

Report on the relevance of EU legislation for the social security rights of persons from SISP countries who move between the Balkan region and the EU Member States

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The EU is there primarily to serve the interests of the EU Member States and their citizens. Where there are any beneficial effects to be expected from the EU for SISP country nationals this is either because these nationals behave as EU citizens who move within the Union, or because there is some extra-territorial “spill over” which is thought to be beneficial for the effective operation of the EU system. But as such the protection of social security rights of the SISP country workers, who move between their home states and the EU in the narrow sense of the word, is not a legally recognized objective of the EC-treaty. Only the association and stabilisation agreements which the EU has concluded with some SISP-countries, offer a framework for such co-ordination. As long as concrete co-ordination instruments to implement these agreements have not come into being, the interests of the SISP country nationals must be protected by the SISP countries themselves, by their national legislation, and by their initiatives or willingness to enter into the bi- and multilateral social security relations.

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PART A: INTRODUCTION

1. Preliminary remarks

According to the “instructions” of the CARDS-SISP project the purpose of this report is to provide an analysis of the relevance of EU legislation for the social security rights of persons from SISP countries and territories, i.e. Albania, Croatia, Bosnia and Herzegovina, Kosovo, Serbia and Montenegro. The analysis should include an overview of relevant EU rules in the area of social security. Furthermore, the interrelationship between these rules and bilateral social security conventions which have been concluded by SISP countries must be studied. Finally, attention should be paid to the interplay between EU law and the Conventions of the Council of Europe in the area of the co-ordination of social security. It is specifically stated that the report is not about the effects which the accession of the SISP countries may have on the social security systems of these countries. Only the impact of present EU law on the legal position of persons who move between the SISP countries and the EU is subject of the report

The question of the effect of EU law on the social security rights of persons from the SISP countries is a relevant one. It is not correct to assume that EU law will only become relevant for persons with SISP-nationality as from the moment these countries were to join the EU. The main EU instrument on the co-ordination of social security rights, Regulation 1408/71 is fully applicable to third country nationals. This means that a SISP country national who lives and works in EU-territory and who move from one member state to another, are treated the same as any other EU-national under this regulation. The impact of EU law for SISP country nationals can even go beyond that, as this law may have extra-territorial effect. Thus, it is possible that the mandatory affiliation to the social security system of an EU Member States imposed by EU law remains applicable when a person is seconded by his employer to one of the SISP countries for a particular assignment. Also -as is suggested in the instructions for the present report- EU law may affect the way bilateral agreements which have been concluded between SISP countries and EU member states must be applied. Such agreements must be applied without prejudice to the nationality of the persons who have been subject to social security legislation of the bilateral treaty partners.

It is difficult to describe the possible effects of EU rules for SISP country nationals in general terms. These effects are often the result of intricate legal constructions or are sometimes mere by-products of the application of legal principles which have been designed for other purposes. As a result, whether or not EU law applies to a SISP country national depends very much on the circumstances of the case. Also it should be remembered that the influence of EU law is not unlimited. There are no EU rules to co-

ordinate the legislation of EU Member States and the SISP countries. Such co-ordination is still fully controlled by the national governments of the countries involved and their bi- or multilateral efforts. However this does not mean to say that the impact of EU rules is minimal. There are large groups of SISP country nationals who work and live in EU-territory. As the case may be, the social security entitlements of these persons may be considerably improved as a result of the application of EU law.

EU co-ordination law has an infamous reputation because of its complexity. The complexity has a negative impact on the accessibility and enforceability of the rights in practice. It is important for the citizens of the SISP countries, their representatives (unions, diplomatic support, lawyers) and the SISP country institutions to know in which situations EU law can successfully be invoked. This report is intended to provide guidance in this matter. By providing systematic information on the value of EU law and addressing specific questions which are relevant for the legal position of SISP country nationals, it will offer a guide to the rights of these nationals. This information can furthermore be taken into account by the SISP countries when developing a future strategy on the international co-ordination of social security.

2. The structure of the report

Apart from the general introduction, this report consists of three parts (B, C and D). The largest part is Part B dealing with the legal analysis of the impact of EU law. In this part attention is paid to three subjects, i.e.

- The territorial scope of application of EU social security law
- The personal scope of application of EU social security law
- The EU status of bi- or multilateral social security agreements and EU agreements with SISP states

These are three major subjects of EU law which have given rise to an abundance of case law and literature. The objective is to give a very brief description of the state of the law with reference to the EC treaty, case law of the European Court of Justice (ECJ) and legal writing. For each of the subjects the general starting points are followed by a more detailed treatise of specific questions which are directly relevant for the legal position of SISP country nationals. The questions that have thus been selected are:

With regard to the territorial scope of application of EU social security law:

- a. To what extent is EU social security law applicable in case a person works outside one of the EU Member States?
- b. Should a person be resident in one of the EU Member States in order to successfully invoke Regulation 1408/71?

With regard to the personal scope of application of EU social security law:

- c. Under what conditions can third country nationals invoke the principle of non-discrimination on grounds of nationality and Regulation 1408/71?

- d. What is the relevance of the so-called ‘migration criterion’ for the applicability of EU social security law

With regard to the status of bi- and multilateral agreements and EU agreements with SISP states:

- e. How does EU law effect the application of agreements concluded by SISP countries?
 f. What is the legal effect of the social paragraphs included in the EU stabilisation and association agreements?

In each paragraph the answer to these questions is summarized in a paragraph by means of “preliminary findings”

Part C deals with the relevance of EU law from the SISP countries perspective. In this part the preliminary findings contained in the previous paragraph are brought together and placed in a wider context: to what extent can SISP country nationals who move between their countries and the EU be considered as “addressees” of EU social security law?

Part D contains general recommendations with regard to the future strategy which could be adopted by the SISP countries taking into account the value of EU legislation. These recommendations have been differentiated according to the (groups) of SISP countries involved. The recommendations should be read in harmony with the recommendations adopted in the SISP reports presented by Paul Schoukens (on the European Convention on social security) and Grega Strban (Interim Agreements and the European Convention on social and medical assistance).

The Annex contains a systematic overview of the treaty relations between the EU on the one hand and the individual SISP countries on the other. This information reflects the research that was carried out for this report into the social security obligations that may have been entered into by the EU. It was felt that the overview provides valuable information that is worth bringing out in the open.

3. Some concepts and definitions

For the sake of clarity it is useful to define a number of concepts and terms used in this report.

EEA-countries and Switzerland

For the purpose of this report it is assumed that EU law is also applicable for the three remaining countries of the European Free Trade Association (EFTA), Iceland, Liechtenstein and Norway. The reason for doing so is that after the conclusion of the treaty on the European Economic Area in 1993¹, these countries have been linked up to the main EU instrument Regulation 1408/71 and Regulation 1612/68. The latter regulation has specific relevance for social security in the light of art. 7(2), prescribing

¹ [1993] OJ L347/2

equality of treatment in the area of social and fiscal advantages. Also Switzerland is subject to EU social security law. Although this country rejected the treaty on the European Economic Area in a national referendum, it subsequently adhered to substantive parts of material EU law by means of a separate agreement. Thus Regulations nos. 1408/71 and 1612/68 equally apply to Switzerland.

As a matter of fact, the inclusion of the EEA countries and Switzerland in the legal order of the European Union should be treated with some caution. Changes in EU law, so also changes in Regulation 1408/71 do not apply automatically to this group of countries. Instead, each time such changes must first be accepted by joint committees before they become applicable. As a result, the actual state of social security law for the EEA-countries may differ on small points or just lag behind the state of EU legislation. The joint committees consist of representatives of all the relevant contracting parties.

EU social security law

In this report the term EU social security law refers to the body of co-ordination law dealing with social security. The term co-ordination law covers art. 41 EC and two regulations which are based upon this article, Regulations 1408/71 and 574/72, as well as all other provisions which may be invoked in order to claim social security benefits in situations of in- or extra-community mobility, most notably the prohibition of discrimination on grounds of nationality (cf. *inter alia* artt. 12, 39 EC, art. 7(2) Regulation 1612/68, art. 11 of Directive 2003/109/EC art. 24 Directive 38/2004/EC) and the provisions on European citizenship (especially artt. 17 and 18 EC). The non-discrimination rule and the notion of European citizenship have an extra value for EU social security law in addition to Regulation 1408/71. The ECJ frequently solves social security cases on the grounds of these principles where migrants are assumed not to be adequately protected by Regulation 1408/71.

With regard to secondary legislation reference will be not only be made to Regulation 1408/71, but also to its successor: Regulation 883/2004. Although the latter regulation has not yet entered into force, it offers the most up to date expression of the present state of EU co-ordination law.

Nationals of SISP countries who move between ...

A final concept that needs clarification refers to a phrase adopted in the title of this report, referring to “nationals of SISP countries who move between the Balkan region and EU Member States”. This phrase can be interpreted in both a narrow and a broad sense. In the narrow sense it refers to migrants who have been subject to the social security legislation of a SISP country and to the legislation of an EU Member State. In a broad sense it also includes SISP country nationals who move between the Member States of the Union. Unless it appears otherwise from the literary text, this report employs the broad meaning.

PART B: LEGAL ANALYSIS FROM THE EU PERSPECTIVE

3. The territorial scope of application of EU social security law

3.1. General starting points

Article 299 of the EC Treaty defines the geographical application of the Treaty and, by doing so, also the application of secondary EU legislation, among which Regulation 1612/68 and Regulation 1408/71. According to Article 299 Community law is applicable in the territory of the member states of the EU. Furthermore, most member states took the opportunity given by this article in relation with annex II of the Treaty, to define the status of their overseas territories under EU law.

Together with their dates of accession, the Member states of the EU are Austria (1995), Belgium (founding member: 1958), Cyprus (2004), Czech Republic (2004), Denmark (1973), Estonia (2004), Finland (1995), France (founding member: 1958), Germany (founding member: 1958), Greece (1981), Hungary (2004), Ireland (1973), Italy (founding member: 1958), Latvia (2004), Lithuania (2004), Luxembourg (founding member: 1958), Malta (2004), The Netherlands (founding member: 1958), Poland (2004), Portugal (1986), Slovakia (2004), Slovenia (2004), Spain (1986), Sweden (1995) and United Kingdom (1973).

The fact that the territorial application is confined to the territory of the Member States does not preclude Community rules from having effects outside the territory of the Community. The European Court of Justice has consistently held that provisions of Community law are applicable to professional activities performed outside Community territory as long as the employment relationship retains a sufficiently close link with the Community.

The oldest court ruling (1974) concerned Mr Walrave, a Dutch national and a professional cyclist behind motorcycles (so called “pacemakers”), who participated in a championship in Spain, at that time not yet a member of the EU². He invoked the principle of non-discrimination of the EC Treaty on the grounds of nationality, because the rules of the Union Cycliste Internationale stipulated that the pacemaker must be of the same nationality as the cyclist. Mr Walrave wanted Mr Koch, not a Dutch national, to be his pacemaker. The European Court of Justice opened the door to the application of the Community law outside the territory of the member states:

The rule on non-discrimination applies to all legal relationships which can be located within the territory of the community by reason either of the place where they are entered into or of the place where they take effect.

The Court left it to the national court to establish if there were indeed sufficient grounds to link the economic relation to EU territory. (...)

Regulation 1612/68

² ECJ 12 December 1974, 36/74, Walrave-Koch

In subsequent case law dealing with Regulation 1612/68 the ECJ has frequently elaborated on the starting point of Walrave/Koch. An important step forwards was made in de Lopez-da Veiga case³. Mr Lopez-da Veiga was a Portuguese seaman who had worked for years on ships flying the Dutch flag. During periods of leave he spent his time in the Netherlands. He was denied a Dutch residence permit because the Dutch authorities did not consider his stay on board Dutch ships as stay in the Netherlands. However, the European Court of Justice decided that Mr Lopez-da Veiga has a sufficiently close connection with the territory of the Netherlands for the application of Community law (in this case Regulation 1612/68):

17. (...) the applicant works on board a vessel registered in the Netherlands in the employ of a shipping company incorporated under the law of the Netherlands and established in that State; he was hired in the Netherlands and the employment relationship between him and his employer is subject to Netherlands law; he is insured under the social security system of the Netherlands and pays income tax in the Netherlands.

The most far reaching Court ruling dates from 1995⁴. Ms Boukhalfa was a Belgian national. Since 1 April 1982, she had been employed on the local staff of the German Embassy in Algiers. She was hired in Algiers. Prior to entering into her contract, Ms Boukhalfa was already established in Algeria, where she also had her permanent residence. German labour law makes a difference between German and non-German diplomatic staff (e.g. different wage levels). Ms Boukhalfa wanted to be equally paid on the basis of the EU non-discrimination principles as laid down in Regulation 1612/68. Germany, on the other hand, argued that Community law was not applicable to the present case because its scope of application is limited, under Article 299 of the EC Treaty, to the territory of the Member States of the EU and Ms Boukhalfa was not in the situation of a national of a Member State employed in another Member State but had always worked in a non-member country. Nevertheless the Court ruled that the employment relationship of Ms Boukhalfa has a sufficiently close link with the EU in order to apply EU law to that relationship.

16. In the present case, it is clear from the documents before the Court that the plaintiff's situation is subject to rules of German law in several respects. First, her contract of employment was entered into in accordance with the law of the Member State which employs her and it is only pursuant to that law that it was stipulated that her conditions of employment were to be determined in accordance with Algerian law. Secondly, that contract contains a clause giving jurisdiction over any dispute between the parties concerning the contract to the courts in Bonn and, ultimately, Berlin. Thirdly, the plaintiff in the main proceedings is affiliated for pension purposes to the German State social security system and is subject, though to a limited extent, to German income tax.

17. In situations such as that of the plaintiff in the main proceedings, Community law and thus the prohibition of discrimination based on nationality contained in the abovementioned Community provisions are applicable to all aspects of the employment relationship which are governed by the law of a Member State.

These rulings show that the ECJ has released the definition of the territorial scope of application of Regulation 1612/68 from the narrow compound of its strict geographical meaning. Instead, there should be a sufficiently close connection between the employment relation and the legal order of the EU.

³ ECJ 27 September 1989, 9/88, Lopez-da Veiga

⁴ ECJ 30 April 1996, 214/94, Boukhalfa

Regulation 1408/71

Regulation 1408/71 does not contain a general provision about its territorial scope of application. Because of that, the territorial application is subject to the same restrictions and extensions as the EU-Treaty. Indeed, there are several clues that the Regulation is originally meant to be applied within the territory of the Member States only.

First of all, the title of the Regulation hints to a limited application: “Regulation (EEC) No 1408/71 (...) on the application of social security schemes to employed persons and their families moving *within the Community*” (italics added). Secondly, Article 10 ensures the payment of benefits abroad, but only if the beneficiary lives in the territory of another Member State. Lastly, the articles 13 to 17a refer explicitly to the Member State in which territory the economic activities are pursued, in order to determine the applicable legislation for a migrant worker.

3.2. Specific questions

In the previous paragraph it was pointed out that the territorial scope of application of Regulation 1408/71 is determined by Article 299 of the EU Treaty. It was also pointed out that Community law sometimes goes beyond the borders of the EU if there remains a sufficiently strong economic tie with the EU. In this paragraph we will discuss two specific questions on the extraterritorial effect of Community law which are connected with Regulation 1408/71.

a. Can Regulation 1308/71 be applied to employment relations outside the EU?

Title II of the Regulation (articles 13-17a) contains a set of rules that determine the applicable legislation to a migrant worker. The rules apply in situations in which workers are in one way or another engaged in cross-border activities. The objective of these rules is to avoid cases where persons are not covered by the social security legislation of any Member State (“negative conflict”), or when they are simultaneously covered by the legislation of two or more Member States (“positive conflict”). To realise this objective, article 13 (1) stipulates that a person can be subject to the legislation of one Member State only (the competent Member State).

But what legislation should apply in a concrete situation? To answer this question, the provisions of Title II contain rules that designate the applicable legislation, the so-called “rules of conflict”. The general starting point for these rules is the principle that a person is subject to the legislation of the Member State where he works, even if he resides in another Member State (*lex loci laboris*). This starting point is embodied in article 13 (2) (a) for employees:

(...) a worker employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State

For other groups of persons, such as self-employed persons, workers who are engaged in transport, seamen or persons who work simultaneously in two countries, specific rules of conflict on the applicable legislation have been adopted.

The explicit reference to the Member State of employment as competent Member State suggests a further obstacle for the application of Title II to employment relationships outside the territory of the EU. However, the Court of Justice has extrapolated the above mentioned case law to the application of Title II: if there is a sufficient relationship with the legal order of (one of the Member States of) the EU, the applicable legislation can be established by the rules of conflict of the Regulation.

The Court decided this in the Aldewereld case⁵. Mr Aldewereld was a Netherlands national who was resident in the Netherlands when he took a job with an undertaking established in Germany, which posted him immediately to Thailand, where he worked during 1986. During 1986 Mr Aldewereld was liable in Germany to pay social security contributions in respect of sickness, unemployment, old age and accidents according to German domestic social security legislation. Over the same year, Mr Aldewereld was –on the basis of residency- also insured under the Netherlands legislation in respect of old age and survivor’s pension. The question arose if this “positive conflict” was covered by Article 13 (2)(a), in spite of the fact that Mr Aldewereld performed his activities in Thailand. The Court of Justice answered this question positively:

14. It follows from the case-law of the Court (...) that the mere fact that the activities are carried out outside the Community is not sufficient to exclude the application of the Community rules on the free movement of workers, as long as the employment relationship retains a sufficiently close link with the Community. In a case such as this, a link of that kind can be found in the fact that the Community worker was employed by an undertaking from another Member State and, for that reason, was insured under the social security scheme of that State.

This was not yet the end of the story, since there is no specific rule of conflict tailored to this situation. Here too, referring to the objective of Title II, the Court of Justice links the applicable legislation to the Member State where the economic point of gravity can be located, *in casu* Germany where the employer is registered:

24. In a case such as that in the main proceedings, the legislation of the Member State of the worker's residence cannot be applied, since there is no factor connecting that legislation with the employment relationship, unlike the legislation of the State where the employer is established, which must therefore be applied.

At this point the conclusion should be that the case law regarding the extraterritorial effect of Regulation 1612/68 also applies to Title II of Regulation 1408/71.

b. Should a person be resident in one of the EU Member States in order to successfully invoke Reg.1408/71?

The previous paragraph was concerned with the question of whether title II of Regulation 1408/71, can have extraterritorial effect in cases where persons work outside the territory of the EU. The present question goes a step further and deals with the situation of persons living outside the territory of the EU. Can Regulation 1408/71 be invoked by persons who are resident in a third state? This is a controversial question which up until now has not been solved by ECJ case law. When looking at the text of Regulation 1408/71, we can find indications for both a positive and a negative answer to this question. On the one

⁵ ECJ 29 June 1994, 60/93, Aldewereld

hand certain provisions clearly indicate the existence of an EU residence requirement. As mentioned before, the export provision of art. 10(1) presumes that the person involved lives on the territory of another Member State. Also the conflict rules of Title II refer to persons who are employed or resident in a Member State. Perhaps also the title of the Regulation suggests the existence of a general residence requirement, when it refers to persons moving within the Community. On the other hand no general EU residence condition has been formulated in article 2 defining the personal scope of application. Furthermore, the text of Article 3 has recently been changed. Article 3 stipulates equal treatment on grounds of nationality. At Austria's proposal the clause that equal treatment can only be invoked by residents of EU Member States has been deleted.⁶

To confuse matters even more, the new Regulation 883/2004 explicitly confines the personal scope of the regulation to persons who live in a Member State of the European Union.⁷ This newly introduced general residence clause in Regulation 883/2004 seems difficult to reconcile with the aforementioned change to art. 3 Regulation 1408/71.⁸

In the case of a British national, Mr Chuck, who had completed periods of insurance in both Denmark and the Netherlands, and who subsequently moved to the USA, the Amsterdam District Court is, at the time of writing, considering referring a preliminary question to the ECJ⁹. In particular this Court wishes to know whether an article of the regulation, article 48, can be applied to Mr Chuck. This article contains a calculation rule in the area of old age pensions. If this case is referred the ECJ will have an opportunity to deliver a principal ruling on the application of an EU-residence requirement in EU co-ordination law.

The only conclusion that we can draw with certainty at the time of writing is that the principle of non-discrimination on grounds of nationality of art. 3 Regulation 1408/71 is *not* confined to persons resident in EU Member States. For our report this conclusion is not an insignificant one. It means that SISP country nationals who have returned to their country of origin or who have moved to another third country can claim equal treatment when claiming EU social security rights. In view of the wide interpretation of the non-discrimination rule by the ECJ this may have far reaching consequences. One of these consequences deals with the possibility to invoke bilateral agreements which have been concluded between EU Member States and SISP countries. This subject is dealt with further in paragraph 6.2.

3.3. Preliminary findings as to the territorial scope of application

EU social security law is primarily confined to the territory of the EU Member States. The first obvious conclusion to be drawn from this is that there is no co-ordination with the social security schemes from SISP countries. Nonetheless there a limited number of

⁶ Regulation (EC) No 647/2005, 13 April 2005

⁷ Art. 2(1) of Regulation 883/2004 will read: "The regulation shall apply to nationals of a Member State, stateless persons and refugees, *residing in a Member State* who are or have been subject to the legislation of one or more Member States (...)", my italics.

⁸ It would rather turn back the clock to the pre-existing situation as the non-discrimination rule of the new regulation adopted in art. 4 will only be applicable to persons "to whom the regulation applies".

⁹ K.D. Chuck ten het Bestuur van de Sociale Verzekeringsbank, AWB 02/535/AOW

exception to the strict territorial application. Extra-territorial application is possible when the employment relationship of a person is closely linked to the legal order of the Member States. Such a situation may occur when a person is temporarily employed in a third country by an employer who is established in the Union. Such person will remain protected by the EC treaty provision on the freedom of movement of workers and are equally covered by the single state rule underlying title II of Regulation 1408/71. With regard to persons living outside the Union, the situation with regard to EC social security law is not clear. It is only manifest that persons living outside the EU can invoke the protection of art. 3 Regulation 1408/71 (non-discrimination clause) in order to claim social security rights under the legislation of Member-States under which they are or have been insured.

4. The personal scope of application of EU social security law

4.1. General starting points

The personal scope of application of EU social security law traditionally extends to workers in an employed and self-employed capacity, as well as the members of their family. The contents of these concepts is not the same for the treaty regime governing the freedom of movement of persons on the hand and for Regulation 1408/71 on the other hand. While Regulation 1408/71 contains detailed definitions of the terms employed person, self-employed person¹⁰, the meaning of these terms as used in the EC-treaty is fully determined by the case law of the ECJ.¹¹ Very simply formulated for the purposes of the treaty provisions on the freedom of movement, a worker or a self-employed person is a person who carries out substantial and genuine activities for which he receives a remuneration. For the purposes of the Regulation 1408/71 it is much rather the status that a person has within the national social security scheme, that determines whether or not he is considered to be employed or self-employed. The term member of the family is defined both in Regulation 1408/71¹² and for the purposes of the freedom of movement in Directive 2004/38.¹³

Following the obligations that all Member States have accepted under the International Conventions for Refugees and for stateless persons, EU social security law also applies to these categories.¹⁴

Regulation 1408/71 has been specifically extended to civil servants and to students.¹⁵ Under the influence of the ECJ-case law, also the treaty provisions on the freedom of movement may be applicable to these categories, but this depends largely upon the circumstances of the case. The new Regulation 883/2004 will simply be applicable to all persons who are or have been subject to the social security legislation of the Member States.

¹⁰ art. 1(a) Regulation 1408/71

¹¹ For an overview, see C. Barnard, *EC employment law*, 2000, 133-136; P.J.G. Kapteyn and P. Verloren van Themaat, *Introduction to the law of the European Communities*, 1998, 701-709.

¹² art. 1(g) Regulation 1408/71

¹³ art. 2 Directive 2004/38.

¹⁴ However as will explained below in 5.2 this is subject to the 'migration criterion'.

¹⁵ See art. 2 Reg. 1408/71

It is important to point out that the various distinctions that can be made between different categories of persons, such as employed persons, self-employed persons, non-active persons, members of the family, civil servants, students, etc. is increasingly losing importance as a result of the treaty introduction of the notion of European citizenship in 1992 (presently artt. 17-22 EC). Every person holding the nationality of one of the Member States is granted citizenship. And even though art. 17(2) merely stipulates that citizens of the Union shall enjoy the rights conferred by the EC treaty, the ECJ has found in this article a major source of inspiration to extend the scope of freedom of movement rights to those who were previously without protection, most notably persons who are economically not active. This has also had a major impact on the possibility to claim all sorts of social benefits in an intra-community context.¹⁶

For the purposes of this report, the main question to be considered is whether persons not holding the nationality of an EU Member State are protected by EU social security law: to what extent are nationals of SISP countries protected by the relevant EU rules?

In order to answer this question properly, it must be pointed out that neither the EC treaty regime governing the freedom of movement of persons nor the EC treaty provisions on European Citizenship apply to third country nationals.¹⁷ The EU has no competence to extend any protection to third country nationals, but on the basis of Title IV dealing with a common immigration policy of the Union (visas, immigration and other policies related to the freedom of movement of persons, artt. 61-69 EC).¹⁸ For our report, there are now three categories of third country nationals which should be taken into consideration

- a. Third country nationals holding long term residence status in one the Member States on grounds of Directive 2003/109/EC. This is a directive based on Title IV, art. 63 EC. Persons with permanent residence status enjoy equality of treatment in the area of social security, social assistance and social protection in the state of residence (art. 11)
- b. Members of the family of EU nationals who make use of their right to freedom of movement within the Union. (traditionally covered by the prohibition of discrimination on grounds of nationality, such as contained in art. 7(2) Regulations and by Regulation 1408/71)
- c. Persons who satisfy the conditions of Regulation 859/2003 extending the scope of application of Regulations no. 1408/71 and 574 to third country nationals (based upon Title IV, art. 63 EC).

In the next paragraph we will consider under what conditions these categories of third country nationals can invoke the relevant legislation. Furthermore, we will specifically pay attention to the question to what extent the third country national should satisfy the

¹⁶ See C. Barnard, "EU Citizenship and the Principle of Solidarity", in: E. Spaventa en M. Dougan, *Social Welfare and EU Law*, Oxford en Portland, 2005; K. Hailbronner, Union citizenship and access to social benefits, *CMLRev* 2005, 1245-1267. .

¹⁷ See the definition of . art. 17 EC. With regard to art. 39 EC the restriction to nationals of the Member States has been formulated in secondary legislation, but not in the treaty provision itself. The Court excepted the restriction in ECJ 8 April 1976, 48/75, [1976] ECR 497.

¹⁸ Denmark and Ireland have negotiated an opt out for this measures taken on the basis of Titel IV

so called ‘migration criterion’, i.e. the condition that a person must have moved between two or more Member States of the European community.

5.2 Specific questions

c. *Under what conditions can third country nationals invoke EU social security law?*

With regard to the possibility to invoke equality of treatment *for persons with permanent residence*, Directive 2003/109/EC primarily requires that the third country national acquires “long term residence status”. This depends inter alia on the duration of the residence in the host state (five years), stable resources and adequate health insurance. Interestingly, the right to equality of treatment in the area of social security, social assistance and social protection is granted by the directive¹⁹ independently from the right to move to another Member State. In other words third country nationals with permanent residence status can invoke equality of treatment in order to obtain social advantages in their host state, even if they have not migrated within the European Union. The ‘migration criterion’ (see below) is not applicable. On the other hand, there is an important restriction: long term residence status terminates when a third country national remains outside the Member State for more than 12 months. As a result, Directive 2003/109/EC is of no avail to third country nationals who have returned to their home countries and who claim social security rights under the legislation of their former EU-states of residence.

Access to the protection of the principle of non-discrimination is extended to *members of the family of European citizens*²⁰, irrespective of the nationality of these members. Directive 2004/38/EC now defines “family member” as:

- a. the spouse;
- b. the partner with whom the Union citizen has contracted a registered partnership (...);
- c. the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point b;
- d. the dependant direct relatives in the ascending line and those of the spouse or partner as defined in point b²¹

These members of the family enjoy the same equality of treatment on grounds of nationality as the European citizens from which they derive their status.²² However it is a condition that the member of the family resides in the territory of the Member State. Hence, SISP-country family members who have returned to their home countries are without protection. Furthermore, it is required that the European citizen who is related to the member of the family can himself be qualified as a person who used the right to freedom of movement between two or more Member States. Unlike Regulation 2003/109 which is discussed above, the ‘migration criterion’ is fully applicable. Thus for example in the case of Poirrez²³ the ECJ did not allow a handicapped child from the Ivory Coast

¹⁹ By art. 11(1)(d) Directive 2003/109/EC.

²⁰ Be it in an employed, self employed or any other capacity.

²¹ Art.2(2) Directive 2004/38/EC; this article replaced art. 10 of Regulation 1612/68.

²² Art. 24 Directive 2004/38/EC

²³ ECJ 16 November 1992, 206/91. Years later on 30 September 2003 Poirrez’s claim was finally recognized by the European Court of human rights under the European Convention on human rights!

who was adopted by a French national access to the principle of non-discrimination as a “member of the family”, in order to claim a French allowance for handicapped persons. The reason was that the French father had always lived in France. Unlike Directive 2003/109, Directive 2004/38/EC is exclusively written for the freedom of movement of citizens within Europe.

Last, but not least *third country nationals* are now fully covered by Regulation 1408/71. This extension is essentially realized by one article of a separate Regulation (no. 259/2003) based upon art. 63 of Title IV of the Treaty:

(...), the provisions of Regulation (EEC) no 1408/71 (...) shall apply to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality, as well as to members of their families and to their survivors, provided they are legally resident in the territory of a Member State and are in a situation which is not confined in all respects within a single Member State.²⁴

There are three aspects to be taken into account. Firstly, the territorial scope of application. Denmark is not in the arrangement (this country has made use of an opt-out possibility under Title IV EC), nor are the EEA countries: Norway, Iceland and Liechtenstein²⁵ The result is that third country nationals cannot claim any advantages from Regulation 1408/71 arising from their migration between a Member State and any of these four countries. Secondly, the requirement of *legal* residence. There is no common definition of this term in community law. Eventually it is the qualification under national immigration law which determines whether a person is to be considered legal or not legal. It is to be expected that the Member States fall back upon the requirement that the third country national is in possession of a valid residence permit. Thirdly, there is the ‘migration criterion’, uniquely codified in art. 1 Regulation 259/2003 in the requirement that the situation should not be “confined in all respects within a single Member State”. The meaning of this requirement is the subject of the next question

d. What is the relevance of the so-called ‘migration criterion’ in applying EU social security law to third country nationals

The purpose of the Regulation is to protect persons from the loss of social security rights following movement between two or more EU Member States. From this it follows that purely internal matters, with no *intra-community connection* are outside the scope of protection of Regulation 1408/71 and the treaty regime governing the freedom of movement of persons. Thus for example in the *Petit-case*²⁶, the Court rejected the claim of a Belgian national under art. 39 EC and Regulation 1408/71 to have the right to conduct legal proceedings in a Belgian court in his own language (French rather than Dutch). The question was considered to be solely within the internal sphere of Belgium.

When there is only a link between one member state and a third state, the situation is equally disregarded by the EU regime on the freedom of movement. This became apparent in the cases of *Khalil* and others.²⁷ These cases involved a number of Palestinian stateless persons or refugees whose claim for German children benefits had been rejected

²⁴ art.1 Regulation 259/2003

²⁵ Switzerland has now accepted the Regulation within its separate agreement with the EU.

²⁶ ECJ 22 September 1992, 153-/91.

²⁷ ECJ 11 October 2001, 95/99 to 98/99, *Khalil* c.s..

by the German authorities on grounds of their insufficient status under German immigration law. They claimed that the refusal of benefits was contrary to the non-discrimination rule of art. 3 Regulation 1408/71. The ECJ did not accept this claim by lack of an intra-community connection. The Court admitted the situation would be different if these persons had moved to France and subsequently back to Germany. Had this been the case, Regulation 1408/71 would have been applicable.

It should be pointed out that Regulation 1408/71 does not impose strict standards for a person to satisfy the migration criterion. It suffices that in some way or other, by moving his place of work or residence, a person should be in contact with the social security legislation of more than one Member State. In case of family benefits the intra-community connection can also arise when the one of the parents does not live in the same country as the children.²⁸

5.3 Preliminary findings as to the personal scope of application

It can be concluded that SISP country nationals are covered by EU social security law in the same way as EU-citizens, subject to the criteria of:

- intra-community movement ('migration criterion'), and
- Legality of residence.

This means that SISP country nationals are protected against a loss of social security rights following their movement between the EU Member States.

Outside the area of Regulation 1408/71 SISP country nationals are only protected by the non-discrimination rule. They are entitled to this protection either as permanent status holders within the meaning of Directive 2003/309/EC or as family members of EU citizens. For permanent status holders the migration criterion does not apply. This status terminates once the person has left the EU Member State for longer than 12 months.

6. The EU status of bi- and multilateral social security agreements and EU agreements with SISP-states

6.1. General starting points

Agreements between Member States

Traditionally, the European countries were connected through a widespread network of bilateral agreements on social security. When the European co-ordination regulation came into force (in 1958 Regulation No. 3, in 1971 replaced by Regulation 1408/71), the question arose as to how to deal with these bilateral instruments. The objective of the Regulation was to create a supranational co-ordination tool. This necessitated the replacement of the pre-existing bilateral conventions between the Member States.

The replacement (not termination!) of binding social security conventions between two or more Member States is now formulated in art. 6 of Regulation 1408/71. Most bilateral

²⁸ ECJ 16 March 1978, 115/77, Laumann

agreements have thus been replaced, unless specifically “preserved” by including them in a separate Annex of the Regulation on grounds of art. 7 Regulation 1408/71 (Annex II).

Art. 7 contains a number of exceptions to the general starting point of Article 6:

1. This Regulation shall not affect obligations arising from:

- (a) any convention adopted by the International Labour Conference which, after ratification by one or more Member States, has entered into force;
- (b) the European Interim Agreements on Social Security of 11 December 1953 concluded between the Member States of the Council of Europe.

2. The provisions of Article 6 notwithstanding, the following shall continue to apply:

- (a) the Agreement of 27 July 1950 concerning social security for Rhine boatmen, revised on 13 February 1961;
- (b) the European Convention of 9 July 1956 concerning social security for workers in international transport;
- (c) the social security conventions listed in Annex II.

Article 8 allows two or more Member States, as need arises, to conclude conventions with each other based on the principles and in the spirit of this Regulation.

Early case law indicated that the articles 6 to 8 are a closed system which does not tolerate any exception, not even if the application of a former bilateral agreement would be more favourable for the migrant worker. The Court of Justice expressed this view in the case Walder²⁹ (on the interpretation of Regulation No. 3):

6. It is clear from these provisions that the principle that the provisions of social security conventions concluded between Member States are replaced by Regulation No. 3 is mandatory in nature and does allow of exceptions save for the cases expressly stipulated by the regulation.

7. The fact that social security conventions concluded between Member States are more advantageous to persons covered by Regulation No. 3 than the Regulation itself is therefore not sufficient to justify an exception to this principle unless such conventions are expressly preserved by the Regulation.

In later years the ECJ has taken a less strict view of the priority of Regulation 1408-71 over bilateral agreements. This became apparent in the rulings of Roenfeldt³⁰ and Thévenon³¹. The conclusion of these court rulings is that a bilateral convention takes priority over Regulation 1408/71 if:

- 1) The application of the bilateral agreement is more favourable in comparison to Regulation 1408/71.
- 2) The worker exercised the right to freedom of move before Regulation 1408/71 came into force (in other words: before the replacement of the bilateral agreement by the Regulation).

It follows from these conditions that the replacement of bilateral conventions by Regulation 1408-71 is contrary to the EC Treaty when this replacement would result in a loss of social security rights which have been built up under bilateral conventions prior to the entry into force of the Regulation.

²⁹ ECJ 7 June 1973, 82/72

³⁰ ECJ 7 February 1991, 227/89

³¹ ECJ 9 November 1995, 475/93

Bilateral agreements with third countries

The next question that has to be answered is how to deal with bi- and multilateral agreements in which third countries are involved. This question should be seen in the light of Article 307 EC. EC law may not stand in the way of any rights and obligations which arise from agreements that the Member States have concluded with third states. However this does not mean to say that while applying agreements with third states the Member States are no longer bound by EC law in relation to each other. This issue played a role in the *Gottardo-case*³², which dealt with a French lady who made a claim under the Italian-Swiss social security convention, which is only applicable to nationals of the contracting parties.

Mrs Gottardo was a French lady who had worked successively in Italy, Switzerland and France. She was in receipt of Swiss and French old-age pensions, which were granted to her without any need for aggregation of periods of insurance. Mrs Gottardo wished to obtain an Italian old-age pension pursuant to Italian social security legislation. However, even if the Italian authorities took into account the periods of insurance completed in France, in accordance with Article 45 of Regulation No 1408/71, aggregation of the Italian and French periods did not enable her to achieve the minimum period of contributions required under Italian legislation for entitlement to an Italian pension. Mrs Gottardo was only entitled to an Italian old-age pension if account were also taken of the periods of insurance completed in Switzerland pursuant to the aggregation principle referred to in Article 9(1) of the Italian-Swiss Convention.

The court ruled that it was contrary to the principle of non-discrimination on grounds of nationality to deny Mrs Gottardo access to the Convention.

It follows from the case-law that, when giving effect to commitments assumed under international agreements, be it an agreement between Member States or an agreement between a Member State and one or more non-member countries, Member States are required, subject to the provisions of Article 307 EC, to comply with the obligations that Community law imposes on them. The fact that non-member countries, for their part, are not obliged to comply with any Community-law obligation is of no relevance in this respect.

(...) when a Member State concludes a bilateral international convention on social security with a non-member country(...), the fundamental principle of equal treatment requires that that Member State grant nationals of other Member States the same advantages as those which its own nationals enjoy under that convention unless it can provide objective justification for refusing to do so.

According to the ECJ this judgment was possible in view of the fact that in this case the unilateral extension of the Convention by the Italians in no way impaired the interests of the Swiss Confederation. The conclusion that can be drawn from this is that social security conventions with third states must be applied in the same way for EU-citizens as long as this does not lead to any extra obligations for the social security institutions of the third state.

EU agreements with SISP-States

De SISP-parties are each in a different phase of the accession process to become a member of the EU. They have not yet accepted every policy area that is regulated by the Union within their own national legal order. The integration of these policy areas is realized by several rounds of negotiations between the EU and the SISP country involved. The negotiations take place prior to the official "candidate status" and may result in different kinds of agreements. A trade and cooperation agreement that regulates

³² ECJ January 2002, 55/00, *Gottardo*

trade and different economic areas will be one of the first agreements with the Union. Pending a stabilisation and accession agreement, the Union and a country will conclude an interim agreement. In the stabilisation and accession agreement itself, the SISP-party agrees to develop the national legal order towards the system of the Community. It is in these types of agreements that the parties tend to adopt a provision on the co-ordination of social security.

Separately from the above sequence of the negotiations and different types of agreements, the EU and the SIP-countries have concluded framework agreements. These regulate the participation in Community programmes and in European partnerships.

The EU has concluded stabilisation and association agreements with Macedonia and with Croatia.³³ It seems that very recently a stabilisation and association agreement was also concluded with Albania but this agreement has not yet entered into force and at the time of writing no authorized text of the agreement is available either. The agreements with Croatia and Macedonia contain an article on the co-ordination of social security. Other social security provisions included in the stabilisation and association agreements are of a more general nature and refer to the adjustment of the SISP-legislation to EU social security standards. It is unclear whether the final version of the agreement with Albania includes a co-ordination article too. A working document which served as a model for the negotiations nonetheless did include such an article³⁴. For an overview of the treaties between the EU and the other SISP countries, see annex 1 of this report.

6.2 Specific questions

e. How does EU law effect the application of SISP country bi- and multilateral agreements?

The third paragraph of art. 3 Regulation 1408/71 contains a provision on grounds of which the provisions of social security conventions which are binding to two or more member states should apply to all persons to whom the regulation applies. An interesting consequence of the Gottardo-ruling which was discussed before is that this rule now also extends to bilateral social security agreements which have been concluded with third states. Furthermore, as a result of the extension of Regulation 1408/71 to third country nationals, also SISP country nationals may benefit from this situation.

When looking at the social security agreements which have been concluded by the SISP countries, it appears that the majority of these agreements have been concluded with EU Member States, mostly by Croatia, Serbia and Macedonia, to succeed agreements previously concluded with of the Republic of Yugoslavia.³⁵ It is unclear which conventions between SISP-states and EU Member States apply to nationals of the contracting states only (*'closed conventions'*) and which conventions apply simply to all

³³ Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part, OJ 28 January 2005, L 26

³⁴ Art. 48 of the concept agreement as published in Council document CSL 08164/2006 of 22 May 2006.

³⁵ Cf. the table of conventions in Paul Schoukens's SISP-report: *Acceding to the multilateral co-ordination Convention on Social Security: consequence for the social security legislation of the involved SISP-parties (Albania, Croatia, Bosnia and Herzegovina, Kosovo, Serbia and Montenegro)*, para. 3.3.

persons who are or have been subject to the legislation of the contracting parties, irrespective of nationality (*'open conventions'*). The modern approach is that countries adopt the second type of Conventions. In any case, it should be borne in mind that for the purposes of assessing the Gottardo consequences for the EU-SISP bilateral conventions, the question of whether or not these conventions have an open personal scope of application, is less relevant than it seems. The reason is that it may very well be the case that the open conventions contain separate articles which restrict the beneficiaries to the respective citizens of the contracting states. Thus the Dutch-Croatian social security agreement of 11 September 1998 has an open personal scope of application, but rights dealing with equality of treatment on grounds of nationality and the aggregation of insurance periods are confined to Dutch and Croatian nationals. The example illustrates that the Gottardo principle is relevant for both open and closed conventions.

There are two elements which must be mentioned in order to fully understand the consequences of the Gottardo-principle for the EU-SISP bilaterals. As a matter of fact both elements cast a bit of a shadow over the useful effect of this principle.

In the first place, it has to be remembered that the Gottardo principle may not create rights for social security institutions of third states. As a consequence of this, the social security institutions of the SISP countries can never be confronted with obligations under the Gottardo-rule if these result in more favourable treatment for the persons involved than the standard which applies under national law and the bilateral agreement.

In the second place, the 'migration criterion' described in para. 5.2 must be taken into account. When there is only a link between one member state and a third state, the situation will have to be disregarded by Regulation 1408/71.

Now let us have a look at the combined effect of these elements. Imagine the situation of an Albanian worker who has worked in Croatia and in Holland and who wants to export his Croatian and Dutch pro-rata pensions to Albania. Art. 5(2) of the bilateral Dutch-Croatian social security convention allows benefits to be exported to third countries. Suppose both the Croatian and the Dutch authorities refuse to export benefit to Albania, in view of a specific interpretation both parties have of art. 5(2) of the convention³⁶. Can the Albanian worker rely upon the Gottardo-principle to challenge the refusal? The answer must be a negative one. The Croatian authorities can hide behind the Gottardo rule that the Albanian worker cannot claim rights in excess of the bilateral agreement, while the Dutch authorities can claim that the matter is outside EU law since the Albanian worker has never set foot in any other Member State except for the Netherlands.

This example shows that the application of Gottardo to EU SISP may not always be as simple as it seems. Nonetheless there are plenty of situations that this ruling can be relied upon successfully. If the SISP country national has moved within the Union, the aggregation of insurance periods and the export of EU pro-rata pensions under EU-SISP bilateral agreements is a possibility.

³⁶ As the Dutch authorities would in the absence of a separate agreement on the export of benefits between Albania and the Netherlands.

A last word on the relation with multilateral agreements, notably the European Convention on social security. According to art. 7(1) Regulation 1408/71, this regulation does not affect obligations arising from ILO-Conventions and the European Interim Agreements. The European Convention on social security however is not mentioned. Nonetheless, as the European Convention is capable of replacing the Interim Agreements between two or more ratifying states, it must be assumed that art. 7(1) Regulation applies to the Convention as well. The wording of art. 7(1) Regulation infers that the European Convention will only remain applicable when this leads to a more favourable result for the person than Regulation 1408/71. As has been pointed out in the SISP-report by Paul Schoukens, in practice the Member States exclusively apply the Convention in relations amongst themselves.³⁷

f. What is the legal effect of agreements concluded between the EU and SISP countries?

As mentioned before, the stabilisation and association agreements with Croatia and Macedonia contain an article on the co-ordination of social security. These are adopted in art. 47, and art. 46 of the association agreements (included in a chapter called “Movement of workers”). The text of the relevant article reads:

1. Rules shall be laid down for the coordination of social security systems for workers with Croatian nationality, legally employed in the territory of a Member State, and for the members of their families legally resident there. To that effect, a decision of the Stabilisation and Association Council, which should not affect any rights or obligations arising from bilateral agreements where the latter provide for more favourable treatment, shall put the following provisions in place:

- all periods of insurance, employment or residence completed by such workers in the various Member States shall be added together for the purpose of pensions and annuities in respect of old age, invalidity and death and for the purpose of medical care for such workers and such family members;
- any pensions or annuities in respect of old age, death, industrial accident or occupational disease, or of invalidity resulting therefrom, with the exception of non-contributory benefits, shall be freely transferable at the rate applied by virtue of the law of the debtor Member State or States;
- the workers in question shall receive family allowances for the members of their families as defined above.

Vice versa, in its domestic legislation Croatia shall treat EU-nationals working in its territory according to the same principles.

This co-ordination article is in many ways comparable to the social security paragraphs which were concluded with third countries in northern Africa and Eastern Europe, prior to the accession of these countries to the Union.³⁸ These social paragraphs provide a basis for the introduction of social security instruments that are based upon techniques comparable to those adopted in Regulation 1408/71. Only in relation to Turkey has such an instrument been developed³⁹, but efforts to apply this instrument by adopting practical implementation measures have been aborted. The result is that the instrument lacks direct

³⁷ P. Schoukens, *ibid*, p. 47.

³⁸ Cf. Yves Jorens, (1998), *Non-European Union nationals and the coordination of European social security law; the international agreements concluded by the European Union with third countries and conflict rules in the European social security law*. In: Yves Jorens, Bernd Schulte eds., *European social security law and third country nationals*, 1-109.

³⁹ Decision 3/80 of the Association Council EEC-Turkey.

effect.⁴⁰ The European Court of Justice only recognizes such direct effect for the equality of treatment on grounds of nationality.⁴¹ Unlike the older co-operation agreements with Northern African countries, the present day association agreements no longer contain a specific clause on the equality of treatment on grounds of nationality. The result is that for Croatian and Macedonian citizens, the co-ordination article of the association agreements remains without any tangible legal (direct) effect, until the respective Stabilisation and Association Councils have adopted further measures.⁴²

6.3 Preliminary findings as to the EU status of bi-and multilateral social security conventions and EU agreements with SISP countries

The Gottardo-principle is applicable to bilateral conventions concluded between EU-countries and SISP countries. This means that SISP country nationals can benefit from these conventions as if they are nationals of the contracting states. However the SISP country nationals must have satisfied the 'migration criterion' explained in para. 5.2. Furthermore the principle does not create obligations for the social security institutions of the SISP countries. The latter two conditions have negative implications for the useful effect of the Gottardo principle.

With regard to EU Agreements concluded with SISP countries the Croatian and Macedonian stabilisation and association agreements contain a provision on the co-ordination of social security. The articles do not have direct effect, but can only serve as a basis for further measures to be adopted by the Stabilisation and Association Council.

⁴⁰ ECJ 10 September 1996, 277/94, Taflan-Met.

⁴¹ ECJ 4 May 1999, 262/96, Sürül.

⁴² At least this would be the present legal situation, but it should be borne in mind that the case law of the ECJ in this area is turbulent and may possibly recognize a stronger legal effect of the social paragraph in the future.

PART C: THE VALUE OF EU LAW FROM A SISP COUNTRY PERSPECTIVE

The previous part contains a legal analysis of the possible impact of EU law with regard to the SISP countries. Part C deals with the relevance of EU law from the SISP countries' perspective. This section may, in part, be read as general conclusions which follow from the legal analysis.

Before we focus on the actual value of EU law from the point of view of the SISP countries, it is necessary to devote some thoughts to the role of EU social security law within the context of the general objectives of the EU. As is commonly known, one of the main objectives of the EU is to establish an internal market in the EU zone⁴³. Article 2 of the EC treaty puts this objective into the following words:

The Community shall have as its task, by establishing a common market and an economic and monetary union (...) to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

The internal market is realized by the promotion of the so called "four freedoms": the free movement of goods, persons, services and capital. These freedoms are ensured by the EC Treaty. The principle of freedom of movement for workers is laid down in Article 39 of the EC treaty. Regulation 1612/68 is based on this article. Also Regulation 1408/71 (and its successor Regulation 883/2004) should be read in this context. It has its legal basis in Article 42 of the EC Treaty:

The Council shall (...) adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, it shall make arrangements to secure for migrant workers and their dependants:

- (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;
- (b) payment of benefits to persons resident in the territories of Member States.

It follows from Article 42 that Regulation 1408/71 has to be considered as a tool for the promotion of the free movement of workers within the EU. By co-ordinating the social security schemes of the EU Member States, Regulation 1408/71 removes the obstacles in the field of social security which might occur if a worker employs his right to move between the countries of the EU.

This relationship between Regulation 1408/71 and primary EU law has some important consequences, for the SISP countries as well. The first consequence is that the provisions of Regulation 1408/71 have to be interpreted in the light of the objectives of the EC

⁴³ Since the Treaty of Maastricht (the EU Treaty, entered into force on 1 February 1993, consolidated version published in OJ C 325 of 24 December 2002) the objective of the Community is not any longer confined to a common market. Since Maastricht, the objective of the EC contains, apart from an internal market, also a common foreign and security policy. The concept of EU citizenship is established in the Treaty of Maastricht too. Maastricht gave the Community its political dimension and its new name: the European Union.

Treaty, in particular the right of free movement for workers, and these days, for European citizens in general. This has given the European Court of Justice (ECJ) room for an extended interpretation of the provisions of Regulation 1408/71, which has been followed by successive adjustments of this regulation to the case law of the ECJ by the EU legislator. As was shown in Part B, due to the case law of the ECJ, European social security law has some external effects, from which the SISP countries may benefit as well. In other words this is a positive effect of the interpretation of Regulation 1408/71 in the light of the general objectives of the EU.

Indeed, this is a major difference compared to other international co-ordination instruments, not only bilateral social security agreements, but also multi-lateral instruments like the European Convention on social security (which is discussed in the paper of Paul Schoukens), the Interim Agreements and the European Convention on social and medical assistance (which is discussed in the report of Grega Strban). These latter instruments lack a “transcendental” context for the interpretation of their provisions. These co-ordination instruments can only be interpreted according to the intention of the signatory parties and general principles of international law.

On the other hand, a negative consequence of interpretation in the light of the objectives of the EU, at least from the point of view of the SISP countries, is the fact that EU social security law only has external effects *if and in so far as it* strengthens the internal market of the EU, or perhaps the EU-project as a whole. This should serve as a limitation of the expectations that the SISP countries may have of the application of EU social security law to their countries or to their nationals. The EU is there primarily to serve the interests of the EU Member States and their citizens. Where there are any beneficial effects to be expected from the EU for SISP country nationals this is either because these nationals behave as EU citizens who move within the Union⁴⁴, or because there is some extra-territorial “spill over” which is thought to be beneficial for the effective operation of the EU system. But as such the protection of social security rights of the SISP country workers, who move between their home states and the EU in the narrow sense of the word, is *not* a legally recognized objective of the EC-treaty.⁴⁵ Only the association and stabilisation agreements which the EU has concluded with some SISP-countries, offer a framework for such co-ordination. As long as concrete co-ordination instruments to implement these agreements have not come into being, the interests of the SISP country nationals must be protected by the SISP countries themselves, by their national legislation, and by their initiatives or willingness to enter into the bi- and multilateral social security relations. It is important to bear in mind this limitation ensuing from the EC Treaty, also when understanding the following compilation of the preliminary findings adopted in part B.

⁴⁴ In view of the extension of Regulation 1408/71 to third country nationals.

⁴⁵ Perhaps this state of affairs helps to explain the seemingly paradoxical situation that the EU legislator has refrained from including a non-discrimination clause in the association and stabilisation agreement with Croatia, while it simultaneously extended the scope of Regulation 1408/71 to third country nationals and even dropped the residence requirement of the non-discrimination paragraph adopted art. 3 of this regulation. The regulation only protects the rights of persons in case of movement between the Member State, while the former agreement would benefits persons who move between Croatia and the Union.

According to the structure of Part B, the effect of EU law for SISP country nationals are discussed under three headings: the territorial scope of application, the personal scope of application and international social security agreements concluded between SISP and EU countries

Territorial scope of application

EU social security law is primarily confined to the territory of the EU Member States. The first obvious conclusion to be drawn from this is that there is no co-ordination with the social security schemes in SISP countries.

Nonetheless, according to the case law of the ECJ, there are a limited number of exceptions to a strict territorial application. Application of EU law outside the territory of the Member States of the EU might be the case if a sufficient economic tie with the EU territory remains: the economic point of gravity must be situated in EU territory. Application of EU social security law to the employment relationship in the territory of SISP countries is possible if such a relationship is closely linked to the legal order of the Member States. Such a situation may occur when a person is temporarily employed in a SISP country by an employer who is established in the Union. Such a person will remain protected by the EC-treaty provision on the freedom of movement of workers and is equally covered by the single state rule underlying title II of Regulation 1408/71.

With regard to a person living in the territory of a SISP country, the situation with regard EC social security law is ambiguous. It is still not yet decided by any ECJ ruling if a non EU resident can enjoy social security rights which are accrued under EU social security law. The only thing that can be said with certainty is that persons living outside the EU can invoke the protection of Article 3 Regulation 1408/71 (non-discrimination clause with respect to nationality) in order to claim social security rights under the legislation of Member-States under which they are or have been insured. Article 3 applies both to nationals and non-nationals of the EU.

Personal scope of application

Since the application of EU social security law does not depend upon nationality, it can be concluded that SISP country nationals are covered by EU social security law in the same way as EU-citizens, subject to the criteria of intra-community movement ('migration criterion'), and legality of residence.

It follows from Article 42 of the EC Treaty that Regulation 1408/71 only protects workers who use their right of freedom of movement. This means that SISP country nationals are protected against a loss of social security rights following their movement between EU Member States. As a consequence, if a national of a SISP country returns to his country of origin after having worked in only one EU Member State he cannot invoke Regulation 1408/71.

Outside the area of Regulation 1408/71 SISP country nationals are only protected by the non-discrimination rule. They are entitled to equal treatment either as permanent status holders within the meaning of Directive 2003/309/EC or as family members of EU citizens. For permanent status holders the migration criterion does not apply. This status terminates once the person has left the EU Member State for longer than 12 months.

Bilateral social security agreements

As a result of the case law of the ECJ, EU agreements concluded with third countries constitute an integrated part of EU law. As such, these agreements can be invoked by all persons covered by the personal scope of application of Regulation 1408/71. This principle (referred to as the Gottardo-principle) is also applicable to bilateral social security conventions concluded between EU-countries and SISP countries. This means that SISP country nationals can benefit from these conventions as if they are nationals of the contracting states. However the SISP country nationals must have satisfied the 'migration criterion'. Furthermore this principle does not create obligations for the social security institutions of the SISP countries. The latter two conditions have negative implications for the useful effect of the Gottardo principle.

With regard to EU Agreements concluded with SISP countries, only the Croatian and the Macedonian stabilisation and association agreements contain an article on the co-ordination of social security. These articles do not have direct effect themselves, but can only serve as a basis for further measures to be adopted by the Stabilisation and Association Council.

PART D: GENERAL RECOMMENDATIONS WITH REGARD TO THE FUTURE STRATEGY

In Part C it has been concluded that the SISP countries can benefit from EU social security law only to a limited extent. SISP country nationals are protected by Regulation 1408/71 when they behave as European citizens who move within the Union. Furthermore, sometimes EU social security law can be applied in an extra-territorial context. But on the whole, the protection of social security rights of the SISP country workers who move between their home states and the EU is not a legally recognized objective of EU social security law. Consequently, apart from the framework for further measures offered by the Croatian, Macedonian and possibly the Albanian stabilisation and association agreements, there is no EU-SISP co-ordination of social security.

As shown in the Annex all the SISP countries are, in some way or another, involved in negotiations with the EU. The state of the relations with the EU is different for the various SISP countries involved. Croatia has been granted official candidate status as a Member State of the EU in June 2004. In the longer run it can be expected that Croatia will join the EU.

If the present writer was allowed to give his personal view on the position of the other SISP countries, he would argue that it is not realistic to expect them to accede to the EU in the immediate future. There are many economic and political impediments for that, also in view of the negative sentiments towards further enlargement among the public in many Member States.

This observation emphasizes the responsibility the SISP-states have to look after the interest of their workers moving to the EU. Pending a drawn out process of further enlargement of the Union these interests can be pursued by adopting a four tier strategy:

- a. adopting favourable standards in national legislation
- b. insisting on entering bilateral social security relations with emigration countries.
- c. adhering to multilateral instruments of the Council of Europe
- d. adopting instruments to implement the co-ordination provisions contained in EU stabilisation and association agreements

With regard to each tier, I will make a number of remarks

National strategy

The protection of migrant workers (in particular of the national working force) who work abroad can be greatly improved by adopting national facilities, such as possibilities for continued voluntary insurance for persons leaving the country or opt in clauses for those who are re-entering the national labour market. The Albanian voluntary insurance scheme, which specifically recognizes the possibility of continued insurance for Albanian emigrants provides an excellent example of such facility. Still, it must be remembered that the reason of existence of these type of facilities lies in the absence of adequate international co-ordination standards which ensure that migrant workers are fully covered

and protected in the country in which they work. The recommendation which follows from this is to make sure that national schemes for continued insurance and opt in clauses should be developed in order to offer migrants additional protection on top of the social security coverage in their country of work and not as an alternative for developing international co-ordination relations with other states. It is in this way that the present writer also interprets the remarks made by Dr. Merita Vaso Xhumari in his CARDS report on the functioning of the social sector administration of Albania.⁴⁶

Bilateral strategy

With regard to the *bilateral strategy* a distinction must be made between the former Yugoslavian republics on the one hand and Albania on the other. Among all the Central and East European countries, the former Socialist Federation of the Republic of Yugoslavia has the longest and most extensive experience of cross border social security relations with western European states. As such Yugoslavia constituted an exception from the policy of the “iron curtain”, which impeded trans-national migration between Eastern and Western Europe. Since the 1950’s a pattern was established of Yugoslavian migrant employees working abroad in countries like Germany, France and Sweden. As a result (or to promote) this migration pattern Yugoslavia had concluded many bilateral social security conventions. The former Yugoslavian republics are as successors of the Socialist Federation of the Republic of Yugoslavia connected to a widespread network of social security agreements with present Member States of the European Union. Gradually the Yugoslavian agreements are being replaced by new agreements, concluded by the separate republics. Also Montenegro and in the future, possibly, Kosovo should have the possibility to continue the bilateral relations on the basis of this position. Because of the long tradition of social security co-ordination there is at the level of the ministries and the implementing institutions already a comprehensive know-how and expertise of international co-ordination techniques which are used in Regulation 1408/71. Even at the local level of the implementing institutions, staff-members are familiar with the application of, for example, the principle of export and the proportional calculation method.

Albania on the other hand still has a lot to gain from entering into new, full bilateral agreements with EU Member States, in particular with Greece and Italy, it’s main European countries of emigration.

Multilateral strategy

With regard to the *multilateral strategy* reference must be made to the conclusions adopted in the reports on the social security instruments of the Council of Europe by Paul Schoukens and Grega Strban.

As stated in these reports, ratification of the European Interim Agreements, the European Convention on Social and Medical Assistance and the European Convention on social security by the SISP countries contributes to fulfill the Council of Europe’s aim to achieve greater unity between its members for the purpose of facilitating their social progress. From the EU point of view it is important to point out that the Council of Europe instruments are fully in line with both EU law and EU policy.

⁴⁶ See Annex 1 of the Albanian reports, p. 27.

With respect to the European Interim Agreements and the European Convention on Social and Medical Assistance, the advised strategy should be the same for all SISP countries. The main principle of these instruments, the principle of equal treatment of nationals, is a corner stone of EU law as well. As Grega Strban explains in his report, ratifying these instruments would have an important legal impact due to the fact that many EU Member States have already ratified them.

With regard to the European Convention there are many good reasons for the SISP countries to join. As stated in Paul Schoukens' report: "It could help to create a controlled but necessary multilateral effect of the bilateral treaties which are now in place between the countries of the SISP-region. Outside the region, it could fortify the rights of their citizens who are now working and living in other European countries. Finally it would consolidate the core Europe co-ordination standards, which are already now in place in the region". Furthermore, it is submitted that implementing the European Convention would have only limited effect for the former Yugoslavian republics in relation to EU Member States given their bilateral experience with EU Member States. Finally for Albania, Montenegro: joining the European convention would be helpful for the authorities and institutions to gain the necessary experience in dealing with multilateral social security standards.

Strategy on EU co-ordination

The stabilisation and association agreements with Croatia, Macedonia and as the case may be, also Albania offer a framework for the co-ordination of social security with the EU Member States. Adopting decisions on the basis of the agreements would in many respects constitute the "first price" from the point of view the interests of the national migrant workers who move between their home countries and the EU Member States. This is not necessarily the case because the EU-SISP co-ordination instruments will mirror Regulation 1408/71, which is the most accomplished co-ordination instrument. EU Member States may insist on adopting less favourable standards. What is import though, is that the interpretation of the EU SISP co-ordination instrument will be brought under the jurisdiction of the ECJ which tends to favour the interests of the migrant workers over the interests of the individual Member States.

It is submitted that the SISP-states involved should not concentrate solely on efforts to reach a decision on the co-ordination of social security schemes with the EU as an alternative to bilateral and multilateral efforts. In the first place: the EU-SISP instruments do not create a solution for workers who move within the SISP region themselves. In the second place: negotiating co-ordination instruments with the EU may be a laborious and painstaking affair. Success is not guaranteed. But for decision 3/80 of the Association Council EEC-Turkey (which decision was never fully implemented anyway) EU co-ordination instruments with other countries have so far never come into being.

Annex 1 EU agreements with SISP countries and the relevance for social security

SISP-Party	Developments	Publication	Phase
Albania	Trade and cooperation agreement with Albania	Official Journal L 343, 25.11.1992 p. 0010 – 0010.	In effect since 1.12.1992.
	Proposal for a Council Regulation on certain procedures for applying the Stabilisation and Association Agreement between the European Communities and their Member States and the Republic of Albania and for applying the Interim Agreement between the European Community and the Republic of Albania	COM (2006) 394 final 2006/0128 (ACC) Date: 11.7.2006	On 12 -06- 2006 The Council concluded an Interim agreement. This agreement is not in force and has not been published yet.
	Proposal for a Council Regulation on certain procedures for applying the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part, and for applying the Interim Agreement between the European Community, of the one part, and the Republic of Albania, of the other part	COM (2006) 394 final 2006/0128 (ACC) Date: 11.7.2006	On 12 -06- 2006 the Council also concluded a Stabilisation and Association Agreement. This agreement is not in force and has not been published yet.
	Framework Agreement between the European Community and the Republic of Albania on the general principles for the participation of the Republic of Albania in Community programmes	Official Journal L 192, 22.7.2005, p. 2–7.	In effect since 11.7.2005.
	2006/54/EC: Council Decision of 30 January 2006 on the principles, priorities and conditions contained in the European Partnership with Albania and repealing Decision 2004/519/EC	Official Journal L 35, 7.2.2006, p. 1–18.	

Former Yugoslav Republic of Macedonia	Cooperation Agreement between the European Community and the former Yugoslav Republic of Macedonia	Official Journal L 348, 18.12.1997, p. 2-167.	In effect since 1.1.1998.
	Interim Agreement on trade and trade-related matters between the European Community and the former Yugoslav Republic of Macedonia	Official Journal L 124, 4.5.2001, p. 2-196.	In effect since 1.6.2001.
	Stabilisation and Association Agreement between the European Communities and their Member States and the former Yugoslav Republic of Macedonia	Official Journal L 84, 20.3.2004, p. 13–80.	In effect since 1.4.2004. Articles 46 and 90 see upon social security.
	Protocol to the Stabilisation and Association Agreement between the European Communities and their Member States and the Former Yugoslav Republic of Macedonia on a Framework Agreement between the European Community and the Former Yugoslav Republic of Macedonia on the general principles for the participation of the Former Yugoslav Republic of Macedonia in Community programmes	Official Journal L 192, 22.7.2005, p. 23–27.	On going negotiations on a framework agreement.
	2006/57/EC: Council Decision of 30 January 2006 on the principles, priorities and conditions contained in the European Partnership with the former Yugoslav Republic of Macedonia and repealing Decision 2004/518/EC	Official Journal L 35, 7.2.2006, p. 57–72.	
Croatia	Interim Agreement on trade and trade-related matters between the European Community, of the one part, and the Republic of Croatia, of the other part	Official Journal L 330, 14.12.2001, p. 3–210.	In effect since 1.3.2004.
	Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part	Official Journal L 26, 28.1.2005, p. 3-220.	In effect since 1.2.2005. Articles 47 and 91 see upon social security.

	Framework Agreement between the European Community and the Republic of Croatia on the general principles for the participation of the Republic of Croatia in Community programmes	Official Journal L 192, 22.7.2005, p. 16-21.	In effect since 22.8.2005.
	Opinion of the Committee of the Regions on the Proposal for a Council Decision on the principles, priorities and conditions contained in the European Partnership with Croatia	Official Journal C 81, 4.4.2006, p. 42-45.	
Bosnia and Herzegovina	Communication from the Commission to the Council on the progress achieved by Bosnia and Herzegovina in implementing the priorities identified in the "Feasibility Study on the preparedness of Bosnia and Herzegovina to negotiate a Stabilisation and Association Agreement with the European Union	COM/2005/0529 final Date: 21.10.2005.	Transmission to the Council. Preliminary work.
	Framework Agreement between the European Community and Bosnia and Herzegovina on the general principles for the participation of Bosnia and Herzegovina in Community programmes	Official Journal L 192, 22.7.2005, p. 19-14.	Not yet into Force.
	2006/55/EC: Council Decision of 30 January 2006 on the principles, priorities and conditions contained in the European Partnership with Bosnia and Herzegovina and repealing Decision 2004/515/EC	Official Journal L 35, 7.2.2006, p. 19-31.	
Serbia and Montenegro	Recommendation from the Commission to the Council to amend the Negotiating Directives for a Stabilisation and Association Agreement with Serbia and Montenegro in order to continue negotiations with the Republic of Serbia	SEC/2006/0885 final Date: 07.07.2006.	Transmission to the Council. Preliminary work.

	Framework Agreement between the European Community and Serbia and Montenegro on the general principles for the participation of Serbia and Montenegro in Community programmes	Official Journal L 192, 22.7.2005, p. 29-34.	Not yet into force.
	2006/56/EC: Council Decision of 30 January 2006 on the principles, priorities and conditions contained in the European Partnership with Serbia and Montenegro including Kosovo as defined by the United Nations Security Council Resolution 1244 of 10 June 1999 and repealing Decision 2004/520/EC	Official Journal L 35, 7.2.2006, p. 32-56.	
Kosovo	2006/56/EC: Council Decision of 30 January 2006 on the principles, priorities and conditions contained in the European Partnership with Serbia and Montenegro including Kosovo as defined by the United Nations Security Council Resolution 1244 of 10 June 1999 and repealing Decision 2004/520/EC	Official Journal L 35, 7.2.2006, p. 32-56.	