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Sincere Cooperation, Mutual Trust, and Mutual Recognition in Social Security Coordination

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Abstract

This article looks into the meaning of the concepts of sincere cooperation, mutual trust, and mutual recognition in EU social security coordination. It analyses the legislative choice of coordination as the main regulatory mechanism in the field, and examines the role of administrative cooperation. Furthermore, the article highlights the challenges that arise in situations where mutual recognition is required under the Regulations, as in connection with portable documents relating to the posting of workers. It also considers the limits to mutual trust via the principle of prohibition of fraud and abuse of rights established in the case law of the CJEU on free movement. In the last few years, this principle has been extended into the field of social security law, notably in Altun. In this way, the coordination regime does not require totally blind trust: rather, it balances the Member States' interests of maintaining the integrity of their social security systems with the Union interest of simplifying free movement. As in other fields of EU law relating to free movement, the mutual trust between the Member States in social security coordination may therefore be set aside in extraordinary cases.

1. Introduction

Social security law is a centrepiece of European welfare states. However, since European national systems have developed differently due to diverse historical, political, and economic conditions, the organisation of social security varies greatly. As is well-known, this poses challenges to the idea of free movement across national borders.[1] In the EU context, an extensive legal framework governs the coordination of social security: in particular, Regulations 883/2004 and 987/2009 concretise the Treaty provisions on free movement

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1 F Pennings, *European Social Security Law* (5th edn, Intersentia 2010) 4.

(see Article 48 TFEU).[2] The coordination regime is also linked to the European citizenship established by Article 21 TFEU.[3]

The national social security systems are organised in different ways, with public or private institutions being responsible for decision-making in the field.[4] Still, to a great extent the legal structures in the area are of a public law character.[5] As in other fields of international cooperation in public law – especially EU free movement law – questions arise over the meaning of sincere cooperation, mutual trust, and mutual recognition between the States involved, and over the effects thereof on the individuals concerned. Such questions take on a special dimension in EU social security law since regulation in this field is based on coordination. The idea is that a division of competences between the Member States applies in this area rather than any harmonisation of substantive provisions. To simplify the matter somewhat, each Member State enacts and applies its own social security law, and the role of EU law is merely to designate which legislation is applicable in various situations (see further Section 2). At first glance, then, it would appear that national institutions in this area operate entirely independently of each other, applying only their own national legislation; the concepts of mutual trust and mutual recognition might therefore seem to be of limited importance here. However, as we shall see below, this is not the case. Whilst the two Regulations do not feature the phrases 'mutual trust' or 'mutual recognition', these concepts are important for understanding the administrative law aspects of social security coordination within the EU. In this way, the field provides important examples of the European and cross-border side of administrative law. Furthermore, there are important administrative network structures in this area.[6]

The main question in this article is what role the concepts of sincere cooperation, mutual trust, and mutual recognition play in the EU's regime for the coordination of social security. One of the points of departure is that the legal framework in this area needs to ensure a balance between the following three things: the rights of individuals to social security (cf Article 34 CFR); the general EU provisions on free movement of workers and the rights of Union citizens

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2 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166/1 [Regulation 883/2004] and Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems [2009] OJ L 284/1 [Regulation 987/2009].

3 Pennings (n 1) 139ff.

4 H Wenander, 'A Network of Social Security Bodies – European Administrative Cooperation under Regulation (EC) No 883/2004' (2013) 6 Review of European Administrative Law 39, 41.

5 B Kahil-Wolff, 'Article 1' in M Fuchs and R Cornelissen (eds), *EU Social Security Law: A Commentary on EU Regulations 883/2004 and 987/2009* (Nomos 2015) margin 15. cf J Schwarze, *European Administrative Law* (rev 1st edn, Sweet & Maxwell 2006) 11ff.

6 Wenander (n 4) 42ff.

to move and reside freely within the Member States (cf Articles 45 and 21 TFEU); and the interests of the Member States in protecting the integrity of their social security systems.[7] As is well-known, differences between the social security systems – in terms of the benefits they offer and the contributions they require – may make it attractive for employers and employees to try to circumvent the coordination regime through various arrangements for 'forum shopping', whereby they seek out the most beneficial social security provisions. The conflicting interests in this field play out both in the general structure of the coordination regime and in its more specific provisions relating to administrative cooperation and mutual trust.

The theoretical premise of the analysis is that the various expressions of sincere cooperation, mutual trust, and mutual recognition form part of a bigger pattern of regulation in EU law. In this broad understanding of regulation, different measures – legislative, administrative, and judicial – have a function of balancing the interests of international cooperation against those of national self-determination. The concepts of sincere cooperation, mutual trust, and mutual recognition are treated as distinct from one another, yet closely related on different levels in EU regulation. Within the constitutional structure of EU law – requiring sincere cooperation – mutual trust works as a regulatory tool for balancing the interests between cooperation and member state self-determination. Mutual recognition, then, concretises this trust either under secondary law or as the outcome of a proportionality assessment under primary law.[8] In this article, this theory of 'regulatory trust' is used in an effort to throw light both on social security coordination and on the wider phenomena of sincere cooperation, mutual trust, and mutual recognition in EU administrative law.

In order to examine the role of sincere cooperation, mutual trust, and mutual recognition, the article first traces the general implications of the choice of coordination as the main regulatory mechanism (Section 2). It proceeds thereupon to outline the framework for administrative cooperation in this area, including the role of the Administrative Commission for the Coordination of Social Security Systems (Section 3). Section 4 discusses the concretised aspects of mutual trust in the form of the recognition of foreign documents, and among them the so-called portable documents. Section 5 looks at the limits to mutual trust and mutual recognition in the CJEU's case law on the abuse of rights. The article concludes (Section 6) with some general remarks.

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7 cf N Rennuy, 'The trilemma of EU social benefits law: Seeing the wood and the trees' (2019) 56 Common Market Law Review 1549, 1572f.

8 X Groussot, G Thor Petursson and H Wenander, 'Regulatory Trust in EU Free Movement Law' (2016) 1 European Papers 865f and 891f and H Wenander, 'Recognition of Foreign Administrative Decisions' (2011) 71 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht: Heidelberg journal of international law 755, 770ff.

2. Coordination as the Main Regulatory Mechanism

The main regulatory mechanism in the EU regime on social security is coordination. This is evident from the title of one of its central Regulations: 'Regulation 883/2004 on the coordination of social security systems'. Where the international aspects of administrative law are concerned, coordination may be understood as a legal mechanism to designate the competent State in administrative matters.[9] The most prominent example of this kind of arrangement is found in EU social security law: here, coordination is understood more specifically as the mutual adjustment of social security schemes so as to promote cross-border mobility, without change in their substantive provisions being required.[10]

Furthermore, the coordination regime in this field is founded on the four principles of (i) equal treatment (non-discrimination), (ii) aggregation of insurance periods, (iii) single applicable legislation, and (iv) exportability of social security benefits.[11] These principles are elaborated in detail in the Regulations, the provisions of which determine, among other things, which legislation is applicable in various situations. In essence, the Regulations allocate competence to institutions within the Member States to apply their own national legislation, while barring institutions in other Member States from applying theirs.[12]

The Regulations also contain provisions on various types of administrative cooperation. Notably, they provide for the establishment of a special EU body: the Administrative Commission for the Coordination of Social Security Systems (the Administrative Commission; see further Section 3).[13]

As touched upon above (Section 2), coordination of this kind is one of several possible legislative options for international legal cooperation. Another mechanism is harmonisation – i.e. the adaptation of substantive rules – which may be done with varying intensity.[14] Harmonisation, as is well-known, figures widely in other areas of EU law relating to the internal market. A further possible legislative option involves mutual recognition, either as a free-standing mechanism or in combination with harmonisation.[15] Moreover, mutual recognition

9 H Wenander, 'A Tool-Box for Administrative Law Cooperation beyond the State' in A-S Lind and J Reichel (eds), *Administrative Law beyond the State – Nordic Perspectives* (Nijhoff / Liber 2013) 61f.

10 Pennings (n 1) 6f.

11 Regulation 883/2004, Preamble, Recitals 8, 10, 18a, and 37.

12 H-D Steinmeyer, 'Title II Determination of the legislation applicable' in M Fuchs and R Cornelissen (eds), *EU Social Security Law: A Commentary on EU Regulations 883/2004 and 987/2009* (Nomos 2015) margins 1ff.

13 Wenander (n 4) 47ff.

14 Pennings (n 1) 6.

15 M Ruffert, 'Recognition of Foreign Legislative and Administrative Acts', *Max Planck Encyclopedia of Public International Law* (*MPIL*, May 2011) margin 2 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1087?prd=EPIL> accessed 11 March 2020.

has developed into a central legal mechanism for realising the free movement provisions in the TFEU.[16]

Since the social security systems of the Member States vary so greatly, there is little political interest in making substantive changes in social security benefits and contributions just in order to adapt to the provisions of other Member States. Thus, coordination would seem to be the natural legislative choice in this field.[17] This is clearly expressed in the Preamble to Regulation 883/2004: 'It is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination.'[18] Referring to the previous Regulation in the field, the CJEU has pointed out that

'it must be borne in mind that the objective of Regulation No 1408/71, as stated in the second and fourth recitals in the preamble, is to ensure free movement of employed and self-employed persons within the European Community, while respecting the special characteristics of national social security legislation.'[19]

Coordination may seem a more limited form of international legal cooperation than harmonisation or mutual recognition, but it too requires a degree of trust between the states involved. In EU social security law, the system of single applicable legislation means that a citizen of a Member State may fall under the applicable law of another state. Member States must therefore rely to some degree on their fellow Member States to have at least a reasonably well-functioning – although perhaps rather different – system of social security. As a matter of principle, after all, it would be problematic for them to refer their own citizens and residents to a dysfunctional social security system in another Member State.[20] In a broader context, this relates to the general level of international trust needed for all kinds of cross-border cooperation. According to the theoretical framework used here (see Section 2 above), coordination can be regarded as a form of trust on the legislative level.[21]

A related requirement is that the institutions of the Member States maintain quality in their decision-making relative to EU law and cross-border mobility.[22] In *Fitzwilliam*, which concerned the issuing of certificates for posted workers

16 C Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford University Press 2013) 11ff.
17 Wenander (n 4) 61.
18 Regulation 883/2004, Preamble, Recital 4.
19 Case C-493/04 *LH Piatkowski v Inspecteur van de Belastingdienst grote ondernemingen Eindhoven*, EU:C:2006:167, para 19 and Case C-610/18 *AFMB e.a. Ltd v Raad van bestuur van de Sociale verzekeringsbank*, EU:C:2020:565 [AFMB], para 63.
20 Wenander (n 4) 61.
21 Groussot, Petursson and Wenander (n 8) 879f.
22 Wenander (n 4) 70ff.

(see Section 4 below), the CJEU concluded that the principle of sincere cooperation (now in Article 4(3) TEU) requires the competent institution to carry out a proper assessment of the facts in order to guarantee the accuracy of the information on the certificate.[23]

Finally, coordination is not just about the EU level and national social security bodies. As will become clear in what follows, individuals too figure within the legal framework of the Regulations, since they as well are affected by the three principles under discussion.

3. Administrative Cooperation: Fostering and Requiring Mutual Trust

A central feature of the coordination regime established by the Regulations is administrative cooperation between national institutions and between such institutions and the EU level. Generally speaking, developing administrative cooperation serves to promote mutual trust and support the effective application of EU law.[24] This applies to EU social security law as well. In *AFMB*, the CJEU (Grand Chamber) stressed that the provisions on information and cooperation in the Regulations are intended to ensure that the coordination rules are applied correctly.[25] This illustrates that the use of the legislative mechanism of coordination – especially in regard to the division of competences among Member States – requires a degree of mutual trust.[26]

The principle of sincere cooperation enunciated in Article 4(3) TEU forms the basis for a general duty of cooperation between the administrative bodies of the Member States.[27] *Athanasopoulos* makes clear this applies as well to cooperation between social security institutions. One of the issues in the case concerned how a national institution should proceed in order to get information on which institution in another Member State possesses competence on a certain

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23 Case C-202/ 97 *Fitzwilliam Executive Search Ltd v Bestuur van het Landelijk instituut sociale verzekeringen*, EU:C:2000:75 [Fitzwilliam], para 51. See also Case C-620/15 *A-Rosa Flussschiff GmbH v Union de recouvrement des cotisations de sécurité sociale et d'allocations familiales d'Alsace (Urssaf), venant aux droits de l'Urssaf du Bas-Rhin and Sozialversicherungsanstalt des Kantons Graubünden*, EU:C:2017:309 [A-Rosa], para 39 and Wenander (n 4) 62.

24 Commission, 'Communication from the Commission to the Council and the European Parliament on the Development of Administrative Cooperation in the Implementation and Enforcement of Community Legislation in the Internal Market' (Communication) COM(94) 29 final, para 30.

25 *AFMB* (n 19), paras 72-74.

26 Wenander (n 4) 63.

27 J Temple Lang, 'Community Constitutional Law' (1990) 27 Common Market Law Review 645, 671 and Schwarze (n 5) CLXXVf.

matter. According to the CJEU, both the principle of sincere cooperation and secondary law provisions[28] mean that

'[...] the Commission and the Member State in which the person claiming a benefit supplement is residing are bound by a duty to cooperate in good faith with the institutions of the other Member States which are responsible for ensuring the performance of the obligations arising out of Regulation No 1408/71 [now 883/2009].'[29]

Thus, the national institution in question could contact either the European Commission[30] or the institutions of the other Member State directly in order to obtain information on the name of the institution in the latter state. Possible restrictions on such contacts – concerning both the requesting and the requested state – in national law or in public international law must be set aside.[31]

The current Regulations set out mechanisms for the electronic exchange of information regarding the competent national institutions (see further below in this Section). The Regulations also concretise in other ways the duties of cooperation that flow from the Treaties. As the preamble to Regulation 987/2009 expressly states:

'Closer and more effective cooperation between social security institutions is a key factor in allowing the persons covered by Regulation (EC) No 883/2004 to access their rights as quickly as possible and under optimum conditions.'[32]

The central duties involved in cooperation are laid down in Article 76 of Regulation 883/2004. They include, first of all, the duty to exchange information with the competent authorities on measures taken to implement the Regulations (Article 76(1)). Communicating in this way about national legislation and changes therein can contribute to understanding between the different national bodies, as well as to the resolution of problems which arise after legislative changes on the national level.[33] Moreover, this duty concretises the possibility

28 Now found in Consolidated Version of the Treaty on the European Union [2016] OJ C202/15 [TEU], art 4(3) and Regulation 883/2004, art 76.

29 Case C-251/89 *Nikolaos Athanasopoulos and others v Bundesanstalt für Arbeit*, EU:C:1991:242, para 57.

30 In order to avoid confusion with the Administrative Commission, the European Commission is here referred to in this way.

31 P Mengozzi, *European Community Law from the Treaty of Rome to the Treaty of Amsterdam* (2nd edn, Kluwer 1999) 88.

32 Regulation 987/2009, Preamble, Recital 5.

33 B Spiegel, 'Coordination of new Benefits' in Y Jorens (ed), *50 years of Social Security Coordination, Past – Present – Future. Report of the conference celebrating the 50th Anniversary of the European Coordination of Social Security Prague, 7 & 8 May 2009* (European Commission 2010) 212.

of exchanging information between national authorities under the principle of sincere cooperation, as established in case law on the free movement of goods (as is set out in e.g. *de Peijper*).[34] In order to ensure that national institutions will know what foreign body they should turn to, Article 88(1) of Regulation 987/2009 enjoins Member States to notify the European Commission on the details of the national bodies relevant for applying the Regulations. The information is collected in a database integrated with the European Electronic Social Security Information (EESSI) system (see below). The database is available to the public on the European Commission's web page.[35]

National authorities and institutions are further to 'lend one another their good offices and act as though implementing their own legislation' (Article 76(2)). This may include such assistance as servicing documents on behalf of a social security institution in another Member State.[36] As a rule, moreover, aid is to be furnished free of charge; national authorities and institutions may communicate directly with each other, as established in *Athanasopoulos* (Article 76(3)). This, in conjunction with the duty of administrative assistance, means that foreign administrative bodies are put on a par with organs from the same Member State. These aspects of administrative cooperation express far-reaching trust, embedded in secondary legislation, in the legal capacity of fellow Member States.

There is further a duty of mutual information and cooperation for the institutions and persons covered by Regulation 883/2004, as stated in Article 76(4). This is a reminder that the concept of mutual trust and cooperation is also relevant in the relationship between the institutions and the individuals covered by the Regulations. As Article 76(5) indicates with its mention of 'proportionate measures' in case of failure to respect the duty of information, this is not a matter of blind trust in the individual.[37]

Article 76 of Regulation 883/2004 further requires national social security bodies to contact each other if there are difficulties in the application or interpretation of the Regulation (Article 76(6)) (see below Section 4 on this duty in relation to conflicts over the recognition of documents). Importantly, a national social security body may not disregard documents on the grounds that they are

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34 Case 104/75 *Adriaan de Peijper, Managing Director of Centrafarm BV*, EU:C:1976:67, para 27. See further Case 272/80 *Criminal proceedings against Frans-Nederlandse Maatschappij voor Biologische Producten BV*, EU:C:1981:312, para 14; Case C-293/94 *Criminal proceedings against Jacqueline Brandsma*, EU:C:1996:254, para 13 and Case C-201/94 *The Queen v The Medicines Control Agency*, ex parte *Smith & Nephew Pharmaceuticals Ltd and Primecrown Ltd v The Medicine Control Agency*, EU:C:1996:432, para 28. See also Wenander (n 4) 59.

35 Wenander (n 4) 54 and European Commission, 'EESSI - Public Access Interface' <https://ec.europa.eu/social/social-security-directory/pai/pai/select-country/language/en> accessed 3 April 2020.

36 Wenander (n 4) 55.

37 cf K Lenaerts, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust' (2017) 54 Common Market Law Review 805, 806f (on the relationship between the Member States).

written in another official EU language than the one used in its own state (Article 76(7)). This administrative aspect too may be seen as an element linked to mutual trust.

As in other fields of European administrative law, social security coordination under the Regulations entails several administrative network features. A European administrative network functions as a nexus for national administrative bodies that act together in cross-border fashion, often together with bodies on the Union level. Moreover, the concept of administrative networks may include both formal and informal mechanisms. The network concept may seem vague from a legal point of view, especially where informal mechanisms are concerned, but it may still be useful for a more general understanding of EU administrative law.[38]

The role of the Administrative Commission in EU social security law is central, and it shows several network features. The very first Regulation on social security coordination provided for the establishment of such an organ.[39] This *sui generis* body consists of a government representative from each Member State, assisted by national experts, and a European Commission representative. Under Article 72 of Regulation 883/2004, its duties include dealing with questions of administration and interpretation, facilitating the uniform application of EU law, and fostering and developing cooperation between Member States and their social security institutions. The Administrative Commission holds regular meetings and adopts formal decisions, in part on a basis resembling delegated decision-making.[40] Through its activities and its links with experts from the national systems, the Administrative Commission functions as a network for enforcement, information exchange, and conflict resolution. It thereby holds a central place in the organisational structure of EU social security coordination.[41]

In *Romano*, the CJEU held that the decisions of the Administrative Commission cannot be legally binding under EU law, but that they still may provide an

38 P Craig, 'Shared Administration and Networks – Global and EU Perspectives' in G Anthony and others (eds), *Values in Global Administrative Law* (Hart 2011) 102f. cf A von Bogdandy and P Dann, 'International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority' (2008) 9 German Law Journal 2013, 2018 <www.cambridge.org/core/journals/german-law-journal/article/international-composite-administration-conceptualizing-multilevel-and-network-aspects-in-the-exercise-of-international-public-authority/6FD387D3E5609830E5344F02E7AB2446> accessed 26 March 2020.

39 Règlement no 3 concernant la sécurité sociale des travailleurs migrants [1958] OJ 30/561 (French edn), arts 43 and 44.

40 Regulation 883/2004, arts 71 and 72. cf Regulation 883/2004, Preamble, Recital 38. See also R Cornelissen, 'Articles 71 and 72' in M Fuchs and R Cornelissen (eds), *EU Social Security Law: A Commentary on EU Regulations 883/2004 and 987/2009* (Nomos 2015) margins 1 and 12.

41 Wenander (n 4) 47ff.

aid to social security institutions.[42] Legal scholars have also pointed out that the principle of sincere cooperation – as well as later case law, such as *Van der Bunt-Craig* – means that decisions by the Administrative Commission 'have an authoritative character'.[43] Furthermore, Article 89 of Regulation 987/2009 requires the competent authorities to ensure that national institutions apply 'all the Community provisions, legislative or otherwise, including the decisions of the Administrative Commission.'[44] At the same time, a deviation from decisions of the Administrative Commission may not as such constitute a Treaty infringement in the sense laid out in Article 260 TFEU.[45] In this way, the principle of sincere cooperation and its realisation in secondary law blur the boundary between formally binding decisions and informal, non-binding norms.

There are also other important network structures in the area of EU social security coordination. The MoveS network (Free Movement of Workers and Social Security Coordination) for example – funded by the European Commission and consisting of experts in the field – has the task of organising seminars, sharing information, and building (further) networks.[46] This kind of network for cooperation and the exchange of information and experience serves as a complement to the work of the Administrative Commission.[47] It may be assumed that here, as in other fields, personal bonds are important – that they facilitate efficient application of the coordination rules by the experts and officials involved.[48] Both formal and informal (personal) networks can contribute to building trust between officials from different Member States.[49]

The electronic structures for information exchange also bear mentioning here. Under the Mutual Information System on Social Protection (MISSOC), national experts, the Administrative Commission, and a special MISSOC secretariat collect information on the various social security regimes into a database.[50] Furthermore, the already mentioned EESSI system, envisaged in Article

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42 Case 98/80 *Giuseppe Romano v Institut national d'assurance maladie-invalidité*, EU:C:1981:104, para 20. This case law is seemingly not affected by the CJEU's judgment on delegation of powers to the European Securities and Markets Authority (ESMA): Case C-270/12 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*, EU:C:2014:18, paras 63–68.

43 Cornelissen (n 40) margin 14; Case 238/81 *Raad van Arbeid v Mrs Van der Bunt-Craig*, EU:C:1983:124, para 24. cf Case 19/67 *Bestuur der Sociale Verzekeringsbank v JH van der Vecht*, EU:C:1967:49, 355.

44 Wenander (n 4) 50.

45 Case C-356/15 *Commission v Belgium*, EU:C:2018:555, paras 110 and 111.

46 European Commission, 'Network of Legal Experts (MoveS)' (*European Commission*) <https://ec.europa.eu/social/main.jsp?catId=1098&langId=en> accessed 26 March 2020.

47 Wenander (n 4) 69.

48 R Pitschas, 'Strukturen des europäischen Verwaltungsrechts – Das kooperative Sozial- und Gesundheitsrecht der Gemeinschaft' in E Schmidt-Aßmann and W Hoffmann-Riem (eds), *Strukturen des Europäischen Verwaltungsrechts* (Nomos 1999) 151f.

49 Wenander (n 4) 58.

50 See further <www.missoc.org> accessed 23 March 2020 and Cornelissen (n 40) margin 33.

78 of Regulation 883/2004, is important. This electronic infrastructure connects national social security organs via a central node under the Administrative Commission, and makes the exchange of electronic information in standardised form mandatory.[51] In principle it dispenses entirely with the previous use of paper forms (however, see Section 4 on the so-called portable documents to be used by individuals). Digitalisation, then, greatly simplifies administrative co-operation. In addition, legal scholars have also suggested that the further development of electronic information exchange may provide important tools against fraud in the future – in connection, for example, with the need to get information on the status of a posted worker with regard to social insurance.[52]

4. Concretised Trust: Recognition of Documents and Conflict Resolution

Although the main legislative mechanism in EU social security law is coordination, there are nonetheless important elements of mutual recognition in the field. As in other areas where the free movement provisions of the TFEU are relevant, the principle of mutual recognition means that foreign documents and decisions are to be recognised or taken into account, depending on the circumstances.[53]

In the field of EU social security law, the principle of sincere cooperation (now in Article 4(3) TEU) and the duty of mutual recognition have been concretised in a number of CJEU cases on the recognition of portable documents. This type of physical document (previously called E-form) is issued for use by individuals in their contacts with social security institutions in other Member States.[54] Given the risk that some persons will circumvent applicable law and engage in 'forum shopping' – through the posting of workers in other Member States – these cases have mainly dealt with certificates on the legislation applying to posted workers (portable document A1, previously known as certificate E 101). Such documents are to be issued by a competent institution in the sending Member State, in accordance with conditions laid down by the Administrative Commission. Although such documents are not constitutive for determining which legislation is applicable in an individual case, they serve in practical terms as a very important tool for realising the right to freedom of movement.[55]

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51 See also Regulation 987/2009, art 4.

52 R Cornelissen, 'Article 78' in M Fuchs and R Cornelissen (eds), *EU Social Security Law: A Commentary on EU Regulations 883/2004 and 987/2009* (Nomos 2015) margin 14.

53 Wenander (n 4) 770ff and Janssens (n 16) 11ff.

54 Cornelissen (n 40) margin 27.

55 Pennings (n 1) 107f.

In the above-mentioned *Fitzwilliam* case, one of the questions from the referring court concerned whether such a certificate should be considered binding on the social security institutions of another Member State. The CJEU ruled that refusing to recognise such a certificate would undermine both the obligation to cooperate under the principle of sincere cooperation and the aims of the relevant provisions of the Regulations. It would also risk bringing about situations where workers are covered by two social security regimes, thereby conflicting with the principles of the coordination regime. As long as such certificates are not withdrawn or declared invalid, therefore, they are to be considered binding in so far as they create a presumption that the worker concerned is affiliated with the social security system of the Member State of establishment.[56]

The ruling in *Fitzwilliam* was reaffirmed in later case law, such as *Banks* and *Herbosch Kiere*.[57] In the latter case, the CJEU clarified further that this meant that courts of the host Member State may not scrutinise the validity of the certificate concerning the factual matters certified. A certificate of this kind, therefore, is binding both for courts and for other competent national institutions.[58] If persons who use the services of a posted worker call a foreign certificate into question, the Court ruled in *Banks,* they have a duty to inform the relevant national institution of the fact.[59]

This case law has now been codified and expanded upon in Article 5 of Regulation 987/2009.[60] The provision requires Member State institutions to accept documents issued by other Member State institutions which state the position of a person – together with such supporting evidence as may be supplied – as long as such documents have not been withdrawn or declared invalid. This requirement includes both the type of certificate dealt with in *Fitzwilliam* (now portable document A1) and other types of portable document, as well as other types of document covered by the Article.[61]

One important kind of portable document is the European Health Insurance Card (EHIC). The purpose of this card is to make it easy to prove that a person has the right to health-care benefits during a temporary visit to another Member

56 *Fitzwilliam* (n 23) paras 51-59.

57 Case C-178/97 *Barry Banks and Others v Theatre royal de la Monnaie*, EU:C:2000:169 [*Banks*], paras 38-48 and Case C-2/05 *Rijksdienst voor Sociale Zekerheid v Herbosch Kiere NV* [2006] EU:C:2006:69 [*Herbosch Kiere*], paras 22-33.

58 *Herbosch Kiere* (n 57) para 32; see also *A-Rosa* (n 23) para 51 and Case C-527/16 *Salzburger Gebietskrankenkasse and Bundesminister für Arbeit, Soziales und Konsumentenschutz v Alpenrind GmbH and Others*, EU:C:2018:669, para 47.

59 *Banks* (n 57) para 42; Cases C-72/14 and C-197/14 *X v Inspecteur van Rijksbelastingdienst and TA van Dijk v Staatssecretaris van Financiën*, EU:C:2015:564, para 42.

60 *A-Rosa* (n 23) para 59 and Pennings (n 1) 108.

61 Pennings (n 1) 108.

State.[62] The EHIC has even been described as an 'important symbol of Europe for many of its citizens'.[63] According to reports, the EHIC functions largely as intended, although there have been instances where health-care providers have refused to accept the card. This has been explained as due to a lack of knowledge.[64] Legal scholars have previously criticised the lack of methods for handling abuse of the EHIC.[65] However, the development of the case law on the abuse of rights in connection with social security coordination may now provide legal tools in this respect (see below on *Altun*).

What, then, should a national social security institution do when confronted with a questionable certificate or the like from another Member State? Concerning the Treaty provisions on freedom of movement, the CJEU has established – in *van de Bijl* and in subsequent case law on free movement – that the host-state authority may contact the issuing foreign authority in order to clarify matters in a document which are uncertain. The latter authority must then reconsider or withdraw the decision.[66] Furthermore, the CJEU has, in *van de Bijl*, acknowledged that Member States have a certain – albeit very limited – scope for refusing to recognise a foreign decision that contains a 'manifest inaccuracy'.[67] In *Tennah-Durez* the CJEU referred to this as a more general principle applicable in several fields of Community (now EU) law.[68]

In the area of social security coordination, the Regulations reflect this general case law on free movement. As mentioned above, Article 76(6) of Regulation 883/2004 requires national institutions to contact each other if difficulties arise in the application or interpretation of the Regulations. In the *Format* case the CJEU held, citing *Fitzwilliam* and *Banks*, that the duty to contact foreign institutions makes it

'incumbent on the institution which has already issued an E 101 certificate to reconsider the grounds for its issue and, if necessary, withdraw the certificate

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62 Regulation 883/2004, art 19; Regulation 987/2009, art 25; Pennings (n 1) 165 and M Axmin, *Access to Cross-Border Healthcare for Older Persons in the European Union. The Interplay between EU Law and Swedish Law* (Lund University 2020) 236ff.

63 Cornelissen (n 40) margin 28.

64 Cornelissen (n 40) margin 31; cf F De Wispelaere, L De Smedt and J Pacolet, *Coordination of Social Security Systems at a Glance. 2019 Statistical Report* (European Commission 2019) 17ff.

65 K-J Bieback, 'Article 19' in M Fuchs and R Cornelissen (eds), *EU Social Security Law: A Commentary on EU Regulations 883/2004 and 987/2009* (Nomos 2015) margin 33.

66 Case 130/88 *CC van de Bijl v Staatssecretaris van Economische Zaken*, EU:C:1989:349 [*Van de Bijl*], para 22ff; Case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food ex P Hedley Lomas (Ireland) Ltd.*, EU:C:1996:205, para 20; Case C-115/00 *Andreas Hoves*, EU:C:2002:409, para 58; Case C-110/01 *MalikaTennah-Durez v Conseil national de l'ordre des médecins* EU:C:2003:357 [*Tennah-Durez*], para 75ff and Case C-111/03 *Commission v Sweden*, EU:C:2005:619, para 61ff. See also Wenander (n 4) 776 and Janssens (n 16) 94f.

67 *Van de Bijl* (n 66) para 27; Wenander (n 4) 776f; Janssen (n 16) 94f.

68 *Tennah-Durez* (n 66) para 80.

if the competent institution of a Member State in which the employed person carries out work expresses doubts as to the correctness of the facts on which the certificate is based and/or as to compliance with the requirements of Regulation No 1408/71 [...].'[69]

This duty of reconsideration, hereby expressed in case law, was codified in Article 5 of Regulation 987/2009: 'An institution in doubt over a document it has received in social security coordination shall turn to the issuing institution, which shall then reconsider it and, if necessary, withdraw it.' The competence to contact national bodies in other Member States, established in general case law on the internal market, has thus become a duty under the Regulations applying in the field of social security law.

This duty may also be seen as an extension of the general duty under the principle of sincere cooperation for Member State institutions to carry out a proper assessment of the facts when issuing certificates (see Section 2).[70] In this way, the principle of sincere cooperation takes the concrete form of a duty to withdraw a previously issued decision. In light of the case law on free movement in other fields of law, such as the *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening* and *Agroferm* cases, this duty would take precedence over any provisions in national administrative law that limit the scope for reconsideration of administrative decisions to the detriment of individuals.[71]

In *Dafeki*, the CJEU held that national authorities must accept foreign civil-status documents in social security cases, unless there is concrete evidence casting serious doubt on their accuracy in a specific case.[72] Thus, the scope for refusal under the rule in this case reflects the reasoning of the CJEU in *van de Bijl* and *Tennah-Durez*, discussed above. However, this possibility of disregarding foreign documents when there is concrete evidence seriously calling their accuracy into question in a specific case has not found its way into the Regulation.[73] In this way, the requirement of trust between different national institutions has been broadened with regard to documents that supply evidence of relevance in social security matters.

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69 Case C-115/11 *Format Urządzenia i Montaże Przemysłowe sp. z o.o. v Zakład Ubezpieczeń Społecznych*, EU:C:2012:606 [*Format*], para 47. cf *Fitzwilliam* (n 23) para 56 and *Banks* (n 57) para 43.

70 cf *Format* (n 69) para 47.

71 Case C-383/06 to C-385/06 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening v Minister van Sociale Zaken en Werkgelegenheid*, EU:C:2008:165, para 53 (on repayment of structural funds subsidies) and Case C-568/11 *Agroferm A/S v Ministeriet for Fødevarer, Landbrug og Fiskeri*, EU:C:2013:407, para 49ff (on repayment of agricultural funds subsidies).

72 Case C-336/94 *Eftalia Dafeki v Landesversicherungsanstalt Württemberg*, EU:C:1997:579, para 19.

73 cf R Cornelissen, 'Article 76' in M Fuchs and R Cornelissen (eds), *EU Social Security Law: A Commentary on EU Regulations 883/2004 and 987/2009* (Nomos 2015) margin 19.

If the views of the Member States involved diverge and their institutions are not able to reach an agreement, the competent authorities may bring the matter to the Administrative Commission to decide.[74] This is interesting, given the ambiguous status of the decisions of the Administrative Commission between formal and informal (see Section 3). In this way, the Administrative Commission takes on a role of solving conflicts that in other fields is reserved for Union agencies or the European Commission.[75] Hence – as pointed out in *Fitzwilliam* – the possibility remains for either of the Member States involved to bring infringement proceedings under what is now Article 259 TFEU, with an eye to obtaining an assessment by the CJEU of the document in question.[76] Such an option is clearly unattractive for political reasons.[77] It would be surprising, therefore, if it were to be used for the rather technical matters dealt with in the regime for the coordination of social security. It is thus hardly a relevant option for addressing deficiencies in the certificates issued by other Member States.

5. Limits to Trust: The Abuse of Rights

As touched upon above, a system of mutual recognition and mutual trust like the one described may give rise to attempts to gain unfair advantage by means of EU law. Member-State governments have accordingly called the regime into question at times. In *A-Rosa*, the French government criticised the procedure for resolving disputes as ineffective, and cited the need to prevent unfair competition and social dumping. The CJEU, however, dismissed such arguments, stating that they 'can in no way justify disregarding that procedure; nor, *a fortiori*, can they justify a decision to disregard an E 101 certificate issued by the competent institution of another Member State.' The Court further remarked that such arguments furnish no reason to change the established case law.[78]

74 Further details are laid down in Administrative Commission Decision No A1 concerning the establishment of a dialogue and conciliation procedure concerning the validity of documents, the determination of the applicable legislation and the provision of benefits under Regulation (EC) No 883/2004 of the European Parliament and of the Council [2010] OJ C106/1.

75 L De Lucia, 'Conflict and Cooperation within European Composite Administration (Between Philia and Eris)' (2012) 5 Review of European Administrative Law 43, 59ff and Wenander (n 4) 66f.

76 *Fitzwilliam* (n 23) para 58.

77 U Karpenstein, 'Art 259 AEUV' in Grabitz and others (eds), *Das Recht der Europäischen Union* (68th update, Beck 2019) margin 6 <https://beck-online.beck.de> accessed 8 April 2020.

78 *A-Rosa* (n 23) paras 54 and 55.

Where attempts at circumvention of the law are concerned, the CJEU has identified as a general principle of EU law that the abuse of rights is prohibited.[79] In *Emsland-Stärke*, the Court established that a finding of abuse would need to show that 'a combination of objective circumstances [obtained] in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved'; and that 'a subjective element [was present] consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it'.[80]

Where the field of social security coordination is concerned, this principle was highlighted in *Paletta II*, which concerned the scope for an employer to question medical findings (on a person's incapacity to work) from another Member State. In light of its previous case law on the abuse of rights, the Court held that an employer may adduce evidence of fraud or abuse even when a document from another Member State certifying a person's incapacity to work has been produced.[81]

In the CJEU (Grand Chamber) judgment in *Altun*, the impact of the principle of prohibition of abuse of rights was clarified further in relation to trust between institutions in different Member States.[82] In the case, Belgian authorities had questioned the factual content of certificates issued by Bulgarian institutions for allegedly posted workers in the construction sector. Contacts between the institutions of the two Member States had not led the Bulgarian authorities to withdraw the certificates under the terms now regulated in Article 5 of Regulation 987/2009 (see above). The competent Bulgarian institution had confirmed the certificates, yet in its reply it had not taken into account information on their deficiencies submitted by the Belgian institution.

For the referring Belgian court, the status of the certificates was relevant for assessing a criminal case; the question from that court to the CJEU was whether an E 101 certificate may be annulled or disregarded by the host state if it had been fraudulently obtained or used.

In his opinion on the case, Advocate General Saugmansgaard Øe held that the principle of sincere cooperation is not absolute: limits to the principle are allowed in exceptional circumstances, especially in cases of fraud. The principle does not call for 'blind trust which facilitates fraudulent conduct'. It does, call

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79 K Lenaerts and P Van Nuffel, *European Union Law* (3rd edn, Sweet & Maxwell 2011) 857f, margins 22-040. cf D Leczykiewicz, 'Prohibition of abusive practices as a "general principle" of EU law' (2019) 56 Common Market Law Review 703.

80 Case C-110/99 *Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas*, EU:C:2000:695, paras 52 and 53. See also Case C-255/02 *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise*, EU:C:2006:121, paras 74 and 75.

81 Case C-206/94 *Brennet AG v Vittorio Paletta* ('Paletta II'), EU:C:1996:182, paras 24-28.

82 Case C-359/16 *Criminal proceedings against Ömer Altun and Others*, EU:C:2018:63 [*Altun*].

for contact between the institutions involved, but there must still be scope for the host state to set a certificate aside in cases of fraud.[83]

In its judgment, the CJEU cited its previous case law on the binding force of such certificates. It remarked that the 'principle of sincere cooperation also implies that of mutual trust',[84] and reiterated that it is the duty of the issuing state to ensure the accuracy of the certificate. It further pointed to the conflict-resolving function of the Administrative Commission. However, the Court also cited its case law on the prohibition of fraud and the abuse of rights. The assessment of fraud, it laid down, shall be based on 'a consistent body of evidence that satisfies both an objective and a subjective factor'. The objective factor refers to a failure to meet the conditions for the certificate; the subjective factor concerns an 'intention of the parties concerned to evade or circumvent the conditions for the issue of that certificate, with a view to obtaining the advantage attached to it'. As the earlier case law made clear, it is the duty of the issuing Member State to reconsider a certificate that has been called into question by another Member State. If, however, the issuing institution does not carry out a review of the certificate within a reasonable time, it must also be possible to bring evidence in proceedings in the latter state to the effect that the certificate should be disregarded. Here the Court stressed the right to a fair trial: the accused must have an opportunity to rebut such allegations in proceedings in the host state.[85]

It was clear to the Court in this case that, where *the objective factor* was concerned, the information on the certificate did not match the real circumstances. On this point, the Court added, the Belgian state had stated in the proceedings that the competent Bulgarian institution had failed to take into account the information it had provided on the deficiencies of the certificate. The Court noted too that it is for the referring court to verify this. Regarding *the subjective factor*, the Court noted that the certificate had been obtained fraudulently. Under such circumstances, the CJEU concluded, a national court may disregard a certificate.[86]

The *Altun* case establishes, within the field of EU social security law, the two-pronged test of abuse of rights previously laid down in other legal areas (e.g. in *Emsland-Stärke*). Legal scholars have also linked the outcome of the case to the limits on mutual recognition in harmonised fields of EU free movement law, such as the rules on recognition of driving licenses.[87] Moreover, the Court

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83 C-359/16 *Ömer Altun and Others*, EU:C:2017:850, Opinion of AG Saugmansgaard Øe, paras 70-72. The Opinion here referred to Lenaerts (n 37).

84 See *Altun* (n 82), para 40.

85 See, for the discussion in this paragraph, *Altun* (n 82), paras 41-56.

86 ibid. paras 57-60.

87 K Engsig Sørensen, 'Enforcement of Harmonization Relying on the Country of Origin Principle' (2019) 25 European Public Law 381, 399 fn 83.

clarified, in *Altun*, that also in the area of social security coordination host states may indeed disregard certificates (and, one must assume, other documents too) if the objective and subjective requirements are fulfilled. In this way, the principle of prohibition of fraud and abuse of rights complements the principle of mutual trust. However, it is not quite clear from the judgment what the failure of the Bulgarian institution to take the alleged deficiencies of the certificate into account meant for the outcome. The remark that it is for the referring court to verify the failure to act could be understood as a further qualification of the scope for relying on the principle of prohibition of fraud and abuse of rights in the field of EU social security law. In other words: if the Bulgarian institution had indeed addressed the alleged deficiencies cited by its Belgian counterpart in its reaction, it would have been hard to claim that the objective requirement had been fulfilled in a sufficiently clear manner. Accordingly, the scope of the rule in *Altun* opening for Member States to set aside duties of mutual recognition is very limited.[88]

In an infringement case decided in 2018, the Commission began proceedings against Belgium for legislation to the effect that A1 certificates for posted workers from other Member States would not be recognised in Belgium in cases where rights were abused. Rather, Belgian social security law would apply in such situations. The Court reiterated its case law (referred to above), i.e. that *Altun* lays down the conditions under which a Member State may disregard a certificate from another Member State. In the view of the CJEU, the Belgian legislation at issue failed to satisfy these conditions, since it did not provide for a dialogue with the foreign institution as stipulated in the Regulations. The Court admitted that 'it is possible that the way in which the cooperation and conciliation procedure operates is not always efficient and satisfactory in practice'[89] However, such administrative problems in the contacts between national institutions do not furnish a reason to set EU law aside; the Court thus held that Belgium had infringed its duties under EU law.[90] Even so, it bears noting that the *Altun* judgment seemingly paves the way for Member States to enact legislation – and not just to make decisions in individual cases – of a kind that limits recognition of foreign decisions, as long as the conditions in *Altun* are met.

88 cf ibid, 399 (on harmonised fields in law governing the internal market).
89 Case C-356/15 *Commission v Belgium*, EU:C:2018:555, para 107.
90 ibid.

6. Conclusions

As discussed above, the concepts of sincere cooperation, mutual trust, and mutual recognition are important in the field of EU social security law, even though coordination is the main legislative mechanism in this area. In light of the theoretical framework presented in Section 1 on mutual trust as a 'regulatory tool box', some concluding remarks are offered below.

A review of the field shows that the current meaning of these concepts – sincere cooperation, mutual trust, and mutual recognition – emerged only gradually. EU regulation (in a broad sense) has sought to balance the principle of freedom of movement against the need to protect the integrity of national – and highly political – systems of social security. In the process, the law has developed through an interplay between the Treaty provisions on sincere cooperation, secondary law, and the case law of the CJEU.

As concluded in Section 2, the legislative choice to opt for a system of coordination, both in the Regulations and in what is now Article 48 TFEU, indicates a certain amount of trust between the Member States. The choice of coordination may seem to indicate a lower level of trust between the Member States in this field than in those where harmonisation is employed. Still, as with all kinds of international cooperation with effects on individuals, the Member States must trust to some extent that the social security systems of other Member States function properly. This is necessary if cross-border coordination is to be meaningful and legitimate in the eyes of citizens.

Administrative cooperation forms an important part of the wider picture in this field. Through the various mechanisms for cooperation and exchange of information laid down in Article 76 of Regulation 883/2004, formal and informal bonds are established between national institutions and agencies at the EU level. The *sui generis* Administrative Commission body is of great importance for the relationship between the Member States and between Member States and the EU level. Network structures are thereby established which help to promote and develop sincere cooperation, mutual trust, and mutual recognition in practice. The duty to cooperate and to exchange information extends as well to the individuals concerned.

The more concrete aspects of mutual trust concern the recognition of documents that are of relevance to the enjoyment of social security rights. In this area, the tension between promoting freedom of movement and protecting national interests (in combatting fraud and maintaining the integrity of national social security systems) is obvious. Duties of recognition have emerged in case law and in secondary law due to the principle of sincere cooperation (now Article 4(3) TFEU). Ever since the seminal *Fitzwilliam* case, the CJEU has taken this principle – together with the Regulations in the field – as a basis for requiring Member State institutions to recognise foreign documents of various kinds, and to resolve conflicts through cross-border cooperation (see Section 4). Notably, this development of case law should not be seen as restricted to the field

of EU social security law. Rather, the CJEU's finding here – that the principle of sincere cooperation authorises direct contact to solve conflicts – developed in the more general case law that governs the internal market. Subsequently, in Article 5 of Regulation 987/2009, the possibility of making contact has even been codified as a duty. This indicates, as in other fields, the potential of the principle of sincere cooperation to bring national institutions closer to one another; from a broader perspective, it demonstrates how the principle serves as a tool for administrative integration. As exemplified by the quasi-legislative role of the Administrative Commission, the principle has the further effect of blurring the line between formally binding provisions and informal, non-binding norms.

With its foundation in the principle of sincere cooperation, the CJEU case law may be seen as going very far in requiring Member States to trust each other. In Section 2 above, the requirement of maintaining quality in decision-making was highlighted. Accordingly, the regime for the recognition of documents is based in essence on two preconditions: (i) that the States actually carry out a proper assessment, so as to guarantee that the information stated is accurate (*Fitzwilliam*, see Section 2); and (ii) that the institutions are able in practice to solve problems through direct dialogue, possibly within the aid of the Administrative Commission (Article 5 Regulation 987/2009, see Section 4).

The CJEU's use of the principle of prohibition of fraud and abuse of rights in *Altun* limits this trust in order to address situations where these preconditions do not fully apply. Accordingly, the trust in the capacity of other Member States to cooperate effectively and to assess accurately is no blind trust. Still, the requirements of *Altun* would only seem to be fulfilled in extraordinary cases; yet the case law does offer a tool for dealing with clearly unsatisfactory situations. In light of the concerns over misuse of the coordination regime – especially in connection with posting certificates, but possibly also in relation to the European Health Insurance Card – this is an important step. Although there are peculiarities in EU social security law, the method used in *Altun* could also serve as a model in other fields of EU Administrative law. Continued fine-tuning of the balance between freedom of movement and national interests through the principle of prohibition of fraud and abuse of rights is likely to be important in the future development of both EU social security law and EU administrative law in general.