

CONTENTS

<i>Series Preface</i>	v
<i>Preface</i>	ix
<i>List of Abbreviations</i>	xxiii

PART I. COORDINATION OF SOCIAL SECURITY

Chapter 1. Introduction to the Concept of Coordination	3
1.1. General	3
1.2. The Territoriality Principle	4
1.3. Coordination and Harmonisation	6
1.4. Tasks of a Coordination Instrument	8
1.4.1. Solving Conflicts of Law	8
1.4.2. Prohibition of Discrimination on the Basis of Nationality	10
1.4.3. Territorial Requirements for Acquiring Benefit Rights	11
1.4.4. Territorial Requirements for Payment of a Benefit	11
Chapter 2. The Legal Basis and Context of Regulation 883/2004	13
2.1. The Decision-Making Procedure for a Coordination Regulation	13
2.2. The Court of Justice	14
2.3. The Legal Basis for the Coordination Regulation	15
2.4. Is Direct Application of Article 48 TFEU Possible?	19
2.5. A Short History of the Coordination Regulations	20
2.6. The Revision of Regulation 883/2004 Proposed in 2016	22
2.7. The Structure of Regulation 883/2004	23
2.8. Coordination Regulations of Non-EU Organisations	26
2.8.1. Coordination Conventions of the International Labour Organization	26
2.8.2. Conventions of the Council of Europe	27
Chapter 3. Applicability Conditions: Cross-Border Situation and Within Territorial Scope	29
3.1. Introduction	29
3.2. The Facts of the Case Must not be Limited to One Member State	29

3.3.	The Territorial Scope of Regulation 883/2004.....	31
3.4.	Applicability to National Schemes Applicable Outside the EU.....	32
3.5.	Applicability of the Regulation to the Continental Shelf.....	33
3.6.	The Application of Rules for Determining the Legislation Applicable Outside the EU.....	34
Chapter 4. The Personal Scope of Regulation 883/2004.....		35
4.1.	Introduction.....	35
4.2.	An Historical Overview of the Personal Scope of Regulations 3 and 1408/71	36
4.3.	The Personal Scope of Regulation 883/2004	38
4.3.1.	Introduction	38
4.3.2.	The Requirement of Being Subject to the Legislation of a Member State	39
4.3.3.	The Nationality Condition	40
4.3.4.	Stateless Persons and Refugees.....	41
4.4.	Third Country Nationals and Coordination	42
4.4.1.	Introduction	42
4.4.2.	The Situation Must not be Confined in All Respects to a Single Member State.....	45
4.4.3.	Legally Resident in a Member State	46
4.4.4.	The Relevance of Other Bilateral and Multilateral Treaties	48
4.5.	Members of the Family and Survivors	48
Chapter 5. The Material Scope of Regulation 883/2004.....		53
5.1.	Introduction.....	53
5.2.	The Term ‘Legislation’ and the Exclusion of Contractual Schemes	54
5.3.	The Classification of Benefits.....	57
5.3.1.	Introduction: A Limited Material Scope.....	57
5.3.2.	The Criteria for Classifying Benefits.....	58
5.3.3.	The Relationship Between a Benefit and the Scheme of which it is Part.....	61
5.3.4.	Taxes and the Coordination Regulation.....	62
5.3.5.	Employers’ Obligations and the Scope of the Regulation.....	64
5.4.	Benefits Compensating Damage	65
5.5.	Social and Medical Assistance.....	66
5.6.	Special Non-Contributory Cash Benefits.....	69
5.6.1.	The Provisions Relevant to Special Non-Contributory Cash Benefits	69

5.6.2.	The Interpretation of the Term 'Reside'	71
5.6.3.	The Qualification as a Special Non-Contributory Cash Benefit ...	72
5.6.4.	Revision of the Annex as a Result of the <i>Leclere</i> Case	75
5.6.5.	The Effect of Claiming a Non-Contributory Cash Benefit and the Right to Residence.....	77
5.6.6.	Non-Exportability of Special Non-Contributory Cash Benefits and Free Movement.....	77
Chapter 6. The Rules for Determining the Legislation Applicable		81
6.1.	Introduction	81
6.2.	The Main Characteristics of the Rules Determining the Applicable Legislation.....	82
6.2.1.	The State-of-Employment Principle	82
6.2.2.	The Exclusive Effect of the Conflict Rules	83
6.2.3.	Conflict Rules and Access to the Applicable System.....	85
6.2.4.	The Freedom or Obligation of the Non-Competent State to Provide Benefits.....	89
6.2.5.	Conflict Rules and Levying Contributions.....	90
6.2.6.	The Inescapability of the Conflict Rules	91
6.2.7.	Special Conflict Rules for Specific Benefits	92
6.3.	The Conflict Rules for Persons Working in One Member State Only	92
6.4.	The Conflict Rules for Benefit Recipients.....	94
6.5.	The Conflict Rules for Unemployed Persons Receiving Benefit Under Article 65.....	95
6.6.	The Conflict Rules for Other Categories	95
6.6.1.	General	95
6.6.2.	Economically Inactive Persons.....	96
6.6.3.	Persons Working Outside the Territory of the EU	97
6.7.	The Conflict Rules when Working Simultaneously in Two or More Member States	98
6.7.1.	Working as an Employee in Two or More Member States.....	99
6.7.2.	Working Self-Employed in Two or More Member States.....	109
6.7.3.	Working in One State as an Employed Person and in the Other as Self-Employed	110
6.7.4.	Provision of Information	112
6.8.	The Conflict Rules for Civil Servants Working in Two Member States	113
6.9.	The Conflict Rules for Special Non-Contributory Benefits.....	114
6.10.	The Coordination System for Compulsory and Voluntary Insurance	114

6.11.	Procedure in Case of a Dispute	116
6.12.	Agreements on the Basis of Article 16	117
Chapter 7. Posting and Social Security		119
7.1.	General	119
7.2.	Posting of Employees	120
7.2.1.	Conditions for Posting	120
7.2.1.1.	General	120
7.2.1.2.	Proposal for Revision	121
7.2.1.3.	The Employee is Sent to Work on His or Her Employer's Behalf	121
7.2.1.4.	The Employer Normally Carries Out His or Her Activities in the Sending State	122
7.2.1.5.	The Employee is Subject to the Legislation of the Sending State	125
7.2.1.6.	The Employee is not Sent to Replace Another Person	126
7.2.1.7.	The Employee is not Sent for More than 24 Months	127
7.2.1.8.	Temporary Work Agencies	128
7.2.1.9.	Provision of Information	128
7.2.2.	The Relevance of a Posting Certificate and the Approach to Fraud	129
7.2.2.1.	The Procedure to be Followed when a Certificate is Disputed	129
7.2.2.2.	Posting Certificates are Binding Even if an Apparent Mistake is Made.	130
7.2.2.3.	When a Certificate is Presumed to be Fraudulently Obtained.	131
7.2.2.4.	The Procedure in Case of Incomplete or Wrong A-1 Certificates	134
7.2.2.5.	The Proposed Revision of the Implementing Regulation	134
7.3.	Posting of Self-Employed Persons	135
7.3.1.	The Condition for Posting of Self-Employed Persons	135
7.3.2.	The Proposal for Revision of the Regulation	137
7.4.	Posting of Third Country Nationals	138
7.5.	The Thin Line Between Posting and Working Simultaneously in Two Countries	139
7.6.	Agreements on the Basis of Article 16	140

Chapter 8. The General Non-Discrimination, Assimilation, Aggregation and Removal of Residence Conditions in Regulation 883/2004.....	143
8.1. Introduction	143
8.2. Equal Treatment (Article 4 of Regulation 883/2004)	144
8.3. Assimilation of Receipt of Benefit, Events and Facts (Article 5).....	148
8.3.1. Assimilation of Social Security Benefits	150
8.3.2. Assimilation of Facts and Events	151
8.4. Waiving of Residence Conditions (Article 7)	152
8.5. Aggregation of Periods (Article 6)	153
8.6. The General Rules Against Overlapping	155
 Chapter 9. Article 45 TFEU and Regulation 492/2011.....	157
9.1. Introduction	157
9.2. Article 45 TFEU: Prohibiting Discrimination on the Ground of Nationality	158
9.2.1. The Coordination Regulation Must be Consistent with Article 45 TFEU.....	158
9.2.2. Invoking Article 45 when the Coordination Regulation is Inapplicable.....	160
9.2.3. National Law, Even if Consistent with the Regulation, Must Comply with the TFEU.....	161
9.3. Article 45 TFEU: Obstacles to Free Movement are not Allowed	162
9.4. Regulation 492/2011: The Free Movement of Workers Regulation	163
9.4.1. General	163
9.4.2. The Personal Scope	164
9.4.2.1. The Meaning of the Term ‘Worker’	164
9.4.2.2. First-Time Jobseekers.....	167
9.4.2.3. Former Workers	168
9.4.2.4. Members of the Family.....	170
9.4.3. The Material Scope	173
9.4.4. The Non-Discrimination Provision of Article 7(2).....	174
9.4.4.1. General.....	174
9.4.4.2. Objective Justification	175
9.5. The Relationship Between Regulations 883/2004 and 492/2011.....	180
9.6. Article 49 TFEU and Equal Treatment of the Self-Employed.....	181
 Chapter 10. EU Citizenship, Free Movement and Discrimination	183
10.1. General	183
10.2. The Case Law on the Citizenship Provisions Before Directive 2004/38	185
10.2.1. General	185

10.2.2.	Older Case Law on Access to Social Assistance and the Effects on Residence Rights	186
10.2.3.	Objective Justifications for Discrimination on the Ground of Nationality	188
10.3.	Directive 2004/38	189
10.4.	Persons During the First Three Months of their Stay (Article 6)	194
10.5.	Equal Treatment of Former Workers and the Self-Employed (Article 7)	194
10.6.	Equal Treatment and Access to Social Assistance.	196
10.6.1.	Special Non-Contributive Cash Benefits are Social Assistance for Directive 2004/38	196
10.6.2.	An Individual or Collective Test on ‘Unreasonable Burden’ for the Social Assistance System?	199
10.6.3.	The Relevance of Directive 2004/38 to Other Benefits Falling Under Regulation 883/2004.	202
10.7.	The Condition of Comprehensive Health Insurance	203
10.8.	Persons Deriving the Right to Residence Other than From Directive 2004/38	204
10.9.	Persons Deriving their Right to Residence from National Law	205
10.10.	The Proposal for Revising Regulation 883/2004.	207
10.11.	Discussion of the Impact of the Citizenship Directive.	208
10.12.	EU Citizenship and Free Movement.	211
10.12.1.	The Test of Residence Conditions Against Article 21 TFEU	211
10.12.2.	Unemployment Benefits and Free Movement	215
10.13.	Can Article 21 Remove the Negative Effects of Exercising the Right to Free Movement?	216
10.14.	Overview of the Relationship Between Regulations 883/2004 and 492/2011 and Article 18 TFEU	216
Chapter 11. Sickness Benefits		219
11.1.	The Meaning of the Term ‘Sickness Benefit’	219
11.1.1.	The Distinction Between Sickness Benefits and Other Benefits	219
11.1.2.	Long-Term Care Benefits	220
11.1.3.	The Distinction Between Benefits in Cash and Benefits in Kind	223
11.1.4.	Compulsory Payments by Employers in Case of Sickness ..	224
11.1.5.	Reimbursement Rules Between Member States	224
11.2.	Benefits in Cash	225
11.2.1.	Aggregation Rules	225
11.2.2.	Benefits in Cash are Exportable	225
11.2.3.	Claiming and Supervision Procedures	226

11.3.	Benefits in Kind for Persons not Residing in the Competent State	229
11.3.1.	Benefits in Kind are Provided by the State of Residence	229
11.3.2.	Persons not Residing in the Competent State	230
11.3.3.	Members of the Family of Frontier Workers	231
11.3.4.	Retired Frontier Workers	232
11.3.5.	The Relationship Between Independent and Derivative Rights.	233
11.3.6.	Benefits in Kind for Pensioners and Members of their Family	233
11.3.6.1.	The Priority Rules	233
11.3.6.2.	The Inescapability of the Provisions on Sickness Benefit for Pensioners.	236
11.3.6.3.	The Applicable Legislation if the Right to Benefits in Kind is not Subject to Conditions of Insurance or Employment	237
11.3.6.4.	Pensioners Living Abroad who go for Planned Care to the State from which they Receive a Pension	238
11.3.6.5.	Family Members who do not Reside in the Same State as the Pensioner	238
11.3.6.6.	Levying Contributions on Pensioners	238
11.4.	Long-Term Care Benefits	239
11.4.1.	Overlapping of Long-Term Care Benefits in Kind and in Cash.	239
11.4.2.	The Specific Character of Care Benefits	240
11.4.3.	The Proposed Revision of the Regulation	242
11.5.	Medical Care Becomes Necessary During a Stay Outside the Competent State	244
11.6.	Planned Care Outside the Competent State	245
11.6.1.	Planned Care and Authorisation by the Competent Institution	245
11.6.2.	The Test of Refusal of Authorisation.	247
11.7.	Obtaining Planned Care without Authorisation on the Basis of the Treaty	254
11.7.1.	The <i>Kohll</i> and <i>Decker</i> Case Law.	254
11.7.2.	Applicability to Hospitals	256
11.7.3.	Non-Hospital Care	258
11.7.4.	The Level of Reimbursement and Travelling Costs.	260
11.8.	The Directive on the Application of Patients' Rights in Cross-Border Health Care.	263
11.8.1.	Introduction	263
11.8.2.	Reimbursement Under the Directive	264
11.8.3.	The System of Authorisation Conditions.	265

Chapter 12. Old-Age and Survivors' Pensions	269
12.1. Introduction	269
12.2. Aggregation of Periods	270
12.3. Calculation of the Amount of Benefits	272
12.3.1. Calculation of the Independent Benefit	272
12.3.2. Calculation of the Pro-Rata Benefit	273
12.3.3. Comparison of the Independent and Pro-Rata Benefits	275
12.4. The History of the Community Rules to Prevent Overlapping: The <i>Petroni</i> Case Law	276
12.5. The Present Rules to Prevent Overlapping	277
12.5.1. Introduction	277
12.5.2. General Principles	278
12.5.3. Overlapping of Benefits of the Same Kind	279
12.5.4. Overlapping of Benefits of a Different Kind	279
12.6. Minimum Pensions	281
12.7. Recalculation of Benefits	281
12.8. Periods Completed Before the Coming into Force of the Regulation	282
12.9. The Relationship Between International Conventions and the Regulation	283
12.10. The Coordination of Non-Statutory Pensions	284
12.10.1. General	284
12.10.2. Directive 98/49 on Safeguarding Supplementary Pension Rights	284
12.10.3. The Portability Directive	285
12.10.4. Application of Article 45 to Waiting Periods for Non-Statutory Pensions	287
12.10.5. Conclusion	288
Chapter 13. Invalidity Pensions	289
13.1. Introduction	289
13.2. Aggregation Rules	291
13.3. A Person has been Exclusively Subject to Type A Schemes	292
13.4. A Person has been Subject to at Least One Type B Scheme	293
13.4.1. Determining Incapacity for Work	293
13.4.2. The Supervision Measures	294
13.4.3. The Insurance Fiction	294
13.4.4. Calculation of the Amount	295
13.5. Recalculation of Benefits	299
13.6. Transition of Invalidity Benefits to Old-Age Benefits	300

13.7.	The Problem of Differences in Waiting Periods	300
13.8.	Benefits for Accidents at Work and Occupational Diseases	302
13.9.	Special Non-Contributory Cash Benefits for Invalidity.....	304
Chapter 14. Family Benefits.....		305
14.1.	Introduction.....	305
14.2.	Aggregation of Periods.....	307
14.3.	Export Rules.....	308
14.3.1.	General	308
14.3.2.	The Level of the Exportable Family Benefit: State of Employment or Residence?	310
14.4.	Priority Rules if Both Parents are Entitled to Family Benefits.....	312
14.4.1.	Introduction	312
14.4.2.	Differential Supplements After Application of the Priority Rules	316
14.4.3.	The Proposal for Revision of the Regulation	319
14.5.	Parental Benefits	319
Chapter 15. Unemployment Benefits.....		323
15.1.	The Term 'Unemployment Benefits'	323
15.2.	Coordination Rules for Unemployment Benefits Deviating from the General Rules.....	325
15.3.	The Aggregation Rules	325
15.3.1.	Which Periods are to be Aggregated?.....	326
15.3.1.1.	The General Rules	326
15.3.1.2.	The Proposal for Revision	328
15.3.2.	Conditions for Application of the Aggregation Rules	329
15.3.2.1.	The Conditions Under Regulation 883/2004.....	329
15.3.2.2.	Some Figures on the Application of the Aggregation Rules	330
15.3.2.3.	The Proposal for Revision	331
15.4.	Unemployed Persons who Reside in a State Other than the Competent One	333
15.4.1.	Frontier Workers	333
15.4.2.	Persons not Residing in the Competent State who are not Frontier Workers.....	335
15.4.3.	The <i>Miethe</i> Case Law.....	336
15.4.4.	The Proposal for Revision.....	337
15.4.5.	Partially Unemployed Frontier Workers	340

15.5.	The Calculation of Unemployment Benefits	342
15.6.	Export of Unemployment Benefits	343
15.6.1.	The Conditions for Export	343
15.6.2.	Data on the Use of Export	345
15.6.3.	The Maximum Export Period	346
15.6.3.1.	General	346
15.6.3.2.	The Proposal for Revision of the Regulation.....	347
15.6.3.3.	Extension of the Export Period.....	347
15.6.3.4.	Exceptional Reasons for Extension in Case of Late Return	348
15.6.3.5.	The Loss of Remaining Benefit Rights in Case of Late Return	349
 Chapter 16. Disparities that are not Removed by Coordination Rules.....		353
16.1.	Introduction.....	353
16.2.	Non-Matching National Systems.....	353
16.2.1.	The <i>Leyman</i> Judgment	353
16.2.2.	The <i>Vester</i> Judgment	355
16.3.	When Mistakes are Made by Persons Covered by the Regulation	356
16.4.	Coordination Rules and the Difference Between Classical and New Benefits.....	358
16.5.	Persons not Protected in the State of Employment and Deprived of a Residence-Based System.....	360
16.6.	Conclusions on the Case Law on Disadvantageous Effects of Coordination	365
16.7.	Social Security and Tax Coordination	367
16.7.1.	Introduction.....	367
16.7.2.	Persons Working in a State Other than their State of Residence	368
16.7.3.	Frontier Workers	369
16.7.4.	Posting.....	370
16.7.5.	Persons Working in Two States Simultaneously	372
16.7.6.	Summary.....	373
 Chapter 17. The Relationship Between Regulation 883/2004 and Bilateral Treaties		375
17.1.	Introduction.....	375
17.2.	Infringement on Social Security Advantages Acquired on the Basis of International Treaties	376

Chapter 18. Agreements with Third Countries and the Position of EU Civil Servants	381
18.1. Introduction	381
18.2. The Euro-Mediterranean Association Agreements	382
18.3. Decision 3/80 of the EEC–Turkey Association Council	385
18.4. The United Kingdom	389
18.5. Persons Working or Having Worked at an EU Institution	392
 PART II. SOCIAL POLICY	
 Chapter 19. Equal Treatment and Social Security	397
19.1. Introduction	397
19.2. Non-Statutory Occupational Social Security	397
19.2.1. Background and Scope of Article 157 TFEU	397
19.2.2. Part-Timers' Pensions and Article 157 TFEU	399
19.2.3. Part-Timers' Pensions and Directive 97/81	401
19.2.4. Differences in Pension Age and Article 157 TFEU	401
19.2.5. Change of Sex and Article 157 TFEU	402
19.2.6. Directive 2006/54	403
19.2.7. Directive 2000/78: Prohibition of Discrimination on Other Grounds	405
19.2.8. Horizontal Effect of the Equal Treatment Provisions	408
19.3. Statutory Social Security	409
19.3.1. Background and Scope of Directive 79/7	409
19.3.2. The Personal Scope of Directive 79/7	410
19.3.3. The Material Scope of Directive 79/7	412
19.3.4. The Equal Treatment Rule of Directive 79/7	414
19.3.4.1. Introduction	414
19.3.4.2. The Direct Effect of Directive 79/7	416
19.3.4.3. Change of Sex and Directive 79/7	417
19.3.4.4. Prohibition of the Effects of a Former Discriminatory Rule	418
19.3.4.5. Indirect Discrimination and Directive 79/7	418
19.3.4.6. Directive 97/81 and Unequal Treatment of Part-Time Workers	426
19.3.4.7. The Article 7 Exception	426
19.4. Equal Treatment of the Self-Employed	430
19.5. The Impact of the Charter on Fundamental Rights	431

Chapter 20. Social Policy Instruments of the European Union	433
20.1. Sources of EU Social Policy Instruments	433
20.2. The Powers to Adopt Legislation on Social Policy	435
20.3. The Open Method of Coordination	436
20.4. The EU Charter of Fundamental Rights.....	440
20.4.1. General	440
20.4.2. Conditions for Applicability of the Charter.....	442
20.4.3. An Example of the Application of the Charter	444
20.4.4. The Effect of the Charter in Private Disputes	448
20.5. The European Pillar of Social Rights.....	449
<i>Bibliography</i>	453
<i>List of ECJ Cases</i>	463
<i>Case Law Index</i>	473
<i>Subject Index</i>	481