme.[61] At the same time, they were not entitled to any benefits, since the law did not foresee benefits where potential beneficiaries resided abroad.[62] Thus, the question referred to the CJEU, was whether such a law was contrary to articles 6 and 48(2) of the Treaty, which both prohibit discrimination based on nationality.[63]

The Court found it necessary to consider such a question under, the then still applicable, Regulation 1408/71.[64] Having identified the regulation as a starting point for the analysis, the first and most crucial step was to determine whether the benefit in question fell within its scope. According to the Court, the decisive criterion for this determination was whether the benefit could be considered a social security benefit of one of the branches listed in article 4(1) at the time. For that, it had to be '[1] granted, without

[61] The insurance was compulsory for 'any person insured, either voluntary or compulsory, against sickness', with Mr and Mrs Molenaar being insured volunatry; Opinion of Advocate General Cosmas on Case C-160/96 delivered on 9 December 1997, ECLI:EU:C:1997:599, §10.
[62] German Social Security Code XI, §34(1)(1).
[63] Case C-160/96 *Molenaar*, [1998] ECLI:EU:C:1998:84, §11, 12; Article 6 paragraph 1: 'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'; Article 48(2): 'Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.'
[64] Case C-160/96 *Molenaar*, [1998] ECLI:EU:C:1998:84, §14.

any individual and discretionary assessment of personal needs' and '[2] [concern] one of the risks expressly listed in Article 4(1)'.[65]

Applied to the German benefit relating to the risk of reliance on care, this first condition did not raise major problems, since it was clear from the wording of the Care Insurance Law that indeed benefits were granted on a legally defined position.[66] More problematic was the second condition, since the insurance, as one of long-term care character, did not fully cover one of the traditional risks as listed in article 4(1). As established in the previous section, the list of branches of social security mentioned in the regulation is exhaustive. If the Court had not considered the benefit in question to fall within one of those branches, the benefit would not have fallen into the scope of the regulation and its export would not have been coordinated.

Under the Care Insurance Law, an insured person reliant on care was entitled to 'home care' provided by a professional or by a non-professional carer at the choice of the insured.[67] In case of the latter, the insured would be provided with a monthly allowance (also referred to as *care allowance*) to, for instance, remunerate the person caring for him. At the same time the insurance gave 'entitlement to [amongst others] direct payment of the cost of nursing home or hospital care, […], to allowances and payments for various costs entailed by the insured person's reliance on care'.[68] At the outset, the benefits granted under this scheme could have either been seen as sickness benefits or as invalidity benefits for the purpose of article 4(1).[69] They could have also been found to constitute neither one of them, thereby not falling within the scope.

The Court, by looking at the specific features of the system, decided that 'benefits of that type are essentially intended to supplement sickness insurance benefits to which they are, moreover, linked at the organisational level, in order to improve the state of health and the quality of life of persons reliant on care'.[70] That being so, the Court ruled that such benefits must be characterised as sickness benefits for the purpose of the regulation,

[65] Ibid, §20.
[66] Ibid, §21.
[67] Ibid, §5.
[68] Ibid, §6.
[69] What is now article 3(1) of Regulation 883/2004.
[70] Case C-160/96 *Molenaar* [1998] ECLI:EU:C:1998:84, §24.

'even if they have their own characteristics'.[71] The importance and the consequences of this decision have to be appreciated. By characterising the German benefits as sickness benefits, they not only come within the scope of the regulation but their export is also coordinated on Union level in accordance with the rules for coordination of sickness benefits. These rules were laid down in Title II, Chapter 1 of Regulation 1408/71, which corresponds to Title III, Chapter 1 of Regulation 883/2004.

Article 19 of Regulation 1408/71 laid down the relevant rule for the situation at hand. This provision coordinated sickness benefits for workers, by distinguishing between benefits in kind and cash benefits, of which only the latter are exportable. While most of the benefits under the German care insurance scheme could doubtlessly be identified as benefits in kind, the care allowance could not be classified that easily. Traditional cash benefits intend to compensate for loss of income. Care allowance on the other hand did not really do that. It was rather intended to help the person reliant on care to cover the costs related to this need for care. The Court considered these aspects but ruled that the care allowance still displayed three key-'features distinguishing it from sickness benefits in kind'.[72] 'First, payment of the allowance [was] periodical and [was] not subject […] to certain expenditure, such as care expenditure, having already been incurred […]. Secondly, the amount of the allowance [was] fixed and independent of the costs actually incurred […]. Thirdly, recipients [were] to a large extent unfettered in their use of the sums thus allocated to them.'[73] Therefore, the care allowance had to be regarded as a sickness insurance *cash* benefit.[74]

The care allowance being classified as a cash benefit in turn lead the Court to the conclusion that such a benefit was to be provided by the 'Member State of employment under the conditions provided for by the legislation of that State'.[75] In this case, it was thus for Germany to provide the care allowance even though the couple resided in France, a state which did not provide for such a benefit. Paragraph 34(1)(1) of the

[71] Ibid, §25.
[72] Ibid, §33.
[73] Ibid, §34.
[74] Ibid, §36.
[75] Ibid, §38.

Pflegeversicherungsgesetz, which required residence in Germany for care allowance to be paid, hence conflicted with article 19(1)(b)[76] of the regulation.

What has to be deduced from this case is the following. The care allowance is a benefit covering the risk of reliance on care, which is not literally listed as a benefit covered by the regulation. Based on this ruling it, nevertheless, comes within its scope of application as it is to be classified as a sickness benefit for the purpose of the regulation. The benefit, furthermore, is to be seen as a cash benefit, even though not neatly fitting the traditional definition of a cash benefit. Consequently, the German care allowance qualifies for export because the benefit is one of social security nature, more precisely a sickness benefit for the purpose of the regulation, and it is considered a cash benefit. National provisions preventing the export of the benefit therefore conflict with the rules laid down in the regulation. Even though, the Court's reasoning is comprehensible, it certainly is not obvious from the mere wording of the regulation and it has to be seen as some kind of stretching the regulation to also cover the benefit in question. While the reasoning of the Court seems relatively short in this case, the Court had multiple opportunities for further elaboration upon the matter following 1998. Thereby, uncertainties that resulted from such a stretching could have been clarified.

2.2.2. The difference between LTC benefits as benefits of social security and LTC benefits as SNCB

(a) *Jauch*

One of these chances arose three years later, when the Court was faced with a similar fact pattern in the case of *Jauch*. Mr Jauch was a German national, who resided in Germany, but had worked in Austria for 40 years.[77] He received Austrian pension but was denied care allowance under the Austrian Federal Law on care allowance (*Bundespflegegeldgesetz* - BPGG) since paragraph 3(1) of this law stipulated that beneficiaries of the care allowance had to be resident in Austria.

[76] Ibid, §39.
[77] Case C-215/99 *Jauch*, [2001] ECLI:EU:C:2001:139, §10.

The crucial difference with *Molenaar* was that the BPGG was listed in Annex IIa to Regulation 1408/71 as a special non-contributory benefit.[78] As has been established previously, such benefits may validly be subject to the requirement of residence. The Court, therefore, was faced with the question as to whether the Austrian care allowance could be regarded as a special non-contributory benefit or as a benefit of social security, whereby article 19(1) of Regulation 1408/71 might preclude the residence clause in question.[79]

While the Austrian government argued that an inclusion of the benefit in the Annex was sufficient for the classification of the latter, the Court did not share this view. First, the Court found that as the regulation was based on article 51, it must 'be interpreted in the light of the objective of that article, which is to contribute to the establishment of the greatest possible freedom of movement'.[80] In this context, the Court acknowledged that it was permissible for the legislature to 'adopt provisions which derogate from the principle of exportability of social security benefits', but these were to be interpreted strictly.[81] A mere mention of a benefit under Annex IIa was thus not sufficient for a benefit to come within the ambit of the exception. The benefit also had to satisfy the other conditions as defined in article 4(2a), namely that it had to be special and non-contributory.

Although the Austrian government claimed that the care allowance formed part of its social assistance policy, the Court considered it to be a social security benefit, since paragraph 3(1) BPGG clearly set out who was entitled to such a benefit. Based on the analysis in *Molenaar,* it was equally 'intended to supplement sickness insurance benefits'.[82] Therefore, the benefit fell within the ambit of sickness benefits for the purpose of the regulation and more specifically cash sickness benefits.[83] By taking a closer look at the financing mechanisms of the Austrian care allowance system, the CJEU further concluded that the system was in fact contributory.[84] The allowance was financed federally, in that it was initially paid by the statutorily pension and accident insurance

[78] Ibid, §13.
[79] Ibid, §16.
[80] Ibid, §20.
[81] Ibid, §21.
[82] Ibid, §28.
[83] Ibid.
[84] Ibid, §33.

institutions and later repaid out of federal funds. Notably, however, those funds originated from a reduction of federal contributions to pension insurance. Due to this reduction, insurance companies had to raise their insurance contributions.[85] As this is a form of indirect financing by the insured themselves, it led the Court to the conclusion that in fact the allowance 'is contributory in character'. [86] That in turn meant that the Austrian care allowance could not be classified as a special non-contributory benefit within the meaning of article 4(2a), even though it had been listed in Annex IIa as such.[87] Based on article 19 (1)(b) it thus had to 'be provided irrespective of the Member State in which a person reliant on care, who satisfies the other conditions for receipt of the benefit, is resident'.[88]

(b) *Hosse*

A very similar case came up in 2006, which was again concerned with an Austrian care allowance. However, this time the allowance was granted by a state law, the Salzburg Law on Care Allowance (*Salzburger Pflegegeld* short: SPGG), instead of a federal law as was the case in *Jauch*. Mr Hosse, a German national residing in Germany but employed in Salzburg (Austria), claimed care allowance under the SPGG for his severely disabled daughter.[89] Paragraph 3(1)(2) of this law provided that the person reliant on care must be resident in the province to receive the benefit. Since Mr Hosse's daughter did not fulfil this criterion, the authorities refused the grant.[90]

The Court was once more faced with the question whether the benefit constituted a social security benefit within the meaning of article 4(1) or a special non-contributory benefit for the purpose of article 4(2b).[91] Following its analysis in *Jauch*, the Court repeated that a social security benefit and a special non-contributory benefit were mutually exclusive, which is why the benefit under the SPGG had to be classified as either of the two.[92] The care allowance in question was 'paid to persons who [did] not receive any

[85] Ibid.
[86] Ibid, §31, 33.
[87] Ibid, §34.
[88] Ibid, §35.
[89] Case C-286/03 *Hosse*, [2006] ECLI:EU:C:2006:125, §13, 14.
[90] Ibid, §15.
[91] Ibid, §19.
[92] Ibid, §36.

pension'.[93] It was 'intended to compensate, in the form of a flat-rate contribution, for the additional expenditure resulting from the recipients' condition of reliance on care',[94] and the amount provided was connected to the degree of reliance on care.[95] This system of granting the care allowance was of course different from that of the federal Austrian – and the German care - allowance, but according to the Court 'it none the less remain[ed] of the same kind as those benefits'.[96] 'The conditions for the grant […] and the way in which it [was] financed' [could] not change 'the character of care allowance as analysed in the *Molenaar* and *Jauch* judgments.'[97] Therefore, the conclusion drawn by the Court was that this care allowance also had to be classified as a sickness benefit.[98]

A further question referred in this case, related to 'whether a member of the family of a worker employed in the Province of Salzburg who live[d] with his family in Germany [might], where he [fulfilled] the other conditions of grant, claim payment of a care allowance'.[99] Since the care allowance had been classified as a sickness benefit, its coordination was determined based on article 19 of Regulation 1408/71 and more specifically article 19 (1)(b) because it was to be seen as a cash benefit.[100] According to article 19(2), article 19(1) should apply by analogy to members of the family as far as they are not entitled to such benefits under legislation of the State, in whose territory they reside. Making the grant of the benefit conditional on the daughter's residence in the competent state would deter the community worker, in this case her father, from making use of his free movement rights, particularly when his daughter would not be entitled to a similar benefit in her state of residence.[101] 'It would accordingly be contrary to Article 19(2) of Regulation No 1408/71 to deprive the daughter of a worker of a benefit she would be entitled to if she were resident in the competent State.'[102]

Concluding, the Austrian state care allowance, just as the Austrian federal care allowance, did not qualify as a special non-contributory benefit and the grant of the

[93] Ibid, §41.
[94] Ibid, §39.
[95] Ibid, §40.
[96] Ibid, §42.
[97] Ibid, §43.
[98] Ibid, §44-46.
[99] Ibid, §54.
[100] Ibid, §48.
[101] Ibid, §54.
[102] Ibid, §55.

benefits under these schemes might not be subject to a residence requirement. *Hosse* thereby confirmed and added a minor new aspect to *Jauch*: members of the family of the worker must equally be entitled to such a benefit if they fulfil the other requirements for grant and where no similar grant is available in the state of residence.

(c) *Commission v. Parliament and Council*

Since the rulings handed down in *Jauch* und *Hosse* did alter the interpretation of the regulation, the legislature amended article 4(2a) and Annex IIa of Regulation 1408/71 to take the Court's interpretations into account.[103] Following these amendments, the Commission sought annulment of benefits wrongly included in the *new* Annex since, according to the Commission, these benefits did still not fulfil the conditions as set out in *Jauch.*[104]

The benefits in question concerned the Finnish child care allowance, the Swedish disability allowance and care allowance for disabled children, as well as the British disability living allowance (DLA), attendance allowance (AA) and carer's allowance (CA).

To determine whether the Commission was right in its claim, the Court assessed whether the benefits fulfilled the criteria set out in *Jauch*, i.e. the special and non-contributory nature of the benefit. With regard to the *special* nature,[105] the Court noted that '[u]nder Article 4(2a)(a)(ii) of Regulation No 1408/71 as amended, a benefit can be deemed to be special only if its purpose is solely that of specific protection for the disabled, closely linked to the social environment of those persons in the Member State concerned.'[106] According to the Court, the benefits in question did not 'have that sole function' and could, therefore, not be classified as a special benefit within the meaning of article 4(2a)(a)(ii). [107]

Article 4(2a)(a)(i), on the other hand, defined a special benefit based on its purpose in that it 'must either replace or supplement a social security benefit, while being

[103] Regulation (EC) No 647/2005, 13 April 2005, [2005] OJ L 117/1.
[104] Case C-299/05 *Commission v Parliament and Council*, [2007] ECLI:EU:C:2007:608, §12,16.
[105] Ibid, §52.
[106] Ibid, §53.
[107] Ibid, §54.

distinguishable from it, and be by its nature social assistance justified on economic and social grounds and fixed by legislation setting objective criteria'.[108] According to the Court, neither the Finnish nor the Swedish care allowances for children did fit this definition.[109] The purpose of those allowances had been said 'to enable the parents of disabled children to provide for the care, supervision of and possibly re-habilitation of those children'.[110] Therefore, the main purpose of those allowances was of medical nature and the benefits had thus to be classified as sickness benefits.[111] Even though the granting of these benefits was indeed 'closely linked to the economic and social context in the Member State', in that for instance 'entitlement to those allowances would not be subject to having worked or made contributions', this did not change the main purpose and consequently equally not the classification of the benefit.[112]

The Swedish disability allowance was intended to 'finance the care of a third person or to allow the disabled person to bear the costs caused by his or her disability and to improve that person's state of health and quality of life, as a person reliant on care'.[113] This benefit was equally considered to not fulfil the conditions of being of *special* nature but was classified as a sickness benefit, due to its intention of improving the state of health.[114]

Lastly, the British benefits, were introduced to 'help promote the independence and social integration of the disabled and also, as far as possible, to help them lead a life similar to non-disabled persons'.[115] Besides the so-called *mobility component* of the DLA, 'which might be regarded as a special non-contributory benefit'[116], the other British allowances under scrutiny were classified by the Court as sickness benefits.[117] In the late 1990s, the Court had ruled to the contrary and found in *Snares*[118] and *Partidge*[119] that both the DLA and the AA did fall within the scope of article 4(2a)(b), however, in

[108] Ibid, §55.
[109] Ibid, §57 – 59.
[110] Ibid, §57.
[111] Ibid, §58.
[112] Ibid.
[113] Ibid, §60.
[114] Ibid, §61.
[115] Ibid, §66.
[116] Ibid, §69.
[117] Ibid, §68.
[118] Case C-20/96 *Snares v Adjudication Officer*, [1997] ECLI:EU:C:1997:518.
[119] Case C-297/96 *Partridge*, [1998] ECLI:EU:C:1998:280.

Commission v Parliament and Council the Court noted that those rulings could not affect the analysis post-*Jauch*.[120]

The overall conclusion was, therefore, that the Commission was correct in asking for an annulment of the Annex in respect of these benefits, except for the mobility part of the DLA, which the Court ruled provisionally to remain within the scope of the exception.[121]

This judgment shows that, even following the amendment in 2005, it was not guaranteed, that the benefits listed in the Annex did fulfil the criteria to be classified as SNCB.

(d) *Barlett*

Part of the issue in *Commission v Parliament and Council* was taken up once more in *Barlett* to assure the nature of the DLA.

This case concerned three separate parties, which had all been denied the grant of the mobility component of the British DLA subsequent to moving to another member state. The referring court asked the CJEU whether the mobility component of the DLA could be considered a special non-contributory benefit within the meaning of article 4(2a) of the regulation, which would justify a residence requirement for the grant of this benefit.

With reference to *Commission v Parliament and Council*, the Court commenced by stating that indeed the mobility component of the DLA could be considered a benefit itself.[122] Since it was undisputed that the benefit was non-contributory in nature,[123] the Court was left to determine whether the benefit was equally special in nature. As special benefits are defined by their purpose, the Court looked at the mobility component and found that it was intended 'to provide specific protection for disabled persons within the meaning of Article 4(2a)(b) […] since it pursue[d] solely the objective of promoting the independence and social integration of disabled persons'.[124] The amount granted as a mobility component was according to the Court, 'closely linked to the social environment

[120] Case C-299/05 *Commission v Parliament and Council*, [2007] ECLI:EU:C:2007:608, §71.
[121] Ibid, §72, 75.
[122] Case C-537/09 *Bartlett and Others*, [2011] ECLI:EU:C:2011:278, §20 – 23.
[123] Ibid, §24.
[124] Ibid, §27.

of that person in that State'.[125] Even though this was not mentioned in the law itself, in practice this benefit was 'awarded in the overwhelming majority of cases to persons who [could] not work because of their disability'.[126] These considerations, in combination with the Court's ruling in *Commission v Parliament and Council*, where it had held that the mobility component '"could" lawfully be included in the list in Annex IIa […] as a non-exportable benefit',[127] let the Court conclude that indeed the mobility component of the DLA was a special benefit for the purpose of article 4(2a).[128] Without prejudice to the fact that this component was not listed as a separate benefit in the Annex, the Court ruled that 'DLA has always had two components clearly identified in the national legislation'[129] and therefore non-exportability was justified without specific mention in the Annex.

Contrary to *Commission v Parliament and Council,* where it was held that a benefit listed in the Annex is not necessarily a SNCB*,* the Court found in *Barlett* that a benefit might be considered a SNCB, even though it is not listed in the Annex but it fulfils the required conditions. The impact of this judgment should of course not be overestimated, since it is limited to the special features of the DLA and the fact that this benefit indeed includes two separate components. Nevertheless, the judgment does raise questions as to the clarity and transparency of the regulation.

(e) *Commission v. Germany*

This lack of clarity and transparency was only confirmed in *Commission v. Germany*. According to German *Länder* legislation, benefits were granted for the blind, deaf and disabled, where those persons resided in the territory of the respective *Land*. The Commission claimed that with this law Germany failed to fulfil its obligations under article 4 of Regulation 1408/71, in connection with Annex II, in which those benefits had been listed as special non-contributory.[130] The Commission, which had waited for the Court's rulings in *Hosse* and *Commission v. Parliament and Council*, brought the present action

[125] Ibid, §28.
[126] Ibid, §29.
[127] Ibid, §25.
[128] Ibid, §30.
[129] Ibid, §32.
[130] Case C-206/10 *Commission v Germany*, [2011] ECLI:EU:C:2011:283, §1; the Commission also claimed Germany did not fulfil its obligations under article 7(2) of Regulation 1612/68, which is however irrelevant for the purpose of this paper.

in 2010 after considering that especially the latter ruling had 'called into question the special nature of the benefits in question'.[131]

Germany argued that prior to these rulings the 'Commission itself was doubtful as to the classification of the benefits', but subsequent to these judgments the *Länder* 'took steps to bring the contested legislation into line with European Union law'.[132] Since 'the Court cannot take account of any subsequent changes'[133] and Germany did 'not dispute that, at the end of the period laid down […] the contested legislation did not comply with Regulation No 1408/71',[134] the Court had to find the Commission's complaint well founded.[135] The benefits in question were granted on objectively defined criteria, 'in the form of a flat-rate contribution, [to compensate] for the additional everyday expenditure resulting from the recipients' disability'.[136] This led the Court to the conclusion that these benefits were to be classified as sickness benefits, which could accordingly not be listed as special non-contributory benefits in the Annex, but had to be exportable.[137]

This case confirms the line of case law just set out and further shows that the benefits listed in the Annex do not necessarily fulfil the criteria established in *Jauch*. It seems as if member states when applying these criteria do not always end up at the same conclusion as the Court. A clarification by the Court for more such benefits might be needed in the future. This is a rather worrying conclusion though, since it does raise issues of legal certainty. Equally, for the individual claiming the benefit, the latter's classification has a direct impact on its exportability.

[131] Case C-206/10 *Commission v Germany*, [2011] ECLI:EU:C:2011:283, §16.
[132] Ibid, §24.
[133] Ibid, §25.
[134] Ibid, §26.
[135] Ibid, §31.
[136] Ibid, §29.
[137] Ibid, §28, 30.

2.2.3. The branch of social security

(a) Sickness benefits vs. invalidity benefits

Having established that a benefit is validly classified as one of social security rather than a SNCB, the next step in the analysis would be to look at which branch of social security a specific benefit would fall into. Since the list of branches that are covered by the regulation is exhaustive, the crucial question is whether a benefit falls into any of the branches and, if so, which one.

A case that particularly concerned these questions was the case of *Lucy Stewart*. Lucy Stewart was a British national who suffered from the Down's Syndrome. In 2000, she moved together with her parents from the UK to Spain. As of 1992, she received retrospectively DLA, also while residing in Spain. When Ms Stewart turned 16 her mother, as her appointee, 'made a claim for short-term incapacity benefit in youth' for her.[138] The Secretary of State for Work and Pensions refused this claim due to her lacking presence in the UK.[139]

Mrs Stewart brought proceedings against this decision. Those were subsequently stayed because the responsible tribunal asked for guidance from the Court on the question: could the short-term incapacity benefit in youth be classified as a sickness benefit or an invalidity benefit for the purpose of the regulation?[140]

To answer this question the Court made the distinction between sickness benefits and invalidity benefits. It considered sickness benefits to cover 'the risk connected to a morbid condition involving temporary suspension of the concerned person's activities'.[141] Invalidity benefits on the other hand were intended 'to cover the risk of disability of a prescribed degree, where it is probable that such disability will be permanent or long-term'.[142] The benefit at issue in the proceedings was paid in two stages, 'the first designated as short-term incapacity benefit, for a maximum period of 364 days, and the

[138] Case C-503/09 *Lucy Stewart*, [2011] EU:C:2011:500, §21.
[139] Ibid.
[140] Ibid, §29.
[141] Ibid, §37.
[142] Ibid, §38.

second, designated as long-term incapacity benefit, for an indefinite period until the claimant reaches State pensionable age'.[143] According to the referring tribunal, a person entitled to the short-term incapacity benefit in youth in all likelihood would also be entitled to the long-term incapacity benefit. Thereby, the latter benefit would have to be seen as a continuation of the short-term benefit. For its grant, the applicant would not have to demonstrate again the conditions he had already fulfilled for the short-term benefit, 'provided that the incapacity for work persists'.[144] In light of the definition of an invalidity benefit, the Court concluded that the short-term incapacity benefit in youth was to be classified as such, 'where it [was] established, at the time of the claim, that the claimant has a permanent or long-term disability' and therefore the continued grant of long-term incapacity benefit was certain.[145]

The distinctive element between invalidity and sickness benefits therefore seems to be the duration of the incapacity. It is not immediately evident why the short-term incapacity benefit in youth is classified as an invalidity benefit and the care component of the DLA as a sickness benefit.[146] Both may be granted to a disabled person whose disability might be permanent or at least long-term. The reasons for a distinction between both are not fully obvious.

Assumingly both are benefits of long-term care but since there is no clear definition of what LTC benefits entail, this is a strong presumption rather than an undeniable fact. Connecting LTC benefits to more than one branch of social security, therefore leads to 'legal uncertainty, inconsistent approaches by national institutions and unpredictable outcomes for citizens'.[147] For this particular case, it was even argued that the Court could have classified the benefit as a SNCB.[148] The short-term incapacity benefit in youth was not listed in the Annex as a SNCB, which was argued to be one of the, if not the main reason, why the Court did not classify it as such.[149] Notably, had the Court classified it as a SNCB, this would have led to the non-exportability of the latter.[150] By categorizing it as

[143] Ibid, §39.
[144] Ibid, §41, 50.
[145] Ibid, §45.
[146] Case C-299/05 *Commission v Parliament and Council*, [2007] ECLI:EU:C:2007:608, §66.
[147] Commission Impact Assessment SWD (2016) 460 final Part 1/6 2016, p.21, 22.
[148] Commission Impact Assessment SWD (2016) 460 final Part 3/6 2016, p. 328, 329.
[149] Ibid, p. 329.
[150] Ibid, p. 328, 329.

an invalidity benefit however, the short-term incapacity benefit was exportable and might not have been made subject to an ordinary residence clause, past presence or presence on the day of the application.[151] This shows that the dividing lines between the branches of social security to which LTC benefits are connected is extremely thin and vague. This rather fuzzy distinction is problematic, to say the least.

(b) Sickness benefits vs. old-age benefits

While a benefit of LTC might resemble characteristics of an invalidity benefit, it equally seems to be close to old-age benefits. The distinction between all these branches is not always clear-cut. Especially in the beginning of the jurisprudence on LTC benefits, not everybody was convinced that LTC benefits should always be seen as sickness benefits. In his opinion on *Jauch,* Advocate General (AG) Alber stated, that the risk of reliance on care 'does not represent a risk in its own right for the purposes of Article 4(1) of Regulation No 1408/71 [today article 3(1) Regulation 883/2004]'.[152] According to him, it might be linked to the risk of invalidity, sickness or even the risk of old age.[153] The German care allowance at issue in *Molenaar* had been characterised as a sickness benefit based 'on the link at an organisational level, between care insurance and sickness insurance'.[154] This led the AG conclude that 'there is nothing to prevent a care allowance from being classified as a different risk where the national legislature has opted for a different link at an organisational level'.[155] Since the Austrian federal care allowance at dispute in *Jauch* was linked at an organizational level to the grant of a pension, this allowance according to AG Alber should have been classified as an old-age benefit.[156] It has been seen, that the Court did not follow the AG's opinion in its judgment, but his opinion should nevertheless be acknowledged as a plausible option that was open to the Court.

In general, old-age benefits for the purpose of the regulation have been characterised as those which 'are intended to safeguard the means of subsistence of persons who, when they reach a certain age, leave their employment and are no longer required to hold

[151] Case C-503/09 *Lucy Stewart*, [2011] EU:C:2011:500, §110.
[152] Opinion of Advocate General Alber on Case C-215/99 delivered on 14 December 2000, ECLI:EU:C:2000:698, §103.
[153] Ibid.
[154] Ibid, §104.
[155] Ibid.
[156] Ibid.

themselves available for work at the Employment Office'.[157] In the majority of cases, the subsequent case law seems to have settled to treat benefits relating to the risk of reliance on care as sickness benefits, even though treating them as old-age benefits would have also been an option.

In *da Silva Martin,* the Court specifically addressed the problems that arise in treating benefits relating to the risk of reliance on care as sickness benefits.[158] It introduced the term 'sickness benefits *stricto sensu'* to illustrate the distinction between 'the "classic" sickness benefits that fall within that provision *stricto sensu*' and those 'relating to the risk of reliance on care [which] are at most supplementary to [them]'.[159] These latter benefits relating to the risk of reliance on care must be regarded as sickness benefits for the purpose of the regulation.[160] Nevertheless, 'it cannot be ruled out that they may, particularly as regards the details of their application, display characteristics which in practice also resemble to a certain extent the invalidity and old-age branches […], without being strictly identifiable with either of them'.[161] In that, the Court acknowledged the difficulty to distinguish the three types of social security. At the same time, it clarified that this does not change the fact that, for the purpose of the regulation, benefits relating to the risk of reliance on care must be treated as sickness benefits.

Although, as needs to be remembered from *Lucy Stewart*, this does always have to be the case. In *Lucy Stewart,* the respective benefit was classified as an invalidity benefit and not as a sickness benefit. This seems to be a direct drawback of the current *ad-hoc* system of coordination of LTC benefits, 'which is not always applied consistently […] by […] the Court'.[162] The main rule therefore appears to be the treatment of LTC benefits as sickness benefits, with certain deviations, which result from this *ad-hoc* system of coordination.

[157] Case C-171/82 *Valentini,* [1983] ECLI:EU:C:1983:189, §14 ; and only recently confirmed in Case C-361/13 *Commission v Slovakia*, [2015] EU:C:2015:601, §55.
[158] Case C-388/09 *da Silva Martins*, [2011] ECLI:EU:C:2011:439, §47, 48.
[159] Ibid, §47.
[160] Ibid, §48.
[161] Ibid.
[162] Commission Impact Assessment SWD (2016) 460 final Part 1/6 2016, p. 21.

2.2.4. Benefits in kind vs. cash benefits

(a) *Gaumain-Cerri & Barth*

Once a certain benefit is identified as a social security benefit and as a benefit relating to the risk of reliance on care, thereby as a sickness benefit for the purpose of the regulation (in most of the cases), the next step is to determine whether the benefit in question is a cash benefit or a benefit in kind. This distinction is crucial for the exportability of the benefit. Only benefits in cash may be exported, while benefits in kind are to be provided in accordance with the legislation of the state of residence.[163]

Already in *Molenaar* did the Court deviate from the traditional understanding of what cash benefits entail: a compensation for loss of income. The German care allowance under scrutiny in this case, was intended to help the person reliant on care to cover the costs related to this need for care. Since it displayed three key-'features distinguishing it from sickness benefits in kind',[164] the Court nevertheless found it to be a cash benefit and thereby exportable. 'First, [the] payment of the allowance [was] periodical and [was] not subject […] to certain expenditure, such as care expenditure, having already been incurred […]. Secondly, the amount of the allowance [was] fixed and independent of the costs actually incurred […]. Thirdly, recipients [were] to a large extent unfettered in their use of the sums thus allocated to them.'[165]

Following *Molenaar*, the need arose to further define the exact scope of what cash benefits entail, and how far this concept could be stretched. In both *Gaumain-Cerri & Barth* in 2004 and in *von Chamier-Glisczinski* in 2009 the Court had the opportunity to further clarify this concept.

The first case concerned an aspect of the German care allowance, which up until then had been rather unproblematic. In certain circumstances, 'the [German] care insurance [paid] old age and invalidity insurance contributions, as well as accident insurance, for the

[163] Regulation (EC) No 883/2004, 29 April 2004, [2004] OJ L 166/1, article 17, 19(1), 21(1).
[164] Case C-160/96 *Molenaar* [1998] ECLI:EU:C:1998:84, §33.
[165] Ibid, §34.

third party assisting the insured person'.[166] Both Ms Gaumain-Cerri and Ms Barth resided outside of Germany (France and Belgium respectively) and assisted a person reliant on care, who was subject to the German insurance scheme. In both cases, the payment of old age insurance contributions for them was refused based on the residence outside of Germany.

The underlying questions of this case referred, firstly, to whether this benefit could be considered a sickness benefit or, in light of the payment of old age insurance contributions, as an old-age benefit.[167] Secondly, the question was posed whether such a benefit might be refused based on residence, in light of article 39 EC, the regulation and other provisions of secondary law.[168] As regards the classification of the benefit, the Court did not see much reason to change its conclusion from *Molenaar*.[169] Even if the benefit was paid to the advantage of the third person assisting, it nevertheless belonged to a scheme 'designed to help [the person reliant on care] to receive […] the care which his condition requires. That benefit was thus fully covered by that branch of sickness insurance.'[170]

With regard to the second question, the Court further classified the benefit as a sickness insurance *cash* benefit.[171] According to the Court, the benefit was ancillary 'to the insurance proper in as much as it directly supplement[ed] the latter in respect of one of its possible purposes, namely to pay for assistance in the home provided by a third person, which it [was] designed to facilitate'.[172] As has been discussed in *Molenaar*, the classification of the care allowance was not evident in the first place, since it did not as such reimburse for the loss of income. Only due to its key-features, which distinguished it from sickness benefits in kind,[173] it was nevertheless considered a cash benefit. The payment of insurance contributions for the third party assisting the person reliant on care is, therefore, even further remote from the traditional understanding of cash benefits. The sole reason for this stretch seems to be the ancillary and supplementary nature to the

[166] Cases C-502/01 and C-31/02 *Gaumain-Cerri and Barth*, [2004] EU:C:2004:413, §7; Case C-160/96 *Molenaar* [1998] ECLI:EU:C:1998:84, §7.
[167] Cases C-502/01 and C-31/02 *Gaumain-Cerri and Barth*, [2004] EU:C:2004:413, §17.
[168] Ibid, §18.
[169] Ibid, §21.
[170] Ibid.
[171] Ibid, §27.
[172] Ibid.
[173] Case C-160/96 *Molenaar* [1998] ECLI:EU:C:1998:84, §33.

care allowance proper and its purpose. As a result of this interpretation it followed, that under article 19(1)(b) of Regulation 1408/71, such benefits were to be provided by the competent state in accordance with its law, which may, however, not include a requirement as to residence.[174]

By interpreting the benefit as it did, the Court made the payment of insurance contributions for the third party exportable, which is of course to be welcomed from the point of view of free movement. For the purpose of predictability and legal certainty it is however another ambiguity.

(b) *von Chamier-Glisczinski*

Only a few years later, in *von Chamier-Glisczinski* the Court had another chance to shed more light into the distinction between benefits in kind and cash benefits.

Mrs von Chamier-Gliszinski was a German national reliant on care, insured with the German employee sickness insurance fund (*Deutsche Angestellten-Krankenkasse – DAK*). She received from the DAK combined benefits (that is a combination of benefits in kind and care allowance).[175] In 2001, her husband requested the insurance fund 'to provide the care insurance benefits to which [she] was entitled under German legislation, in the form of full in-patient care […] in a care home in Austria' because he intended to acquire a business there.[176] This request was, however, denied due to the fact that Austrian law did not foresee the grant of a benefit in kind in such a situation.[177] At the same time, her entitlement to care allowance, the cash benefit, remained untouched.[178] Irrespective of the insurance fund's decision, the couple moved to Austria, where Mrs von Chamier-Gliszinski stayed in a care home from 2001 to 2003. After returning to Germany in late 2003, they claimed repayment of the costs incurred. Explicitly, they asked for the difference between the amount they would have received if they had resided in Germany and the amount of care allowance they were able to export.[179]

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[174] Cases C-502/01 and C-31/02 *Gaumain-Cerri and Barth*, [2004] EU:C:2004:413, §28, 31, 32.
[175] Case C-208/07 *von Chamier-Glisczinski*, [2009] ECLI:EU:C:2009:455, §15, 21.
[176] Ibid, §24.
[177] Ibid, §25.
[178] Ibid.
[179] Ibid, §32.

The first question, therefore, referred to the Court was whether the German DAK could be required to repay the sum in question, in light of the regulation.

Since, based on the regulation, only cash benefits may be exported, the Court first needed to clarify the nature of the requested reimbursement. Already in 1966 did the Court state that 'the term 'benefits in kind' does not exclude the possibility that such benefits may comprise payments made by the debtor institution'.[180] In *von Chamier-Glisczinski,* the Court reaffirmed this finding as it held that, 'care insurance benefits consisting in the direct payment or reimbursement of the costs of a specialised home entailed by the insured person's reliance on care fall within the definition of *benefits in kind*'[emphasis added].[181] Hence, while in *Gaumain-Cerri & Barth* the scope of the cash benefit had been extended to cover the payment of insurance contributions for the third party, in this case the Court reaffirmed its distinction between cash benefits and benefits in kind. According to article 19 the latter benefit was to be granted by the member state of residence 'in so far as the legislation of that State, whatever the more specific name given to the social protection scheme of which it form[ed] part, provid[ed] for the provision of benefits in kind designed to cover the same risks […]'.[182] In other words, benefits in kind are not exportable from the competent state. The intention of article 19 was to guarantee access to care 'on an equal footing with persons insured with the social security system of that Member State.'[183] For these reasons, the regulation could not require the competent state to pay for such benefits in kind, especially not where such benefits did not exist in the state of residence.[184] At the same time, the Court clarified that the regulation did not have the effect of *prohibiting* member states from making such payment, thereby granting higher protection.[185]

If the first question were to be answered negatively, the referring Court added a second related question as to whether, in light of article 18 EC, 39 EC or 49 EC, there was 'any entitlement to payment […] by the competent institution'.[186] In respect of article 39 and 49

[180] Case C-61/65 *Vaassen* v *Beambtenfonds Mijnbedrift,* [1966] ECLI:EU:C:1966:39, p. 278.
[181] Case C-208/07 *von Chamier-Glisczinski*, [2009] ECLI:EU:C:2009:455, §48.
[182] This conclusion did equally apply to article 22 of Regulation 1408/71, see: Case C-208/07 *von Chamier-Glisczinski*, [2009] ECLI:EU:C:2009:455, §50, 52.
[183] Ibid, §50.
[184] Ibid, §53.
[185] Ibid, §56.
[186] Ibid, §34.

EC Treaty, the Court concluded that both provisions were not applicable to Mrs von Chamier-Glisczinski.[187] Article 18(1) EC, on the other hand, did transfer the right to free movement upon the couple. It was clear from the facts that making use of this right, Mrs von Chamier-Gliszinski found herself in a situation less favourable than before such a movement.[188] However, keeping in mind that member states' laws were not harmonised in this area, article 18(1) EC could not 'guarantee to an insured person that a move to another Member State will be neutral as regards social security, in particular as regards sickness benefits'.[189] Her situation hence resulted from a combined application of German and Austrian law, and *had* Austrian law provided for a benefit in kind in a situation such as hers, she would have been entitled to it, based on the regulation.[190] Since both Austria and Germany were free to organize their sickness insurance scheme, none of the two systems could 'be considered the cause of [the] discrimination'.[191]

Thus, the overall conclusion drawn by the Court was that Mrs von Chamier-Gliszinski could not claim a reimbursement of the costs such as those at issue in the main proceedings based on the regulation or based on primary law.[192]

What is to be deduced from these cases is that LTC benefits do not fit the traditional definition of cash benefits as the compensation for loss of income. The Court therefore needed to interpret the concept of cash benefits broadly to also include certain LTC benefits. On the one hand, the Court seemed flexible enough to accept the payment of insurance contributions for third parties as cash benefits. On the other hand, with regard to the reimbursement of the costs of a specialised home, it did not stretch the concept any further but classified such reimbursement as a benefit in kind. Whether a benefit, not falling into the traditional definition of cash benefits, is still considered as such, seems to depend on the nature and the purpose of the benefit,[193] as well as what the insured may do with the money he receives.[194] However, where the benefit is solely intended to

[187] Ibid, §69 – 77.
[188] Ibid, §83.
[189] Ibid, §85.
[190] Ibid, §86.
[191] Ibid, §87.
[192] Ibid, §89.
[193] Cases C-502/01 and C-31/02 *Gaumain-Cerri and Barth*, [2004] EU:C:2004:413, §27.
[194] Case C-160/96 *Molenaar* [1998] ECLI:EU:C:1998:84, §34.

reimburse medical costs incurred, such as in the case of Mrs von Chamier-Gliszinski, this must be classified as a benefit in kind, and may not be exported from the competent state.

2.2.5. The drawback of the intransparency of the LTC coordination system

What should be clear by now is that the coordination of LTC benefits is not evident from the mere wording of the regulation. In order to understand this system, the regulation has to be read in light of all the cases just discussed. Obviously, this situation is far from ideal. The case of *Tolley* reflects how problematic and intransparent this system actually is. It shows on the one hand, how many open questions member states still have with regard to the coordination of LTC benefits. On the other hand, it demonstrates how difficult this system is to handle for the individual claiming his or her LTC benefit in a cross-border situation. *Tolley* concerned once more the British DLA and the problem of exportability. The ruling itself should not come as a surprise in light of the jurisprudence discussed, but what this case certainly underlines are the drawbacks of an intransparent LTC coordination system.

Mrs Tolley, a British national, who was entitled to a retirement pension, was also awarded the care component of the DLA for an indefinite basis as of 1993.[195] In 2002, she and her husband moved to Spain. Subsequent to her change of residence the Secretary of State withdrew her entitlement to DLA.[196] In the course of the proceedings she brought against this decision of the Secretary of State, the Supreme Court of the United Kingdom referred in essence three questions to the CJEU.

By its first question, the Supreme Court asked whether the care component of the DLA had to be treated as a sickness benefit or as an invalidity benefit for the purpose of Regulation 1408/71. As could have been expected, the Court classified the care component of the DLA again as a sickness benefit for the purpose of the regulation, thereby confirming its conclusion in *Commission v. Parliament and Council.*[197]

[195] Case C-430/15 *Tolley*, [2017] ECLI:EU:C:2017:74, §18, 19.
[196] Ibid, §20 – 21.
[197] Ibid, §49 – 51, 55.

The second question referred, related to article 13 of the regulation. According to article 13 persons to whom the regulation applied, shall be subject to the legislation of a single member state only. The Supreme Court in this respect asked whether 'the fact that a person has acquired rights to an old-age pension [in one member state] […] precludes the legislation of that Member State from subsequently ceasing to be applicable to that person'.[198] In light of article 13(2)(f), the Court responded to this question in the negative. A person who acquired rights to old-age pension might indeed subsequently become subject to another national legislation.[199]

With its last question, the Supreme Court sought to ascertain whether with regard to article 19(1) and/or article 22(1)(b) national legislation might make the entitlement to DLA subject to the condition of residence.[200] 'Article 22(1)(b) […] relates to the situation of a person who transfers his or her residence from the Member State in which he or she began to receive a sickness or maternity benefit to another Member State. This provision makes the maintenance of the benefit conditional on obtaining authorisation from the competent institution of the first Member State.'[201] Article 19(1) on the contrary, relates to a situation where the applicant of the benefit 'resided in another Member State [than the competent one] on the date of his application'.[202] Since Mrs Tolley still resided in the UK when she applied for the benefit, her situation fell within the ambit of article 22(1)(b).[203] This provision allowed for the export of cash benefits, when the required conditions were met in the competent state.[204] Seeing that a condition as to residence would in fact 'render that provision entirely devoid of purpose',[205] the Court found, that the conditions laid down by the competent state for the retention of the benefit, might not include such a residence requirement.[206]

[198] Ibid, §56.
[199] Ibid, §69.
[200] Ibid, §70.
[201] Opinion of Advocate General Saugmandsgaard Øe on Case C-430/15 delivered on 5 October 2016, ECLI:EU:C:2016:743, §83.
[202] Case C-430/15 *Tolley*, [2017] ECLI:EU:C:2017:74, §72.
[203] Ibid, §75.
[204] Ibid, §87.
[205] Ibid, §88.
[206] Ibid, §89.

So far, the judgment looked very similar to that in *Molenaar*, where it was equally confirmed that a residence requirement conflicted with article 19(1).[207] The crucial difference to *Molenaar* was, however, that article 22(1)(b) required an authorization for the export of benefits.[208] Even though such an authorization could only be refused in very limited circumstances, the Court decided that, in the absence of any form of authorization, article 22(1)(b) could not be interpreted as to oblige the competent member state to grant the benefit subsequent to change of residence to another member state.[209] In other words, a prior authorization was required for the export of the benefit.[210]

Since the facts of the case are silent on any such authorization, it seems that Mrs Tolley was ultimately not entitled to the benefits she intended to export, for the sole reason of a missing authorization. This can of course only be said for certain, once the Supreme Court hands down its final judgment in this case.

This case illustrates once more how intransparent it can become for the individual actually reliant on the exportability of these kinds of benefits. This is especially the case when national law does not comply with the regulation, in that it requires residence where this is (more or less clearly) prohibited by the regulation. In this case, the crucial factor for the export was a simple authorization, which potentially might not have been claimed for the sole reason of unawareness of the exact rules applicable. This is of course far from a desirable situation and does not speak in favour of transparency or legal certainty for sure.

2.3. Conclusion: Under which circumstances can LTC benefits be exported?

What is to be deduced from this line of case law is that LTC benefits indeed might be exported, if three criteria are fulfilled. The benefit in question must be one of social security, it must be considered a sickness benefit for the purpose of the regulation and it must be a cash benefit. It is apparent from the cases discussed, that LTC benefits do not

[207] Case C-160/96 *Molenaar* [1998] ECLI:EU:C:1998:84, §39.
[208] Case C-430/15 *Tolley*, [2017] ECLI:EU:C:2017:74, §92; Opinion of Advocate General Saugmandsgaard Øe on Case C-430/15 delivered on 5 October 2016, ECLI:EU:C:2016:743, §124 – 126.
[209] Case C-430/15 *Tolley*, [2017] ECLI:EU:C:2017:74, §91 - 93.
[210] Ibid, §93.

easily fulfil these criteria. The Court was keen to include these benefits in the scope of the regulation but in order to do so the concepts of sickness benefits as well as cash benefits had to be stretched. Broadening those concepts led to rather blurred dividing lines between the branches of social security and cash benefits and benefits in kind. The inclusion therefore made it rather intransparent for member states, but equally for claimants, to see which national benefits would fulfil all these criteria at the end. This might be deduced from the number of cases referred to the CJEU in this field, but also from the very similar questions asked in these cases, which to a certain extent had already been answered by the Court.

The jurisprudence dealing with LTC is mainly based on the predecessor of Regulation 883/2004 but since no major changes had been made in respect to LTC benefits,[211] the case law developed must be interpreted to equally apply to the new regulation.

In general, the regulation covers benefits of social security, as far as the responding branch of social security is listed in article 3(1) and special non-contributory cash benefits, in accordance with article 3(3) in conjunction with article 70. Special non-contributory benefits are a category which is somewhere between social security and social assistance. While it is covered by the regulation, the grant of these kinds of benefits is limited to the territory of the member state of residence.[212] In four out of five cases discussed here, the Court considered the benefits under scrutiny to be benefits of social security nature and not, as had been claimed by the member states, of special non-contributory nature.[213] Only in the case of *Barlett,* the Court accepted the mobility component of the DLA to fit in the exception of article 70. This proves that the Court allows derogations from the principle of exportability but it interprets them strictly and does not stick to the interpretation of the member states.

Once a benefit is classified as a social security benefit, its type must be established. As discussed in the previous section, in principle the Court opted for a classification of

[211] Jorens & van Overmeiren 2009, p. 78.
[212] Regulation (EC) No 883/2004, 29 April 2004, [2004] OJ L 166/1, article 70 (4).
[213] Case C-215/99 *Jauch*, [2001] ECLI:EU:C:2001:139; Case C-286/03 *Hosse*, [2006] ECLI:EU:C:2006:125; Case C-299/05 *Commission v Parliament and Council*, [2007] ECLI:EU:C:2007:608; Case C-206/10 *Commission v Germany*, [2011] ECLI:EU:C:2011:283.

LTC benefits as sickness benefits. Those have to be distinguished from both invalidity benefits[214] and old-age benefits.[215] What has proven to be difficult is that LTC benefits resemble characteristics of both these latter benefits 'without being strictly identifiable with either of them'.[216] For the purpose of the regulation, LTC benefits nevertheless have to be treated as sickness benefits, with only few deviations.

Sickness benefits, in turn, are divided into benefits in kind and cash benefits. While the focus of benefits in kind is clearly on health care, cash benefits compensate the loss of income during sickness.[217]According to the regulation, benefits in kind are to be provided by the competent institution of the place of residence in accordance with the legislation in place in that state,[218] while cash benefits are to be provided by the competent institution in accordance with the legislation it administers.[219] That consequently means that cash benefits can be exported, while benefits in kind cannot. While this distinction works largely fine for sickness benefits *stricto sensu*, in this case law it has been seen that LTC benefits are not that easy to fit into these categories.[220] The German care insurance, for instance, provides for benefits in kind and cash benefits as well as a mixture of the two. As was discussed in *Gaumain-Cerri & Barth,* under the German law there was even the option of the care insurer paying 'old age and invalidity insurance contributions, as well as accident insurance, for the third party assisting the insured person'.[221] It certainly is not evident whether that is a cash benefit or a benefit in kind. According to the Court, this kind of benefit still had to be seen as a cash benefit 'by reason of its ancillary nature to the insurance proper' and its purpose, in this particular case.[222] In 2009, the legislature added a definition of benefits in kind to the regulation.[223] According to this definition, '"[b]enefits in kind" means: for the purposes of […] sickness, maternity and equivalent paternity benefits […] [those] provided for under the legislation of a Member State which are intended to supply, make available, pay directly or reimburse the cost of medical care and

[214] Case C-503/09 *Lucy Stewart*, [2011] EU:C:2011:500, §37, 38.
[215] Case C-171/82 *Valentini,* [1983] ECLI:EU:C:1983:189, §14.
[216] Case C-388/09 *da Silva Martins*, [2011] ECLI:EU:C:2011:439, §48.
[217] Case C-160/96 *Molenaar*, [1998] ECLI:EU:C:1998:84, §31.
[218] Regulation (EC) No 883/2004, 29 April 2004, [2004] OJ L 166/1, article 17, article 23. Previously, article 19(1), article 25(1), article 28(1) of Regulation (EEC) No 1408/71, 14 June 1971, [1971] OJ L 149/2.
[219] Ibid, article 21, article 29.
[220] Jorens et al. 2011, p. 26.
[221] Cases C-502/01 and C-31/02 *Gaumain-Cerri and Barth*, [2004] EU:C:2004:413, §7.
[222] Ibid, §27.
[223] Regulation (EC) No 988/2009, 16 September 2009, [2009] OJ L 284/43, article 1(3).

products and services ancillary to that care. *This includes long-term care benefits in kind*.'[224] Whether, under this definition, the benefit at issue in *Gaumain-Cerri & Barth* would have been considered a benefit in kind or be excluded as such, is not very evident. Hence, the fact remains that the necessary distinction between benefits in kind and cash benefits is not always clear-cut when it comes to benefits of LTC.

The overall conclusion of this line of case law is that, yes, LTC benefits might be exported, provided that the requirements set out above are fulfilled. The benefit in question must be one of social security, it must be considered a sickness benefit for the purpose of the regulation and it must be a cash benefit. Since those requirements are certainly complex and far from evident from the mere wording of the regulation, cases like *Tolley* should not be surprising. This ruling is a direct result of the intransparent *ad-hoc* system of coordinating LTC benefits. It suggests that the benefit in question did qualify for export. The only thing that prevented Mrs Tolley from exporting the benefit was a missing authorization.[225] In light of this very complex system of coordination of LTC, it might be assumed that she was not aware of the need for such an authorization.

Irrespective of these problems, the Court's decision to include LTC benefits into the scope of the regulation can be supported. [226] In case it had not done so, there would have been no coordination of these types of benefits at all. However, LTC benefits and sickness benefits *stricto sensu* of course 'differ in their aims, instruments and means'.[227] This leads to a situation where the coordinating rules for sickness benefits are not always appropriate to coordinate LTC benefits.[228] For example, the difference between cash benefits and benefits in kind was drafted in a way to refer to sickness benefits *stricto sensu* and not to LTC benefits. Therefore, the rules on 'the calculation of benefits in cash under Article 21 (2) to (4) usually are of no importance to LTC benefits'.[229] A further complication is the lack of a common definition between member states on what constitutes an LTC benefit. Some member states might consider their benefits in question to be one of social

[224] Ibid.
[225]Case C-430/15 *Tolley*, [2017] ECLI:EU:C:2017:74, §91-93.
[226] Jorens et al. 2011, p. 40.
[227] Ibid.
[228] Ibid, p. 31.
[229] Ibid.

assistance character, even though at EU level these benefits would have to be seen as sickness benefits.[230]

The bottom line seems to be that by fitting LTC benefits into the scope of the regulation, complications were inevitable. The regulation was arguably not intended to cover these benefits or at least these benefits were not specifically considered when drafting the regulation. In view of the Courts case law, there have been various efforts to adapt the regulation in order to take account of this case law and thereby adequately adapt the rules. The most recent proposal to amend the regulation was launched in late 2016.

3. Commission Proposal for amending Regulation 883/2004

3.1. Regulation 1408/71 to Regulation 883/2004

While Regulation 883/2004 did not adjust the coordinating rules for LTC benefits,[231] it did for the first time make specific reference to these kinds of benefits in a legislative text.[232] Article 34 addresses the situation in which the insured receives LTC benefits in cash, 'which have to be treated as sickness benefits'.[233] Although only mentioned by means of a subordinate sentence, the provision spells out that LTC benefits may be provided in accordance with the rules on sickness benefits. However, the main aim of the legislator was solely to 'establish specific provisions regulating the non-overlapping of sickness benefits in kind and sickness benefits in cash which are of the same nature as those which were the subject of the judgments […] *Jauch* and […] *Molenaar*, provided that those benefits cover the same risk'.[234] In three paragraphs article 34 focuses on rules of overlapping LTC benefits. Based on article 10, overlapping benefits shall generally be prevented. For LTC benefits in particular, article 34 confirms this general prohibition also in relation to LTC with only one supplement. Where the person concerned claims and receives a benefit in kind in the member state of residence, the amount of the benefit in

[230] Ibid, p. 40.
[231] Jorens & van Overmeiren 2009, p. 78.
[232] ILO Report 2010, p. 4; Regulation (EC) No 883/2004, 29 April 2004, [2004] OJ L 166/1, article 34.
[233] Regulation (EC) No 883/2004, 29 April 2004, [2004] OJ L 166/1, article 34.
[234] Ibid, preamble, recital 24.

cash which he receives from the competent member state shall be reduced by the amount of the benefit in kind.[235] It is accordingly, for the competent institution to inform the insured about article 34 to prevent overlapping benefits.[236] The insured shall then apply for the grant of cash benefits to the competent institution. This institution will in turn notify the institution of the place of residence where the latter states provides for LTC benefits in kind.[237] The member state of residence is then required to inform the competent institution of the benefits in kind intended to be granted. Whether a member state provides for benefits in kind is to be deduced from the list published and regularly updated by the Administrative Commission, in accordance with article 34(2).[238] The European Commission, in its latest impact assessment, could not certainly approve the correctness of this list.[239] If the list were incorrect this would of course hamper the aim of article 34.

However, this is not the only difficulty with article 34. In the 2016 impact assessment the Commission itself noted that the 'existing anti-accumulation rules at Article 34 [were] not working effectively'.[240] In its current structure article 34 is only applicable where the benefits received by the insured are 'intended for the same purpose'.[241] In practice, this proved to be a difficult assessment. 'In particular, a competent Member State providing long-term care benefits in cash is unable to verify whether or not the person in receipt of sickness benefits in kind from the State of residence for the same purpose and the same time period; this would only reveal itself when the competent Member States receives a claim for reimbursement from the Member State of residence which normally happens only annually.'[242]

Already in 2009 did Marhold note that 'Regulation 883/2004 missed an opportunity to provide greater clarity.'[243] This lack of clarity combined with shortcomings such as that of

[235] Ibid., article 34.
[236] Regulation (EC) No 987/2009, 16 September 2009, [2009] OJ L 284/1, article 31(1).
[237] Ibid, article 28(1), article 31(2).
[238] For the current version of this list see: List of long term care benefits (Regulation 883/2004 art. 34) 2016.
[239] Commission Impact Assessment SWD (2016) 460 final Part 1/6 2016, p. 23; List of long term care benefits (Regulation 883/2004 art. 34) 2016; Jorens et al. 2012, p. 22.
[240] Commission Impact Assessment SWD (2016) 460 final Part 1/6 2016, p. 23.
[241] Ibid.
[242] Ibid.
[243] Marhold 2009, p. 126.

article 34, might have been the reason why in 2016 the Commission published its proposal for an update of Regulation 883/2004.[244]

3.2. Proposed changes

In this proposal, the Commission identified three major problems with regard to LTC benefits. These are (1) the 'wide variety in long-term care benefits between member states', (2) the 'lack of a common definition or common criteria to identify long-term care benefits', and (3) the 'ad hoc coordination of long-term care benefits as sickness benefits'.[245] These *drivers* lead to essentially three real problems, (1) a 'lack of clarity for citizens and institutions', (2) a 'lack of clarity in legal framework' and (3) the 'possibility of losing benefits, or double payments'.[246] In the EU Public Consultation, 44% of the individual respondents claimed to not know 'about the current rules on care benefits for elderly and/or disabled persons when moving within the EU'.[247] This is an alarming number which shows the need to raise awareness and clarify the regulatory system of LTC benefits. Those who are familiar with the system along general lines are nevertheless faced with numerous uncertainties.[248] In the absence of a common understanding of what LTC benefits are, differing 'outcomes for citizens and competent institutions' are inevitable.[249] This in turn leads to an increased number of cases which are brought to the CJEU, as well as infringement procedures. These are all to be decided by the Court on kind of a case-by-case basis, to determine 'which national benefits are to be considered a long-term care benefit'.[250] In addition, where a case is not referred to the Court, there is the risk for the insured to lose out 'on long-term care benefits [simply because they are] not properly classified and coordinated'.[251]

[244] COM (2016) 815 final.
[245] Commission Impact Assessment SWD (2016) 460 final Part 1/6 2016, p. 20.
[246] Ibid.
[247] Ibid.
[248] Ibid, p. 21.
[249] Ibid.
[250] Ibid, p. 22.
[251] Ibid.

All these considerations eventually led the Commission to include the issue of LTC benefits in its proposal of amending Regulation 883/2004. The proposal forms 'part of the European Commission's Labour Mobility Package' and targets essentially four areas: unemployment benefits, long term care benefits, access of economically inactive citizens to social benefits and social security for posted workers.[252]

With regard to LTC, the Commission intends to introduce a separate chapter for the coordination of LTC, 'including a definition and […] a list of those benefits'.[253] This proposal relies on the suggestions of both the Think Tank Report of 2011 and of 2012.[254] Already in 2011, the drafters of the Report suggested to introduce a definition and an exhaustive list of benefits to 'enhance transparency and contribute to a smoother coordination of LTC benefits'.[255] Following this Report, a questionnaire was sent to member states 'to get a clearer picture of the attitude of MSs towards [the different options proposed in the Think Tank Report 2011]'.[256] In this questionnaire, the majority of member states seemed to be in favour of agreeing on some kind of definition on LTC as well as a separate chapter.[257]

Specifically, the Commission wishes to introduce the following definition of LTC benefits into article 1(vb). '"Long-term care benefit" means any benefit in kind, cash or a combination of both for persons who, over an extended period of time, on account of old-age, disability, illness or impairment, require considerable assistance from another person or persons to carry out essential daily activities, including to support their personal autonomy; this includes benefits granted to or for the person providing such assistance.'[258] This definition is drafted 'in line with the United Nations Convention on the Rights of Persons with Disabilities' and in light of the 'analysis from the trESS network and reflects the case-law of the Court of Justice'.[259] Notably, LTC benefits are also intended to be listed separately in article 3. They would thereby be accepted as a 'distinct branch of social

[252] COM (2016) 815 final, p. 2; Commission Press Release 13-12-2016.
[253] COM (2016) 815 final, p. 2.
[254] Jorens et al. 2011, p. 10, 47, 48; Jorens et al. 2012, p. 18 – 20.
[255] Jorens et al. 2011, p. 10, 47, 48.
[256] Jorens et al. 2012, p. 7.
[257] Ibid, p. 7, 59 - 61; COM (2016) 815 final, p. 6.
[258] COM (2016) 815 final, p. 26.
[259] Ibid, p. 10, art. 1(12).

security'.[260] Following Chapter 1 on Sickness, maternity and equivalent paternity benefits, Chapter 1a would be added to address Long-term care benefits in three provisions; articles 35a – c.[261] Article 35a would thus address the general aspects of LTC benefits. Accordingly, LTC benefits shall be coordinated by the rules on sickness benefits.[262] The Administrative Commission is to draw up a detailed list of benefits that meet the criteria of the new definition contained in article 1(vb).[263] Member states, by way of derogation form the general rule, may also grant LTC benefits in accordance with rules coordinating the other branches of social security besides sickness where the outcome of such coordination is not less favourable.[264] Article 35b would incorporate the prohibition of overlapping long-term care benefits, which is currently to be found in article 34.[265] Lastly, article 35c clarifies that article 35 (Reimbursements between institutions) equally applies to LTC benefits.[266] Where the legislation of the member state of the competent institution would not know LTC benefits in kind, it would be for the institution, which is competent for such reimbursement under Chapter 1, to also reimburse such costs under Chapter 1a.[267]

3.3. Possible implications and further comments

How exactly these amendments would change the coordination of LTC is of course only an assumption. A few comments may still be made.

LTC benefits had already been mentioned in the regulation, by means of article 1(va), article 34 and recital 24 of the preamble, which in its current form at least refers to *Molenaar* and *Jauch*. Nevertheless, it was often claimed that there is no common definition or general understanding of what LTC benefits actually entail. With the proposal to amend the regulation, the Commission would tackle exactly that issue. By adding a common definition, which many member states seem not to object,[268] and by including LTC as a specific branch of social security, there will be more clarification as compared to the

[260] Ibid, p. 10, art 1(13).
[261] Ibid, p. 11, art. 1(20); p. 28, art. 1(17).
[262] Ibid, p. 28, art. 1(17) – art. 35a(1).
[263] Ibid, p. 28, art. 1(17) – art. 35a(2).
[264] Ibid, p. 28, art. 1(17) – art. 35a(3).
[265] Ibid, p. 11, art. 1(20); p. 28, art. 1(17) – art. 35b.
[266] Ibid, p. 29, art. 1(17) – art. 35c(1).
[267] Ibid, p. 29, art. 1(17) – art. 35c(2).
[268] Jorens et al. 2012, p. 18.

current situation. Especially by making them as a distinct branch of social security in article 3, there will certainly be the positive effect of clarifying what the regulation covers. Member states have an obligation to annually report to the Commission on their legislations and schemes referred to under article 3. Hence, adding LTC to the list can also be advantageous in view of legal certainty and transparency.[269] As had been suggested in the Think Tank Report of 2012, a definition of LTC benefits if 'coupled with a list enumerating LTC benefits' could achieve even more legal certainty.[270] Article 35a(2) would do exactly that. It would require the Administrative Commission to draw up a list of LTC benefits, by means of Annex XII, that meet the newly introduced definition. In this list, it also shall be specified whether the respective benefits would be considered benefits in kind or cash benefits. Therefore, in terms of clarification, the proposal would certainly be an improvement.

In terms of protection of rights, which equally has been addressed in the Think Tank Report, there also seems to be a positive effect, even if not as evident. *Protection of rights* was used as an umbrella term in the Think Tank Report to analyse whether 'all benefits which could be claimed without a cross-border situation can be granted [in a cross-border situation] or if the person loses entitlements'.[271] Needless to say, the receipt of LTC benefits depends on the coordinating rules, not on a definition. Nevertheless, having a definition and a list of benefits covered, increases 'legal certainty about which LTC benefits are coordinated and could also be claimed in cross-border situations'.[272] This means that there seems to be a positive effect on what the drafters of the Think Tank Report called *protection of rights*.

With regard to the coordinating rules for LTC benefits, the proposal essentially codifies the case law by recording that LTC benefits are coordinated by the rules applicable to sickness benefits.[273] As it codifies the case law, this does of course mean that the proposal does not change the coordinating rules. Yet, this also seemed to be the preferred option of many member states, as can be deduced from the answers of the questionnaire sent

[269] Regulation (EC) No 883/2004, 29 April 2004, [2004] OJ L 166/1, article 9; Jorens et al. 2012, p. 20.
[270] Jorens et al. 2012, p. 19.
[271] Ibid, p. 13.
[272] Ibid, p. 19.
[273] COM (2016) 815 final, p. 21, preamble – recital (6); p. 25, article 1(5); p. 28, art. 1(17) – art. 35a(1).

to them in 2011.[274] Concretely, the option on which member states agreed entailed that '[t]he competent Member State provides long-term care benefits in cash and reimburses the cost of benefits in kind provided by the Member State of residence'.[275] In extension of the general rule deduced from the case law, article 35a(3) adds another option for member states to also grant LTC benefits in accordance with the rules coordinating the other branches of social security. Member states may do so if these benefits and the way in which they are to be granted, are listed in Annex XII and if 'such coordination is at least as favourable for the beneficiaries as if the benefit was coordinated under this Chapter [1a]'.[276] This means that, while the general rule is coordination in accordance with the rules on sickness benefits, the exception allows for coordination in accordance with other rules as well. In either case, the result would be at least equally beneficial to the insured. There is hence an assessment to be made whether indeed the result is at least equally beneficial. This would require the correct application of the rules of Chapter 1, even though these rules would in the end not determine the grant of the benefit. For the administrations concerned, this would constitute the advantage of still applying the rules they are used to. If, for example, a certain benefit was always coordinated under the invalidity chapter, the administrations would not be faced with the complications of suddenly coordinating it under the sickness chapter (as was the case in *Lucy Stewart*).[277] While as such, that might facilitate the procedure for the administration; this derogation would necessarily have to be proceeded by the assessment laid down before, which might be a potential source of error. The correct application of these rules, however, is detrimental to protect the individual's rights, as are guaranteed by article 35a(3). If the assessment made by administrations was defective, it would eventually be for the Court to correct such flaws.

Apart from these potential problems of the proposal, the overall reaction seemed to be positive.[278] The European Economic and Social Committee, which has been consulted on an optional basis by the Commission,[279] considered that 'the new rules give citizens better protection in cross-border situations.'[280] What it also pointed out though is that 'the new

[274] Council Interinstitutional File 2016/0397 (COD), p. 3, 5.
[275] Ibid, p. 3.
[276] COM (2016) 815 final, p. 28, art. 1(17) – art. 35a(3).
[277] Jorens et al. 2012, p. 27.
[278] ETUC position on proposal for new Regulation 883/2004 27-03-2017; Dassis 2017.
[279] Council Interinstitutional File 2016/0397 (COD).
[280] Dassis 2017, para. 1.3.

rules do not establish a new entitlement to long-term care in every Member State, as this depends on the existence of such services in the host country.'[281]

The British Minister of State for Employment, Damian Hinds, believes that the new rules 'may impact on what benefits currently are or are not covered by the coordination rules'.[282] This is certainly correct. The list to be drafted according to article 35a(2) will have a major impact on which benefits will be covered by the coordinating rules. It also seems, as if the accuracy of this list is a key element of the success of the proposal. It will be crucial to see whether all member states will consider their respective benefits under the new definition. Where the list was defective, this would lead to legal uncertainty once again, which would in turn have to be corrected by the Court. Moreover, that would create a situation very similar to that of SNCB, where member states simply relied on the Annex, while the Court found it more important that the benefits actually met the criteria established, to be classified as SNCB. It might, therefore, be the Court's task once more to correct member states, or the Administrative Commission, the one responsible for the list, to ensure that the criteria of LTC benefits are being correctly applied to national benefits. It should be seen in this respect that ETUC, while in general supporting the efforts of the Commission, stressed the importance of the list to be drafted in accordance with article 35a(2) and called for a 'full and proper involvement of social partners in the drawing up of the detailed list of long-term benefits.'[283]

Most recently, the Committee of the Regions (CoR) published its position on the proposal, noting that the amendments in respect of LTC benefits are necessary but 'the ban on overlapping of sickness and long-term care benefits is likely to be difficult to implement'.[284] The CoR in the same vein opposed the introduction of a separate chapter covering LTC benefits, since '[f]urther coordination requires that long-term care benefits be recognised and developed in all Member States as a form of benefit complementary

[281] Ibid, para. 1.3.
[282] Mr Hinds commented upon the proposal in his Explanatory Memorandum of 4 January 2017. House of Commons 2017, p. 72, 76.
[283] ETUC position on proposal for new Regulation 883/2004 27-03-2017.
[284] European Committee of the Regions 12 & 13-07-2017, p. 1.

to sickness benefits'.[285] At the current stage, the CoR would therefore prefer to adapt article 34 instead.[286]

On the whole, it remains to be seen how the proposal will further develop in the course of the legislative procedure. If it were to be adopted in its present state, there would be clarifications, but a lot would depend on the accuracy of the list of benefits covered by the new definition on LTC. Right now, the proposal is in a very early stage of the procedure, which means still a lot can happen.

4. Conclusion

All EU member states have their own social security schemes. Harmonization of these schemes was never in the Union's competence but, in light of the right to free movement, some kind of coordination between social security systems was needed to ensure that rights to social security benefits would not be lost upon making use of one's free movement rights.

Regulation 883/2004 is the current successor of the often-amended Regulation 1408/71, and aims at exactly this coordination of social security systems. The regulation covers the benefits granted under ten different branches of social security. The list of branches is exhaustive, which is problematic in light of covering all social security benefits in place in the 28 member states of the Union. One such benefit, which was not explicitly mentioned in the list, was the benefit of long-term care.

Therefore, the questions arose whether such benefits would be covered by the scope of the regulation and whether they could be exported. As of 1998, the Court repeatedly confirmed that indeed such benefits would be covered and might be exported where they are social security benefits, more precisely sickness benefits, and at the same time benefits in cash. This finding was not unproblematic and, as shown in the course of this paper, there were several steps to take before arriving at this conclusion.

[285] Ibid, p. 3.
[286] Ibid, p. 3, 5 – 6.

Besides these benefits granted under the listed branches of social security, the regulation also covers special non-contributory cash benefits. The latter category is somewhere between social security and social assistance and its grant is limited to the territory of the member state of residence. According to article 70 of Regulation 883/2004, a benefit is considered to be of the latter category, where it is either 'supplementary, substitute or ancillary cover against the risks covered by the branches of social security […] or solely specific protection for the disabled […] and where the financing exclusively derives from compulsory taxation intended to cover general public expenditure […] and [where it is] listed in Annex X'. The Court demonstrated a very strict application of these conditions. A benefit of social security, on the other hand, was considered one that is 'granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position and relates to one of the risks expressly listed in Article [3(1) of Regulation 883/2004]'. In most of the cases, under scrutiny in this paper, the Court considered the benefits in question to be social security benefits.

As such, the next step was to determine into which category the social security benefit would fall. In a majority of cases, the benefits relating to long-term care were considered to belong to sickness benefits. This categorization, however, caused interpretation problems, as long-term care benefits often resemble 'to a certain extent the invalidity and old-age branches […], without being strictly identifiable with either of them'. Hence, while the Court realized that LTC benefits are connected to more than one branch of social security, it found that in general, they should nevertheless be treated as sickness benefits for the purpose of the regulation. Unfortunately, since the coordination of LTC benefits constitutes a kind of *ad-hoc* system, the Court was not always consistent in applying its self-tailored general rule, as illustrated in *Lucy Stewart*.

As benefits relating to the risk of sickness, LTC benefits are coordinated by the respective sickness chapter, according to which a distinction is made between benefits in kind and cash benefits of which only the latter might be exported. While benefits in kind generally relate to the provision of health care, cash benefits compensate the loss of income during sickness. As regards LTC benefits, this distinction is not that easy. In *Gaumain-Cerri & Barth,* the Court also accepted insurance contributions paid to the third party caring for the insured to be covered by the concept of cash benefits. On the other

hand, the boundary seemed to be reached in *von Chamier-Gliszinski*, where ‘direct payment or reimbursement of the costs of a specialised home entailed by the insured person’s reliance on care [fell] within the definition of *benefits in kind*’. These latter benefits were, therefore, not exportable but had to be provided in accordance with the law of the state of residence.

In 2016, the Commission launched a new proposal to take account of this very fragmented picture of coordinating long-term care benefits. By introducing a common definition of long-term care benefits and a list including all national benefits that fall under this definition, the Commission intends to clarify the matter. As regards the substantive coordinating rules, the proposal foresees a provision according to which LTC benefits would in general be coordinated by the rules of the sickness chapter. Therefore, the proposal would only codify the case law and keep the status quo. In principle, the Commission’s efforts need to be welcomed for at least clarifying the matter. However, a lot will depend on the accuracy of the list containing all national LTC benefits.

Since the Commission’s proposal did not alter the substantive rules coordinating LTC, it will have to be seen whether this amendment will suffice to solve all problems connected to the coordination of LTC. Even if it did, the underlying question remains whether the regulation does, or rather can, adequately address all social security benefits existing in 28 member states. Benefits such as the special non-contributory benefits and LTC benefits prove that the regulation, as it stands, does not address every national social security benefit. It is, therefore, very likely that there will be further benefits in the future, which run into similar problems. In that sense, this will most certainly not be the last amendment of the regulation.

Based on all these findings, as things currently stand, and even without the Commission’s proposed amendments, long-term care benefits are covered by the scope of Regulation 883/2004. For the purpose of the regulation, they are considered sickness benefits and are hence covered by article 3(1)(a). This conclusion does however not automatically make these benefits exportable. Exportability depends on the categorization of the latter as benefits in kind or as cash benefits. Only LTC benefits in cash are eligible for export. LTC benefits in kind, on the other hand, are granted according to the legislation

of the member state of residence and can hence not be exported from the competent state.

As this current situation is far from perfect, the further developments of the Commission’s proposal are worth to be monitored closely.

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