Introduction

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

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

1612 and 1408: complementary material scopes

- 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

- 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

- 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?

- 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 Meinls (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

- 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

- Family members of frontier workers
  - 1408: no access to healthcare in MS of employment of the frontier worker
  - 1612: should have access to all social benefits in MS of employment of the frontier worker; Meessen (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)

- 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)

- 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

- 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

- 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?

- 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?

- 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?

- 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

### Divergent definitions of “residence” in 2004/38 and 1408 - 883

- 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?

- 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

- 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?

- 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 Vathouras and Koushanzani (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

- 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

- 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

- 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)

- 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

- 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