TRAINING SEMINAR ON COMMUNITY COORDINATION[1]

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Applicable legislation in the framework of Community coordination

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CONTENTS

1. OVERCOMING THE LACUNAE OR INCONVENIENCES OF NON-HARMONIZATION: DRAWING DOWN THE BOUNDARIES BETWEEN NATIONAL AND COMMUNITY COMPETENCE

The core of Community coordination consists of a set of principles and techniques, aiming at guaranteeing to the persons exercising their right to free movement security and

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continuity by linking the national social security schemes of Member States together so that they interact to provide the migrant persons with constant social security protection.

Coordination, in other words, is designed to give effect to the rights, bestowed by the Treaty to free movement, free establishment and free provision of services, by defining the principles and rules deemed indispensable for the realization of the major targets and corresponding pillars of action, Article 51 explicitly and Articles 52 and 59 implicitly (new Articles 42, 43 and 49) set out, when referring to the prohibition of any obstacle to free movement (in the broader sense of the word), or when demanding, in a more technical and concrete way, the establishment in the field of social security of all arrangements safeguarding the maintenance of all acquired as well as rights in course of acquisition.

The coordination mechanism of Regulation 1408/71, functioning within the broader context and serving the objectives of the Treaty, as set out in the framework of its fundamental principles and freedoms, intervenes by virtue of Title II complete system of general and special conflict rules, "the effect of which is to divest the legislature of each Member State of the power to determine the ambit and the conditions for the application of its national legislation so far as the persons who are subject thereto and the territory within which the provisions of national law take effect are concerned".

As it is repeatedly stated by the ECJ case-law, Community rules must be worded, read and applied or interpreted in the light of the general context within which they are situated and must always reflect the broader targets they are called to realize. On the other hand, Community rules must also be interpreted taking into consideration the existing differences in national social security systems, which remain intact up to the moment their interaction with other or corresponding national schemes and structures could prove detrimental for or producing undesirable effects with regard to the rights of persons in cross-border situations.

Thus, when the Community legislator determines explicitly the legislation applicable in various types of movement and/or transnational employment, involving in principle and at least more than one national legislation (the one of the State of origin and the corresponding of the other State of employment/stay/residence), national administration has always to bear in mind that if the whole exercise were to be implemented in conformity with the letter of Title II and the spirit of Community social law, what it had never to betray are the underlying objectives, the very *"raison d' être"* of this complete system of explicit conflict rules, such as:

- free movement as the utmost basis, framework and limits of coordination;
- the inner rationality of Title II objective**s** and explicit criteria, taking seriously into consideration and respecting also the "interests" of each category of migrant workers/persons or of each type of mobility;
- simplification with regard to administrative procedures;
- equitable distribution of contributions and services;
- a justified equilibrium between obligations and rights;
- redressing eventual imperfections, inherent in a mechanism coordinating non-harmonized social security systems, so that their concomitant application does not result in undesirable effects for moving persons;
- maintenance and strengthening of the complete system's overall internal economy and equilibrium as a minimum prerequisite for safeguarding the migrants legal status.

Opposite to the interpretative method followed traditionally in the domain of international law, allowing the contracting Member States to preserve their national competence and discretion to the greatest possible extent, Community coordination on social security is constantly demanding them to serve efficiently and effectively a common goal: "to facilitate and promote the pursuit by Community citizens of occupational activities of all kinds throughout the Community", thus precluding national legislation which might place Community citizens at a disadvantage when they wish to extend their activities beyond the territory of a single Member State.

The Treaty's utmost, far-reaching target being: "the establishment of a unique legal order in conformity with the idea of social justice and the quest for European integration at the peoples level".

2. TITLE II: ITS RATIONALITY AND THE INTERNAL ECONOMY OF COMMUNITY COORDINATION

2.1. Introductory remarks

One of the most important issues the Community legislator deals with as soon as the personal and material scope of the Regulation is explicitly determined, is the designation of the legislation applicable; a question lying at the very heart of coordination, since the establishment of the predecessor Regulation 3/58, providing in that way a general outline of obligations, rights and/or expectations, which the actual affiliation of the person concerned with the applicable, at each time and/or for each specific social insurance branch, legislation would entail.

The establishment of a complete system of Community rules is regarded as being not only of major interest for the insured persons falling within the scope of coordination but equally important for the employers as well as the social insurance institutions involved. Its utmost significance lies behind the fact that conflict law provisions are included in a separate Title, immediately following the first one, which establishes coordination's general principles, rules and common/community definitions.

Under the initial Regulation 3/58, the lex loci laboris principle, although introduced by express provisions (Article 12) proved per se insufficient to solve all problems arising from the then still intervening (by extending or eliminating rights), at least in parallel, principle of territoriality, inherent in all national social security schemes. Yet, it was in fact impossible for the national legislature to tackle, by itself alone, with situations taking place in two or more Member States. As a consequence, a series of special provisions were incorporated, as an indispensable complementary corpus, setting out the rules and conditions for the removal in practice of all eventual repercussions that territoriality, a substantial element of national legislation, could have on conflict law provisions and free movement.

It was then, that the determination rules could function as the regulating mechanism that fixed the overall relationship between a migrant worker and the different national social insurance schemes or institutions, he was subject to due to the exercise of his professional activity; on the other hand, the latter were obliged to follow the legislation of the place of employment (the applicable one) of another Member State in order to establish one's rights and obligations.

Sooner or later, however, the question arose as to the exclusive and/or overriding effect of such conflict law provisions.

The two Regulations (3/58 and 1408/71), driven by the uniform spirit of Community primary law to provide for legal security and global social protection, approached the above-mentioned problem in a converging way, although choosing different wording. Besides, as the Court stated it later in *Kuijpers*, the text of the corresponding rules under both Regulations should be deemed as virtually identical, since those Regulations were adopted by the Council pursuant to Article 51 (new 42) of the Treaty in order to bring about freedom of movement for workers; thus, certain differences in wording should not entail any difference in legal consequences.

However, Regulation 3/58 did not contain any express provision prohibiting even the possibility of a "simultaneous" application of several systems of legislation.

On that basis, when the Court was asked whether the mandatory application of the legislation of the Member State of employment excluded the application of the legislation of any other Member State, it ruled in *Nonnenmacher* that Article 12 of Regulation 3/58 (coming also under the then Title II conflict rules) prohibited the worker from a parallel affiliation to another legislation in so far as his obligation to contribute to the financing of a social security institution would not provide him with additional advantages in respect of the same risk and for the same period.

In the light of those considerations, the system set up under Regulation 3/58 was slightly different, in that it might permit in certain clearly defined cases the parallel application to the same worker of the legislation of more than one Member State.

The Court, however, reexamining the crucial question of the compatibility and the extent of such a simultaneous interference of two legislations held in *Van der Vecht* that that situation was incompatible with Article 12, where to do so would lead to an increase in the charges borne by workers or their employers without any corresponding supplementary social security protection.

The whole issue was definitely settled by Regulation 1408/71 which, laying down expressly and for the first time that a person falling within its scope must be subject to the legislation of a single Member State only should be considered as embodying detailed and exhaustive rules governing the whole problem of the legislation applicable.

The cases where a parallel supplementary affiliation is deemed compatible for the purposes of Title II are expressly defined (Article 15) and in that way the present coordination mechanism guarantees on the one hand the avoidance of harmful confusion and unjustified overlapping liabilities and on the other the complementary protection and maintenance of rights under national legislation (the principle of the most favourable treatment) whenever the socio-economic interpenetration within the European Union is not affected.

2.2. Key interpretative tools initiating to Title II

It is interesting, however, to think more seriously about the clarity and stability of this uniform set of explicit, objective and purely technical in nature criteria contained in Title II.

Especially, when uniform definitions of terms applied in the field of social security are lacking at Community level, interpretations follow very often attitudes and approaches characterizing the diverging national social security schemes.

ECJ case-law, abundant in respect of that particular pillar of the Regulation, proves why going back to the Treaty is the safest, sometimes one-way, if national administration or jurisdiction were to look for an authentic Community answer to a transnational situation, falling under the scope and competence of Community primary and secondary law.

This is, on the other hand, the reason why coordination is to be seen as a particularly dynamic process, which demands a strong political commitment from all Member States, whilst the application of major coordination rules in general and of conflict provisions, par excellence, is to be considered as "a continuously moving target".

It is not accidental that many Title II provisions are not yet applied in a uniform and homogeneous way by all Member States; such a blurred, sometimes, situation strongly contests the general validity as well as the exclusive and overriding effect of the general and specific principles in everyday European practice.

Indeed, the most comprehensive theoretical guidelines, helping us to overcome ambiguities deriving from national legislation or diverging interests when implementing Title II provisions, are stemming from settled case-law.

Those considerations focus on questions dealing mainly with the non homogeneous terminology used by the Community legislator under Titles I and II, due to the different scopes and objects of those Titles and to the urgent need for the Regulation to include within its personal and material scope all types of national schemes, situated in the overall context of "social security" (in the broader Community sense of the term as defined by the Court for the purposes of Article 42, ex 51, of the Treaty).

The issues raised in the long-run refer mainly to the different wording and context of the terms "worker", "employed person", "self-employed person", "persons who are employed (or engaged in paid employment)" and "persons who are self-employed" (as these terms are used in the english version), as defined either explicitly or implicitly in the framework of primary and secondary law.

As the Court has repeatedly stated, it should always be borne in mind that for the purposes of coordination the unique criterion, prevailing when interpreting those terms, is the one deriving from social security legislation exclusively.

Although such a criterion should function as the organic bond between both Titles I and II and as the safest means guaranteeing their undoubted logical consistency, Member States are still encountered with problems, when attempting to identify a person as an "employed" or "self-employed", or an activity as "employment" or "self-employment". The reason invoked is that, since there exists nowhere in the Regulation a Community definition of the latter concepts, it may be compatible with the wording of Title II to apply the latter's provisions referring to an employed or self-employed activity, based on labour law criteria or on the Community definitions developed by ECJ case-law in the framework of Articles 48 and 52, new 39 and 43, of the Treaty.

However, since those provisions have Article 42, ex 51, of the Treaty as their utmost basis, limits and framework, the only strait forward way to interpret them is by using social security law criteria and by totally precluding the interference, even indirectly, of elements based on labour law.

In fact, Articles 48 and 51 (new 39 and 42) serving unique objectives, have different personal scopes and, consequently, attribute to such notions different meaning.

As the Court has held, the term "worker" in the context (and for the purposes of) Article 48 (new 39) of the Treaty is not to be defined by reference to each Member State national legislation but has a Community meaning. Taking into consideration that the said Article confers on the persons to which it refers special rights, were it otherwise, the application of the Community rules on freedom of movement for workers might be jeopardized, since the meaning of the term could be decided upon and modified unilaterally, without any control by the Community institutions, by the Member States, which would thus be able to exclude at will certain categories of persons from the benefit of the Treaty.

Consequently, for the purposes of that Article the term "worker" must be defined in accordance with the objective criteria which characterize the employment relationship, taking into consideration the rights and duties of the persons concerned; the essential characteristic of the employment relationship being that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.

The Court interpreting this definition by contrary interference, ruled that any activity which is not carried out in the context of subordination has to be treated as "self-employment" and the person concerned as pursuing an activity as a "self-employed" person within the meaning of Article 52 (new 43) of the Treaty.

On the contrary, Article 51 (new 42) of the Treaty which serves as Regulation's 1408/71 legal bases, provides for the coordination, not the harmonization, of Member States' legislation/systems. Substantive and procedural differences between the social security schemes of individual Member States, and hence in the rights of persons working there and falling under their scope, are therefore not affected by that provision.

Consequently, in order to define the persons who may rely upon the provisions on the coordination of national social security schemes which it establishes, the Regulation refers to persons who are insured under those schemes' legislation. Articles 1(a) and 2(1), providing that the Regulation is applicable to employed or self-employed persons who are or have been subject to the legislation of one or more Member States, must be understood as meaning persons who are insured in one of the above-mentioned capacities, either as employed or as self-employed, under a Member State's social security scheme. Thus, as the Court rightly pointed out, the terms "employed person" and "self-employed person" in the Regulation refer to the definitions given to them by Member States' social security legislation, regardless of the nature of the activity pursued in conformity with labour law provisions (concepts/definitions).

Given that Title II concerns, in particular, the employed and self-employed persons to whom Article 2(1) of the Regulation refers, as defined in Article 1(a) thereof, a logical and consistent interpretation of the personal scope of the Regulation (Title I) and of the system

of conflict rules which it establishes requires the terms in question under Title II ("persons who are employed or self-employed", *"personnes qui exercent une activité salariée/non-salariée"*) to be interpreted in the light of the definitions in Article 1(a) of the Regulation.

Accordingly, "a person who is employed" (or "engaged in paid employment") and "a person who is self-employed" for the purposes of Title II should be understood to refer to activities deemed as such by the legislation applicable in the field of social security in the Member State in whose territory those activities are pursued.

It should be emphasized that that interpretation, which is based on the definitions of the terms "employed person" and "self-employed person" under the above-mentioned Article, guarantees consistency between Title I general rule (Article 2(1)), establishing the personal scope of community coordination and Title II general principle and special provisions, by ensuring that the conflict rules which the latter provides are applicable to any person falling within its scope.

3. THE MECHANISM OF TITLE II: DECISIVE CRITERIA

As a starting point, Title II anticipates for a major distinction:

- the unity of the legislation applicable, as the general rule, and
- the concomitant applicability of more than one legislations, as a compatible deviation from the general rule.

It is worth mentioning that the general rule also applies to voluntary or optional continued insurance in so far as, in respect of one of the branches falling under the material scope of the Regulation, there exists in any Member State only a voluntary scheme of insurance (Article 15(1)).

3.1. The general rule: The unity of the legislation applicable

The Community legislator developed a set of rules to determine which national substantive law applies to a transnational social security situation. The target was to exclude the possibility of more social security schemes to apply simultaneously (on the basis of national law criteria); it was also necessary and crucial to make sure that the social security legislation of the Member State, designated as competent, would indeed cover the person concerned (albeit its territorial scope of application).

The social security system of a single Member State is the only applicable and has to be applied (notwithstanding contrary national criteria).

The next crucial issue, however, was how to determine the legislation applicable; which criteria were to be chosen as the decisive ones.

Historically, when the six Member States were negotiating Regulation 3/58, it was rather self-evident for the Community legislator to opt for the lex loci laboris principle, since the national social insurance schemes of the then majority were following the "Bismarckian" model, linking thus social insurance with employment.

However, progressively when other Member States with a "Beveridge-type" model, joined the European Community as well as when all social security systems started adopting

mixed-type elements affecting their schemes' financing and structure, it was not apparent why the lex loci laboris principle should still be prevailing the lex loci domicilii one; a substantial problem arising in the meantime either directly or indirectly in the framework of prejudicial questions addressed to the ECJ and looking for a convincing answer.

Hence, the Community legislator was inevitably faced with two contradicting or different interests:

- the Member State's concerned, for whom it is advantageous to levy contributions to the national social security scheme;
- the person's concerned, for whom it is in general more natural and advantageous to be insured in the Member State of residence and be affiliated with the "familiar" institution.

Confronted with that dilemma, Regulation 1408/71 established, with respect to all persons pursuing all their activities in the territory of *one* Member State, its general rule (Article 13(1)), on the basis of an element which the Community legislator considered as decisive. So, the preponderant criterion in that case is the interest connected with the application of the social security legislation of the Member State in whose territory the person concerned is professionally active (lex loci laboris, Article 13(2)).

This very interest is still to be considered as crucial and thus the general principle should apply even if the insured person's place of residence is in the territory of another Member State or in spite of the fact that the legislation of the place of employment need not always be favourable to the person concerned in such a situation.

However, it is interesting to see in which cases and how this general principle functions autonomously or needs to be further supported with complementary elements, if one takes into consideration a major de facto distinction underlying a series of determination rules:

- the pursuit of a single activity,
- the pursuit of more than one parallel activities within the European Union.

3.1.1. Pursuit of a single activity

The wording of the rules setting out the lex loci laboris principle is explicit and its application should be a rather simple exercise since the said rules are connecting all categories of economically active persons with the legislation of the Member State in whose territory they pursue their activity or the one expressly treated as such by the Regulation.

More specifically and in order to avoid any ambiguity in eventually more complex situations, it has been stated that:

- for persons who are employed in the territory of *one* Member State, the territory of the other Member State where the registered office or place of business of the undertaking or individual employing them is situated must not be identified as "place of employment" (Article 13(2)(a));
- for mariners, working on board a vessel flying the flag of a Member State, the territory of the said Member State is deemed to be their "place of employment" (Article 13(2)(c)).

However,

when a vessel, flying the flag of a Member State, is in the territorial waters or a port of another Member State, it is the territory of the latter which is defined as the "place of employment", for persons who are performing work on it, while neither belonging to the crew nor being normally employed at sea (Article 14b(3));
when a person employed on board a vessel flying the flag of a Member State, resides in the territory of another Member State where the undertaking or the registered office/place of business of the person remunerating him for such an employment are situated, it is the territory of the latter Member State which is defined as the "place of employment" (Article 14b(4));

- for civil servants and persons treated as such, the Member State to which the administration employing them is subject, is defined once and for all as their "place of employment" (Article 13(2)(d));

- for persons who are employed or self-employed in an undertaking straddling a frontier common to two Member States, it is the Member State in whose territory the undertaking has its registered office which is determined as their "place of employment" (Articles 14(3) and 14a(3));

The lex loci laboris principle is not affected when an employed person is posted, a self-employed (*normally active in the territory of the Member State of origin*) or a mariner (*in his capacity as employed or self-employed person*) are temporarily (one to two years) performing work in the territory of another Member State.

Such a *temporary work* is not considered as second activity(-ies), since Community coordination's major objectives, as developed by settled case-law, are:
- to overcome any eventual impediment to free movement;
- to achieve the necessary economic interpenetration (aimed at by various Community policies, initiatives and Instruments);
- to avoid complicated administrative procedures.

Continuity and legal security are, thus, fully guaranteed, once the legislation applicable remains that of the Member State in whose territory the normal activity is being pursued.

The aforementioned legal fiction has the following impact:

With regard to employed persons

It is worth mentioning that although the whole activity is performed in the territory of another Member State, such a situation ("posting") is deemed to be a temporarily restricted transfer to the latter State of the direct relationship between the employer and the person engaged by him/her, already existing in the sending State.

"Posting" could never be safely envisaged in the mere context of Article 13(2)(a), implying even a large interpretation of the latter, a reason why the Community legislator established a separate rule, as lex specialis with regard to the general one, explicitly dealing with the fiction and technical features of "posting".

Thus, the legislation of the Member State of origin can only remain applicable when conditions/elements and criteria, set out under Articles 14(1) (and 14b(1)), as further developed and interpreted within the context of Decision No 162 of the Administrative Commission, are fulfilled.

In other words, the sending State should essentially verify:

- whether the posted person is normally attached to the sending undertaking;
- whether the person concerned is actually performing work in the territory of the other Member State for the sake of the said undertaking;
- the existence of an organic link between the posted and the sending undertaking;
- in the case of an undertaking whose activity consists in making staff temporarily available to other undertakings, whether such an activity is equally pursued in the territory of the sending State.

With regard to self-employed persons

A corresponding lex specialis (Article 14a(1)), as compared to the general rule (Article 13(2)(b)), was established to cover also this category of economically active persons when temporarily (one to two years) performing work in another Member State. The Community legislator aimed at fulfilling the combined objectives of free movement and free provision of services (Articles 39 and 49, ex 48 and 59, of the Treaty) by eliminating *all* administrative complications or lacunae in the field of social security that could hinter the degree of flexibility required for the self-employed.

Hence, the legislation of the Member State of origin is defined as remaining applicable under the only prerequisite, expressly stated by the corresponding special rule, that the person concerned has to be *normally active as self-employed* in the territory of the said Member State.

However, the terms "(a person) normally self-employed" and "(who performs) work" are nowhere given a Community definition in the framework of Regulations 1408/71 and 574/72, a reason why substantially diverging interpretative approaches, followed by the Member States involved, have resulted in leaving the application of the special rule provisionally in suspense.

Yet, setting aside subjective interpretations or some Member States' interests and positions related to aspects of their social security schemes or the non-coordinated tax legislation, we nowadays dispose sufficient evidence about the intentions and targets of the then Community legislator when choosing this specific terminology and the theoretical guidelines figuring out the safest way of reasoning and applying Community primary law's principles and objectives.

We mainly refer to the views expressed in the (then very recent) Opinion of Advocate General Colomer in *Banks* (Case C-178/97), where he provided the interpretation of the terms "normally self-employed" and "work", placing these notions in their broader legal context as a prerequisite to render faithfully the spirit of that lex specialis. So more specifically:

With regard to the term "normally self-employed"

The said Advocate General referred to the following objective criteria and elements (that could be safely assessed and controlled by the competent State):

- actual pursuit of a real activity (in the Member State of origin) so that fraud or convenience/*à la carte* affiliations just before moving to another Member State are excluded;
- maintenance in the Member State of origin (during the temporary stay abroad) of a sufficient infrastructure so that the person concerned is able to continue pursuing his activities as self-employed on the way back, i.e.:
  - maintenance of an office;
  - payment of social security contributions and all relevant levies and taxes;
  - membership to a professional Chamber and regular payment of the corresponding fees (maintenance of his capacity as self-employed).

On the other hand, with regard to the term "work"

Colomer, recalling the works preceding the adoption of Regulation 1390/81 (extending the scope of Regulation 1408/71 to the self-employed), stressed that on purpose the then Council did not adopt Commission's initial proposal (using the terms *a person who provides services*), but opted instead for the more general notion "work".

According to the Advocate General's arguments, the term "work", etymologically, is a much broader concept, including actually both, employment and self-employment. The Community legislator did not even choose the term "activity" that could have been considered closer to self-employment. This means that the latter introduced on purpose the term "work" which, as undoubtedly more general, suited better his aim to cover paid employment as well, in other words, flexibility for the sake of mobility, especially so, if we keep in mind that the Regulation's structure follows the patterns of general rules rather than specific, case-by-case provisions.

In fact, if the then Community legislator really meant to cover temporary self-employment only, he could have chosen a more precise wording such as "a person… who pursues his activity… or …part of his activity… or …a corresponding activity in the territory of another Member State". However, the target and special emphasis of Article 14a(1) provisions was to cover the temporary nature of *any* activity; given also the social security criterion on which concepts under both Titles I and II are based, self-employment is more or less rarely identified as such under different national security schemes.

Otherwise, limiting the scope of Article 14a(1) only to an independent activity of the same nature would lead to another inconvenience in the framework of non-harmonized social protection schemes, a reality which the Community legislator is obliged to take always seriously into account. So, taking into consideration the great diversity of national social security legislations, even a temporarily "self-posted", i.e. a self-employed person in both Member States, who also exercises an independent activity of the *same nature*, could have been automatically excluded from the scope of the said Article, as soon as, under the second Member State's legislation, he could have been considered as an "employed" person (under the social security criterion).

More specifically, in respect of the "temporary" nature of the work performed, the suggested criteria are as follows:

- the said work must have a well predefined content and duration, explicitly stated in the relevant community E Form issued by the competent State (a work vaguely taking place within a 12-months period is to be excluded);
- it has to be a single work; thus, performing limited in time predefined work successively within the 12-months period is only acceptable when separate E Forms are issued at a time.

It is worth mentioning, however, that such an interpretation is scarcely shared by the Member States who are following a very diverging practice, applying their own criteria, mainly arguing that the person concerned can only be exempted from the second Member State's legislation if he/she pursues temporarily an activity of the same nature as a self-employed.

Greek authorities have been always following the above stated reasoning in their everyday application of Article 14a(1) provisions, as the only way providing for the realization in practice of free movement and free provision of services within a European socio-economic space characterized by a great diversity of social security schemes. Especially nowadays, when a series of other Community instruments and European initiatives (e.g. the European Employment Strategy) are calling for active measures to enhance and promote the greater possible flexibility, entrepreneurship and socio-economic interpenetration.

With regard to the contemporary Community commitments (focusing mainly on the self-employed) for a new balance between flexibility and security, looked at from every day's experience, it is verified that the extremely time-consuming administrative procedures that a decision on an activity's social security status often implies, has not only a discouraging impact on the persons' decision to exercise their right to free movement, but could also last longer than the short period of the "work" to be pursued in the host Member State.

Actually, contemporary forms of mobility or new types of economic activity might prove equally ambiguous, since we are sometimes confronted with cases that although for the sending State fulfill the criteria of "posting", in the host Member State may take the form of a typical provision of services (self-employment). Besides, a possibly parallel interference of the legislation of the Member State where temporary "work" is being carried on would entail to both Member States involved additional administrative procedures:

- with regard to the definition of the ad hoc applicable legislation;
- delayed issue of the recommended E certificates (Forms) with additional problems in providing the short-term benefits for which there is already an entitlement (acquired right);
- possible claims for retroactive payment or reimbursement of contributions.

Coming back to the impact of that legal fiction of continuity on the obligations and discretionary power of the Member States involved, it is the Member State of origin the one possessing the competence and priority to control and verify the fulfillment of the conditions and elements set above and, in so doing, to attest the legal status of a concrete situation.

In that way, as soon as its legislation is deemed remaining applicable, the said Member State issues an E 101 certificate (form), which has a binding effect, so that Articles' 48 to 51 (new 39 to 42) TEC "*effet utile*" is guaranteed, (as, following Advocate General Jacobs'

Opinion in *Fitzwilliam*, Case C-202/97, the legal impact of this E Form has always to be interpreted in the light of the said Articles of the Treaty).

This in practice means not only that the mobile person is exempted from the legislation of the Member State of temporary work but also that the Member State of origin becomes responsible to cover him with the appropriate social security protection during his temporary stay in the second Member State.

Consequently, the second Member State has no competence for determining the kind of the temporary work performed in its territory, since it does no longer dispose the discretionary power to refuse the validity of an E 101 certificate, already issued.

Otherwise, not only the objectives of the foreseen administrative mechanism are immediately at stake as a whole, but this could also result in endangering one of the major principles of the Regulation: the unity of the legislation applicable, as designated by Title II unique terms and not according to national law criteria.

However, the second Member State has the discretionary power to control whether the elements and data declared on E 101 Form correspond to actual facts taking place in its own territory; it may also verify all features regarding the temporary nature of the work pursued. It goes without saying that close and prompt cooperation between the national authorities and institutions concerned is an indispensable prerequisite for the efficient functioning of the implementation mechanism.

It is only after the second Member State disposes sufficient evidence contesting the validity of an E 101 certificate that contacts in that sense with the competent State could lead to a possible withdrawal of the said E form by the competent institution.

It is of course a different question when a Member State contests the very interpretation of certain provisions of the rules in question, a problem that should immediately be addressed and possibly be solved in the framework of the Administrative Commission or definitely by the Court's jurisprudence.

It should be noted that even under those circumstances, leaving the person concerned in an ambiguous and indefinite legal context either by not providing the relevant E Forms or by contesting their validity, is deemed unacceptable and incompatible with the objectives of coordination. In fact, as it has been repeatedly stated by ECJ case-law, there exist no substantial lacunae within the Community legislation, provided that the latter is interpreted in the light of the objectives of the Treaty. Legal insecurity with regard to the legislation applicable is the *par excellence* impediment to free movement.

3.1.2. Pursuit of parallel normal activities

In all those cases where the economically active person pursues his activities both in the territory of his own Member State and in that of another Member State, priority is given to the interest of the person concerned. In such cases where the strict application of the lex loci laboris principle could entail the simultaneous involvement of several legislations (several Member States might claim payment of contributions), it is the interest of the person concerned which is decisive in the choice between those different interests.

In other words, seeking to eliminate a series of undesirable effects for the migrant, the Community legislator chooses for a combined application of the general principle via a complementary but decisive element, balancing in that way the interests of the person concerned against those of the Member States involved. Thus, he declares as applicable the legislation of the place of residence, where the activities are partly pursued (a joint criterion), since that place, as defined by the European Court, represents a certain stability in the whole complex of relationships and therefore may be assumed to be the closest connecting factor (Article 14(2)(b)(i)), for persons normally employed in the territory of more Member States and Article 14a(2), first sentence, for the self-employed).

It should be noted that the implementation of the joint criterion presupposes that the "activity partly pursued" must be effective and genuine and not a purely marginal one, since the latter could result in convenience/*à la carte* affiliations and fraud.

However, in those cases where the complementary element of residence cannot be combined with, as a supportive element to, the lex loci laboris principle (when the economically active person pursues no activity in the territory of the Member State of residence), the Community legislator, in order to define the Member State's applicable legislation, opts for an alternative criterion:

- on the one hand, for the employed, the territory where the employer's registered office or place of business is situated (Article 14(2)(b)(ii));
- on the other hand, for the self-employed, the place where the "main activity" is pursued (Article 14a(2), second sentence), providing also for a Community definition of the term (Article 12a(5)(d), Regulation 574/72).

However, in exceptional cases, when a person is engaged in paid employment in several Member States and at the same time is attached to several undertakings or several employers who have their registered office or place of business in the territory of different Member States, the then criterion chosen, as the safest Community one, is again the place of the employed person's residence (the generally most advantageous to be insured in, regardless of his not pursuing any activity there, Article 14(2)(b)(i), third part of the sentence).

Finally, in the case of civil servants, simultaneously employed or self-employed in other Member States, the Community legislator does not opt for an alternative complementary criterion; instead, their status as civil servants is given priority and thus the legislation applicable remains that of the Member State to which the administration employing them is subject.

3.2. Peculiarities/deviations in respect of the general rule

3.2.1. Persons who are simultaneously employed in the territory of one Member State and self-employed in the territory of another

The general rule laid down in Article 13, that persons to whom the Regulation applies are to be subject to the legislation of a single Member State only, seems in principle prevailing also in cases of mixed-type simultaneous activities pursued in more than one Member States. In those cases it is the legislation of the Member State in whose territory the person concerned is engaged in paid employment which is defined as applicable (Article 14c(a)),

since this kind of employment was apparently considered as usually more stable and more long-lasting or supposedly, by its nature, the main activity.

On the other hand, social insurance schemes for the self-employed were, at the time, less developed, often non-obligatory and some already excluded from the material scope of coordination (conventional in nature); a reason why this was the only rule included in the Commission's initial proposal submitted to the Council when extending the Regulation to the self-employed.

It goes without saying that if the person concerned is engaged in paid employment in more than one Member State or is self-employed in more than one Member State, the applicable legislation shall be determined in accordance with the respective provisions of the Regulation (Articles 14(2) and 14a(2)).

However, when the Commission's proposal extending the scope of Regulation 1408/71 was submitted to the Council, a substantial amendment was raised within the latter as a deviation to the general rule. Thus, according to the second paragraph added to Article 14c, it is provided that in the cases mentioned in Annex VII to the Regulation, persons who are simultaneously employed in the territory of one Member State and self-employed in the territory of another Member State are subject to the legislation of each of those States as regards the activity pursued in its territory.

As far as the justification for this exceptional rule is concerned, the Council has always claimed that the purpose of those provisions was to ensure that a person who was simultaneously employed and self-employed in two Member States did not pay lower contributions than a person pursuing both activities in a single Member State, which would have allowed him to enjoy an unwarranted advantage compared with his competitors whose activities were not divided between two Member States. Besides, the opposite could have another unacceptable consequence, that the fact of pursuing, whether fraudulently or lawfully, an activity as a self-employed person outside the Member State concerned would give rise to an unintentional principle of indirect harmonization of the social security schemes of the Member States referred to in Annex VII; such an impact, following the Council's arguments, would be contrary to the Treaty and, at length, might adversely affect the social security schemes of those States and increase their deficits. Moreover, the Council observed that in some cases the two-fold contribution, calculated according to the income received in each Member State concerned, may bring additional social protection, mainly by way of pension rights or family allowances.

The question of whether such a derogation was compatible with the Treaty (Articles 48 and 52, new 39 and 43), of whether, in other words, it was "duly justified" or it afforded "additional social protection", was raised in the framework of two cases, examined by the Court (*De Jaeck* and *Hervein & Hervillier*), provoking the Advocate General Colomer's strong criticism who asked the Court to declare the said exceptional rule as invalid (an impediment to freedom of movement in general).

In his Opinion in both cases Colomer stressed that even if Article 14c(b) may in certain cases have the effect that the person concerned has additional protection by way of pension rights or exceptionally for certain short-term allowances acquired under the legislation of each of the Member States, the provision not only places obstacles in the way of the pursuit of occupational activities in different Member States but also emphasizes the disparities

already deriving from their national laws and has the effect that nationals of the Member States are treated differently depending on the place in which they intend to pursue those activities (Member States included in or excluded from the list in Annex VII).

Although the Court did not rule on that very issue, since no such a specific prejudicial question was addressed, it should be noted that the problem raised still remains if one considers that the Court has always stated that the provisions of the Treaty relating to the free movement/provision of services/the freedom of establishment are intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community; whereas, in order to make these freedoms fully effective, the social security schemes for self-employed persons should be coordinated.

In fact and apart from the above-stated consideration, individual cases of self-employed persons proving how detrimental in everyday practice such a double affiliation could actually be, are often calling for the reapplication of the general rule and the determination of a single legislation as applicable on the basis of an Article 17 agreement between the Member States involved.

Last but not least, one of the major difficulties prejudicing the correct and homogeneous implementation of Article 14c provisions lies in identifying whether the mixed-type activities pursued in several Member States are simultaneous.

Given the disparities of national social security schemes and the fact that no Community definition of the term exists, in interpreting the said provision one has to consider the context in which it occurs and the objects of the rules of which it is part. As the Commission has stated in *Banks* (still pending) when the activities, in parallel or successively pursued in two or more Member States are regularly and in a foreseeable way repeated during a predetermined period of time (extended from one month or more to several years), they should be deemed as simultaneously pursued in the terms of Article 14c.

This criterion is in fact the decisive element differentiating the scope of the said Article provisions

- from the one under Articles 14(2) and 14a(2) (pursuit of parallel but normal activities) and
- mainly from the scope of Articles 14(1) and 14a(1) provisions (featuring the exclusively temporary nature of the work performed in the second Member State).

3.2.2. Persons simultaneously employed in two or more Member States as civil servants or persons treated as such subject to a special scheme for civil servants in one at least of those Member States

This recently established specific rule, providing that the persons concerned are subject to the legislation of each Member State in whose territory they are employed as civil servants (Article 14f), introduces a two-fold derogation:

- from the general rule (Article 13);
- from the specific application of the general rule to persons normally engaged in paid employment in the territory of several Member States (Article 14(2)), disregarding the Court's ruling in *Van Poucke* according to which civil servants should be deemed as

falling within the broader category of employed persons (covered by the Community definition of the term "worker" under Article 39, ex Article 48, of the Treaty).

Although such a provision concerns a relatively limited number of persons (a reason why several Member States preferred a case-by-case determination of the legislation applicable by means of Article 17 agreements), it was finally adopted by the Council as a compromise solution, closer to the specific characteristics of the special schemes for civil servants. Besides, this rule must be interpreted within the general context of the sui generis coordination regime, established by Regulation 1606/98 for civil servants and persons treated as such subject to special benefit schemes, which is based on a restricted and more or less selective implementation of the Regulation's principles and mechanisms (mainly in the domain of pensions).

3.2.3. Persons employed by diplomatic or consular services and auxiliary staff of the European Community

The social security status of those persons is to a great extent inspired by the relevant provisions laid down in the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations correspondingly.

So, persons employed by diplomatic missions and consular posts as well as the private domestic staff of agents of such missions or posts are in principle subject to the legislation of the Member State in whose territory they are employed (Article 16(1)).

However, if these persons have the nationality of the accrediting State they can opt to be subject to the legislation of that State. This option must be exercised for the first time within three months following the date on which the employed person was engaged by the diplomatic mission or consular post and it may be renewed annually (Article 16(2)).

Yet, the unity of the legislation applicable was recently contested by the Court which ruled in *Gomez Rivero* that the decision of a person employed in a consular post to opt to be subject to the legislation of the sending Member State did not have the effect that the spouse could no longer claim a social security benefit which is guaranteed to her by the legislation of the Member State of residence. Although the Court found that the exercise or non-exercise of the right of option by the person working in the diplomatic mission or consular post did have direct consequences for the extent of the rights which the family members could derive, it held that such a decision could not deprive the family members of the social security benefits which, irrespective of the social cover of the worker himself, were guaranteed to them by the legislation of the Member State in which they resided. Furthermore, the rules designed to avoid overlapping prevented possible double entitlement to family benefits under two different national legislations.

With respect to the auxiliary staff of the Community institutions the legislation applicable is not determined by the Community legislator; the latter, instead, provides that these persons can be subject, at their option to:

- the legislation of the Member State in which they are employed;
- the legislation of the Member State to which they were last subject (before being employed by the Community institutions);
- the legislation of the Member State of their nationality.

This right of option which may be exercised only once does not affect the special regime for family allowances applicable to all employees of the European Communities (Article 16(3)).

3.2.4. Lex loci domicilii: An alternative to the general rule

Article 13(2)(f) is a provision that for the first time introduces the lex loci domicilii rule as an alternative expression of the general principle according to which the social security legislation of a single Member State is the only applicable.

This provision is a compromise solution, deviating from what could previously be considered as settled case-law with regard to the scope of the lex loci laboris principle (Article 13(2)(a)).

As a matter of fact, in a series of rulings the Court was called, by interpreting the objectives of the above-mentioned principle to determine the applicable legislation in the cases where a person had ceased carrying on an activity in the territory of a Member State whilst not having taken up employment in the territory of another.

In the first Case (*Ten Holder*) the Court declared as remaining applicable the legislation of the Member State in which that person was last employed, regardless of the length of time which had elapsed since the termination of the said activity and the end of the employment relationship.

However, in its following jurisprudence (Cases *Noij*, *Daalmeijer* and *Commission v the Netherlands*) the Court concluded that neither Article 13(2)(a) nor any other provision of Title II could be applicable to persons who had definitely ceased carrying on any activity in the territory of the Member State of their last employment when transferring their residence to another Member State.

In fact, considering the general context in which Article 13(2)(a) occurs and the objectives of the rules which it is part of, the Court stated that the said provision aims at preventing any positive or negative conflict of laws whenever the place of employment and the place of residence do not coincide in time in the territory of the same Member State. Consequently, it should be self-evident, that where such a situation does not exist, i.e. when the person concerned has definitively ceased any activity in the territory of a Member State, there is no ground for any conflict of laws whatsoever and thus no reason for any of the conflict law provisions of Title II to intervene.

By extending the scope of the lex loci laboris principle so as to cover any temporary interruption of a person's activity, or, in other words, all potentially active persons (one's "objective capacity" as an employed person), the Court was pointing at a single legal lacuna which should be covered in the framework of Title II provisions. The least specific rule determining the legislation applicable to a person who was transferring his residence to a Member State, other than the one of his last employment, as a non-active person.

Yet, the Community legislator when modifying the general rules (Article 13 of Regulation 1408/71) established a more restrictive, general clause determining as applicable the legislation of the Member State of residence (lex loci domicilii) whenever a person ceases, either temporarily or definitively, pursuing any activity or being entitled to a benefit by

virtue of pursuing such an activity (Article 13(2)(f)). It is worth mentioning that the person concerned is subject to the latter legislation in accordance with its provisions exclusively.

The scope of this alternative general rule, recently interpreted by the Court in *Kuusijarvi*, has already proved too broad, creating a series of problems to persons who, although economically active in a wider sense of the term, are for the purposes of Title II treated as genuinely non active, an unjustified situation, deteriorating the continuity and the level of a migrant's social security coverage and potentially functioning as an obstacle to free movement.

The whole question concerning the elimination of the negative impact of that provision is being reexamined by the Administrative Commission and in the framework of the debate with regard to the Commission's Proposal for the future simplification and reform of Regulation 1408/71.

3.2.5. Determination of the legislation applicable: Flexibility in the interest of certain categories of persons or certain persons

At the end of Title II the Community legislator leaves some space for flexibility, always in the light of Community law objectives; by recognizing a dominant position to some persons or categories of persons social security interest, Member States are vested the power to grant exceptions from the rules laid down and thus to determine ad hoc the legislation applicable (Article 17).

As it has been already stated above, the aim of the provisions of Title II is to ensure that the persons concerned shall be subject to the social security scheme of only one Member State, so that complicated accumulations and divisions of contributions and benefits are avoided in favour of a simple practical scheme.

In order to achieve that aim the lex loci laboris is established as the general principle, subject, however, to the provisions of a series of special rules.

In fact, in certain specific situations the unreserved application of the rule set out in Article 13(2)(a) might create, instead of prevent, administrative complications for "workers" as well as for employers and social security authorities, which would entail delays in the forwarding of the insured persons' files and, therefore, place obstacles in the way of their freedom of movement; special rules governing such situations are set out in Articles 14 to 16.

In addition, Article 17 allows exceptions to be made in order to cover other situations which, although they are not specifically provided for in Tittle II, call for a solution which differs from those adopted in Articles 13 to 16. The task of identifying those situations and determining the legislation to be applied is entrusted by Article 17 to the Member States concerned, which may, by common agreement, derogate from Article 13 to 16 provided the agreement is concluded "in the interest of certain categories of persons or of certain persons".

Consequently, it is wholly consistent with the scheme of the coordination mechanism and compatible with the Treaty for two Member States to conclude an agreement with a view to subjecting certain persons or certain categories of persons to legislation other than that

designated in Articles 13 to 16. The Member States concerned can only exercise that power provided that they reach common agreement as to whether and how exceptions will be granted and above all only if such an exception to the rules otherwise applicable is in the interest of the persons concerned.

It is worth, however, pointing out that Article 17 should not be taken as a substitute to the complete system of conflict rules, covering any new type of mobility not falling within the scope of Title II. Such a large interpretation would risk to imply that the said Article is a general, alternative solution which overpasses coordination per se, granting to Member States, on a bilateral basis, an absolute discretionary power going even beyond the general context, the economy and objects of the rules it is part of.

As the Commission has stated in *Brusse*, Article 17 should be interpreted on the basis of an examination of its wording and context and in particular in the light of Article 42, ex 51, of the Treaty. In that respect the Commission maintains that since the provision at issue derogates from the general and special rules contained in Articles 13 to 16, it is necessary to commence with the nature of those rules. They are not substantive provisions but rather rules governing cases of conflict and as such should be simple to use in practice and should always assist in the attainment of the general purpose.

The presence of a provision such as Article 17 accurately reflects the need to be able to set aside the rules in cases where they are no longer appropriate.

Nevertheless, any provision which derogates from general rules must, in Community law, be interpreted narrowly. In other words, the case of a person or category of persons which is governed by an agreement made under Article 17 must be examined on its own merits, and is not capable of operating as a precedent. The Commission emphasizes in *Brusse* the crucial role to be played by the interest of the person in deciding to conclude an agreement for the purposes of Article 17. The interest must be in the determination of the legislation applicable, and not in its application. A comparison of the number and amount of the benefits or the level of the contribution which would be involved in the application of one body of legislation rather than another should not be taken into account in such cases.

More specifically, the said interest should be

- of the same type as is taken into account in interpreting and applying Articles 13 to 16, and
- sufficiently great to justify a derogation from the general rules applicable.

The Commission notes in *Brusse* that the rules contained in Articles 13 to 16 reflect to major considerations, namely an intention to determine a single body of legislation applicable to each employed person and the desire for practicability, that is to say, in social security matters the determination of the legislation applicable should not amount to an obstacle to the existence or the exercise of the right of free movement of persons envisaged in Article 42, ex 51, of the Treaty. Consequently, the interest referred to in Article 17 should be assessed in the light of, on the one hand, the practical aspects of affiliation to the social security scheme of one Member State rather than that of another and, on the other hand, the effect of the provisions of Articles 13 to 16 on the right to freedom of movement of the person concerned.

Moreover, it is in no way admissible for Member States to grant exceptions from the rules simply because it is convenient to those administering the scheme or simply because it is in the interests of employers. Subject to the essential criterion, the interests of the persons concerned being satisfied, the discretion is theirs, though it should be exercised in the light of the basic objectives of the Regulation and Article 42, ex 51, of the Treaty.

With regard to a substantial question, competent authorities are in their everyday practice confronted with, when asked to conclude an Article 17 agreement, is whether such a derogation might be given retroactive effect; that is to say whether the legislation designated by the Member States in derogation from Articles 13 to 16 may be regarded as applicable in respect of past periods.

As the Court has already stated, there is nothing in the wording of Article 17 to indicate that recourse to the derogation made available to the Member States by that provision is possible only as regards the future.

No restriction actually on the power conferred upon the Member States appears anywhere in Article 17. Besides, that provision makes no reference to the reasons or circumstances which might lead the Member States to derogate from Articles 13 to 16, the latter enjoying a wide discretion to which the only limitation is regard for the interests of the persons concerned.

On the contrary, it follows from the spirit and scheme of Article 17 that an agreement within the meaning of that provision must also be capable, in the interests of the person or persons concerned, of covering past periods. Since Article 17 provides for an exception intended to mitigate the difficulties resulting from the application of Articles 13 to 16 to special situations not specifically envisaged in Regulation 1408/71, it may be used not only to ensure that a certain situation does not arise but also to remedy an existing situation the injustice of which appears only after it has arisen.

Such an injustice could easily occur if one takes seriously into consideration how ill-informed about legal or procedural aspects of the regulations the parties concerned still are; on the other hand, even genuine belief that a person insured in the Member State of origin should not or is not expected to be subject to any other national legislation when moving within the European Union should also not be disregarded.

As a matter of fact, an act or omission of the persons concerned, the employers or indeed the authorities involved, due to one of the factors stated above, is the underlying reason of many delays or misleadings that should be remedied if the spirit of conflict provisions were to be respected.

It must also be emphasized that, in view of the time needed for two or more Member States to reach agreement as to whether it is appropriate to derogate from Articles 13 to 16, Article 17 would be deprived of much of its meaning if the agreement could have only prospective effect.

It should be noted that in practice Article 17 is neither being interpreted nor implemented in a uniform way. In the long run it has being attempted to establish a Community definition of the “social security interest” referred to in Article 17 or even to describe it by means of

an interpretative Decision of the Administrative Commission, without any compromise solution being feasible for the time being.

On the other hand, many Member States, considering such a derogation as a simple extension of the posting provisions, are following a restrictive policy, limiting the duration of those agreements to a maximum 5 years period, whilst for others exceptions exceeding even 20 years are deemed compatible with the spirit of the said Article. As an outcome, the actual time needed for two or more Member States to reach agreement might be longer than expected and the persons concerned legal certainty may very often be at stake.

Coordinating Member States policies in that domain and enhancing cooperation and mutual trust in their interactive communication, is a priority always encouraged by the Court as the only way to overcome the widespread fear to prevent "shopping around" for the most advantageous system and to accomplish the aims of the coordination mechanism: the establishment of the fundamental freedoms of the Treaty.

3.3. The legislation applicable on voluntary or optional continued insurance: Demarcation lines

The whole economy and balanced structure of the coordination mechanism is achieved by the legal consistency and conceptual unity existing between Titles I, II and III.

Conflict law provisions, placed within such a comprehensive context, are inevitably affecting either directly or indirectly voluntary insurance or optional continued insurance, so that legal continuity and maintenance of rights already acquired or in course of acquisition are guaranteed.

Since Regulation 1408/71 aims at coordinating a great variety of national social security schemes, Title I incorporates within the scope of its definition concerning the terms "employed person" and "self-employed person" also persons who are insured voluntarily or on an optional continued basis.

In that way a series of substantive coordinating principles and rules provide for entitlement to those legislations either independently of the persons' residence/stay or by rendering obligatory the totalisation of periods of insurance/residence accomplished under any Member State's legislation.

Regulation 1408/71 for the first time establishes a clear-cut relation between compulsory and voluntary insurance by introducing a special rule in the context of the provisions determining the legislation applicable (Article 15).

The practical impact of that rule is obvious and substantial since a great number of national legislations provide for persons residing or employed in another Member State to be insured under them either voluntarily or on an optional continued basis even when those persons are compulsorily subject to the social security scheme of the Member State of their residence or employment.

So, when modifying Regulation 3/58 the Community legislator, taking into consideration already settled jurisprudence and seeking to leave no space for further ambiguities arising

in the future, introduced in the framework of the new Regulation 1408/71 Article 15 special provisions in parallel with the general principle of the unity of the legislation applicable.

In that way the Community legislator defined expressly the extent and the context in which an eventual overlapping of a voluntary insurance or an optional continued insurance with the legislation having been determined as applicable is considered compatible for the purposes of coordination.

Under those specific provisions such an overlapping is acceptable only in respect of invalidity, old age and death (the pensions branch) and in so far as that overlapping is explicitly or implicitly admitted in the Member State providing for a voluntary affiliation (Article 15(3)).

Moreover, precluding any eventual ambiguities from coming out of particularities of national legislation, that rule is further specified in the framework of the implementing Regulation (Article 6(1) of Regulation 574/72); in cases where a person satisfies the conditions for admission to a voluntary or optional continued insurance in several schemes under the legislation of one Member State, without having been subject to compulsory insurance under one of those schemes by virtue of his last employment/self-employment, that person may join the voluntary or optional continued insurance scheme specified by the legislation of that Member State or, failing that, the scheme of his choice.

On the contrary, with regard to all other branches of social security (short-term benefits), where application of the legislation of two or more Member States entails overlapping of insurance, compulsory insurance under the respective branch is always prevailing; in exceptional cases where such an overlapping takes place under two or more voluntary or optional continued insurance schemes, the Community legislator, in the name of a person's interest, grants to the latter the right of opting out the scheme suiting better his situation (Article 15(2)).

Finally, the interest of the persons concerned is also given priority by a special conflict law provision (Article 14d(3)) when a pensioner under the legislation of one Member State is pursuing a professional or a trade activity in the territory of another Member State.

The Regulation, although, in the first instance, respecting a possibly existing anti-overlapping provisions under the legislation of the latter Member State, which thus prohibits the active pensioner to be compulsorily insured also by virtue of the said activity (one legislation applicable: a person is exclusively insured in his capacity as a pensioner), finally, confers to the person concerned the right of being so subject on a voluntary basis (by applying to the institution designated by the competent authority of the Member State of employment/self-employment).

3.4. The financial impact of the general principle

One could describe briefly the basic object of Article 14d (paras 1 and 2) provisions as the rule determining the rates of the social security contributions payable as well as the income the latter rely on. In other words, it is the financial facet of the special conflict rules, regulating all parties concerned obligations in respect of financing the social security scheme to which a person is subject once the legislation applicable has been determined.

The scope of those provisions is activated whenever

- either parts of an activity are pursued in the territory of Member States, other than the one whose legislation is determined applicable according to one of Title II criteria,
- or, more, normal or parallel, activities are pursued in the territory of more than one Member States.

For the purposes of this Article the activity/activities pursued anywhere within the European Union are considered as a whole taking place in the territory of only one Member State and more specifically, that whose legislation Title II determines as applicable.

Consequently, the persons concerned are charged the rates of contributions corresponding to the total amount of the income resulting from their professional activity/activities taken as a whole.

Generally speaking, for the purposes of Title II general rule once the legislation applicable is determined, the person concerned is treated as if he were "situated" in the territory of a single Member State, the one whose legislation is applicable (independently of the actual place of residence, the employer's registered office/place of business, the territory of the Member State the administration employing him is subject to etc., Article 13(2)).

More particularly, such an assimilation of situations is obviously underlying the spirit of the general rule, in cases where temporary work is performed in the territory of a Member State other than the one in whose territory an employed or self-employed person is normally active.

In such cases, the said temporary work is not considered by the Regulation as interrupting the continuity of the activity normally pursued and thus, the person concerned is still treated as being exclusively employed or self-employed in the territory of a single Member State, the Member State of origin. In other words, that temporary work is not treated for the purposes of coordination as a new activity, affecting the rates of contributions to be charged to the person normally employed or self-employed in the Member State of origin and, consequently, such a case does not fall within the scope of Article 14d.

An additional reason why, by temporary "work" the Community legislator should be interpreted as including both types of temporary activity (as an employed or self-employed person). Otherwise, one risks, mainly in the cases of the self-employed temporarily pursuing a different kind of activity in another Member State, to assimilate the latter to a parallel activity, a case falling under Article 14c and, consequently, under Article 14d. That assimilation would have as an inevitable further repercussion for the person concerned to be charged with high rates of contributions disproportionately to the limited period for which that work is performed.

Finally, in the specific cases mentioned in Annex VII and thus falling under Article 14c(b), by virtue of which two legislations are becoming applicable and so contributions are payable under both of them, the rule introduced by Article 14d (1) is exclusively applying to the legislation of the Member State where the self-employment is pursued. It is a provision which in principle aimed at reducing the rate of contribution payable by the self-employed.

However, following the Advocate General's Opinion in *Hervein & Hervillier*, from the wording of this Article it is in no way clear whether the person concerned is by each Member State involved charged with contributions only as regards the activity pursued in each territory (since this point was finally not included in the amendments of Article 14c). On the other hand, when it comes to applying the national legislation, a provision so worded may have the effect of reducing the rate of contribution as well as increasing it.

4. CONCLUSIONS

Community conflict law provisions constitute an undoubtedly complete as well as apparently complicated system of rules. However, Title II, far from being a technical issue, should be considered as the backbone of coordination; its very starting point and bases on which general Community principles and mechanisms are activated, to guarantee for persons in cross-border situations, when exercising the rights bestowed by the Treaty, legal continuity and security in respect of Member States social security schemes coming into play.

With regard to national legislation, Title II complete system draws the actual lines between national and Community competence, imposing to Member states systems of social protection an intensive and efficient interaction, adaptability and flexibility which goes, sometimes, as far as indirectly accelerating the pace towards convergence.

Moreover, in respect of European socio-economic integration, conflict law provisions are the prerequisite for the substantial establishment of the fundamental freedoms in everyday practice and thus the completion of the internal market.

It should be noted, that the impact of European economic initiatives and commitments on national social security schemes demands an equally strong political response in the field of coordination, which should never be put at stake each time financial or structural changes imposed thereof are regarded as "overcharging" the latter. Efficient coordination will always be needed as long as Member States social protection systems are not converging in a uniform way. Besides, the targets of simplification and visibility are never to come true if national social security schemes remain per se complicated or are developing without taking the aims of coordination seriously into consideration.

ANNEX

ECJ JUDGMENTS

1. Case 92/63, *Nonnenmacher*, judgment of 09.06.1964,
2. Case 19/67, *Van der Vecht*, judgment of 05.12.1967,
3. Case 110/79, *Coonan*, judgment of 24.04.1980,
4. Case 276/81, *Kuijpers*, judgment of 23.09.1982,
5. Case 101/83, *Brusse*, judgment of 17.05.1984,
6. Case 302/84, *Ten Holder*, judgment of 12.06.1986,
7. Case 300/84, *Van Roosmalen*, judgment of 23.10.1986,
8. Case C-2/89, *Kits van Heijningen*, judgment of 03.05.1990,
9. Case C-245/88, *Daalmeijer*, judgment of 21.02.1991,
10. Case C-140/88, *Noij*, judgment of 21.02.1991,
11. Case C-198/90, *Commission v the Netherlands*, judgment of 28.11.1991,

12. Case C-121/92, *Zinnecker*, judgment of 13.10.1993,
13. Case C-71/93, *Van Poucke*, judgment of 24.03.1994,
14. Case C-425/93, *Calle Grenzshop Andresen*, judgment of 16.02.1995,
15. Case C-107/94, *Asscher*, judgment of 27.06.1996,
16. Case C-340/94, *De Jaeck*, judgment of 30.01.1997,
17. Case C-221/95, *Hervein & Hervillier*, judgment of 30.01.1997,
18. Case C-275/96, *Kuusijarvi*, judgment of 11.06.1998 and
19. Case C-211/97, *Gomez Rivero*, judgment of 03.06.1999.