prof. dr. Herwig Verschueren
University of Antwerp
Limassol - 10 October 2009

1612/68, 1408/71, 2004/38, 883/04, friends or foes?

Introduction

2

- How do the provisions of these EC legal instruments relating to free movement of workers/persons interfere?
  - Complementary?
  - Reinforcing?
  - Contradictory?
  - Undermining?

1612 and 1408: complementary material scopes

3

- 1612: Article 7(2): conditions of employment and social advantages
- Prohibition of discrimination on grounds of nationality
  - Very broad concept: confirmed by settled case law
  - Also social security rights covered by 1408: *Schmidt* (C-310/91)
  - As well as social security rights not covered by 1408

1612 and 1408: complementary material scopes

4

- 1612 also covers social security rights not covered by 1408
  - child birth allowances excluded from the scope of 1408 (and of 883: see Annexes)
    - *Leclere* (C-43/99): the ECJ applied Art. 7 of 1612 to waive residence clause in Luxembourg legislation
  - Pre-retirement benefits: *Com. v France* (C-35/97): waiving of residence clauses
  - Career-interruption benefits: not considered unemployment benefits under 1408 - *Com. v Belgium* (C-469/02)
    - Social advantage under 1612: waiving of residence clauses

1612: no rules on conflicts of law

5

- Benefits covered by 1612 but not by 1408
  - 1612: MS of employment must grant the benefit
  - But what if MS of residence grants a similar benefit to all residents (child birth allowances)
  - Double entitlement? Which benefit will take precedence?
  - No “single legislation applicable” or rules on overlapping of benefits in 1612
    - compare detailed arrangements in 1408 on child benefits
  - Only national anti-cumulation provisions may apply

What if benefit is covered by 1408?

6

- Art. 42 of 1612: “*This Regulation shall not affect measures taken in accordance with Article 51 of the Treaty*”
  - Friendly relationship
- *Com. v France* (C-35/97)
  - “*in accordance with Article 42(2) of Regulation No 1612/68, the provisions of Regulation No 1408/71 take precedence over those of Regulation No 1612/68*”
- See *Meints* (C-57/96); *Fahmi et al* (C-33/99): only after the ECJ had concluded that the benefit was not covered by 1408, it proceeded to examine the applicability of 1612

Possible contradictions between 1612 and 1408

7

- Unemployment benefits for unemployed frontier workers
  - 1408: state of residence
  - 1612: benefits inextricably linked to occupation (such as unemployment benefits): equal treatment under the legislation of state of former employment
- Part-time frontier workers working in two MS
  - 1408: only subject to the social security legislation of MS of residence
  - 1612: equal treatment in each state of employment

Possible contradictions between 1612 and 1408

8

- Family members of frontier workers
  - 1408: no access to health care in MS of employment of the frontier worker
  - 1612: should have access to all social benefits in MS of employment of the frontier worker: *Meeussen* (C-337/97); Hartmann (C-212/05)
- Special non-contributory benefits
  - 1408 en 883: residence based co-ordination system: no export
    - long and difficult political negotiations
    - ECJ fine-tuned and confirmed the political agreements
  - 1612: MS of employment

However: *Hendrix* (C-287/05)

9

- ECJ explicitly acknowledged the existence of 42(2) 1612: precedence for 1408
- However: the objective of the establishment of the greatest possible freedom of movement for migrant workers should be respected by 1408
- Article 7(2) of 1612: expression of that objective
- ECJ: residence clauses in 1408 should be justified objectively and be proportionate in each case and specifically for active migrant workers

However: *Hendrix* (C-287/05)

10

- Precedence of 1612 objectives over 1408 co-ordination methods
  - Possible consequence for aggregation of periods of residence under 1408 for the special non-contributory benefits and waiving of "length of residence" requirements under 1612
  - case of Cypriot Social Pension
- Compare with *Petersen* (C-228/07) and *Leyman* (C-3/08)
  - ECJ overruled (not annulled) provisions of 1408 as being contrary to 39 EC in these cases: no sufficient justification for the obstacles to the freedom of movement for workers
- Opening of Pandora's box?
- 1612 and 1408: not such good friends any more?

1612 and 1408: complementary personal scopes

11

- *Hartmann* (C-212/05)
  - Mr. Hartmann was not covered by the personal scope of 1408
  - ECJ: he is a migrant (frontier) worker under 1612
  - Residence clause for the entitlement of his spouse to the German child-raising benefit not acceptable under Article 7(2) 1612 (see opposite opinion of AG)

1612 and 1408: complementary personal scopes

12

- *Geven* (C-213/05)
  - Ms Geven not covered by the personal scope of 1408
  - ECJ accepts justification for a residence clause for the entitlement to the German child-raising benefit under 1612
    - Minor occupation of Ms Geven: not sufficiently substantial to invoke Article 7(2) 1612
    - Departs from the previous case law on frontier workers
    - However: *Com. v Germany* (C-269/07 – 10.9.2009): "*compulsory membership of the German social security system, …, constitutes a sufficiently close connection with German society to enable cross-border workers to benefit from the social advantage in question*"

What about 2004/38 and 1408?

13

- No provision in 2004/38 comparable to Article 42 of 1612
- Article 24(1) of 2004/38
  - Equal treatment in the host state for all matters within the scope of the Treaty
    - *Martinez Sala* (C-85/96): benefits falling under 1408 as well as under 1612 are matters within the scope of the Treaty

2004/38 undermining "single legislation applicable" and "*lex loci laboris*" in 1408?

14

- 1408: single legislation applicable and *lex loci laboris*: access to social security benefits in only one MS, in principle the state of employment
- Article 24 of 2004/38: equal treatment in MS of residence
- See *Bosmann* (C-352/06) (family benefits for frontier worker)
  - ECJ: 1408 rules do not exclude the entitlement to benefits under the legislation of the state of residence
  - ECJ: Community law does not require national law of state of residence to create such entitlement

2004/38 undermining "single legislation applicable" and "*lex loci laboris*" in 1408?

15

- BUT: Ms Bosmann would also fall under 2004/38 since she was a Belgian national residing in Germany, while working in the NL
- Could she invoke Art. 24 of 2004/38 creating a Community law obligation for the state of residence to grant benefits to workers who are subjected to the social security system of the MS of employment by 1408?
  - Not examined by the ECJ; because of timing?
- What about "single legislation applicable" and *lex loci laboris*?
- How to co-ordinate these Community law entitlements?

Divergent definitions of "*residence*" in 2004/38 and 1408 - 883

16

- No distinction in 2004/38 between "stay" (temporary) and "residence" (permanent): both situations "*residence*" in "*host state*" under 2004/38
- 1408 and 883: distinction between "*stay*" and "*residence*" is of paramount importance for the implementation of their provisions
  - For instance: no entitlement to family benefits, long-term care benefits in cash or special non-contributory benefits in MS of "stay"
    - German pensioners "staying" in Spain for 5 months during winter
    - they however "reside" there within the meaning of 2004/38 and its Article 24
  - Could they claim benefits in the MS of "stay", where 1408 does not guarantee such entitlement?

2004/38 interfering with other rules of 1408?

17

- Article 28 of 1408: MS paying a pension is "competent" for sickness benefits in cash (long-term care benefits) when the pensioner resides in another MS
- Would this pensioner be entitled to comparable benefits in the MS of residence on the basis of Article 24 of 2004/38?
  - Only if the "competent" MS does not provide for an equivalent benefit?
  - How to co-ordinate, prioritize or "anti-cumulate"?

2004/38 interfering with 1408

18

- Should the rules of 1408 be giving priority as *lex specialis*?
- Article 24 of 2004/38 is too embryonic for adequate co-ordination
  - Is its introduction "*Subject to such specific provisions as are expressly provided for in the Treaty and secondary law …*" sufficient to give precedence to the provisions of 1408 as Art. 42 of 1612 did?
  - should Community legislator intervene?

Or 1408 interfering with the rules of 2004/38?

19

- Exceptions in Article 24(2) for social assistance
- Social assistance not in the first 3 months of "residence"
  - What about the special non-contributory benefits listed in 1408
    - Are they "social assistance" within the meaning of 2004/38?
    - Probably some are, other ones are not: compare *Vatsouras and Koupatanze* (C-22 and 23/08)
  - 1408 guarantees entitlement from the first day a person transfers his/her habitual residence to a MS
  - See *Swaddling* definition of habitual residence

"Sufficient resources" requirement in 2004/38

20

- Articles 7, 8, 14: for economically inactive persons
- "*not becoming a (an unreasonable) burden on the social assistance system of the host MS*"
- 1408 could help the migrant person fulfil the sufficient resources requirement
  - for instance export of pensions or of unemployment benefits (for 3 months)

"Sufficient resources" requirement in 2004/38

21

- What is meant by "social assistance system"
  - What about special non-contributory benefits listed in 1408?
  - Some benefits would qualify as "social assistance" under 2004/38
    - For instance the Belgian "*guaranteed income for elderly persons*"

"Sufficient resources" requirement in 2004/38

22

- Would it be unreasonable to rely on 1408 in order to claim "social assistance" in the host State?
- Or would claiming rights under 1408 jeopardize residence rights under 2004/38?
- Example: Spanish widow moving to Belgium
- *Effet utile* and *lex specialis*: 1408 should take precedence over 2004/38

"Comprehensive sickness insurance" in 2004/38 (Article 7)

23

- 1408 can help
  - European Health Insurance Card when travelling in the EU
  - Provisions on entitlement to sickness benefits in kind (health care) in the MS of residence but at the expense of the health system of the "competent" State
    - Pensioners and their family members
    - workers' family members not residing in the same State as the worker
  - Also equal treatment (guaranteed by Art. 3 1408) in MS of residence if no other MS should cover sickness according to 1408?

Concept of family members in 1408 – 883 and 2004/38

24

- Different concepts in 883 and 2004/38
  - 2004/38: definitions in Articles 2 and 3: refer to civil law concepts and to factual situations of dependency
  - 1408 refers to "social security" definitions; for access to health care: definitions in legislation of place of residence
  - It may happen that a person is considered to be a member of the family under 2004/38, but not under 1408 and therefore risks losing health care coverage under 1408 in the state of residence
    - … and consequently residence rights under 2004/38?
  - Example: German pensioner with registered partner moving to The Netherlands

Maintenance grants for studies and "workers"

- Article 24(2) 2004/38: maintenance grants for students only once they have acquired the right of permanent residence (after 5 years)
- Implicitly confirmed in *Förster* (C-158/07)
- But:
  - 1612: residence clause cannot be applied to students family members of migrant workers
  - or to students turning into workers by carrying out a "student" job which is "*real and genuine*" and "*not regarded as purely marginal and ancillary*"
  - 32 hours a month/ 8 hours a week sufficient?

To conclude

- Different EC free movement instruments
  - Sometimes complement each other
  - Sometimes contradict each other
  - Sometimes threaten to undermine each other's solutions or objectives
- 1408/71 and 883/2004: complex compromises with detailed arrangements; principles sometimes difficult to spot
- 1612/68 and 2004/38: principles; poor co-ordination of national systems
- Co-ordination between these instruments needed