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Comments – Intervention as a follow-up to the main contributions on the determination of various Community legal instruments' scope: prevailing (Community) criteria

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Comments on the determination of various Community legal instruments' scope: prevailing (Community) criteria

The starting point was, that two of the main interventions raised questions referring essentially to particularities deriving form *special schemes* (either for civil servants or other professional categories), which "function" mainly as *obstacles* to Community acquis' smooth interpretation and uniform implementation, guaranteeing, above all, continuity and legal security. Thus, the comments for animating the debate had to do mainly with the absolute necessity to find out the most adequate means contributing to raising consciousness and awareness – providing for an in-depth clarification of *Community* criteria, defining the scope of *different* Community instruments. Moreover, representative examples, in the sense of comparative, more or less, situations under each Member State's social security – protection system, would be a great target and contribution to highlighting truly similar or differing elements and to raising awareness of all parties concerned. It was stated that it is very important to be at the outset conscious of what changes towards which direction- with what repercussions, (*see relevant comments on pension schemes major reforms in trESS European Report 2006*).

It was pointed out, that the safest way not to mix up the scope of the community legal instrument each time involved (i.e. Regulation 1408/71 (883/2004 in the future) or one of the Directives, dealing either with gender equality or "Portability" – *vesting and preservation* of pension rights) and safely determine what is deemed as the *prevailing characteristic* of a "scheme" – "legislation" – "system" (in the light of Community legislature spirit), is to start with the following crucial question:

"What for – for the purposes of which Community principle(s) – objective(s) – freedom(s) do we need/are we asked to (find out) define the outstanding features and classify, accordingly, a certain system/scheme as "legislation" or "not legislation?" (in Community *jargon*, as 1st pillar, 2nd, 3rd pillar, occupational, supplementary scheme etc.).

In other words:

1. The Community coordination's perspective (path 1)

1.1. Where national systems are falling under Community coordination's *philosophy*, i.e. *free movement of persons*, "the most important right under Community law for *all insured EU citizens* and an *essential element of both Internal Market and of European citizenship*" (the above-mentioned EC Regulations or the *portability Directive* to be adopted), then: the

definition (in the light of corresponding *whereas*), by virtue of Article 1 (for both Regulation 1408/71 and Regulation 883/2004), should be considered as sufficient or sufficiently clear, providing all necessary elements to define in practice *social security* within each national context as a *Community concept* in conformity with Articles 39 to 42 EC aims (see the Advocate's General, Cosmas', Opinion in *Molenaar*). Yet, it proves in every-day practice too difficult to *manage* - to be really conscious of, in all its respects.

1.2. The extent of the *latent* difficulty (-ies) has once more been revealed during the discussions at Council level (Social Questions Working Party), regarding the material scope (Article 2, sometimes combined with Article's 3 definitions – mostly points (a) and (b)) of the Commission's Proposal for a Directive *on improving the portability of supplementary pensions rights*. Actually, a number of new Member States' delegations, starting with the Maltese and followed – supported by the Polish, Romanian and the Czech delegation (each one highlighting its national particularities), asked for *express exemptions* from the said scope of *special* schemes (for persons, civil servants/assimilated personnel, engaged in the public sector, mostly *stricto sensu* – e.g. the *Civil Service*, the *Police Force, Correctional Officers*, the *Armed Forces*) to be included under a newly created "paragraph 3".

1.3. Yet, according to the said national delegations' analytical description of the system, the special schemes concerned present characteristics, which would safely classify them as *legislation* under Regulation's 1408/71 material scope. Taking into consideration that the new Proposal for a Directive, aiming at geographical as well as professional mobility, contains a "negative" definition of its scope, i.e. what is not *legislation* falls *automatically* under the said Directive's mixed-type *coordination/harmonisation mechanism*, it is obviously crucial for all actors involved – s*takeholders* (Member States' delegations, authorities and/or Commission's and/or Council's Services, depending on the context and level, in the framework of which the problem appears) to be, any time, *at the ready* to "address" such issues in the light of Community legislature's objectives – spirit. On that occasion, it has been stated that emphasis should be put on further clarifying Community coordination's *factual* scope. This would imply strengthening transparency with regard to Community criteria applying on the concept of *legislation* and representative – comparative examples of *typical* national schemes falling under various subcategories of the above Community notion.

1.4. Apparently, this was not the state of play during the discussion at SQWP level; in fact, when a few (only!) delegations advocated that those express exemptions were not only incompatible but also superfluous, since the above-mentioned schemes were already falling under the Regulation's scope, i.e. the latter were *ex officio* not covered by the Directive, there was no clear-cut answer – counter argument either from the Commission's or the Council's competent Services (eventually their respective Legal Service). In my opinion, such a debate should have never taken place at that level; on the opposite, clarifying the issue *at the outset* should have been considered as *a major question of principle*, primarily and in the long-term by the Commission's competent DG EMPL (following the successful precedence of coordinated information supporting the implementation of the EHIC). Yet, this is not the case and, by now, the delegations concerned are apparently not convinced.

1.5. It should be noted that political agreement at Council's level has not been reached, also due to diverging positions on the Directive's scope, going as far as seeking the express exemption of (supplementary) pension schemes "*established by the State for the personnel of* "*disciplined forces*" (to be extended to "*disciplined services*" or "specific supplementary

pension schemes *established by the State for personnel exercising, on a regular basis, powers conferred by public law within public security institutions and judicial authorities or for the performance of diplomatic, consular and parliamentary activities*, where for reasons of limited human resources, the recruitment and retention of such personnel may be jeopardized to the detriment of the national public interest". The debate continues to be on whether it is *politically correct* to have *so many* exemptions from the scope of that new, mixed-type coordination/harmonisation mechanism! However, the major political question for the present (European) state of play is, in my view, that, still, we are not sufficiently aware of *what* falls *under which* Community objective (freedom/principle – consequently, legal instrument) and *to what extent*! Moreover, it is worth raising the question of whether those special/specific pension schemes have been (or should have been) the subject of Member States' declarations provided for under Article 5 provisions of the Regulation 1408/71 (corresponding Article 9 of Regulation 883/2004).

1.6. On the other hand, looking at Czech supplementary pension system's *ratio legis* (on the basis of that delegation's Note to SQWP), *"consisting primarily of supplementary pension with state contribution and private life insurance schemes – considered as falling within the generally accepted definition of an individual private pension under Pillar III – based on a civic, individualist principle rather than occupational, corporative principles… and the employer has the only option to make voluntary contributions as a third party…"*, which, for the reasons exposed in the Note does not fall within the scope of either the Regulation or the Directive, the issue arising is twofold: given the important role to be played by the latter system in the realm of social protection, to what extent the Commission has examined the structure and organization of that Czech system, mainly from both the Internal Market's and the European citizenship's perspective. As the prerequisite for a State's accession to the EU is the degree the latter's legislation is in conformity with the European acquis as a whole (its evolution/perspectives included), to what extent the Commission is aware of the impact the above-stated situation may have on EU *priorities* and citizens (mobile ones, properly speaking) and how far any Member State may reform its social security – social protection legislation/system, in other words exercise its competence/discretional power, without taking into account *a priori* or *a posteriori*, as the case may be, the dynamic nature of the European acquis in the said field, falling within Community competence. As it has already been pointed out in the trESS European Report 2006, reforms in the Member States' pension systems may have an uneven and negative impact on the unhindered implementation of Community coordination's fundamental (general) principles, such as those of aggregation and assimilation.

2. The gender equality perspective (path 2)

2.1. Where national systems are examined from the perspective of combating gender discrimination in matters of employment and occupation (*"equal opportunities"* between men and women – *"equal pay"*, more specifically, within the meaning of Article 141 EC), then, we *naturally* enter a more (or the most) complex and problematic area at Community level, where confusion – *grey areas* have arisen out of ECJ' case-law, mainly its judgments in Cases *Beune* and *Niemi* (and, following a similar concept, in *DEI v. Evrenopoulos*, the first such case of Greek interest). The ambiguities stemming from the above-mentioned case-law consist not only of interpretative questions in the specific domain of Article 141 per se, where the recently adopted Council Directive 2006/54/EC is hopefully bringing the answer (transparency in respect of decisive criteria and concepts) but, mainly, when

schemes concerned and eventually falling there under, are also "examined" from the Community coordination's perspective.

2.2. Yet, since that time, it has proven for governments not always so easy to "grasp" and manage in practice the broader impact of the said jurisprudence: namely, to deem as falling within the scope of the principle of *equal pay* exclusively in the light of *primary Community law* (namely, *Article 141 EC*), named by the Court as *quasi occupational schemes* independently from the "corresponding" definition of the material scope of *secondary/derived Community law* (as laid down by Article 2 of Council Directive 86/378/EEC on the implementation of the said principle in occupational social security schemes, as subsequently amended and replaced by Article 2 of Council Directive 96/97/EC), *a number of special insurance schemes*, which have been established by law and, thus:

- on the one hand and in principle, fall (or used to fall) within the scope of Council Directive's 79/7/EC *on the progressive implementation of the equal treatment* in matters of social security and,
- on the other, in their capacity as statutory social security, fulfill the decisive criteria of *legislation* (as laid down by Article 1(j) of the Regulation), whenever looked at in the context and for the purposes of another Community objective – aspect, i.e. Community coordination.

2.3. It is worth mentioning that the insurance (pension) schemes concerned are covering mostly civil servants (special schemes for civil servants or assimilated personnel) or employed persons, engaged in Organisations/State Bodies, which are Public-Law Entities (e.g. the Greek State Electricity Company, DEI, in the said Case) and administer their own insurance scheme also established by law. Notwithstanding the Court's judgments, stated above, under the perspective of *facilitating* and *promoting the exercise of the right of free movement in the broader sense of the term* (the establishment of Internal Market's freedoms), benefits (pensions) provided for under the said special schemes are, in parallel, considered as "social security benefits", "*although the concept of "pay", within the meaning of Article 141 of the Treaty does not encompass social security benefits*".

2.4. The essential difficulty for national administrations concerned (different services – authorities – competent institutions) is precisely the *dichotomy*, for the first time "introduced" by the Court's case-law, between Council Directive's 79/7/EC scope and that of Regulation 1408/71, which always coincided, as both covering the field of social security (statutory social security systems). Otherwise stated, it is the first time that a (special) scheme may be characterized as falling under Article 141 EC directly (*equal pay*) being at the same time expressly excluded from Council Directive's 96/97/EC scope of matters covered, by virtue of two criteria introduced under the latter's Article's 1 definition: *"occupational social security schemes"* means schemes *not governed by Directive 79/7/EC*, whose purpose is to provide… with *benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional*.

2.5. The extremely "cautious" way in which the Community legislature provides for an express and for the first time transparent definition of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) by virtue of Council Directive 2006/54/EC, is the best evidence proving the measure to which such a diversification, in terms of Community concepts and definitions, is subtle and

to a certain extent *unprecedented*. In fact, the Community legislature reproduces, also in the framework of the latter Directive (recast), the definition of "occupational social security schemes" (Article 2(1)(f)) as mentioned above); it is only under Title II, "Specific provisions", Chapter 2, "Equal treatment in occupational social security schemes", Article 7, "Material scope", where under a specific, separate provision (paragraph 2) it is made crystal-clear that, *apart* from the "occupational social security schemes" covering an enumerated list of risks (paragraph 1), the said Chapter applies *also "to pension schemes for a particular category of worker such as that of public servants"*, stating moreover the conditions under which benefits should be payable as well as specific organizational features of the scheme concerned: i.e. benefits are paid *by reason of the employment relationship with the public employer*, even if that scheme forms part of a general statutory scheme.

Yet, the existence of that *employment relationship*, as the most – the only possible decisive criterion for a pension scheme to be treated as an assimilated to an occupational one, is not expressly defined, unless reference is made to the Court's rulings in the above-cited Cases (*Beune* and repeated in *DEI v. Evrenopoulos*), where it is actually stated that the fact that *pensions concern only a particular category of workers, are directly related to length of service and their amount is calculated by reference to the last salary confirms that the pension is payable by reason of* the *employment relationship with the former employer*.

2.6. The only purpose for being so analytical is to "prove" the need to have a sort of Community *Guide – guidelines – comparative tables* (see OECD Working Parties – Committees, dealing with collection of data and assessment of supplementary pension schemes) to assist governments, national administration and/or the social partners in their work of implementing or reforming national and Community law in the broader and rapidly/dramatically changing domain of social protection, especially regarding pension systems level of coverage v. sustainability and, why not, flexicurity.

3. A pending theoretical issue

However, an essential, theoretical question, apart from transparency and legal security, raised at the Seminar and asking for an answer, has to do with the *ratio legis* for the extended (broader) implementation of the gender equality principle on social security systems which, after all, constitute *legislation* (especially when just a few, special schemes still retain certain *discriminatory* yet *transitional* provisions). In fact, the progressive implementation of the principle of equal treatment in the matters of social security has it already come to an end?

- Firstly, if social security is and remains in principle (or *par excellence*) a domain of *national competence*, which is being respected by Community legislature, precisely the reason why coordination has been chosen as the only adequate Community mechanism, and
- secondly, if for the sake of that *a priori* acceptable national social security systems' diversification, *derogating even from the legal basis of Community coordination -an equally fundamental principle* of the Treaty (Article 42 TEC)- the principle of *aggregation of periods* (also a general rule of derived law – Article 6, Regulation 883/2004), appears as *objectively justified* (in the light of the (third) principle of *proportionality*) even where such a derogation is not practiced equally by all Member States,

then

- *why derogating, even for a limited transitional period, from the equal opportunities – equal pay principle would be deemed unjustified and disproportional? Or, the other way round, why derogating from direct and full implementation of the principle of aggregation of periods would still be deemed in conformity with one of the basic (far-reaching) aims of the Treat, free movement of persons within the EU?*

Of course, according to settled case-law, *"considerations of social policy, of State organisation, of ethics, or even budgetary concerns which influenced, or may have influenced, the establishment by the national legislature of a particular scheme, cannot prevail if the pension concerns only a particular category of workers…"*, (see Case C-147/95, *DEI v. Evrenopoulos*, point 21). However, for the purposes of justifying maintaining, temporarily, the difference in pensionable age (Council Directive's 79/7/EC *quintessence*) the Court has reiterated that "that will be the position, where such forms of discrimination are objectively necessary in order to avoid disturbing the financial equilibrium of the social security system or to ensure coherence between the retirement-pension scheme and other benefit schemes", (see Case C-104/98, *Buchner*).

In fact, when *derogating* from an unhindered implementation of the aggregation (of periods) principle, it simply means that Community legislature respects the nature and goes as far as each Member State's internal mechanism, coordinating special schemes for civil servants/assimilated personnel with other categories' of the economically active (private sector) insurance schemes, at national level: national competence takes precedence once more! This means furthermore, that national social security systems are not all affected in a similar way by Regulation's 1408/71 (883/2004) extended material scope, although all steps taken since EEC's creation should aim at guaranteeing that free movement is applied in a coherent and simplified way throughout the EU Member States. Yet, the reasons lying behind that priority yielded to the internal (national) coordination mechanism's principles, are mainly and *a priory* financial; in other words, the latent aim being, by means of thee said uneven impact of such an extension, not to deteriorate the schemes' concerned or the national systems' as a whole, sustainability.

Going back, however, to settled case-law again, regarding once more implementation of the gender equality principle, we are confronted with another postulate, which "*must be borne in mind*": "*although budgetary considerations may influence a Member State's choice of social policy and affect the nature or scope of the social protection measures it wishes to adopt, they cannot themselves constitute the aim pursued by that policy and cannot, therefore justify discrimination against one of the sexes*", (see above-cited *Buchner*, paragraph 28).

Obviously, it remains hard to understand how far the Council can go and the degree of the latter's discretionary power with regard to measures drafted and adopted with a view to establishing free movement (acknowledged as a fundamental right for all EU citizens) and equality of treatment between men and women in matters of social security. Anyhow, since all these discrepancies – difficulties *obscure* in a way derived Community legislation's scope and thus Community provisions efficient implementation, the Commission would take advantage of a series of various means it disposes (technological tools as well as institutionalized instruments: competent Committees, Commissions, Working Parties, trESS par excellence, to provoke an in-depth debate about the different impact of

Community law on schemes deemed as legislation and at the same time, but for other Community purposes, as *occupational – special* or *supplementary* schemes.

Last but not least, no matter what the characteristic features of national systems are or how they develop, it should be crystal-clear that *in principle* no scheme may remain (or seek to be) excluded/exempted from a major task/obligation enshrined in the Treaty, that of maintaining acquired or rights in course of acquisition or, otherwise stated, vesting and preservation/portability of social security rights, in order to safeguard the effective exercise of the right to freedom of movement for persons (pension rights par excellence). Furthermore, we should never forget that the Court has gone so far as to refer to Article 10 EC provisions as the legal basis for guaranteeing *maintenance* of a mobile person's social security entitlements (focusing on *genuine cooperation and assistance*, as Member States' fundamental obligation, for the purposes of facilitating the achievement of the Community's tasks, (see on different grounds, Cases C-165/91, *Van Munster*, C-262/97, *Engelbrecht* and C-293/03, *My*).

Taking into account that the Council has only reached partial general approaches to both a series of amendments and the content of pending Annexes (mostly VIII and XI) of Regulation 883/2004 and to a number of Titles and Chapters of the draft implementing Regulation, which are all subject to final approval of the content as a whole of above-cited Regulations, it is worth re-examining in depth the impact of certain readjustments brought on special rules of aggregation or assimilation, applying either for the acquisition (retention or recovery) of the right to benefits (pensions) and/or the calculation of the benefit's amount, where the schemes concerned provide benefits in respect of which *periods of time* are of no relevance. It should be assessed whether, after all, those amendments have successfully reached their goal, i.e. to provide for horizontal solutions, catering for several Member States' similar specificities and limiting – rationalizing the scope of Annex XI (VI under Regulation 1408/71) and to safeguard simplification and transparency also with regard to the new implementing Regulation, whilst at the same time respecting fundamental principles and freedoms of the Treaty. The numerous entries under new Annex VIII of Regulation 883/2004 might also be of interest as a paradigm for comparative analysis, a case for assessing of concrete schemes (a case-study of their number and nature) for which (aggregation and) pro rata calculation should be waived or considered as not applicable.