

**EXAMINATION OF THE CARDS-SISP COUNTRIES'
SOCIAL SECURITY SYSTEMS**

**In comparison with the Council of Europe's
Interim Agreements and the
European Convention on Social and Medical Assistance**

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FOREWORD

The **goal of this report** was to assess the national legislation of the countries involved in the project CARDS - Social Institution Support Programme (SISP) with regard to its relation with the Council of Europe's European Interim Agreements and the European Convention on Social and Medical Assistance.

Other legal instruments of the Council of Europe in the field of social security coordination, like the European Convention on Social Security or Model Provisions for a bilateral Social Security Agreement were **not subject of this assessment**. The European Social Charter and the Revised European Social Charter were examined only in part relating to the European Convention on Social and Medical Assistance. Some bilateral agreements were taken into account, again only partially. The task was not to assess legal consequences of all possible legal situations that may occur in practice. Other legal instruments of the Council of Europe and of other international and supranational organisations dealing with social security matters were not subject of this report.

Sometimes the **terms** CARDS-SISP country and CARDS-SISP countries are used. It should be noted that these are not official terms. They were used to describe a country or a group of countries involved in this project, which are all independent states, i.e. Croatia, Bosnia and Herzegovina, Serbia, Montenegro, Macedonia and Albania. The sole purpose was to avoid enumerating the countries too many times and to provide a more transparent text. The terms encompass the territory of Kosovo as well, although Kosovo has a special international status, but no legal personality yet. When remarks relate to the specific country or the territory of Kosovo, this country or the territory is clearly mentioned.

The assessment was carried out in the months of June and beginning of July 2006. The **structure** of the report is as follows. It starts with a presentation of the objective and sources used for the assessment. It is followed by the analysis of the European Interim Agreements and the European Convention on Social and Medical Assistance in relation to the legislation of the CARDS-SISP countries. Due to many similar or even identical provisions both Interim Agreements could be dealt with simultaneously. However, for the sake of clarity, it was decided to deal with each of them separately. Legal consequences of possible ratification relate to both of them.

The report ends with final conclusions, proposing some possible future legislative action. It should be noted that no formal proposals to supplement or change the legislation without thorough investigation of the relevant laws and regulations could be made. Thus, proposals should be seen only as well intended **suggestions**.

The author wishes to express his appreciation to all actors involved in the CARDS-SISP project, especially its head Mr. Sixto Molina and respected colleagues Prof. Dr. Danny Pieters and Prof. Dr. Paul Schoukens for their comments on the first draft of this report.

I. OBJECTIVES AND SOURCES

The analysed legal instruments of the Council of Europe, i.e. the European Interim Agreements and the European Convention on Social and Medical Assistance, are designed to safeguard one of the main principles of international social security so-ordination law, the **principle of equal treatment**.

Therefore, in this report especially targeted issue is **non-discrimination** of foreign nationals in social protection, i.e. social security and social assistance schemes. Some countries usually provide better access and/or more rights to their own nationals, especially in relation to medical benefits and medical assistance, family allowances and social assistance in general.

The main objective of this report was to **assess possible legal consequences**, i.e. rights and duties of the countries and their nationals of a possible signature and ratification of already mentioned international legal instruments by one or more of the CARDS-SISP countries. Legal consequences would not occur only for the CARDS-SISP countries and their nationals, but for the existing contracting parties and their nationals as well.

The report is based mainly on the following **sources**:

- General information on the social security system of each of the involved CARDS-SISP country, gathered for the purpose of the CARDS-SISP programme:
 - o Annex I – Report on the social security system,
 - o Annex II – Social security schemes presented in tables,
 - o Annex V – Migration and social security,
 - o Annex VI – Statistical data relevant for social security.
- Texts of both European Interim Agreements and its Protocols, Explanatory report, and Lists of declarations made with respect to each of them, status as of 8.6.2006, <http://conventions.coe.int>,
- Text of the European Convention on Social and Medical Assistance and its Protocol, Explanatory report and List of declarations made with respect to it, status as of 8.6.2006, <http://conventions.coe.int>,
- Texts of European Social Charter and Revised European Social Charter and Lists of declarations made with respect to each of them, status as of 28.6.2006, <http://conventions.coe.int>,
- Some bilateral social security agreements,
- Nickless, J. and Siedl, H.: Co-ordination of Social Security in the Council of Europe: Short Guide, Council of Europe Publishing, Strasbourg, 2004.

It should be noted that the information was gathered not from legal documents (except partially for Macedonia), but rather the description of social security schemes, kindly provided by the Local project officers, who were sometimes confronted with not an easy task of gathering fully consistent information in English language.

II. EUROPEAN INTERIM AGREEMENTS

1. Short introduction

In recent years, accessions of the European States to the Council of Europe, including the CARDS-SISP Countries, which are not yet members of the European Union, have **revived interest** in the European Interim Agreements (hereafter also Interim Agreements) amongst these countries. This way a renewed relevance is given to these international legal instruments.

It should be noted that **two** European Interim Agreements are in force. Their structure and substance is very similar. Both contain same principles and in a large part identical provisions (i.e. except for articles 1 to 3, which nevertheless correspond to a large extent).

However, there is an important difference in their material scope. Considering that it would be difficult for some member states of the Council of Europe to ratify a text relating to all social security schemes, two separate agreements were drafted. It was thought that states may be prepared to accept co-ordination provisions in relation to short term benefits, but not to long term benefits.

One Interim Agreement covers the benefits provided in case of old-age, invalidity and death, while the other covers the benefits provided in case of sickness, maternity, unemployment, employment injury, family allowances and death grants. In practice, all states that have ratified one of the Interim Agreements have also ratified the other.¹

The Interim agreements **do not apply** to

- public assistance, since these schemes are covered by a separate convention (c.f. point III, below),
- special schemes for civil servants (which seem not to exist in the CARDS-SISP countries) and
- benefits paid in respect of war injuries or injuries due to foreign occupation, (which seem to exist in some of the CARDS-SISP countries, e.g. Bosnia and Herzegovina, Serbia).²

Both Interim Agreements were signed on 11th December 1953 and entered into force on 1st July 1954. They represented the first step towards the multilateral instruments of social security co-ordination by the Council of Europe. As their name implies, the Interim Agreements were originally conceived as **provisional measure**. According to their preambles a general convention based on a network of bilateral agreements should be concluded. Accordingly, the European Convention on Social Security was designed to replace the interim agreements in relations between the contracting parties.

¹ See lists of ratifications for both Interim Agreements, status as of 8.6.2006.

² Bosnia and Herzegovina, Annex I, p. 11. Serbia and Montenegro, Annex I, p. 11.

However, the Interim Agreements **continue to remain in force** between the states which have not ratified the European Convention on Social Security and between such states and contracting parties to the European Convention on Social Security. Therefore, the Interim Agreements remain in force with a life of their own. The state may still choose to ratify one or both of the Interim Agreements rather than the European Convention on Social Security.³

To each of the Interim Agreements a **Protocol** was added. Both protocols are exactly the same. They extend the personal scope of the Interim Agreements to *refugees*. States which ratify the protocols are under legal obligation to apply the Interim Agreements to refugees under the same conditions as they apply it to nationals of the contracting parties. Refugees are entitled to non-discrimination and the extension of bilateral agreements between the contracting parties. The later will apply only if all the contracting parties to the bilateral or multilateral social security agreement have ratified the Protocol.⁴

Both Interim Agreements have been subject of an **Explanatory Report**, produced by the Committee of Experts for Co-ordination in the Field of Social Security and adopted by the Council of Europe's Committee of Ministers. It is therefore an official document of the Council of Europe, dealing with both Interim Agreements and their Protocols.

³ Separate social security co-ordination report prepared by Paul Schoukens is dealing with the European Convention on Social Security.

⁴ Art. 2. of both Protocols.

2. European Interim Agreement on Social Security Schemes relating to Old-age, Invalidity and Survivors (ETS No.12)⁵

2.1. Material scope

When this Interim Agreement is signed and ratified by one or more of the CARDS-SISP countries, than it will apply to all social security rules (laws and regulations) which are in force at the date of signature and even those, which may subsequently come into force.⁶

The material scope of this Interim Agreement is **limited to benefits**

- in respect of old-age,
- in respect of invalidity, i.e. permanent or long-term incapacity. Benefits awarded under employment injuries scheme are excluded, because they are covered by the other Interim Agreement (c.f. point 3, below),
- to survivors. Death grants and benefits awarded to survivors under employment injuries scheme are excluded and covered by the other Interim Agreement (c.f. point 3, below).

The term benefit covers also any **increase** or **supplement** to the benefit. For example, there seems to be a disability supplement (granted to some beneficiaries of disability pension, amount of which is below a prescribed level) in Macedonian legislation. This supplement seems to be a constituent part of the disability pension.⁷ Another example might be found in Albanian legislation, where for every dependent child up to 18 years or up to 25 years, if studying or disabled, a family supplement to the disability pension seems to be awarded.⁸

When ratified, the Interim agreement will apply to **contributory** and **non contributory** schemes. There are no definitions of these notions in the Interim Agreement. The Explanatory report refers to the definitions used in the *European Convention on Social Security*, which was drafted after the Interim Agreements entered into force.⁹

In might be argued, that majority of schemes in the CARDS-SISP countries are of a contributory nature, e.g. in Croatia, Bosnia and Herzegovina (in the Federation of Bosnia and Herzegovina, Republic of Srpska and Brčko District, where employee may choose in which of the two systems the contributions should be paid), Serbia, Montenegro, Macedonia and Albania. Social risks of old-age, invalidity and death are mainly covered in a uniform pension and invalidity insurance scheme.

⁵ ETS No. 12 stands for European Treaty Series No.12. It is a classification of the Council of Europe.

⁶ Article 1 of the Interim Agreement.

⁷ Art. 66 of Macedonian Pension and Disability Insurance Law.

⁸ Albania, Annex I, p. 6. The information provided seems not no be fully consistent. In Annex II, Chapter V: Invalidity it appears that family supplement is granted for every dependant child up to 15 years.

⁹ See Article 1 (y) of the European Convention on Social Security.

There is a somewhat different situation in the territory of Kosovo, where the basic (old-age) pension seems to be of a non-contributory nature. It is provided to all habitual residents after the age of 65, regardless of their work history. It is financed from the Consolidated budget of Kosovo and paid as a fixed amount. Disability pension also seems to be of a non-contributory nature. On the other hand second pillar individual pension savings for social risks of old-age and death seem to be paid out of contributions.¹⁰

In case of ratification, each of the CARDS-SISP countries will be obliged to **list all the schemes** to which the Interim Agreement applies in **Annex I** to this agreement. Annex I represents an exhaustive list of the schemes subject to the Interim Agreement. There is no list of laws and regulations, but simple identification of the social security scheme subject to the Interim Agreement. Whenever a scheme is abolished or a new one is created, falling within the material scope of the Interim Agreement, it has to be declared to the Secretary General of the Council of Europe within three months of the date of publication of the national law abolishing or creating the scheme.¹¹ Notification is not required, if the new law or regulation does not change the character of the scheme.

The schemes have to be listed without exception. Even social security schemes to which a government does not want the Interim Agreement to apply should be listed. However, there is possibility to make a **reservation** and exclude a particular scheme or schemes from the material scope of the Interim Agreement. Annex I should also indicate whether a scheme is of a contributory or non-contributory nature.

If one or more of the CARDS-SISP countries would ratify the Interim agreement the notions of **nationality** and **territory** would have to be defined, limiting personal and territorial scope of the Interim Agreement's application. Probably the definitions could be the same as in some already existing bilateral agreements.¹²

2.2. Equality of treatment

2.2.1. General rule

One of the main principles of the Interim Agreement is the principle of equal treatment. Nationals of all other contracting parties have to be treated equally, as if they were own nationals of the country providing the benefits. Thus, it has to be ensured that there is **no discrimination** between **nationals** of all contracting parties.¹³

¹⁰ Kosovo, Annex I, pp. 4-6 and 11.

¹¹ Article 7 of the Interim Agreement.

¹² The definitions may usually be found in the 1st Art. See Art. 1 of the agreement between Croatia and Serbia (at that point Federal Republic of Yugoslavia), Art. 1 of the agreement between Croatia and Bosnia and Herzegovina, Art. 1 of the agreement between Serbia (at that point Federal Republic of Yugoslavia) and Macedonia.

¹³ Article 2 of the Interim Agreement.

2.2.2. Legal situation in the CARDS-SISP countries

In case of ratification of the Interim Agreement by CARSD-SISP countries, the principle of equal treatment will become applicable for the

- nationals of already existing contracting parties moving to one of the CARDS-SISP country, and vice versa i.e.
- nationals of the CADRS-SISP countries moving to other contracting parties, as well as
- nationals of the CADRS-SISP countries moving between these countries.

For instance, a Belgian national moving to Croatia would have to be treated the same way as Croatian national and vice versa, Croatian national moving to Belgium would have to be treated as Belgian national. The same goes if, for example, a national of Montenegro would move to Serbia or a national of Serbia would move to Montenegro.

The Interim agreement stipulates that a national of any other contracting party is entitled to receive the **benefits under the same conditions**. This provision applies to measures such as conditions of entitlement to a benefit, the amount of benefit, the export of benefits (if nationals are allowed to export a benefit, also nationals of other contracting parties are allowed to do the same). It could be argued, that all nationals of contracting parties should be treated equally also when determining the access to a social security scheme. Having access and being socially insured might be perceived as a benefit (in a broad sense) as well.

However, in some CARDS-SISP countries access to a pension and invalidity insurance might be conditioned with nationality. For instance, it seems that in the legislation of Croatia all foreign nationals employed in Croatia are covered by pension insurance. Therefore it is questionable, if special provision including only Croatian nationals employed in the territory of Croatia at foreign diplomatic or consular missions or in personal service of foreign nationals applies also to foreigners (e.g. employed in a personal service of foreign nationals) or not.¹⁴ There seems to be similar provision in the Macedonian pension and invalidity insurance scheme.¹⁵

In Serbia it seem that only nationals of Serbia are affiliated in pension and invalidity insurance, if they are employed abroad, e.g. in the country where there is no pension and invalidity insurance or export of benefits is not provided for. Similar provision seems to exist in Macedonian legislation.¹⁶ However, a reservation might be made, e.g. excluding the application of the Interim Agreement to provisions which extend the social protection to own nationals abroad, like France did.¹⁷

¹⁴ Croatia, Annex I, p. 6. Although in Annex V, p. 3 it is emphasised that in pension insurance no difference is made between foreign migrant worker and Croatian citizen.

¹⁵ Macedonia, Annex I, p. 7

¹⁶ Serbia and Montenegro, Annex I, p. 6. Macedonia, Annex I, p. 7.

¹⁷ List of declarations made with respect to the Interim Agreement (ETS No. 12.), France, Annex III, points e and f, status as of 8.6.2006.

2.2.3. Direct and indirect discrimination

The Interim Agreement prevents **direct** (open, overt, *de iure*) discrimination based upon a person's nationality. It does not generally extend to **indirect** (hidden, covert, *de facto*) discrimination. However, if benefits are conditioned by the fact that a national was born in the country it may affect foreign nationals more. If nationals of all contracting parties are *de iure* treated equally, the *de facto* discriminating factor may be the place of birth, placing non-nationals in a worse legal position. Non-nationals are more likely to be born outside of the country imposing the birth condition.

The Interim Agreement expressly stipulates that a person born in the territory of any contracting party must be treated as being born in a contracting party stating such condition. It appears that benefits in CARDS-SISP countries are not conditioned with birth in the country. Therefore, these countries should have no problems implementing this provision.

2.2.4. Not unconditional equality

However, the principle of equal treatment is **not absolute**. The contracting parties, also the CARDS-SISP countries, are free to exclude the principle of equal treatment in some areas or make it conditional in others. The conditions that may be imposed may vary according to the social risk covered and according to the legal nature of the scheme (i.e. being contributory or non-contributory one).

Already the Interim Agreement expressly states, that the principle of equal treatment (i.e. foreign nationals) may be excluded in relation to the participation of insured (or other categories of) persons in the **management** of social security.¹⁸ Many CARDS-SISP countries' legislation provides for participation of employers and employees or insured persons or beneficiaries or other groups in administering the social insurance scheme. This seems to be the case, e.g. in Croatia, Serbia, Montenegro, Albania, and partially in the territory of Kosovo.¹⁹ Some bilateral agreements seem to provide the same exclusion.²⁰

The contracting parties, also the CARDS-SISP countries, have the possibility to condition equality of treatment with certain period of **ordinary residence** or **residence** in their country. The Interim agreement distinguishes between three situations.

Firstly, rules on non-discrimination apply to *invalidity benefits (i.e. invalidity pensions)* only when the person claiming the benefit was "ordinarily resident" in the contracting

¹⁸ Article 6 of the Interim Agreement.

¹⁹ Croatia, Annex I, p. 3. Serbia and Montenegro, Annex I, p. 4, Annex VI, pp. 44-45. Albania, Annex I, p. 2. Kosovo, Annex I, p. 3.

²⁰ E.g. Art. 4 of the agreement between Serbia (at that point Federal Republic of Yugoslavia) and Macedonia.

party before the first medical certification of the medical condition leading to his/her invalidity. This conditional equal treatment applies to contributory and non-contributory schemes and is intended to prevent persons travelling from one country to the other just to receive higher benefits.

Secondly, the principle of equal treatment may be conditioned in *non-contributory* schemes. There should be no discrimination in relation to non-contributory (old-age, invalidity or survivors') pensions only if the person concerned has been:

- a resident in the country where he/she is claiming the benefit for at least 15 years after reaching the age of 20 (in the aggregate, meaning not necessary continuously),
- ordinarily resident in this country without interruption for at least 5 years immediately before the claim is lodged, and that
- he/she continues to be ordinarily resident in the country.

Such condition for equal treatment could be imposed e.g. by the territory of Kosovo where the basic (old-age) and disability pension seem to be of a non-contributory nature.

Finally, in relation to *contributory (old-age, invalidity, survivors') pensions* equal treatment has to be guaranteed in all cases when a person concerned resides in the territory of any of the contracting parties. After a contributory pension is granted, there is no obligation to remain in the contracting party and a person may move to any other contracting party. This means, if the national law allows its own nationals to export a contributory pension, then also nationals of other contracting parties may export their pensions from this country. No restrictions may be imposed solely to foreign nationals. It seems that pensions are more or less freely exportable according to the legislation of the CARDS-SISP countries.²¹ The exception is the territory of Kosovo, where exportation of pensions (also the contributory part) seems to be impossible²² and Albania, where export is only possible if allowed by a bilateral agreement.²³

The notions of "residence" and "ordinarily residence" should be determined by each of the contracting party. The term residence might correspond to the term temporary residence as used in the CARDS-SISP countries. The question, which is bound to be left open is whether the term ordinarily residence corresponds to the term permanent residence used in the CARDS-SISP countries. To obtain permanent residence sometimes many years of residence in the country may be required. Ordinarily or habitual residence seem to be somewhere in between temporary and permanent residence. It is usually the place where the habitual centre of person's interests is to be found.

If a person does not satisfy the above mentioned conditions, a contracting party is free to exclude him/her from equal treatment with its own nationals. However, the contracting states are **not obliged** to exclude the principle of equal treatment or impose suggested conditions. It is simply an option opened to them by the Interim Agreement. Moreover,

²¹ See e.g. Croatia, Annex V, pp. 4, 5, 10. Serbia and Montenegro, Annex V, pp. 21-22 and Annex VI, p. 46, Macedonian Law on Pension and Invalidity Insurance, Art. 146 and following.

²² Kosovo, Annex V, p. 2.

²³ Albania, Annex V, p. 4.

contracting states are free to adopt rules (in national law or international agreements) that are more favourable for migrants (e.g. treat them equally also in the administration of social security schemes or impose no conditions for equal treatment).²⁴

On the other hand stricter conditions are in principle not allowed. Nevertheless, principle of equal treatment may be **subject to reservations**.

2.3. Extension of the advantages of international agreements

2.3.1. General rule

The second basic principle enshrined in the Interim Agreement is **extension of the advantages derived from bilateral or multilateral agreements** on social security covering old-age, invalidity and survivors' pensions concluded between two or more contracting parties **to nationals of all contracting parties**.²⁵

There is **considerable number** of bilateral social security agreements in force between the Council of Europe member states, including the CARDS-SISP countries. The later have concluded or notified the succession of many bilateral agreements with other member states. Many bilateral agreements have been concluded between the CARDS-SISP countries themselves. This goes especially for Croatia, Bosnia and Herzegovina, Serbia, Montenegro (although Montenegro has only recently become an independent state and no information on notification of succession is yet available) and Macedonia. They have a well developed system of social security co-ordination mechanisms. This could not be said for the territory of Kosovo (which is not an independent country yet and has no power to sign international agreements) and Albania (which has signed social security bilateral agreement only with Bulgaria, Romania and Turkey).²⁶

2.3.2. Basic principles of social security co-ordination

The bilateral agreements usually provide, among other things, **legal rules for**

- determining the legislation applicable to migrants,
- maintenance of rights in course of acquisition (usually with aggregation of relevant periods, e.g. of insurance or residence),
- maintenance of already acquired rights (usually with export of benefits to other countries).

The fourth basic principle of international social security co-ordination is principle of equal treatment of nationals of the contracting parties. However, the ratified bilateral

²⁴ Article 5 of the Interim Agreement.

²⁵ Article 3 of the Interim Agreement.

²⁶ For more details see Annexes VI for each CARDS-SISP country.

agreements may be **limited** in their personal scope to nationals of both contracting parties or they may cover all insured persons.

2.3.3. Influence of the Interim Agreement

The specific nature of the Interim Agreement and its beauty is that it avoids the development of quite complex set of legal rules for establishing all four basic principles of international social security co-ordination. Instead, it **relies upon existing social security mechanisms** to ensure that an increased number of migrants receive the protection of already mentioned four basic principles. Thus, it only stipulates that nationals of all contracting parties to the Interim Agreement should be treated equally as nationals of contracting parties to a bilateral agreement.

For example, there is a bilateral social security agreement between Croatia on one side and Bosnia and Herzegovina on the other. If a national of any other state which is a party to the Interim Agreement, e.g. Belgian or Dutch national, comes to work to Croatia he will be insured on the same basis as a national of that state. Equality of treatment of nationals of all contracting parties is one of the basic principles of the Interim Agreement and is probably also stipulated in bilateral agreements between Croatia and Belgium or Croatia and the Netherlands. If after some time he would move to Bosnia and Herzegovina, he will not only be treated like national of that state, but could also invoke the bilateral agreement between Croatia and Bosnia and Herzegovina. He would benefit from *all* the advantages of this bilateral agreement, if these two countries would decide to ratify the Interim Agreement.

He could already, as an insured person benefit from the advantages of mentioned bilateral agreement, since it appears that it applies to **all insured persons** (Art. 3). It seems that other bilateral agreements, concluded between the CARDS-SISP countries are also universal in scope, i.e. they apply to all insured persons.²⁷ According to the information provided, it appears that only the agreement between Croatia and Macedonia might be applicable solely to nationals of these two states.

However, according to bilateral agreements between the CARDS-SISP countries it seems that the principle of equal treatment²⁸ and some special provisions apply **only to nationals** of contracting parties.

For example, some bilateral agreements provide for aggregation of insurance periods completed not only in the contracting parties, but also in some third countries. For instance, the bilateral agreement between Croatia and Serbia (at the time of ratification Federal republic of Yugoslavia) stipulates (in Art. 16), that for *nationals* of these two countries also pension periods in a third country may be taken into account. The

²⁷ Usually Art. 3 of mentioned bilateral agreements.

²⁸ Usually enshrined in Art. 4 of mentioned bilateral agreements.

condition is that both countries have a bilateral agreement with this third country.²⁹ This is an interesting solution contained in bilateral agreements concluded between the successor states of former SFR Yugoslavia, i.e. Croatia, Bosnia and Herzegovina, Serbia (and Montenegro), Macedonia, which could be seen as the first step to a multilateral social security co-ordination. Nationals of these countries may (at least partly) enjoy advantages of bilateral social security co-ordination agreements with third countries. However, this provision applies only to nationals of the contracting parties of a specific bilateral agreement.

All these countries have a network of bilateral agreements. In case CARDS-SISP countries would decide to ratify the Interim Agreement, *all* advantages of bilateral agreements, also those which at the moment seem limited only to nationals of the two contracting parties, would be available to nationals of all other contracting parties of the Interim Agreement.

Extension of the advantages of international social security agreements applies also to **multilateral agreements**, also those concluded by contracting and non-contracting parties of the Interim Agreement. However, the extension must not adversely affect the non-contracting parties.

On the other hand the extension does **not apply** in respect of non-contributory pensions (e.g. like basic old-age or disability pension in Kosovo), unless the claimant has

- resided in the contracting party for total of at least 15 years after the age of 20, and
- has been ordinarily resident without interruption in that state for at least 5 years immediately preceding the claim.

Any of the contracting party, also one or more of the CARDS-SISP countries, if they would decide to ratify the Interim Agreement, may decide to make **reservations** in respect of the application on any bilateral or multilateral agreement listed in Annex II.

²⁹ Similar provision is contained in bilateral agreement between Serbia (at the time of ratification Federal republic of Yugoslavia) and Macedonia (Art. 17), Serbia (at the time of ratification Federal republic of Yugoslavia) and Bosnia and Herzegovina (Art. 16), Croatia and Bosnia and Herzegovina (Art. 17, in this case it seems that it is enough that one state has a bilateral agreement with a third state). It is possible that similar provisions might be found in other bilateral agreements between these states as well. It should be emphasised that the purpose of this report is not detailed analysis of all existing bilateral agreements.

3. European Interim Agreement on Social Security other than Schemes for Old-age, Invalidity and Survivors (ETS No. 13)³⁰

3.1. Material scope

This Interim Agreement extends the equal treatment provisions to social security schemes that provide mainly **short term benefits** and benefits from a specific employment injury scheme.

When this Interim Agreement is signed and ratified by one or more of the CARDS-SISP countries, than it will apply to all social security laws and regulations which are already in force and those, which may subsequently come into force, and relate to the **following schemes**:³¹

- sickness and maternity cash benefits;
- medical benefits (i.e. medical care or health care or sickness and maternity benefits in kind), insofar they are not subject to a needs test. This means that the benefit is not conditioned with a claimant's income or means being below a prescribed threshold. For medical assistance c.f. point III, below;
- death grants, i.e. one-time lump sum payments to survivors;
- employment injury. Benefits for both, short term incapacity and long term incapacity caused by employment injury are included. Although not explicitly mentioned, employment injury schemes usually cover occupational diseases as well;
- unemployment;
- family allowances.

When ratified, the Interim agreement will apply to **contributory** and **non contributory** schemes. It seems that in the CARDS-SISP countries *sickness and maternity* cash benefits as well as *medical benefits* are provided from health insurance (i.e. contributory) scheme. This seems to be the case in Croatia, Bosnia and Herzegovina, Serbia, Montenegro, Macedonia and Albania.³² In these countries also the employer is obliged to provide cash benefits for a certain beginning period of sickness or maternity. Only in the territory of Kosovo it appears to be no health insurance scheme. A sort of national health service system seems to be in force, since all habitual residents are entitled to medical services, financed by the budget.³³ Therefore, it could be argued that this is a non-contributory scheme.

³⁰ ETS No. 13 stands for European Treaty Series – No.13. It is a classification of the Council of Europe.

³¹ Article 1 of the Interim Agreement.

³² Croatia, Annex I, pp. 12, 17. Serbia and Montenegro, Annex I, pp. 9, 12 and Annex VI, pp. 47-48. Bosnia and Herzegovina, Annex I, pp. 12, 15. Macedonia Annex I, pp. 10, 14. Albania, Annex I, pp. 5, 8. C.f. also Annex II of the involved countries.

³³ Kosovo, Annex I, pp. 3, 7.

Some CARDS-SISP countries, like Bosnia and Herzegovina or Albania, provide for *death grants*. Majority of them provide a (partial) compensation for funeral expenses, a benefit, which might not be covered by the Interim Agreement.

Benefits provided in case of *employment injury* in the CARDS-SISP countries are normally provided in the uniform health insurance schemes (medical benefits and cash benefits for short term incapacity) and in uniform pension and invalidity schemes (for long term incapacity). Usually the access to benefits is easier and their level is higher when they are employment or work related. In Albania it seems that there is a separate social insurance scheme covering the risks of employment injury and occupational disease.³⁴ It appears that in the territory of Kosovo, there is no social security scheme covering this social risk. Special UNMIK regulation seems to oblige the employer to provide safe work environment and pay for work injuries.³⁵

Unemployment insurance provides *unemployment benefits* also in the CARDS-SISP countries. The exception is again the territory of Kosovo, where no unemployment benefits are granted.

The most colourful is the category of *family allowances*. In the CARDS-SISP countries family allowances are usually means tested, non-contributory or in some cases contributory (e.g. in some parts of Bosnia and Herzegovina)³⁶ and conditioned by nationality and/or residence of the beneficiary and/or a child in the country. They are paid periodically or as a one-time payment (e.g. when the child is born). Despite being perceived in some countries as a social assistance scheme,³⁷ family allowances are provided for covering part of the expenses for upbringing and development of a child, rather than to help the person concerned to continue to lead a decent life.³⁸ Therefore, it could be argued, that even these family allowances fall under the material scope of the Interim Agreement and not under the material scope of the European Convention on Social and Medical Assistance (c.f. point III, below). A question might also arise whether parental leave and parental benefit extending beyond the first several of months after birth may be qualified as maternity benefit or family allowance.³⁹

Some provisions are **identical** as in the first Interim Agreement (ETS No. 12, c.f. point 2, above). The term benefit covers also any *increases* or *supplement* to the benefit. For example, increase of the basic child allowance for single-parent families, full orphans and

³⁴ Albania, Annex I, p. 7, also Annex II.

³⁵ Kosovo, Annex I, p. 6.

³⁶ I.e. in the Federation of Bosnia and Herzegovina and in Republic of Srpska (c.f. Annex II).

³⁷ E.g. Croatia, Annex V, p. 15.

³⁸ See the definition of »assistance« in the Explanatory report of the European Convention on Social and Medical Assistance. Compare with the contingency covered by the Part VII of the European Code of Social Security or ILO Convention 102 and interpretation of the Regulation 1408/71/EEC by the European Court of Justice, e.g. in the case *Hoever and Zachow* (C-245/94).

³⁹ Benefit for the first several months is intended predominantly for a mother and her recovery. After that, e.g. a father may be entitled instead. See Chapters 4 of Annexes II for Croatia, Bosnia and Herzegovina, Macedonia and Albania. For Serbia, see Annex I, p. 13 and for Montenegro Annex VI, p. 49.

handicapped children in Croatia or family supplements to unemployment benefit in Albania seem to fit into this category.⁴⁰

In case of ratification, each of the CARDS-SISP countries will be obliged to list all the schemes to which the Interim Agreement applies in *Annex I* to this agreement. The schemes have to be listed without exception, but a *reservation* to exclude a particular scheme from the material scope of the Interim Agreement is possible. Annex I should also indicate whether a scheme is of a contributory or non-contributory nature.

Also when ratifying this Interim agreement, the terms *nationality* and *territory* have to be defined.

3.2. Equality of treatment

3.2.1. General rule

One of the main principles of both Interim Agreements, also this one, is the principle of equal treatment. Nationals of all other contracting parties have to be treated equally in the country providing benefits, as if they were its own nationals. Thus, it has to be ensured that there is **no discrimination** between **nationals** of all contracting parties.⁴¹

3.2.2. Legal situation in the CARDS-SISP countries

In some of the CARDS-SISP countries the eligibility for benefits is conditioned with the nationality of the respected country. For instance, in Croatia *maternity cash benefit* is provided also to unemployed mothers, who have been Croatian nationals for at least 3 years. It appears to be a non-contributory (state financed) benefit. Croatian nationality is also required when a pupil or a student wants to claim maternity cash benefit.⁴² It is not easy to be certain, whether in Albania nationality is a condition for entitlement to sickness and maternity benefits or not.⁴³

In Bosnia and Herzegovina, more exactly in the Federation of BiH, among others, only nationals employed at foreign or international organisations and institutions with offices within the Federation are entitled to *medical benefits*. In the Republic of Srpska, among others, only nationals receiving pensions or invalidity benefits from foreign insurance carriers are entitled to medical benefits, but only if it is not otherwise regulated by an international agreement.⁴⁴ If the Interim Agreement would be ratified, than also nationals

⁴⁰ Croatia Annex I, p. 17, Albania, Annex I, p. 8, also Annexes II.

⁴¹ Article 2 of the Interim Agreement.

⁴² Croatia, Annex II, Chapter I and IV.

⁴³ Albania, Annex V, p. 6.

⁴⁴ Bosnia and Herzegovina, Annex I, p. 6, Annex II, p. 8.

of other states (ordinarily resident) would be entitled under the same conditions as nationals of Republic of Srpska.

In Serbia it seem that only nationals of Serbia are affiliated in *health insurance* (also in unemployment insurance), if they are employed abroad, e.g. in the country where there is no health insurance scheme. Similar provision seems to exist in Macedonian legislation.⁴⁵ However, Interim Agreement does not provide for unconditional equality and ordinarily residence in the country may be demanded to treat nationals of other contracting states equally. Also a reservation may be made, e.g. excluding the application of the Interim Agreement to provisions which extend the social protection to own nationals abroad, e.g. like France did.⁴⁶

Access to health insurance scheme (and benefits it provides) in Macedonia seems to be limited to Macedonian nationals, when employed at foreign employers, foreign missions or in personal service at foreign nationals in Macedonia. *Argumentum a contrario* that means that nationals of other contracting parties to the Interim Agreement employed in Macedonia e.g. by foreign employers would be excluded. However, there is also another provision, including all “employed persons” in health insurance scheme. Therefore, the legal interpretation and administrative practice is of relevance.

Since there is normally no separate *employment injury* scheme in the CARDS-SISP countries, the same observations apply regarding the pension and invalidity insurance (c.f. point 2.2.2, above) and health insurance. The only separate scheme appears to exist in Albania, where all employees seem to be covered.

Unemployment benefits in the CARDS-SISP countries seem to be provided on equal footing to own and foreign nationals (apart to the observation above made also to health insurance). Usually the unemployment benefit is not exportable to other countries (unless, otherwise provided with bilateral agreements, except for Albania, where unemployment benefit seems not to be included in the material scope of bilateral agreements).⁴⁷

Some *family allowances* are granted only to own nationals of the country granting the benefit, residing in the country. E.g. Children allowance in Croatia is granted only to Croatian nationals, residing with the child in the country. Foreign nationals are only entitled if they have permanent residence permit and a residence record of at least 3 years.⁴⁸ To be entitled to Child allowance or Parental supplement in Serbia, the beneficiary has to be national of Serbia, residing and being health insured there. Although in Montenegro financial protection of family appears to be means-tested, there is no information about the nationality condition.⁴⁹ In Macedonia Child benefit is granted to a

⁴⁵ Serbia and Montenegro, Annex I, p. 6. Macedonia, Annex I, p. 6.

⁴⁶ List of declarations made with respect to this Interim Agreement (ETS No. 13.), France, Annex III, points c and d.

⁴⁷ Albania, Annex V, p. 13.

⁴⁸ Croatia, Annex I, p. 8, Annex II, Chapter 9, Annex V, p. 15.

⁴⁹ Serbia and Montenegro, Annex I, p. 13. For Montenegro, Annex VI, p. 48-49.

Macedonian national with permanent residence in the country, raising a child who is also a Macedonian national. Foreign nationals are entitled if they possess a residence permit.⁵⁰ In Bosnia and Herzegovina no conditions of nationality seem to apply, however, a child has to have his/her permanent residence in the country.⁵¹

Majority of the CARSD-SISP countries provide some sort of a birth grant, i.e. one time lump sum payment or benefit in kind (i.e. “baby package”) when a child is born. The entitlement may be linked to the entitlement to the benefits from health insurance (like Croatian New-born child assistance) to the Child allowance (e.g. in Federation of BiH), residency of the parents (e.g. in Brčko District) and nationality. Assistance for a newborn child in Macedonia is granted for the first child only to the nationals and permanent residents of Macedonia, whose child is born there.⁵² In Montenegro and Albania, there seem to be no conditions (or at least no information is provided).⁵³

Some countries protect handicapped children with higher level and/or longer entitlement to child allowances (e.g. in Croatia, Bosnia and Herzegovina) or grand special family allowances. This is the case for instance in Macedonia, where Special allowance for handicapped children is provided to the permanent resident for a child with permanent residence and Macedonian nationality. It appears that foreigners with residence permit are equalled with Macedonian nationals.⁵⁴

3.2.3. Direct and indirect discrimination

Interim Agreement prevents **direct** discrimination based upon a person’s nationality. It does not generally extend to **indirect** discrimination. However, if benefits are conditioned by the fact that a national was *born* in the country it may affect foreign nationals more. This kind of indirect discrimination is not allowed. In some of the CARDS-SISP countries, place of birth, not of the beneficiary but of the child entitling to a benefit may be legally relevant, e.g. when granting birth grants.

In addition, this Interim Agreement (ETS No. 13) contains specific provision on non-discrimination on the grounds of *nationality of a child*. Making the nationality of a child a condition of entitlement for family allowances may be indirectly discriminatory. Such a condition exists for example in Macedonian legislation relating to Child benefit and Special Allowance. It is possible that a Macedonian national may have a child, national of some other country (perhaps because of the nationality of the other parent). Nevertheless, it is more likely that a foreign national (with a residence permit) is having children who are not Macedonian nationals. Therefore, the Interim agreement states that a contracting party (e.g. Macedonia, if the decision is made to ratify this Interim

⁵⁰ Macedonia, Annex I, p. 8, Annex V, p. 10. According to Annex II, Chapter 9, it seems that foreigners have to be in the possession of a permanent residence permit.

⁵¹ Bosnia and Herzegovina, Annex II, p. 36.

⁵² Macedonia, Annex 1, p. 16.

⁵³ Serbia and Montenegro, Annex VI, p. 45, 49. Albania, Annex 1, p. 9.

⁵⁴ Macedonia, Annex I, p. 16.

Agreement and no reservation relating to this provision is made) has to treat a child who is a national of any other contracting party (e.g. German, French, Belgian etc.) as its own national.⁵⁵

3.2.4. Not unconditional equality

Another possibility of indirect discrimination of foreign nationals is by imposing residence conditions. To some limits, this kind of indirect discrimination is not prohibited. Thus, the Interim Agreement does **not provide for absolute or unconditional equality** between the nationals of the state providing the benefits and nationals of other contracting parties.

Identically as with the Interim Agreement (ETS No. 12) dealing with pensions, this Interim Agreement states that foreign nationals may be excluded in relation to the participation of insured (or other categories of) persons in the **management** of social security.⁵⁶ In the majority of the CARDS-SISP countries insured and other groups of persons participate in the administration of social (also health and unemployment) insurance schemes. This seems to be the case, e.g. in Croatia, Serbia, Montenegro, Macedonia, Albania. Some bilateral agreements seem to provide the same exclusion.⁵⁷

The contracting parties, also the CARDS-SISP countries, have the possibility to condition equality of treatment with certain period of **ordinary residence** or **residence** in their country. The Interim agreement distinguishes between following four situations.⁵⁸

Firstly, the right to equal treatment applies in respect of (contributory on non-contributory) benefits for **employment injury**. National of other contracting party has to be treated equally if he/she resides in the territory of any of the contracting parties. Thus, if the national law of the competent state allows its own nationals to export employment injuries benefits, it must allow to nationals of all other contracting parties to do the same.

Secondly, for all benefits **other** than those for employment injuries the claimant has to be and remain *ordinarily resident* in the contracting state which provides the benefit. This means, even if there is national law that specifically allows own nationals to export the benefits, nationals of other contracting states cannot rely upon this provision. Once they cease to be ordinarily residents, the country of (former) residence is free to discriminate against them on the grounds of nationality.

Thirdly, there is an additional condition for benefits provided in the case of **sickness, maternity** or **unemployment**. They are subject to non-discrimination rules only, if the claimant was already ordinarily resident in the competent state before the occurrence of

⁵⁵ Article 2 of the Interim Agreement.

⁵⁶ Article 6 of the Interim Agreement.

⁵⁷ E.g. Art. 4 of the agreement between Serbia (at that point Federal Republic of Yugoslavia) and Macedonia.

⁵⁸ Article 2 of the Interim Agreement.

social risk. This means, before the date of first medical certification of sickness, before the presumed date of conception or before the beginning of unemployment. The purpose is to prevent persons of other contracting states coming into the country just to receive the benefits.

For instance, in the territory of Kosovo it appears that foreign nationals have to pay double fees as part of co-payment for medical benefits. Habitual residents pay half lower fees. Thus, a question arises whether foreigners with habitual residence pay lower fees and higher only in they have no habitual residence. If that is not the case (i.e. foreigners in any case have to pay higher fees), than this would be contrary to the Interim Agreement. However, medical benefits in Kosovo seem to be of a non-contributory nature. Therefore, the next limitation to equal treatment may apply as well.

Finally, for *non-contributory* benefits, like the majority of family benefits in the CARDS-SISP countries, the rules on equal treatment will only apply if the national of the other contracting state has been resident for at least 6 months in the state providing the benefits. It is required that residence should be uninterrupted.

The notions of “residence” and “ordinarily residence” should be determined by each of the contracting party. Again the question might arise if the term ordinarily residence and permanent residence may be equalled (c.f. point 2.2.4., above).

The contracting states are **not obliged** to exclude the principle of equal treatment or impose suggested conditions. It is simply an option opened to them by the Interim Agreement. Moreover, contracting states are free to adopt rules that are more favourable for migrants.⁵⁹ On the other hand principle of equal treatment may be **subject to reservations**.

3.3. Extension of the advantages of international agreements

3.3.1. General rule

The second basic principle of the Interim Agreement is the **extension of the advantages derived from bilateral or multilateral agreements** on social security covering social risks of sickness and maternity (benefits in cash and medical benefits), death (death grants only), employment injury, unemployment and family burden concluded between two or more contracting parties **to nationals of all contracting parties**.⁶⁰

There is **considerable number** of bilateral social security agreements in force between the Council of Europe member states, including the CARDS-SISP countries. These bilateral agreements cover also, sickness and maternity cash benefits, medical benefits,

⁵⁹ Article 5 of the Interim Agreement.

⁶⁰ Article 3 of the Interim Agreement.

benefits for employment injuries and occupational diseases and unemployment benefits.⁶¹ Some of them extend also to death grants⁶² and family benefits (mainly limited to child allowance).⁶³

3.3.2. Basic principles of social security co-ordination

The bilateral agreements usually provide, among other things, **legal rules for**

- determining the legislation applicable to migrants,
- maintenance of rights in course of acquisition (usually with aggregation of relevant periods),
- maintenance of already acquired rights (usually with export of benefits)

In bilateral agreements between the CARSD-SISP countries usually the *lex loci laboris* (i.e. the place of work) principle is applied. There are rules for aggregation of the periods of (usually) insurance, required for obtaining the entitlement e.g. to maternity benefits, unemployment benefits – under certain conditions. Also the export of benefits is foreseen, e.g. for sickness and maternity cash benefits and with some limitation medical benefits. Unemployment benefits and child allowances are usually not exported, although children residing in the other contracting state are taken into account.

The fourth basic principle of international social security co-ordination is principle of equal treatment of nationals of the contracting parties. However, the ratified bilateral agreements may be **limited** in their personal scope to nationals of both contracting parties or they may cover all insured persons.

3.3.3. Influence of the Interim Agreement

The specific nature of the Interim Agreement and its beauty is that it avoids the development of quite complex set of legal rules for establishing all four basic principles of international social security co-ordination. Instead, it **relies upon existing social security mechanisms** to ensure that an increased number of migrants receive the protection of already mentioned four basic principles. Thus, it only stipulates that nationals of all contracting parties to Interim Agreement should be treated equally as nationals of contracting parties to a bilateral agreement.

For example, the bilateral social security agreement between Serbia (at that point Federal Republic of Yugoslavia) and Macedonia seems to provide that also children residing in the territory of the other contracting party are taken in to account when granting child

⁶¹ E.g. Art. 2 and following of the agreement between Croatia and Serbia (at that point Federal Republic of Yugoslavia), or of the agreement between Croatia and Bosnia and Herzegovina.

⁶² E.g. Art. 27 of the agreement between Serbia (at that point Federal Republic of Yugoslavia) and Bosnia and Herzegovina.

⁶³ Ibidem, Art. 28 and 29, or agreement between Serbia (at that point Federal Republic of Yugoslavia) and Macedonia, Art. 29.

benefit.⁶⁴ Thus, if a national of any other contracting party to the Interim Agreement, e.g. a French national would be ordinarily resident for a certain period in Serbia he would have to be treated equally as Serbian nationals. If he would then move to Macedonia, leaving his child in Serbia (e.g. with his wife), he would not only be treated equally (after certain period of residence) in Macedonia as Macedonian nationals, but could invoke the bilateral agreement between Serbia and Macedonia. He would then be entitled to child allowance in Macedonia (if no child allowance would be granted in Serbia, i.e. the place of residence of the child, according to bilateral agreement).

However, apart from the principle of equal treatment (which seems to be reserved only for nationals of the contracting parties of the bilateral agreement),⁶⁵ the French national in our case could probably already invoke this provision of the bilateral agreement, since it appears that its personal scope is not limited to nationals of both contracting parties.⁶⁶

The extension of a bilateral (or multilateral) social security agreement does **not apply** unconditionally in respect of non-contributory benefits (e.g. child allowances in some of the CARDS-SISP countries). The extension may be invoked only if the claimant, national of any of the other contracting party to the Interim Agreement has resided in the contracting party providing the benefit for at least 6 months.

Any of the contracting party, also one or more of the CARDS-SISP countries, if they decide to ratify the Interim Agreement, may decide to make **reservations** in respect of the application on any bilateral agreement.

⁶⁴ Article 29 of this bilateral agreement.

⁶⁵ Article 4 of this bilateral agreement.

⁶⁶ Article 3 of this bilateral agreement.

4. Legal consequences of ratification of the European Interim Agreements

Some legal consequences of the ratification of one or both Interim Agreements by one or more of the CARDS-SISP countries have already been highlighted under points 2 and 3, above.

4.1. Legal consequences for the CARSD-SISP countries and their nationals

If the decision by one or more of the CARSD-SISP countries to ratify the Interim Agreement(s) is made, then the instrument of ratification will have to be deposited with the Secretary General of the Council of Europe. The Interim Agreement(s) would then **come into force** on the first day of the next month, i.e. the month following the deposit.⁶⁷

4.1.1. Equal treatment and extension of the agreements

Upon entry into force **a number of people** would have to be treated equally and would be covered by bilateral (and multilateral) social security agreements by which they were not previously covered.

Nationals of all contracting parties would have to be **treated equally**, with some limitations of (certain period of) residence or ordinary residence in the country providing the benefits. This means, for example, that nationals of existing contracting parties (at the moment predominantly EU and EEA Member States, and Turkey) would have to be treated equally in the CARDS-SISP country as if they were its own nationals. In addition, nationals of one CARDS-SISP country would have to be treated equally in another CARDS-SISP country, if at least two would decide to ratify the Interim Agreements. At the same time they would have to be treated equally in the existing contracting parties as well.

Nationals of all contracting parties moving between other contracting parties could (with some limitation for non-contributory benefits) **invoke the bilateral (and multilateral) agreements** between these countries.

Ratification of the Interim Agreement(s) has a so called *multiplication effect*. Nationals of each new contracting party, e.g. CARDS-SISP country would gain access to all bilateral agreements (except for those subject to a reservation) already concluded between the existing contracting parties. At the same time nationals of already existing contracting parties would gain access to all advantages of bilateral agreements concluded by or between the CARDS-SISP countries.

⁶⁷ Article 13 of the Interim Agreement.

Thus, on one hand a national from the CARDS-SISP country ratifying the Interim Agreement(s) could invoke bilateral agreements when moving between

- two other CARDS-SISP countries, which have also ratified the Interim Agreements,
- one other than his/her own CARDS-SISP country and already existing contracting party (if they have concluded a bilateral agreement, covered by the Interim Agreements) and
- at least two already existing contracting parties to the Interim Agreements (again if they have concluded bilateral or multilateral social security agreement, covered by the Interim Agreements).

For instance, Macedonian national would be entitled to equal treatment in German social security system and when moving e.g. to Turkey, he could also invoke the advantages of bilateral agreement between these two states. On the other hand when he would move from Germany to France, he would probably be covered by the European Community (EC) social security law, which applies not only to the nationals of the European Union (EU) Member states, but under certain conditions also to third country nationals, in our case Macedonian national.⁶⁸

On the other hand also nationals from existing contracting parties could invoke the advantages of bilateral agreements concluded between

- other already existing contracting party and a CARDS-SISP country, or
- two CARDS-SISP countries.

4.1.2. Backdated claims

Nationals of other contracting parties may become entitled to benefits in a CARDS-SISP country to which they previously were not. If they claim their new benefits **within 1 year** of the entry into force of the Interim Agreement(s), they would have to be paid the full amount of the benefit from the date of Interim Agreement(s)' entry into force. The contracting party is of course free to determine longer period.

If benefits are claimed after this (one year or longer) period a national of any other contracting party is only entitled to the benefit from the date of the claim. In this case there are no backdated (*ex tunc*) entitlements, unless the contracting party (i.e. the CARDS-SISP country) providing the benefit voluntarily decides to do so.

4.1.3. Reservations

Every contracting party, also a CARDS-SISP country, is entitled to make **reservations**. There are many possibilities to do so. A reservation may be made not only in respect of the application of any social security scheme listed in Annex I, but also in respect to any

⁶⁸ C.f. the Regulation 859/2003/EC. For more detailed analysis on the impact of the EU legislation consult the separate social security co-ordination report, prepared by Gijsbert Vonk.

bilateral agreement, listed in Annex II. Thus reservations may state that nationals of other contracting parties are not treated equally (beyond the residence conditions already stated in the Interim Agreements) and provide for non-extension of (some) bilateral agreements to the nationals of other contracting parties. All reservations are listed in the Annex III to the Interim Agreements. All three annexes constitute an integral part of the Interim Agreement.

It seems important to emphasise that there is a restriction placed upon making reservations. They may only be made at the date of signature of the Interim Agreement(s). In respect to the new social security scheme or a new agreement, that have to be notified and listed in the annexes, reservations may be made only at the same time with the notification. After these deadlines the reservations cannot be entered in Annex III. On the other hand a reservation may be withdrawn (in whole or in part) any time, with the notification to the Secretary General of the Council of Europe.

It appears that until now not many reservations have been made and not by all countries. It seems that the reservations usually concern social (non-contributory) pensions, supplementary pensions or providing benefits to country's own nationals abroad.⁶⁹

Reservations are also made in respect to family allowances, e.g. Latvia has excluded the application of the Interim Agreement to the birth and baby-minding allowance system and allowances to adoptive families and guardians, and Luxembourg has excluded the system of birth allowances. In France some family benefits are reserved to parents whose children are of French nationality at birth so long as it makes no distinction based on the nationality of parents. Under the United Kingdom's family allowances scheme, nationals of other contracting parties will be treated as its own nationals but they will not be treated as if they were born in the United Kingdom. Few reservations are also made concerning the medical benefits (Italy).⁷⁰

Some bilateral and multilateral social security agreements are excluded from the application of Interim Agreements as well.

4.1.4. Implementation and denunciation

Interim Agreements state that necessary arrangements for **implementation** are to be determined by the contracting parties. There is no need for Interim Agreements to be more specific, since they have clear rules on non-discrimination and extension of bilateral or multilateral agreements, which usually have their own provisions for implementation.

⁶⁹ Concerning social pensions, reservations were made either with requesting reciprocity (e.g. Belgium for the income guaranteed to aged persons or France for the additional non-contributory benefit paid by the *Fonds national de Solidarité*) or excluding the application of the Interim Agreement (e.g. Italy for non-contributory social pension). Supplementary pensions were excluded by Sweden. France excluded the laws providing benefits to their nationals abroad. List of declarations made with respect to treaty No. 012, Status as of 8.6.2006.

⁷⁰ See the List of declarations made with respect to treaty No. 013, Status as of 8.6.2006.

The disputes between the contracting parties should be solved by negotiation and if that is unsuccessful, by arbitration.⁷¹

Once a state, also a CARDS-SISP country, has ratified the Interim Agreements, it may also **denounce** them. Nevertheless, the denunciation does not completely free the contracting party. In our case, if the CARDS-SISP country would denounce the Interim Agreement(s) it would still be bound to

- respect any rights already acquired under the Interim Agreement(s). It could not simply stop paying the benefits, also not those which are exported to residents of other contracting parties,
- take into account (aggregate) periods of insurance (or other periods, like employment or occupational activity or residence) completed before the denunciation.

4.2. Legal consequences for the existing contracting parties and their nationals

Ratification of the Interim Agreement(s) could also have some legal consequences for the existing contracting parties and their nationals. Upon entry into force **a number of people** would have to be treated equally and would be covered by bilateral (and multilateral) social security agreements by which they were not previously covered.

This of course goes both ways. In an already existing contracting party, e.g. Belgium, the national of a CARDS-SISP country, e.g. Croatia would have to be **treated equally** as Belgian nationals (with certain limitations). But at the same time, nationals of an already existing contracting party, e.g. Belgium would have to be treated equally in the CARDS-SISP country, e.g. Croatia.

Already mentioned *multiplication effect* should not be forgotten. When CARDS-SISP countries would ratify the Interim Agreement(s), their nationals would gain access to many bilateral agreements in force between the European states, which are already parties to the Interim Agreement(s). Although, the Interim Agreement(s) are dealing mainly with only one social security co-ordination principle, i.e. equality of treatment, they have an important legal impact due to the fact that as many as 21 European States have ratified them.⁷² Legal consequences are of course notable in both directions.

Nationals of already existing contracting parties would **benefit from the advantages of bilateral agreements** (e.g. aggregation of periods, export of benefits) concluded between

- other existing contracting party and a CARDS-SISP country, e.g. Belgian national moving between the Netherlands and Macedonia, and

⁷¹ Article 11 of both Interim Agreements.

⁷² The Interim Agreements were ratified by Belgium, Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Greece, Iceland, Ireland, Italy, Latvia, Lithuania, Luxemburg, the Netherlands, Norway, Portugal, Spain, Sweden, Turkey, United Kingdom (status as of 8.6.2006).

- CARSD-SISP countries themselves, e.g. German national moving between Bosnia and Herzegovina on one hand and Serbia on the other.

At the same time nationals of the CARSD-SISP countries could invoke bilateral agreements when moving between at least two already existing contracting parties. However, in this case probably not many new obligations would arise between the EU Member States (also EEA Member States). According to the EC social security co-ordination law they have to treat nationals of third (also CARSD-SISP) countries legally residing in the EU and moving at least between two Member States equally as other EU nationals. Thus, third country nationals may benefit from the EC social security co-ordination mechanism, which is much more complex and directly applicable.⁷³

Some new obligations might arise when a national of a CARSD-SISP country would move between two existing contracting parties of which at least one is not member state of the EU (or EEA), e.g. between Germany and Turkey or between an existing contracting party and a CARSD-SISP country other than its own, e.g. Croatian national between Macedonia and Denmark.

Nationals of CARSD-SISP countries may become entitled to benefits in the existing contracting parties to which they previously were not. They too, could lodge **backdated claims** for at least a period of 1 year, similarly as it was already described above.

The question that might arise is, whether existing contracting parties could make new **reservations** when one or more of the CARSD-SISP countries would ratify the Interim Agreement(s). Just due to the fact that new countries would ratify it new reservations could probably not be made in relation to existing social security schemes. Reservations may be made only if the scheme would change.⁷⁴

On the other hand, new bilateral agreements would have to be entered into Annex II (e.g. an agreement between Croatia and Italy). The existing contracting party could probably make a reservation concerning this bilateral agreement. This should be done at the same time with the notification. In case of reservation the bilateral agreement could be excluded from the application of the Interim Agreement(s) and its provisions would not be extended to the nationals of other contracting parties to the Interim Agreement.

However, the existing contracting parties could probably make no new reservations concerning the principle of equal treatment (art. 2 of both Interim Agreements). Art. 9 of both Interim agreements allow new reservations, i.e. after the date of signature, only in respect to

- Art. 7, which relate to Art. 1 of both Interim Agreements (i.e. material scope) and
- Art. 8 which relate to art. 3 (i.e. extension of bilateral agreements).

Although (according to Art. 2) equality of treatment is subject to reservations, but as it would appear from Art. 9 of both Interim Agreements, only at the date of signature.

⁷³ C.f. the report of Gijsbert Vonk.

⁷⁴ Art. 9 and 7 of both Interim Agreements.

Concerning the **implementation, dispute resolution** and **denunciation** of the Interim agreements by the existing parties, the same rules apply as demonstrated under the point 4.1.4., above.

III. EUROPEAN CONVENTION ON SOCIAL AND MEDICAL ASSISTANCE (ETS No. 14)⁷⁵

1. Short introduction

The European Convention on Social and Medical Assistance was drawn up and signed at the **same time** as the European Interim Agreements. It is intended to operate alongside the two Interim Agreements. They exclude “public assistance”, which is covered by the European Convention on Social and Medical Assistance.

It should be noted that in the international law the distinction is still made between **social security** and **social (and medical) assistance**. The basic human right to social security enshrined in (universal and regional) international legal documents is exercised through the schemes that provide security upon occurrence of the traditional social risk. These are social risks covered by the ILO Convention 102 on minimum standards of social security and, indeed, very similar Council of Europe’s European Code of Social Security.⁷⁶ The need to receive assistance to leave a decent life is not one of the traditional social risks.

Therefore, the Interim Agreements and the European Convention on Social and Medical Assistance complement each other in order to ensure the international co-ordination of the **full range** of social protection (social security and social assistance) schemes.

The European Convention on Social and Medical Assistance (hereafter the Convention) was signed together with the Interim Agreements on 11th December 1953 and **entered into force** at the same time, i.e. on 1st July 1954. Like the two Interim Agreements. It is also supplemented by a **Protocol** concerning the rights of refugees. The Convention and its Protocol were subjects of an **Explanatory Report**, too. The Convention was ratified by 18 European States.⁷⁷

2. Material Scope

The Convention covers those schemes that provide **assistance**, i.e. the means of subsistence and the care necessitated by the condition of the persons without sufficient resources. Assistance may be provided in cash and/or in kind (e.g. food, shelter, medical assistance). It has to be provided as long as the need persist in order to help the person concerned to lead a decent life.⁷⁸

⁷⁵ ETS No. 14 stands for European Treaty Series No.13. It is a classification of the Council of Europe.

⁷⁶ Also a Revised European Code of Social Security exists. Although, it was signed by 14 states, not even one of them has yet decided to ratify it.

⁷⁷ The European Convention on Social and Medical Assistance was ratified by Belgium, Denmark, Estonia, France, Germany, Greece, Iceland, Ireland, Italy, Luxemburg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, Turkey, United Kingdom (status as of 8.6.2006).

⁷⁸ Explanatory report, Art. 2.

2.1. Social Assistance

Social assistance describes those schemes that are not related to any particular traditional social risk. They are of a non-contributory legal nature and financed directly from the (state or local) budget. Thus, these are schemes that cover the general risk of need and alleviate poverty (and possible social exclusion) by paying benefits to a person or a family, who have means below a certain amount and cannot afford the basic standard of living. If the benefits are linked to a particular social risk, e.g. old-age, invalidity, death, sickness and maternity (requiring benefits in cash and/or in kind), employment injury, unemployment, family burden, then they are covered by the Interim Agreements.

All of the **CARDS-SISP countries** have well established systems of social assistance. They provide for a minimum living standard of individuals and families who cannot provide for themselves, due to the circumstances beyond their control, and if all other options for gaining income have been exhausted. They are non-contributory schemes, mainly financed by the state budget and in some cases also by local budgets.

It seems that the *most important* social assistance rights are the Support Allowance in Croatia, Financial support in Serbia, Financial protection of family in Montenegro, Financial social assistance in Macedonia, Economic assistance in Albania and social assistance in the territory of Kosovo.⁷⁹

Sometimes a distinction is made between persons capable and those *incapable for work*. In Serbia, persons capable for work or families with majority of work capable members are only entitled to the Financial support for 9 months a year. In Bosnia and Herzegovina it seems that social assistance is granted only to those incapable of work.⁸⁰ In Macedonia, special benefit, i.e. the Permanent financial assistance is provided for persons incapable of working.

Other *specific forms* of assistance exist as well. They range from limited one time payments (e.g. Lump-sum payment in Croatia, Cash assistance in Serbia and in Montenegro, One-off financial assistance in Macedonia) to additional benefits, like housing costs allowance, disability allowance, allowance for assistance and care of other person and other types of assistance either in cash or in kind.

The amount of social assistance may be *determined* by law (e.g. in Serbia, Montenegro), by the governmental decision (e.g. in Croatia, Macedonia, Albania, partially in the territory of Kosovo), or by local units (e.g. Cantons in the Federation of Bosnia and Herzegovina).

⁷⁹ Croatia, Annex I, p. 18. Serbia and Montenegro, Annex I, p. 14, Annex VI, p. 48. Macedonia, Annex I, p. 17. Albania, Annex I, p. 10. Kosovo, Annex I, p. 9.

⁸⁰ Bosnia and Herzegovina, Annex II, p. 46.

2.2. Medical Assistance

Medical assistance applies to medical treatment of persons, who are unable to afford the medical care or attention they may need. Thus, it is financed by the (state or local) budget and the entitlement depends upon a means-test. Medical treatment that is not subject to a means-test is covered by the Interim Agreement ETS No. 13.

In the **CARDS-SISP countries** medical assistance to persons without sufficient resources may be provided in the general health insurance or/and in some cases in special medical assistance scheme.

For instance, in Croatia disabled persons without resources for subsistence are covered by the health insurance scheme, and there is a special law covering the costs of an emergency health care provided to foreign nationals without sufficient resources.⁸¹ In Serbia, it seems that persons entitled to permanent cash benefits from social assistance scheme are covered by health insurance and persons who are not health insured (probably also other social assistance beneficiaries) may benefit from a health protection scheme, financed from the budget. Also in Montenegro health protection is provided among others to social assistance (i.e. financial protection of family and personal disability benefit) beneficiaries.⁸²

In Macedonia it seems that recipients of Permanent financial assistance and all registered unemployed persons are covered by the health insurance scheme. It appears that a universal health insurance scheme covers the whole population of Bosnia and Herzegovina.⁸³ In Albania health insurance covers also social assistance recipients. In this case contributions are paid by the state.⁸⁴ In the territory of Kosovo, all habitual residents are entitled to medical benefits. It appears that medical fees may be covered by Material assistance, i.e. assistance provided, when there is urgent need and no other source is available.⁸⁵

2.3. Limitations and declarations

Besides medical benefits provided without means test (which are covered by the Interim Agreement - ETS No.13), the convention expressly **excludes**

- non-contributory pensions, i.e. pensions provided in a non-contributory scheme paid in respect of old-age, invalidity and death of a breadwinner, which are also covered by the Interim Agreement (ETS No. 12),
- benefits paid in respect of war injuries due to foreign occupation. They are part of so called social compensation scheme and tied to a person's sense of national identity.

⁸¹ Croatia, Annex I, p. 7 and Annex V, p. 13.

⁸² Serbia and Montenegro, Annex I, pp. 3, 6, 11-12, 16, Annex VI, pp. 44, 49.

⁸³ Macedonia Annex I, p. 6. Bosnia and Herzegovina, Annex I. p. 14.

⁸⁴ Albania, Annex I, p. 3.

⁸⁵ Kosovo, Annex I, p. 8.

The precise material scope of application is determined by the **declaration** of all schemes covered by the Convention. The contracting parties, also the CARDS-SISP countries (if they decide to ratify the Convention), have to list the schemes in Annex I to the Convention. It represents an exhaustive list of all covered schemes.

Like when ratifying the Interim Agreements, the terms *nationals* and *territory* have to be defined when ratifying the Convention.

3. Equality of treatment

3.1. General rule

One of basic principles of the Convention is the **principle of equal treatment** of nationals of all contracting parties. They have to be entitled to the same social and medical assistance in the same amounts and under same conditions as own nationals of the contracting party providing the assistance.

To be granted equal access to social and medical assistance a person has to be not only

- a national of a contracting party, but also
- lawfully present in the territory of a contracting party providing assistance and
- without sufficient resources.⁸⁶

The Convention stipulates that the proof of *nationality* is provided according to the legislation of the country of origin. It is the home country of the person concerned, i.e. the country of which a person is a national. It was already mentioned that every country has to define the term national and notify about it the Secretary General of the Council of Europe. He sends the notification to all other contracting parties.⁸⁷

To be entitled to social and medical assistance a national of other contracting party has to be **lawfully present** in the territory of a contracting party providing assistance. Thus, no ordinarily residence or even residence (as in Interim Agreements) is required. Convention does not define the term lawfully present. Whether or not a person's presence is lawful is determined by the laws governing the entry and presence of foreigners of the contracting country on the territory of which he/she is present. This may be influenced by international law, like conventions of asylum seekers, refugees or bilateral or multilateral agreements. It is enough that a person is lawfully present. The length of stay plays no role. Thus, no minimum periods of presence are required and also tourists or persons in transit may be entitled to equal treatment.⁸⁸

⁸⁶ Art. 1 of the Convention.

⁸⁷ Art. 1, 2 and 3 of the Convention.

⁸⁸ E.g. The French government has declared that any national of a contracting party present in French territory, even in transit, meets the lawful presence requirement. List of declarations made with respect to treaty No. 14, status as of 8.6.2006.

The final condition is that a national of a contracting party, lawfully present, is *without sufficient resources*. Needs test is applied in the country where the assistance is being claimed, in accordance with its rules. However, the country may not apply a different test to the one applied upon its own nationals.

The Convention expressly states that the **cost of assistance** provided to a national of other contracting party is born entirely by the state which granted the assistance. There is no requirement for the country of origin to refund the cost of assistance.⁸⁹ However, Convention obliges the contracting parties to help each other to recover the sums paid to an assisted person. Other contracting parties (i.e. those not providing assistance) should, so far as their laws and regulations permit, recover the debts owed to an assisted person by individuals in their territory. They should recover them either from third parties, debtors of the assistance recipient, or persons who should provide maintenance payments, e.g. (ex) spouse or other family members.

3.2. Legal situation in the CARDS-SISP countries

In the CARDS-SISP countries foreigners are usually **treated differently** from own nationals of the country concerned. For instance, it appears that in Croatia only Croatian nationals (and stateless persons) residing in Croatia may be entitled to social assistance. Foreign nationals with permanent residence may only be entitled in accordance with international agreements. Otherwise, foreigner might be temporarily entitled only to accommodation in Croatia, but without other rights to social assistance. Persons eligible for social assistance in Serbia seem to be only nationals of Serbia, with residence in the country.⁹⁰

Bosnia and Herzegovina seems to grant social assistance only to its own nationals who permanently reside in the country. However, it appears that foreigners with permanent residence permit may also be entitled. Similarly, in Macedonia its own nationals and foreigners may be entitled to social assistance, if they permanently reside in the country. For minors (person below the age of 18) the residence condition in Macedonia is dropped. They may be granted social assistance and at the same time their country of origins is informed about the situation. In Albania it appears that permanent residence not nationality is a condition as well. In the territory of Kosovo social assistance seems to be conditioned not with permanent but habitual residence on the territory.⁹¹

⁸⁹ Art. 4 of the Convention.

⁹⁰ Croatia, Annex I, p. 8, Annex II, Chapter 11, Annex V, p. 15. Serbia and Montenegro, Annex I, p. 5, Annex V, pp. 21, 30. No information could be found for Montenegro.

⁹¹ Bosnia and Herzegovina, Annex II, p. 45, Annex V, p. 6. Macedonia, Annex I, p. 7, Annex V, p. 11. In Albania it appears that the requirement for at least 10 years residence imposed upon foreign citizens has been dropped. No information could be found on the exact requirements presently in force. Albania, Annex II, Chapter XI, Annex V, pp. 4, 20. Kosovo, Annex I, p. 2.

Medical assistance seems to be provided to social assistance beneficiaries and in some cases everyone in the territory of the concerned country who is in need of emergent medical assistance.

Thus, to be entitled to social (and medical) assistance a person has to fulfil nationality and/or residence conditions. However, these conditions are not in accordance with the Convention. If the Convention would be ratified, then assistance should be provided also to nationals of all other contracting parties, being merely lawfully present in the territory of the country providing assistance. The legislation of the CARDS-SISP countries ratifying the Convention would probably have to be amended.

4. Non-repatriation

4.1. General rule

The second basic principle of the Convention is the **principle of non-repatriation**. Country providing assistance is obliged not to repatriate from its territory a lawfully residing national of another contracting party just because he/she is in need of assistance.⁹²

Thus, the prohibition of repatriation does not apply to all lawfully present nationals of other contracting parties, but only those, who have established *lawful residence*. The convention expressly defines when residence is lawful. It is lawful as long as a person is in possession of a valid residence permit or other form of permission to reside from the country in which he/she resides.⁹³ Therefore, lawfulness of residence has to be judged according to the legislation of the concerned country.

The contracting parties are free to repatriate a person **on any other ground**, e.g. deportation order followed by a criminal conviction. The country may deport such a person, even if he/she is at the same time in need of assistance.

4.2. Not an absolute prohibition of repatriation

The prohibition of repatriation on the sole ground that a national of other contracting party is in need of assistance is not an absolute prohibition. Contracting parties **may repatriate** a national of another contracting party solely because he/she is in need of assistance if certain conditions are fulfilled.⁹⁴ The conditions, which have to be met cumulatively (i.e. at the same time) are:

- age and length of residence of the person concerned,
- fit state of health,

⁹² Art. 6 of the Convention.

⁹³ Art. 11 of the Convention.

⁹⁴ Art. 7 of the Convention.

- no close ties exist,
- no objections on humanitarian ground.

The first condition concerns the *age and length of residence*. Repatriation is only possible if the person concerned has been

- continuously resident less than 5 years in the territory of a contracting party where assistance is claimed, if he entered that country before attaining the age of 55 years, or
- continuously resident less than 10 years, if he/she entered the country after this age.

Thus, if the person has resided longer than 5 or 10 years in the country, the repatriation solely because he/she is in need of assistance is not allowed. This provision ensures that a bond or a genuine link with the society of the host state is being established and that abuses are prevented. Without such provision foreign nationals might become an unreasonable burden which could have consequences for the overall level of assistance, granted by the concerned contracting party. It could be argued that after a certain period of time a national of another contracting party is integrated in the society of the host state.

The Convention itself defines the term *continuous residence*. Absence from the country of less than 3 months does not interrupt the continuity of residence. On the other hand absence for 6 months or more will automatically be considered as an interruption. Periods between 3 and 6 months may or may not interrupt the continuity of residence. It has to be decided on a case by case basis. Contracting party wishing to repatriate a person has to consider that person's intention to return in the country, and extend to which he/she has preserved his/her links with this country while being away.⁹⁵

However, some periods of residence may be *deducted* when calculating the length of residence. Periods during which a person concerned has received social or medical assistance in the country are excluded from the calculation of the period of residence. Nevertheless, they are included and count as residence, if the person has received medical treatment for short-term or acute illnesses.⁹⁶

The second condition for repatriation demands that the person to be repatriated is in a *fit state of health* to be transported. Thus, his/her health must allow repatriation.

According to the third condition a person has to have *no close ties* in the territory of residence. It is generally accepted that all the different kinds of ties, e.g. family, social, cultural, economic, have to be taken into account before the decision to repatriate a person is taken.

The fourth condition prevents repatriation, if there are *objections on humanitarian grounds*. Here considerations such as the likely treatment by the country of origin as well as the distance and mode of transport have to be taken into account.

⁹⁵ Art. 13 of the Convention.

⁹⁶ Art. 14. of the Convention.

Even if all of the conditions for repatriation are met, the contracting party is not obliged to repatriate a person. The contracting parties may have recourse to repatriation only in the **greatest moderation**. Convention (like the Interim Agreements) stipulates that the states are always free to provide a system more favourable to the person concerned.⁹⁷

The **costs of repatriation** to the frontier of the country to which the person is being repatriated are borne by the country deporting the person. The country to which the person is being deported has to accept its repatriated nationals. Other contracting parties have to facilitate the transit of the repatriated person across their territory. Also the facilities have to be provided to the spouse and children to accompany the repatriated person. The convention provides for a special procedure if the country of origin does not recognise the repatriated person as its own national.⁹⁸

5. Legal consequences of ratification of the European Convention on Social and Medical Assistance

Some legal consequences, in case one or more of the CARDS-SISP countries decide to ratify the Convention, have already been high lightened under the points 2 to 4, above.

5.1. Legal consequences for the CARSD-SISP countries and their nationals

5.1.1. Legal consequences of ratification

Every new party to the Convention, also one or more of the CARDS-SISP countries, has to deposit an instrument of ratification with the Secretary General of the Council of Europe. The Convention would than **come into force** on the first day of the next month following the deposit.⁹⁹

From this date nationals of other contracting parties, i.e. already existing contracting party or other CARDS-SISP country which would ratify the Convention as well, will be entitled to social and medical assistance under the same conditions as nationals of the new contracting party. This may result in **more people being entitled** to assistance than they were before the ratification. On the other hand also nationals of the new contracting party will be entitled to social in medical assistance in all other contracting states.

The new contracting party could **repatriate** assistance recipients. There seem to be no conditions for persons merely lawfully present, who have not established residence yet. On the other hand lawful residents could be repatriated only under certain conditions, one of them being insufficient length of residence. Thus, there seems to be no option not to

⁹⁷ Art. 18 of the Convention.

⁹⁸ Art. 9 of the Convention.

⁹⁹ Article 13 of the Interim Agreement.

grant the assistance. The contracting party will have to grant it, but may at the same time start the procedure for repatriation.

Although, the provisions of the Convention are directly applicable,¹⁰⁰ the contracting party may avoid them by making a **reservation**. Reservations for the application of social and medical assistance schemes (listed in Annex I) are contained in Annex II of the Convention. There are no restrictions as to which reservations may be made. The only rule for reservations is that all reservations concerning the already existing schemes have to be declared at the time of ratification. Reservations for any new scheme have to be made at the same time with the notification of the new scheme.¹⁰¹

For instance, some existing contracting parties have reserved the right not to grant certain forms of social assistance to nationals of other contracting parties,¹⁰² or possibility to repatriate the assistance recipient if he/she was not resident in the country for at least 10 years (regardless of his/her age).¹⁰³ Some countries have excluded the possibility of repatriation of nationals of other country (e.g. exchange of notes between Norway and Germany) and some has reserved the right not to grant assistance to persons who were repatriated, but have not used the facilities for repatriation, including free transport to the frontier of his/her country of origin (United Kingdom). It may generally be observed that not many reservations have been made so far.¹⁰⁴

There are no detailed rules for the **implementation** of the Conventions. It does not deal with sometimes technically complicated rules of social security co-ordination. The Convention obliges the administrative, diplomatic and consular authorities of the contracting parties to afford each other all possible assistance in its implementation. The disputes between the contracting parties should be solved by negotiation and if that is unsuccessful, by arbitration.¹⁰⁵

After ratifying the Convention, every (also a CARDS-SISP) country is free to **denounce** it. This may be done after an initial period of two years and after that every year, with 6 months prior notification. Unlike the Interim Agreements, the convention does not provide for any backdated claims nor for any obligations of the denouncing party to continue to pay assistance that has already been awarded under the Convention.

The ratification of the Convention may demand some **amendments to the legislation** of the ratifying CARDS-SISP country. At least it should be stated that assistance may be granted to foreign nationals also under the conditions of international agreements.

¹⁰⁰ Explanatory Report, point I (4).

¹⁰¹ Art. 2 and 16 of the Convention.

¹⁰² Reservations of Belgium concerning the minimum level of means of subsistence and Germany concerning the assistance to enable the beneficiary to make a living or assistance to overcome particular social difficulties (with an addition that social assistance may be granted in appropriate cases).

¹⁰³ Reservation of Luxembourg.

¹⁰⁴ C.f. list of declarations made with respect to the Convention, status as of 8.6.2006.

¹⁰⁵ Art. 10, 15 and 20 of the Convention.

5.1.2. Relation between the Convention and the European Social Charter

A question that might arise is the relation between the Convention and the European Social Charter (hereafter the Charter) or the Revised European Social Charter (hereafter the Revised Charter). Both Charters (initial and revised) contain not only the right to social security (Art. 12, covering traditional social risks) but also **the right to social and medical assistance** (Art. 13). Both rights are part of the core provisions of both Charters.

Among the CARDS-SISP countries, Croatia and Macedonia have ratified the Charter and Albania has ratified the Revised Charter. Bosnia and Herzegovina, Serbia and Montenegro have until now signed the Revised Charter, but have not yet ratify it. What seems more important is that Albania is not bound by Art. 13, but Croatia and Macedonia are. They are **obliged** by it in its full scope. Croatia and Macedonia have made no reservations concerning the right to social and medical assistance (by e.g. excluding some paragraphs of Art. 13).¹⁰⁶

Art. 13 (paragraph 4) of both Charters expressly requires contracting parties to provide the right to social and medical assistance on an equal footing to nationals of other contracting parties *lawfully within their territories* as they do to their own nationals, **in accordance** with the provisions of the European Convention on Social and Medical Assistance. It is of no legal relevance whether or not a contracting party (e.g. Croatia or Macedonia) has ratified the Convention. The rules contained in this Convention are binding to all those contracting parties that acceded to Article 13 (4) of the Charter(s).¹⁰⁷

Moreover, Art. 13 is **not based on reciprocity**. Thus, the protection offered under Art. 13 cannot be refused because the person concerned comes from a contracting party that has not adopted this Article. And this applies also in respect to paragraph 4 of Art. 13.

Therefore, Croatia and Macedonia already have to act according to the rules contained in the European Convention on Social and Medical Assistance to **fulfil their obligations under the Charter**. They have to treat nationals of other contracting parties lawfully present in their territory equally as their own nationals and their options for repatriation are limited.

However, the supervisory body of the Charters, i.e. the European Committee of Social Rights has made a clear distinction between

- foreigners *lawfully residing or working* in a contracting party (according to paragraphs 1-3 Art. 13 of both Charters in connection to first paragraph of the Appendix to the Charters) and
- foreigners *lawfully present* in the territory of the contracting party (according to paragraph 4 Art. 13 of the Charters in connection to the Appendix relating to it).

¹⁰⁶ See the List of declarations made with respect to the European Social Charter and the List of declarations made with respect to the Revised European Social Charter.

¹⁰⁷ Appendixes to the Charters state that Governments not Parties to the European Convention on Social and Medical Assistance may ratify the Charter in respect of paragraph 4 Art. 13 provided that they grant to nationals of other Parties a treatment which is in conformity with the provisions of the said Convention.

The later group is not entitled to the extensive range of benefits in cash and in kind for social and medical assistance that should be available to foreigners who reside or work in another contracting party. However, this should not be interpreted too restrictively.¹⁰⁸

5.2. Legal consequences for the existing contracting parties and their nationals

The result of ratification of the Convention by one or more of the CARDS-SISP countries might be that **more people would be entitled** to social and medical assistance in the already existing contracting parties than they were before the ratification. Nationals of newly acceding countries will be entitled to social and medical assistance under the same conditions as nationals of the existing contracting parties. On the other hand also nationals of existing contracting parties will be entitled to social and medical assistance in the new CARDS-SISP countries.

Limitations on the repatriation of nationals of the CARSD-SISP country, would be limited, the same as it is limited to nationals of other already existing contracting states. This goes not to lawfully present, but already for a certain uninterrupted period of time lawfully resident nationals of the CARDS-SISP country, who has already integrated in the society of the existing contracting state.

The question might be, if the existing contracting states could make new **reservations** on the sole ground that new states accede to the Convention. The Convention expressly states that the reservations must be made at the time of ratification. New reservations may be made only when notifying the Secretary General of the Council of Europe about the new law or regulation not already included in Annex I. This includes situations when already existing laws are repealed, modified, supplemented or replaced after ratification.¹⁰⁹

Every (also the existing) contracting parties are free to **denounce** the Convention according to already mentioned rules (above, point 5.1.1.).

All of the existing contracting parties to the Convention have also ratified the **European Social Charter** or the Revised European Social Charter. Thus, they are already under obligation, arising from the Charter, to apply the rules of the Convention to nationals of the contracting parties to the Charter (Croatia and Macedonia) or the Revised Charter (Albania).¹¹⁰

¹⁰⁸ More on the observations and conclusions of the European Committee of Social Rights in Social protection in the European Social Charter, pp. 63 and following.

¹⁰⁹ Art. 16 of the Convention and Explanatory Report concerning Annex II.

¹¹⁰ The only contracting party of the Convention that has not acceded to Art. 13 (4) of the Revised Charter is Estonia.

IV. CONCLUSIONS AND SUGGESTIONS DE LEGE FERENDA

It may be concluded that majority of the CARDS-SISP countries, i.e. Croatia, Bosnia and Herzegovina, Serbia, Macedonia and probably also Montenegro (if notifying the succession to international agreements) have a **well developed** and comprehensive social security system and well developed network of bilateral agreements, relating partially only to the nationals of contracting parties. They would probably have no legal problems implementing the European Interim Agreements, if they decide to ratify them.

Some of the CARDS-SISP countries have quite restrictive legal rules of providing social and medical assistance to nationals of other countries. However, most of them provide some form of emergency assistance and urgent medical care also to foreigners. Therefore, it might be concluded that they would probably have no legal problems implementing the European Convention on Social and Medical Assistance as well.

The European Interim Agreements and the European Convention on Social and Medical assistance are not all encompassing co-ordination instruments. They are restricted to the **principle of equal treatment** of nationals of other contracting parties with nationals of the country providing social security benefits or granting assistance. It is one of the basic principles of international social protection co-ordination. Although, all of the three analysed international legal instruments are dealing *mainly with only one co-ordination principle*, they have an *important legal impact* due to the fact that many European states have already ratified them.

It appears that in the legislation of some of the CARDS-SISP countries foreigners are treated differently from own nationals, not only in the social assistance schemes, but also in social security schemes (most evidently in family allowances schemes).

Therefore some **amendments or modifications** of the legislation in each of the CARDS-SISP countries might prove to be necessary, if the country would decide to ratify the interim Agreement(s) and/or the Convention. The legislator in each of the respected country could consider following solutions:

- There could be a *general article* at the beginning of each social security and social assistance law stating that foreigners are to be treated the same way as nationals. Or the word national (or citizen) could be replaced by the word person or even everyone. This way not only nationals of other contracting parties of the analysed international legal documents, but all foreigners would have to be treated equally with nationals of the respected country. This solution might prove to be too broad and thus not acceptable.
- Similarly, one general article in each social security and social assistance law could be introduced, stating that its application may be affected by international agreements. However its value would be limited. It would provide no indications in what direction it may have an effect.

- Therefore, it seems advisable to introduce more *specific amendments*. In all social security and social assistance legislation where nationality of the respected country is mentioned, there could be an addition “unless otherwise provided by an international agreement”. This may relate for instance to eligibility conditions, export of benefits etc. These way nationals of other contracting parties, but not at the same time nationals of other states, would be entitled to equal treatment.
- Specific amendments should not prevent only direct discrimination based upon nationality, but indirect discrimination as well. Thus where entitlements are conditioned with residence or permanent residence, or nationality of the child, similar addition could be placed, i.e. “unless otherwise provided by an international agreement”. Difficulties might arise because of different meanings of the terms. Analysed international agreements allow limitations to the principle of equal treatment, sometimes with (certain period or at a certain moment) residence, ordinarily residence, or mere lawful presence.
- Possible solution could also be to abandon the citizenship condition and replace it with the condition of legal and stable residence in the country.

Concerning the extension of the advantages of bilateral agreements to nationals of other contracting parties no modifications in the national legislation appear necessary. Bilateral agreements will have to be listed in the appropriate annex to the European Interim Agreement(s).

In case of ratification of one or more of the analysed international agreements **concrete obligations** will depend on the declarations made in various Annexes as well as the number and content of the reservations made. It is true that reservations are not limited in number or scope and thus leave states with a great deal of flexibility. It is not necessary to accede to certain articles or paragraphs to be allowed to ratify the Interim Agreements or the Convention. However, if there are too many reservations or they are too broad in scope, then the intention for ratification might become questionable.

It is reasonable to expect that due to ratification somewhat **increased number** of persons might be entitled to some social security benefits as well as social and medical assistance they would otherwise not be entitled. That could be expected in the CARDS-SISP countries concerning nationals of other CARDS-SISP country or nationals of existing contracting parties, and for the existing contracting parties concerning nationals of one or more of the CARDS-SISP countries. Thus, the country will have to provide equal treatment (benefits) to nationals of other countries, but at the same time its own nationals will be treated equally (receiving benefits) in other countries. The equality principle would extend to advantages from bilateral and multilateral agreements and to prohibition of repatriation of assistance recipients already integrated in the society of a host state. At this point it is impossible to predict the exact number of possible new beneficiaries.

In addition, some obligations concerning the Council of Europe’s legal instruments relating also to co-ordination in the field of social protection **seem to exist already**. All of the existing contracting parties as well as some of the CARDS-SISP countries have already ratified the European Social Charter or the Revised European Social Charter.

Ratification of the European Interim Agreements and the European Convention on Social and Medical Assistance by the CARDS-SISP countries could contribute to fulfil the **Council of Europe's aim** to achieve greater unity between its members for the purpose, among other, of facilitating their social progress.