WORKING SEMINAR ON THE REFORM OF REGULATION 1408/71
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The Greek Contribution

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MODERNIZING AND IMPROVING OUR COORDINATION

Welcoming the really brave initiative of the Finnish Presidency to invite us all to discuss in depth and for the first time such a "hot" and daring topic as the Commission's concrete

proposal we would like from the very beginning to declare that coordination per se is a common goal par excellence.

So reacting spontaneously to the first question seeking to reveal the distance between Commission's targets and the ones sought by each Member State seperately, we feel almost obliged to state that talking about coordination we would better forget purely national priorities or interests. We should instead contribute to a debate seeking as an outcome the promotion of a common goal, convergence in interpreting and applying the means out of which our different social security schemes could succeed in guaranteeing the social rights of European citizens when moving within a common space, the European Union.

Given that such a discussion is just starting we realize that we are confronted with a twofold difficulty. As a process, revising the Regulation straitforward in the framework of the Social Questions Group (at the Council's level) is a completely new experience and also a politically delicate initiative prejudicing greatly our way of thinking and our positions when acting on a mixed capacity, as experts and co-deciding factors, improvising more or less for the first time.

On the other hand, such a perplex and difficult exercise is taking place in parallel with the work and tasks for further interpretation and/or modification of the existing Regulation in the framework of the Administrative Commission where the spirit and approach is almost a "conservative", hesitating and time-consuming one.

We are so witnessing a split since in the one instance, stuck in our defensive attitude, we are "contributing" to the perpetuation of the perplexity and traditional structure of the Regulation (EEC) 1408/71 whilst in the other we are expected to adopt a modern attitude, a broader mind and flexibility.

Inevitably we envisage the dilemma which way towards simplification and/or reform would be worth following:

- Based on the existing Regulation to start integrating into its corpus the most recent, general and outstanding guidelines of the case-law or other interrelated Community Instruments (by adding or omitting principles and rules)?
- Or starting from the very beginning as the Commission has chosen, to change the whole structure and to some extent the economy of the coordinating Instrument, establishing a completely new Regulation?

Risking the second alternative our common goal should be to dare make a further step towards changing mentality and the new coordinating system's philosophy. It is not worth spending time if we were finally to come back to outdated rules and mechanisms which already exist in the actual Regulation. Such an attempt is the least recommended under the proposal's new structure.

Besides, safeguarding and modernising coordination is a challenge to give the great leap forward and to upgrade it into a substantive social protection Instrument for the insured persons disposing the right of free movement and stay within the EU.

1. THE BASIC PRINCIPLES OF THE REFORM

1.1. Revision and simplification of Community coordination: general goals

A possible reform of the existing Community Regulations should at least meet the broader aims mentioned in the introductory guidelines of the European Commission's Action Plan and the subsequent explanatory memorandum attached to the present proposal. It shouldn't escape us that coordination is a dynamic process in need of constant adjustment, clarification or analytical interpretation. This explains on the one hand why the existing rules are so complex and on the other makes the aim of simplification unfounded, even impossible or out of the question if we consider how difficult it is to coordinate national social security schemes continuously evolving or social protection policy even in the national context.

The development of the acquis communautaire is proof of its ability to evolve into a system of Community rules which can take on board any changes in social security schemes. This flexibility and versatility of the acquis is not automatic but the result of minor or timely interventions when the conditions are right or when this is made necessary by Community decisions. By way of introduction into this simplification process, it is important to admit and also to stress the fact that any complexity or malfunctioning during the implementation of the coordinating provisions is due to a large extent to the diversity and complex nature (even for historical reasons) of these (potentially) coordinated national legislations, to the lack of readiness on the part of national Administrations and competent services and to the reluctance of every Member State to give up its sovereignty (implicitly the principle of territoriality) thus complying with the letter and the spirit of the general coordination principles and methods.

This can be seen from the plethora of questions referred for preliminary ruling which denotes not so much a difficulty with interpretation but the intention of the Member States that the transposition of Community law into national law be affected at the smallest possible financial cost and with the fewest organizational changes and adjustments.

How otherwise could we explain this weakness or inadequacy as regards coordination which presupposes diversity, especially at a time when the national systems in trying to meet the Community macro-economic dictates gradually tend to converge not only in the case of organization but also of financing.

This is clearly demonstrated by the ever more frequent invocation of Article 10 (ex 5) of the Treaty by the Court of Justice as ultimum refugium, despite the refusal of the Member States to convert a formal and primarily legal obligation into a substantive political will to abide by the rulings of such an advanced Community Instrument (to exercise a broader social policy). For the coordination to be thorough it indirectly plays a harmonizing role in cases where the maintaining of differences reduces the level of social protection and hinders free movement.

Undoubtedly, the effective coordination of the various social security schemes has also to be considered as the corner stone for the implementation of all the fundamental freedoms enshrined in the Treaty, as the essential mechanism and prerequisite which will encourage European citizens intra-Community mobility, providing them with invaluable support in seeking and finding employment in a united socio-economic space. Moreover, in all the political texts of the European Commission laying down the Community strategy for the completion of the Internal Market and the promotion of employment, coordination is indirectly or directly considered a precondition for the realization of free movement in

practice, while the full and continuous protection of persons moving within the EU is seen as a key point of European cohesion and integration.

Bearing all the above in mind, we believe that any attempt to revise or simplify the Regulation should also be governed by the aim of not limiting the personal and material scope of the existing coordination mechanism at a time when the personal scope of primary law in the corresponding domains has been considerably extended (new Articles 17 and 18 of the Treaty). However, such a risk is omnipresent although latent because the material scope could be restricted in practice,

- either due to the substantial and constant development of supplementary/occupational schemes which although progressively substituting statutory social security, do not fall automatically within the coordination mechanism (Article 1 (j) "legislation")
- or due to the gradual appearance of "new" types of benefits destined to cover traditional or contemporary social risks under a new name or breaking down into (newly created) branches according to national legislation which makes it increasingly difficult to include them in the binding list in Article 4 para 1 or the special coordination rules of the Regulation even though these benefits fall within the material scope of coordination as far as their content and objectives are concerned
- or, finally, due to the upward trend to grant the statutory social security/protection in the form of non-contributory benefits which leads to the extension of the special regime of limited coordination at Community level (Article 10a and Annex IIa).

It is undoubtedly interesting to note that the Commission's initiative for simplification and/or reform of the Regulation coincides with the effort undertaken by the Member States to introduce broader adjustments into their national schemes which may seem convergent from a macro-economic point of view and within the framework of the European Guidelines on "Modernizing and Improving Social Protection", but are quite divergent (even historically and culturally) in their selected form of organization and financing. These developments, together with the fact that the Member States have not yet become aware of or have not taken seriously basic, yet extremely important obligations to undertake certain actions and political functions which form part of the so-called "cross-border cooperation", means that the responsibility of the Community Instruments which provide for and control the implementation of Community law is even greater and the attempt of simplification a two-edged weapon. What may but should never happen is an oversimplification, eliminating the whole effort of its "raison d' etre". The nullification or minimization of the subject matter to be coordinated on the one hand, or again the simplistic approach downgrading review to mere technical questions, are both undesirable and a stalemate evolution.

The aforementioned remarks and our more specific comments on the proposal's main topics serve the following purpose:

- Firstly, by pointing out the unusual set of circumstances to stress the priority that must be given regardless of the end result of this global revision to the strengthening and establishment of all, expressly formulated general principles underlying Community coordination as a broader social protection instrument.
- This function has been carried out up to now by case-law instead of the Community legislator. By filling in even formal gaps it proved the soundness of the claim made by the Community judge, i.e. that in essence there are no gaps in Community law; an approach which best reveals the global and multi-dimensional nature of the acquis communautaire, thus sometimes considered as complicated.

- Secondly, to show that another important task is to find and establish at a Community level the most effective procedure between Member States which will guarantee a long-term compliance with the general principles and particular rules of secondary law while drafting and implementing national legislation. In this way, the competent Institutions or other actors will acquire a better understanding of the coordination elements and perceive coordination as a common political choice and commitment which can only be enacted by gradually revising the restrictive logic of national legislation and the "entropy" characterizing all national social security schemes.

We believe it is time we gave some serious thought as to how (according to which principles and procedures) we could cover this social deficit in coordination regardless of whether this is done in the framework of a micro- or macro-amendment of the Regulations or it could also be linked with major reforms of primary and secondary law jointly. It is true that the social deficit arises when the provisions related to the coordination mechanism are applied and it is only later and ad hoc covered by case-law so as to immediately interpret any rule (national or Community) in the light of the fundamental freedoms enshrined in the Treaty which give full meaning and political content to the right of free movement and stay within the EU to all European citizens.

What is needed in other words, is an integrated political initiative, an indirect also way of creating the conditions for the extension of the scope and the further revision of this crucial sector of the Treaty, that the European Commission and all parties concerned must start developing systematically and with a long-term perspective, initiating eventually a deeper political rather than technical debate and inventing new or better performing fora which would explore ways to escape the existing boundaries of legalistic or administrative approaches.

1.2. Clarifying and strengthening the principles of coordination

Undoubtedly the safest way to secure rights but also to correctly interpret the provisions in force and make them completely transparent is by clarifying and strengthening the general principles of coordination. One should inevitably start with Title I which should include as a harmonious whole as many secondary law principles as possible, especially those that have resulted from case-law. It is a fact that the more generalized enactment of rules, even those repeatedly stated by the Court when applying provisions ad hoc in specific cases, may entail exaggeration or oversimplification (an unjustified or a disproportionate intervention). The expected overall benefit however is not only far greater than the above-mentioned risks but it is also perfectly legitimate and in accordance with the fundamental principles and objectives of the Treaty. In this way one achieves not only the generalized application of the acquis but the results for those interested are uniform despite the existing differences. What is more important is that the defences of the Community mechanism against marginal differences and national or partial escape hatches artfully introduced by the national legislator are fortified.

The clarification and systematic presentation of general principles in Title I greatly helps simplification and full transparency so that general provisions are not later revoked because of their specialized application in the framework of the various Chapters of the Regulation with the exception of certain cases where the special wording falls within the general spirit of the Community legislator and tries, precisely because of existing peculiarities, to provide legal security while taking into account the structure of the system.

By reinforcing the general principles, the presence of the Community judge and his interventions are brought back to their normal levels. The Community judge is attributed his proper role (laid down in the Treaty) and the current situation where he gradually takes the place of the Community legislator, is reversed. The ad hoc and fragmented application of the general principles referred to and imposed by case-law makes the task undertaken by the Court of Justice increasingly difficult and dangerous while at the same time it reveals the lack of common political will even in the limited sector of Community social security law.

We believe that the following principles should be included in Title I in a clear and systematic way:

- the principle of equality of treatment strengthened and complemented with the assimilation of facts and events;
- the principle of the "most favourable treatment" (the "Petroni principle");
- the principle of securing the "award" of all insurance benefits and
- the establishment of a clear demarcation of the links between the Regulation and International Conventions on social security, taking seriously their integration into national legislation and the subsequent impact of the principle of the most favourable (national) treatment.

1.2.1. Strengthening the principle of equality of treatment and complementing it with the assimilation of facts and events

The Community decision to apply a coordination policy to social security, despite the fact that its complete integrated use indirectly and systematically leads national schemes to a greater convergence of aims and policies, because it still fails to cover the lack of a common European social policy or eliminate the effects of different national provisions inevitably, gives rise to cases of discriminatory treatment.

However, there is a limit to the lack of harmonization or the discretionary power possessed by the Member States to freely intervene in their internal social protection sector, since they can in no way hamper the application of the fundamental principles of Community law in the given sector.

The principle of equality of treatment is fundamental to coordination and is being applied more often and more extensively in case-law. Its strengthening is considered necessary so that it be harmonized with the ECJ guidelines, i.e. the more general principle of equality it has recourse to more often and systematically, to give coordination substance or to reveal any form of covert discrimination in national legislation (even a rebours) and to give a boost to the free movement of persons (the ultimate goal). This strengthening should be made now, given that its scope has substantially been extended by the Treaty, above and beyond the initial purely economic functions and aims of free movement.

Adopting the assimilation of facts or events (a principle directly emanating from jurisprudence in the domain of social security for migrant workers) as a general complementary principle for Title I would be an important step, ensuring the homogeneous application of a rule which the Court of Justice invariably comes back to. We could safely say that this is the main guideline used by case-law, especially in cases where special coordination has not been foreseen or when there is a concordance of coordinated social

security branches or schemes in one country with non-coordinated ones in another. The same practice is followed when the whole structure and organization of social security for various historical, social and profoundly cultural reasons, does not lead to identical or absolutely equivalent forms of social protection in each Member State; thus by assimilating facts or events is the only way the Community judge (in future the legislator) has to overcome these substantial differences which are latent.

Of course any difficulties or the risk of an unrestricted or uncontrolled application of the assimilation principle could be possibly dealt with by recording the criteria (the Administrative Commission could undertake this task) according to which facts, actual events or benefits are to be considered as equivalent provided they have occurred or been sustained anywhere within the Community.

The initiatives undertaken by the Union in the wider sector of social protection policy should also be taken into consideration in order to locate facts or events (potentially benefits) which could create future social rights. We are beginning to see this happen. It is the corollary of the European Strategy for Employment as, at a national level replacing passive policy measures (traditional social security benefits) with active support measures, i.e. benefits in kind or new procedures and/or programmes is now being encouraged. The latter require coordination so that the rights of migrant potentially active persons can be safeguarded (at every stage). The extended principle of equal treatment is bound to play a decisive role in the materialization of more sectors of Community competence.

Finally, by granting this principle the autonomy of a fundamental right, the sector of social security for migrant persons would take on the true spirit of the Community provisions which would greatly contribute to making the idea of free movement and stay in a single area (the EU) a reality.

1.2.2. The generalized application of the principle of the "most favourable (national) treatment"

The aforementioned principle, also known as maintenance of acquired rights and expectations or as forbidding the loss or reduction of social security rights has been dubbed the "Petroni" principle and is already being applied in a limited or specialized way in certain branches or Chapters of the Regulation.

We believe that the principle of the most favourable treatment should be established with certain explicit exceptions of course as a principle of the Regulation with general force, for the sake of simplification, transparency, legal security and the uniform and controlled application of Community law by national Administrations. In this way it will be made abundantly clear to all, that the rules of coordination, instituted on the basis of Article 42 (ex 51) of the Treaty must at least provide for the maintenance of migrant persons acquired rights and expectations (rights in the course of acquisition).

In other words, it is forbidden to deprive the migrant "worker" of social privileges (rights or expectations) which he is entitled to only according to national law. If this is not the case then the person concerned would be obliged to "pay" for the right of free movement conceded to him by virtue of the Treaty, by losing specific social security rights he acquired under different legislations in the Member States concerned.

Establishing the above interpretation as a general principle of coordination simply specifies and makes the general application of what has been repeatedly pointed out by the European Court of Justice necessary ("it would run counter to Articles 48 and 51 of the Treaty if the provisions for the improvement of free movement of workers were to end up obstructing it by depriving interested persons privileges which they would have enjoyed had the provisions of the Treaty and the provisions implementing the former not entered into force").

The "heightened awareness of the right to free movement and exercising of this right", the "greater transparency of coordination rules achieved thereof", the aim to achieve "better cooperation and increased responsibilities on the part of national authorities", (see the Commission's Action Plan on Free Movement), make it imperative for both migrant "workers" and national Administrations to know the correct interpretation mentioned above and to apply this explicit rule in the context of the coordination mechanism. The "spirit of the Community legislator" cannot possibly depend on the interpretation given by each competent administrative body separately.

On the contrary, there should be an overriding, uniformly applied rule according to which "in cases where the use of provisions of Community Regulations signifies the loss or reduction of social benefits to which an employed or self-employed person is entitled to according to the national legislation of a Member State, the Regulations shall not apply in that part". Only then can the above-mentioned political commitment be translated into "effective action" and only in this way will the involved bodies realize that "Article 51 of the Treaty and Regulation (EEC) 1408/71 do not forbid the national body to grant, by applying national law, benefits which exceed the minimum protection level guaranteed by Community law".

1.2.3. The principle of securing the "award" of all insurance benefits

There is a need to also formally safeguard this principle which is "somewhat broader" than the right of maintaining acquired rights, and is otherwise called the exportability of insurance benefits. It is a corollary of the importance attributed by Community law to the link between contributions and benefits and as such can be seen as a general principle which runs through Community law on the social security of migrant "workers" and best expresses and complements the spirit of Article 42 (ex 51) of the Treaty (see the advocate general Kosmas' comments in case "Molenaar").

We believe that we should seriously concern ourselves with the underlying reason why such a proposal is made, i.e. to introduce into secondary Community legislation a principle tacitly followed and recommended by standard case-law. The wording of the rule should also take into account the two specific interrelated principles put forward in the Commission's plan that is the principle of aggregating insurance periods and the right of the exportability of benefits.

Specifying this principle (together or separately) would complete the real spirit of Article 42 (ex 51) of the Treaty which by stating the measures that need to be "mainly" adopted by the Council, provides for a minimum degree of intervention, (see the ECJ ruling in the "Patteri" case). Also, the application of this principle would fully reflect the case-law guidelines which move within the spirit of extensively applying the principle of maintenance of acquired rights for three main reasons:

- firstly, it would highlight the contribution of the European "worker", i.e. the European citizen to the economy as well as the of the social security system of the Member States where he/she exercised his/her professional activity;
- secondly, it would underscore the fact that the principle of solidarity governing the compulsory statutory schemes is not one-sided;
- thirdly, it would cover all social security benefits, both in cash and in kind, because the latter are just as important as the former, and are not really different since they are both meant to cover vital needs of the insured person (see the above-mentioned proposals made by the advocate general Kosmas).

We believe that structuring and securing the general principles of coordination in this way, i.e. as a single set of principles included in Title I which best express the spirit and the whole economy of coordination is truly the golden mean between Community and national competence in this specific sector of Community law.

Showing respect to the differences, even in the latent national "identity" reflected in the way a social protection system is organized (a trend reinforced by the Treaty of Amsterdam) should not lead to protective measures or an introversion of the national system. On the contrary, only when the approach towards fundamental principles of primary law and their invocation overcomes the fear of violating a largely uncertain demarcation of specific sectors of Community competence and opts for co-existence (this being the essential message given by case-law) will it be able to consistently serve the broader idea of free movement and stay of persons. This is a right and an idea which can be realized only by upgrading the right of equality and giving it the status of an autonomous fundamental right.

2. THE MOST IMPORTANT ASPECTS OF THE COMMISSION'S PROPOSAL

2.1. Title I

2.1.1. Extending the personal scope

We truly believe, not only for simplification purposes, that coordination should cover by means of an explicit provision, all persons insured (now and in the past) under the social security legislation of a Member State. Besides, this aim is already achieved in many cases by the existing regime for certain branches or social security schemes. However, the complete and formal extension would ensure that the new regulatory arrangements serve in a uniform and complete manner as an efficient social security Instrument which will be compliant with the strategic goals of the Single Market as well as the rules of the Treaty on citizenship.

It is true that at this time phase the coordination provisions cannot be limited only to the free movement of the active population in the narrow sense of the word, but intends to guarantee a constant and satisfactory social protection network by maintaining the social security rights of any person who being a European citizen has the right to move or stay for whatever reason within the European Union. This is a primary right, the first right inextricably linked to the new legal status of European citizenship.

However, bearing in mind the social security criterion for the inclusion or exclusion of a person from the coordination mechanism and the stark differences in the personal scope of

national social security schemes, it would be difficult, notwithstanding the structural changes in the new text of the Regulation, to make reference (together or in parallel) to the existing division of beneficiaries into employed persons, self-employed persons and members of their family.

For reasons of transparency however and legal security it would be important first to examine in a consistent and cohesive way the correspondence between the scope of the Treaty (Articles 17 and 18, ex 8 and 8A) and the new Regulation on the one hand and the three Directives of the Council concerning the right of stay on the other, so that the inclusion of this broader category of insured persons is not isolated or fragmented.

As regards the new political framework of the Treaty, the main guidelines of the Commission's proposals aim at creating the most uniform regime for free movement in the sense of Article 18 (ex 8A), addressed to all European citizens, and providing a harmonized approach as regards their exercising the right of stay. Its quite acceptable limitations must be defined clearly so that the full and complete establishment of the free movement of persons will not one day due to the circumstances be nothing but "a conventional lie".

Having the above-mentioned criteria as our immediate political priority and bearing in mind that

- interested persons (in the general sense, also meaning those to be included) cannot derive from the simple implementation of the Regulation any right concerning entry, stay or exercise of an economic activity in another Member State, nor can they acquire any right of free movement by invoking the implementation of Community provisions;
- the actual implementation of the Regulation is independent of matters concerning the legal status of the interested person as far as the right of entry into or stay within the Union is concerned, as the terms "residence" and "stay" in the sense of Article 1 (h) and (i) of the Regulation (new Article 7 (f) and (g)) and the case-law of the ECJ cover objective concepts focusing on "duration" and "continuity";
- henceforth, an EU national, legally residing within the territory of another Member State is subject to the scope of the Treaty on European citizenship and as citizen of the Union (Article 8 para 2) enjoys all the rights and has all the obligations foreseen by the Treaty, so the right provided by virtue if Article 12 is not subject to discrimination because of citizenship within the scope of Community law,

extending the scope of the Regulation whilst maintaining the conditions set forth by the Directives on the right of stay or a simple reference to their regime existing in parallel, would in the very least mean violating the nature and the global economy of the coordination system. It would also distort the meaning of Article 18 (ex 8A) of the Treaty which introduces a substantial innovation into the system of the latter by separating for the first time the free movement of persons from the other freedoms and by upgrading it into a primary right of free movement and stay.

The Commission's proposal looked at from a different perspective and taking for granted that the implementation of the new coordinating system to all "insured persons" is a major step towards the attempted simplification/reform we would like to raise for further in depth discussion two issues that are not clear as to their actual and global repercussions:

- With regard to third country nationals, for reasons stated in the Commission's explanatory memorandum to the then specific proposal as well as for the sake of an essential simplification and uniformity, we believe that separating such a category of

insured persons from the personal scope which is based on this conception could prove a rather questionable and hardly manageable attempt, moreover since their inclusion must never be confused or interrelated with the creation of any new right concerning their free movement or stay in the EU.

- As far as the very redaction of Article 1 is concerned, we would like to stress the need for a further study of its final impact, since it implies an essential distinction between directly insured and members of the family/survivors (seen also in combination with the corresponding definitions of the said terms under Article 7). It is therefore important to point out from the very beginning the implementation of each Title (how and to what extent) to these categories of "insured persons", attributed different rights under national social security legislation, bearing also in mind the eventual repercussions of the ECJ's ruling in "Cabanis – Issarte" case.

Our major concern, even for the sake of mere simplification, is that the abolition of the present fragmented structure, based on specific rules (per branch) concerning different groups of insured persons should not be undertaken only superficially and in principle. This is a risk we inevitably envisage if we end up introducing in parallel to general principles and definitions a range of substantially diverging (in their ad hoc implementation) specific rules that practically reflect the different rights attributed by the existing provisions to the named different categories of insured persons actually included in Regulation (EEC) 1408/71.

If generalization and simplification of terminology still implies the diversification in practice, we strongly fear that the proposed rules and principles risk neither to be understood properly nor to be applied in a safe way according to the spirit of the Community legislator.

2.1.2. The flexibility of the material scope: is the list of social security branches indicative or binding?

For a start, in our opinion there is here a problem of substance hidden behind a methodological question. If our aim is to make the coordination framework more comprehensive and dynamic and not to avoid it (depending on the situation) or reduce it substantially, and given the broad legal interpretation of the term "social security benefit", we believe that any in principle enumeration of specific social security branches is up to a certain extent conventional and finite, since it has inevitably been affected by the particular socio-economic circumstances. Consequently, since such a classification runs the risk of being indicative in practice, the question posed is made redundant and the dilemma ceases to exist.

However, as a matter of principle, if this question were asked, we would agree with what the Commission suggested, that the indicative character of the list in new Article 2 para 1 should be confirmed. Moreover, attention should also be paid to the functioning so far and the de facto "flexibility" of the "binding" list of traditional social security branches and to the criteria set by the ECJ for the inclusion of a benefit within the material scope of the Regulation.

Our final (common) position on this specific issue of major importance must be based on certain substantive assumptions established in case-law. This is almost compulsory because when a benefit is defined as a "social security" benefit what weighs heavily in this

identification is, amongst others, whether the latter falls within one of the branches of social security included in the "exhaustive" (in principle) list in actual Article 4 para 1 of the Regulation.

However, case-law has invariably shown that subsuming a benefit within the material scope of the Regulation depends essentially on its components, its primary target and the overall qualifying conditions for entitlement. In no way does it depend on its (formal) description according to autonomous criteria of national legislation. Of course this specific distinction is examined together with social welfare (actual Article 4 para 4) or with the realm of special non-contributory benefits which are obviously more vague (Article 4 para 2a).

It is very important as far as coordinating provisions are concerned, to recognize that the concept of social security, being a concept with both an independent and a Community content, should not be confused with the specific social security branches in the presently existing restricted list in Article 4, because it is based on a rule of higher formal force, Article 42 (ex 51) of the Treaty. Consequently the Community legislator refers to social security as a generic concept in order to then enumerate the specific kinds of insurance risks for which he has instituted coordinating rules.

One can also see its comprehensive nature by the fact that this list which had been first included in the old Regulation No 3, contains the most typical and important social security branches of the time (using International Convention No 102 of the ILO as a reference point) and has left out of the special coordination provisions certain national arrangements which were made much later on. Yet, the latter do not cover separate, let alone new social risks but cause problems with classification as they are innovative interventions made by the Member States concerning organization and financing (sometimes deliberate avoidance tactics).

If we realize that the Community legislator did not try to "freeze" abstract concepts that are in a State of flux, a wise decision consistent with the function and range of the above-mentioned concepts which take on a special meaning when applied by the Community legislator or judge and the aim to coordinate different and rapidly changing systems due to legal and social circumstances, we can ascertain there cannot be a substantial gap according to case-law with a few rare exceptions. The above holds true because whenever a benefit lies between article 42 (ex 51) of the Treaty and the list of Article 4 para 1 of the Regulation, coordination is once again achieved in accordance with the Treaty provisions and the general principles of Community law.

In those rare cases however for which legal security requires covering the located gap, i.e. when the classification under a national arrangement is particularly troublesome or when its coordination causes sizeable or even insurmountable difficulties, the problem could be solved separately or in groups of similar types of benefits (either by extending the existing list itself or by making positive entries per country in an Annex).

An interpretative Decision of the Administrative Commission could solve minor coordination problems just as effectively. We will have to look up these Decisions more and more often in the future with greater diligence since case-law repeatedly refers to enhanced cooperation between involved or potentially involved national Authorities pursuant to Article 10 (ex 5) of the Treaty.

The difficulty of coordination in the future should be deemed as the starting point in our discussion. For the personal and/or material scope not to shrink any further what should be done first, before any amendments are made to the Regulation and even in spite of them, is to evaluate the problems emanating from the coordinating mechanism or to make sure that new forms of protection/organization are compatible with other (national) systems of social security by always catering for this cross-border element/situation.

2.1.2.1. Specific remarks in combination with other related provisions

a) The proposed redaction of Article 2 para 1 might be inconsistent with the definition of the term "legislation" (Article 7 (h)) which still refers to the "branches" covered by the said article. Anyway, since para 1 is expressly referring to "all social security legislations", there is no doubt that the omitted terms "branch" or "insurance" are obviously implied, given the up-to-date structure of national social security schemes.

b) With regard to the suppression of any express reference to special non-contributory benefits (actual Article 4 para 2a), we believe that the latter are undoubtedly included under the suggested para 2 which covers equally contributory as well as non-contributory social security schemes/benefits.

Moreover, such a proposal reinforces the application of general coordinating principles and rules to all such types of schemes/benefits, an exceptional and specialized mechanism of coordination being restricted only to the scope of new Article 55 (which inevitably needs further study and discussion in the light of the present debate's elements and criteria elaborated in the framework of the Administrative Commission).

It is true that given the contemporary as well as improvising initiatives influencing the structure, financing and the types of social protection in a national context, a modern coordinating mechanism either goes along with flexibility and adaptability or ceases to exist and to function in the way imposed by different sectors of the Treaty and subsequent Instruments related to the Commission's political commitments and strategies (i.e. on Employment, Social and Economic Integration, Cohesion etc.).

2.1.3. Clarification and review of definitions: preliminary remarks

Since secondary law instituted by virtue of Article 42 (ex 51) of the Treaty is related to the coordination of national social security schemes, any definitions referring to the different categories of insured persons should show in the most comprehensive way the presence and the type of the social security criterion used in accordance with the expanding teleological interpretation given to it by case-law. The aim of definitions is to provide clarity, transparency and legal security as regards the determination of the personal and the range of the material scope of the Regulation.

Making use of our experience of the problems arising from the implementation of the Regulation, these definitions should be construed as guidelines, a function which could also be served on an ad hoc basis by interpretative Decisions or Recommendations of the Administrative Commission or analytical memoranda of its Secretariat with its full members (government representatives) undertaking to send them on to the national Administrations in the form of analytical circular letters and adapted to the peculiar situation in each Member State.

It goes without saying that the Community legislator must change the wording of all concept definitions that have been the subject of case-law and even introduce new ones where the Court included in the material scope a new kind of benefit as an insurance benefit (e.g. pre-retirement benefits).

When the Community legislator rewords the Community content of certain concepts he must not stray from the spirit of the acquis, which is constantly extended when it is called upon to act in the social and economic sphere during the time period when harmonization has not yet been achieved (see the main thrust of the Action Plans on the Single Market and Free Movement of Persons or the European Employment Strategy).

2.1.3.1. The concept of "legislation": how flexible and comprehensive is the material scope?

The attempted changes in the European social security schemes influence our opinion of the general concept definitions, especially as regards the term "legislation", bearing also in mind the character and the role attributed to the list of social security branches or other various forms of social protection to be covered by the Regulation.

The concept of "legislation" in secondary law is surely very broad. This can be seen by the very comprehensive definition referred to in Article 1 (j) and the content given to it by standard ECJ jurisprudence due the historic changes made to the material scope of the Regulation. The wide-ranging nature of this term can also be seen from the wording of the third recital of Council Directive 98/49/EC which was recently adopted. It is stated therein that the current coordination system, despite the explicit exclusion of contractual supplementary schemes from it, does concern those covered by the term "legislation", or the ones inserted following a declaration of the Member State concerned.

Given, however, the very specific and limited range of the sui generis coordinating regime established by the above Directive, which aims to protect the supplementary pension rights of migrant employed and self-employed persons, we should examine closely whether the objectives of Articles 39, 42, 43 and 49 (ex 48, 51, 52 and 59) of the Treaty on the coordination of contractual provisions are actually being met.

Taking into account the ever increasing role of compulsory contractual schemes providing for supplementary or even basic pension benefits and the resort to private law methods of financing and/or organization with regard to certain branches or sectors of social security, the problem is how to offer real and constant protection to those rights which are acquired or in course of acquisition by a large number of migrant persons. The need for protection is made even greater by the legal doubt increasingly expressed about the areas of Community competence which includes supplementary protection (social security law or competition law under the Treaty). The widely accepted view that has been established by case-law is that when supplementary/occupational schemes fall within the area of social security, they automatically fall within the scope of Article 42 (ex 51) of the Treaty.

This is true in most cases, bearing in mind that these systems are developing due to historical socio-economic events, into substitutes for traditional statutory social security schemes. This trend is reflected in certain national legal orders where national jurisdiction has grouped together both basic (legal) and supplementary (conventional) social protection

schemes, thus recognizing that the social security provisions may differ in their origin but are governed by common rules and principles. This is particularly so when the contractual (supplementary) provisions are regarded by law as pension insurance schemes in cases where social security does not grant satisfactory benefits and when compulsory affiliation and subsequently the principle of solidarity is of vital importance for their existence and inclusion in the social security sphere.

If we also take into consideration the great importance attached by Community Instruments and other international Organizations (directly or indirectly) to supplementary protection, we can conclude that Directive No 98/49/EEC, which was adopted after discussions which lasted over a decade, constitutes for the time being a framework which does not make possible the elimination of all obstacles to free movement.

At an international level, contractual supplementary/occupational provisions form part of the acquired rights of the European social model and are generally included with a view to achieving a high level of social protection (Article 2 (ex 2) of the Treaty).

When the Community legislator forces the competent national Authorities, only by invoking the fundamental articles and principles of the Treaty, to take into account events or periods (of employment and/or insurance) that have taken place within the Community and when case-law rejects the possibility of substantial lacunae being created in the Community acquis, inevitably the following question arises: how is it possible that the principle of maintaining acquired rights or those in course of acquisition is still violated, that expectations dwindle and that the establishment of free movement of persons is practically obstructed ?

Consequently, we consider it wise from the Commission's part to revise the definition of the term "legislation" (Article 7 (h)) so as to include expressly all "contractual provisions which have been subject of a decision by the public Authorities rendering them compulsory or extending their scope", extending in that way coordination to those contractual schemes at least which possess the necessary characteristics and meet the objectives of statutory systems. This initiative is of an outmost importance given that the recent painfully adopted Directive No 98/49/EEC does not foresee the most important and basic element of a coordination mechanism, the rough aggregation of previous insurance periods (or of contributions) under any appropriate/corresponding contractual provision, nor does it guarantee a uniform implementation of the principle of maintenance of acquired rights, the latter being linked only to the principle of equality of treatment.

2.1.3.2. The terms "insured person" and "member of the family"

a) Taking into consideration that the term "insured person" is the outcome of a series of various ECJ rulings stressing the decisive role of the social security criterion in the determination of the personal scope of secondary law, we think it is appropriate to be clearly stated that such a status is also acquired when the person concerned complies with the substantive conditions laid down objectively by the social security scheme applicable to him even if the steps for affiliation to that scheme have not been completed (case 39/76 "Mouthaan").

b) With regard to the suggested definition for the concept "member of the family" and apart from the above-mentioned concerns on the impact of a such a distinction between directly

and indirectly insured persons, we think that an analytical and global approach of the recent case-law would elucidate all its dimensions in the light of other principles of Community law.

More specifically, these terms should be interpreted following the conclusions to be drawn mainly from ECJ's ruling in the cases "Cabanis – Issarte", "Martinez Sala", "Gomez Rivero" and "Delavant".

With regard to "Delavant", it is worth explaining on what grounds the so defined members of the family are treated in a different way as regards the branch of sickness (Title III, Chapter 1) while for the directly insured the coverage provided in the framework of every coordinated branch of insurance is continuous and uniform. How this is considered compatible with the principle of maintenance of acquired rights or those in course of acquisition (according to the unique legislation applicable to the directly insured).

In the other words, if a "member of the family" is by definition an indirectly insured person on which legal basis one can still intervene by changing, either positively or negatively, as an outcome the "insured persons" per se extend of social security protection taken as a whole? Is this ad hoc derogation from the principle of one applicable legislation justified even for the sake of equal treatment with the nationals of the place of residence or eventually in the name of the "most favourable national treatment"? The equal treatment of all persons with derived rights with regard to all types of benefits does not consist a simpler and fairer solution in the name of free movement?

If we have not yet proceeded to the extension of all basic principles (totalisation/exportation) of coordination to the broader category of insured persons (including active and non-active on an equal footing), it should not be permitted to substitute an intermediate Institution (of the place of residence), responsible only for determining the methods or modes of provision of benefits, for the really competent, the one whose conditions of affiliation have already been satisfied by the directly insured person.

2.2. Title II

2.2.1. Positive elements

With regard to Title II, the first positive elements we could point out are in principle:

a) The maintenance and in a way the reinforcement of one of the traditionally basic principles of the coordination mechanism, the unity of the applicable legislation (with its exclusive and overriding effect). The abolition of Article 14c (b) provisions along with Annex VII entries as well as Article 14f are particularly encouraging attempts to rationalize and restore a reasonably balanced social protection along with the promotion in practice of the freedom of establishment and the free movement in general.

b) The priority recognized to the lex loci laboris principle; the proposal is in fact trying to establish it in a more consolidated way as was the case in theory and the ECJ case-law where needed. The deletion of a series of specific rules concerning the social security status of mariners by means of the equation of a ship's flag with a Member State's territory and the classification of different types of parallel salaried activities under a uniform rule,

concerning all persons normally pursuing an activity as employed persons in the territory of two or more Member States, may be considered in the first place as positive steps towards simplification and homogeneity.

c) On the other hand, drawing a clear-cut borderline between what is considered as pursuit of a professional activity and the situation of persons who either have ceased any activity or are non-active from the very beginning, is an essential step to integrate a wide and complex jurisprudence and the only way to distinguish the scope of the lex loci laboris principle from the lex loci domicilii one (however, redactional improvements are sometimes indispensable).

d) The maintenance of residence as the stable and unambiguous element of the combined criteria proposed for the determination of the applicable legislation where a person is normally pursuing an activity in the territory of two or more Member States.

e) The maintenance of a series of basic principles and rules established by the provisions of existing Articles 14d, 14e, 15, 16 and 17.

However, further discussion should focus on some eventual lacunae and their possible impact on the categories of persons concerned:

- leaving out the case of an employed or self-employed person called up or recalled for service in the armed forces or for a civilian service creates ambiguities as to the legal basis determining the applicable legislation;
- it is questionable whether the rule set out under Article 8 para 3 sufficiently also covers the situation of persons falling at present under Article 14b para 3 and 4;
- new Article 12 could be extended so as to include, apart from the traditional category of the "auxiliary staff" of the European Communities, new categories of temporarily employed persons in the framework of European programmes of research mainly or under other types of contract between the EC and the Member State in whose territory the one- or two-years maximum activity takes place. Usually, the legislation mentioned as applicable with regard to general labour law issues is the one of the latter Member State. However, since such an employment is exclusively temporary, the application of Article 17 procedure proves to be too time-consuming whilst the option, provided for the already mentioned categories, to be exercised once at the date of signing of the contract, could offer the best manageable solution, encouraging their uninhibited involvement with the highly important tasks they are asked to fulfil.

2.2.2. Problematic issues

2.2.2.1. Posting: terminology and rules

Taking as a starting-point that the objectives of all "legitimate" derogations from the general lex loci laboris principle are:

- to overcome any eventual impediment to free movement;
- to achieve the necessary economic interpenetration (aimed at by various Community policies, initiatives and Instruments);
- to avoid complicated administrative procedures,

we would find it extremely important to focus on some of the main difficulties, ambiguities and problems arising from the issues Article 9 tackles with:

a) The term "posting", applied already in the Title of Article 9, should be abolished (replaced by a more descriptive definition), since it has proved to be an extremely problematic notion. For those exercising an activity as employed persons, "posting" is usually interpreted and applied in practice by national Administrations according to labour law criteria, which makes it even more difficult to reason in terms of the principles set out by a mechanism coordinating social security schemes. We should never forget that labour law criteria inhibit in practice the correct application even of the interpretative Decision No 162 of the Administrative Commission, which was adopted in order to describe and define the situations and substantial elements falling under the Community definition of "posting".

For the self-employed on the other hand, the mere assimilation of temporary activity exercised in the territory of a second Member State to "posting", as described in the case of the employed, and subsequent interpretative approaches, which tried to treat completely heterogeneous and incomparable situations in the same way, have resulted in a prolonged stagnation and controversy, rendering the actual provisions (Article 14a 1) almost inapplicable or in suspense (waiting for the ECJ ruling in case C – 175/97 "Banks").

b) Article's 9 main goal should be to provide for the safety and continuity of social security protection to persons exercising a temporary activity either as employed or as self-employed; in other words, if such a derogation is worth maintaining at all, it should be as flexible and comprehensive as to cover the temporary nature of any activity, given also the social security criteria on which concepts under both Titles I and II are based and as a result of which similar situations or even "the same nature" of an activity are only rarely identified as such under different social security systems.

2.2.2.2. Article 9 para 1

The types of undertakings covered by such a derogation are obviously limited. It is questionable whether such a restrictive formulation is compatible even with the Directive 96/71/EK concerning the posting of workers in the framework of the provision of services and more specifically with its scope as set out by Article 1 para 3 (c). Under the proposed provision the decisive criterion is shifted with regard to the present situation, analytically described by Decision No 162. So, instead of the "organic bond" combined with the characteristic features of posting undertakings (para 2 b) i) and ii)), it is at present stated that the sending undertaking has to employ habitually personnel in the territory of the first Member State.

Furthermore, the new redaction of the above-mentioned paragraph does not make it absolutely clear whether the person sent by the said employer is attached to him under a contract of employment or this person can also pursue his temporary activity in the territory of the second Member State in the framework of a works contract (status of a self-employed).

Paragraph 1 should rather adopt the safety-valve solution opted for by Decision No 162, in other words the requirement that in cases of temporary employment undertakings or placement agencies, such an activity is usually (normally) taking place by the said undertakings in the territory of the sending state as well.

Otherwise, how could the restricted 12 months exemption be compatible with the overall objectives of the "posting provisions" laid down on many occasions by ECJ rulings or with the target of simplification per se (its underlying "raison d' etre"), if similar cases of activities, far shorter than 12 months, are left to the unswerving application of the lex loci laboris principle?

With regard to the 12 months period as such, although it is apparently proposed in order to reinforce the general principle, it could finally prove as deteriorating it, since it is doubtful whether, ceteris paribus, such a target is a realistic one. Taking into consideration previous ad hoc and comparative studies or other theoretical contributions on posting and the data presented in the European Conference held in Crete (1995), the usual anticipated duration of normally posting nowadays has been extended to more or less 2 years. Such a development leads social Administrations to an increasingly frequent application of Article 17 agreements, a reason why one of the then suggested solutions was to provide for an initial 24 months period exemption in a future modification of the derogation rules.

The radical proposal of the European Commission intensifies our fears that Article 17 will be an one-way solution to cover all cases that previously were almost automatically receiving the 1 year further extension by issuing an E 102 form.

Given that socio-economic reality is not going to change abruptly, as a result of the Regulation's simplification and since derogations from the lex loci laboris principle are not targeting so much the social security schemes of different Member States but mainly consist in deviations regarding the non-coordinated up to now tax legislation, the outcome of such a reform would be to deepen administrative complications while enhancing at the same time insecurity and deversified application of the determination rules.

2.2.2.3. Article 9 para 2

Although, we understand that the proposed formulation aims again at reinforcing the general principle and at providing a direct answer to the outstanding questions and problems raised by some Member States, leaving the application of the existing provisions in suspense, we find such an approach considerably narrow, simplistic and in a way outdated. This reaction is almost inevitable if one takes seriously into consideration the ECJ's abundant jurisprudence concerning the realization and promotion of the Treaty's fundamental freedoms and more specifically, in the case of the self-employed, the free provision of services.

It is worth remembering that the Council when adopting the Regulation (EEC) 1390/81 did not accept the then identical proposal of the European Commission, opting instead for the more general term "work". In fact, the term "work", etymologically, is a much broader concept, including actually both activities, employment and self-employment. The legislator did not even choose the term "activity" that could have been considered closer to self-employment and thus would render faithfully the spirit of that article as a whole. This means that the legislator introduced on purpose the term "work" which as undouptedly more general suitted better his aim to cover paid employment as well, (in other words, flexibility for the sake of mobility), especially if we keep in mind that the Regulation's structure follows the patterns of general rather than case-law.

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

Given that nowadays, Community's commitments for free movement in general and free provision of services/establishment in particular (for the self-employed) have become even wider looked also from the European Employment Strategy point of view, we strongly think that the future specific determination rules should keep in mind the targets underlying all short-term derogating provisions so as to respond to the increasing European initiatives demanding for greater flexibility/enterpreneurship, socio-economic interpenetration and thus for a highly protected and prompt mobility, by means of a new balance between flexibility and security.

However, with the Commission's proposal taken as a whole with Article's 10 relevant provisions, we gather that the juridical lacuna is widening, since a series of activities of an exclusively temporary nature are practically driven outside the scope of conflict law provisions.

In fact, Article 10 para 3 is even stricter than the actual redaction of Article 14c (a), since it provides for persons normally and not in parallel pursuing a mixed-type career in the territory of two or more Member States. If according to the advocate general Colomer's interpretation (in "Banks", points 69 – 74) the exercise of parallel activities does not imply that each one of them is normally performed, the new provisions do not determine the legislation applicable in all cases where a person, normally pursuing an activity as a self-employed in the territory of a Member State, goes to another to perform a temporary activity either as an employed person or as a self-employed, when the activity is of a different nature, or when such a person pursues in parallel but neither normally nor temporarily an activity as an employed person in the territory of another Member State.

Coming back to the term "work" and bearing in mind the problems arisen in every day practice mainly due the great diversification of national social security schemes and taking into consideration the fact that Article's 14a para 1 solution is actually sought and achieved by means of Article 17 agreements (a time-consuming and diversified application), we think it is worth focussing on the way the terms "work" and "a person normally self-employed" (actual Article 14a para 1) should be better described and interpreted, so that fraud or convenience/a la carte affiliations are excluded.

A safe way of reasoning on these topics comes out of the advocate general's analysis in "Banks" and more specifically under points 57 – 59, which constitute the elements and guidelines that could serve as the basis for further, more detailed provisions to be included in the future implementing Regulation or in the framework of an interpretative Decision of the Administrative Commission.

Besides, the necessity for additional clarifications by means of the said Instruments is pretty obvious with regard to other newly proposed terms under Article 10, such as "substantial activity", or the "centre of interest of (the self-employed person's) activities".

Otherwise, limiting the scope of Article 9 para 2 only to an independent activity of the same nature would lead to another inconvenience in the framework of non-harmonized social protection schemes, a reality which the legislator is obliged to take always seriously into account. Taking into consideration the great diversity of national social security legislations, even a temporarily "self-posted", a self-employed in both Member States who exercises an independent activity of the same nature, could have been automatically excluded from the scope of the said article, as soon as, under the second Member State's legislation, he could have been characterized as an "employed" person (social security criterion).

On the other hand, with regard to mobility's demands for flexibility and promptness, the extremely time-consuming administrative procedures that a decision on an activity's social security status often implies, has not only a disencouraging impact on the persons' decision to exercise their right of free movement, but could also last longer than the short period of the "work" to be pursued in the host Member State (imagine De Jaeck for six months in the Netherlands).

Actually, contemporary forms of mobility might prove equally ambiguous, since we are sometimes confronted with cases that although for the sending State fulfil the criteria of "posting", in the host country they take the form of a typical provision of services (self-employment).

For all these reasons we think that Member States should take more advantage of the attempted reform providing, under the new coordination mechanism, for enough flexibility and broadness to cover the continuous evolution of different types of mobility and social security schemes. Besides, such an objective and priority imply simple, prompt and low administrative costs procedures. On the contrary, a possible, parallel interference of the legislation of the Member State where the short "work" is being carried on would entail to both Member States involved additional administrative procedures:

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

2.2.2.4. Article 10 para 1 and 2

Under this radically new provision the proposed term "substantial activity", although justified and reasonable, could prove quite difficult to be identified and applied by social Administrations since, as it stands, it is too vague implying besides different subjective criteria for the employed and the self-employed, exhaustive exchange of information and administrative complications.

If, following the Commission's explanatory report, with "substantial activity" one intends just to exclude the lex loci domocilii principle where "insignificant" activities are pursued, then we wonder why the previous criteria (residence and part of the activity) are not maintained.

On the other hand, we doubt whether following the social security criterion and expressly identifying any type of activity according to the latter (Article 7 (a) and (b)), such a requirement could be considered as compatible with the ECJ case-law, the above-mentioned very definitions of the new Regulation are based on or it could be considered as indirectly initiating mixed labour-law criteria with subsequent more complex implications.

With regard to persons engaged in paid employment, although the criterion of residence appears as auxiliary (the lox loci laboris principle is indirectly prevailing), in the absence of "substantial activity" the proposed rule deviates even from the combined application of the two principles, which was the case of the existing rules. The actual proposal opts for a place which could be neither the place of residence nor the one where part of the person's activity is pursued. Such a solution, apart from being problematic for certain categories of persons not expressly mentioned in the new text, is somewhat controversial, especially if we take into consideration that residence, a Community notion (case-law, Article 7 (f)), also implies a person's centre of main professional interests.

2.3. Title III

2.3.1. Chapter 1 ("Sickness and Maternity")

2.3.1.1. General remarks

The Commission's primary goal is to achieve a fairer method of cost reimbursement between all Institutions involved.

This target is attempted by the establishment of a basic rule providing that benefits in kind are fully refunded, whilst in the case of poly-pensioners specific provisions are settling the distribution of costs proportionally to the periods completed in various Member States.

The above goal is in fact justified for two reasons:

- firstly, because the present method of reimbursement based on lump-sum payments, apart from time-consuming is not totally reliable; as a matter of fact, it has always been extremely difficult to prove, given the lack and comparability of real statistical data, that the national average cost is as close as possible to the actual expenditure incurred and
- secondly, because it answers to the concerns expressed by some Member States in the past, with regard to the burdensome financial provisions of the existing Regulation (the Institute of the place of residence refunds fully the costs incurred for benefits in kind by the Institution of the place of stay, whilst the competent State is very often charged the far lower average costs of the place of residence).

Following the Commission's initiative, a series of provisions are radically simplified in the framework of a quite innovative structure. Moreover, and for the insured person at least, one gets the impression that the immediate outcome of such a rationalization could be a pretty clear-cut answer as to "who gets what, when and how".

Yet, with regard to the Institutions involved, these apparently simple and transparent provisions require very complicated administrative procedures; especially, in the case of

Article 20, interpretative also questions arise with regard to the way national provisions on the retention and reimbursement of contributions should be applied.

As far as the application of these rules is concerned, new, detailed provisions have to be agreed upon and established in the framework of the implementing Regulation, serving also as the efficient basis of the new E forms to be subsequently issued.

However, such an exercise is neither easy nor evident; in addition, an essential prerequisite for the adoption of a series of the said (simplified) provisions is that a general consensus on the proposal's two major principles is feasible.

Finally, in the case of pensioners and/or members of their family, a possible alternative could be the maintenance of the present structure, based on the determination of one competent State, fully funding either the State of residence or the State of stay. With regard to poly-pensioners, as competent could be defined the State to whose legislation the longest period of time has been spent. The provisions of new Article 15 should apply by analogy.

2.3.1.2. Specific issues

Another aspect of the suggested provisions is the restricted personal scope of the new special rules under Article 17. The said article in a quite strange way, while on the one hand (extent of coverage) assimilates the stated period of stay to residence (directly invoking Article 14), on the other hand introduces indirectly a new (Community) definition of "members of the family"; this more restricted version is inserted in spite of the fact that Article 7 includes a specific definition of those persons expressly for the purposes of Chapter 1.

In such a way, different legal bases (national legislation of the State of residence and/or of the competent State Article 7 (e) 2 jointly with Articles 14 and 17) define insured persons' derived rights in a diverging way and for reasons which is hardly to understand from the outset.

Furthermore, the new Chapter contains no special (express) rules applying in the case of pensioners and/or members of the family on a temporary stay outside the Member State of residence; unless it is implied that such a situation falls under Article 16 which, however, presupposes that the more general category of an insured person includes, in that specific case, also pensioners and that the State of residence is always deemed as the competent State. However, such an assimilation is neither evident nor is it deriving directly from the determination rule of Article 20.

Finally, the new provisions do not contain any special rule providing that entitlement to benefits as a result of pursuing an activity as an employed or self-employed person dominates over the status of being entitled as a pensioner.

2.3.2. Safeguarding and reinforcing the spirit of Community rules on pensions

2.3.2.1. General concerns

As a starting-point, we would like to point out that we wholeheartedly welcome most of the Commission's proposals in the domain of pensions. As a matter of fact, we always believed

that if a system of provisions should remain intact and be spared the "simplification/revision" operation, save for a few minor interventions of purely "pedagogic" character, made to determine the letter and grasp the spirit of what was written by the Community legislator, that is the set of detailed rules relating to the determination of right to, and the calculation of different types of pensions (aggregation of periods, retention of rights).

These provisions have recently been amended and taken on board extensive case-law so as to be able to deal with, "immobilize" or make redundant a whole number of partial national provisions which have tried, repeatedly changing even in cases where the Court rulings were abundantly clear, to violate the letter and the spirit of the Community acquis. It is no coincidence that the most interesting "theory" in this field of Community law, which has created principles that are of general force yet implicitly, comes from standard case-law on pensions.

The possible complexity of certain provisions (particularly the ones on overlapping) must be seen as the inevitable result of multifaceted national arrangements; in other words, they must be read in the way they were drafted, i.e. in the light of the existing differences in national social security systems, which may be respected but not added to by Community law. Moreover, it is by means of these rules and definitions that coordination succeeds in linking the social security schemes of the Member States together so, that they interact to provide the migrant person with constant social security protection.

Any other approach would be unacceptably simplistic for an effort of this day and age, when we all know that the only radical solution to the problem is linked to the level (deficit) of substantive convergence of policies in the social security domain and the importance attached by the national Administrations to the organization and training of all actors involved.

From the moment that Article 42 (ex 51) of the Treaty does not aim to establish rules for a common social security system or policy, but simply dictates the adoption of rules for the coordination of the Member States social security legislation, then the underlying logic of the provisions on entitlement to and calculation of the amount of a pension benefit in Regulation 1408/71 accepts the "coexistence of different schemes in the framework of which different liabilities are born vis-a-vis certain bodies from which the beneficiary/migrant "worker" draws immediate rights".

Therefore, the Community should further stress the logic and the utility of the aggregation principle and also underline the impact it has, in different sectors and various stages of the coordination procedure, the obligation of the competent national Institutions to take into account all periods of "insurance", "employment" and/or "residence" completed under the legislation of any Member State. This is the reason why we fully understand and could accept the additional insertion under separate Chapters of provisions repeating general principles, already stated under Title I (mainly on the totalization or assimilation of facts).

The uninterrupted cohesion of the system of Community provisions, obliging the double calculation of the amount, of the "autonomous" (national) pension first and that of the "pro rata" one, (both to be compared before providing the benefit) clearly reflects the spirit of the Community legislator, who is searching for the golden standard. He is trying to respect this diversity as regards national legislation but also to promote the right to free movement

(in practice) by guaranteeing the most favourable national treatment. However, he most often places this legislation within the spirit and the content of Community terms (e.g. "benefits of the same nature") or dictates ("Community rules against the overlapping of benefits") in order to apply the rule that for movement within the Union to be real and free it should not lead to the alteration of rights or the total situation regarding a person in relation to the regime that would have applied had the latter spent his entire insurance career in a single Member State.

This basic objective in the mind of the Community legislator runs through both the immediate and automatic granting of a pension benefit after the interested person has submitted a claim, and the right this person has to explicitly ask for the postponement of the award of a benefit. The implementation of this obligation deriving form Article 42 (ex 51) of the Treaty and of the special rules which regulate the various stages of establishing title to and the calculation of a benefit, serves to cover any serious "lack" of general or special qualifying conditions and to determine the amount to be paid by each insurance body concerned, according to the periods completed under its legal regime.

It is not a coincidence or arbitrary that the "autonomous" pension falls compulsorily within the Community system regarding the overlapping of benefits, despite the fact that it is due according to national legislation on the basis of periods covered exclusively under it, and may concern more than one benefits, still constituting a benefit awarded in accordance with provisions of Community law. The reason for this, which cannot easily be understood or even accepted by the national Institutions, is that the function of the national legislation during the calculation of the "autonomous" benefit lies in achieving the broader purpose of the relevant Community provisions, i.e. "that the objective of Articles 48 and 51 of the Treaty would not be realized in cases when, after exercising the right to free movement, the workers would have to lose social security benefits guaranteed to them only by the legislation of the Member State" and according to additional wording (in a later judgment) "or they would be in a worse position than if their whole professional career had taken place only in one Member State". The principle of aggregation, constituting a fundamental principle of coordination is also subject to the spirit of the objectives of Article 51 of the Treaty, which "refers mainly to the case where the legislation of a Member State alone does not confer the interested person right to a benefit either because the number of periods completed under the legislation of this Member State is insufficient or because the benefit he/she would get from it is smaller than the minimum permissible amount".

Bearing in mind that national Administrations prefer the grammatical and restrictive interpretation of the principle of equal treatment (new Article 12 of the Treaty and Article 3 of the Regulation) claiming with great ease that the national provisions applicable do not lead to discriminatory treatment because of citizenship, it would be good to stress the substantive content of this principle, especially when at a time of fiscal discipline the national systems are teeming with rules against the overlapping of benefits which cover the whole insured population.

This specific distinction made by Community law must be safeguarded because it prohibits direct and indirect discrimination against insured persons exercising their right to free movement and averts the possibility of their being treated unfavourably. One should point out that this Community principle is adhered to compulsorily during the application of national legislation, whereas the general principle of equality of treatment also applies at the level of Community law as a general principle. So in the case where the principle, with

the meaning given to it above, does not apply directly as a fundamental right of national legislation, then it can and ought to be applied through the application of Community law.

2.3.2.2. Specific remarks

a) Although all general as well as specific rules and definitions related to the overlapping (of periods and/or benefits) are integrated into the new Chapter(s) concerning the award of pensions, as mostly referring to these particular benefits, we would like to raise the point of whether some general rules (actually under Article 12) should also be inserted under new Title I; such an insertion, if finally deemed necessary, would define the scope and the extent to which national anti-overlapping clauses, concerning other branches (apart from invalidity, old-age or survivor benefits), are applicable to benefits awarded (or periods to be taken into account) in accordance with the provisions of Community law,

b) Given the inclusion of all increases in or supplements to pensions in respect of children or orphans within new Chapter 3, an all-long desired reform, a still remaining substantive gap to be covered by specific rules is the eventual overlapping of the said benefits with the ones falling under new Chapter 7. Since the benefits provided for by diverging social security schemes are, essentially, of the same nature (according to criteria highlighted by case-law) but falling under different (national) branches/Chapters of the Regulation, it is deemed as necessary to establish specific clauses, guaranteeing the global and continuous protection of the persons concerned.

3. FURTHER PREPARATION AND ORGANIZATION OF THE REFORM WORK

Although we are not that ambitious to believe that we can cut the Gordian knot, we are of the opinion that the essential discussion on the provisions content as well as technical formulation has to take place in the Social Questions Group.

The time spent however when we first attempted to have an exchange of views with regard to a very limited number of articles proves that such a debate could take too long drag on, eventually over five years. This may especially happen if it is left to each Presidency's absolute discretion to decide whether, to what extent and how intensively that issue is going to be included in its work programme priorities.

Considering a too long perspective as fatal for the proposal's future and also misleading for functions undertaken at two different levels, the Administrative Commission will be always working in parallel, an effort should be made by all actors involved, to prevent a transitional period of an implicit but general legal insecurity and instability with regard to European citizens interests and prospects as well as the implementing social Administrations efficiency.

Inevitably, such a situation could be deemed as inhibiting in a certain way the safe exercise in practice of fundamental freedoms if one considers that a migrant person's situation might start being treated under the present regime, fall afterwards into the scope of the transitional period and tackled with finally according to a completely new set of rules (change of applicable legislation, or of the competent State for sickness benefits in kind or again lacunae and disparities in new forms or documents).

Things may also worsen if we keep in mind social Administrations marginal flexibility and capacity to endure actual common amendments; so much the worse as regards the totally revised Regulation the redaction of which, although easy to understand at first sight, entails a series of far more complicated procedures for the Institutions concerned.

Moreover, since national social security schemes are continuously evolving and modernizing, a prolonged period of discussions might render targets set forth by the present proposal insufficient and outdated, while the suggested provisions would run the risk to need frequent and further revision. So, we might easily be all of us involved into a never-ending try of prolonged amendments concerning an Instrument that has never been adopted (a simplification for (the sake of) simplification process).

Consequently, we should set an ambitious goal, to fulfil our discussions within a concrete and binding of approximately two-years period, forcing ourselves not to let misunderstandings, partial interpretations or fragmented interests to function as ways of escaping or condemning the task undertaken.

Acknowledging the necessity to intensify and systematize our efforts as much as possible we welcome the Finnish Presidency's initiative to organize a Working Seminar and also to address an invitation to the Presidencies coming after and to all of us indirectly to decide within the Seminar already about the common procedure to be followed onwards.

This Finnish initiative should be followed by all the subsequent ones so as to keep the Social Questions Group work programme scheduled always on time and with the greater consensus possible between previous and coming after Presidencies; in such a way continuity of our initial political commitment to start examining seriously the proposal will be guaranteed.

If the binding time-table of our discussions is foreseen for an overall two-years period, it should be preferable for the Council to create an ad hoc Working Group in the framework of the Social Questions Group meeting at least once a month in a two-days session.

Given the overcharged programme of each Presidency, the ad hoc Group could be constituted of governmental experts only, meeting the Social Questions Group for one day once per month, where the President of the said Group shall present all technically examined issues. The role of the Social Questions Group will be then to proceed to the search of a political consensus on the major and more or less mature topics.

It would be recommended this whole procedure to be adopted by the Labour and Social Affairs Council in its November session where it could be at least decided that each Presidency is bound to present in one of the said Council's sessions a report on the follow-up of the discussions related to the undertaken reform of the Regulation, highlighting major issues in suspense and main orientations or prospects.