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Title

Third Country nationals and scope of the coordination,
Regulation 859/2003

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References:

- **Recital(s):** ----
- **BR :** ---
- **IR:** ---
- **AC Decision (s) :** ---
- **ECJ CASE Law:** C-95-98/99 Khalil, Chaaban, Osseili, Nasser and C-180/99 Addou

Comments:

- Until 1 June 2003, Regulation No 1408/71 applied to Community nationals but only to limited categories of nationals of third countries, such as the members of the family of EC nationals, stateless persons and refugees. There lacked however a single instrument of coordination that dealt with the positions of all third country nationals in cross-border situations¹. In 1998, the European Commission proposal for simplifying and modernising the coordination rules in various respects included third country nationals in its scope. The objective was that, in applying the coordination rules to this limited and well identified group of persons, it would considerably reduce the administrative burden of institutions whilst at the same time ensuring an equalisation of rights between EU I and Third country national workers. This part of the Commission proposal was however not agreed upon because some Member States were of the opinion that it had no adequate legal basis (Article 42 and 308 EC).
- In 2002, the Commission, to the same end, issued a new proposal on a different legal basis; Article 63(4) EC Treaty, which was introduced in Title IV of the EC Treaty by the Amsterdam Treaty. It permitted the Council to adopt "measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States."
- As Regulation 1408/71 dealt already with some categories of third country nationals, the proposal aimed at including in the coordination scope "*those individuals who] are not already covered solely on the ground of their nationality.*" The main group of third country national concerned were workers and their families.

¹ To be completed.

This proposal resulted in Regulation 859/2003, extending the Regulation 1408/71 to third country nationals, which was adopted in 2003 on this specific legal basis. The Regulation is in effect a “bridge”, which brings third country nationals within the personal scope of the coordination rules, without affecting the rules themselves.

- To be covered by this regulation two important conditions shall be fulfilled:
 - being legally resident in a Member State; and
 - being in a situation where not all the elements are within a single Member state (need for a cross border element).

First condition : being legally resident

- The nationals of third countries covered by Regulation 859/2003 must be legally resident on the territory of a Member State and hence have a temporary or permanent right of residence. To benefit from the rights in Regulation 1408/71 in a second Member State, the third-country national does not however have to satisfy the residency conditions in this second state, but may simply move there (for instance he can be posted by his employer or be temporarily staying), albeit having to comply with that country’s national legislation concerning entry.
- The application of Regulation (EEC) No 1408/71 to these persons does not give them any entitlement to enter, to stay or to reside in a Member State or to have access to its labour market. Social security coordination rules and immigration law are in principle two separate issues. However, once a third country national is legally resident in one Member state and is in a cross border situation involving a second Member state, then the coordination rules apply [and entitlement to social security benefits (including healthcare) has to be judged in the light of the rules in Regulation 1408/71.
- In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark did not take part in the adoption of Regulation 859/2003 and is not bound by it, nor subject to its application. It has to be considered as a non Member state for coordination matter dealing with third country nationals covered by this Regulation. By contrast, Ireland and UK decided to opt in and so they apply Regulation 859/2003 with other MS.

Second conditions : being in a cross-border situation

- Regulation 859/2003, hence the coordination rules, apply only when a cross border element between two member states is involved (see Case C-95-98/99 Khalil). It does not apply to third country nationals whose situation remains solely within the remits of a single Member state. It does not regulate the relationships between their country of origin and the EU State where they legally reside

The effect of Regulation 859/2003 on persons covered.

- Regulation 859/2003 provides for the principle of equal treatment to the benefit of persons covered by this Regulation. Third country nationals legally resident in the European Union and being in a cross border situation shall be treated as if they were EU citizens in the same situation.
- However Germany and Austria were granted derogations to the principle of equal treatment with regard to family benefits. The effect of these derogations is that those MS will not pay family benefits in accordance with their national legislation in Annex 1 of Regulation 859/2003.

The effect of the coordination rules (Regulation 1408/71) on persons covered by Regulation 859/2003

- The application of Regulation (EEC) No 1408/71 to these persons does not give them any "automatic" entitlement to benefits. They shall be treated in the very same way as EU nationals in the same situation and are required to fulfil the criteria and conditions set out in national legislation. Previous periods of insurance in the former MS of employment shall be aggregated to determine whether these persons have a right to benefits.
- As far as pensions are concerned, the persons covered by Regulation 859/2003 enjoy equal treatment as regards old-age, invalidity and survivors' statutory pensions based on the worker's previous employment and acquired in accordance with the legislation defined in Regulation (EC) N° 1408/71 under the same conditions and at the same rates as the nationals of the Member States concerned and other EU nationals who move to a third country. It is not necessary to be, or to have been, a legal resident in a Member State of the EU at the time when the person concerned applies for the award of a benefit concerning old age, invalidity and survivor's statutory pensions.
- Regulation 859/2003, as applied to Regulation 1408/71, does not create any principle that requires a pension to be exported to a third country. However, equal treatment principle in Regulation 1408/71 means that Member States must grant nationals of third countries covered by the Regulation the same advantages that they guarantee to their own nationals, and to EU nationals and their family members. So where national legislation gives a right to export a pension to a third country, then this right should be accorded to the person who obtains rights by virtue of Regulation 859/2003.

Conclusion

- In order to be entitled to any social security benefits by virtue of the EU coordination rules, third-country nationals have to fulfil, or must have fulfilled, three sets of conditions: first, the conditions set out by Regulation 859/2003; secondly, those which are provided for in Regulation (EC) No. 1408/71 and, thirdly, the conditions set out by the legislation of the Member States concerned with regard to affiliation or entitlement to a social security benefit.

Proposal to extend Regulation 883/2004 to third country nationals

- The Commission in 2007 issued the proposal for extending Regulations 883/2004 and 987/2009 to Third country nationals who were not already covered. The aim of the proposal was in essence the same as that of Regulation 859/2003: to enable institutions to apply the same set of coordination rules which they apply to EU nationals from 1 May 2010 also to non EU nationals in a comparable situation. It is of particular importance to facilitate the tasks of the institutions and also to enable the new cooperation tool between institutions (EESSI electronic exchange of social security information (see EN on EESSI)) to apply.
- The proposal was made on the same legal basis, Article 63 (4) (now 79(2) (b) TFEU), and contains the same pre-conditions for a TCN to be covered by the coordination rules: - being legally resident; and being in a cross border situation. Like Regulation 859/2003, it encompasses the principle of equal treatment.
- Denmark is not taking part in this instrument according to the specific protocol referred above. Ireland has "opted in" meaning this Member State will apply this Regulation. However, currently the UK has not exercised its opt-in.
- For the time being no political agreement has been reached on the proposal. After Regulations 883/2004 and 987/2009 become applicable, Regulation 859/2003 will remain in force and the

coordination rules applicable to persons covered will still be Regulation 1408/71 and 574/72. This situation will persist as long as the new Regulation, extending the above mentioned Regulations, is not adopted.

- At the time this text is drafted, no final view exists on the impact of the Lisbon treaty on the negotiation process of this Commission proposal. However, in Article 79, which replaces Article 63(3) and (4), there is a change in the decision making process. The adoption procedure becomes the "ordinary one", meaning co decision between Parliament and Council and qualified majority.

To go further:

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Comparison between Personal scope 1408/71 and 883/04 and extension 3rd country nationals

Conditions and Status	UE citizens	3rd Country Nationals
	Cross-border situation	
Immigration Admission	Directive 2004/38	National immigration rules + EC directives
Social security	Being covered by statutory social security schemes (according to conditions of national legislation).	

Persons covered	Regulation 1408/71 Application Field	Regulation 859/03	Regulation 883/04	Proposal of Regulation for Extension of 883/04
	UE citizens	3 rd Country Nationals	UE citizens	3 rd Country Nationals
Workers	Y	Y	Y	Y
Non-active: students, pensioners, member of family of a worker or of a pensioner or of a refugee or of a stateless person.	Y ²	Y ³	Y	Y
Other non actives & members of their family.			Y	Y

² 3rd Country national, member of family of a EU worker, refugees and stateless persons.

³ 3rd Country national worker & member of family.