Overview of recent cases before the Court of Justice of the European Union (September 2021-December 2021)

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Abstract
The concept of ‘working time’ for a period of stand-by time according to a stand-by system applicable to firefighters was interpreted by the Court in MG (C-214/20). In the Y case (C-636/19), the Court interpreted the concept of ‘insured person’ for the purpose of reimbursement of healthcare costs under Directive 2011/24. In the TS case (C-538/19), the Court dealt with another cross-border healthcare case. This time the question was whether a Member State can require an authorisation for cross-border healthcare to be subject to the submission of a medical report drawn up by a doctor from its national public health insurance system in light of Article 20 of Regulation 883/2004 and Article 56 TFEU. In ASGI and APN (C-462/20), the exclusion of third-country nationals from the eligibility to the Italian family card was under scrutiny. In SC (C-866/19), the Court clarified that the principle of aggregation applies to the calculation of the theoretical amount of benefit but not to the calculation of the actual amount of benefit under Article 52(1)(b) of Regulation 883/2004. In K (C-285/20), the Court held that being on sick leave and receiving sickness benefits can be considered as equivalent to the pursuit of an economic activity for the purpose of applying the rules on unemployment benefits for wholly unemployed frontier workers under Article 65(2) and (5) of Regulation 883/2004.

Keywords
insured person, working time, third-country nationals, calculation of benefits, frontier worker, unemployment benefits, cross-border healthcare

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The concept of ‘working time’ for a period of stand-by time according to a stand-by system: *MG v Dublin City Council*¹

MG was a retained firefighter, employed on a part-time basis by Dublin City Council. By a virtue of a system of stand-by time according to a stand-by system, he was retained by the brigade of the fire station by which he was trained. MG was required to participate in 75% of that brigade’s interventions. His period of stand-by time, according to a stand-by system, was seven days per week and 24 hours per day, which could be interrupted by leave periods, or when MG notified his unavailability in advance. During the stand-by time, he was not obliged to be present at a specific place, but should he receive an emergency call, he must arrive at the fire station within a specified time limit (the maximum turn-out time is 10 minutes). He could carry out other professional activity, provided that activity did not exceed 48 hours per week on average, and as far as he lived and performed these activities at a reasonable distance from the fire station.

In the opinion of MG, the fact that he must be in a position to respond rapidly to an emergency call at all times prevented him from freely devoting himself to his family and social activities, as well as to his professional activity as a taxi driver. For these reasons, he argued that his stand-by time constituted working time, thus Dublin City Council was violating the rules on daily and weekly rest and maximum weekly working time. To this effect, MG filed a claim at the Workplace Relations Commission. However, his claim was rejected, and MG appealed before the referring court, the Labour Court (Ireland). Uncertain about the interpretation of the concept of ‘working time’ in these circumstances, the Labour Court decided to refer questions for a preliminary ruling. Reframed by the Court of Justice, the questions essentially asked whether Article 2(1) of Directive 2003/88 must be interpreted as meaning that a period of stand-by time according to a stand-by system served by a retained firefighter, during which that worker carries out a professional activity on his own account with the permission of his employer but must, in the event of an emergency call, reach his assigned fire station within 10 minutes, constitutes ‘working time’ within the meaning of that provision.²

While the Court left the final assessment of whether the stand-by time in these circumstances should be classified as ‘working time’ or ‘rest period’ to the referring court, it did provide guidance on the criteria for that assessment. The Court recalled its *Stadt Offenbach am Main* judgment and stated that the concept of ‘working time’ within the meaning of Directive 2003/88 may cover the entirety of periods of stand-by time. This is when the constraints imposed on the worker are such as to affect, objectively and very significantly, the possibility for the latter to freely pursue his own interests and manage the time during which his professional services are not required.³ To assess whether a stand-by system creates such major constraints, the Court stated that it is essential to consider the average frequency of the interventions during the period of stand-by that the worker is actually called upon, and the time limit within which they must return to their professional activities.⁴ Organisational difficulties generated by the stand-by time, however, are not to be taken into account in this assessment. These include difficulties arising, for instance, when the worker has freely chosen to pursue professional activity distant from the place that he must reach in the context of his post as a retained firefighter.⁵

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1. C-214/20 *MG v Dublin City Council*, EU:C:2021:909.
2. C-214/20 *MG v Dublin City Council*, EU:C:2021:909, para.34.
3. C-580/19 *Stadt Offenbach am Main (A firefighter’s period of stand-by time)*, EU:C:2021:183, para.38.
4. C-214/20 *MG v Dublin City Council*, EU:C:2021:909, paras. 38-40.
5. Ibid, para.45.
The Court noted that MG had the possibility to carry out other professional activity during his periods of stand-by, which indicated that the stand-by system did not place a major constraint on the management of his time. Furthermore, MG was not obliged to be in a specific place during his periods of stand-by and he was not nor to participate in all interventions of the fire station. This could lead to the conclusion that he was in a position to undertake other professional activity during those periods. It was for the referring court to assess whether the frequency and duration of the interventions as a retained firefighter prevented the effective pursuit of his other professional activity.6

The MG judgment follows the case law of Offenbach am Main7 and Radiotelevizija Slovenija8 where the factors for assessing whether stand-by time is to be considered as ‘working time’ have been established. However, it adds the circumstances under which periods of stand-by time under a stand-by system where a worker pursues other professional activity may be classified as ‘working time’ within the meaning of Directive 2003/88.9

The concept of ‘insured person’ under Directive 2011/24: Y v CAK10

Y, a Dutch national residing in Belgium, received an old-age pension from the Netherlands. As a non-resident, Y was not covered by the Netherlands compulsory healthcare insurance scheme, but under Article 24 of Regulation 883/200411, in return for a contribution to the CAK (Central Administration Office, Netherlands) she was entitled to receive healthcare benefits in her Member State of residence (Belgium), at the expense of the Member State granting her pension (the Netherlands).

After a consultation with her general practitioner in Belgium and medical examinations conducted in Maastricht (Netherlands), Y was diagnosed with breast cancer. Seeking a second opinion, Y consulted a hospital in Germany, where her cancer was found to be more advanced than initially diagnosed. One week later, Y underwent surgery and post-operative treatment in that hospital. While Y had requested a prior authorisation from CAK for the second opinion, she had not done so for the other treatments received in Germany. Therefore, in the absence of prior authorisation, CAK refused to reimburse the cost of the treatments. CAK argued that one week between the second medical opinion and consequent treatments did not indicate any urgency, thus Y should have obtained prior authorisation for ‘scheduled’ treatment under Article 20. Y disagreed, as in her view, the surgical operations were of an urgent and unexpected nature, thus ‘unscheduled’ treatment for which no prior authorisation was required. Furthermore, in the opinion of Y, pursuant to Directive 2011/24 the post-operative treatments were not subject to prior authorisation.

Y brought an action against the decisions of CAK before the District Court in Amsterdam. After her case was dismissed, Y lodged an appeal before the referring court, the Centrale Raad van

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6. Ibid, paras. 43-44.
7. C-580/19 Stadt Offenbach am Main (A firefighter’s period of stand-by time), EU:C:2021:183.
8. C-344/19 D. J. v Radiotelevizija Slovenija, ECLI:EU:C:2021:182.
9. Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299/9.
10. C-636/19 Y v CAK, EU:C:2021:885.
11. Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, p.1).
Beroep (Higher Social Security and Civil Service Court). Referring two questions for interpretation of the Court of Justice, first, the referring court was uncertain as to whether a person in receipt of a pension, but not insured under the compulsory sickness insurance scheme, could rely on Directive 2011/24 as an ‘insured person’ within the meaning of Article 3(b)(i). If answered in the negative, secondly, the Court asked whether, pursuant to Article 56 TFEU, the refusal to grant the reimbursement would be an unjustifiable obstacle to the free movement of services. Agreeing with the view of CAK that the surgical treatments constituted ‘scheduled’ treatment, the referring court did not in include this aspect in the referred questions.12

The Court began with clarifying the concept of ‘insured person’ by first answering whether that concept assumes affiliation to a compulsory sickness insurance scheme. The Dutch Government argued that Y could not be considered an ‘insured person’, since she was only contractually insured with CAK, and not affiliated with the compulsory insurance. The Court found such an interpretation restrictive.

In this respect, the Court noted that with a view to ensure coherence between the two legal instruments, the Directive refers to persons covered by Article 2 of Regulation 883/2004 and who are insured within the meaning of Article 1(c) of that Regulation. Under these provisions, the Court noted that the concept of ‘insured person’ entails two conditions. First, the person must be a national of a Member State who is, or has been, subject to the legislation of one or more Member States. This was clearly the case, as Y received an old-age pension under the legislation of the Netherlands of which she was a national, and under Article 24(1) of Regulation 883/2004, she was entitled to the benefits in kind provided by the Member State of residence at the expense of the Member State responsible for paying her pension. Secondly, the person must satisfy the conditions under the legislation of the competent Member State to have right to those benefits.13 Subject to verification of the referring court, the Court found that the conditions to have the right to those benefits were, in essence, the same under Dutch legislation as laid down in Article 24 of the Regulation. These provisions, and neither those of the Directive, do not impose a requirement for an ‘insured person’ to be affiliated with the compulsory sickness insurance of the Member State granting the pension.14

It was also unclear to the referring court whether ‘pensioners’ such as Y would fall under the concept of ‘insured person’. It was argued by the Dutch Government that the chapters of the Regulation draw a distinction between provisions applicable to ‘insured persons’ and ‘pensioners’. Thus, in their view, the latter would not fall within the concept of ‘insured person’. The Court disagreed with these findings. According to the Court, the systematisation only intends to provide special provisions for pensioners (lex specialis), and the two categories of persons are not mutually exclusive.15

Regarding reimbursement in the absence of prior authorisation, the Court stated that the Netherlands had not communicated and made use of the option provided in the Directive to establish systems of prior authorisation, and on that ground Y could not be deprived of reimbursement of the costs of the post-operative treatments which she had received in Germany.16 In light of the answer to the first question, the Court did not see the need to answer the second question referred.

12. C-636/19 Y v CAK, EU:C:2021:885, para.34.
13. Ibid, paras. 37-39.
14. Ibid, paras. 40-48 and 56-57.
15. Ibid, paras. 49-54.
16. Ibid, para.59.
Neither did the Court comment on the reimbursement of the surgical operations, and whether they were of ‘scheduled’ or of ‘unscheduled’ nature.

Following the recent case law on the reimbursement of cross-border healthcare in the absence of prior authorisation,17 the CAK judgment clarifies the concept of ‘insured person’ under Directive 2011/2418 and whether it entails an obligation to be affiliated with a compulsory national sickness insurance scheme. However, the question of what is scheduled or unscheduled treatment remains open.

**Alternative treatment prescribed as part of a second medical opinion in a Member State other than the one in which the insured person resides: TS and Others v Casa Națională de Asigurări de Sănătate and Casa de Asigurări de Sănătate Constanța19**

Another case with relevance to cross-border healthcare concerned a person, ZY, residing in Romania and affiliated to its national public health insurance scheme, who was diagnosed with tongue cancer in a hospital in that Member State. The doctor treating him recommended an operation in which two-thirds of the tongue would be surgically removed. ZY sought a second medical opinion in Vienna (Austria), where the diagnosis was confirmed. Nevertheless, the doctor did not agree with the proposed surgical intervention and instead suggested an alternative therapy that was as effective as the surgical procedure but had the advantage of avoiding a disability caused by the removal of a part of the tongue. Relying on Article 20 of Regulation 883/2004, ZY applied for prior authorisation for that treatment. The competent institution refused to provide him with prior authorisation because, under Romanian law, such authorisation could only be obtained for a treatment recommended by a doctor designated by the competent institution. Nevertheless, ZY underwent the medical treatment in Austria.

Following ZY’s death, his heirs sought reimbursement for the treatment received in Austria, but only received a partial reimbursement. ZY’s heirs filed an appeal against that decision to the Tribunal Constanța (Court of First Instance, Constanța, Romania) requesting full reimbursement pursuant to Regulation 883/2004. That court dismissed the action, as prior authorisation had not been obtained. Finally, the heirs appealed to the referring court, the Curte de Apel Constanța (Court of Appeal, Constanța, Romania). In essence, the referring court asked the Court of Justice whether, in these circumstances, the national legislation, which does not provide a procedure for examining a second medical opinion issued in another Member State for the purposes of granting prior authorisation, is compatible with Article 20 of Regulation 883/2004, read in conjunction with Article 56 TFEU.20

The Court began by elaborating the conditions of reimbursement under Article 20. Generally, an insured person must obtain authorisation before they receive treatment in another Member State. The competent institution is required to grant such authorisation when the treatment in question

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17. C-777/18 WO v Vas Megyei Kormányhivatal, ECLI:EU:C:2020:745, C-243/19 A v Veselības ministrija, ECLI:EU:C:2020:872.
18. Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients’ rights in cross-border healthcare (OJ L 88, 45–65).
19. C-538/19 TS and Others v Casa Națională de Asigurări de Sănătate and Casa de Asigurări de Sănătate Constanța, EU:C:2021:809.
20. Ibid, para.27.
is among the benefits provided for by the legislation in the Member State where the person concerned resides and where he cannot be given such treatment within a time limit which is medically justifiable, taking into account his current state of health and the probable course of his illness.²¹

In this respect, the Court recalled its earlier judgments in Vas Megyei Kormányhivatal²² and Elchinov.²³ In these rulings, the Court held that although prior authorisation may generally be required, a rule which excludes in all cases the reimbursement of hospital care provided without prior authorisation, even if the reimbursement conditions are otherwise met, constitutes an unjustified restriction on the freedom to provide services.²⁴ This is the case in situations where the refusal of authorisation is unfounded, or when the insured person is unable to request or wait for a decision on that authorisation due to medically urgent circumstances. In these cases, the insured person may, despite of the absence of prior authorisation, be entitled to reimbursement.²⁵

In light of these conditions, the Court found that the Romanian law, which makes the granting of authorisation subject to the submission of a medical report of a doctor in the Romanian national public health insurance system, goes beyond the scope of Article 20 of Regulation 883/2004. Such a condition may deprive an insured person, who has only been issued with a medical opinion prescribing alternative treatment in another Member State, of the possibility of obtaining authorisation. The procedure also does not ensure that the competent institution will take into account that second medical opinion, preventing the competent institution from determining whether the conditions on prior authorisation under Article 20 are met.²⁶ Thus, the Court found that Article 20 of the Regulation, read in conjunction with Article 56 TFEU, must be interpreted as precluding such national law.²⁷

The Court left it to the referring court to verify whether the other conditions for reimbursement under Article 20 were met. However, the Court stated that if the failure to obtain the authorisation was solely due to the fact that the medical report prescribing the treatment was written by a doctor from a Member State other than ZY’s state of residence, his heirs were entitled to reimbursement equal to the amount that this institution would normally have paid if ZY had obtained such authorisation.²⁸

Following its earlier judgments in Vas Megyei Kormányhivatal²⁹ and Elchinov³⁰ on the reimbursement of cross-border healthcare expenses and the system of prior authorisation, the Court clarified, in TS and Others v Casa Națională de Asigurări de Sănătate and Casa de Asigurări de Sănătate Constanța,³¹ the conditions for reimbursement in the event of diverging medical opinions.

²¹. Ibid, paras. 29-31.
²². C-777/18 Vas Megyei Kormányhivatal, EU:C: 2020:745.
²³. C-173/09 Elchinov, EU:C:2010:581.
²⁴. C-777/18 Vas Megyei Kormányhivatal, EU:C: 2020:745, para.58, C-173/09 Elchinov, EU:C:2010:581, paras 38 and 49.
²⁵. C-538/19 TS and Others v Casa Națională de Asigurări de Sănătate and Casa de Asigurări de Sănătate Constanța, EU: C:2021:809, paras. 37-39.
²⁶. Ibid, paras.45-46.
²⁷. Ibid, para.55.
²⁸. Ibid, paras. 56-57.
²⁹. C-777/18 Vas Megyei Kormányhivatal, EU:C: 2020:745.
³⁰. C-173/09 Elchinov, EU:C:2010:581.
³¹. C-538/19 TS and Others v Casa Națională de Asigurări de Sănătate and Casa de Asigurări de Sănătate Constanța, EU: C:2021:809.
Exclusion of third-country nationals from eligibility to a family card: ASGI, APN v Presidenza del Consiglio dei Ministri-Dipartimento per le politiche della famiglia, Ministerio dell’ Economia e delle Finanze

In 2016, the Italian Government introduced a family card for families whose members are Italian nationals or nationals of other Member State of the EU legally residing in Italy, and who have at least three children under 26 years of age. The family card grants discounts or price reductions when purchasing goods and services supplied by public or private entities which have entered into an agreement with the Italian Government. ASGI and APN are two associations defending the rights of migrants. They brought a case in front of the Italian courts contesting the exclusion of third-country nationals from the family card.

The questions referred to the Court of Justice asked whether the equal treatment provisions in relation to social security benefits enshrined in Directive 2003/109, Directive 2011/98, Directive 2009/50 and Directive 2011/95 precluded the exclusion of third-country nationals from eligibility for the family card. The equal treatment provisions of the different Directives involved would only apply if the family card was considered to be included in the benefits covered by those Directives.

The benefits covered by Article 12(1)(e) of Directive 2011/98 and Article 14(1)(e) of Directive 2009/50 are the benefits defined by Regulation 883/2004. The Court recalled that a benefit may be considered as a social security benefit under Regulation 883/2004 if it is granted without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position and if it relates to one of the risks expressly listed in Article 3(1) of Regulation 883/2004. The Court considered that the Italian family card fulfilled the first part of the test but did not relate to one of the specific risks listed in Article 3(1) of Regulation 883/2004. The Court explained that the family card could not be considered as a family benefit referred to in Article 3(1)(j) of Regulation 883/2004 since the discounts and price reductions offered were directly financed by the undertakings participating in the family card and therefore could not be considered as a public contribution in the form of a contribution by society towards family expenses. As a result, Article 12(1)(e) of

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32. C-462/20 ASGI, APN v Presidenza del Consiglio dei Ministri-Dipartimento per le politiche della famiglia, Ministerio dell’ Economia e delle Finanze, EU:C:2021:894.
33. Article 11(1)(d) or Article 11(1)(f) of Directive 2003/109, Article 12(1)(e) or Article 12(1)(g) of Directive 2011/98, Article 14(1)(e) or Article 14(1)(g) of Directive 2009/50, and Article 29 of Directive 2011/95.
34. Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 016/44.
35. Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ L 343/1.
36. Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155/17.
37. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337/9.
38. C-462/20 ASGI, APN v Presidenza del Consiglio dei Ministri-Dipartimento per le politiche della famiglia, Ministerio dell’ Economia e delle Finanze, EU:C:2021:894, para.25.
39. Ibid, para.28.
Directive 2011/98 and Article 14(1)(c) of Directive 2009/50 did not preclude the exclusion of third-country nationals from eligibility to the family card.40

The benefits covered by Article 11(1)(d) of Directive 2003/109 are defined as ‘social security, social assistance and social protection as defined by national law’. Since the definition of those concepts is left to national law, the Court only examined the exclusion of third-country nationals from the family card on the basis of the principle of effectiveness of EU law. It considered that such an exclusion did not appear to undermine the effectiveness of Directive 2003/109 as regards equal treatment in the field of social security, social assistance and social protection.41

The benefits covered by Article 29 of Directive 2011/95 are social assistance benefits. The definition of social assistance can be found in the case law of the Court as referring to ‘all assistance schemes established by the public authorities, whether at national, regional or local level, to which recourse may be had by an individual who does not have resources sufficient to meet his or her own basic needs and those of his or her family’.42 The Court left it up to the referring court to determine whether the family card was a social assistance benefit.43

Finally, Article 11(1)(f) of Directive 2003/109, Article 12(1)(g) of Directive 2011/98, and Article 14(1)(g) of Directive 2009/50 provide for equal treatment with regard to access to and the supply of goods and services. Since the purpose of the family card was to grant access to and supply goods and services with a discount or price reduction, the Court held that the exclusion of third-country nationals from the eligibility of the family card amounted to unequal treatment contrary to Article 11(1)(f) of Directive 2003/109, Article 12(1)(g) of Directive 2011/98, and Article 14(1)(g) of Directive 2009/50.44

The Italian courts seem to be asking questions regarding the lack of equal treatment of third-country nationals in the various pieces of Italian legislation on social security benefits. Indeed, after the INPS v WS case45 on the Italian legislation on family benefits and O.D. and Others v INPS46 on the Italian legislation on childbirth and maternity allowances, ASGI and APN is the third preliminary ruling where the Court of Justice has found that a piece of Italian legislation amounted to unequal treatment of third-country nationals, albeit this time on the basis of equal treatment with regard to access to and the supply of goods and services.

**The principle of aggregation for the purpose of the calculation of the amount of pension benefits: SC v Zakład Ubezpieczeń Społecznych I Oddział w Warszawie Wydział Realizacji Umów Międzynarodowych**

The SC case concerned a dispute over the calculation of the actual amount of pension benefits to be paid by the Polish authorities to SC. More specifically, there was a dispute over the weight given by the Polish authorities to the non-contribution periods completed by SC.

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40. Ibid, para.29.
41. Ibid, para.32.
42. Ibid, para.34.
43. Ibid, para.35.
44. Ibid, paras. 37-39.
45. C-302/19 INPS v WS, ECLI:EU:C:2020:957.
46. C-350/20 O.D. and Others v INPS, EU:C:2021:659.
47. C-866/19 SC v Zakład Ubezpieczeń Społecznych I Oddział w Warszawie Wydział Realizacji Umów Międzynarodowych, EU:C:2021:865.
Under Article 52(1)(b) of Regulation 883/2004, the calculation of the amount of pension benefits is achieved in two stages: (i) a theoretical amount and (ii) an actual amount. The main question in SC was whether the principle of aggregation applies to both the calculation of the theoretical amount under Article 52(1)(b)(i) and the calculation of the actual amount under Article 52(1)(b)(ii) of Regulation 883/2004.

Concerning the theoretical amount under Article 52(1)(b)(i) of Regulation 883/2004, the Court held that, in light of the objective laid down in Article 48 TFEU, the purpose of that provision is to give a worker the maximum theoretical amount so that migrant workers would neither lose rights to social security benefits nor suffer a reduction in the amount thereof as a result of their exercise to their right of freedom of movement. Hence, the principle of aggregation applies to the calculation of the theoretical amount, meaning that all the periods of insurance completed in the various Member States involved are considered as if those periods were completed under the legislation of the competent Member State.

However, the Court reached the opposite conclusion for the calculation of the actual amount. The Court considered that Article 52(1)(b)(ii) of Regulation 883/2004 operates solely on the basis of the principle of apportionment and not on the basis of the aggregation principle. Under the principle of apportionment, each Member State should pay only the part of benefit relating to the relevant periods completed under its own legislation. Hence, the actual amount is calculated on the basis of the proportion of the theoretical amount corresponding to the total periods of insurance actually completed under the legislation of each Member State concerned. Accordingly, the calculation of the actual amount of the benefit should be made in accordance with Polish legislation, taking into account the contribution periods and the non-contribution periods only completed in Poland.

In conclusion, this case confirms the Court’s case law on the relevance of the principle of aggregation for calculation of the theoretical amount and the principle of apportionment for the calculation of the actual amount rendered in the context of Regulation No 1408/72, now also in relation to Regulation 883/2004.

Receiving sickness benefits can be considered as equivalent to the pursuit of an economic activity for the purpose of applying Article 65(2) and (5) of Regulation 883/2004: K v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen (Uwv)

Mr. K worked between 1979 and 2015 in the Netherlands. In 2005, he moved with his family in Germany. On 1 May 2015, he started working in Germany until being placed on sick leave on 24 August 2015. He received his salary until 14 October 2015 and then sickness benefits. On 2 February 2016, Mr. K moved back to the Netherlands. Two weeks later, his German employer

48. Ibid, paras.38-39.
49. Ibid, paras.35-37.
50. Ibid, para.41.
51. Ibid, para.42.
52. Ibid, para.44.
53. For example, C-793/79 Menzies, EU:C:1980:172; C-132/96 Stinco and Panfilo, EU:C:1998:427; C-347/00 Barreira Pérez, EU:C:2002:560; C-30/04 Koschitzki, EU:C:2005:492.
54. C-285/20 K v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen (Uwv), EU:C:2021:785.
terminated his contract with effect from 15 March 2016. The competent German institution took the view that Mr. K was fit for work and ceased to pay him sickness benefits. Mr. K then applied to the Dutch Employee Insurance Schemes Implementing Body for unemployment benefits. According to Article 65(2) of Regulation 883/2004, a wholly unemployed frontier worker is required to make himself or herself available to the employment services of the Member State of residence. Furthermore, Article 65(5) of the Regulation states that the unemployed frontier worker should receive benefits in accordance with the legislation of the Member State of residence as if he or she had been subject to the legislation during his or her last activity as an employed or self-employed person. The Dutch authorities refused to apply Article 65(2) and (5) of Regulation 883/2004 to Mr. K and therefore to grant him unemployment benefits on the grounds that he was not pursuing an actual activity when moving back to the Netherlands, but was instead on sick leave.

The Court was asked whether the rules on unemployment benefits for wholly unemployed frontier workers enshrined in Article 65(2) and (5) of Regulation 883/2004 apply to a person who has not actually been employed before unemployment but was on sick leave and received sickness benefits. Article 65(2) and (5) contains the phrase ‘during his/her last activity as an employed…person’. The Court held that those words must be interpreted in light of Article 1(a) of Regulation 883/2004 which defines the concept of ‘activity as an employed person’ as being ‘any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situation exists’. Hence, if being on sick leave and receiving sickness benefits is treated in the same way as pursuing an economic activity in the competent Member State (Germany, in the case of Mr. K) then the Member State of residence (the Netherlands) will have to apply Article 65(2) and (5) of Regulation 883/2004 to the wholly unemployed frontier worker. Finally, the Court held that the reasons, in particular of a family nature, for which a person transferred his or her residence to a Member State other than the competent Member State should not be taken into account for the application of Article 65(2) and (5) of Regulation 883/2004.

Declaration of conflicting interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship and/or publication of this article.

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55. Ibid, para.38.
56. Ibid, paras.39-40.
57. Ibid, paras.41-45.