Acceding to the multilateral co-ordination Convention on Social Security: consequences for the social security legislation of the involved SISP-parties (Albania, Croatia, Bosnia and Herzegovina, Kosovo, Serbia and Montenegro)

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1. Introduction

Present report highlights the (legal) consequences which a possible signature and subsequent ratification of the Council of Europe Convention on Social Security can have upon the social security legislation of the involved countries in the SISP-project (Albania, Croatia, Bosnia and Herzegovina, Kosovo, Serbia and Montenegro). The co-ordination problems which the countries of this region face, are of a multidimensional nature. First of all the involved countries witnessed a lot of refugees and displaced persons due to the internal conflicts and wars related to the crumbling down of the former Socialist Federal Republic of Yugoslavia (abbreviated as SFR Yugoslavia). Next to this the new countries that emerged from the past SFRY - each now having different social security systems in place - are confronted with different kinds of cross-border movement, ranging from illegal migration over movement of a temporary nature and transition migration to labour migration. Moreover, there is a time dimension as many insurance records do stem from the SFRY-era.The latter system has been succeeded by various new systems and it is not always clear to what extent the successor state has to take into account the "old" insurance recors. Next to the traditional co-ordination issues there is thus the problem of the succession of former the SFRY- social security system. Finally there is also a territorial issue. The migration is not confined to the region. Already in the SFRY-period many persons moved to "the West" (i.e. other industrialised parts of the world). This number of emigrants has been increasing after the break-up of the SFRY, creating then social security co-ordination problems of their own.

Due to those multidimensional break-up of social insurances, people in the region risk to loose parts of their entitlements, or even to fall outside of the scope of social protection. To address these problems, the successor states of the SFRY invested already quite a lot of efforts in making between them co-ordination arrangements. And although they solved already quite a lot issues at stake, some problems continue to persist. In a previous report made for the Council of Europe[1], we already stressed that to a certain extent this is due to the bilateral set-up of the co-ordination treaties among the successor states of the SFRY; a problem, which has mainly a multilateral nature, cannot be addressed properly in a bilateral way. Furthermore as not all countries are bound by treaties in the region one ends up with loopholes in the insurance records that have been built up across various Republics of the former SFRY. The recent independence of Montenegro is again an example of this very problem.

With regard to the conventions concluded with third states in Europe, we already underlined the problem that some of the treaties, especially the ones concluded in the past by the SFRY that the successor states took over, are outdated in their set-up. Not so much the co-ordination techniques used by these conventions pose a problem, but more the fact that some co-ordination realities are left out from the scope of these conventions is creating a problem. For instance many of the older conventions do not deal with the category of moving self-employed people, a professional category which is growing in the envisaged countries.

[1] D. PIETERS and P. SCHOUKENS, *Enhancing Social Cohesion in South east Europe by promoting the co-ordination of national social security systems*, Strasbourg, Council of Europe, 2004, 88p.

One of suggestions made in the previous report on the co-ordination needs in South-Eastern Europe, was to look to what extent multilateral treaties could address of the actual co-ordination issues at stake in the region, especially the ones which are due to the bilateral set-up of the present treaties in the region and to the outdated co-ordination techniques applied in these conventions. Concretely the focus will be upon the European Convention on Social Security of the Council of Europe providing an in-depth multilateral social security co-ordination instrument, parts of which having even direct applicability. As the multilateral co-ordination instruments of the ILO are more of the nature of "model" provisions for further bilateral conventions, and as they traditionally lack any direct effect, they will not be in the centre of this report. Reference will only be made to them when describing the various co-ordination techniques which they have in common with the European Convention on Social Security. In this report we will not deal extensively either with the interim agreements of the Council of Europe, a multilateral co-ordination instrument putting the focus upon the non-discrimination principle with regard to nationality, as these agreement will be part of the more general investigation done by colleague Strban on the effect of equal treatment conventions on the social security systems of the region.

With this report we thus focus upon the traditional instruments designed to overcome (potential) breaks-up of social security coverage, i.e. the co-ordination of social security. The latter technique traditionally is applied in international social security law, in order to "gear" or "co-ordinate" different social security systems so that persons might not be confronted with "positive" or "negative " social security law conflicts"; in other words, it tries to prevent migrating persons being made subject to different social security systems at one time (the positive conflict of law), or not being subject to any system at all (the negative conflict of law). As we are dealing with several countries in South Eastern Europe and as the SISP-project is of a "regional" nature, we will do so by focusing upon multilateral co-ordination instruments, and more precisely the European Convention on Social Security. Contrary to bilateral conventions, it binds different countries at once and hence overcomes problems of social security co-ordination which is strictly applicable to only two countries, a citizen of a third country not being able to invoke the bilateral treaty. We will not deal either with harmonisation instruments which set on an international level standards for migrant persons or workers. Most of these treaties are to be implemented on a national level and hence cannot provide for co-ordination solutions of a multilateral nature.

In order to address the central question of this report, we will deal first with a general description of the co-ordination rules at stake in the European Convention on Social Security. Thereafter we concentrate upon the bilateral treaties which the countries already undertook to address the existing co-ordination problems. First the co-ordination treaties that they concluded among themselves will be addressed in a cross-cut way, describing the general techniques commonly applied. They will be described in the light of the co-ordination provisions foreseen under the European Convention on Social Security: it will be regarded to what extent they are (dis)similar to the ones of the Convention on Social Security. Secondly a short overview will provided of the bilateral treaties in place with other European countries; a specific focus will be put upon those countries having ratified (or signed) the European Convention on Social Security. Finally we go into the question to what extent a signature of the European

Convention on Social Security could have an added value for the co-ordination problems in the region. Here as well a split-up will be made between the intra-regional co-ordination relations and extra-regional co-ordination relations.

For the purpose of this report the concept of social security will be restricted to the statutory rules providing protection for the traditional social contingencies as enumerated in the ILO-Convention 102 and taken over by the European Convention on Social Security, being: sickness, maternity, invalidity, labour accidents, professional diseases, unemployment, family, old age, and survivorship. As a consequence in this report we will not deal with social assistance.

The report is based upon the materials that have been selected and sent in by the various local project officers. To a great extent the analysis is based upon the translated texts of the bilateral conventions which the SISP-countries agreed among themselves. Some of the conventions were only available in Serbo-Croatian and/or Macedonian langueage and hence could not be used for the study. Although the translations were of a good level, it has to be acknowledged that social security co-ordination is of an extreme technical nature. The possibility that due to the translations things have been put wrongly and consequently misinterpreted by the author cannot be fully excluded.

The main focus is put upon the social security systems and related bilateral social security conventions of the involved SISP-countries/territories, being Albania, Bosnia and Herzegovina, Croatia, FYROM (which for the purpose of this report will be indicated as "Macedonia"), Kosovo, Serbia and Montenegro. As the latter country gained independency at the moment of writing this report it will be dealt with separately. However most of the information used for Montenegro found its origin when it was still part of Serbia-Montenegro and hence by definition is structurally outdated. At the moment of writing it was not known to the author to what extent Montenegro is taking over the international agreements to which originally SFRY and the consequent successor states, the Federal Republic of Yugoslavia (abbreviated as FRY) and Serbia-Montenegro were party. The observations in relation to this new born country will hence be of a conditional nature. The same goes for the autonomous province of Kosovo the outcome of the international UN negotiations on the future status of this Province, still being not clear at this moment. Finally it should be underlined that the status of Albania is of a particular nature, as it obviously was not part of the SFRY and the related succession treaties related. However parts of the population in the successor states of the SFRY are of Albanian nationality and a certain cross-border movements has been established in the recent years between countries like Macedonia, Montenegro, Serbia (i.e. Kosovo) and Albania. Their co-ordination problems will thus be of a different kind.

2. An introduction into the European Convention on Social Security

For the purpose of this report we concentrate ourselves upon the major co-ordination rules which are put in place by the European Convention on Social Security[2]. First the convention will be generally situated, describing its multilateral nature, the

[2] For an extensive overview of this convention see: J. NICKLESS and H. SIEDL, *Co-ordination of social security in the Council of Europe*, Strasbourg, Council of Europe, 2004, 41ff.

contracting parties and the mix of direct applicable rules and model provisions for further bilateral treaties. In a following part the general co-ordination principles will be highlighted, i.e. equal treatment between nationals, the protection of acquired rights, the protection of rights in course of acquisition, and the indication of the competent country. Finally the concrete co-ordination rules per structured set of risks will be summarised in the following order: sickness (covering health care, maternity and short term work incapacity), pensions (covering old age, survivorship and long term work incapacity), labour accidents and professional diseases, death, unemployment an family.

2.1. In general

The European Convention on Social Security (abbreviated for the purpose of this report as ECSS) is a multilateral convention which is put at the disposal of the states which are member to Council of Europe. The Convention was opened for signature at Paris on 14th December 1972 and entered into force on 1st March 1979. The following countries ratified the convention: Austria, Belgium, Italy, Luxembourg, the Netherlands, Portugal, Spain and Turkey; it has been signed but not yet ratified by Moldova, Czech republic, France, Greece and Ireland. The Convention is of a special nature, partly explaining the restricted number of participants to it. Originally it was drafted during the 1960s by the then 15 member states to the Council of Europe. When it started to be put in practice most of these states of the Council of Europe were also member states of the European Community, the later having its own multilateral co-ordination arrangement in place (in the form of EC Regulations 1408/71 and 574/72). This set of co-ordination rules however prevails over the ECSS in the social security relations between the EU-member states. In other words, joining the ECSS did not give much added value to the EU-member states for their social security co-ordination.

The resemblance between both co-ordination instruments is striking though, especially when one compares the original version of EC-Regulation 1408/71 with the European Convention on Social Security. The EC-regulation served to a great extent as model for the co-ordination convention of the Council of Europe.

The Convention is an all encompassing co-ordination instrument. First of all it is not restricted to one or some co-ordination techniques which we for instance come across in the European Interim Agreements (focusing upon the equal treatment principle) and the ILO-Conventions Nos 18 (equal treatment labour accidents and professional diseases), 48 (maintenance of migrants' pension rights), 118 (equality of treatment), 157 (maintenance of social security rights). It does encompass all traditional co-ordination techniques: equal treatment (art. 8), export of benefits (art. 11), protection of rights in course of acquisition (art. 19), but also the more developed sets of rules which are specifically designed for the co-ordination of social security contingencies and the indication of the competent country. The fact that the EC-coordination rules served as model is not strange to this approach. Furthermore the idea of the convention is to be multilateral. Contrary to the ILO-Conventions the objective of this convention goes further than simply stimulating states to make bilateral co-ordination treaties on the basis of the models promulgated by the multilateral convention. The ECSS goes further than that as many of the provisions are directly applicable and

hence can be directly invoked by the citizens of the countries having ratified the convention. Especially the fact that the convention is binding several countries gives an added value: the same co-ordination solutions are to be applied across various countries: the risk that a person with a multinational career would loose out entitlements due to the unsynchronised bilateral co-ordination treaties minimises. Later on it will be indicated which articles do have direct effect and which ones do lack it. The added value of the Convention in relation to the existing bilateral treaties will also extensively developed. Here it suffices stating that the articles that are not immediately effective represent suggestions or models for bilateral or multilateral agreements between the contracting parties. In that way the convention is a mix of rules which can have direct effect and other rules which leave flexibility with regard to the eventual co-ordination techniques to be applied.[2]

2.1.1. Personal scope

The ECSS applies to everyone who is or has been covered by the social security legislation of more than one of the contracting parties, provided that the person is i) national of one of the contracting parties, or ii) a stateless person or refugee, or iii) Is a member of the family and/or survivor of one of the two earlier mentioned groups of persons (art. 4). The Convention is thus only applicable to nationals[3] of the signatory parties; it does go beyond the nationality requirement for certain categories such as the family members of the insured citizens and stateless persons and refugees. Furthermore the scope is broad as it encompasses all persons who are (or have been) socially insured; it is not, as e.g. in the EC Regulations, restricted to professionally insured persons such as employees and self-employed persons. On the other hand it excludes again civil servants who are protected in a specifically for them designed social security system (and thus are not taking part in the general system for workers).

2.1.2. Material scope

The Convention applies to all legislation concerning the following social security schemes (art. 2): sickness and maternity benefits, invalidity benefits, old age benefits, survivor's benefits, benefits for occupational injuries and diseases, death grants, unemployment benefits, and family benefits. The Convention applies to all general and special schemes whether contributory or non-contributory[4]. It does not apply upon social and medical assistance. For the latter eventuality a proper European Convention on Social and Medical Assistance is in place[5]. Hence we do not deal with schemes that are purely based on the risk of need or poverty. Important is that the Convention does not deal with benefits paid to victims of war (as these benefits are closely linked to a person's national identity). The countries have to list in Annex 2 to the Convention the statutory acts that regulate the covered risks and hence upon

[3] The term "national" of a contracting part (as well as "territory" of a contracting party) is to be defined by the country an annex I to the Convention (art. 1 sub b).
[4] Contributory schemes are those where the recipient must have made a financial contribution to the financing of a scheme and/or of which the benefits are made dependent on previously paid in contributions (e.g. when a qualifying period of occupational activity is required). Non-contributory schemes are those that do not require any financial contribution from the recipient and/or aren't constituted on the basis of previously paid in contributions (see article 1 sub y).
[5] As being addressed by colleague Strban in his report.

which the Convention applies. Furthermore the contracting parties are under a duty to keep this list up to date.

2.1.3. Cooperation between administrations

As the co-ordination in the field of social security often relies upon the information transfer from a foreign administration, a general principle refers to the need of co-operation between administrations. This principle is often forgotten by the traditional listing of basic co-ordination techniques. Nevertheless, quite a lot of co-ordination provisions are devoted to shape this cooperation between administrations. To that purpose the ECSS is accompanied by a Supplementary Agreement for the Application of the Convention. The latter instrument covers the practical application of the ECSS. It lays down how the relevant authorities and institutions in the contracting parties must interact in order to ensure the smooth and effective running of the co-ordination process. Here as well some provisions have direct effect whereas others only serve as a model for further bilateral or multilateral arrangements. Moreover for its application proper forms have been developed (which come close to the ones used for the purpose of the EU-Regulation).

The traditional method of applying the principle of mutual administrative assistance is to establish relations and links between social security administrations and institutions, wherever necessary, to ensure the effective operation of co-ordination systems. It has led to the establishment of specialised technical bodies i.e. the Council of Europe's Committee of Experts for the application of the European Convention on Social Security. It goes without saying that in case the administrative cooperation does not function well or is not established at all, the co-ordination guarantees remain very much silent provisions on paper.

2.2. The general co-ordination principles

2.2.1. Equal treatment of nationals (art. 8 ECSS[6])

Equal treatment between citizens and non-citizens is one of the corner stones of the co-ordination agreements[7]. In a way it is a further application of the general clause of non-discrimination between nationals and non-nationals, which can be found in various instruments of principle[8], human rights instruments[9], minimum standards instruments[10] and general instruments protecting the migrant worker[11]. A migrant (or

[6] Provision with direct effect.
[7] Guaranteed by ILO Convention N° 19 concerning equality of treatment for national and foreign workers as regards workmen's compensation for accidents; ILO Convention N° 118 concerning equality of treatment of nationals and non-nationals in social security; the two European Interim Agreements on social security schemes of 11.12.1953. In the EC Regulation 1408/71 this principle is being enshrined in article 3.
[8] See e.g. the Appendix to the (Revised) European Social Charter; in the framework of the EU: the Charter on Fundamental Rights (article 34, par.2)
[9] The European Convention on Human Rights (article 14 in conjunction with the first protocol: see as well case Gaygusuz).
[10] Article 73 of the Code of Social Security, article 68 of ILO-Convention N° 102

foreign) person may find that the social security legislation of the host country includes clauses which entail discrimination on grounds of nationality (citizenship). Such discrimination may, for example, lie in the conditions for affiliation to a social security system, in the conditions for entitlement to a benefit or in the conditions for the payment of the benefits. With regard to social security this principle provides that foreign persons residing in the territory of one of the member states are subject to the same obligations and enjoy the same benefits under its legislation as the citizens of that state. In the framework of the European Union, and more particularly in the case law of the European Court of Justice the principle of equality of treatment has been given a broad interpretation, prohibiting not only overt discrimination based on citizenship but also hidden forms of discrimination which, by applying other distinguishing criteria, in fact achieve the same result (see e.g. the *Pinna* cases[12]).

When looking at the social security systems in place in the concerned SISP-countires it can be acknowledged that seldom citizenship requirements are demanded in order to open entitlement or to adhere in general to social security. Yet examples are still to be found, especially related to family benefits and health care where the nationality (the "citizenship") of either the insured person or the family member is still relevant for opening entitlement and/or receiving benefits (abroad). In the framework of the family benefits this often finds origin in the fact that the concerned benefits are of mixed nature, in the sense that they partially or fully belong to the national social assistance scheme. For the application of the ECSS it should be mentioned from the outset that the national qualification of a scheme does not matter. Whether a certain benefit or scheme is nationally labelled as "social assistance", "medical assistance", "social service", "social welfare", or "social insurance", is in principle not relevant for the application of the material scope. The concept of "social security" for the purpose of the application of the ECSS is defined in a European way and encompasses all benefits and schemes which have the fundamental characteristics of the contingencies listed in article 2 of the Convention, whatever the national qualification. Even if the national benefit makes use of a means test or is closely linked to the national poverty policy, it will have to be co-ordinated along the lines of ECSS.

Indirect discriminatory provisions are more difficult to track down. Reference could be made to practices where authorities only pay out a benefit abroad under condition that the insured person still has an address or bank account number in the country[13]. Although this provision is not directly referring to the citizenship of the insured person, the effect though is that citizens with foreign nationality will be targeted easier by this rule/practice than own nationals.

Most international conventions accept some exceptions to the application of the non-discrimination principle, especially when it concerns non-contributory benefits. This is also the case for the European Convention on Social Security. Specific applications of the equal treatment principle are tolerated for the benefits, which are not based

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[11] The European Treaty on the legal position of the migrant workers (article 18); the UN-Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

[12] ECJ, 15 January 1986, Pinna I, case 41/84, *ECJ*, 1986, 1 and ECJ, 2 March 1989, Pinna II, case 359/87, *ECJ*, 1989, 585.

[13] See UNHCR, *Pension and disability insurance within and between Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia in the context of the return of refugees and displaced persons*, Sarajevo, 2001.

upon earlier paid contributions (but are traditionally financed out of general means): the so-called non-contributory benefits. In these co-ordination rules equality of treatment with regard to these benefits is made conditional upon periods of residence of varying length (see article 8 § 2 ECSS). For the application of many family benefits schemes, which in the SISP-countries are often designed in a non-contributory way this exception could have relevance.

Finally something has to be said about the application of the principle of reciprocity in conventions which stipulate equality of treatment. In the strictest sense of the term, reciprocity means that one of the contracting parties grants citizens of the other party neither more nor fewer advantages than those, which it delivers to its own citizens. This is based on the desire to balance obligations between the contracting parties, and at a bilateral level it usually results in sector by sector reciprocity, with equality of treatment being required only in the sector(s) in respect of which the states in question have agreed to be bound by the convention. If country X e.g. does not accept the principle of reciprocity with regard to the unemployment scheme, country Y, having ratified the part dealing with unemployment is not obliged to apply equality of treatment with regard to citizens of X when they apply for an unemployment benefit in country Y. It goes without saying that depending upon the reservations or exceptions made by countries party to a convention dealing with the equal treatment, the latter principle risks to become narrowed very much in its application. Whereas the oldest treaties dealing with the principle of equal treatment between citizens and non-citizens still foresee the possibility of applying the principle of reciprocity, this is not being accepted anymore under the multilateral treaties of the ILO/Council of Europe that saw the light after the second world war. Also in the European Convention on Social Security the states involved, have moved away from the application of the reciprocity principle towards a blanket reciprocity guaranteeing equality of treatment between their own nationals and nationals of all other contracting states, irrespective of the sectors for which the latter have accepted their obligations.

2.2.2. Protection of acquired rights or "export of benefits" (art. 11 ECSS[14])

The principle of equal treatment is not sufficient to deal with all problematic issues of uncoordinated social security schemes. For example it is very much possible that a state does not export social security entitlements and this equally for its own citizens and foreign persons. The latter persons however, having the desire to move to another country (e.g. return to the country of origin) risk then to loose their social security benefits for which they have been contributing. A similar problem occurs when the family members are still residing in the country of origin and the foreign worker would like to export family benefits. The principle of the maintenance of acquired rights prohibits the reduction, adjustment, suspension, discontinuation or forfeiture of social security benefits on the grounds that the beneficiary resides in the territory of a contracting party other than the one in which the insurance record has been built up and the liable social security entity is based. Whereas traditionally this principle of export of benefit was mainly applied in case of long term benefits (old age, survivor's, invalidity benefits and long term benefits in case of labour accidents and professional

[14] Provision with direct effect.

diseases)[15], it is the last couple of decades gradually being extended to short term income replacement benefits and cost compensations benefits (sickness and maternity benefits, unemployment benefits, entitlement to health care services, family benefits, short term benefits in case of labour accidents and professional diseases)[16], be it that some more restrictions are being tolerated (e.g. in case of unemployment) and/or adapted provisions are being foreseen (e.g. in case of health care, the entitlement is being exported and not the health care service as such).

Practically all the systems of the SISP-countries do only make the exportability of the social security benefits possible under condition of the presence of a (bilateral or multilateral) social security convention; in some cases it is practice to export benefits to a country which reciprocally guarantees an export of the said benefits. In some cases the export of benefits has been made (or is still) dependable upon a heavy procedure when dealing with foreign citizens. Sometimes the social security institutions introduce extra conditions to pay out benefits abroad[17], such as the extra proof that one is already entitled to a pension benefit in the other country, or the requirement to have a fixed residence abroad, or an additional proof or registered residence, or the requirement of holding a bank account in the given country, in absence of which the person has to fetch the benefit himself from the pension authorities As people refrain from crossing again the borders, the entitlement is often lost. In practice this meant (means) that the export of benefit, although officially guaranteed in a convention or reciprocal arrangement with another country, is being emptied from its core sense.

As mentioned already the ECSS guarantees the exportability of invalidity, old age and survivor's cash benefits as well as pensions in respect of occupational injuries or diseases and death grants (art. 11: direct applicable); these benefits shall not reduced, suspended or withdrawn by reason of the fact that the beneficiary resides in the territory of another contracting party. However, to this general principle some exceptions are allowed. Here again, non-contributory benefits can be exempted from export[18]. For sickness benefits specific rules are in place for the taking up of the right to health care abroad. Or to put it differently: only in specific defined circumstances, it is possible to have access to the health infrastructure in another contracting state, on the account of the health care scheme of the country of insurance. These rules (enshrined in the articles 20-22(1) and 23-24 ECSS), that lack any direct applicability, will be explained more in detail below. Also for the unemployment benefit it is only possible under certain circumstances to export the benefit to the country of residence

[15] See e.g. ILO-Convention N° 48 concerning the establishment of an international scheme for the maintenance of rights under invalidity, old age and widows' and orphans' insurance of 1935.
[16] See e.g. the more recent ILO-Convention N° 157 on the maintenance of social security rights of 1982, the European Convention on Social Security (Council of Europe) and in a very elaborated form EU Regulations 1408/71 and 574/72.
[17] As being reported in See UNHCR, *Pension and disability insurance within and between Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia in the context of the return of refugees and displaced persons*, Sarajevo, 2001. It should be said though that most of these problems have been reported before the bilateral social security conventions between the successor states of the SFRY became applicable. These conventions were developed to address most of these problematic issues.
[18] For pensions see article 11(3) ECSS. The non-contributory benefit should however have a "special" character in relation to the normal pension benefit. This can be e.g. a special benefit granted as assistance or in case of need, but also a complementary benefit to invalids who are unable to earn a living. Similarly ILO-Convention N° 157 (article 9).

(art. 52-54 ECSS: not direct applicable provisions). In the field of family benefits it should be made clear form the outset that the provisions specifically designed to make the exportability possible of these benefits do not have direct applicability: further bilateral or multilateral arrangements are needed to make the exportability of family benefits possible.

As with the equal treatment principle, a blanket reciprocity is being applied in the field of export of social security benefits. When a country would make a reservation regarding the export of certain benefit, other contracting parties cannot apply this reservation towards the citizens of this country .

2.2.3. Protection of rights in course of acquisition: "counting together insurance periods" (art. 19)

The principle reflecting the protection of rights in course of acquisition refers in the first place to the aggregation of periods of insurance, employment or residence completed under the legislation of various states. These periods are taken into account where necessary for entitlement to benefit under the legislation of another state than the one in which they have been completed. A worker who claims an old-age pension after having worked for 14 years in X and 4 years in Y risks to fulfil neither the conditions under the legislation of X for opening entitlement to a pension (in case e.g. you need 15 years of insurance in X in order to be entitled to a pension) nor the conditions under the legislation of Y (when he has not worked the minimum period of 5 years required in Y). In order to avoid the obstructing effects of the qualifying periods, the co-ordination conventions provide for an aggregation of periods of insurance completed in the member states.

The social security systems of the SISP-countries do amply, as most other European states, apply minimum insurance periods to open entitlement to social security benefits. This is especially true for the pension schemes (covering old age, survivorship and invalidity) and for the unemployment schemes. This is however less the case of the income replacement benefits in case of sickness. Next to this, the amount of many benefits (especially pensions, but also short term income replacement benefits) is often related to the completed periods of insurance, work and/or residence in the country. A person with a mixed professional career (or even residential status) across the territories of many SISP-countries would risk to loose benefits or even could end up with no (insurance related) benefit at all when not complying with the minimum insurance periods. An aggregation of insurance periods provided by an international agreement could solve this issue. As we will see later most of the countries invested here already quite some efforts in addressing this issue in bilateral conventions.

In the co-ordination treaties, enacted by the international bodies, an evolution is to be discerned with regard to the aggregation of benefits. Originally the aggregation of periods of insurance, employment and residence was only guaranteed for the long-term benefits[19] (old age, survivorship, invalidity, death grants and long term benefits in case of labour accidents and professional diseases). Over time the principle got expanded to other (i.e. short-term income replacement and cost-compensation) schemes as well,

[19] See ILO Convention N° 48 of 1935.

among others through the enactment of the ILO-Convention N° 157 of 1982. In EC-Regulation 1408/71 e.g. this aggregation applies to various types of benefits, as laid down, in particular, in article 18 (sickness and maternity), article 38 (invalidity), article 45 (old-age and survivors' pension), article 64 (death grants), article 67 (unemployment benefits) and article 72 (family benefits).

Similarly to the EC-regulations, the ECSS provides a general guarantee of this principle across the various chapters dealing with the co-ordination of specific social security risks: sickness and maternity (art. 19: direct effect); invalidity, old age and survivorship benefits (art. 28: direct applicable), death grants (art. 49: direct applicable), unemployment benefits (art. 51: direct applicable) and family benefits (art. 57: having direct affect as well).

In this way, the convention guarantees that rights in the process of being acquired are retained. The social security institutions of a state, the legislation of which makes the acquisition, retention or recovery of the right to benefits subject to the completion of periods of insurance or residence, have to take into account, to the extent necessary, periods of insurance or residence completed by the person concerned under the legislation of any other state, as though they were periods of insurance or residence completed under their own legislation. In our example this means that the insured person accumulated over the respective systems an insurance record of 18 years, which is sufficient to open pension entitlements under both the laws of X and Y.

As indicated already, aggregation is applied to all social security schemes. For those schemes related to long-term benefits, it is however combined with the principle of apportionment or *pro-rata* calculation (artt. 29-31 and 33-34 ECSS, all having direct effect). In case of a professional career completed in several states, it will be important to figure out which state will pay what amount of the long-term benefit (old age, invalidity and survivorship pensions). For the people who have had a mixed career spread over several states, the *pro-rata* method is then being applied. In relation to the insurance period, which has been fulfilled in the state, each state pays a part of the final benefit (*pro rata*). The application of the pro rata technique, however, has resulted in quite complex situations, especially in the area of pensions, and more precisely with regard to the European and/or national anti-cumulation rules which are (or are not) to be taken into account (see below for anti-cumulation). This resulted in the application of alternative calculation methods on the basis of which the pensions are being calculated solely on the basis of national legislation (see article 30(3) and 34(2) ECSS, having direct effect). The latter technique is especially applied for pensions of which the amount is not in proportion to the completed insurance or residence period (flat rate benefits e.g.).

This principle of maintenance of rights in course of acquisition guarantees at the end of the day that the migrant person's insurance life is being treated as a single unit, notwithstanding the migrations that took place and the fact that the person has been made subject to various social security systems. As with the principles of equal treatment and export of benefits, the protection of the rights in course of acquisition is to be guaranteed in a blanket reciprocity.

Whereas these co-ordinations rules developed in the international and European conventions are traditionally conceived of as model provisions, which should inspire the states when concluding the bilateral treaties, the provisions of the Council of Europe

Convention on Social Security applying the principle of protection of rights in course of acquisition do enjoy direct applicability, barring some exceptions (i.e. art. 32 Convention dealing with the question to what extent an insurance period of at least one year and maximum five years is to be taken into account for the pension calculation).

2.2.4 Indication of the competent country: "the applicable social security legislation" (artt. 14-18 ECSS: directly applicable)

2.2.4.1. "Lex loci laboris" as general rule for migrating workers"

The designation rules envisage to guarantee that neither double protection nor loopholes in protection occur. One tries to come to the indication of one competent country in the case of cross-border movement.

The SISP-countries do use different territorial delimitation rules among them. As such this is not surprising as most (European) countries do so. The difference can lie in the different set-up of the systems, some of them based upon the professional insurances (most of the successor states of the SFRY do so, except for the risk of family benefits), while other systems are based upon the residence principle (in this sense the basic statutory schemes of Kosovo). But beyond the structural differences in the set-up of the systems, the concrete territorial delimitation rules can have as consequence that people are protected twice or are not protected at all. For instance it could be discerned from the descriptions of the national social security systems, that in order to adhere to the system, one requires work to be performed on the territory of the state; next to this it is demanded that it has to be done for a local employer. As a consequence a worker having a labour relation with a foreign employer would not be protected. Other countries simply require that professional activities are performed, even when the work assignment is of a short nature: from the first day of activity the person is to be enrolled in the system, even when the concerned person is already socially insured in another country. It seems evident that cross-border activities in the region lead to positive or negative conflicts of law. As we will see later these issues start to get addressed as well in their bilateral co-ordination conventions.

Apart from the relevant EU Law, the rules governing the indication of the competent country in a general way, are mainly to be found in the recent multilateral conventions. Especially the Convention on Social Security (of the Council of Europe) devotes quite many paragraphs to this principle, except for the migrating group of persons not being professionally active.

Across those multilateral conventions, the principle governing the question which state should become competent in case of trans-national migration is indeed well developed when it concerns migrant workers; for persons who move between states without any relation to work, strangely enough not many general designation rules have been developed. For the latter group one will have to take into account what has been foreseen in the respective sections dealing with the various social security risks. For example the EU-regulations 1408/71 and 574/72 have recently been extended to students who move to another state for the purpose of conducting studies. As such no specific rule has been inserted in the title governing the competent state (title II Reg. 1408/71). The eventual co-ordination of their social security entitlements is left to the

provision dealing with the social security risks (i.e. health care and child care benefits, as only those two sections are made applicable upon students). The Convention on Social Security follows a similar logic. Only in the ILO-Convention 157 of 1982 some attention has been paid to this category of moving persons. In article 5, par. 1 sub d we can read that the guiding principle for indicating the competent state for persons who are not part of the economically active population is the legislation of the state in whose territory they are resident, only in so far they are not already protected by virtue of the provisions dealing with the professional active persons.

For the professionally active persons, the general starting point is traditionally the principle of *lex loci laboris*, meaning that the law of the state where a person is working determines the applicable law (art. 14 ECSS). Important is that this rule applies as well upon the self-employed people: the country in which the self-employed person runs his business is competent for social security matters.

The principle of *lex loci laboris* knows many exceptions. Special provisions exist for employees of diplomatic missions and the personnel active in international transportation. On the basis of the posting provisions, it is possible to send workers for a (brief) period to another member state, in order to accomplish some work, while keeping them insured under the social security system of the country of origin (see as well below under persons working temporary on the territory of another country).

The present social security co-ordination arrangements pay traditionally little attention to the financing side of the co-ordination. In fact, the principle is clear: the country's competence for the social security coverage of a person implies that both benefits and contributions will have to be paid according to the competent legislation, which is being designated by the relevant co-ordination treaty. Social security co-ordination however does not touch upon taxes; this is eventually being covered by the double tax-avoidance treaties.

2.2.4.2.: Persons working/staying temporary on the territory of another country

Social security co-ordination was originally developed for the migrant persons (workers) who move(d) to another country with the intention to stay a long period over there. However, very quickly specific provisions had to be foreseen as well for persons who only stay on a temporary basis on the territory of another country (whether it is for professional or non-work related reasons). As such specific conventions deal e.g. with persons working in the international transportation sector and who are, by definition, continuously staying temporary in other countries than the one in which reside (see Convention workers international transportation, Convention Rhine Boatmen; see as well the specific co-ordination measures for this category of workers in the European Convention on Social Security: art, 15).

Looking at the national systems of the SISP-countries short term work assignments performed by a foreign labourer seem to be problematic. Some countries simply apply the national social security system from the first day of activity performed on the territory. However, how these foreign persons with short work assignments, are tracked down in practice for social security purposes, is less clear. Probably most of them do work but are never made subject to the system (and hence do no pay in the necessary contributions). On the other hand some countries have very liberal

provisions with regard to foreign persons coming to work in the country: as soon as the person is already socially protected in another country, he is to be made free form paying contributions to the social security system. Unrelated to the question whether the social protection system is applicable to the foreign person staying temporary on the territory, various rules are in place with regard to the access to the health care system. Most of the countries do grant access to urgent health care, but on the top of this basis protection, all kinds of not always coherently developed, rules are in place, granting a more generous access to health care. In one country the government decides by decree which foreign nationals can have full access to the health infrastructure, and this unrelated to the fact whether international agreements are in place. It is evident that the SISP-countries do struggle with the question to what extent foreign persons staying and/or working temporary on the territory should made subject to the social security system. The states succeeding the SFRY do address the short time work in another country, in their bilateral treaties, as will become more clear later. The situation for Albania is different though; especially this country is struggling to develop a coherent set of rules related to the issue of short term stay in the country and access to social provisions.

On an international level one does provide specific provisions for persons who work (or stay) only for a fixed period in another country. It quickly turned out that the general co-ordination rules (such as the principle of *lex loci laboris*) were causing practical problems for persons who worked only a short period in another country. Hence the facility to post these workers to another country (and keeping them in the social security system of the sending country) was being developed: art. 14(a) ECSS – direct applicable). It is indeed possible that an employer wants to send one of his employees to perform work in another contracting party or to work in one of its offices or subsidiaries based in another state. Provided that the employee is sent to another contracting state for 12 months or less and is not sent out to replace an employee who has just finished a period of work under posting, the employee will remain covered by the legislation of the state from which he has been sent. This period can be extended with an extra period of 12 months when due to unforeseen circumstances his stay needs to be prolonged in the host country and the host country agrees to this posting prolongation.

If the worker has two (or more) occupations in two (or more) different states, e.g. employee in one country, and employee in another country, the competent country is the one where the person resides (or where the employer has its principal place of business when no activity is performed in the place of residence of worker).

For self-employed people there are no posting provisions in place. Yet a general rule is developed in case the self-employed person performs activities outside his traditional country of work. A self-employed person who has activities in two or more contracting states is covered by the state in which he has residence. In the theoretical case the self-employed person does not perform activities in his country of residence, the contracting states have to agree among themselves which state will be competent.

Other specific categories are for instance the seasonal workers and frontier workers, the latter being persons who work in one country and reside in another. Persons who reside in one country but work in another country are by definition crossing regularly (sometimes daily) the borders. By application of the general principle *lex loci laboris*

they will be insured in the country of work. As a consequence they will enjoy equal treatment with the citizens of the country of work. However, due to the fact that they have residence in another country than the competent country, specific problems may occur with regard to the access to social security benefits in the place of residence. Especially in the field of health care and family benefits, specific co-ordination measures have been developed to guarantee access to benefits in the country of residence.

But also outside of the sphere of work, persons can stay on a temporary basis in another country (tourism and visit). Especially in the field of health care some co-ordination guarantees have been developed. Practically all conventions, which provide in an extensive co-ordination, touch upon the issue of health guarantees for persons staying temporary in another country. Such a set of rules is also foreseen by the Convention on Social Security (art. 21: see further).

2.3. The co-ordination rules related to the risks

2.3.1. Sickness and maternity

A distinction is made in the co-ordination rules between sickness benefits in cash (relating to short term work incapacity and maternity) and sickness benefits in kind (access to health care)

2.3.1.1. Right to health care in another member state

The substantive provisions on the co-ordination of sickness and maternity benefits are at hand in articles 19-26, 38 ECSS, the latter article dealing with health care benefits in the eventuality of a labour accident or professional disease. The administrative provisions are being established in the Supplementary Agreement (art. 16-31).

In the terminology of the Convention, the provisions dealing with health care are denominated as “sickness and maternity benefits in kind”. Whether health care is being provided in kind or is being refunded is not relevant: both systems do fall under the concept of “sickness benefits in kind”.

Important to know is that none of these provisions have direct effect, they simply serve as a model or as a standard for further agreements between the contracting parties.

Roughly speaking the following situations can be discerned:

> *Access to health care in case of residence in other country than the country in which one is socially insured*

The first set of rules deals with the situation in which the insured person resides in another country than the one in which he is socially insured. A person who resides outside the competent state, can qualify for a benefit in kind in the residence state (article 20). The benefit has to be delivered in accordance with the provisions of the

residence state, as though the person were insured in the country. Similar provisions have been enacted for the pensioner and the unemployed person (art.23-24).

It follows from article 20 (and alike) that an insured person residing on the territory of a member state other than the competent state is subject to the legislation of the latter state so far as conditions for entitlement to benefits are concerned. Once that entitlement has been recognised, the worker will be entitled to receive, in the state in which he is resident benefits in kind (health care) provided by the institution of his place of residence within the limits and in accordance with the provisions of the legislation of that country as if he were insured in the latter country. This means among others that the tariffs of the residence state are applied, as well as any procedure of referral to health care providers. At the end of the day the competent state has to refund the costs to the state of residence, as the person is socially insured in the former country.

Furthermore, these provisions are applicable by analogy to members of the family of the worker who reside in the territory of a member state other than the competent state, as specified above, in so far, as they are not themselves entitled to health care under the legislation of the state in whose territory they reside.

An additional principle is established for frontier workers[20] by article 20, par. 3 ECSS. Applying the general rule mentioned above, they and their family members are entitled to the benefits of their state of residence. However, article 20 provides for frontier workers and their family members that they are also entitled to the benefits of the competent state; for the family members this is however only possible if the beneficiary has an urgent need for care, if the concerned states made an agreement or, finally, if the authorities of the competent state gave a permission in advance.

Access to health care in case of temporary stay abroad

Article 21 ECSS concerns the access to foreign health care providers in case of temporary stay abroad. It gives solutions for persons residing in and covered by the competent state, but who are in need of a treatment which is delivered by a health care provider of another member state. The coordination provisions provide entitlements under three conditions:
- the beneficiary stays temporarily outside the territory of the competent State and needs urgent medical help,
- the beneficiary – having been entitled to a specific treatment – with the permission of the authorities of the competent state moves to his/her state of residence or alters her/his state of residence, or
- the beneficiary gets the permission (= the authorisation procedure) by the authorities of the competent state to look for a suitable treatment in another member state. The authorisation cannot be refused when the requisite treatment cannot be given in the territory of the contracting party in which the person resides[21].

[20] A frontier worker is according to the Convention, an employed person (and not a self-employed person!) who is employed in the territory of another contracting party where he returns in principle every day or at least once a week (art. 1 sub n)
[21] The analogous authorisation procedure foreseen in EU regulation 1408/71 is much more strict: authorisation cannot be refused when the treatment is part of the covered health care package and cannot be given within reasonable time (art. 22 Reg. 1408/71)

2.3.1.2. Sickness benefits (in cash)

With regard to sickness benefits (cash benefits in case of short term incapacity of work or maternity), the co-ordination is much more simpler. The main rule here is that (only) the competent state pays out the benefits in case of sickness, eventually by exporting them to the state where the concerned person is residing or temporarily staying (art.20).

The Convention does not put much of a strain on the actual sickness (health care and work incapacity) schemes of the SISP-countries. In the field of sickness (short term work incapacity) the countries seldom apply waiting periods or minimum insurance periods and if they do so, they already apply the aggregation principle when co-ordination treaties are in place. The story is a bit different when it deals about health care. All countries do provide access to urgent care for all persons staying on the territory (whatever the nationality). However less developed is the practice to settle accounts among each other. Some countries do already know the possibility of allowing patients to get (covered) treatment abroad but the conditions to do so are not always very well developed. Maybe most problematic is the situation where a person resides in another country than his country of work. Those persons do have definitely access to the health infrastructure of the country where they work (in case they are insured there) but, in absence of a bilateral treaty, it becomes much more difficult to get a doctor consult refunded when this is taking place in the country of residence.

2.3.2. Coordination of benefits related to invalidity, survivorship and old age: "pension" calculation (artt. 27-37)

The provisions dealing with the co-ordination of old age, death and survivorship benefits show that all provisions have direct effect, barring one (art. 32)[22].

Although the usual approach in international social security co-ordination is to ensure that only one state at a time is responsible for the provision of benefits, this is not the case with long-term benefits such as old age, invalidity and survivor's benefits. In the case of these benefits, which are often granted in the form of a pension the amount of which is related to the previously built up insurance periods, the responsibility is shared, proportionally between all the contracting parties under which the person concerned has been insured (pro rata assignment of the pension). This meas that the person will receive payments from several contracting parties.

Roughly the following rules are applicable. As just mentioned, starting point in case of old age, invalidity or survivorship pensions is the aggregation of insurance credits earned under the schemes of the various member states. Aggregation means that the competent state has to consider periods of coverage being acquired in accordance to the law of other member states as if they were fulfilled under its own law for determining the eligibility for benefits (see as well 2.2.3). For determining the amount of benefit, however, the calculation is to be restricted to periods of coverage and

[22] This article allows the contracting parties to agree upon the possibility not to grant rights in case the insurance record of the concerned person amounts to less than five years in the given country.

earnings gained under the system of the competent state. For instance, a person worked as cook for twelve years in X, twelve years in Y and twenty-one years in Z. Assuming an identical pensionable age in the three concerned countries, the retired person will be entitled to three pensions payable by the social security administrations of resp. X, Y and Z. Each national administration has to calculate the benefit *pro-rata* according to the time of coverage spent under its law (art. 29-30 ECSS). In order to do so, the administration has to calculate first the theoretical amount of the benefit the person could claim, would he have completed all the insurance periods under the legislation of each of the concerned countries. In our example each country has to calculate the theoretical pension that would be granted to a person having fulfilled an insurance record of 45 years (12 + 12 + 21). Of this theoretical amount the country pays out an amount pro rata the insurance record effectively completed under its legislation (this means in our example $12/45^{th}$ of the theoretical amount for country X, $12/45^{th}$ of the theoretical amount of country Y and $21/45^{th}$ of the theoretical amount of country Z).
However, as some (pension) benefits are no related to the number of insurance years, a second calculation is foreseen (art. 34 (1) ECSS). Without applying the co-ordination rules on pensions, the administration has to calculate which pension amount the insured person would receive by applying strictly national law only. A comparison has to be made by each country between the two methods; the person is entitled to the highest of the two amounts. If more than one of the contracting parties would have to pay the person a supplement on the basis of the national calculation, then only the highest supplement is to be paid out. However, the cost of the supplement is then shared proportionally between the states concerned having regard to the amount of the supplement which each would have to pay (art. 34 (2) ECSS).

Applying the (directly applicable) co-ordination rules for pensions would have an impact upon the social security systems of the SISP-countries. As already indicated earlier, with the exception of one or two states, most SISP-countries do know minimum requirement periods and pensions, the amount of which are in relation with the previously built up insurance periods. Migrant persons of whom the insurance records are spread over two or more countries will be affected in their eventual pension amount. If not already regulated through bilateral conventions, accepting the ECSS would solve these problems to a large extent (at least in relation with the other countries which accepted the treaty). In that way it could affect the national (pension) schemes of the SISP-countries.

Furthermore the pro rata calculation for pension has also implications for the national anti-cumulation rules in place. In article 13 ECSS it is stated in general that national anti-cumulation rules may reduce the benefit paid, suspend the benefit for a specified period or even terminate the benefit altogether. In other words one cannot confer or maintain entitlement to several benefits of the same nature or to several benefits to one and the same period of compulsory insurance. The Convention states that when applying these rules a contracting party is entitled to take into account any benefits or income received in other contracting parties as well as any occupational activity conducted in other contracting parties. However one should be carefull when applying these general rules on pro rata divided pension. We should not forget that as an outcome of the pension calculation several countries pay a part of the total (pension) amount. Reducing the pension with amounts coming from abroad would then have a perverse effect. When applying the anti-cumulation rules in the pension field one

should take into account that the different pension parts reflect each an insurance record which has been built up over time in different countries by the insured person.

The anti-cumulation rules to be applied upon pensions, are hence specific in their design. Pension amounts of other countries cannot be reduced unless they have been constituted during the same insurance period. In line with the general rules, it remains still possible to reduce from the pension benefit, income earned on the basis of professional activities performed abroad.

The anti-cumulation rules seem to take an important share in the rules related to the pension calculations of the various SISP-countries. Especially in the pension field very stringent rules do apply with regard to the combination of different pensions (or pension with income on the basis of labour). It is in principle not possible to combine two different pensions which find their origin in different occupations (e.g. self-employed activity and wage earner activity performed at the same period of time). In other words: if a person has combined two professional activities in the country and he has been insured for both of them at the same time, he can receive pension for only one professional activity. However, if that same person has realised a right to a pension in the country and at the same a pension benefit in another country, he can receive both pensions. As we will see later, this rather liberal approach is not commanded by the bilateral conventions in place; but by the mere application of national legislation. Taking into account the anti-cumulation rules of the ECSS, it would however be possible to apply the national anti-cumulation rule on cross-border situations. Only when the foreign pension amount is referring to another insurance period, the reduction cannot be done

Finally some words have to be said about the special schemes which are often in place for specific professional groups (characterised by heavy work or highly esteemed artistic work). Many of these schemes do exist in the SISP-countries. Very often the insured are entitled to higher benefits or are required to fulfil shorter perods of insurance. Where contracting parties operate such special provisions, they need only aggregate periods of insurance spent in these specific occupations in other contracting parties. If that does not suffice to open entitlement in the special regime, then the person will be dealt with under the general schme or general provisions (art. 28(4) ECSS).

2.3.3. Co-ordination of benefits of occupational injuries and diseases (art. 38-48), except art. 42 (cost of transportation) and art. 46 (special cases)

In general the co-ordination rules related to the risks of sickness, invalidity, survivorship and health which find their origin in a labour accident or professional disease follow the co-ordination rules as explained above. However some specific rules have been elaborated in the ECSS, all of them barring two[23], having direct effect.

The most important specific rule concerns occupational diseases. The latter are often caused by long-term exposure to harmful substances (e.g. asbestos). Where a person

[23] Article 42 dealing with the transportation of the victim to the territory of the contracting party in which he resides or the place of burial and art. 46 dealing with some specific conditions related to occupational diseases.

has been exposed to a hazardous substance or has pursued a dangerous occupation in more than one contracting party, the ECSS provides that benefits shall be awarded only by the last contracting party whose conditions for entitlement for the occupational disease are fulfilled. The national legislation of the SISP-countries does not go so far, unless a bilateral treaty would be in place (see further).

2.3.4. Co-ordination death grants

Death grants are one-off lump sum payments paid for the loss of a breadwinner. They do not include one off lump sums that are paid instead of a periodic survivor's benefit. The provisions dealing with the co-ordination of these benefit do have direct effect. (art. 49-50) next to the general rules of equal treatment, aggregation of insurance periods and export of benefits some specific co-ordination issues are dealt with here. The ECSS clearly states that where someone dies in the territory of a contracting party other than the competent state, the competent state should treat that death as occulting within its territory (equal treatment of facts having consequence for the entitlement of the benefit). Not many states know special detah grants that do not take the character of a survivorship benefit. Hence the co-ordination rule at stake becomes here without major subject.

2.3.5. Co-ordination of unemployment benefits (art. 51-54 ECSS)

For unemployment insurance benefits an aggregation of periods of coverage is provided (article 51 ECSS). The determination of the amount of benefit refers strictly to the income the unemployed person earned in the state where he worked immediately before becoming unemployed. The state of the last employment is in principle the state competent for paying out unemployment benefit (art. 55 ECSS). The other provisions do lack direct effect; they mainly deal with the very restricted possibilities to export the benefit to another country. Are only possible the export when the person moves residence to another country and when the person already lived in another country before he entitles to an unemployment benefit in the competent state. However, as these provisions lack direct effect, practical arrangements are still to be made between the countries to make these basic rights to export of benefits, applicable[24].

Among the income replacement benefits, it were especially the unemployment benefits that were most restricted in the SISP-countries as far as they take into account foreign insurance elements. Especially the export of the benefits is in all SISP-countries made impossible (even with a bilateral treaty in place). In some countries it is possible to count together foreign insurance periods, when co-ordination treaties are in place. The application of the ECSS would not change dramatically this scenery (except the fact that the aggregation of insurance periods would be more broadly guaranteed than now). Only in relation to the export of the benefits, the necessary arrangements should be made, be it that the eventualities to do so are kept very

[24] See article 56 for the exact issues to be dealt with in the further bilateral or multilateral treaties between the contracting parties.

restrictive (i.e. in case the country of work and residence would differ). Especially the question who will take the burden of the payment of the unemployment benefit would need to be solved.

2.3.6.Co-ordination family benefits

The direct applicable rules with regard to the specific co-ordination rules related to family benefits are restricted. Article 57 ECSS clearly stipulates that where a benefit is made conditional on the completion of periods of employment, occupational activity or residence, any of these periods completed in other contracting parties must be taken into account. In addition to this article 58 of the Convention demands the contracting parties to make the necessary arrangements for the remaining co-ordination articles related to family benefits (art. 59-63). In other words most of the provisions do lack direct applicability. The model provisions are separated into two sections relating respectively to family allowances and family benefits; the first category of benefits relate to periodical cash benefits granted according to the number and age of children (i.e. child care benefits); family benefits on the other hand are benefits in kind or in cash granted to offset family maintenance costs.

Furthermore a distinction is made between two sets of co-ordination rules indicating the competent state for granting the benefits. This has to do with the two major types of family benefit's schemes that we come across in Europe: schemes where persons do open entitlement because they perform professional activities and systems which are of a universal nature covering the whole population residing in the country. The first set of rules is based upon the application of the legislation of the state in which the person entitled to family allowance is employed; these rules are restricted to family allowances. The second set of rules, covering all family benefits, is based upon the application of the legislation of the state in whose territory the other members the family reside. The contracting parties are free to decide in their bilateral or multilateral agreements whether they will apply the first set of rules or the second set. Furthermore the convention specifies some matters which should appear within any agreement, such as the categories of persons who shall be covered by the arrangements and the rules on the overlapping the benefits. Especially the latter ones can be important when both the country in which the migrant workers performs labour, and the country in which the family members reside do open entitlements to family benefits/allowances. In the arrangements to be made between the contracting parties, solutions will have to be put forward which country will pay what and to what extent double coverage can be foreseen: e.g. the country of work paying the benefit and the country of residence topping up the benefit in case the amount would be higher in this country, or vice versa).

In the field of cost compensation schemes, together with social assistance (which is outside the scope of the Convention) the family benefit schemes of the SISP-countries d pose most of the problems in relation to foreign persons. Next to the fact that quite often nationality clauses prevail (family benefits only for the own citizens in the most strict sense: both parent and children should be citizen: see as well 2.2.1. equal treatment), very seldom it is possible to export benefits to another country (even if co-ordination agreements are in place as family benefits are often left out from their scope or no particular rules are in place for this benefit). The acceptance of the ECSS by the SISP-countries would however not put much strain upon the actual legal

situation: except the equal treatment principle and the aggregation principle, most of the family co-ordination is still to be settled among the parties and the solutions suggested by the ECSS are very flexible in their set-up.

3. Co-ordination treaties in place

3.1. Introduction

The SISP-countries, except Albania, have a vast set of co-ordination treaties in place. Some of these treaties have been inherited from the SFRY-era, others have recently been negotiated. A distinction has to be made between the treaties which the countries concluded among themselves to resolve the issue of the succession of the SFRY and on the other hand, the treaties with countries from outside the region (that either have been concluded recently or have been inherited from the SFRY-period. The reason to separate both kinds of treaties mainly has to do with the fact the first mentioned treaties do go further than the traditional co-ordination of social security. They touch upon the question to what extent the former Yugoslav Republics take over the insurance periods which have been built up during the SFRY-period, and this not only with regard to social security within the former Yugoslav Federation, but also in relation to insurance liability which stems from the bilateral treaties concluded by the SFRY. Hence the following description will be split up in a section dealing with only the treaties which have been concluded in the region, and a section which provides a basic overview of the co-ordination treaties that are in place with countries outside the Balkan region. For the latter kind of instruments we will restrict ourselves to Europe (as the European Convention on Social Security is restricted to this part of the world).

3.2. Treaties between the countries in the region

3.2.1. Co—ordination problems in the region which led to an agreement on succession issues

The break-up of the former Socialist Federal republic of Yugoslavia had many consequences for its citizens, one of the major ones, the problem of insurance records being broken up. This is especially true for the pensions as these benefits are traditionally based upon insurance records that are being built up during a person's life. Next to this, new countries emerged from the SFRY, not always having the best relationship with the new neighbours: as a result some citizens who moved away or fled the country where they traditionally lived or worked, had difficulties to get the pension exported to their new "home country".

In the former SFRY pensions of civilians were under the competency of the six Socialist Republics and each republic had its own laws and institutions dealing with the issue of pensions. Yet, in addition a state-level law on the basic Rights of Pension and Disability Insurance was in force, granting equal minimal rights to every SFRY-citizen and regulating as well the rights of persons who moved from one Republic to the other. As this Act was not valid anymore after the breaking down of the SFRY, something had to replace it. As the former Socialist Republics of the SFRY became genuine new states, each with their own social security systems, the way to go for was the creation of co-ordination treaties regulating both the succession of the past

insurance records built up in the SFRY and the future cross-border entitlements for people who move(d) to a neighbouring country. The successor states[25] to the SFRY agreed to develop such conventions among each other in the UN "Agreement on Succession Issues", signed in Vienna on 29 June 2001 and becoming effective on June 2 2004, 30 days after disposal of the final, fifth, ratification document before the Agreement Depositor.

The Agreement's main objective is to resolve questions of state succession arising upon the break-up of the former Socialist Federal republic of Yugoslavia. The agreement regulates the question of pension payments in Annex E thereto, where it is prescribed that each State will pay pensions they owe to the rightful pension beneficiaries, irrespective of the beneficiary's citizenship or place of residence (art. 1 of the Annex E). The provision is quite general and Annex E therefore provides also that the successor states shall, if necessary, conclude bilateral arrangements for ensuring, among others, payment of pensions to persons located abroad and transfer of the necessary funds to ensure such payments. Furthermore it is stipulated that any such bilateral agreement shall prevail over the provisions of the Annex. Finally in article 4 of the Annex it is mentioned that a Standing Joint Committee is to be established whose principal task is the monitoring of the effective implementation of the Agreement.

It has to be said though that already before this UN Succession Agreement, many of the successor states undertook own initiatives to regulate the matter of cross-border pension calculations which stem from the SFRY-period. On top of this some of the bilateral co-ordination agreements were already initiated[26] before the Succession Agreement was signed. Although the states themselves already foresaw possibilities to export benefits (especially pensions) to the neighbouring countries, or to validate old insurance record of the SFRY, consequently of the war period(s) after the crumbling down of the SFRY, many practical problems continued to exist[27]. In essence they could be grouped as follows:

a) In principle each successor state to the SFRY took over the past insurance liability, meaning that they consider as theirs the insurance records built up in the former SFRY-Republic which they succeeded. More problematic are post-SFRY insurances which have been built during periods of conflict. First of all there is the different date of the end of the SFRY, which the countries apply among them. Normally the end of the SFRY falls together with the end of the conflict in which the country has been involved. As a consequence insurance periods of the SFRY do stop earlier in one country than in another. This can have consequences for SFRY-records of a person who had cross-republic insurance records in the period 1991-1992.

Another problem is related to the validation of insurance periods which were fulfilled during the war, especially when they are related to territories which changed country as a consequence of the conflicts (e.g. Eastern Slavonia). Question at stake is which

[25] Bosnia and Herzegovina, the Republic of Croatia, the Republic of Macedonia, the Republic of Slovenia and the Federal Republic of Yugoslavia.
[26] Or even signed such as the agreement between Macedonia and the Federal Republic of Yugoslavia.
[27] See for an extensive overview: UNHCR, *Pension and disability insurance within and between Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia in the context of the return of refugees and displaced persons*, Sarajevo, 2001

country is now responsible for the insurance records built up on that given territory during the conflict? In the opinion of the new "owner" country, pension rights which were built up during the conflict, relate to a "foreign" country. The "new country", ruling the territory, does not accept the employment documents that were used by the "previous country", especially not in relation to citizens who fled the country.

However, initiatives have been undertaken to have these insurance records validated enabling so the persons to get their insurance periods accepted for the social security system. In practice though it seemed that the procedure to do so was kept very strict and many persons, especially, the ones who were staying abroad, were not able to validate the insurance records in practice. Whereas those "convalidation-acts" gave the possibility to validate documents issued in these areas which proved such employment and related rights, the restrictive deadline for applying as well as certain residency requirements under these acts have resulted in the exclusion of several refugees still abroad, from applying the procedure.

b) When payments of pensions to beneficiaries abroad were made possible by national acts, practical problems emerged disenabling the export; sometimes the beneficiary needed in practice to travel to the country to fetch himself the benefit as bank transfers where not possible in reality. In other situations he was confronted with a strict procedure requiring a document stating that he has registered residence in the other country. As some persons, especially refugees who were not sure yet to remain in the host country, could not get hold of the required document, the pension was not paid out/exported. Some others faced the problem that the pension institution of a given country simply did not accept the documents that were being certified by the authorities or another country. The reason for this being that there was no agreement in place between the two countries regarding cooperation on civil and criminal matters and mutual recognition of documents.

c) A specific kind of problems is related to the internal structure of some of the new countries, that are composed of regional sub-entities. In some cases the social security legislation across the entities is simply not co-ordinated creating internal problems when persons of the country move from one entity to another. These kinds of problems have been reported for Bosnia and Herzegovina and Serbia (in relation to Kosovo). It can also be mentioned that Montenegro within the former State Union of Serbia-Montenegro did not honour anymore for the purpose of the pension calculation the insurance periods being fulfilled in the Serbian entity. The problem gets externalised however, when the social insurance of a third country is involved.

So although the countries made some arrangements to take into account the insurance periods built up in another country, many insured persons, especially when staying abroad as refugee, faced practical problems to get the arrangement applied upon them.

These practical problems triggered the development of the UN Agreement on Succession Issues, which in itself facilitated the negotiations for the bilateral social security agreements across the successor states of the SFRY. Now, except for Montenegro all actual successor states of the SFRY in the SISP-region are bound by such a co-ordination treaty.

This gives then the following overview, when ordered by country:

Croatia-

Bosnia and Herzegovina (signed: 4 October 2000; ratified 2001)
Federal Republic of Yugoslavia (signed: 15 September 1997; ratified)
Macedonia (signed; ratified)

Federal Republic of Yugoslavia-

Croatia (signed: 15 September 1997; ratified 1 May 2003)
Macedonia (signed:29 December 2000; ratified 01 April 2002)
Bosnia and Herzegovina (signed: 29 October 2002; ratified 1 January 2004)

Bosnia and Herzegovina-

Croatia (signed: 4 October 2000; ratified 2001)
Federal Republic of Yugoslavia (signed:29 October 2002; ratified 1 January 2004)
Macedonia (signed: 17 February 2005; ratified February 2006)

Macedonia-

Bosnia and Herzegovina (signed: 17 February 2005; ratified 13 September 2005)
Croatia (signed; ratified)
Federal Republic of Yugoslavia (signed: 29 December 2000; ratified: 23 January 2002)

Bilateral Treaties across Successor states SFRY	Bosnia and Herzegovina	Croatia	Federal republic of Yugoslavia[28]	Macedonia	Montenegro
BiH	-	X	X	X	?
Croatia	X	-	X	X	?
FRY	X	X	-	X	?
Macedonia	X	X	X	-	?
Montenegro	?	?	?	?	-

Following remarks should be made in relation with the overview. First of all the issue of Montenegro should be addressed. In relation to this (now independent) country, all treaties of possible relevance are the ones concluded by the (then) Federal republic of Yugoslavia (abbreviated as FRY) , which was succeeded in 2003 by the State Union of Serbia-Montenegro. The latter country declared itself independent after a public referendum was held in May 2006. By the time of the writing of the report, it was not clear at all to what extent the independent Montenegro will take over the duties (and rights) which are linked to the treaties which, originally the FRY and later the Union of Serbia-Montenegro, concluded. In relation to this, the following documents have relevance: the UN Agreement on Succession Issues and the respective bilateral co-ordination treaties concluded with Bosnia and Herzegovina, Macedonia and Croatia. If no arrangement is made on the basis of which Montenegro is taking over the

[28] At the time of the signature. Later the signed conventions were followed up by the State Union of Serbia-Montenegro, and then recently by Serbia.

responsibilities in relation to the social security, a series of new loopholes in the multilateral co-ordination relations in the region risks to take place.

Kosovo might end in a similar situation when becoming independent. At this very moment, the outcome of this autonomous province was not clear yet. However, already now the province has the competence to develop its own social security arrangements; on the basis of the country reports it became very clear that the Kosovar social security system differs considerably from the systems in place in Serbia (and Montengro). More problematic however is the situation reported on the basis of which it seems that the co-ordination agreements that Serbia-Montegro concluded with third parties are not applied (anymore) in the relation to the Kosovar system. This is mainly due to the fact that a separate government and public administration are in place in Kosovo which function independently from the Serbian authorities. As a consequence Kosovor people with careers abroad run into problems when they want to see their social security entitlement coordinated in accordance with the Yugoslav co-ordination agreements. It seems that whatever the outcome of the Kosovar situation will be, that new agreements will have to be made with the Kosovar authorities to co-ordinate the social security entitlements of its citizens living and working abroad. Either this will have to be done as an independent country on the basis of international agreements, or as entity within Serbia on the basis of the internal legislation and administrative practice, depending upon the outcome of the negotiations.

Another issue is related to Slovenia, which is not part of the SISP-project. Slovenia is one of the formal successor states of the SFRY, having signed and ratified the Agreement on Succession Issues. However up till now they only concluded two bilateral agreements with their neighbouring Balkan countries, i.e. with Croatia and Macedonia. No arrangements are made with Serbia, Montenegro or Bosnia and Herzegovina, creating still some problems in relation to the co-ordination of social security within the region when e.g. Serbian insurance periods are involved. In the relation between the Slovenia and the three fromer SFRY-Repblics with which no agreement is in place, only the general rules as being stipulated in Annex E to the Succession Agreement are applicable. Hence each of the states shall assume responsibility for and regularly pay legally established pensions, funded by that State in its former capacity as a constituent Republic of the SFRY, irrespective of the nationality, citizenship, residence or domicile of the beneficiary. Yet article 3 of this Annex stipulates that the successor states should conclude the necessary arrangements for ensuring the calculation and the export of the pensions.

Albania, being part of this very SISP-project, did not enter into co-ordination arrangement with any of the former SFRY-republics and is, in accordance with international law not bound to do so. The Succession Agreement is for evident reasons not applicable to this country. Yet already in the report addressing the co-ordination needs, it became evident that movements of (especially) Albanian nationals can be observed between Albania on the one hand, and the neighbouring countries, Macedonia, Montenegro and Serbia (i.e. Kosovo)[29]. In an original stage many Albanian refugees coming from the Yugoslav territories fled to the neighbouring

[29] See more in detail: D. PIETERS and P. SCHOUKENS, *Enhancing Social Cohesion in South east Europe by promoting the co-ordination of national social security systems*, Strasbourg, Council of Europe, 2004, 88p.

country. Nowadays the movement between the involved territories changes character, being of the type of short term movements for work or leisure, which create their own co-ordination needs.

In what follows a cross- cut description will be provided of the several bilateral treaties in place among the SISP-countries, which succeeded the former SFRY. As Albania is not having a treaty with any of these states, it will be left out of the description here. This exercise is being facilitated as the contents of the various bilateral treaties is very similar to each other. It seems that the different treaties are inspired by the same co-ordination model. The description will be done in such a way that a direct comparison will be made with the co-ordination rules of the ECSS. A comparative table, listing the co-ordination provisions of the bilateral treaties next to the provisions of the ECSS, will provided at the end. The description will be divided in two parts: one dealing with the co-ordination rules in place across the various co-ordination principles and risks (which will instantly be compared with the set of co-ordination rules of the ECSS); and another part focusing upon the rules dealing with the succession of the former SFRY-social security system. In both descriptions special attention will go out to the rules which incorporate a possible multilateral co-ordination, i.e. that are not strictly focusing upon the social security systems of the two concerned countries and enable already now to take into account social security elements of third countries.

3.2.2. Cross-convention overview of the co-ordination rules in place (in comparison with the European Convention Social Security)

3.2.2.1. Personal scope

The agreements are in principle applicable upon persons to whom the legislation of one or both contracting parties is applicable (or has been applicable) and other persons, whose rights are derived from the first mentioned category of persons (art. 3 of all co-ordination agreements). Except some treaties, the agreements do apply the principle of universal coverage, in the sense that they cover all persons who are or were subject to the national legislation on social security of the contracting parties (including persons deriving their rights from such persons) and not only to citizens. Yet there are still some examples of agreements with the principle of “citizen coverage”, thus applicable solely to the citizens of both contracting states (Agreement Macedonia – Croatia). Except for the latter one, the bilateral treaties seem to go even further than the ECSS as the conventions are not to be restricted to the own nationals of the involved contracting parties. However this statement is to be put in a conditional way as we will se later that some of the co-ordination rules applied in these conventions are only reserved to own citizens.

Contrary to the ECSS, the stateless persons and refugees are not mentioned in the personal scope of the concerned treaties. In none of the treaties reference is made to them. It is assumed that, in case such persons would be socially insured, they will immediately fall under the scope of the bilateral treaty. Yet it are especially these groups of persons who face(d) most of the problems in practice to get entitled to their benefits and/or to receive co-ordination of their social security records built up across

the various states. Including them clearly in the scope of application of the treaties would have strengthened at least their weak position

3.2.2.2.Material scope

Here more differences are to be found across the bilateral treaties. In its most extensive version, the bilateral treaty is applicable upon the (social security) legislation addressing the following contingencies: sickness (covering both health care, maternity and short term work incapacity), pensions (covering old age survivorship and invalidity), labour accidents and professional diseases, unemployment and family[30]. However, when Croatia is involved as contracting party the list is normally more restricted, skipping family benefits[31]. Also death grants are not always in the list of co-ordinated contingencies. This however finds sometimes its origin in the fact that there are no specific benefits to be labelled as death grant. As we will se later this category of benefits is residually applicable to the category of survivors' benefits, which are separately co-ordinated. Although not explicitly mentioned it can be deducted from the fact that reference is made to "legislation"[32], that the agreement is restricted to the statutory schemes. Whether the conventions are applicable upon the capitalised 2nd tier pensions is not clear however.

Compared to the ECSS, similar contingencies are being addressed in the material scope, with the exception of death grants and (sometimes) family benefits. On the other hand they do not exclude the social security schemes of civil servants.

3.2.2.3. Principle of equal treatment

When applying the legislations of the contracting states, equal treatment between the citizens of both contracting states should be guaranteed (art. 4 of the conventions). Strangely enough all treaties speak clearly about "citizens" and do not anymore refer to the more general "persons", when regulating the equal treatment principle in their conventions. It should be mentioned again that present report has been made on the basis of translated versions of the conventions. So one should be carefull with drawing conclusions from, maybe badly, translated concepts. Yet, the restriction to citizens came every time back in translations which have been carried out by different persons across the countries (even in different languages: i.e. English and German). So it is very likely that the original versions do restrict the equal treatment principle to their own citizens, cutting down severely the universal scope of their treaties. As a consequence the effect of one of the most crucial co-ordination principles is being neutralised in relation with third country nationals. Strictly speaking the ECSS is also applicable to own nationals of the contracting parties, yet this is, contrary to the bilateral conventions done in a multilateral way, reducing in this way the effect of reserving the equal treatment principle to solely the citizens of two countries.

The treaty between FRY and Macedonia goes even one step further by guaranteeing an "equalisation of facts" with regard to their legal effect (article 6). Yet this principle

[30] Art.2 agreement FRY and Macedonia and FRY-BiH
[31] Of the latter: art. 2 BiH-Croatia and FRY-Croatia.
[32] Normally described in art. 1 as "laws, sublaws and other regulations related to the social insurance specified in article 2".

is being confined to solely the legal effects professional activities can have in the social security system.

All treaties make reservations to the application of the equal treatment principle for the following matters:

a) legislation regulating the participation of the insured persons and employers in the bodies and institutions administering social security.
b) the "burden of insurance" stemming from international agreements concluded with third countries. This provision is very badly drafted (or translated) and it is not clear whether it applies only upon the treaties which the SFRY had concluded in the past with third countries, which the successor states took over or whether it is generally to be understood as relating to all treaties the other contracting party has concluded with third countries. In the latter interpretation it would reduce drastically the multilateral effect that treaties with third countries might have upon the citizens of the other contracting party. Moreover it would come into conflict with other provisions in the bilateral treaties which have a multilateral effect (see e.g. art. 5(3) of the conventions).
c) Legislation dealing with the insurance of persons employed in the official representative institutions in a third country.

3.2.2.4. Protection of acquired rights.

All bilateral treaties guarantee the export of benefits trough the principle of "equality of territories" The general rule is that cash benefits will be paid to the beneficiaries who have their residence in the territory of the other contracting state (art. 5 of the treaties) These benefits cannot be reduced, withdrawn, confiscated or suspended when the beneficiary is residing in another state. Interesting is the third paragraph of the article giving some multilateral effect to the export principle. Benefits for the citizens of the other contracting state can even be paid out to the territory of a third country, under the conditions equal to those which are valid for its own citizens. The possibility to export to third countries is though reserved for the own citizens of the (two) contracting states. Apparently one was afraid to build in too much of a multilateral application of the exportability principle; citizens not having the nationality of one of the contracting states can thus not invoke this particular rule.
An exception is made for unemployment benefits. Furthermore, the export of benefits is not done for benefits related to reduced work capacity, minimum pensions, assistance and care benefits for (invalid) persons, social assistance benefits and other pension and invalidity benefits which are assistance related. Also the ECSS (art. 11) foresees the possibility to exclude assistance related benefits or benefits that are non-contributory and "special" in the sense that they are paid out on top or besides the traditional social insurance benefits. Of course it remains to be seen whether all benefits, envisaged under the bilateral treaties, would qualify for the category of special non-contributory and assistance benefits as being foreseen under the ECSS. The export of the unemployment benefits is also made conditional to further arrangements between the contracting parties in accordance with the ECSS.

3.2.2.5. Protection of rights in course of acquisition

As within the ECSS, the principle of the protection of the rights in course of acquisition is spread over the various risks. Hence, the formulation of this principle is

not done in the general part of the conventions but every time again in the various chapters related to the concrete contingencies. As in the ECSS it has a double function: first of all it can be used to open the right to entitlements when waiting period or minimum insurance periods are being applied; secondly the principle can also be invoked for the mere calculation of the benefits (pro rata calculations). The latter is mainly to be found in the long term income replacement benefits (old age, survivors' and invalidity pensions), as will be explained more in detail later.

3.2.2.6. Indicating the competent state

Only for the professional active persons clear rules are foreseen that indicate the competent state. In that way, the designation rules are similar to those of the ECSS: the country in which the person is working is competent for social security security. The *lex loci labo*ris principle prevails here as well. Furthermore posting provisions are foreseen for both employees and self-employed, the former group having the possibility to work 24 months on the territory of the contracting party while remaining insured in the sending country, whereas the time period for the latter group is restricted to 12 months. Contrary to the ECSS posting for self-employed persons is possible under the bilateral conventions in the region. The posting periods for both categories can even be extended for the same period again when the competent authority of the receiving country agrees so. Except for people working in the transportation sector no specific rules are foreseen for persons working simultaneously in different countries (this contrary to the ECSS). However a "specific" posting provision is in place for persons who are sent to the territory of another country in which the company holds a business representation: these persons remain insured in the country of origin (in which the head office of the employer is located) without any time restriction.

3.2.2.7. Administrative cooperation

Maybe as important as the right to the export of benefits are the rules in relation with the cooperation between administrations (normally regulated in part IV of the bilateral conventions). Next to the fact that liaison bodies should be installed in each of the contracting states, and that the submitting of the benefit request is extensively regulated, it is also clearly stipulated that identity papers, documents and written requests of any kind that are submitted for the purpose of application of the agreement, do not have to be certified; and furthermore that the submitting of benefit requests cannot be made subject to any tax. It were often these "smaller" application rules which in the past made difficult if not impossible to claim benefits in another country (see above).

Yet although the necessary practical arrangements are established to smoothen the administrative cooperation, problems might still persist in the interpretation of the conditions and paper files. Here again the export of benefits to persons who cannot show that they "officially" reside in the other contracting party, seem to remain problematic. Countries do seem to have different opinions whether residence abroad means the factual stay abroad or the formally registered residence abroad. As long as one cannot proof the formal residence, as required by the administrations which apply the latter interpretation of residence, the benefit might not be exported. An example of

this dispute finds e.g. its origin in the convention between BiH-Croatia. In article 5 it is mentioned that the authorities should pay out the benefit to the insured persons during their residence in the territory of the other contracting party. At least it should be shown that one has temporary residence in the other country. The concept temporary residence is defined in this convention (contrary to the other conventions) in such a way that it means that one should have permanent residence in the country other than the country where one is staying temporary. Many of the (Croat) refugees in BiH (being often Serbian nationals) do not hold *formal* evidence of having temporary residence in BiH, leave alone that they can show that they have permanent residence in Croatia. Hence they risk to loose their "Croat" benefits, that are not exported.

3.2.2.8. Ant-cumulation rules

Except the treaty between BiH and Croatia there is no general article dealing with the anti-cumulation of benefits related to the same insurance period or dealing with the combination of benefits with income out of work. The anti-cumulation articles are spread over the conventions; they are mainly to be found in the specific sections dealing with the co-ordination of the various contingencies. Most of the times, they are to be found in the articles formulating the principle of aggregation of insurance periods (for pensions). It is stated then that the insurance periods fulfilled on the territory of the other contracting party can be taken into account for the determination of the benefit (e.g. for he calculation of the theoretical amount); however when the insurance record is related to a same time period as the insurance record stemming from another contracting party, it should not be taken into account.

3.2.2.9. Co-ordination of sickness benefits (health care, sickness and maternity)

The concerned bilateral agreements in the region do have specific co-ordination rules for the sickness benefit ("chapter 1" of the agreements). They cover both the health care benefits ("sickness/maternity in kind") and the income replacement benefits in case of sickness and maternity ("sickness/maternity in cash"). We will first have a look at the health care co-ordination and consequently at the co-ordination of the cash benefits.

Sickness/maternity in kind – co-ordination of health care benefits

The person who has residence in another country than the country in which he is socially insured has access to the health care infrastructure of the country of residence under the following conditions: he is entitled to the health benefits under the same conditions as the insured persons of the country of residence as if he would be insured in that country. It is however the country in which he is socially insured which should refund the competent health care institution of the country of residence in which the migrant person received treatment[33].

A person who only stays on temporary basis on the territory of another contracting country, will have access to health care in case he urgently needs it. What urgent care

[33] Article 12 agreement FRY-Macedonia, art. 12 agreement Bih-Croatia, art. 11 agreement BiH-FRY, art. 11 agreement Fry-Croatia, for the refund of the health care costs see art. 15 of the said agreements.

exactly means, is not being defined more in detail. Specific provisions are in place for the pensioners; more precisely it is being regulated which country is competent for the health care costs in case the person receives a (part of the) pension from another country.

Different however are the rules for health care co-ordination for employees and self-employed persons who are working (temporary) under posting or are being sent to the business representation in another country. Some conventions provide a similar treatment as in place for the person who resides in another country than the country in which he is socially insured: access to the health care infrastructure in a similar way as the own residents[34]. Condition however is that the posted person has residence in the country to which he is being sent. Other agreements however provide (only) a guarantee of access to treatments in case of urgency[35].

Interesting is that in all conventions it is clearly stipulated that, although the treatment is provided in accordance with the legislation of the country in which the person gets access to the health care infrastructure, the maximum duration of the treatment, if any, remains the competency of the country in which the person is socially insured[36].

Family members residing/staying with the insured person in another country than the country of social insurance, have in a similar way access to the health infrastructure of the country of residence/stay. However when we are dealing with family members of posted workers the competent institution of the country in which one is insured should first give prior approval. A similar approval for all insured persons wanting to have access to health care abroad is always needed for expensive medical services, helping devices, utilization of prostheses and othopedic aids. Problem though is that except for the mentioned treatments and goods, the concept of expensive medical services is not being defined more in detail, making the application of this provision in practice to be very difficult if not impossible.

Although the co-ordination rules related to sickness are being generally stipulated and do often lack any direct effect in the ECSS, the sickness co-ordination of the concerning bilateral conventions does come in line with their corresponding provisions of the Convention. Some might utter that the provisions do deviate from what is being regulated in EC-co-ordination rules, but the EU is not at stake here. The health care co-ordination should function within the Balkan region and is not to be copied from the Ec Regulation as such when this does not make sense. Creating rules stipulating that the duration of the treatment is controlled by the competent country in which the person is socially insured, is perfectly fitting the co-ordination standards as being developed in the Council of Europe. Furthermore the situation of health care access abroad is being regulated as well for family members and pensioners; sometimes though no specific provision has been made for the family members of pensioners and unemployed, yet nothing obstructs to apply the general health care co-ordination rules which in the bilateral treaties are applicable for the insured persons (art 11, respectively 12 of the mentioned bilateral treaties).

[34] E.g. art. 12 agreement FRY-Macedonia, art. 11 FRY-Croatia and art. 11 agreement FRY-BiH, the latter even providing this access when the person is only staying on the territory of the other country.
[35] Art. 12 agreement BiH-Croatia
[36] This e.g. contrary to the EC coordination rules as being laid down in Reg. 1408/71; yet they are not in contradiction with the ECSS, as this is being left open to the initiative of the contracting parties.

More problematic though is the absence of a specific provision for granting authorisation to receive treatment in the other contracting party (under stipulated conditions). The bilateral agreements do indeed lack such provisions, but the national legislation of the SISP-countries does often foresee it. In that sense the rule of access to foreign health care system is being applied, not on the basis of a convention, but on the basis of national rules. Yet the national application rules for these provision grating the authorisation to get treatment abroad may differ. Here the acceptance of the ECSS could trigger the states to make some common arrangements.

Finally what is still missing is a specific provision for frontier workers giving them the possibility to receive treatment in the country where they work (the country of insurance). At least it is not specifically foreseen. Yet, one should not forget the specific set-up of the health care co-ordination in these treaties: they broaden the applicable legislation, in the sense that the rights of the moving person are being guaranteed as well when they stay or reside in another country. This does leave the general rule that the person is socially protected in the country of professional activities untouched: hence the frontier worker can also have access to the health infrastructure of the country in which he is socially insured on the basis of the general designation rules (art. 11, resp. 12 of the bilateral treaties). By doing so one stays in line with the provisions of the ECSS.

Sickness and maternity cash benefits

The rules concerning the co-ordination of cash benefits are kept restricted. The granting of the benefit is clearly the sole responsibility of the country in which the person is socially insured. Thereto the institution should respect the principles of aggregation of insurance periods and export of benefits. In case the legislation stipulates that the amount of the benefit is depending upon the number of family members, the competent institution is taking into account as well the family members who happen to reside in the other contracting country.

The concerned co-ordination provisions do not deviate from what is foreseen in the ECSS (art. 22 (2) tot (4), being directly applicable).

3.2.2.10 Co-ordination of pensions (old age, survivorship and invalidity)

The sections in the bilateral co-ordination agreement dealing with the (old age, survivorship and invalidity) do all start[37] by applying the principle of aggregation: in case a minimum of insurance/pension records is needed to open entitlement to a benefit, it is possible to take into account the insurance records fulfilled in the other contracting party[38]. All treaties make it even possible to take into account the insurance periods fulfilled in a third country under the condition that both contracting parties have an agreement with that third country. By doing so the treaties do multilateralise somewhat the aggregation principle for the pension calculation. For the

[37] See art. 17 agreement FRY-Macedonia, art. 16 agreement FRY-BiH, art. 16 agreement FRY-Croatia, art. 17 BiH-Croatia.

[38] As to the insurance record being built up in the "past", i.e. in the SFRY-period or period between the end of the war and the coming in place of the convention: see further.

SISP-countries, and especially the countries who succeeded the SFRY, this provision is of particular relevance as all[39] countries are mutually bound by agreements: by doing so a multilateral aggregation of insurance records is possible in the region, at least at first sight. Yet, it is unfortunate that the principle of aggregation of insurance periods built up in third countries is only reserved to the citizens of the contracting parties; third country nationals can not invoke this rule. Here again the multilateral effect of the rule is kept restricted. Although the treaties have a universal application in their personal scope, the condition of citizenship pops up every time when a multilateral application of a co-ordination rule is being foreseen. To give an example: a Macedonian citizen can apply e.g. art. 17 § 3 of the convention FRY-Macedonia to take into account the insurance periods which he built up in Croatia in order to open entitlement to pension rights in resp. Macedonia and Serbia. A Croatian citizen can not do this. He will have to rely upon the treaties concluded between respectively Croatia and Serbia, and Croatia and Macedonia. But what it those other agreements do not exist? A citizen of Montenegro could e.g. face this problem as so far no agreements are in place between Montenegro on the one hand, and Croatia and Macedonia on the other hand.

In case specific schemes are in place for certain categories of workers, only the insurance periods fulfilled in that profession will be taken into account. If that does not lead to entitlement to a benefit, the aggregation principle will be applied of the general social security system. Furthermore, countries are not forced to take into account insurance periods which amount to less than one year, in order to open the entitlement to a pension.

As to the calculation of the cross-country pension, two methods are applied: a national pension without taking into account the provisions of the treaty. This can be done if the right to benefit exists without applying the aggregation rules. When it is not possible to come to a national pension without applying the aggregation of insurance records, a pro rata pension, in relation to the insurance periods fulfilled in the contracting party, will have to be calculated. In this case it does follow the traditional logics of the pro rata pension as being applied in the ECSS (and also of e.g. the EC regulation 1408/71). It does so by first calculating the "theoretical" amount: each country calculates the pension as if the full insurance period would have been fulfilled on its territory. The theoretical pension is subsequently being adapted, proportionally to the relation between the pensionable period completed in the country and the total pensionable period of the concerned person. If a pro rata pension is being applied each country takes into account the salary, earnings contributions, relevant to the calculation for the pension, that has been earned or paid in the country: in other words, no data in relation to the earnings, salary and contributions are requested from abroad.

The pension co-ordination follows similar logics as the one that is being applied in the ECSS (and has direct effect). Some minor issues are not being addressed though in the bilateral conventions, such as what to do with the conversion from invalidity pension in to old age pension, what to do in case not in all contracting parties the

[39] In so far of course Montenegro would follow-up the FRY-conventions. However, one of the successors of SFRY that is out of the SISP-scope, i.e. Slovenia, does not have an agreement with BiH, Serbia and Montenegro. Specifically in that relation deficiencies are still to be found in the multilateral aggregation for pension records.

conditions are already fulfilled to open pension entitlement (e.g. due to different pensionable age in place), what to do in case the invalidity aggravates; furthermore some conventions do not deal with anti-cumulation rules. Finally the bilateral conventions link the calculation of the national pension to the situation where no use is made of the principle of aggregation to open pension entitlements, whereas the ECCS foresees that in such a situation also the pro rata calculation has to be made by the country and the highest of the amounts to be provided.

3.2.2.11 Co-ordination of labour accidents and professional diseases

The bilateral agreements provide in their respective third chapter the specific co-ordination rules for labour accidents and professional diseases. The chapter consists of four sub-chapters, incorporating
- rules related to the benefits in kind (health care): where the general co-ordination rules of sickness (benefits in kind) are applied on the specific cases of labour accidents and professional diseases: benefits to be provided on account of the country of insurance when the persons stays or resides in another country, in accordance with the health care legislation of the latter (without maximum limit, but still with specific approval necessary for utilization of protheses, orthopaedic aids, and other more medical services);
- rules related to the occurrence of an injury on the road: a person who has residence in one contracting country, and suffers an injury while going to work in another country, will be entitled to a benefit on the basis of the labour accident legislation, according to the legislation of the latter country . This rule is also applicable upon the (last) return from the country, when e.g. the employment contract has been stopped;
- rules related to the specific case of professional disease: if the professional disease legislation of a country stipulates that the benefits are only to provided when the disease is first medically discovered in that country, then this condition is supposed to be fulfilled, when the disease is first medically discovered in the other contracting party. Furthermore when the benefit is only provided when one can prove to have worked during a minimum period in the occupation (likely to have caused the contamination), the periods of work in that occupation fulfilled in the other contracting party, can be taken into account in order to reach the required minimum period;
- rules in relation to the calculation of the cash benefits: the country where the injury occurred or where the profession, that caused the disease, has been performed for the last time, is the only competent one for the calculation and granting of the cash benefit. Finally a rule is in place when the disease would become worse, indicating which country should pay the possible increase of benefit, related to the worsening of the disease.

The applied rules do not fundamentally differ from the co-ordination that is foreseen by the ECSS.

3.2.2.12 Co-ordination of unemployment benefits

These rules are kept restricted and mainly focus upon the possibility of aggregating the insurance periods to open entitlement in case minimum periods of work, insurance or alike, are being applied in the concerned national legislations. Sometimes the agreement itself applies a minimum period of work (in the other country) before the

aggregation rule can be applied by the insured person (9 months of work in the last 12 months before applying for a benefit[40]). Furthermore in some treaties[41] the duration of the payment of benefit is reduced for a period for which the unemployed person already was receiving unemployment benefit in a period of twelve months before submitting the claim in the other contracting state.

The applied co-ordination rules are concentrated around the principle of aggregation but are even then kept restrictive: minimum periods of work should be accomplished in the host country; in case the person was already entitled in the other contracting state during a certain period to an unemployment benefit, this period can even be deducted from the period during which the new unemployment entitlement is to be granted.

Although the unemployment co-ordination is kept quite restricted in the ECSS (and most of the provisions do not have direct applicability), we find here some differences between on the one hand the applied bilateral conventions in the Balkan region, and on the other hand the model co-ordination provisions foreseen under the ECSS. In principle no additional conditions of minimum work periods are to be established to make use of the possibility to count together insurance periods. On the other hand it remains possible under the ECSS to deduct prior period of unemployment payment from the actual period the benefit is to be paid (art 54 ECSS). Furthermore, the ECSS invites the countries to regulate matters such as
- the situation where the person lives in another country than the country where he worked and the related question how the export of the benefit to the country of residence can be organised (on whose account, e.g.)
- the situation where the person wants to move to another country (exportability of the benefit) .
Also guidelines are established for the calculation of the benefit (which salaries, wages, income, contribution records, etc should be taken into account).

Although not drastically different, some adaptations are to be addressed be required in case of possible signature of the ECSS (and the chapter on unemployment benefits).

3.2.2.13. Co-ordination of death grants[42]

Rather seldom death grants are in the material scope of the bilateral treaties (as they do not always exist in the legislation of one or the other contracting party). In the convention between Bosnia and Herzegovina and FRY a specific set of co-ordination rules is being foreseen. However it is restricted to one major principle: if the right to obtain death grants exists according to the legislation of both contracting parties, only the legislation of the contracting state where the deceased person had his residence, will be competent. Furthermore the general principles such as equal treatment and export of benefits are applicable, but no special provision is foreseen for aggregating insurance periods. The latter should be necessary when taking into account the rules related to the co-ordination of death grants as being foreseen under the ECSS

[40] Unless the work was being stopped for a reason beyond the control of the worker: in this case the minimum work period of 9 months is not valid.
[41] Such as the convention between FRY and BiH, Macedonia and BiH-Croatia.
[42] Death grants are for the application of the ECSS one-off lump sum payments paid for the loss of a breadwinner.

3.2.2.13. Co-ordination of family benefits

Also family benefits are not always co-ordinated in the bilateral treaties between the SISP-countries: e.g. treaties concluded with Croatia do systematically omit the co-ordination of these benefits. And if rules are foreseen, they often are restricted to child benefits and/or a very restrictive set of co-ordination rules, mainly boiling down to the indication of a competent state. Although the provisions of the ECSS are kept restricted as well, the convention however invites the contracting states to make arrangements along the lines of the foreseen family co-ordination, touching upon rules such as aggregation of insurance periods, export of benefits to an other country, specific rules for children or family members of unemployed persons, and arrangements for refunding the costs.

Comparison co-ordination
Bilateral conventions with ECSS

	Bilateral conventions among the SISP-countries	European Convention on Social Security -multilateral
Personal scope	All insured **persons** Except: HR-MAC **No stateless/refugees**	All insured **citizens** **Stateless/refugees**
Material scope	Sickness (health, sickness and maternity), pensions (old age, survivorship and invalidity), labour accidents and professional diseases, unemployment, **(death grants)**, **(family)**	Benefits for sickness and maternity (including health), invalidity, old age, survivorship, occupational injuries and diseases, unemployment, family and death grants No specific schemes for civil servants
Equal treatment nationals	Equal treatment, restricted to own citizens **Exceptions to the principle of equal treatment** - **Administrative participation** - **Agreements third parties** - **Insurance representations abroad**	Equal treatment between nationals **Application upon non-contributory benefits can be made conditional**
Protection of acquired rights	Principle of "equality" of territories guaranteed for cash benefits Exceptions for unemployment benefits and special benefits related to invalidity, care, minimum pension and non-contributory benefits	Export of benefits, except for special non-contributory benefits and assistance benefits Special rules in place for unemployment made subject to arrangements to be made between contracting parties
Protection of	Principle applied for the various	Principle to be applied for the

rights in course of acquisition	contingencies falling under the material scope	coordination of each contingency
Designation of the applicable legislation	- Restricted to workers - Lex loci laboris - Posting employees (**24 months**) - **Posting Self-employed** (12 months) - Special rules for transportation workers and diplomatic personnel	- Restricted to workers - Lex loci laboris - Posting employees (12 months) - **Special rules for persons simultaneously working in different countries** - Special rules for transportation workers and diplomatic personnel - **exception possible in the interest of the worker**
Coordination sickness	*In kind* - Residing in another country than competent country: access to health care in accordance with rules of country of residence, to be refunded by country of insurance (**rule applied as well in some treaties upon posted workers**) - Temporary stay in other country: access to emergency care - Similar rules for family members (sometimes prior approval) - Specific provisions for pensioners to figure out which is competent country covering health care costs *In cash* - Competent country calculates and pays out benefits - Taking into account family members residing abroad (if relevant)	*In kind (not direct applicable)* - Provisions to be made for persons residing permanently abroad - Provisions to be foreseen for those who stay temporary on the territory of other contracting state, **who return to country of insurance or who go for treatment abroad** - Provisions to be foreseen for family members - Provisions to be foreseen for pensioners and **unemployed persons** *In cash* - Competent country calculates and pays out benefits - Taking into account family members residing abroad (if relevant)
Coordination pensions	- Aggregation insurance periods to open entitlements - Pensions stemming from insurance record smaller than one year, not to be paid out - Calculation: pro rata when national pension cannot be obtained solely on the basis	- Aggregation insurance periods to open entitlements - Pensions stemming from insurance record smaller than one year, not to be paid out - Calculation: pro rata or national, **depending upon highest amount**

	national legislation - calculation: national pension when aggregation of insurance periods is not needed to open entitlement of pensions - parameters "income", "wages" etc: only national information to be used - **Sometimes anti-cumulation rules foreseen** (cumulation income abroad, insurance period from abroad related to same time period)	-parameters "income", "wages" etc: only national information to be used **- anti-cumulation: pension can be reduced when simultaneous income from abroad; insurance record from abroad related to the same time period should not be taken into account** **- conversion invalidity to old age pension** **- aggravation invalidity**
Coordination labour accidents/disease	-road accident from place of residence to place of work: competent is the country where the person is insured - health care co-ordination (application general rules) - professional diseases: rules concerning discovering the disease and aggregation of work periods in case of minimum periods of work required - calculation cash benefit: last country of work; specific rules in case of worsening of disease	- accidents on the way to and from the work - health care co-ordination (*not direct applicable*) - **cost of transporting the victim to the country of residence** (*not directly applicable*) - contracting occupational diseases after exposure to the risk in other countries -calculation of cash benefits - aggravation
Coordination death grants	**Only available in some conventions + restricted to indication of competent state paying out benefit**	- Aggregation of insurance periods **- Occurrence of death in other state than competent state**
Coordination unemployment	- Aggregation of insurance periods **if one already worked at least 9 months in the country** - possible to deduct prior period of unemployment benefits paid in the other contracting states from the maximum period during which benefit is paid	- Aggregation of insurance periods - **Maintenance of entitlement to benefits when changing residence** (*not direct applicable*) - **unemployment person residing in other country than country in which he gets unemployed** (*not directly applicable*) - maximum duration of benefits and possibility to take into account prior periods of payment fulfilled

		in another country (*not directly applicable*) - calculation of benefits
Coordination family	**Only available in some conventions + restricted to indication of competent state paying out benefit**	-**Adding together periods** - *Not directly applicable*: **family benefits/allowances for children/family members residing in other country, special provisions family benefits/allowances for children/family members of the unemployed worker living in another country than the competent country** - *Not directly applicable*: **settling the accounts**

3.2.3. The specific (co-ordination) rules addressing the succession of the SFRY

One of the specificities of the bilateral co-ordination conventions of the region is the fact that they regulate as well the succession of the common SFRY-social insurance past. In that way they follow up the obligations, which the "Agreement on succession issues" addressed in its Annex E. The bilateral conventions are therefore of a mixed nature, as they do not only touch upon the traditional social security co-ordination but also regulate the succession of a former common social insurance past. A specificity we will have to take into account, when addressing the issue of a possible acceptance of the ECSS.

Here again the rules are rather similar across the various agreements. They can shortly be summarised as follows:

In principle the agreements only have effect from the moment that they start to be applicable[43]. In other words they do not provide rights to benefits for the periods before its entrance in force. This principle however does not apply for insurance periods related to pensions[44]. It is possible to take the past insurance periods, laying in a period before the coming into applicability of the treaty, into account (sometimes however under certain conditions[45]). In principle each state takes up the responsibility for the insurance periods which have been fulfilled in the late Yugoslav Republic which the country succeeded.

Although this is not explicitly mentioned in this very chapter of the bilateral treaty, one should draw again the attention to the aggregation rule which is applicable in the co-ordination chapter for pensions; this very principle has a multilateral application: it is clearly mentioned that the principle of aggregation of insurance periods for opening pension entitlements can be applied by the citizens[46] of the contracting states in relation to the insurance systems which they happen to have fulfilled in third countries; condition though is that both contracting parties are bound by a treaty with the third country. Except for Montenegro of which it is not clear yet in what way they will take over the FRY-conventions, this applies for all concerned countries in the region. This multilateral aggregation can be applied as well upon the past insurance periods of the SFRY. As a consequence, for the opening of pension entitlements one can take into account his past insurance periods which have been built up in one of the former SFRY-Republics and/or successor states.

Then follow the succession rules, specific to certain topics; they can be summarised as follows:

3.2.3.1. Consequences of the former SFRY-conventions with third countries

[43] See article 40§ 1 FRY-Macedonia; art. 40§ 1 Croatia-BiH; art. 40§1 BiH-FRY; art. 38 FRY-Croatia.
[44] See article 40 § 5 FRY-Macedonia; art. 40 §2 and § 4 Croatia-BiH; art. 40§2 and §5 BiH-FRY; art. 38 § 2 and § 4 FRY-Croatia.
[45] See e.g. art. 40 § 2 and § 3 Croatia-BiH; art. 40§3 and §4 FRY-BiH; art. 38 § 2 FRY-Croatia.
[46] And thus not by a third country national: see 3.2.2.10.

Question at stake is which successor state takes up the "burden" created by conventions of the SFRY, concluded with third countries. Principal rule here is that the state which followed up the former SFRY-Republic takes up the responsibility for its own citizens. The periods of coverage completed in a third state shall be recognised (at the cost) of the contracting country of which the concerned person is citizen[47]. When the concerned person has the citizenship of both contracting parties, the country will be assigned in which the person holds residence (on the day of acquiring the pension rights). If the person has no citizenship of any of the involved contracting parties: assigned is the country of which that person was citizen on the day when the obligations were assumed under international law. The same rule applies in case the person does not have residence in one of the contracting parties.

3.2.3.2.Assimilated periods – military service fulfilled in the SFRY

If under the legislation of both contracting states, the same years of military service (fulfilled in the SFRY) of the concerned person are accredited as insurance periods, these periods of coverage shall be debited only to that contracting state of which the concerned person is citizen. If he is citizen of both states, that state will be assigned where the concerned persons holds residence on the day of acquiring the pension. Nothing is said however when the concerned person does not have the citizenship of any the contracting states[48] A similar set of rules is in place for the pension rights acquired as active military officer[49].

3.2.3.3.Benefits granted on the basis of the former legislation

Cash benefits granted (before the end of the war) on the basis of the SFRY-legislation by one of the concerned republics shall remain the responsibility of that state. These benefits shall not be recalculated[50]. Benefits granted in between (the end of the war[51]) and the coming into effect of the coordination agreement do fall under another set of rules[52] : foreseen is an *ex officio* recalculation of the pension amount when the benefit was being accomplished with the use of insurance periods acquired in the other contracting party. As already mentioned many successor state stipulated, before the coming into place of the conventions, in their national legislation or administrative practices all kinds of interim arrangements that granted the possibility to take "foreign" (i.e. of another former SFRY-Republic) insurance periods into account in order to calculate the eventual benefit. As these provisions were of an "interim" nature, different one from another, and as many persons faced, especially practical, problems when applying these interim-provisions, the countries decided to build in a recalculation of the benefits on the basis of the provisions foreseen in the bilateral agreement. Question is of course which (national) legislation one should take into account when recalculating the benefits: the one which is currently in place, or the one which was in place at the moment of the date of entrance of the bilateral treaty? Or the one which was in place when the "interim" benefit has been granted? Here one opted for the rule that the legislation should be used which was valid on the moment

[47] See art. 40 § 4 Macedonia-FRY; art. 42 § 1 Croatia-BiH; art. 41 FRY-BiH
[48] Provisions not foreseen in all treaties: see art. 42 § 2 Croatia-BiH; art. 41§2-§6 FRY-BiH.
[49] See art. 42 § 3 HR-BiH; art. 41§2-§6 FRY-BiH.
[50] See art. 40 § 6 Macedonia-FRY; art. 41 § 2 Croatia-BiH; art.40§6 FRY-BiH; art. 38§5 FRY-Croatia
[51] And this for the concerned Republic the end of the SFRY.
[52] See art. 41§1 FRY-Macedonia; art. 43 § 1 BiH-Croatia; art.42§1 FRY-BiH; art. 39§1 FRY-Croatia.

the insured person became first eligible to a pension[53].When doing this recalculation, the pensionable periods completed in the territories of the other republics of former Yugoslavia, on the basis of which the benefit was originally calculated, will be taken into account[54] Contrary to this is e.g.: art. 44 § 2 of the convention Croatia-BiH: when the original benefit was calculated taking into account insurances of third countries on the basis of an international agreement, there will be no recalculation on the basis of the co-ordination agreement.

When the total of the recalculated amount is smaller than the original amount received by a given country, the latter will pay the difference[55] .

Recalculation at the request of the insured person is also possible when the benefit was granted taking into account the insurance periods of the other contracting state, without however opening entitlement in that other contracting state[56] . The recalculation shall be done at the moment the insured person fulfils the requirements of the legislation of the other contracting state which opens the entitlement to a benefit.

[53] See art. 43 § 2 BiH-Croatia; art. 42§2 FRY-BiH. Again not all conventions regulate this question!.
[54] Article 41 § 2 Macedonia-FRY; art. 42 § 4 FRY-BiH; art. 39§2 FRY-Croatia.
[55] Art. 41 §3 Macedonia-FRY; art. 45 Croatia-BiH; art. 39 § 4 FRY-Croatia.
[56] Art. 46 Croatia- BiH; art. 43 § 1 FRY-BiH; art. 40 FRY-Croatia. As the other state does not pay out a benefit an ex officio recalculation is more difficult to be undertaken. Therefore one waits for the initiative of the insured himself.

3.3.Treaties with third countries (in Europe)

The states taking part in the SISP-programme do have a tradition of (bilateral) co-ordination treaties with other European states. This holds true especially for the successor states of the SFRY (and hence less for Albania). Already during the Yugoslav period, many persons went to work abroad (especially in Europe) and the SFRY invested quite some efforts in the development of co-ordination conventions with other European states, protecting so their migrant workers who spent some of their working life in other European countries. The successor states took over this tradition, and, do often still apply the former SFRY-conventions, when no new treaty came in place.

The following overview could be given of the treaties in place. Countries indicated by an * are also bound by the European Convention on Social Security.

Conventions	**Croatia**	**Serbia**	**Macedonia**	**Bosnia and Herzegovina**	**Montenegro**	**Albania**
Ratified	Austria* (1997), Bulgaria (2003), Czech Republic (1999), Germany (1997), Italy* (1997) Luxembourg* (2001) The Netherlands* (1998) Slovakia (1997) Slovenia (1997) Switzerland (1996)	Austria* (2002) Czech Republic (2002)	Austria* (1997) Bulgaria (2003) Denmark (2000) Slovenia (1999) Turkey* (1999) Switzerland (2000)	Austria* (2001) Turkey* (2004)	No info	Bulgaria (1952) Romania (1961) Turkey* (1998)
Inherited from the SFRY	Belgium* (1954) Denmark (1977) France (1950) Hungary (1957) Norway (1974) Poland (1958) Sweden (1978) United Kingdom (1958)	Belgium* (1956) Denmark (1979) Italy* (1961) Luxembourg* (1956) France (1950) Hungary (1958) The Netherlands* (1979) Norway (1976) Poland (1959) Romania (1976) Germany (1969) Sweden (1979) Switzerland (1979) United Kingdom (1958) Slovakia (1957)	Belgium* (1954) United Kingdom (1958) Italy* (1957) Luxembourg* (1954) Hungary (1957) Norway (1974) Poland (1958) France (1950) The Netherlands* (1977) Czech Republic and Slovakia (1957) Sweden (1978)	Not reported	No info	
Signed	Belgium Denmark Hunary	Bulgaria	Germany, Czech Republic, Romania		No info	
Negotiation				Belgium*, Switzerland, Slovenia, NL*, Germany	No info	

It is impossible to give a cross-cut description of the treaties, as the texts of the involved treaties were simply not always available. Yet they can be categorised somewhat. The more recent treaties which the successor states concluded follow very closely the co-ordination patterns as being laid down in the ECSS and also the EC regulation 1408/71 (be it in a simplified form). This holds true as well for the late SFRY-conventions. On the other hand, the earlier SFRY-treaties are often only focusing upon some benefits, especially the long-term benefits related to pensions.

The (older) conventions concluded with the other (former) Communist states are often of a different type. Most of these conventions work with the so-called principle of "incorporation", a technique which is e.g. also still used in the co-ordination relations between the former Soviet states. This incorporation principle guarantees that the state in which the migrant is residing, takes the full responsibility with regard to social protection. As such nothing is wrong with this, rather straightforward co-ordination principle. But doubts can be raised as to its practical application as the social security systems of the countries in the SISP-region started to become fundamentally different after the fall of the Iron Curtain beginning of the 1990s. One could e.g. put question marks behind the application of this co-ordination principle on schemes which are e.g. related to the previously earned income or with the amount of contributions which have been paid in previously. Furthermore we have noticed that a large part of the migrating or professionally moving active people consists of self-employed people. This professional category is in need of an adapted set of co-ordination provisions, which the existing bilateral treaties more than probably will not have, taking into account the formal absence of self-employed people during the communist period. The incorporation principle will more than likely not fit the cross-border work movement, which is in essence of a short nature. Here as well adapted co-ordination provisions should be foreseen. Moreover, in a situation of short time (work) movement across the borders, the need of documents showing the social security position of the person/worker is more than necessary. The latter seems often to be a problem in the region of South East Europe, especially with *Roma*-people who travel across the countries. A modernised set of documents proving the social security position of the person moving across the borders is needed to have a smooth functioning co-ordination. Co-operation between administrations means also working with reliable and common administrative documents, that can be a proof of the social security position of the migrant/moving persons. Summarised we could say that especially these "older" co-ordination relations between the countries of the SISP-region are in need of some modernisation and/or revitalisation. Apart from this some of the co-ordination arrangements are in need of extension as the treaties in place do not cover all social contingencies.

4. Consequences of signature and ratification of the European Convention on Social Security by all involved SISP-countries

4.1. Consequences for the social security relations between the SISP-countries

Before embarking upon the consequences of a possible ratification, one prior note should be made with regard to the legal relationship between on the one hand the European Convention on Social Security, and on the other hand, the undertaken co-ordination initiatives, and more precisely the existing bilateral conventions, which the involved SISP-countries already signed. From what has been previously mentioned, it became clear that the countries did already quite considerable efforts to co-ordinate their social security with the neighbouring countries, to take up responsibility for the past SFRY-social security claims and to maintain co-ordination relations with third countries in the rest of the world. It cannot be the purpose to the have all these initiatives washed away when signing the European Convention on Social Security. The relation between the ECSS and the other international social security commitments that countries undertook is being addressed in article 5 of the European Convention. In general it is stated that the provisions of the Convention replace the bilateral and multilateral social security co-ordination agreements existing between the contracting parties. Thus at first sight, signing the ECSS would mean that between the SISP-countries the convention would come into place of the existing bilateral conventions.

Yet article 5 of the ECSS continues by stating that exceptions are allowed upon the general principle for replacing the existing social security conventions in place between the contracting parties. It does not replace any conventions adopted by the ILO nor any provisions of the European Union: the latter exceptions e.g. has as a consequence that the current ECSS is hardly applied as the ratifying members are all member to the EU (and thus EC-co-ordination regulation 1408/71), except for Turkey. It is especially in the relation between the ratifying EU-members (Belgium, Italy, the Netherlands, Austria, Luxembourg, Portugal and Spain) on the one hand, and Turkey, on the other had that most of the ECSS provisions, that have direct effect, are being applied[57].

More important for this project is that the contracting parties can make an exception to the overruling of the ECSS by listing the bilateral and multilateral agreements they wish to preserve or by listing provisions of such conventions which they want to keep applicable. The contracting parties must expressly agree to keep the particular agreements in force between them and these agreements (or provisions) must be listed in Annex III to the convention.

Article 5 also stipulates that the existing treaties between the contracting parties will remain applicable with regard to the provisions of the ECSS that are subject to the conclusion of further bilateral and multilateral agreements, until the entry into force of such agreements. In other words the provisions of the existing bilateral or multilateral treaties remain applicable until new treaties are coming into place, which apply the co-ordination principles as being laid down in the ECSS. In case the provisions of the

[57] E.g. A Turkish national can export on the basis of the ECSS his pension entitlements to Turkey which he built up in Spain and Portugal, the latter rights first being co-ordinated on the basis of EC regulation 1408/71.

existing agreements already reflect the co-ordination principles of the ECSS it goes without saying that the obligation to make agreements with the other contracting parties to the Convention is being fulfilled. It suffices then, in appliance of article 7 to the Convention, to report of the Council of Europe the compatibility of the existing conventions with the rules of the ECSS. As mentioned before already many of the co-ordination rules that the SISP-countries developed among themselves are in line with the (non directly applicable) framework rules of the ECSS. These provisions of the existing treaties are then being backed up by the signature of the ECSS.

Important though is that the ECSS still can have an effect upon the provisions or treaties which are being notified in annex III as not to become overruled by the ECSS. In other words the treaties remain to exist but are in the same time getting amplified by the ECSS. The ECSS will not override these bilateral agreements (or provisions of them) but it will make sure that persons[58] who happen not to fall within the personal scope of these agreements, will now be able to rely upon them. For instance Macedonia and Croatia could agree to list their bilateral social security convention under annex III of the ECSS. The Convention then is not overruled by the ECSS. Yet due to the ratification of both countries of the ECSS, from now on citizens of other ratifying countries (in hypothesis of the other SISP-countries) can invoke from now onwards the bilateral treaty, even when the latter in the description of its personal scope is being restricted to the citizens of Croatia and Macedonia.

Furthermore, the treaties which are listed in Annex III, and thus are not overruled by the ECSS, will be multilateralised in their application. The Convention will apply in multilateral relations between states bound by any bilateral agreements that are listed in Annex III. For example, bilateral agreements are in place between Bosnia and Herzegovina, and Serbia, between Serbia and Croatia and between Croatia and Bosnia and Herzegovina. All three states are e.g. linked by bilateral agreements, listed in Annex III; but if someone were to have lived in the three states (in which he built up insurance records), this would be classified as a multilateral relationship to which then the Convention would apply and not the individual bilateral agreements listed in Annex III. They remain only applicable in bilateral relationships and not in multilateral ones, which is the natural ambit of the ECSS. As such this will not have tremendous consequences as too a large extent the actual bilateral treaties reflect the co-ordination rules of the ECSS. Furthermore the overruling by the ECSS of bilateral treaties listed in annex III when dealing with multilateral cases holds only true for matters which are being regulated by the ECSS. The succession rules for instance are not part of the material scope of the ECSS and hence remain regulated by the three bilateral agreements at stake in our example.

4.1.1. Consequences for the present loopholes

The signing and ratification of the ECSS could fill up some of the existing loopholes to be found in the bilateral conventions which are in place between the countries. These loopholes do reflect various elements, touching upon the material scope, the

[58] Of course when these persons themselves fall under the personal scope of the European Convention on Social Secuity (art. 4).

personal scope and the lack of technical co-ordination rules. They will be addressed systematically now. What is not being touched upon here is the multilateralisation of the social security co-ordination in the region; this will be done in the following chapter.

4.1.1.1. Loopholes in relation to countries with which no agreement is in place

For the moment being some countries are not bound by bilateral agreements across the SISP-region. Albania e.g. is not having a treaty in place with any of the other SISP-countries although migration fluxes and movements of persons were being reported between this country and Serbia (i.e. Kosovo), Montenegro and Macedonia. By signing the ECSS the set of (directly applicable) co-ordination as foreseen by the Convention would regulate the social security systems between Albania and the other SISP-countries. Furthermore, the involved countries would be invited to make arrangements for the not direct applicable provisions of the Convention (of which are the most relevant, the ones related to the co-ordination of health care and family benefits). The same is true for Montenegro of which it is not clear yet to what extent this country will take over the international agreements concluded by Serbia-Montenegro. Anyhow, it will not be simply a matter of taking over agreements as Montenegro itself was not party to the UN Agreement on Succession Issues. At least Serbia and Montenegro will have to agree to what extent they will respectively take over the (international) social security liabilities, that have been taken up previously by the SFRY, the FRY and Serbia-Montenegro. Besides this succession matter, Montenegro itself will probably have to co-ordinate its social security system with foreign states, both within the region and abroad. It can do so bilaterally but a possibility could also be the acceptance of the European Convention. A similar matter will show up if Kosovo would become an independent state.

Although the country is not taking part in the SISP-project as such, it should be reminded that part of the problems related in the cross-regional co-ordination has to do with the fact that Slovenia, as former SFRY-Republic, did not enter into bilateral agreements with all other former SFRY-republics. Especially treaties are missing in the relations with Serbia, Montenegro and Bosnia and Herzegovina. Although the signing by Slovenia of the ECSS could have positive effects for the current migration flows in relation to the SISP-countries, it does however not solve the issues related to the succession of the SFRY. For these matters the ECSS does not have an added value; Slovenia is here only accountable to the UN, and more specifically the Agreement on the Succession issues. As already mentioned this topic will be addressed more extensively below.

4.1.1.2. Loopholes in relation to the personal scope of the conventions

The current bilateral treaties across the SISP-region do show some loopholes with regard to the personal scope. Some of the conventions – being only a marginal sample – still apply the convention only upon their citizens (and not universally upon all persons socially insured in one of the contracting parties). All conventions, including the ones with a universal scope, restrict though the multilateral rules applied on the principles of export of benefits and aggregation of pension insurance periods, to their

won citizens (see 3.2.2.4. and 3.2.2.10). Accepting the Convention would mean that also third-nationals (at least of the signatory parties to the Convention) would see their social security entitlements co-ordinated in relation to the (bilateral) relations to these countries. This holds true as well in case the concerned countries, using citizenship as delimitation criterion in their co-ordination treaties, would enrol these treaties in Annex III to the Convention (see earlier).

Maybe more important is the introduction of two groups of people who happen to be completely forgotten in the bilateral social security conventions amid the SISP-countries: in application of the relevant UN-conventions, stateless people and political refugees are part of the personal scope of the European Convention on Social Security. Although the conventions applying universally upon all socially insured people do not exclude them literally from the co-ordination corpus, the fate of the stateless people and political refugees is not so clear when applying these conventions. With the acceptance of the Convention, the social security entitlements of these people will have to be co-ordinated, also when the concerned bilateral conventions would be listed in annex III (see earlier).

4.1.1.3. Loopholes in relation to the material scope of the conventions

Some of the bilateral treaties which have been explained earlier limit their material scope to some of the traditional social security risks. Family benefits are traditionally left out from the co-ordination treaties to which Croatia is contracting party. But also death grants are seldom co-ordinated. With the acceptance of the ECSS, these schemes will be coordinated alongside the lines of the Convention. For family benefits this will mean that the countries, not having a co-ordination in place for these benefits in their bilateral treaties will be invited to take the necessary steps. And for the ones which co-ordinate these benefits in their bilateral relations, a check with the co-ordination standards of the ECSS will have to be established.

As we will see later, some of the schemes are belonging already to the material scope of the bilateral treaties, but do only enjoy a restricted set of co-ordination rules. This is especially true for unemployment, yet this issue will be tackled elsewhere when dealing with different co-ordination rules for the contingencies.

More important here is that except in the bilateral convention between Croatia and Bosnia and Herzegovina, no attention is paid to the co-ordination of voluntary insurances. This can e.g. be relevant for the indication of the competent social security system, but also for the question whether these schemes should be taken into account for the application of the co-ordination principles. The ECSS does provide some co-ordination rules for voluntary schemes starting to be applicable when the countries would accept this treaty. Co-ordinating these schemes does have relevance, knowing that many of the SISP-countries introduced the possibility (for citizens) to adhere to the system on a voluntary basis. Especially for persons who work in another country (in which they are not – yet - socially insured) this issue can be of relevance.

4.1.1.4. Loopholes in relation to the application of the principle of equal treatment

Earlier we have seen that the bilateral conventions included some exceptions to the principle of equal treatment in relation to foreign nationals. First of all the bilateral treaties, including the ones with a universal scope, do restrict the application of the equal treatment principle to the citizens of the contracting parties. Next to that, some specific exceptions to the equal treatment principle, are being inserted in the bilateral treaties. With regard to the restriction of the equal treatment principle to own citizens, it should be made clear from the outset that the ECSS does the same yet in a multilateral way: the citizens of all signatory parties could rely upon the equal treatment clause of the Convention.
As to the other exceptions applied in the bilateral treaties, they are not so problematic either when adhering to the ECSS. The first one is related to the blocking of the application upon the insured persons of third co-ordination treaties, which the other contracting party would have in place. This exception will loose relevance as a multilateral set of rules is to be applied, when the ECSS would come into place (and bilateral treaties listed in annex III will have to be applied as well upon citizens of other signatory parties to the Convention). This has in principle not so much to do with the effect of the equal treatment principle but much more with the multilateral nature of this very convention. The other exception which we found in the treaties was related to officials representing their countries. It should be reminded that for civil servants specific rules are in place, such as the exclusion of the specific civil servant schemes and the specifically for diplomatic personnel developed rules for designating the competent country.

On the other hand, it will be made possible to sign up non-contributory benefits in the annex IV to the Convention having as consequence that the equal treatment principle only start to be applicable in relation to these benefits for persons who stayed long enough on the territory of the country (see art. 8 § 2 ECSS as explained above).

4.1.1.5. Loopholes in relation to the definition of concepts

Another current problematic feature has to do with the different interpretation of concepts across the bilateral conventions in place; sometimes two parties to the same convention have a different opinion upon what should be understood by a given concept (see. e.g. the example given on the concept of residence). Earlier we have already shown that due to this different interpretation people miss out benefits. Certainly in multilateral cases a different interpretation of a concept can have annoying consequences (see below on the multilateral effect of the convention as well). By accepting the Convention more homogenous (interpretations of) concepts will have to be used. This will not only be true for the mere application of the (concepts used in the) ECSS. Treaties that will have to be established on the basis of the co-ordination standards of the Covention will need to be in line as well with the used concepts of the latter treaty. This holds even true for bilateral (and multilateral) treaties that are being submitted in Annex III (and which the Convention does not replace). As said before the Convention can still intervene in matters which cannot be solved solely on the basis of the bilateral treaties. When the application of a bilateral

treaty does not have an outcome in a case due to a mismatch of concepts, the multilateral Convention is to provide a "back-up solution".

4.1.1.6. Loopholes in relation to missing anti-cumulation rules

Not many anti-cumulation rules are being applied in the bilateral conventions across the SISP-region. An exception to this is the convention in place between Croatia and Bosnia and Herzegovina. The Convention does provide a coherent set of rules giving guidance when to apply national anti-cumulation rules and when it is better not to do so, as the insured person then would fail entitlement. An acceptance of the convention would have as added value that similar anti-cumulation rules are applied across the SISP-territory, making complicated co-ordination cases (especially for long-term benefits) smoother. Another advantage would be the more mature position of the national legislation in relation to foreign benefits. As already mentioned many a SISP-country does allow the cumulation of foreign professional income or income replacement benefits, whereas the combination with similar incomes having a national basis, would be forbidden. Apparently one is afraid to cut down any income coming from abroad. However, when this is related to the same period of the insurance international co-ordination does allow anti-cumulation rules. This principle should become more reflected in the national legislation.

4.1.1.7. Loopholes in relation to technical co-ordination rules related to the contingencies

Earlier on we highlighted the blank spots for which the bilateral agreements do not provide any co-ordination. Compared to the ECSS, which is already rather basic in this respect, the bilateral co-ordination foreseen for unemployment benefits, death grants and family benefits are rather keep to the mere basics. Except for death grants, the co-ordination of the ECSS is rather of a framework-kind as the provisions do not have direct effect and ask the countries to develop rules alongside the issues addressed by the ECSS. In other words, when accepting the Convention the consequence will not be that co-ordination rules come to fill up the gaps, but that the countries are invited to take the necessary steps to develop somewhat more the actual co-ordination rules in respect of unemployment and family benefits.

For the other contingencies, related to health care, sickness, maternity, labour accidents, professional diseases, old age, invalidity and survivorship the existing bilateral conventions do use rather similar rules. Not many loopholes were found here, except some minor issues (such as what to do in case of different pensionable age, anti-cumulation etc.) The ECSS can fill these gaps now.

Another issue is what to do in case the applied rules are technically different between the bilateral conventions and the ECSS. As mentioned already it is possible to list the bilateral conventions (or provisions of them) in annex III and hence to preserve these conventions for the bilateral relations. However, as soon as a multilateral case shows up, the rules of the Convention are to be applied.

4.1.1.8 Loopholes in relation to information exchange and cooperation

Not much has been reported by the countries on how they follow-up on a practical administrative level the different bilateral co-ordination conventions. Only on the basis of some UN-reports one could discern some co-ordination problems which find their origin in the administrative practices. However, one has to admit that many application problems date back from the period before the bilateral conventions were to be applied: e.g. the problems related to the required certified documents as explained above. Many of these issues have been addressed by now. Yet problems can still find their origin in different types of documents to be used for national social security and/or for the application of bilateral treaties. Sometimes the treaties do provide rather flexible posting provisions allowing people, insured in one contracting party, to work many years on the territory of another country. Already in an EU-setting posting causes many problems just because it is so difficult to control whether the person is really insured in the other country. Bilateral treaties do foresee different administrative applications which risk to clash in a multilateral case (e.g. the transportation personnel working by definition on the territory of different countries and thus being made subject to different administrative rules of the various bilateral treaties). Also the exchange of information between the various administration is a rather difficult issue to manage. Not so much attention has been paid to these issues as other experts will be involved in the development of the cross-border administrative flows in the region. For the purpose of this report, it could be said though that the ECSS is applying uniform forms for the administrative application of the Convention[59] (coming very close to what the EU uses for the purpose of the application of the EC regulations 1408/71 and 574/72). Accepting the convention would also mean starting to use uniform administrative forms for the sake of co-ordination in the region. It could address some issues which now seem to be unspoken of.

4.1.2. Making the existing social security relations more "multilateral"

4.1.2.1. In relation to the plain co-ordination

One of the essential consequences of accepting the treaty is the multilateral effect it will have for the co-ordination relations between the SISP-countries. It should be said however that the current bilateral agreements apply already some co-ordination rules which are having a multilateral effect. Apart from the ones that are applied for the rules of the succession of the SFRY-period and the intermediate period between the end of the war ant he application of the conventions (see below), these rules concern mainly:

- the universal approach applied in the personal scope (except some conventions)
- the possibility to export benefits to third countries
- the possibility to aggregate insurance periods fulfilled in third countries

[59] See CONSEIL DE L'EUROPE, *Guide pour l'application de la convention eruopéenne de sécurité sociale*, 1972, Strasbourg: the forms are put in annex.

Yet in the same time these "multilateral" rules are very conditional: they are only to be applied when both contracting parties do have a (bilateral) treaty with the concerned country. Moreover, they are only applied for the own citizens of the contracting parties, also when the bilateral treaty has a universal scope. Although some examples of multilaterally applied rules are applied, problems remain due to the lack of a multilateral set of co-ordination rules.

A first example is related to the application of the equal treatment principle. Although practically all the conventions are designed universally in their personal scope, we notice however that the equal treatment principle is only applied to the own citizens. In fact this undermines almost completely the multilateral application of the treaties. A Serbian citizen can indeed apply the aggregation rules which are being defined in the agreement between Croatia and Bosnia Herzegovina. Yet the two involved countries can continue to discriminate that Serbian citizen on the basis of the bilateral agreement at stake. When both countries do exclude the Serbian citizen from the application of their national legislation, he will not be able from the outset to apply the aggregation rules laid down in the treaty. On the basis of the country descriptions such exclusions on the basis of nationality were not present for most of the social risks (except for family benefits), yet more difficult to track down are hidden forms of discrimination which on the basis of the treaties in place, can continue to be applied. Due to the ECSS the equal treatment principle can be limited in its application to the citizens of the signatory parties to the ECSS, yet it will have to be applied in a multilateral way. If in our example the three involved countries would accept the Convention, the Serbian citizen could not be discriminated anymore in the national legislations of Bosnia and Herzegovina and Croatia.

Another example is related to the principle of aggregation of insurance periods. Citizens of the contracting countries can invoke insurance periods which have been built up in a third country, at least when the two contracting countries are bound by a co-ordination treaty with this third country. Due to the citizenship clause a citizen of Montenegro cannot rely upon the treaty between Serbia and Croatia to take into account insurance periods which he previously built up in Macedonia (to open entitlement to pension rights, respectively in Serbia and Croatia). In case the involved countries here would accept the Convention, this would be made possible.

Another set of examples is related to the (sometimes) different rules in place across the bilateral conventions. The concept of residence is very strictly defined in the convention between Croatia and, Bosnia and Herzegovina: temporary residence is defined in such a way that the concerned person should have permanent residence in the other contracting party. A Serbian citizen resides permanently in Serbia but is staying temporary in Bosnia and Herzegovina, as he is working for an entreprise located in Croatia, country in which he is also socially insured; that person cannot apply the health care coordination rules which prescribe the possibility to have access to the health infrastructure of the country of (temporary) stay, as he is no permanent resident in the other contracting country!

Let us take the example of a person having BiH-citizenship who previously worked (and lived) on the territories of Macedonia and Croatia. Due to the fact that the agreement between Croatia and Macedonia is only applicable to its own citizens, the

concerned person cannot invoke the co-ordination rules to calculate and consecutively export his pension rights to the country in which he is residing for the moment.

A similar example: a Croat citizen who worked in Croatia and Macedonia but resides now in Montenegro. Due to the fact that no treaty is binding Montenegro with any of the two other states, the Croat citizen cannot export his benefits to this country. A similar outcome would hit the Serbian citizen (e.g. a Kosovar) who lives in Albania now (this due to the fact that Albania has no agreement with any of those countries and the fact the he is not having the citizenship of one of the contracting parties).

A similar problem occurs when only one of the contracting parties has a convention with a third country. A person who has the citizenship of BiH worked some years in BiH, Turkey and in Serbia: the person cannot aggregate the insurance records fulfilled in Turkey, on the basis of the convention in place between FRY and BiH as Serbia has no convention with Turkey. Or a Croatian citizen who worked consecutively in Croatia, Bosnia and Herzegovina and Italy: the person cannot aggregate the insurance records fulfilled in Italy on the basis of the agreement between Bosnia and Herzegovina and Croatia, as the former country is still not bound by any convention with Italy.

When accepting the ECSS, the multilateral co-ordination rules would become applicable in these cases, and this even if the bilateral treaties were listed in Annex III. Although not part of this report, the Interim Agreements, although having a high value for the co-ordination rules in the region (see report of expert Strban) do not provide a solution either for the last mentioned examples. When there is no bilateral treaty in place between two countries (i.e. Turkey and Serbia, respectively Bosnia and Herzegovina, and Italy) this cannot be applied to the citizens of other contracting states to the Interim Agreements. However as far as these countries are party to the ECSS, a multilateral co-ordination can be applied

4.1.2.2. In relation to the succession rules?

The succession rules are “by definition” multilateral as they relate to the common past of the SFRY-social security system or the calculation of benefits in between the end of the SFRY and the coming into place of the conventions, when this calculation partly took into account insurance periods from another successor state of the SFRY. Yet still problems can occur here, due to the bilateral approach of these succession rules.

The different dates applied in the bilateral treaties indicating the end of the war (resp. the end of the SFRY-era) can create problems for multilateral co-ordination cases.

Another problem related to this is the sometimes different approach towards insurance periods fulfilled in other states/Yugoslav republics when recalculating the pension benefits which a country granted in the interim period between the end of the war and the coming into place of the bilateral conventions. In the convention between Croatia and Bosnia and Herzegovina it is stated that such recalculation will not be done when an insurance period would have been completed in a third state (successor to the SFRY). The other conventions do just the opposite and allow the inclusion of such

insurance periods which are fulfilled in third countries, for the recalculation. This leads to possible conflict when the said conventions are to be applied simultaneously. Will the recalculation have to be denied when a BiH-citizen (Croat national e.g.) is applying both the convention between Croatia and, Bosnia and Herzegovina on the one hand and the convention between FRY and BiH on the other hand for recalculating his pensions which in an earlier state were granted on the basis of the national legislation of BiH and FRY?

The latter two issues show the weaknesses of the lack of a multilateral effect in relation to the technical "succession rules".

Here we reach the limits of the European Convention on Social Security. As such it cannot soluve these problems as by essence they do not deal with them. Moreover one should be careful here when signing the ECSS as it replaces normally the conventions in place between the signatory parties. One could argue of course that the ECSS, as it is not dealing with the succession rules, it will consequently not affect these provisions in the bilateral treaties among the SISP-countries. Yet it is legally speaking much safer to list these provisions in annex III to the Convention, and by doing so, guaranteeing their further application.

Here the countries will have to come with solutions themselves, inspired by the Agreement on Succession Issues. With regard to the latter agreement reference should be made to the provisions which provide solutions when differences arise over the interpretation and application of the Succession Agreement. As the bilateral conventions are a further application of this very Succession Agreement, at least in relation to the co-ordination rules which are related to the succession, these rules can be of further guidance[60]. The Agreement is referring itself to a Standing Joint Committee for the resolution of problems that may arise in the application of this treaty. In that sense one could also give a multilateral effect to the co-ordination rules which are in place across the various bilateral treaties: a Co-ordination Committee composed of representatives of the involved SISP-countries could form the platform for providing a uniform interpretation to the bilateral treaties when differences might occur in the interpretation of these conventions in multilateral cases. It could also stir uniform solutions to issues which are not regulated yet or which are differently regulated across the treaties. The action field of such committee could go beyond the mere succession rules: it could also vigilate over the multilateral cases affecting the various bilateral co-ordination treaties which should have been put in annex III of the ECSS (and which are still applicable). This would certainly make sense in case the ECSS would not be signed at all.

In international social security coordination conventions it is common to install committees which interpret co-ordination rules of a certain treaty or series of treaties. As the concerned SISP-countries do all find origin in a common social security system, have been investing quite some time and effort in elaborating a set of rules dealing with the co-ordination of the systems which stem from the common SFRY-origins, it could also make sense to gear somewhat the interpretation given to the concerned bilateral treaties which in essence apply similar rules. All states (and

[60] See e.g art. 5 § 3 where explicit reference is made to any subsequent agreement used for the implementation of the annexes of the Agreement.

follow-up states) which are bound by the UN Agreement on Succession Issues could be invited to such an initiative.

4.2. Consequences for the social security relations with third countries in Europe

4.2.1. A first step towards the EU acquis in the field of social security co-ordination

As mentioned in the beginning of the report the European Convention on Social Security is too a large extent inspired by the predecessors of the EC regulations 1408/71 and 574/72. In many cases it provides similar rules as the ones foreseen in these EC Co-ordination regulations. Signing and ratifying the ECSS can therefore be considered to be a signal which the involved Balkan countries give towards the EU, that they accept the principles which are at the core of the EU co-ordination. Yet this signal should not be overestimated either. The EC Regulations go much further into detail than the ECSS, and this to a large extent due to the case law of the European Court of Justice which quintessentially defends the promotion of the free movement of workers principle, as being laid down in article 39 EC-Treaty. Such a principle is not underpinning the ECSS making its co-ordination less sophisticated than the one applied in the EU. Contrary to the EU, many of the co-ordination rules, and especially those with a potential serious impact upon the national social security systems, do lack direct effect. The provisions related to the co-ordination for health care, unemployment and family benefits remain to be negotiated further by the concerned countries. The rules should reflect the (minimum) standards provided by the ECSS, yet the final outcome is the result of the negotiation between the involved countries.

4.2.2. A multilateral co-ordination across (parts of) Europe

Another effect is that between (some) countries in Europe a multilateral set of co-ordination rules starts to become applicable. Contrary to e.g. the Interim Agreements and the Agreement on non-discrimination related to social and medical assistance[61], the territorial scope of the ECSS is to be called rather limited. Have ratified the ECSS by now: Austria, Belgium, Italy, Luxembourg, the Netherlands, Portugal, Spain and Turkey. With the exception of Turkey, the ECSS is not applied among those countries as they are all bound by the EC co-ordination regulations. One could even say that not the ECSS is to give added value to the SISP-countries but rather the SISP-countries to the ECSS.

Although limited in their number, the signatory parties of the Convention are all countries to which citizens of the SISP-countries emigrated or at least moved to on a temporary basis. Many of the SISP-countries have already an agreement in place with those countries, sometimes though, one still dating from the SFRY-period. Yet the acceptance of the ECSS could facilitate the multilateral co-ordination and/or fill up the loopholes in the co-ordination relations among the concerned countries.

[61] See report of colleague Strban.

Earlier on we indicated the problems the current bilateral treaties of the SISP-countries have when the social security system of a third country is involved with which one or both contracting parties are not having a co-ordination treaty in place.
(a person who has the citizenship of BiH worked some years in BiH, Turkey and in Serbia or a Croatian citizen who worked consecutively in Croatia, Bosnia and Herzegovina and Italy). Earlier on we mentioned that these person cannot aggregate the insurance records fulfilled in the third country for the application of the bilateral agreement between BiH-FRY, respectively BiH-Croatia. Signing the convention could facilitate the solution of this problem, but does even more as it provides in similar co-ordination rules for the social security relations between Serbia and Turkey, respectively Bosnia and Herzegovina, and Italy.

Another example: a person, of BiH citizenship, resided/worked consecutively in the Belgium and Italy, and wants to return to Sarajevo. The Belgian and Italian authorities will have to calculate an aggregated pension on the basis of the insurance years fulfilled in both countries[62]. Furthermore, when the person returns to Bosnia and Herzegovina these will be bound to export the benefit to his new country of residence[63]. This will be true as well when the person e.g. worked first in the SFRY (e.g. Republic of Croatia)[64] and then moved to the EU (Belgium and Italy).

Important as it may be with regard to the multilateral co-ordination, it has to be acknowledged that many countries to which Balkan-citizens emigrated are not signatory part to the ECSS (e.g. Germany). Here other conventions could play a more significant role (such as the Interim Agreements, the European Convention on Social and Medical Assistance or, outside the strict scope of conventions, the model provisions for co-ordination of the Council of Europe).

4.3. Consequences for the social security systems of the signatory parties

4.3.1. Impact of the co-ordination rules

Adhering to the co-ordination treaties, especially when they contain direct applicable provisions, has consequences for the own national social security system. Citizens of the contracting parties should be granted equal access to the system; benefits have to be exported and the system has to take into consideration foreign insurance periods when calculating benefits. With regard to the benefits, health care which is provided abroad will have to be paid for under certain circumstances, unemployment benefits have sometimes to be paid out abroad although the beneficiary is not available for the (own) labour market and family benefits are to provided to family members not residing in the country. Even when the own system is indicated as competent one for the application of social security, the administrations has to take into account foreign

[62] This should be normally done on the basis of the EC-Regulation 1408/71 as in the relation between these two countries this Regulation is superseding the ECSS. Moreover, the Regulation is since 2003 made applicable upon third-country nationals who have legal residence in one of the EU-countries and have been moving between at least two countries.
[63] The export will however not be based upon the EC-Regulation as the person is not fulfilling anymore the requirement of having residence in the EU. The legal basis for the export is now the ECSS.
[64] The pension calculation between the two EU-countries based upon the EC-regulation, and the ECSS with regard to the insurance period which finds its origin in Croatia. On the basis of the agreement between Croatia and Bosnia and Herzegovina, Croatia is as successor state to the SFRY-Republic of Croatia to honour the insurance periods previously fulfilled in this country.

elements: e.g. when the amount of a benefits is depending upon the number of family members, one has to take also into account the family members residing in the territory of another member state. Next to the financial consequences of e.g. exporting social security rights abroad, the administrations have also to be organised to deal with the application of the social security co-ordination; they have to be ready to exchange the necessary information to the counterparty abroad; in case of the ECSS, the available forms have to be applied.

In other words, quite some consequences, both from a legal, financial and administrative point of view does a country face when it accepts a co-ordination treaty such as the ECSS. Yet this starting point has to be put into the right perspective. Most of the SISP-countries do already have a quite high number of bilateral co-ordination treaties in place that cover most of the contingencies that are co-ordinated by the ECSS. Furthermore as we could learn earlier these conventions have been developed along the lines of "modern" social security co-ordination, i.e. they embody the rules as we know them from the co-ordination that is being promulgated by the ILO, Council of Europe and even EU. When entering (jointly) the co-ordination corpus of the ECSS, as such no tremendous earthquakes will have to be expected for the concerned social security systems; on the basis of the bilateral conventions that are in place they already should be prepared to deal with the consequences such co-ordination brings along. This is certainly true for the former Yugoslav states which are bound among each other by bilateral treaties. Moreover, many of these states have already treaties in place with other European countries, some of them being party to the ECSS. Here as well not so very big consequences for the national social security systems are to be expected.

However, there will be some changes. As already indicated the major asset of the ECSS lies in the multilateralisation of the existing co-ordination relations. The latter treaties, although multilateral elements have been built in to these, are still bilaterally developed and apply their "multilateral" rules only on own citizens. In other words the national social security systems will have to take into account more social security elements of third countries when applying their co-ordination rules. On the other hand nationals from the concerned countries will in the relation with "third" (European) countries, have easier access to benefits and/or the export to the home country might be facilitated. This multilateralisation will in other words build further upon the existing co-ordination infrastructure in the country. It could be interesting to map this administration in the country and to indicate the (potential) missing capacity.

Yet there will be other consequences. When joining the ECSS one will not fully control anymore the counterparties with whom one co-ordinates. When a third country, now not being party to the ECSS, enters the conventions, one is bound to co-ordinate one's own system with the system of the new member to the convention. Citizens of that country will have to be guaranteed the co-ordination rules that have direct effect. On the other hand there are still many provisions, especially related to the specific co-ordination rules of the risks (health care, unemployment, family benefits) where the provisions are not directly applicable: here the countries are invited to make on a bilateral or multilateral level the necessary arrangements. Here one still has control over the co-ordination outcomes, but not anymore over the wish to contract or not the other state.

Another issue is related to the co-ordination rules which are now still not developed in the bilateral agreements that bind the SISP-countries. The bilateral treaties in place do cover most of the co-ordination rules, yet in relation to the specific rules related to the risks, we could conclude that for family benefits, death grants and unemployment benefits, often no rules were in place or only some basic rules. By entering the ECSS this will have to be changed, but here again it is left to the initiative of the countries to take the necessary co-ordination rules, as, with the exception of death grants, the provisions do not have direct effect. The latter is also true for health care, the co-ordination of which having sometimes a serious impact on the budget when treatments in more expensive Western European countries have to be refunded. The countries will have to make arrangements with other European states in relation to health care co-ordination (as far no arrangements would be in place yet). This means that also the country can keep control over the outcome; contrary to e.g. the EC co-ordination rules the rule that health care treatments are to be refunded at the level of the country where they have been provided are not automatically being imposed upon the country. Other solutions and outcomes (e.g each country takes financially care of the foreigners treated on the territory) can be negotiated within the framework of the ECSS.

What has been said by now is mainly applicable to ex-Yugoslav countries that followed up the SFRY. However a serious side-remark has to be made for Albania. So far the country is only bound by one "modern" agreement with Turkey (also partner to the ECSS). The two other agreements relate to former Communist states, i.e. Bulgaria and Romania; treaties which do apply the co-ordination principle of "incorporation", meaning that every country is taking care of the citizens of the other contracting party, as if were own citizens and as if the foreign insurance would have been built up in the own country. The joining of Albania to the ECSS will have, contrary to the successor states of the SFRY, serious consequences. It is unlikely that the co-ordination administration that has been set up for the bilateral treaty of Turkey-Albania will be able to cope with the rise in work caused by the multilateral application of the ECSS. To apply the ECSS many negotiations will have to start up as well in order to make bilateral arrangements for the non-directly applicable provisions of the Convention. As has been stressed often, these arrangements are important as the outcome of the co-ordination for health care and family benefits can have serious financial consequences for the system.

A similar remark can be made for Montenegro and even Kosovo, if the latter province would become independent. To what extent will the newly born state takes over the agreements concluded by FRY (and later the Union of Serbia-Montenegro)? Does it have the financial, legal and administrative capacity to do so? And if not will it have the capacity to step into a multilateral treaty such as the ECSS, Much depends on how the obligations taken up by Serbia-Montenegro are/were redirected to the components Montenegro and Kosovo.

4.3.2. Filling out the annexes of the ECSS

When accepting the ECSS, countries should also fill out the annexes to this Treaty. As indicated earlier this is to a large extent to specify in more detail some of the provisions within the Convention (translation of the used concepts in national

concepts, providing a list of social security acts which are now falling under the material scope, etc...).

Two of those annexes need special attention. The first one is related to the co-ordination conventions that are already in place between the contracting parties to the ECSS and which should be preserved. As to the co-ordination relations in place between the former Yugoslav Republic now successor states of the SFRY, it has been repeatedly outlined, that the "transitional" rules - dealing with the concrete succession of the former SFRY-system by the new systems, as well as dealing with the recalculation of benefits that have been granted in between the end of the war and the coming into place of the bilateral conventions - should be preserved. It cannot be the idea that these rules would become overruled (and hence vanish) due to the adhesion of the countries to the ECSS. Legally one could state, that as the ECSS is not covering this area of transitional and succession provisions, the rules that are in place in the bilateral convention would not be affected. Yet to play safe, it is recommended to list at least the said provisions in Annex III. As the co-ordination rules of the bilateral conventions do follow similar patterns as the ones foreseen in the ECSS, it can even be suggested to list the treaties as such in Annex III. They will remain applicable in bilateral cases, and furthermore will be filled up by the ECSS-provisions for matters that are not covered by the bilateral treaties. The latter will mean also that in multilateral cases the ECSS will prevail over the bilateral treaties (see 4.1.).

With regard to the treaties in place with other European countries, a similar exercise will have to be made. Although no texts of these treaties were available, it appears that the conventions that have been recently concluded by the SISP-countries do follow similar patterns as the co-ordination rules of the ECSS. The older treaties (especially the ones inherited from the SFRY) could on some point create problems of conflicts with the standards used in the ECSS.

4.4 Not solved (or partially) solved co-ordination issues

As indicated the ECSS would come in place of the current co-ordination relations among the SISP-countries and between the SISP-countries and other European states that are signatory parties to the ECSS. Especially for the former Yugoslav states much efforts have been put already into the development of co-ordination arrangements both within the region and outside the region. The ECSS could provide these arrangements with a new dimension, being the multilateral application of the said conventions. This means that the acceptance of this Convention will not solve many of the other reported problems, such as

- problems with the banking transfers
- the social security position of illegal migrants
- the social security situation of semi-legal migrants (such as Roma-people who are not in the possession of social security documents enabling them to open entitlement abroad)
- the lack of sufficient internal co-ordination between entities in a given country (for instance in Bosnia and Herzegovina and the relation between the autonomous province of Kosovo and Serbia)
- the different levels of benefits across the countries due to the different standards of living: some exported pensions e.g. are too low to live on in the country to which they are exported
- the sometimes different rules in place in the bilateral treaties dealing with the succession of the SFRY (e.g. different dates used to indicate the end of the war)
- the fact that not all former SFRY-countries are bound by arrangements that developed the succession rules (e.g. Slovenia and recently Montenegro)

To solve such problems other international conventions could be of relevance but one should also take into consideration the limits of any co-ordination: they gear the different system to make life easier for the migrating or moving person, they however do not touch in essence upon the internal organisation or levels of benefits. Here we come at the margin of what co-ordination treaties can do. Most of these listed unsolved problems are to be tackled on the national level.

Nor will it immediately provide co-ordination rules for the contingencies for which the existing bilateral treaties have no rules or underdeveloped rules. Indeed, the co-ordination rules related to the risks of health care, unemployment benefits and family benefits are not-directly applicable. They only stir the contracting parties to take the necessary arrangements

5. Conclusion

What kind of added value can the ECSS have for the SISP-countries? This has been the central question at stake in this report. Out of the overview it became apparent that the SISP-countries which succeeded the SFRY have already a quite elaborated social security co-ordination in place between themselves but also increasingly with other

European states. Moreover in many of these arrangements, especially the new ones, the "modern" (some would say "traditional") thinking about social security co-ordination is being reflected. Yet the bilateral set-up of these treaties is at the same time their biggest weakness. The extensive co-ordination work could be finished off, or improved qualitatively, by accepting the ECSS. The latter could come on top of the treaties and does not have to replace the existing bilateral treaties. Except the multilateralisation and filling up of existing co-ordination loopholes, the ECSS will not shake profoundly the co-ordination landscape in the SISP-region; it will enhance it qualitatively speaking.

Two points of reserve have to be made though.

- Albania and Montenegro, and possibly Kosovo (the latter when it would become independent): these countries do not have yet many treaties in place. For Montenegro it is recommended to take urgently the necessary decisions concerning the follow-up of the bilateral conventions concluded or inherited by the FRY. Even when accepting as country the ECSS, arrangements will still have to be made with the other former Yugoslav Republics. A similar exercise will have to be carried out for Kosovo when it would become an independent state. For Albania the story is different. Looking at the rather underdeveloped co-ordination infrastructure now, taking on board a multilateral Convention such as the ECSS could put too much of a strain on the current social security system. It is recommended here to start negotiations and treaties with neighbouring countries from which migrants or temporary visiting persons come from. The agreements could focus upon the social security schemes at stake: i.e. health care co-ordination.

- The transitional rules which deal with the succession of the SFRY and the intermediate period between the end of the wars and the coming into place of the co-ordination conventions across the SISP-countries: the latter multilateral rules should be maintained and possibly improved. It has been suggested to have these bilateral provisions supervised by a co-ordination Committee of the SISP-Region, which should be competent in dealing with unsolved cases and with the common interpretation of these succession rules and other co-ordination rules of the bilateral conventions which remain in place. To guarantee the coherence with the Council of Europe conventions, it is recommended that such Committee would be functioning within the Council of Europe.

Generally concluding, one could look at this evaluation from another, more positive angle too: taking into account the co-ordination infrastructure in place in the successor states to the SFRY, an acceptance of the ECSS should not create major problems for these countries. 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.