The role and limits of the European social security coordination in guaranteeing migrant persons social benefits

Abstract

This contribution examines whether the EU social security coordination regulations 883/2004 and 987/2009 contribute or fail to contribute to the EU policy objective of guaranteeing adequate social protection and fighting against poverty as set by Article 9 TFEU. Even if this coordination system does not directly interfere with the social protection systems of the Member States, it plays an important role in preventing persons who use the right to free movement within the EU from ending up in a situation in which they would lose entitlement to social benefits because of their migration. In analysing this issue we will concentrate on the role of the underlying general principles of this coordination, more specifically on the rules for the determination of the applicable legislation, the principle of equal treatment, the export of benefits and the aggregation of periods. We will also elaborate on a number of examples where this coordination system fails to prevent loss of entitlement to social benefits, such as the position of workers in non-standard forms of work, the limited rights of economically inactive migrants, the recent introduction of waiting periods for newcomers, and situations in which the migrants risk to fall between two stools. We will conclude with the notion of fairness.

1. Introduction

The research question of this contribution is whether the EU social security coordination regulations 883/2004 and 987/2009, which apply to persons migrating within the EU, contribute or fail to contribute to the EU policy objective of guaranteeing adequate social protection and fighting against poverty as set by Article 9 of the Treaty on the Functioning of the European Union (TFEU). It adds to the existing literature on this coordination system, which is mostly descriptive\(^1\) or which analyses this question from a different angle.\(^2\)

In order to support and promote the free movement of persons within the EU, the European legislature developed a coordination system of the social security regimes of the Member States. The starting point of EU law and EU policy is that the Member States are entirely free to organize their internal social protection systems as they see fit. In the absence of harmonization,

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\(^1\) See *inter alia*: Fuchs and Cornelissen (2015), Paju (2017), Pennings (2020b).

\(^2\) See for instance the various contributions in a special issue of this Journal, 2020, volume 22, issue 2.
it is up to each Member State to determine the features of its own social security system, including which benefits are provided, the conditions for eligibility, how these benefits are calculated and the level of contributions to be paid. This also means that it is, in the first place, the responsibility of the Member States to ensure that their social security benefits are sufficient in order to prevent situations of poverty and social exclusion. Indeed, the European social security coordination does not affect this. Fact is, however, that due to the differences between the systems of the Member States, migrating persons are, as a result of their cross-border situation, at risk of losing existing rights or having no or only limited access to the Member States’ systems.

In order to prevent the application of the Member States’ social security legislations from creating obstacles for migrants to the access to the social security systems of the Member States and consequently to the exercise of the EU rights of free movement of persons and services, the European legislature has adopted an elaborate social security coordination system. This system is currently laid down in Regulation 883/2004 and Regulation 978/2009, which are interpreted by the Court of Justice (CJEU) in an abundance of case law. The purpose is to coordinate the disparate social security systems of the Member States in such a manner as to eliminate any negative consequences for the migrating individual that may arise from differences between the various systems.\(^3\) This EU social security coordination system guarantees that persons migrating within the EU can keep their social security allowances (export of benefits) or have access to benefits in the new host country through the mechanism of aggregation of periods or the right to equal treatment. Consequently, it is an important instrument in preventing the loss of income and therefore poverty of persons migrating within the EU. Its contribution to the social dimension of the European integration is undeniable as it creates some form of social citizenship beyond the boundaries of nation states. The first recital of Regulation 883/2004 even states that its main objective is to contribute towards improving the standard of living of persons migrating within the EU. However, it is important to re-emphasize that this European coordination of the Member States’ social security systems cannot ensure as such that these national systems provide adequate protection against social exclusion or poverty. That remains the responsibility of the Member States. The coordination system does not contain a rule that orders the Member States to provide social benefits that are sufficiently high or extensive so as to prevent poverty.

\(^3\) E.g. Case C-388/09 da Silva Martins ECLI:EU:C:2011:439, para 70 and Case C-515/14 Commission v. Cyprus ECLI:EU:C:2016:60, para 34.
Regulation 883/2004 applies to all branches of social security. Nevertheless, social assistance is excluded from its scope, even though the Court of Justice has always interpreted this exclusion rather narrowly. It developed a broad definition of social security, including the so-called ‘special non-contributory benefits’ that are half-way between traditional social security and social assistance guaranteeing the persons concerned a minimum subsistence income in accordance with the economic and social situation in a Member State. Examples of such benefits are supplements to pensions and special benefits for disabled or invalid persons.

This contribution examines to what extent these regulations and their application can guarantee persons migrating within the EU access to social benefits in the host country or maintenance of existing rights, but also to what extent these regulations may fail in this respect. We will give a number of examples to illustrate this. Because of the limited space we will restrict ourselves to the general principles underlying this coordination instead of elaborating on every specific provision in the regulations.

2. Determination of the applicable legislation

One of the most important tasks of the coordination system is to determine the legislation applicable in cross-border situations (Articles 11 to 16 of Regulation 883/2004). Economically active migrants are subject to the legislation of the Member State where they work, although with a number of exceptions and special rules (such as for civil servants, seamen, airline personnel, posted workers or persons simultaneously working in more than one Member State). Persons who are not economically active are subject to the legislation of the Member State of residence.

The rules of conflict of Regulation 883/2004 are in the first place intended to prevent the simultaneous application of several national legislative systems and the complications that might ensue from this. They are also meant to ensure that a person in a cross-border situation between Member States is not left without social security coverage because there is no national legislation covering that person. In that perspective these rules clearly contribute to combating poverty by avoiding situations in which a migrant person is not covered by any social security legislation at all. These rules of conflict have a binding character and an exclusive effect,

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4 Article 3 of Regulation 883/2004 refers to the following branches of social security: sickness benefits; maternity and equivalent paternity benefits; invalidity benefits; old-age benefits; survivors’ benefits; benefits in respect of accidents at work and occupational diseases; death grants; unemployment benefits; pre-retirement benefits and family benefits.

5 Article 3(5) of Regulation 883/2004.

6 E.g. Case C-548/11 Mulders ECLI:EU:C:2013:249, para 39.
meaning that migrant persons are to be subject to the legislation of a single Member State only. Such a person is entitled, in principle from day one, to social protection in the so-called competent Member State (the State whose legislation is determined to be applicable) as soon as he/she is no longer covered by the social security system of another Member State.

However, migration may or may not be to the advantage of the person concerned in terms of social security, depending on the circumstances. Indeed, migration between the Member States may give rise to more extensive or less extensive social protection, depending on the system that is in place in the Member State where the individual concerned is working or residing. From that point of view the regulations are neutral as to their impact on poverty. It may well be the case that the level of social benefits in the competent State is limited and will not prevent the migrant persons relying on such benefits from finding themselves in a situation of poverty. But this is primarily the responsibility of the applicable legislation of the relevant Member State.

Still, the question was raised whether the strict implementation of these conflict rules and their exclusive effect should not be overturned in a situation in which the migrant worker would only be covered for a limited number of social security branches by the legislation of the State of employment. Such a situation could lead to poverty. In a recent case before the CJEU, the issue was raised whether in some situations the Member State of residence would be obliged to complement the partial coverage by the State of employment. This case concerned unemployed persons who lived in the Netherlands and subsequently went to work part-time in Germany as cross-border workers (in so-called mini jobs). As this concerned jobs with a limited number of working hours, they were only insured for accidents at work in Germany and not for the other social security branches. For instance, they were not entitled to family allowances and did not build up old-age pensions for the period of employment in Germany. In addition, their employment in Germany was so limited that their income from it was not sufficient either to guarantee them a minimum income or to allow them to pay contributions to a voluntary or additional insurance scheme. Despite the fact that they had continued to live in the Netherlands and that in the Netherlands these branches of social security are based on residence in that country, they were not entitled to this insurance under Dutch law. The Dutch legislation

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7 Article 11(1) of Regulation 883/2004. See, e.g., Case C-382/13 Franzen and others ECLI:EU:C:2015:261, paras 41-42.
8 E.g. Cases C-393/99 and C-394/99 Hervein and others ECLI:EU:C:2002:182, paras 50–51 and Cases C-95/18 and C-96/18 van den Berg and others ECLI:EU:C: 2019:767, paras 57-58.
9 Cases C-95/18 and C-96/18 van den Berg and others ECLI:EU:C: 2019:767.
excluded them because pursuant to the rules of conflict of Regulation 883/2004 they were
subject to the legislation of another Member State, namely Germany where they worked. So,
as a consequence of the combined application of the European conflict rules and the national
legislation of the Member States concerned, they ran the risk of ending up in poverty.

The Dutch judiciary submitted the question to the Court of Justice whether or not Union law on
the free movement of workers (Article 45 TFEU) obli ges the State of residence, despite its own
legislation, to insure the persons concerned for these branches if they are not insured by the
State of employment. In her opinion, the Advocate General suggested applying the
proportionality principle in this case in order to avoid that the exclusion of these persons from
the Dutch system would have disproportionate negative consequences for the persons
concerned.\textsuperscript{10} However, the CJEU decided that Articles 45 and 48 TFEU do not oblige the
Member State of residence to grant benefits to a migrant worker who is not entitled to such
benefits under the legislation of the Member State of employment.\textsuperscript{11}

This judgment is very disappointing because it states that Union law does not offer protection
to migrant workers who, because of very marginal part-time employment in the country of
employment, are not covered for a number of social security branches. This is of course in the
first place the result of the restrictions in the national legislation of the state of employment and
the responsibility of the policy makers in that country. But the CJEU missed the opportunity to
compensate this by guaranteeing continued access to the social protection system of the
Member State of residence of these persons. Furthermore, this kind of precarious employment
and non-standard forms of work are increasing and situations of this kind will occur more and
more.\textsuperscript{12} This judgment also bears clear and painful evidence of the limitations of the European
social security coordination.\textsuperscript{13}

3. Equal treatment
The principle of equal treatment, laid down in Article 4 Regulation 883/2004, guarantees that
in social security matters nationals of a Member State are treated by any other Member State as
if they are nationals of the latter State. It applies to direct discrimination on grounds of
nationality as well as to indirect discrimination, meaning all forms of discrimination which,

\begin{itemize}
\item \textsuperscript{10} Opinion of AG Sharpston in Cases C-95/18 and C-96/18 \textit{van den Berg and others}, ECLI:EU:C:2019:252.
\item \textsuperscript{11} Cases C-95/18 and C-96/18 \textit{van den Berg and others} ECLI:EU:C:2019:767, paras 58-65.
\item \textsuperscript{12} See more on the challenges of non-standard work for the social security coordination in the contribution of
Schoukens in this special issue.
\item \textsuperscript{13} For a more detailed discussion of this issue: Essers and Pennings (2020:8-13).
\end{itemize}
through the application of other distinguishing criteria, lead in fact to the same result. A clear example of such provisions are residence clauses. However, the CJEU does accept provisions which are indirectly discriminatory provided that they are appropriate for securing the attainment of a legitimate objective, that they do not go beyond what is necessary to attain that objective and that they are proportionate.\textsuperscript{14} Still, the Court is normally very strict as far as acceptance of such justifications is concerned.\textsuperscript{15}

It is clear that the principle of equal treatment offers adequate protection for migrant persons against possible discrimination by the host State regarding social benefits. It is therefore a crucial element in preventing poverty.

Nevertheless, there are some worrying recent developments in the CJEU’s case law, more specifically with regard to benefits which are intended to prevent poverty, such as the above mentioned special non-contributory benefits. In recent case law it became clear that for economically inactive migrants entitlement to equal treatment for social security benefits may depend on the person involved having the right to reside in the host State. The CJEU expressly stated that the right to equal treatment under Article 4 of Regulation 883/2004 regarding special non-contributory benefits in the host country is for economically inactive migrants subject to such persons having the right to reside in that Member State on the basis of the provisions in Directive 2004/38.\textsuperscript{16} Under this directive the right of residence for more than three months and the retention of this right for economically inactive persons are conditional upon citizens having sufficient resources for themselves and their family members, so as not to become a burden on the social assistance system of the host Member State (Article 7(1)(b) and Article 14(2) Directive 2004/38). The CJEU disputably qualified in this case law the special non-contributory benefits under Regulation 883/2004 as ‘social assistance’ within the meaning of Directive 2004/38.\textsuperscript{17}

The CJEU confirmed that those conditions are intended to prevent Union citizens from becoming an unreasonable burden on the social assistance system of the host Member State\textsuperscript{18} and that they are based on the idea that the exercise of the right of residence can be subordinated to legitimate concerns of the Member States, such as the protection of their public finances.\textsuperscript{19}

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\item \textsuperscript{14} E.g. Case C-228/07 Petersen ECLI:EU:C:2008:494, para 54.
\item \textsuperscript{15} E.g. Case C-515/14 Commission v Cyprus ECLI:EU:C:2016:30, paras 53-55.
\item \textsuperscript{16} Case C-140/12 Brey ECLI:EU:C:2013:565, para 44 and Case C-333/13 Dano ECLI:EU:C:2014:235, para 83.
\item \textsuperscript{17} For a critical assessment see also Vonk (2020:7)
\item \textsuperscript{18} Cases C-424/10 and C-425/10 Ziołkowski and Szeja ECLI:EU:C:2011:866, para 40.
\item \textsuperscript{19} Case C-140/12 Brey ECLI :EU:C:2013:565, paras 54 and 72.
\end{itemize}
Furthermore, in *Dano*, the Court explicitly stated that Article 7(1)(b) Directive 2004/38 ‘seeks to prevent economically inactive Union citizens from using the host Member State’s welfare system to fund their means of subsistence’.\(^\text{20}\) This case law expresses the fear of ‘benefit tourism’ within the EU, despite the fact that research showed that such fears are rather based on anecdotal evidence and that in practice this ‘benefit tourism’ is very limited.\(^\text{21}\)

Nevertheless, in its judgment in *Commission v United Kingdom* the CJEU confirmed this case law on special non-contributory benefits for other social security benefits as well.\(^\text{22}\)

Basically, this case law means that economically inactive Union citizens can only invoke Article 4 of Regulation 883/2004 and equal treatment with the citizens of the host Member State as regards social benefits if their residence in the territory of the host country is lawful. As a result, these Union citizens, when claiming social benefits in the host State, may find themselves caught in a vicious circle: to be entitled to such a benefit, they must have a right of residence which in its turn is subject to the condition of having sufficient resources so that they do not have to use the benefit they apply for. The result is that these applicants for social benefits will not be entitled to equal treatment with the nationals of the host State, so that they will remain in a situation of poverty and will even be forced to return to his/her country of citizenship, since indeed they do not have the right to reside in that State.\(^\text{23}\) Research on the application of this case law in the various Member States suggests that there is often great legal uncertainty on the rights the economically inactive intra-EU migrant persons have regarding access to social benefits in the host State and the right to remain there.\(^\text{24}\) This often results in situations in which these persons do not receive an official expulsion order and are therefore tolerated to remain, while excluded from social benefits. It is suggested that as long as such a person is not effectively expelled, he/she should remain entitled to minimum subsistence benefits in the host Member State and that a cost sharing mechanism with the Member State of origin could be set up, so that the financial burden is shared between those States.\(^\text{25}\)

\(^{20}\) Case C-333/13 *Dano* ECLI:EU:C:2014:2358, para 76. For more detailed comments on this case law see e.g. Verschueren (2015a), Thym (2015).

\(^{21}\) E.g. Martinsen and Werner (2019).

\(^{22}\) Case C-308/14 *Commission v United Kingdom* ECLI:EU:C:2016:436. This case concerned family benefits. For more detailed comments on this judgment: O’Brien (2017) and Verschueren (2017).

\(^{23}\) For further discussion on this issue see: Heindlmaier and Blauberger (2017) and Spaventa (2016).

\(^{24}\) Mantu and Minderhoud (2019).

\(^{25}\) Verschueren (2015b) and Vonk (2020:9)
4. Waiving Residence Clauses

Regulation 833/2004 also contains a general rule on the waiving of residence clauses in the legislation of the Member States (Article 7). It guarantees the export of benefits. This holds first and foremost for benefits like old-age pensions or invalidity and long-term care benefits. It also applies to child benefits: the residence of a child in another Member State should not prevent a person from being entitled to child benefits for that child.²⁶

But the principle that persons entitled to social security benefits in a certain State may take those with them if they were to move to another Member State, does not, in itself, offer protection against poverty, since the EU coordination system does not guarantee that these benefits are sufficient to meet the poverty threshold. These benefits continue to be calculated on the basis of the provisions in the legislation of the exporting Member State and at the level prevalent there. Quite often the level of the benefit is also linked to the cost of living in a certain Member State. This means that a move to a Member State with retention of this benefit does not necessarily guarantee that this benefit is in accordance with the cost of living in the new Member State of residence. Therefore it is quite possible that even with retention of a benefit, a move to a Member State with a higher cost of living may lead to poverty in the latter Member State.²⁷

Moreover, there are a number of exceptions to the export principle. One such exception concerns unemployment benefits, which only need to be exported for a maximum of three months if the unemployment benefit recipient moves to another Member State in order to seek employment.²⁸

Another exception is the special coordination regime that applies to the above mentioned special non-contributory benefits. Article 70(4) of Regulation 883/2004 indeed confirms that the special non-contributory cash benefits listed in Annex X shall be provided exclusively in the Member State in which the persons concerned reside. As a consequence, beneficiaries of such a benefit would, on the one hand, lose this when transferring their residence to another Member State and would, on the other, be entitled in their new Member State of residence to the benefits of that State listed in Annex X. The justification for limiting the export of these benefits was mainly that they were not based on the payment of contributions by the beneficiary.

²⁶ See also Article 67 Regulation 883/2004.
²⁸ Article 64 Regulation 883/2004.
and were meant to guarantee a level of subsistence, taking account of the cost of living and integration in a particular Member State.29

It goes without saying that this only applies insofar as the legislation of the new Member State of residence provides for such special non-contributory benefits and these are included in Annex X of Regulation 883/2004. Indeed, this regulation in no way obliges the Member States to introduce benefits of this kind. This means that if a person were to move from a Member State where he/she is entitled to such benefits to a Member State where comparable benefits do not exist, the loss of the benefit in the first Member State, because of the move, will not be compensated by entitlement to a similar benefit in the State of residence. Moreover, as we mentioned above, if economically inactive migrant persons were to claim such special non-contributory benefits in the new State of residence this could have consequences for their right of residence there. As indicated above, the vicious circle arising from this could have as a result that the person concerned will not obtain such a benefit in his/her new State of residence and therefore could end up in poverty or be forced to return to the country of which he/she is a national.

5. Aggregation of periods

One of the essential measures to facilitate the free movement of persons within the EU is the aggregation of periods. For entitlement to social security benefits the legislation of the Member States sometimes requires that the person concerned has completed certain periods. These periods can be periods of insurance, of residence or of employment. For instance, for entitlement to unemployment benefits, the legislation of Member States often requires that the unemployed person has previously worked or been insured for unemployment during a certain period. For entitlement to old-age pensions, too, quite often the legislation of the Member States requires that the person involved has been insured for a certain period of time for this kind of benefit. Such requirements become problematic for the exercise of the right to free movement if under the legislation of a Member State only periods fulfilled in that Member State are taken into consideration. This would lead to the loss of periods fulfilled in another Member State. Persons who have recently moved from one Member State to another would run the risk of having their claim for a social security benefit rejected by the latter Member State because they do not fulfil the necessary periods in that Member State.

Let us take the example of the legislation of Member State A which submits entitlement to an unemployment benefit to a previous insurance period of a minimum of two years in that Member State. A person who had first worked for some years in Member State B before moving to work in Member State A, but who became unemployed after only one year in Member State A, would not be entitled to an unemployment benefit in that Member State because that person has not fulfilled the required two years of insurance there.

Such a situation would clearly be to the detriment of migrant workers and would constitute an obstacle to the free movement and could potentially lead to poverty. Therefore, the EU social security coordination contains a general principle, worded in Article 6 Regulation 883/2004, according to which a Member State whose legislation makes the acquisition of the right to benefits or the coverage by its legislation conditional upon the completion of periods of insurance, employment, self-employment or residence shall take into account such periods completed under the legislation of any other Member State.

Nevertheless, the principle of aggregation of periods is under pressure. In 2016 the European Commission proposed to implement the grant of an unemployment benefit only after the person concerned has first worked in a Member State for three months.\(^\text{30}\) This proposal means that if migrant workers were to become unemployed during the first three months of their employment in a certain Member State, that Member State would no longer be obliged to take into account the periods fulfilled in another Member State to grant unemployment benefits. The persons concerned would only be able to invoke the unemployment legislation of the Member State where they worked before, without any guarantee that these persons will be eligible for such benefits under that legislation. Moreover, if these migrant workers wanted to stay in the Member State where they carried out their last activities, the Member State where they worked before must pay the unemployment benefits for six months only. Obviously this proposal entails a serious risk of poverty because the level of the unemployment benefit which this second Member State would have to pay does not necessarily correspond to the cost of living in the first Member State. It especially affects those migrant workers who only go to work in another Member State for a short period. Meanwhile, the European legislature has not yet been able to make a decision on this proposal.\(^\text{31}\)


\(^{31}\) For an in-depth analysis of this proposal and the ongoing negotiations on it, see: Pennings (2020a:149-154).
Recently, certain Member States too introduced new conditions in their legislation which require a certain duration of previous residence or insurance before a migrant is entitled to certain benefits. For instance, for the special non-contributory benefits the Belgian legislation introduced the condition that the person involved must at least have resided in Belgium for ten years, of which at least five years continuously before he/she is entitled to these benefits. It concerns, more specifically the Income replacement allowance for the disabled and the Guaranteed income for the elderly. These benefits are special non-contributory benefits within the meaning of Article 70 of Regulation 883/2004, listed in Annex X. As we already mentioned above, these benefits are subject to a residence requirement and are not exported. They guarantee a minimum income to disabled persons or old people and so are clearly intended to prevent poverty. The introduction of the condition of prior residence of ten years would mean that migrants would only be entitled to such benefits after ten years of residence in Belgium. This legislation did not provide for aggregation of periods of residence, in which the periods of residence in other EU Member States should be taken into account. Meanwhile this measure has been declared invalid by the Belgian Constitutional Court, inter alia because it is contrary to Article 6 of Regulation 883/2004 which imposes the aggregation of periods of residence.

6. Limits of the coordination system

The European social security coordination plays a crucial part in preserving and guaranteeing the social protection of persons moving within the Union. Nonetheless, in certain circumstances this system fails.

Big obstacles to the application of the European regulations are their complexity. Problems occur for instance in the case of non-standard forms of employment, employment in more than one Member State, posting and cross-border employment. The complexity of the legislation and the case law on this means that in situations of this kind the persons concerned cannot always enforce their rights adequately. Administrative practices in the Member States often add to this. No doubt, there is a problem of non-take-up of rights.

32 Law of 27 January 2017 and law of 26 March 2018. See also: Rennuy (2019:1585-1586) where this author qualifies this tendency as ‘the regrettable rise of asymmetrical waiting periods’.  
34 See on posting also the contribution of Jacqueson in this special issue.  
As explained above, the EU social security coordination allows the existence of different national social security schemes so that it is, in principle, up to the legislation of each Member State to determine the conditions for entitlement to benefits, provided they respect the EU coordination rules as set out before. However, this does not prevent the frequent occurrence of situations in which migrant persons fall between two stools. Among other things, this is the case with the differences in retirement age in the Member States. Migrants who have worked in two Member States during their career are entitled, in principle, to a *pro rata temporis* old-age pension in each of these Member States. When migrant worker reach the retirement age in the Member State where they pursued their last activity and they are entitled to a pension for the periods that they have worked in that Member State, but they have not yet reached the retirement age according to the legislation of the Member State where they have previously worked, they will only be entitled to a partial pension. They will not obtain a full pension until they also reaches the retirement age in that other Member State. In the meantime, there is a genuine risk that the first partial pension is not sufficient to prevent them from ending up in poverty. Additionally, it will depend on the legislation in that first Member State whether they are allowed to continue to work while receiving an old age pension.

Another problem is the difference in conditions for entitlement to an invalidity benefit. The Member States use different criteria. Therefore it is possible that because of incapacity for work, workers are entitled to an invalidity benefit in the Member State where they carried out their last activities, but not in the Member State where they worked before. They then run the risk of having to live on a small allowance which cannot guarantee them a sufficient income to prevent them from ending up in poverty. Of course it is not sure whether a full benefit will guarantee them a sufficient income, since that would depend on the level of benefits under the legislation of these Member States.

These are examples of mismatches between the social security systems of Member States for which the EU social security coordination does not offer any solutions. Still, recently the CJEU, in its *Vester* judgment, obliged the Member States involved (Belgium and the Netherlands) to seek a solution for such a mismatch between their legislations.\(^{36}\) This is an interesting and valuable judgment because the Court clearly indicates that when the differences in the legislations of the Member States, although not as such contrary to Union law, would lead to situations in which migrant workers are treated less favourably than sedentary workers, Union

\(^{36}\) Case C-134/18 *Vester* ECLI:EU:C:2019:212.
law does order the Member States involved to seek a solution with a view to guaranteeing migrant workers the same rights as sedentary workers. The Court obliges the Member States to find solutions which have to prevent migrant persons from falling between two stools and ending up without social protection for a certain period. However, there is a risk, in practice, of Member States wanting to stick to the strict application of their own legislation and referring to the other Member States to accommodate their legislation to the situation of a migrant worker.

7. Conclusion

It is undeniable that the European social security coordination has made a crucial contribution towards preventing persons who use the right to free movement within the Union from ending up in poverty in the absence of the right to social benefits. In most situations the general principles and detailed rules of this coordination on the determination of the applicable legislation, prohibition of discrimination on grounds of nationality, aggregation of periods and export of benefits guarantee the access to and the retention of the social rights of migrant persons. Thus this coordination has certainly made an important contribution to the objective of the EU, as worded in Article 9 TFEU, to combat social exclusion and poverty.

However, it should be emphasized that this European coordination of the Member States’ social security systems cannot ensure as such that these national systems provide adequate protection against social exclusion or poverty. That remains the responsibility of the Member States. In addition, the application of these coordination rules does not prevent a migrant person from ending up in poverty in all circumstances. Each Member State remains competent to decide for itself which social rights it creates for the various categories of persons. The so-called neutrality of the coordination vis-à-vis the Member States’ social legislation means that a migrant person continues to be dependent on the conditions in the applicable legislation to obtain the right to a social benefit and the level and scope thereof. The coordination does not contain a rule that orders the Member States to provide social benefits that are sufficiently high or extensive so as to prevent poverty. Neither does the export of benefits guarantee that these benefits will be sufficient to rise above the poverty threshold in the new State of residence.

37 For a more detailed discussion on this kind of mismatches and on the Vester case: Essers and Pennings (2020:4-8).
38 This happened in the Vester case: the Belgian court that had referred the case to the CJEU, eventually decided that it was up to the Dutch authorities to grant a benefit to Ms Vester: Labour Court (Antwerp), 11 June 2020, No. 16/1642/A.
Apart from this, the discussion on making the social security coordination fairer is also growing. This fairness can have different meanings. In most cases reference is made to financial fairness in the sense that the Member States which, through the application of Union law, are obliged to grant social benefits to migrant persons, also have to have the possibility to ask these persons to pay a contribution corresponding to the rights they obtain. When the rules of determination make a certain Member State competent for the social protection of a migrant person, this does not only mean that this person can claim rights in that Member State but also that this person and/or his/her employer must pay the appropriate social security contributions in that Member State. The coordination system implicitly assumes that in this way there will be a balance between the rights and obligations of the person concerned. This is not always the case though. For some benefits this is guaranteed by the coordination, for instance for the pensions which only have to be granted pro rata for the periods in which the persons concerned have contributed to the funding thereof. For other benefits this is far less the case, for instance for benefits for which a Member State is fully competent from the first day of insurance or residence in that Member State (family allowances, sickness benefits, unemployment benefits, special non-contributory benefits).

This rising concern about the financial fairness of the social security coordination is also apparent from the case law of the CJEU on the right to social benefits for economically inactive migrants. It is also apparent from the recent discussion about the Commission’s proposal to make the aggregation of periods for obtaining the right to unemployment benefits in the last State of employment dependent on a previous period of three months of employment. Recent changes in the legislation of some Member States in which the right to certain social benefits is subject to a prior period of residence or employment point in the same way.

But apart from this financial fairness vis-à-vis the Member States there is also the matter of individual fairness towards migrant persons who rely on the promise of European citizenship and free movement as a fundamental right and on the EU’s objective to combat social exclusion. The danger of these developments is that migrant persons cannot in all circumstances invoke rights to certain social benefits in the Member State where they work or reside, as a result of which they may de facto end up in poverty. This is particularly the case for workers in precarious employment, for those with incomplete working careers or for those who are

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40 For an in-depth discussion on the link between integration and social protection in the context of EU law see: Rennuy (2019:1552-1558). See also the various contributions in: Verschueren (2016).
economically inactive. Quite often the only solution is a return to the country of which they are nationals. And so, this tendency jeopardizes the right to free movement of persons with limited financial resources.

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