ERA SEMINAR 2007 – FOLLOW UP

Comments on the occasion of the public consultation and debate launched by the Commission with its Green Paper on the European Research Area's new perspectives (COM(2007) 161 final, 04.04.2007)

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1. Introductory remarks

In the context of Section 3 "Making ERA a reality", aiming at the analysis of the situation of European research with respect to ERA's six main dimensions (as defined by the said Green paper), we would like to focus on/highlight certain issues, regarding the first question raised - "*3.1. Realising a single labour market for researchers*" – mainly its dimension on removing all obstacles stemming from the social security domain (sub-question no "6"), i.e. taking appropriate measures (at Community and national level) to guarantee the acquisition and maintenance of acquired rights (exportation of social security benefits) as well as those in the course of acquisition (by means of aggregation of periods, assimilation of facts/events, "portability" of supplementary pension rights).

What is actually being asked by the Commission is whether there is a real need for further steps to be taken and, if so, towards which direction?

- that of a more selective coordination in the framework of Regulations 1408/71, in the future, Regulation 883/2004, either by amending Community provisions regarding specific provisions on the applicable legislation or by enhancing administrative cooperation between competent authorities and/or institutions concerned in the mobile researcher's interests; or
- that of a "model" horizontal Community framework – the quasi harmonization approach – in the form of a Directive, in order to be feasible to tackle with the variety of a number of issues, concerning researchers' mobility and flexicurity.

To start with, if ERA is to be considered as the key challenge for Europe and researchers' *seamless mobility* across institutions, sectors and countries is deemed as "even more important than for other professions", although, today, most opportunities are still found "*curtailed by institutional and national boundaries…*", then we have to reconsider seriously how effective and comprehensive existing Community instruments are for researchers' specific situation.

Taking into account that, according to the previous Communication, researchers "increasingly need to be mobile for large parts of their careers, typically through medium-

term assignments or appointments", it is, indeed, to wonder how far Community coordination's simplification and/or modernization by virtue of Regulation 883/2004 have gone or whether the initial Commission's Proposal for a "Directive of the European Parliament and of the Council *on improving the portability of supplementary pension rights*" may be considered as an appropriate/essential response (contribution) to the above-mentioned far-reaching Community aim. It goes without saying that the modernization endeavour has not gone sufficiently far as to bring an in-depth change to the applicable legislation special provisions; in other words respective Title II rules are not adapted to new forms of mobility and/or activity (to new socio-economic reality), a reason why the Commission has elaborated a questionnaire (to be elaborated in the context of the Administrative Commission and the Advisory Committee on Social Security of Migrant Workers) with a view to examining whether the *current Community framework* on social security *is still suitable* for meeting the objectives of evolving national systems' coordination in relation to *increasingly diversified patterns of mobility*. That study, which is undertaken as a follow-up to the European Year of Workers' Mobility (EYWM), launched by DG EMPL, will be carried out in parallel by the trESS network (Training and Reporting on European Social Security), which will focus on the development of new mobility forms. On the other hand, in respect of the above-mentioned Draft Directive, still under examination at Council's level, we should bear in mind that, according also to the outcome of the European Parliaments' first reading and the Commission's recently amended proposal, its "portability" *per se* dimension has already been curtailed, the Directive's title referring henceforth to "*minimum requirements for enhancing worker mobility by improving the acquisition and preservation of supplementary pension rights*". Although a compromise solution, it is attempted as the first, realistic but of a transitional nature step to be followed, the soonest possible, by the second, major target, i.e. that of acquired rights' portability in the form of *exportability* of (parts of) benefits "acquired" under the scope of a Member State's supplementary pension scheme to that of another's, the person concerned is affiliated with following the latter's ad hoc type of geographical/labour mobility at the time.

Following the German Presidency's motto "Success through research", equally supported and promoted by Portuguese Presidency, the initiatives to be taken in the interest of the persons concerned (researchers and, to a certain extent, other bodies – stakeholders), should *by analogy* reflect what could be called *Mobility through Flexicurity*, i.e. flexibility and legal certainty in the way general principles or special rules of Community coordination on social security are interpreted and implemented in everyday practice.

In fact, those "coinciding" broader Commission initiatives undertaken (a) by DG EMPL (study on *New forms of mobility and the Community rules on social security schemes' coordination*) and (b) by DG Research (recent Public Consultation on its Green Paper "the *ERA: New Perspectives"*), should be brought together, in the most suitable way, with the view to reaching the aim of deepening within ERA for the creation of growth and jobs in the EU; in other words, *to improve coordination rules as much as possible in relation to patterns of mobility featuring forms of employment/activity in the field of research*, taking into account that ERA's concept includes the creation of an effective "Internal Market" for research, "*where researchers, technology and knowledge circulate freely*".

2. Current Community framework on social security: are coordination rules fully adapted to researchers' specific patterns of mobility/activity?

1. The *concept* of *"worker"* (settled case-law), as further specified under Title II provisions of Regulation 1408/71 and interpreted in conformity with *social security law* criteria for the purposes of Community coordination, *is it always sufficiently flexible – broad or transparent?*

Discussions in the framework of the Administrative Commission should be used as a starting point mainly those focusing on Title II special rules' particularities, rigidities or gaps, when applying to "unconventional" types of activity or mobility. Among the representative examples to be discussed, various forms of activity in the research area should be closely examined: it is worth referring to and taking advantage of contributions (at national as well as community level) and discussions which took place in the context of the Greek Presidency's initiative (2003) to guarantee a sufficient degree of flexibility and security by means of modernizing the scope of the Administrative Commission's Recommendation No 16 (*of 12 December 1984 concerning the conclusion of agreements pursuant to Article 17 of Council Regulation (EEC) No 1408/71 (OJ C 273, 24.10.1985)*).

In fact, given the strong reservations, expressed by the great majority of delegations at that time, to insert under Title II special provisions express rules on "researchers", instead of treating the latter as mere workers, proved sometimes quite problematic, the Greek Presidency had sought to cover all different types of mobility and activity for the sake of the so-called "knowledge society" (a crucial bet for Europe) by a "*daring*" amendment of Recommendation No 16, reflecting the socio-economic developments at the period it had been established by the Administrative Commission (mainly or exclusively for the sake of multinationals' highly skilled personnel). Unfortunately, regulating the issue of flexibility within the current Community mechanism of coordination for the sake of mobility proved impossible: neither the proposal for a "larger" and updated Recommendation on *minimum* but *contemporary Community* criteria for the conclusion of agreements pursuant to Article 17 (in the interests of the persons concerned) has been adopted nor the draft provisions proposed, later on, in the context of the new Implementing Regulation (express criteria and procedures of cooperation) concerning the implementation of respective Article 16 under Regulation 883/2004 had been supported.

Recently, however, a number of delegations has raised once more the issue of flexibility *ceteris paribus*, pointing out the non-transparent (unclear – uncertain) scope of Article's 17 implementation, i.e. the "gap" with regard to the criteria used by each Member State for the purposes of defining the person's(s') concerned interest(s).

It should be noted that the question of flexibility, in other words, the question of choosing the appropriate rules for the determination of the legislation applicable in conformity with the spirit of Community legislature – for the purposes of free movement in the broadest sense of the term – comes over and over again, as one of the main issues for examination by the Administrative Commission; yet, the outcome of those efforts has up to now been "miserable". It seems as if decisions on labour mobility or, in a way, on labour market policies at European level, which set up priorities as e.g. the creation (deepening and extension) of an ERA, are taken *elsewhere* whilst national authorities in the field of social security are unwilling – reluctant to contribute to removing obstacles, stemming from their domain or to find out efficient ways for the unhindered realization of labour – economic policies in a European environment (EU). It seems as if those decisions could be realized *unilaterally*, without the shared responsibility – contribution of the social security area (notwithstanding the latter's *in principle* national competence).

Obviously, the problems on *concepts and definitions* shall, sooner or later, draw the attention of the Administrative Commission since further issues may arise from the newly established notions in the context of both Title I and Title II of Regulation 883/2004. The said, newly adopted terminology substitutes all variants of the concept of "worker" for the formally seeming more general/uniform notions of "activity as an employed person" or "activity as a self-employed person" (Article 1(a) and (b)) and "a person pursuing an activity as an employed or self-employed person" (Article 11(2) and (3)(a)), mainly in the name of simplification as well as for attaining the balanced sharing of mobility's costs between national social security systems (Member States) involved (according to ECJ, the principle of *proportionate apportionment justice***)**. The issue is raised already, following EYWM with the forthcoming analysis of new forms of mobility vis-à-vis Community acquis, to start with (and/or in principle) on the basis of the above-mentioned questionnaire.

2. *At the search of the appropriate solutions in-between "over-regulation" and "deregulation"* (attention should be paid not to move from Community regulation as a whole).

"Overregulation" would be taken as meaning the attempt to re-insert within Regulation 883/2004 (or even its implementing Regulation, as accompanying detailed rules of procedures) of too selective – fragmented provisions, referring to each specific/individual case/type of mobility/activity encountered or to be encountered at EU level. An approach rejected as counter to the principle per se of simplification as well as that of modernisation. This is the reason why a series of Articles (special rules) under Title II of Regulation 1408/71 have been replaced by a few only provisions under the corresponding Title of Regulation 883/2004, followed, however by a very detailed transposition in the new implementing Regulation of the most representative ECJ's case-law criteria on subtle issues dealing with the legislation applicable in, more or less, complicated cases; yet, the situations described there under are far from featuring what would be perceived as *new forms* of mobility (or researchers' mobility).

A "*threatening – disguised challenge*" would be to move progressively and without being always conscious of such an evolution, to a European situation reigned by what could be called "deregulation", i.e. *alternatives/approaches outside Community coordination* (Regulations in force), putting an emphasis to "diversity" rather than to valid Community criteria (more or less general and uniform in nature), which have been developed by the Court's in-depth analyses, precisely because there is an urgent need (Community priority) to enhance free movement besides the fact that social security schemes differ and should continue to differ (domain of national competence), and furthermore given the Council's often rigid political position, even at the expense of more flexible Community practices.

Attention should be paid to the fact that under the existing as well as future Regulations there exist Community rules, criteria and exemptions. In respect of *new patterns* of mobility (still to be identified and/or determined), it is more suitable at least to start with putting an emphasis on the application of *Community criteria* also in respect of possible - legitimate exemptions, already provided for in the context of the coordination mechanism in force, so as to ensure that the latter keep as close as possible to the ratio legis – balanced functioning of the general and "cautiously" adopted special rules on the basis of the principle of proportionality. In such a way, derogations – legitimate exemptions have the chance/possibility to remain still within the spirit – in conformity with Community

legislature, guaranteeing the very (need for the) existence of Community Regulations, a prerequisite for the existence of general regulatory rules.

Consequently and from that perspective, Administrative Commission Recommendation No 16, especially molded at that period (12.12.1984) as an adequate response to mostly multinationals' pushing demand to provide for sufficient flexibility, as regards the applicable legislation to certain categories of highly skilled personnel, posted as a rule on behalf of those undertakings, could serve as an appropriate, short-term tool to be further elaborated in order to cover researchers as well as other similar yet *new* mobility/activity forms. Obviously, the Administrative Commission, trESS or other Instruments, in close collaboration with DG Research (following Greek Presidency's previous example), should further elaborate on new criteria that would fit the best researchers' patterns of activity, with a view to enhancing those persons' mobility and legal security.

3. *An in-depth study of existing Article 14(2) provisions* is needed (corresponding Articles of Regulation 883/2004 and its implementing Regulation), in order to point out *the reasons why* those rules are *not always* suitable for meeting the objectives of researchers' mobility, to find out the *precise aspects*, *terminology* used which make those provisions falling short of responding to situations featuring mobility in the field of research.

The other way round, *how could a "researcher" be treated*, following the broad definition adopted by the Commission for the purposes of the latter's Recommendation *on the European Charter for Researchers* and *on the Code of Conduct for the Recruitment of Researchers* (of 11 March 2005), in respect and for the purposes also of the objectives of Title II of the Regulation (1408/71), vis-à-vis the equally broad dimensions attributed by the Court (settled and extensive case-law) to the concept of "worker", in terms of Community coordination?

As it has already been stated, Regulation 883/2004 has neither brought a new approach to old complex, thus problematic situations nor has it improved the approach quite recently attempted (by the then Greek presidency and the Greek delegation subsequentoy) for the sake of researchers *expressis verbis;* in fact, the particular characteristics of the types of activity pursued by all actors involved in that domain (researchers, undertakings, organisations, Institutions-"employers and/or founders" under the definitions of the said Recommendation) are already known to a great extent and have previously been raised as pending issues or, at least, as questions which Member States treat (interpret and implement) in quite a divergent way.

So, we are actually facing a dilemma, i.e. we find ourselves in front of two extreme positions:

On the one hand, some delegations insist on treating *researchers* as common *workers*, seeing no reason for a slightly different, more flexible, even ad hoc approach; according to that position, researchers in the capacity of normal/typical *employed persons*, are deemed as always falling under the *lex loci laboris* principle, without facing any problem, difficulty or ambiguities and gaps in respect of the overall level of social protection they finally attain (are entitled to) at the very end of their professional career. Moreover, those persons are expected to succeed in pursuing a career in the field of research and not to be disappointed, contrary to what most case-studies seem to maintain as the most probable impact for the future.

On the other hand, a few delegations would not deny or would rather support the establishment of a new (separate-specific) European regulatory framework horizontally, for instance in the form of a Directive, for researchers as well as eventually other specific categories of workers, which could lead progressively, if not cautiously assessed, even to a full substitution – repeal of Title II provisions as a uniform set of general – special but not too fragmented rules.

4. *Available and valid information* on researchers' patterns of mobility – *its impact on EU's policy to make research an attractive career, a vital feature of the European strategy to stimulate economic and employment growth*.

3. General remarks

In order to understand mobility patterns in different Member States and within EU, an urgent need for statistical information is pointed out by a series of mobility of researcher's studies. When trying to search for data that could help starting a preliminary analysis of the state of art in the particular domain of social security coordination, or even to identify some best practices, the WP each time involved (is) will be faced with a systematic lack of statistical information in most countries. The lack of data is raised as a generalized problem in Europe with respect to mobility of researchers' studies. Seemingly, traditional available and comparable data sources (migration surveys, labour force surveys etc.) do not lead us to any or efficient (valid) information on researchers' mobility.

As it has been stressed, this is due mostly to the fact, that the category "researcher/scientist" cannot be properly identified through the traditionally used occupation clarifications. So much the worse, when trying to identify on solid grounds the social security criterion for the purposes of smoothly applying Title II provisions of Community Regulation (at present and in future). Moreover, mobility of researchers is a very particular phenomenon in which temporary, short-term flows are of great importance, but are not captured by migration statistics or any other traditional data source.

More specifically, for the purposes of Community coordination:

A full and documented collection of comprehensive statistical data concerning basic patterns of researchers' mobility in EU, diversifying between basic-substantial and accessory data, should indicatively focus on the following:

- the Member State of the researcher's and/or his/her family members' origin;
- the Member State of the researcher's place of employment/activity (lex loci laboris);
- the Member State of the researcher's and/or his/her family members' place of residence at the period the person concerned is pursuing an activity as a researcher:
    - non-coincidence of the place of activity and that of residence;
    - non-coincidence of the researcher's place of residence with that of his/her family members';
- essential concepts to be depicted – defined, such as:
    - "employer", "program", the employer's "place of business";
    - to verify the existence of eventual (implied) elements of "hiring" or "posting" as in the case of typical employed persons;
    - examining and/or establishing the appropriate (most suitable) links (correlations) between Title II decisive concepts and corresponding terminology

used in the ERA, such as "researchers", "employers", "funders", "appointment or employment", as already described and defined in the context of the *Definitions* (Section 3) for the purposes of the said Recommendation for researchers;
    - it goes without saying that a similar analysis should take place on corresponding, substantial concepts of Regulation 883/2004 and/or its implementing provisions;
- crucial data, amongst others: the research program/activity's duration and frequency, the researchers' profile, such as age, socio-cultural status.
- Identification of specific groups of researchers, taking into account their patterns of mobility and/or activity and classification of respective data sets. It is only through the creation of such an "inventory" that, for the purposes of Community coordination, the criterion of the "social security" "interest" of *a researcher* or *groups of researchers* could be efficiently defined and reinforced, serving also as a solid basis (a starting point) – a trustful perspective either for concluding an agreement between competent authorities of the Member States involved by virtue of existing Article 17 provisions of the Regulation (Article 16 correspondingly, under Regulation 883/2004) or for determining the scope of the rule falling closer to a certain type of researcher's activity – mobility.

The above-mentioned analysis should be based on a detailed, yet specialized questionnaire, focusing on real - factual data targeting the said questions, without mixing information regarding taxation or other similar legal issues.

The aim should be to identify ad hoc the individual/concrete pattern of mobility in the specific case of a researcher (as a unit or a group), for determining then the appropriate applicable legislation, thus avoiding the risk of either rigid regulations or deregulation and/or oversimplification.

In fact, taking seriously into account the issues raised selectively in "*Mobility in Europe: The researcher's viewpoint*", what seems crucial and predominant to Lisbon strategy is *"not more, but better mobility"*, which means that "*EU policy should in the first place serve mobility behaviour that leads to a better future, to better living and working conditions of European citizens; the ambition should be to optimise rather than maximise mobility – the debate should not focus on quantitative mobility figures but on qualitative aspects of mobility, since EU should focus more on labour market mobility than on geographic mobility*".

Do we really need a new – specific European instrument for researchers: a European supplementary pension scheme?

Given the high political importance attributed to researchers' *efficient mobility* and the above-mentioned gaps of protection – coordination, due to researchers' particular features of activity/mobility, the idea of establishing a *European supplementary pension scheme* should not be rejected *a priori* or *in principle*.

Such an initiative, as the last resort at least, if all other approaches prove impossible, would have a political added value of high significance, functioning as EU's active commitment in the interest (legal continuity and security) of researchers, to safeguard and promote incentives to scientific research, labour market mobility – productive incentives, in the way

another political European decision functioned, *ceteris paribus*, for all mobile insured citizens in the domain of Community coordination. Thus, in the way the introduction of a European Health Insurance Card (EHIC) has from the very beginning been welcomed, even in its simple-preliminary form, as a very tangible manifestation of an initiative by the EU which would have real, practical benefits for its citizens – *"more (another piece of) Europe in our pockets*", the establishment of a European supplementary pension fund for researchers would be equally perceived as another evidence for EU's real intentions to fully establish ERA as soon as possible.