INTERNATIONAL CONFERENCE

50 YEARS AFTER THE START – NEW RULES ON EU SECURITY COORDINATION

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Participation in "Round-Table on past and future changes"

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1. Is it possible at all to imagine Europe without Regulation 1408/71?

Community coordination in the field of social security is not only indispensable, due to EC Treaty provisions on fundamental freedoms -as the *"reasoned social dimension"* of EU- but nowadays is merely not sufficient. As long as we officially stand in an area of national *in principle* competence but at the same time we are running an era (period) where European citizenship becomes all the more of an increasing importance, following ECJ's case-law. In fact, Member States need supplementary-supportive tools/instruments, if concepts, general principles and Community criteria governing Community coordination are to be interpreted uniformly by all actors concerned *in the light of the overall, far-reaching aims of primary law* (mainly Articles 39 to 42 EC and, all the more recently, 17 and 18 EC).

Following ECJ's settled jurisprudence, on issues dealing mostly with the ad hoc interpretation *of particularities* of national "legislation", it is revealed that Member States often legislate or organise their systems without paying due attention to the efficient coordination of implied national criteria with respective Community ones, in other words, without taking seriously into consideration the economy of the Community coordination provisions, e.g., in respect of a benefit's/scheme's general nature, its more specific

classification under the "exhaustive" -as agreed- list of Regulation 1408/71 (and/or Regulation 883/2004) material scope, indirect discrimination (*"à rebours"*) beyond nationality of mobile insured persons, who either lose or see their rights reduced, where national legislature is not or pretends not to be aware of the latter's obligation under the Treaty to provide for effective aggregation of periods and/or assimilation of facts in many "newly" emerged social "risks" *as independent or conceptualised social security risks*, "new forms" of protection (old risks only recently been accepted as part of public welfare) or mobility.

Sometimes, it is more than obvious the "delicate effort" of Member States (competent authorities and/or institutions) to enact in a more "protective" way, in the interests of national welfare. Especially where active social measures take precedence over traditional, passive ones or legislative or administrative initiatives are taken for enhancing national welfare system's or just pension schemes' sustainability.

In the above cases, unfortunately, the Administrative Commission proves either inefficient or not the appropriate instrument to substitute recourse to the Court, although the latter has many times (applicable legislation, the legal value of Community E-Forms, loyal cooperation) raised the decisive role of the said Commission's instrument. According to our proposal in the framework of trESS national report 2005, the Administrative Commission should (and could) organise "thematic" meetings, devoted to horizontal examination, by means of comparative analysis, of Member States' legislation and practice on special issues, e.g., the social status of pensioners exercising an economic activity, national anti-overlapping rules regarding pensions or "special" (mainly non-contributory) benefits, active measures against unemployment, particularities in respect of groups of persons' applicable legislation, advantageous, transitional conditions for the establishment of pension rights in specific economic sectors or for strictly determined periods, due to structural changes of the economy.

The Commission -as the Secretariat of the Administrative Commission- should organise a number of special meetings where the AC would undertake to study comparatively/debate national legislation and practice followed by each Member State's Administration vis-à-vis aspects of Community coordination at stake, respective provisions of Regulation 14008/71 (Regulation 883/2004 in the future), smooth or hindered application of certain rules, main problems of interpretation – coordination, their impact on the level of protection of mobile insured. Examination and creative discussion of experiences on that comparative basis, would better help identification of eventual problems, genuine particularities (not hinted derogations), serious practical aspects that deserve special procedures/best practices. At the same time, that comparative presentation of crucial social policy sectors would highlight in a convincing way the redistributive function of uniform approaches of implementation; the said debate would bring to the fore the common at a macro-perspective aims of typically diverse national measures. Is there a better, more productive way of approaching diversity than identifying and pointing out common interests? It is only in the context of such a creative dialogue that administrative problems and financial costs take a more realistic dimension.

It goes without saying that Administrative Commission is already the forum where Member States communicate developments in their legislation and/or practice, as part of their obligation to take all necessary measures so as to guarantee respect to the letter and spirit of Community legislature. Degradation of that expressly provided procedure could only contribute to Community coordination's scope progressively shrinking as to actually serve no substantial purpose. Advocate Generals' Opinions usually pave the way to qualitative coordination, e.g., by pointing out that there is no real gap but only possible alternative

solutions, thanks to the given "economy" of the coordination mechanism, or by revealing dangers/traps lying behind reforms of social security's financing or systems' structures. A good example is the call for cautious behaviour from the Member States' part regarding the chosen method of financing social security by means of different forms of generalised "contributions" – "taxation", forms which hinder amongst others implementation of Title II conflicts law rules as well as the general principle of "maintenance of acquired rights" (exportability of benefits). Indicative but outstanding references may be found in the Opinion of the Advocate General *Cosmas*, going as far as to propose exportability of any type-amount of a mobile person's "contribution" to any Member States' system, even *portability* of benefits in kind as a symbolic gesture of EU towards its citizens. In the same spirit, it is worth noticing Advocate General's *La Pergola* Opinion on the problem of the tendency towards funding social security by taxation and the risks it would possibly entail for the full establishment of the principle of free movement, eventually, an absolute reversal (subversion) of Community coordination's philosophy and mechanism (see, in cases C-34/98 and C-169/98, *Commission vs. France*).

An overview of the Regulation's 1408/71 *"problematic"* implementation could, in general terms, be attributed to Member States' responsibility (omissions, misunderstandings, derogations). In the context of the *spirit* of that broader defensive attitude/resistance, reflecting social security' status merely as an area of national competence, it is evident, that neither national representatives could change that *stagnant climate* in practice. Moreover, even alternative bilateral models of best practices/exemplary applications in practice, agreed upon between two or more Member States, although indispensable, could not easily change the situation as a whole.

In other words, the state of play before the Commission's initiative of simplification and modernization, was that even if derived legislation was sufficiently implemented, what was falling short were the *Treaty provisions on free movement* (equality of treatment – citizenship progressively) or *the implementation of Community Regulations in compliance with the spirit* of the Treaty's general principles and fundamental freedoms (the spirit of *Community legislature*).

The lessons learned by Regulation 1408/71, with its gradual piece-meal amendments and/or major modifications, since the very first Regulation 3/58 and its implementing Regulation 4/58, adopted by absolute priority as the initial coordination instruments, that very *continuity* and *legal certainty* achieved by an implied pedagogic approach, also by maintaining its unique and uniform Title ("mysterious" for some numbering) throughout all these years, could in general terms be summed up,

- *as getting* into *deeper analysis and knowledge of national social security concepts*, in principle, *diverging from respective notions under other Member States systems*, historically developed as better addressing the essentially similar, yet under a different socio-economic and cultural context, social needs;
- *as reaching the philosophy of one's national legislation seen more as an overall system* for the purposes of understanding the economy of the Regulation's provisions and furthermore guarantee its smooth implementation;
- finally, *as getting more acquainted* with the *horizontal framework of general principles – conflict law provisions* setting the rules for the legislation applicable at each specific case of active or non active persons and/or social security branches.

2. What importance has social security coordination for the citizens of your country?

The positive impact of Community coordination for the insured of my country is and could further be far more important than interested persons are conscious of, and there is where the gap, the deficit lies. Being not in a position to realize and know all the dimensions of such a mechanism, which is the unique Community instrument that concerns ***everybody***, each one of us, independently of social ranking, in our capacity as insured and as potential subjects to cross-border situations.

At the time Greece was joining the European Economic Community, the outstanding issues at EU level, under examination by the European Commission and the Administrative Commission, dealt mainly with:

- equality of treatment – assimilation of facts (indirectly and on an ad hoc/branch case-by-case basis);
- the developing concepts of "worker", "activity", clarifying and reinforcing of the social security criterion, establishment of Community criteria on other concept definitions, according to the Court's broader interpretation; following that, progressive extension of the personal scope of Regulation 1408/71 – major difficulties: special features of civil servants' and students' schemes and deriving particularities in respect of horizontal principles of coordination, e.g. totalisation of periods, method of calculating cash benefits/pensions, scope of benefits/allowances provided under the legislation of those schemes and their classification under the respective chapters of the Regulation;
- reform of the Pensions Chapter: major reform, integrating ECJ's case-law in respect of concepts (*benefits of the same, benefits of different kind*), general and special rules mostly on anti-overlapping of benefits and the method of establishing entitlement and calculating the pension's amount;
- Chapter 8, an exceptional way/special rules defining the applicable legislation for acquiring right to a "variety" of benefits in respect of pensioners' dependent children or orphans: Administrative Commissions interpretative Decisions, mainly No 150 integrating settled case-law and updating the interpretive approach on the differential supplement;
- special non contributory benefits: concepts – respective entries under Annex IIa, general rules specifically (slight exceptions/derogations) applying for the purposes of that Community type of benefits (acquisition and maintenance of acquired rights);
- special categories of insured under Greek legislation: farmers, mariners, self-employed – liberal professions (issues arising mostly from special provisions on the applicable legislation, anti-overlapping rules, access to voluntary insurance under the legislation administered by the corresponding schemes and/or general questions dealing with the internal mechanism of coordination of the Greek legislation);
- *pending questions*: alignment of Greek supplementary legal pension schemes with the general rules of Community coordination on the aggregation of periods for the acquisition of the right to pensions and the calculation of their amount – award of benefits (Chapter 3 of Regulation 1408/71) applying to all schemes covered under the term "legislation".
- *pending for all schemes concerned but of special Greek interest*: follow-up from the abrogation of Chapter 8 and its integration within Regulation's 883/2004 broader and horizontal provisions concerning mostly *family* benefits provided for pensioners' children and/or for orphans (additional or special family benefits): looking for a solution guaranteeing supplementary protection where different kind of benefits are provided under the legislation of more than one Member States involved.

Major positive impact for the Greek social security system: *the personal scope*, bringing to the fore (the Greek competent authorities) a new approach for *sectors/branches* or *concepts* deemed as "taboo" under Greek legislation and every-day practice and treated differently if at

all in the context of Bilateral and/or International Conventions of Social Security, such as mariners (traditionally, the legislation covering all branches of social security under special schemes for mariners was remaining outside any type of International "coordination" in the field of social security); most important, the actual "classification" of the agricultural insurance scheme covering the whole rural population (OGA) as "legislation", thus under the Regulation's material scope, by virtue of Article 1(a)(iii) definition (as a "standard social security scheme for the whole rural population"), while in the context of Greek administration such a completely exceptional scheme in terms of Greek legislation (the only non contributory one) had been considered up to Greece's adhesion to EEC as pure welfare. Thus, the inclusion of OGA's insured as "employed persons" in conformity with uniquely Community law criteria (an explicit assimilation of facts clause, Article 1, in combination with Annex I, Greek entry, Regulation 1408/71), i.e., "persons who are or have been subject to the legislation of another Member State and who consequently are or have been "employed persons" within the meaning of Article 1(a) of the Regulation are considered as employed persons within the meaning of Article 1(a)(iii) of the Regulation, had an extremely important impact for the great number of repatriated classic Greek migrants (potential or already pensioners), mostly of a rural origin. Periods of insurance completed by the latter before and after the establishment of OGA' scheme could be smoothly taken into account by all competent institutions involved (OGA as well as in most cases German, Belgian, French, Dutch), while that scheme, as non-contributory, remained non coordinated under Greek legislation until its transformation into a basic pension's partly contributory scheme (1997). So, quite strangely and exceptionally in comparison with what would have been expected internally but also at Community level, the fact that according to the Community principle of aggregation, OGA's periods of insurance were taken into account by other Member States competent institutions and vice versa, did not have a positive impact on the Greek legislature, i.e., it did not "oblige" the latter to extend internal coordination rules, so as to cover also that scheme, a repercussion expected by the Commission as the first change to follow Greece's adhesion.

The same strong reaction was provoked for a number of typically welfare (social assistance) allowances, which had to be considered as *special non-contributory benefits*, falling under the scope of the amended Article 4(2a) and the special rules of Article 10a, i.e. under that special coordination mechanism, whilst following Greek legislation, its ratio legis and organisation, those allowances were outside "social insurance" (Greek terminology), thus totally excluded from the material scope of Regulation, by virtue of Article 4(3), as typical social assistance (allowances).

On the opposite, the Chapter on Sickness benefits with its corresponding financial provisions had a "disproportionate" output for the financing of the branch of sickness insurance under the Greek social security system: the *positive consequences for the mobile insured*, i.e., maintenance of rights in course of acquisition and "retention" of acquired rights – exportation/"portability" of respective benefits, in other words, for the first time better treatment under Community law compared to no coverage at all in the context of preexisting bilateral Conventions of Social Security (that specific branch was totally excluded or only partially and exceptionally included under ad hoc bilateral agreements of cooperation in the Health sector), were transformed into a real economic "burden", risking to turn the balance of the healthcare system upside down.

The then Greek delegation, seizing the opportunity on various occasions had tried several times to enhance major reform regarding the scope of the Chapter on Sickness benefits and the impact of the Chapter on Financial provisions of the Regulation. The Greek delegation

had repeatedly stressed the need to establish, on the one hand, a system for the reimbursement of benefits in kind between institutions on the basis of actual costs rather than on a flat-rate basis, i.e. a system as close as possible to actual costs (the case under Regulation 883/2004) and, on the other hand, equal distribution of costs of benefits in kind granted to pensioners among the institutions concerned, a balanced sharing of health care costs, mainly by the reconstitution of the responsibility (competence) of the actually competent institution, to bear the costs incurred in any other Member State, instead of referring the costs to the institution of the place of residence, nowadays considered as "quasi competent". In that capacity, the Greek institution of the place of residence has been paying disproportionately high actual amounts for pensioners' necessary treatment, while on a temporary stay in another or even back in the competent Member State, while the latter is obliged to reimburse the Greek institution of the place of residence its disproportionately low lump-sums. Evidence (empirical data) had been officially presented on the occasion of the one-day Seminar which took place in Athens (1999) on the occasion of the then forthcoming simplification and modernization of the Community coordination mechanism (Regulation 1408/71 and its implementing Regulation 574/72).

In the pensions' sector, given the comparatively great number of cases, categories of insured, where Greek legislation provided for the granting of an early retirement pension (special schemes – special status), the principle of aggregation of periods in combination with the principle of assimilation of periods completed in another Member State in the same occupation or in the same employment, regardless of the fact that the latter were not subject to a special scheme under the legislation of the other Member State, had a two-fold impact:

- *for the insured*, effective coverage – payment of an early pension under the Greek special scheme involved even five or seven years earlier, before reaching pensionable age under the legislation of other Member State(s) along with the award of a supplement so that the benefit awarded is not less than the minimum benefit fixed by Greek legislation (for a period of insurance equivalent to all periods taken into account for the payment in accordance with the provisions of Chapter 3 "Pensions");
- *for the Greek competent institution*, an economic burden not only following the time-span between different pension-ages provided under the legislation of most Member States but also, because certain persons lose any interest in applying for another Member State's pension when reaching the age required by the other legislation involved, especially if the total amount of pension they got (prorate plus top-up to the minimum amount) were equivalent to the sum they would get from two Member States. On the other hand, the Greek institution assumed the whole burden of the costs for sickness benefits.

It is to be noted that the first two decades following Greece's adhesion, the ECJ's case-law was at its apogee concerning important legislative measures, the outcome of reforms in the context of certain Member States' legislation (mainly the traditional "European North") having a crucial positive impact on the maintenance of repatriated pensioners' amount of benefits and, thus, their overall level of coverage. The Court's jurisprudence and interpretative guidelines had a beneficial impact mostly for the employed, traditional type of migrants and their family members of the then "labour exporting" Member States (Italian trade unions paved the way to the Court!).

The Court dealt with "Greek cases" or mostly with cases of "Greek origin" or with an impact on Greek legislation, while all those judgements had actually a broader, most significant impact on crucial issues of Community coordination at a European level.

The cases that could be mentioned are:

Paraschi (case 349/87): where the Court has started paving the way for the subsequent (under reform) explicit introduction of the principle of assimilation of facts or events, as a horizontal general principle of Community coordination. A very crucial judgment shedding light to the way fundamental freedoms of the Treaty should be interpreted. It is classified under the cases serving the teleological argument used by the Court in order to interpret the objectives (free movement of workers) of Articles 39 to 42 EC (former 48 to 51 of the EC Treaty), according to which *"it is contrary to these Articles if, as a consequence of the exercise of the their freedom of movement, migrant workers were to lose the social security advantages guaranteed to them by the laws of a single Member State, since such a consequence might discourage Community workers from exercising their right and would therefore constitute an obstacle to that freedom"*. In particular, under the said ruling the Court comments ad hoc, namely in the case of invalidity insurance, on the impact of diverging requirements under a variety of existing national social security schemes, stating that the above-mentioned Articles of the Treaty must be interpreted as not preventing the national legislation from amending the conditions for the grant of an invalidity pension, even where the latter makes them stricter by providing for a reference period prior to the occurrence of the invalidity, during which the insured person must have exercised an activity subject to compulsory insurance and paid a minimum number of contributions in order to be entitled to an invalidity pensions, provided that the contributions adopted do not entail overt or disguised discrimination between Community workers.

However, by virtue of those provisions, the Court underlines, where it allows prolongation of the reference period in certain circumstances, it is unlawful for such legislation not to provide for the possibility of prolongation, where the events or circumstances corresponding to those which make prolongation possible, arise in another Member State; by failing to do this, it is obvious that such legislation, even if formally applicable to all Community workers, is liable to have a much greater adverse effect on migrant workers, who, particularly in case of sickness or unemployment, tend to return to their countries of origin, and may dissuade them from exercising their right of free movement.

Athanasopoulos vs. Bundesanstalt für Arbeit (case C-271/89): whereby the Court established that where the amount of benefits paid under Chapter 8 provisions by the Member State of residence is less than the amount of the benefits payable by another Member State, the pensioner or the orphan of a diseased worker is entitled to receive from the competent institution of the latter Member State a benefit supplement equal to the difference between those two amounts, even where under the legislation of that State the grant of the benefits is subject to the condition that both the claimant and the qualifying child reside within its territory.

The Court confirmed that entitlement to the benefit supplement for dependent children of pensioners seeks to promote freedom of movement for workers by ensuring that those concerned obtain the amount of benefits which would have been granted to them had they continued to reside in the Member State granting the most favourable benefits.

It is one of the most important rulings for migrant workers which, while respecting the unity of the applicable legislation defined by special conflict rules (Chapter 8) for dependent children of pensioners or for orphans (a separate chapter was indispensable due to the great variety of benefits provided for under each legislation for that category of persons), at the same time reiterated and extended the ambit of a supplement benefit (the differential amount), thus guaranteeing an adequate level of coverage – maintenance of acquired rights

for the beneficiaries concerned and redistributing the costs between two Member States (actual and ex place of residence).

In other words, the Court recognised that the said entitlement exists irrespective of *when* the pensioner becomes entitled to a pension under the legislation of the Member State granting the most favourable benefit (i.e., before or after transferring his/her residence to another Member State) and having regard to *all* the dependent children of the pensioner, including those born after the latter's transfer of residence to the Member State which grants the less favourable benefits.

In the same spirit, in conformity with the principles of proportionality and loyal cooperation, the competent institution should not require the person concerned to provide information and supporting evidence other than could be provided by a reasonably diligent person residing in the same Member State, while the Administrative Commission had been called to draw up a list of institutions responsible for communicating the official information necessary for calculating the differential amount.

So, that case was the precursor of Administrative Decision No 150 which, however did not meet the expectations of all actors involved in practice, since it was never applied by all Member States' competent institutions involved due to the diversity of benefits and the particularities of national legislation and/or the so-called administrative cost that uniform implementation of the latter would involve. Progressively, following beneficiaries pending claims – partial coverage and institutions' complaints about the complexity of rules and required procedures, on the occasion of simplification and the principles of modernisation, that judgement became also the precursor of the separation finally of Chapter 8 benefits of different nature: the pension-type supplements remaining under the rules and calculation methods of the new Chapter on Pensions, and the family benefits, increases or other supplements of family benefits for dependent children of pensioners, or for orphans fall under the new Chapter on Family benefits.

Commission vs. Hellenic Republic (case C-185/96): a case whereby the Court grasped the chance to develop more in depth and ad hoc (a quasi case-study) *the range* of family benefits or, vice-versa the limited or concrete scope of either special non-contributory benefits or of social advantages, for the purposes of Community coordination; in fact, the Court declared that the Hellenic Republic has failed to fulfil its obligations under primary and derived Community law, by precluding on the grounds of their nationality employed and self-employed workers from other Member States and the members of their families from being attributed *large-family status* for the purpose of the award of special benefits for such families and from being awarded family allowances. A very important judgment of Greek interest which touched upon an extremely sensitive domain traditionally considered as "social assistance" both by the Greek legislator and administration; thus, the Court's intervention, by reinforcing the Community criteria for family benefits/allowances and also for the overall Community concept of social security, was unfortunately the only way to persuade the Greek competent authorities to regulate the matter in conformity with the principles of Community law, in the interests of insured persons with a cross-border element.

Dafeki (case C-336/94): where the Court ruled on the implications of the free movement of persons on the rules governing civil status, declaring that in proceedings for determining the entitlements to social security benefits of a migrant worker who is a Community national, the competent social security institutions and the courts of a Member State must accept certificates and analogous documents relative to personal status issued by the competent

authorities of the other Member States, unless their accuracy is seriously undermined by concrete evidence relating to the individual case in question; otherwise, that freedom of movement for workers requires the acceptance of documents concerning the legal status, likewise Court's judgements on a number of concepts relating to family law, e.g., the status of a person (as a child, dependent, spouse), the right to maintenance, parental authority and exercising it and the right to family reunification.

It is noted that it is essentially in terms of free movement that the Court of Justice intervenes in areas primarily linked to personal status and family law.

Although the Community has no general competence to lay down rules concerning the law applicable to civil status or questions related to the probative value of documents relative to civil status, the Court points out that *"exercise of the rights arising from freedom of movement for workers is not possible without production of documents relative to personal status"*, and that *"the administrative and judicial authorities of a Member State must accept certificates and analogous documents relative to personal status"*.

Vougioukas (case C-443/93): where the Court has ruled on a number of substantial questions, such as the term "civil servants", "special" scheme (for civil servants) and the applicability of general principles of coordination, such as the principle of aggregation of periods, acting as a bridge and an accelerator for the future extension of Community coordination' scope. The Court clarified that "the term "civil servants" does not refer only to civil servants covered by the derogation provided for in Article 48(4) of the Treaty (now 39(4) EC), as interpreted by the Court, but to all civil servants employed by a public authority and person treated as such. The subject-matter and objectives of the two provisions are different.

In order to be regarded as "special" within the meaning of (the then) Article 4(4) of Regulation 1408/71 -the Court's interpretation was essential to make more transparent Community law for different purposes- it is sufficient, without there being any need to take other factors into consideration, that the social security scheme in question is different from the general social security scheme applicable to employed persons in the Member State concerned and that all, or certain categories of, civil servants are directly subject to it, or that it refers to a social security scheme for civil servants already in force in that Member State. By adopting Article 4(4), the Community legislature intended to exempt social security schemes established by Member States for all or some of the staff of their public authorities from the coordination of the general schemes applicable to other workers.

Since Articles 48 and 51 of the EEC Treaty (now 39 and 42 EC) preclude national legislation which might place Community nationals at a disadvantage when they wish to extend their activities beyond the territory of a single Member State, the must, accordingly, be interpreted precluding refusal to take into account, for the acquisition of the right to a pension, periods of employment completed by a person subject to a special scheme for civil servants or persons treated as such, in public hospitals in another Member State, where the relevant national legislation allows such periods to be taken into account if they have been completed in comparable establishments within that State. Where such a refusal is not based on any justification which may be taken into consideration, it amounts to discrimination with regard to the aggregation of reckonable periods for the grant of social security benefits accorded in principle by the proviosn of the Treaty (Article 51, now 42 EC) against workers who have exercised their right to freedom of movement.

Consequently, in the case under examination, the above-mentioned articles of the Treaty must be interpreted as precluding refusal to take into account, for the acquisition of the right to a pension, periods of employment completed by a person subject to a special scheme for civil servants or persons treated as such, such as an IKA staff doctor, in public hospitals in another Member State, where the relevant national legislation allows such periods to be taken into account if they have been completed in comparable establishments within that State.

So progressively the Court proceeded to its core contribution by underlining, that in order to safeguard the effective exercise of the right to freedom of movement enshrined in Article 48 of the Treaty (now 39 EC), the Council is required, under Article 51 (now 42 EC) thereof, to set up a system to enable workers to overcome obstacles with which they might be confronted in national social security rules. The Court admitted that, in principle, the Council had carried out that duty by introducing Regulation 1408/71, the Community legislature, however, had not yet adopted the measures necessary to extend the material scope of Regulation 1408/71 to special schemes for civil servants and persons treated as such, with the result that Article 4(4) of the Regulation was leaving a considerable lacuna in the Community coordination of social security schemes. That "gap", eventually justified at the time of Regualtion's 1408/71 adoption, to overcome the profound differences between the national schemes, giving rise to difficulties which the then Community legislature might have regarded as insurmountable when seeking to coordinate those schemes, could no longer have inhibit free movement.

In the light of the task entrusted to the Council by Article 51 of the Treaty (now 42 EC), the existence of such technical difficulties could not justify indefinitely the lack of any coordination of special schemes for civil servants and persons treated as such, particularly since, in December 1991, the Commission had submitted to the Council a Proposal for a Regulation amending Regulation 1408/71, designed inter alia to bring such schemes within its material scope.

In any event, the Court concluded that, by not introducing any measure for coordination in that sector following the expiry of the transitional period provided for with regard to freedom of movement for workers, the Council had not fully discharged its obligation under Article 51 of the Treaty (now 42 EC).

Although the Court did not declare invalid the then standing provisions of Article 4(4) of Regulation 1408/71, it held that the said provisions do not entail that a request for aggregation is to be refused when it may be satisfied, in direct application of Articles 48 to 51 of the Treaty (now 39 to 42 EC), without recourse to the coordination rules adopted by the Council.

Mr Vougioukas and the Commission submitted in that connection that, under Articles 48 and 51 of the Treaty, periods worked in German public hospitals must be treated in the same way as comparable periods completed in Greece. The fact that only periods of service in Greek public hospitals were recognized as pensionable, but not those completed in comparable establishments in other Member States, was o considered by the Court as constituting a serious obstacle to the freedom of movement for persons.

IKA vs. Ioannidis (case C-326/00): whereby the Court has ruled that Article 31 of Regulation 1408/71 must be interpreted as meaning that enjoyment of the benefits in kind guaranteed by that provision to pensioners staying in a Member State other than their State of residence is not subject to the condition that the illness which necessitated the treatment in question

manifested itself suddenly during such a stay, making that treatment immediately necessary. That provision therefore precludes a Member State from subjecting that enjoyment to such a condition as well as to any authorisation procedure.

The provision and funding of the said benefits must normally take place in accordance with the provisions of that Article in conjunction with Article 36 of Regulation 1408/71 and Articles 31 and 93 of Regulation 574/72.

Where it appears that the institution of the place of stay has wrongly refused to provide the benefits in kind referred to in Article 31 of the Regulation, and the institution of the place of residence, on being advised of that refusal, has declined to contribute, as it is obliged to, to facilitating the correct application of that provision, it is for the latter institution, without prejudice to the possible liability of the institution of the place of stay, to reimburse directly to the insured person the cost of the treatment he has had to bear, so as to guarantee him a level of funding equivalent to that which he would have enjoyed had the provisions of that article been complied with.

In the latter case, Articles 31 and 36 of Regulation 1408/71, preclude national legislation from subjecting such reimbursement to the obtaining of *ex post facto* authorisation which is granted only in so far as it is shown that the illness which necessitated the treatment in question manifested itself suddenly during the stay, making that treatment immediately necessary.

Stamatelaki (case C-444/05): a very important ruling for Greek legislation, also reinforcing settled case-law since *Watts* on scales of reimbursement in the light of freedom to provides services, following which Article 49 EC precludes legislation of a Member State which excludes all reimbursement by a national social security institution of the costs occasioned by treatment of persons insured with it in private hospitals in another Member State, except those relating to treatment provided to children less than 14 years of age.

Such a measure may not be justified by the risk of seriously undermining the financial balance of a social security system, because the absolute terms, with the exception of the case of children under 14 years of age, of the prohibition laid down by that legislation are not appropriate to the objective pursued, since measures which are less restrictive and more in keeping with the freedom to provide services could be adopted, such as a prior authorisation scheme which complies with the requirements imposed by Community law and, if appropriate, the determination of scales for reimbursement of the costs of treatment.

The above-mentioned ruling led to a corrective intervention by the Greek legislature (competent authority) having yet as a consequence a rather static amendment of the respective provisions.

3. How do you see the role of the European Court of Justice, which, in many of its rulings, has strengthened free movement in the field of social security, thereby strongly influencing the conception of the Regulation?

Recent developments -settled and expanding ECJ's case-law/Advocate Generals outstanding Opinions- demonstrate that the *limits and the scope* of Community law are being *continually clarified* through *dynamic processes*, seriously *challenging the balance established* in the context of Regulation 1408/71 (883/2004) by a series of provisions, Annexes and entries

therein under, *reconciling, each time, competing political and legal interests and perspectives*.

In spite of the fact that *"Community law does not detract from the powers of the Member States to organize their social security systems"*, Community law does affect this national domain by means of the application of the fundamental principle of free movement. So, although the European Community holds no formal power in the field of welfare organisation thus, national welfare States remain the primary institutions of European social policy, still Member States' sovereignty and autonomy, to a certain extent, suffer some kind of erosion through the issuing of a variety of interventions, e.g. Regulations, Directives and ECJ's rulings. These interventions (*"negative European integration"*) increase market integration by eliminating national restraints on trade and distortions of competition, in short, contributing to the establishment of a common market.

With the primary intention of *realizing the internal market*, Community law *stimulates free movement by removing restrictive national measures* even if they relate to *aspects of the national welfare systems*. However, these national measures can be the result of *subtle socio-economic market correcting mechanisms* and, therefore, *potentially vital to the subsistence of those welfare systems*.

The endeavour to reconcile the European fundamental principle of free movement with the national interests of Member States' social protection lies at the core of the case-law of the Court (hereinafter ECJ), which has repeatedly stressed the cardinal importance of the Treaty provisions on free movement and completion, both having a constitutional rank in the Community legal order.

Awarding social rights (as the corollary to rights of free movement/to citizens of the Union) versus *safeguarding the national social system*s is a delicate balancing act which the Court is called to accomplish and its extensive settled case-law proves/shows how the latter weighs those sometimes heavily contradicting interests (or at least argued as contradicted).

From the case law of the Court it emerges clearly that the use of a *pure nationality criterion* or of the *territoriality principle* to limit access to the membership cycle of the welfare state and deny award of social security benefits/national social rights to non-nationals/non-residents, *conflicts with the fundamental character of the right to freedom to move and reside within the Community*.

Member States are almost in every-day practice confronted with the both the "duty" to accept "*a certain degree of financial solidarity* between *nationals of other* Member States" and the "right" to ensure that "the grant of social assistance does not become *an unreasonable burden*, which could have consequences for the overall level of assistance that may be granted by that State".

The Court appears to accept the requirement of *a certain length of residence* as an *important justifiable objective* criterion, corresponding to the legitimate aim of ensuring that the person concerned (an applicant for an assistance/subsidized allowance) has demonstrated a certain degree of integration into the society of the Member State involved.

ECJ's interpretative approach in respect of a significant number of a variety of cases seems to indicate that *"a society can no longer limit its solidarity to its nationals but should include all persons who demonstrate a sufficient degree of integration in that society".* It is obvious, that

(national) authorities will always have to take into account the applicant's *personal circumstances* that may point to that person's societal integration.

The *complex matter* of according *national* social rights on the basis of Community law *without thereby destabilizing* the entire national system relates to *health care costs.* The cases examined by the Court concern *the situation where a patient goes to another Member State with the explicit goal of receiving medical care at the expense of the healthcare system with which he/she is insured.*

In the citizenship cases, the Court seems to recognize that *the membership circle* of a welfare state *cannot be extended ad infinitum* but that it requires Member States to employ *relevant criteria* of distinction that are *proportionate to the goal pursued.*

Indicative topics/titles of ECJ's intervention:

Exportability of "new" social responsibilities (the long-term care benefits);
Territorial demarcation of certain benefits as contradicting Community law
or
Territorialisation re-quested;
Challenges to residence-based welfare states
or
The demystification of the clear-cut demarcation between the Bismarckian and the Beveridge model of social welfare, thus the unbalanced (negative) impact of Community coordination on residence-based systems;
References to the Court will 'ex officio' confirm or extend the established line of reasoning
or
The dynamic nature of social security is reflected in the dynamic (non-stop) modernisation of the latter's coordination at Community level;
EU citizenship rights versus national residence clauses
or
The development of European citizenship is the other angle from which social assistance and special non-contributory benefits are becoming increasingly accessible EU-wide;
Justifying national residence tests as objective and proportional measures against free movement provisions and Union citizenship

4. Has the inclusion of third-country nationals in the coordination system proved its value?

To put it the other-way round, as a starting point: Are we able (do we dispose the appropriate data, quantitative as well as qualitative) to identify the administrative costs eventually deriving from such a complex system, activating a multiplicity of legal basis and implying a great number of exceptions – derogations/a variety of practices (anyhow, not the best ones)? Has the Commission made up the list of open-up questions, pending legal issues in search of uniform interpretation or implementation in conformity with primary Community law?

From the discussions having taken place in one of the past meetings of the Administrative Commission (290th meeting 2003) a series of problems were pointed out in respect of third-country nationals' acquisition, retentions and recovery of rights. It is worth mentioning that third-country nationals in their capacity as active or non-active persons (insured with direct or derived rights) are falling under various legal bases of the Treaty, and respective legal instruments of secondary Community legislation such as Regulation 859/2003, on the

application of Community coordination of Member States social security systems to national of third countries, the Association Agreements with the countries of the Mediterranean under the Barcelona process and the "cooperation and stabilisation" agreements within the Western Balkan countries (specifically on the question of exportation of rights (maintenance of acquired rights) to a third country).

Moreover, given that even the realm of Community coordination of national social security systems is governed by two separate legal bases (Article 42 EC for Regulation 1408/71 and Article 64 of the Treaty for Regulation 859/2003), makes uniform and smooth implementation of the latter instrument in principle politically not desirable (the case of Denmark under the Treaty's respective Protocol) and unfeasible (e.g., the criterion of "legal residence" is too restrictive, especially for derived rights -family members- and interpreted in different ways, the limited territorial scope of that Regulation -EFTA countries are not automatically included-).

5. Has Regulation 1408/7 also had a specific effect on developments in your national law (e.g. long-term care insurance)?

In general terms, very limited, concerning, for instance,

- in the past, substantial, yet not exhaustive, adaptations of OGA legislation, particularities which are linked to the "special nature" and scope of the said scheme in the framework of Greek legislation (due to its initially non contributory character, the Greek legislature used to "discharge" that scheme from "burdens" (e.g., in respect of affiliation, acquisition of rights to sickness benefits or pensions) where persons potentially falling under its scope were subject to any other legalisation and/or drew entitlement to rights from/were granted benefits by another scheme;
- equally, adaptations of the special scheme for civil servants (law enacted in order to abolish discrimination on the grounds of nationality for the purposes of acquiring right to survivor's benefits or other derived right;
- amendments of Greek legislation for family benefits to large families, following ECJ's judgment in the above-mentioned case C-185/96;
- most recently, Greek authorities are probably in search of regulating the appropriate procedures and/or legislative reforms, following the removal from Annex IIa of the Regulation of Greek entries on special non-contributory benefits in cash for categories of disabled persons, as a consequence of settled case-law and corresponding amendments of Regulation 1408/71 (see Article 4(2a) and Annex IIa as replaced by Regulation 647/2005) and Regulation 883/2004 (Article 70), not withstanding the last Court's ruling in case C-299/05. That waiting period of awkwardness is rather due to the lack of any internal coordination mechanism which would solve a number of technical problems arising in praxis. That ad hoc coordination and cooperation of all competent authorities (four at least) and institutions involved would set up the rules and procedures, enabling the administration to address effectively and efficiently questions dealing amongst others with the applicable legislation, priority rules and/or the eventual exportation of those "supplementary sickness benefits in cash" (according to the Court's Community definition). Instead of following that approach, while an ad hoc group is assisting the Administrative Commission with an analysis for the coordination of benefits aiming to help people "with extra costs of disability or illness", the most recent instructions leave the whole complex issue pending, totally up to the discretionary power of the Ministry of Health and Social Solidarity, one of the Greek competent authorities concerned.

It is worth mentioning, that certain groups of economically active persons (in their capacity as engineers, lawyers and, to a smaller extent, healthcare professionals -mostly the liberal professions), who have exercised their right to free movement, have taken advantage of Community coordination and acting as *pressure groups* have contributed in raising non-mobile workers' consciousness in respect of broader social security entitlements deriving from Community law (enhancing the qualitative approach). Enquiries regarding mobile insured persons' situations (interpretative and/or administrative problems) have opened the door to identifying essential questions, concerning the material and personal scope of internal legislation' special provisions, and have encouraged national administration, all institutions involved, to work more and more on principles and concepts for the purposes of the fundamental freedoms of the Treaty.

Regulation 1408/71 and its implementation could be considered as synonymous with *progress*, although slow in some respects, yet very positive as a general outcome. In fact, Community coordination has enhanced the so-called *Community approach*, i.e. national administration's examining mobile persons' situation from a purely *Community viewpoint*.

A representative example of the (unexpected) positive results of unhindered -enhanced- cooperation at Community level is recently the introduction of the European Health Insurance Card (EHIC), a Community initiative with a high symbolic value, which had initially raised strong reactions whilst, finally, activating fully a great range of Community and national institutions and instruments. An indication of what can be achieved in practice if all actors concerned are duly committed is the Commission's website devoted to EHIC's introduction and operation.

Greek administration is strongly "introverted", recognizing priority to the national dimensions and ratio legis of internal legislation. Still, in many cases, Greek administration refuses aiming at more general, "theoretical" solutions in the light of Community legislature's aims; last but not least, some of the Greek competent authorities and Institutions involved are not easily convinced by arguments, guidelines, circulars on the basis of Community rules and the Court's interpretations, not even where the latter are advanced by national experts-neither by the AC's members, preferring instead, to refer a number of cases (sometimes the great majority) to national courts. In other words, national administration does not "dare" to make the "great leap forward" and follow in every-day practice the "theory" underlying Community coordination, i.e. the latter's rules and principles in the light of EC Treaty's general principles and fundamental freedoms, mainly those on equal treatment (Article 12 EC), as a general principle of law, and that on European citizenship (Article 18 EC).

6. Public opinion often criticises unjustified export of social benefits, what is your view on this issue?

Since that question appears as the most *delicate* one, we would like to point out as a start, that its very drafting is quite ideologically biased. It needs at least clarification, on the one hand, as to what is implied by *public opinion* – does the said term refers to the *clash* between *non mobile versus mobile* citizens/insured persons? It is about a *conflict situation* which proves/shows the existing *"social deficit"* (of legitimisation) due to lack of knowledge – lack of awareness of the impact of Community law in the field of social security. In fact, without an in depth-comparative analysis of what actually constitutes *equal treatment*, in other words, the completely different, incomparable situation of mobile and non-mobile persons, an issue difficult to interpret always in conformity with Community law even by national

administration, it is more probable to deem any exportation of benefits as unjustified and as a sheer financial cost vis-à-vis those who have stopped contributing to the members' community of an insurance scheme.

Yet, in the light of the objectives of the Community legislature (Articles 39 to 42 EC), residence clauses, i.e., provisions precluding exportation of social security cash benefits, defined as "legislation" by virtue of Article 1(j), Regulation 1408/71, are considered by the Court as unjustified obstacles, hindering the free movement of (insured) persons. The only condition, as stated by settled case-law of the Court, for such national provisions to be deemed compatible with the Treaty, is to be based on objective, thus justified, and proportionate criteria. Respect of the Community *principle of proportionality* is usually too difficult to be retained by the Court.

On the contrary, as Advocate General *Cosmas* has extensively stated (see his Opinion in case C-160/96, *Molenaar*, inter alia, paragraphs 87-93), *"it is clear from the case-law of ECJ, that Community law envisages the relationship between contributions and benefits as one which gives rise to rights and obligations on both sides. In this relationship benefits are seen as compensation for the payment of contributions such that the obligation to be insured gives rise to a right to the payment of the relevant benefits"*.

Accordingly, Advocate General *Cosmas* reading into the question of the *"true significance"* of "Article 51 EC Treaty" (now 42 EC), reiterates furthermore, that it is possible "to formulate *a general principle underlying Community law* on social security of migrant workers", which should be something *"more than the protection of acquired rights or the principle of the exportability of benefits"*, essentially in *three aspects*:

- It would emphasize the legal nature of the personal right of the migrant worker, to receive anywhere in the Community the benefits which he has helped to finance himself using income from his employment or possibly also his savings. *Thus, the contribution of the European worker, that is to say, of the European citizen, to the construction of the economy and the social security system of the Member States through his work would be acknowledged.*
- It would highlight the fact that the principle of solidarity, which applies to statutory social security systems, works both ways. *Thus, it not only requires that a worker make sacrifices for the benefit of the system but also requires the system to show solidarity when necessary, that is to say, when the insured risk materializes*.
- It would cover all benefits whether in cash or in kind, as the latter, which are just as vital as the former, are not essentially different from them as both are intended to meet the vital needs of the insured. *Thus attention would be drawn to the* ***true significance of Article 51 of the Treaty*** *which, in providing as it does that the Council is inter alia to make arrangements to secure "payment of benefits to persons residing in the territories of Member States", offers a* ***minimum guarantee***. ***The objective*** *can be nothing less than to guarantee the* ***"payment"*** *of* ***all*** *social security* ***benefits***.

The above-mentioned broad interpretation of Article 42 EC had been confirmed by the Court for the purposes of implementing Chapter 8 (*"right to an additional benefit"*-the differential amount) (see, judgement of 12 July 1984, in case 242/83, *Patteri*), whereby it had been stated that: "it is apparent from the very wording of Article 51 of the Treaty that the two measures mentioned, namely (a) aggregation, for the purpose of acquiring and retaining the right to benefit, of all periods taken into account under the laws of the several countries and (b) payment of benefits to persons resident in the territories of Member States, are ***merely two possible measures among several*** *which it is the responsibility of the Council to adopt in*

order to promote the free movement of workers. Since the fundamental aim of Article 51 EC Treaty (now 42 EC) is to secure free movement of workers, any restrictive interpretation of the said Article advocated by national authorities (governments) cannot be accepted". As the Court has emphasized on several occasions, the aim of Article 42 EC (ex 51 of the EC Treaty) influences accordingly the interpretation of the Regulations adopted by the Council in the field of social security.

It is that whole-bracing approach which is missing from the Regulations' context (or form the Council's attitude), as an expressly stated two-way relationship/situation, making the difference and also the concept of "indirect discrimination" so difficult to grasp. If that broad interpretation of Article 42 EC, which does not seem so apparent in Community practice, were established and entrenched under secondary law, then national administration or other factors involved would have no difficulty in understanding, *in concrete terms* regarding each social security scheme, how to "translate" into right(s) to payment of relevant benefits (as a compensation) that person's obligation to be insured under their legislation.

In other words, the remedy to that vague and troublesome situation would be to define *expressly* and *extensively* within secondary legislation, (what constitutes) that concrete *reciprocity relationship* which gives rise to rights and benefits *on both sides*, in the light of the fundamental aims of the Community acquis.

It goes without saying that such an expansion of the level and quality of coordination should in no way to be artificially and thoughtlessly substituted by a progressive fiscalisation of the social security system. Unless, for the purposes of Community coordination, i.e., enhancing free movement, we should urgently search for other ways to achieve, on the one hand European citizens' "compensation" (acquisition of right to benefits as a counter-part of the latter's contribution to the financing of the system) and on the other, redistribution or fair distribution of burdens between all Member States involved.

A representative and unusual example, in the context of Greek legislation, is the "hostile" attitude of non-mobile self-employed persons versus those falling under the Regulation's personal scope, subject to the Greek legal scheme for engineers. Those insured who have never been in a cross-border situation were totally against modifying a series of their legislation's provisions, dealing mainly with disproportionate qualifying conditions of acquisition or retention of the right to benefits, access to voluntary insurance or generally coverage by the said legislation, the impact of which was at the detriment of mobile self-employed who were either obliged to pay a double contribution or had the amount of the pension received by the Greek Fund reduced because of its overlapping with another pension of the same kind acquired in or payable under the legislation of another Member State. The examination of parts of the said scheme's legislative provisions by the Commission services is still pending. Adapting that legislation for the sake of abolishing "indirect discrimination" has been a very tough exercise for the Greek competent authority, since insured persons with no cross-border element could in no way understand the concept of "discrimination à rebours"; on the contrary, they have always deemed the suggested *reforms in conformity with Community law* as consisting *discriminatory* treatment at the detriment of non-mobile self-employed. Thus, any reform should "cover" at the same time and in the same way also economically active persons exercising their activity exclusively in Greece, a target, though, which had been considered as too costly an endeavour for the said insurance scheme.

7. Do you think that the new Regulation will simplify the complex rules of the existing Regulation and what are your expectations with regard to the new rules?

As a first reaction, the answer is rather no, at least not so much as it has been expected!

Simplification depends on Member States' political will, commitment and possibilities – infrastructure.

An overview of the Regulation's 1408/71 *"problematic"* implementation could, in general terms, be attributed to Member States' responsibility (omissions, misunderstandings, derogations). In the context of the *spirit* of that broader defensive attitude/resistance, reflecting merely social security' status, as an area of national competence, it is evident, that neither national representatives could change that *stagnant climate* in practice. Moreover, even alternative bilateral practical applications/models agreed upon between two or more Member States could not easily change the situation.

In other words, the state of play before the attempt of simplification/modernization, was that even if derived legislation was sufficiently implemented, what was falling short were the *Treaty provisions on free movement* (equality of treatment – citizenship progressively) or *the implementation of Community Regulations in compliance with the spirit* of the Treaty's general principles and fundamental freedoms (the spirit of *Community legislature*).

Modernisation, as defined in parameter 1, requires – presupposes a state of readiness at Council's level to integrate substantially the Court's interpretative guidelines, to chose approaches which, in every-day practice will not lead either to a reduction or even worse, to a loss of mobile persons' social security rights.

New, simpler provisions under the Regulation 883/2004 may create (or have already risen) a series of other equally or more complex questions. Moreover, I am afraid that understanding new concepts in their broad and historical dimension would require having already a deep knowledge of the reasoning and practical experience of existing Regulations' provisions (mainly Regulation 1408/71 in combination with Regulation 574/72).

If, at the end of the day, the new implementing Regulation proves either not sufficiently transparent, demanding for more clarifications or too burdensome, and the Administrative Commission finds it necessary to issue as many (or even more) Decisions and/or Recommendations as the range of the existing ones for the purposes of Regulation 1408/71, then we are driven to the conclusion that no real simplification or modernisation have actually taken place.

Some of the provisions of Regulation 883/2004 and/or the new implementing Regulation are even more complicated and tougher, i.e., the chapters on sickness benefits, unemployment, family benefits, although the latter's priority rules are transparent and within the spirit of Community legislature regarding high level of protection for mobile persons (see the differential amount). Certain provisions reflect the difficulties encountered to reach consensus, more particularly so the particularities of national legislations and wishful thinking of certain delegations (so, some provisions or whole chapters have specific names, territories, very concrete background, which helps a lot in understanding their true interpretation, otherwise difficulties remain insurmountable. However, that method of "reading" the Regulations goes far beyond historical or teleological interpretation; it reflects national reaction/opposition to go further – to realize that *Community* part.

Expectations for a more cohesive, more convergent mentality vis-à-vis Community coordination practices. Getting closer is translated into becoming more aware of our diversity on the one hand and also more conscious of our great similarities (common goals), on the other.

Everything relies on national administration, on persons, on services with highly specialized staff and high quality infrastructure. In almost all Member States, administration, actors dealing with internal (not cross-border) situations are usually very suspicious! Their attitude is defensive, thus genuine modernisation for EU citizens' sake or simplification risks to consist of mere words or meaningless slogans with counter effects at the detriment of coordination.

Yet, modernisation has been achieved, at least in the text, in two respects:

- In focussing and giving great priority to the principle of administrative, loyal and efficient, cooperation, highlighting the decisive role of a pedagogic relationship between authorities and institutions of all Member States, on the one hand and institutions and the insured/other parties concerned, on the other. Rights and obligations are brought to the fore as a creative, genuine interactive relationship.
- In designating always an institution and its legislation, that of the Member Sates of residence, as the primary although provisionally responsible vis-a-vis the insured, to play the role of the quasi competent institution, in case of necessity, ambiguities, disputes, gaps in information or understanding, lack of knowledge. Although such a designation, which functions horizontally, is a real burden for the institution of the place of residence, yet the Commission's initiative and tough persistence has a substantial and highly symbolic significance: that there is no insurmountable problem, no lack of communication, in short nothing, that could hinder mobility (the exercise of a fundamental right conferred by the Treaty) or leave the mobile insured without a sufficient coverage of social security protection. In spite of administrative, sometimes heavy financial costs, the European citizen or the situation of the mobile insured has a clear priority in the context of the modernised coordination mechanism.

That daring imitative is also the bet for Europe in that specific but crucial area. May be modernisation proves not feasible at the end of the day or the fact that an institution is already involved, providing benefits, collecting contributions and accomplishing all administrative procedures, proves in the opposite that counts at the end of day since refunding procedures are time-consuming and over cumbersome.

Consolidation of common criteria, establishment or sharing of best/common practices, uniform interpretation and implementation of secondary legislation is and will remain the *terminus ad infinitum*.

It wouldn't be that provocative to paraphrase that new, promising initiative as an endeavour towards *forced*, i.e., de facto *"harmonisation"*, not as a commitment based on Member States' political will and conscious choice! Thinking, more specifically, the rules on the applicable legislation (general and special, exceptions included) or the casuistic approach under the sickness benefits' Chapter, the procedures established for their implementation as well as the financial implications (reimbursement, recovery of costs) of decisions on coverage by legislation, access to insurance, acquisition of right to and/or award of benefits, on a temporary or transitional basis, we would not exaggerate if we see "harmonised patterns" to derive out of necessity.

The future may be either non applicability of the new Regulations, which would lead to chaos, unless the period they start being applicable following successive amendments is further (de facto) postponed or maintenance of practices under Regulation 1408/71 which would also be detrimental. Yet, that "obligatory", although temporary, administrative and financial involvement of one at least legislation/institution/Member State at a time, may at the end prove the only way to be "reasonable", when interpreting, implementing, or pretending rights and priority positions; at the end of day, only theory will be in a position to identify and evaluate for us that "phenomenon" after a comparative assessment of practices.

Diversity of interpretative approaches or organizational structures, affecting the every-day uniform application of the Regulations by all Member States, is the outcome of the conflict situation between the different ratio legis and interests governing individual sectors – areas which have a direct or indirect influence on the structure and organization of Member States social security system and some of them are subject to EU harmonization/convergence (Community competence sectors), touching on social issues which are, in principle, topics of national competence.

On the one hand, it is impossible to draft *ideally* clear-cut (transparent) and at the same time exhaustive provisions (e.g., trying to make explicit general principles, such as assimilation of facts and events and/or aggregation of periods, implementation of anti-overlapping rules etc.), which could cover explicitly, at present and in *perpetuity*, each different aspect and particularity (often purposeful) of Member States' national legislation, present and future (mostly special statutes, regulations or other implementing measures) and/or practice.

Exhaustive provisions are, in principle, obscure, too complicated, difficult to be grasped by the majority of the diverse stakeholders concerned; in other words, what constitutes the "spirit of Community legislature" proves sometimes extremely difficult to be expressed and implemented, more so when implementation has to be as smooth and uniform as possible.

On the other hand, it is a rather fake assumption to believe that *any compromise* solution can serve the long-term objective of simplification and/or modernisation. In fact, the more difficult it is for the Council (or even the Administrative Commission) to arrive at a compromise solution, the worse its impact on the transparency and thus, the *longetivity* of the adopted Community rule. This has been the case with Regulation 883/2004, each time the Council chose referring a question for better drafting or an exhaustive clarification of situations and/or procedures and for a more transparent definition of some concepts, to the new implementing Regulation (see, for instance, several provisions under Title I and II of the said Regulation).

The best answer to the question *"have we achieved modernization?"* would be *"look for the most complicated – too theoretical/generalizing provisions"*. Yet, there is still no obvious answer to the next question *"and, who is to be blamed?"*.

Indicative examples of implementation gaps in the context of the forthcoming basic Regulation 883/2004 and the new implementing Regulation (all deriving from and developed by ECJ's case-law):

- the principle (obligation) of *sharing responsibilities* (*Annette Keller*);
- the principle of the legal value of documents (*Banks*);
- the principle of sincere (*loyal*) cooperation;
- the principle of proportionality (horizontal);
- the principle of most favorable (national) treatment.

8. We are looking back to 50 years of coordination, what developments could you imagine for the next 50 years?

Firstly, as long as past "tools" have provided the elements, the necessary prerequisites for a broad interpretation of Community coordination's legal basis, the Council has the means and the order to extend present and future Regulations, so as to cover each newly appearing case.

The development of rights based on the concept of European citizenship gives rise to a number of crucial issues, amongst which:

- Do these rights outweigh the mostly work-related rights of existing and forthcoming Regulations?
- Citizenship-based, primary law rights will they decide the future scope of welfare rights in the EU?
- Are those Citizenship-based rights going to determine the limits set within secondary legislation of the Regulations in force?
- Is it now becoming necessary to update secondary legislation to reflect the dynamism of European citizenship rights?
- What are the implications of these developments of national residence clauses?

A real priority for the sake of efficiency and the principles of transparency and legal certainty: working systematically towards *coordination* of various Community initiatives and instruments affecting the overall aims of the per se Community coordination of social security systems. The SPC should always examine or elaborate the aspects of that unique Community coordination when working on issues of the open method of coordination.

In other words, we should no longer "need" one and the same issue (regarding freedom of movement in the field of social security), to be dealt with by several different legal instruments (existing outside and in parallel with the Regulation), as is the case, for instance, with the *Proposal for a Directive on the application of patients' rights in cross-border healthcare* (COM(2008) 414 final), in respect of the latter's rules regarding sickness benefits' provision and reimbursement of healthcare costs incurred outside the competent Member State. Equally, it is against transparency and citizen's interests leaving outside the Regulation settled case-law, as another, parallel alternative, providing for interpretation stemming directly from primary law's fundamental principles and freedoms.

Converging interpretations and administrative practices should lead progressively to *substantial* convergence of legislations. Yet, that whole *metamorphosis* would require Administrative Commission's members to have upgraded to a higher status and would end up to the Administrative Commission becoming an instrument, which will deal with purely "administrative matters", the very "administrative detail" of a constructive interaction and data exchange. Obviously, a revision of the rules of procedure of the Administrative Commission as well as of the Committees and ad hoc Groups working under its responsibility would be indispensable.

The Commission, in the interest of all stakeholders concerned, should urgently look for and take new, adequate, above all substantial measures – find out *new* ways for the dissemination of knowledge on Community coordination of social security systems as well as on interrelated matters influencing all aspects of free movement, broadly speaking. Unfortunately, the methods tried at present have proven insufficient in every-day practice (e.g., Conferences, Seminars, even trESS, although the latter is an extraordinary and dynamic

initiative). It is worth noticing that annual Reports (national and European) elaborated by trESS and submitted to the Commission raise a range of important issues per country and elaborate conclusions regarding the state of play in Community law (coordination of social security systems), without the Commission having taken any advantage so far.

The creation of a new forum for structured and creative debate leading the way to sound paths in conformity to Community law in the light of general principles, the fundamental freedoms and the whole embracing perspective of the European citizenship, would be the dynamic instrument which would best support the Commission services as well as national administration and social partners' organizations in accomplishing their respective tasks; that forum composed of well read and experienced persons who shall be called by the Commission to lend their good offices in that unique capacity as high quality experts, would assist the former as well as the Administrative Commission, working next to trESS or becoming an extended version of the latter. That endeavour should be based on clear-cut rules of cooperation and exchange of views or elaboration of proposals/projects/studies.

As it must have been already experienced by the Administrative Commission especially now that all delegations, the Commission and the Council are trying hard to coordinate their efforts to fulfil all the actions adopted as necessary for the smooth implementation of the new Regulations (883/2004 and its implementing one), any organised debate and cooperation leading to binding interpretation and decision-making has to be structured in order to be effective and efficient and, above all, to allow for the Commission's supervisory role to be promptly exercised as the most adequate means providing for legal certainty.

No express provision targeting mostly the implementation as *lex specialis* of general principles and fundamental freedoms in the framework of the Regulation (see, for instance, Title I of the basic Regulation 883/2004) could be feasible to embrace all concrete situations that would fall under its scope and demand a uniform implementation of the latter, since those "real" cases (regulations, arrangements, practices at national level, i.e., "legislation" by virtue of Article 1(j)) are difficult to grasp and to describe, like provisions would seriously risk to be incomprehensible, at least non transparent and rendering secondary law too casuistic, whilst those ad hoc situations are never the same but in continuous evolution (transformation, adaptation… escape – derogation). On the other hand, providing for an exhaustive list of cases would create the impression of a more or less restrictive then indicative approach, as is the case with the everlasting discussion about the exhaustive or indicative list of social security branches falling under the Regulation's material scope.

Yet, 50 years are already too long a period to continue referring similar cases (comparable national situations) to the Court, asking from the latter, as the unique instrument, to recapitulate the same definitions and reasoning (lessons) in respect of important concepts of Community coordination, such as *"worker", "social security" vs. "social assistance benefits"*, the decisive *"link with the previous worker status", "residence"* (for the purposes of the applicable legislation as a start, and actually, all following chapters, mainly on the sickness benefits, on unemployment and/or family benefits), "*sickness* benefits", "*unemployment* benefits" and "*family* benefits", again for the purposes of Community coordination and according to the economy of the latter's provisions.

An indicative example of the above description of the persisting "power game" is what the Court stated in its quite recent judgement of 11 September 2008, in case C-228/07, *Petersen*, i.e. *"...it clearly follows from the order for reference that a situation such as that of Mr. Petersen is not covered by either of those Articles and, consequently, that Regulation 1408/71*

(as well as 883/2004) does not contain any provisions governing cases such as the one which is the subject of the main proceedings" (see paragraph 40). The Court in its following paragraphs gives, once more, an exemplary and comprehensive "lesson" of what Community law on free movement means and how should it be implemented given the pertaining *diversity* of social security systems and the dynamic and flexible structure of the Community mechanism coordinating them.

The only (pedagogic) alternative to be followed in praxis would be to put on Circa -in the context of Eulisses, trESS or otherwise- substantial abstracts of important Court's rulings and/or Advocate General's opinions, under a special subject-matter catalogue.

The above said, it is obvious why the proposed forum should be composed of persons in their exclusive capacity as "experts" in the Community acquis, far from any "disguised" role of representation, perpetuating compromise solutions as it is actually the case at Commission and Council levels.

It is to wonder, however, whether invention and activation of those *new tools* would need more resources to be devoted to that unique but binding field of coordination, which although emanating from an economic in principle domain, encourages in the long run, the promotion of European social perspectives.

Special attention should though be paid to developments potentially putting at risk Community coordination in its present architecture and in the long-run, such as:

- the individualisation of social security rights;
- the progressive move towards funding social security by taxation: an approach reflecting the assumption that the right of social protection is one of the citizens' fundamental rights. Such protection must cover the entire population and at the same time be at a high level, whilst its cost must be shared equitably between citizens. The latter objective should not be attained by financing founded on social security contributions based on employment income alone but must involve all income (*"le problème de la fiscalisation progressive du financement des régimes de sécurité sociale"*, see Advocate General's La Pergola Opinion in Cases C-34/98 and C-169/98);
- the expansion of "special non-contributory cash benefits" replacing contributory employment-related pensions (mostly in the form of protection minima -minimum pensions fulfilling the Community criteria set forth by the Regulation);
- the substitution of mandatory statutory social security schemes by multiple forms of supplementary/complementary provisions, mainly supplementary pension schemes, which for mobile persons is actually setting aside general principles of coordination such as that of aggregation of periods (and following that, the special rules regarding the calculation/award of benefits and the particular the mechanism guaranteeing comparison between "*autonomous/national*" and "*prorata* benefit", the minimum benefit – protection).

The above-stated types of intervention in the broader context of social policy-making at national level, if not followed by corrective special mechanisms/regulations regarding "Community cases", would undoubtedly lead (sooner or later) to disastrous situations, since, as strongly underlined by the Court, application of national domestic law to "migrant workers" in the same way as to "non-migrant workers" gives rise to unforeseen consequences, hardly compatible with the Treaty's aims (Articles 48 to 51, now 39 to 42 EC) and attributable to the very fact that the migrant worker's entitlements (in particular pension rights) are governed by two or more different bodies of legislation.

Concluding, the two alternative pathways for Community coordination in the future may be summed up as follows:

Either

By virtue of the principle of cooperation in good faith (Article 10 EC) Member States are obliged to implement in "isolation" domestic law ad hoc, by using all the means at their disposal to achieve the aim of Article 39 EC, i.e., in order to detect in each particular cross-border situation whether the interpretation and/or implementation of national legislation is in conformity with Community law. That requirement implies that Member States competent authorities should ascertain whether their legislation can be applied *literally* to "migrant workers", in exactly the same way as to "non-migrants", without ultimately causing "migrant workers" to lose a social security advantage and, consequently, discouraging them from actually exercising their right to freedom of movement.

When applying domestic law the national authority each time involved must as far as possible interpret it in a way which accords with the requirements of Community law. Where, on the other hand, for the purpose of applying a provision of domestic law, a national authority has to characterize a social security benefit awarded under the statutory scheme of another Member State, it should interpret its own legislation in the light of the aims of Articles 48 to 51 of the Treaty (now 39 to 42 EC) and, as far as is at all possible, prevent its interpretation from being such as to discourage a migrant worker from actually exercising his right to freedom movement.

That alternative seems pretty heterogeneous, time-consuming with plenty red-tape, endangering smooth application of Community law and, thus, transparency and legal certainty.

Or

Community coordination as a mechanism for the realisation of the principles and fundamental freedoms of the Treaty will see its impact progressively shrinking and finally put at stake as a whole.