

Analysis of Cases of Application of Community Regulations to Non- community Workers

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The object of this report is to analyse situations that involve determining the Social Security legislation applicable to workers who do not have the nationality of any of the EU Member States, i.e. to examine situations in which the application of Community rules to foreign workers from outside the Community arises.

It covers three different aspects:

1. The application of Regulations 1408/71¹ and 574/1972² on the Social Security of workers who do not have Community nationality, in the light of bilateral conventions between the Member State in which they live and work and their country of origin outside the Community.
2. The relationship between the European Social Security system and Council of Europe Social Security conventions ratified by European States that are not members of the European Union by virtue of applying the Most Favoured Nation clause contained in the European Provisional Agreements on Social Security, which allow any contracting party of a Provisional Agreement to have the benefit not only of the domestic laws of the other parties (principle of equality of treatment) but also of international conventions signed by each of the latter with the other contracting parties.
3. Cases of application of Community rules to migrant workers from non-Community countries with which the European Union has signed agreements relating to Social Security.

The central focus of our report is on examining the application of Community Regulations relating to Social Security to nationals of third countries that are not members of the European Union but maintain an element of connection with it, i.e. the element of residing or providing services within the territory of a Member State, as distinct in any case from the element of nationality.

1. The Relationship between Community Law and Bilateral Social Security Conventions between a Member State and a State outside the European Union

The application of Community Regulations is of course based on the principle of territoriality. Community enactments establish rules about conflict of laws and indicate the legislation applicable in situations involving people from outside the Community. In this respect, the application of the *lex loci laboris*, the law of the place of work, as the rule determining the law applicable, raises interesting issues,

one of them pertaining to bilateral conventions between a Member State and a State outside the Community.

Specifically, our purpose here is to analyse the relationship between bilateral conventions on Social Security between a Community State and a third State and Community law, with a view to determining its impact in the cases discussed below:

- a) **Non-Community workers residing and working in a Member State.** Here we address the hypothetical application of Community regulations to non-Community workers from a State with which a bilateral convention on Social Security has been signed.
- b) **Community workers residing and working in a Member State of which they are not nationals.** This case refers to the application of a bilateral convention between a Community State and a third State to workers who are nationals of another Member State, a matter on which the ECJ has ruled on several occasions.
- c) **Community workers residing within the territory of a non-Member State other than that of the contracting party to the convention.**

Our starting point in analysing the above cases has to be the provisions of the Community Regulation concerning bilateral conventions between two or more Member States or between Member States and non-Community States.

The Regulation defines a Social Security convention as "...any bilateral or multilateral instrument that binds or may bind at least two Member States and one or more other States within the field of Social Security". The Regulation goes on to make it clear that the relationship between its provisions and such international instruments has to be a matter of replacement, which leads to distinguishing between two different situations:

- **One refers to bilateral or multilateral conventions between Member States.** Here it is necessary to consider in conjunction Articles 6 and 8 of the Regulation which provide for the replacement of existing conventions on Social Security and allow the possibility of conventions between Member States, subject to Community principles and the obligation to notify the EU.

- **The other situation of major relevance to the topic here concerned pertains to bilateral or multilateral conventions in which third States are contracting parties.** In this respect, the Regulation provides for the replacement of bilateral conventions between Member States and one or more third States in cases where their dissolution does not affect institutions of any of the non-Community States that are party to them. This means conversely that the provisions of the Regulation do not affect conventions whose application entails involvement of an institution of a third State.

Leading exceptions to the replacement rule include ILO Conventions, European Provisional Agreements, certain international agreements on very specific matters (e.g. those on Rhine boatmen and on international transport workers) and the Social Security conventions listed in Annex III.

1.1 The Extension of Community Regulations to Citizens of Non-Community Countries with which a Member State signs a Bilateral Convention

Here we try to analyse the scope and interpretation of the clauses of bilateral conventions that relate to equality of treatment or non-discrimination. The issue here is whether convention arrangements between States may be regarded as part of a country's domestic legislation for the purposes of extending Community Regulations to nationals of a non-Community contracting State, or whether what is rather concerned is ensuring equality of reciprocal treatment between nationals of both contracting States with regard to Social Security, limiting its application to the domestic legislation of each State.

It should be noted that bilateral conventions are international instruments entered into between two States that create legal obligations upon both parties. In the Spanish legal system, EC Article 96 is the main point of reference of the legal regime of domestic legislation in that it sanctions the validity of conventions once they are published, thereby becoming part of the domestic legal system.

The majority of bilateral conventions are based on the principles of reciprocity, equality of treatment, preservation of rights acquired or being acquired and determination of applicable legislation. In the specific case of Spain, countries with which such conventions on Social Security have been signed include Andorra³, Latin American countries (Argentina⁴, Mexico⁵, Panama⁶, Paraguay⁷, Peru⁸, Chile⁹, Ecuador¹⁰, Brazil¹¹, Uruguay¹² and Venezuela¹³) and countries in other continents, viz. Australia¹⁴, Canada¹⁵, USA¹⁶, Philippines¹⁷, Morocco¹⁸ and Russia¹⁹.

The question that now arises is whether Community legislation of a Member State in which a non-Community worker lives and works is deemed applicable by virtue of the principle of equality of treatment stated in an international convention.

The main obstacle to such applicability is the worker's lack of the element of nationality, resulting in his exclusion from the scope of Community Regulations. Yet the idea of Community law being subsumed in domestic law weighs in favour of Community nationals and non-Community nationals being treated equally with regard to Social Security.

Accordingly, a broad interpretation of the term "domestic legislation" would lead to looking not only at enactments by the legislative machinery of the State in question but also at each and every one of the international conventions (bilateral and multilateral) entered into and incorporated in the domestic legal system.

Although no writers have viewed the application of Community rules to non-Community citizens in this indirect way as not feasible, the Court of Justice of the European Communities has had occasion to settle this thorny issue. The ECJ has in fact ruled on the impact of bilateral conventions between a Member State and a third State on Community workers to whom the principles of Community law which arise from free movement of migrants apply. It has deemed that non-Community workers covered by a Social Security regime cannot have the benefit of Community provisions in this respect. Thus an Argentinian who works in Spain and migrates to France and thereby relocates within the Community will not remain protected by Community rules but by any existing international conventions with the Community countries concerned.

It may therefore be concluded that analysis of Community rules and their caselaw application suggests that non-Community nationals who relocate across the Community do not currently enjoy the same protection as Community nationals, stateless persons or refugees.

1.2 The Application by Extension of a Bilateral Convention between a Member State and a non-Member State to Community Workers

The question is whether it is possible to apply the provisions of a bilateral convention between a Community State and a third country to nationals of another Member State. The numerous relevant ECJ decisions include the *Mateucci* case (C-235/1987), which establishes doctrine that enables citizens of a Community country to benefit from bilateral international agreements between Member States despite the exclusion from their scope of nationals of other Member States. This is by virtue of the principle of equality of treatment between national and Community workers established within the territory of a Member State.

The solution thus involves partial extension of a bilateral convention to Community citizens residing in the Member State that has signed the convention concerned. This does not mean that the contracting State acquires obligations to such Community citizens. The Community State will be the only one affected by the partial extension rule.

Thus in the *Peschiutta* case (C-51/1991), in which the issue was the extension of Social Security benefits established in a bilateral convention between France and Monaco to an Italian citizen living and working in France, the Commission defended the application of such benefits on the ground that the Community national concerned was covered by the regime of social protection of employed workers from the Member State signatory to the bilateral convention.

An issue that might arise on this particular point is whether the same doctrine (also called the “scissionist doctrine of the convention”) would apply to the reverse situation, i.e. whether a non-Community worker who is a subject of a State with which a bilateral convention has been signed might have the benefit of Community arrangements on the basis of Community rules being deemed part of the Community country’s domestic legal system.

In this connection, the ECJ judgement of 2 August 1992 in case C-23/92 ruled on the relationship between bilateral conventions and Community Regulations. The Court’s decision was based on the idea that international conventions do not fall within the definition of “legislation” stated in the Regulation and are therefore subject to its specific provisions. Thus the ECJ considers that the Community Regulation covers only international conventions in which at least two Member States are contracting parties. In the case of a convention with one or more third States, the Regulation only applies to the extent that it refers to relations between Member States. Accordingly, the Community Regulation replaces international conventions that involve exclusively two or more Member States or at least two Member States along with one or more third States.

Article 6 of the Community Regulation mentions conventions that bind at least two Member States and one or more other States, but does not refer at all to conventions between a Member State and one or more third States. This means that the Community Regulation contains no rules or criteria for assessing the extent to which there has to be replacement of such conventions, nor even whether the principle of equality is applicable to these bilateral agreements. This silence in the Community Regulation is construed by the Court as a wish to exclude such conventions from its scope. Accordingly the Court is categorical in interpreting the concept of “legislation” stated in the Regulation and deems that “it is not possible to include within that term any bilateral conventions on Social Security between a Member State and a third State”.

Thus the ECJ, adopting the legal basis of uniformity of scope of the Regulation throughout the Community, concludes that subsuming a convention to the domestic legal system of the Member State does not entail the latter's inclusion within the scope of the convention. Accordingly it states that "... the scope of the Regulation has to be the same in all Member States in order to guarantee its uniform application throughout the Community, and therefore cannot depend on the method of incorporating into the legal system of the various Member States the international conventions on Social Security entered into by them".

1.3 The Effects of Bilateral Conventions between Member States and Non-Member States on Community Workers Working in Countries Outside the European Economic Area

The issue here is the possibility of extending the application of a bilateral convention beyond the territory of the contracting States. The real question is whether a Community worker earning his living in a third State that is not one of the contracting parties can have the benefit of the convention's "equality of treatment" clauses with regard to Social Security.

Resolving this question involves analysing the provisions of the convention, since they may or may not establish ultraterritoriality of the rules which it contains, which they do if the element of nationality either of the contracting parties is maintained. The principle of the legislation applicable being determined on the basis of the criterion of the *lex loci laboris* has also to be taken into account.

Now what is the real significance of such requirements? The answer is conclusive: a migrant worker remains subject to the legislation of the place of work, in other words each country applies its own law to foreigners working within its territory. Such was the ruling of the Supreme Court of Justice (TSJ) of Andalusia (Málaga) in its judgement of 2 May 1991, case 3117, on the application of the principle of territoriality in the Spanish-Swiss Social Security Convention. The principle of ultraterritoriality is also referred to in Article 13.2 of the Community Regulation. It appears that the reason for its express inclusion is the idea that the actual State in which the worker earns his living and hence contributes to the Social Security system is the one that should bear the costs of that system.

Yet this general principle is inevitably subject to some exceptions, covered by Article 14 of the Community Regulation, specifically:

- the situation of an employed worker sent by his firm to work within the territory of another State temporarily, i.e. for not longer than 12 months, subject to the possibility of a longer stay being authorised.
- the situation of a worker who normally earns his living within the territory of two or more Member States.

The problem arises in cases where a Community worker works outside the territory of either of the contracting parties, a situation in which the criterion laid down by the bilateral convention, that of the rule of the law of the firm's headquarters location or the law of the place of residence, would not be applicable at all.

If on the contrary an agreement between a Member State and a third country allows application of its provisions to nationals of either of the contracting parties, irrespective of their work location, this would entail extension of the convention beyond the territorial scope of each State.

Nevertheless, it does not seem clear that Community nationals are protected by Community arrangements, apart from exercising their right of free movement within the European Economic Area.

2. The Relationship between the European Social Security System and Council of Europe Conventions and Agreements relating to Social Security

International instruments developed within the framework of the Council of Europe with regard to Social Security that accept the principle of equality of treatment between nationals of contracting countries include primarily:

- The European Provisional Agreements on Social Security signed on 11 December 1953, replaced by the European Convention on Social Security and Supplementary Agreement adopted in Paris on 14 December 1972²⁰.
- The European Social Security Convention²¹
- The European Convention on the Legal Status of Migrant Workers, signed in Strasbourg on 24 November 1977.

These international enactments enable workers to have the benefit of agreements entered into, provided that they are nationals of one of the States party to the convention.

2.1 The European Provisional Agreements on Social Security signed on 11 December 1953, replaced by the European Convention on Social Security and Supplementary Agreement adopted in Paris on 14 December 1972

Each of the Provisional Agreements covers different benefits. The first of these Agreements refers to old age, invalidity and survivors' benefits, while the second is concerned with benefits relating to sickness, maternity, industrial accidents and occupational diseases, death benefits and family allowances. All that is excluded from the effective scope of these Agreements is the special regimes of civil servants and benefits arising from war injuries.

The requirements for inclusion within the personal scope of these Agreements are nationality and usual residence.

The signing and ratification of these Agreements²² makes it possible to apply to citizens of a contracting party State not only the domestic legislation of the State where he works but also international conventions which the contracting State has signed with other contracting countries.

The ECJ has ruled on several occasions on the relationship between these Agreements and Community Regulations. For example, the *Callemeyn* and *Frascoigna* cases (C-187/73 and C-157/84 respectively) concern the application of Provisional Agreements which in the case of Member States are subject to Community rules. Community caselaw enshrines in this respect the rule of the Community Regulation taking precedence over Provisional Agreements in cases where it is more favourable than they are.

2.2 The European Social Security Convention

The European Social Security Convention and Supplementary Agreement for its application, signed in Paris on 11.12.83, contains the fundamental principles pertaining to international Social Security law, viz. equality of treatment, determination of applicable legislation, preservation of rights acquired or being acquired and sending benefits abroad. According to Nagel (RSS 1998, no. 39, page 28), this Convention is characterised by two requirements:

- a) First, it is a framework convention in that only some of its provisions are applicable from its effective date. Moreover, the only provisions deemed immediately applicable are those relating to the subjective and objective scope of the Convention, its fundamental principles, Part II pertaining to aggregation of the periods required for establishing benefit rights, and the special provisions of Part III relating to benefits arising from sickness, old age, survival, industrial accidents and occupational diseases.
- b) Second, it is a model convention in that its provisions which are not immediately effective may serve as models for bilateral or multilateral agreements. The Supplementary Agreement does in fact lay down the criteria for applying the Convention and appends to its main body a series of annexes relating to competent authority, competent institutions, institutions of place of residence, institutions of temporary location, interlinking organisations, provisions for application of bilateral conventions that remain in force, banking institutions and institutions designated by competent authorities of contracting parties.

The Convention replaces not only previous bilateral or multilateral conventions between two or more contracting parties but also the Provisional Agreements of 1953. Nevertheless, the contracting parties are free to maintain in force such conventions as they think fit and may also arrange among themselves bilateral conventions relating to Social Security that conform to the principles established in the Convention, and they may even extend the application of conventions to nationals of all contracting parties.

However, the Convention does not live up to the ILO Conventions nor to the Regulations on Social Security adopted within the framework of the Treaty of Rome.

The various contracting parties (Austria, Belgium, Italy, Luxembourg, Netherlands, Portugal, Spain and Turkey) that have ratified the Convention have to make bilateral or multilateral agreements for applying the provisions that are subject to such agreements.

The Convention may be ratified by non-Member States of the Council of Europe after notification to the Committee of Ministers and unanimous approval from the contracting parties.

It should be noted that the scope of personal application of the Convention coincides to a large extent with the subjective scope of Regulation 1408/1971. It thus covers persons who are subject to the legislation of one or more contracting States, refugees and stateless persons, residing within the territory of a contracting party, and their family members and survivors, irrespective of nationality if they are survivors of nationals of a contracting party, refugees or stateless persons residing abroad. Civil servants and the like who are subject to legislation of a State are in any case excluded.

2.3 The European Convention relating to the Legal Status of Migrant Workers

This Convention is intended to regulate the legal situation of migrant workers who are nationals of Council of Europe Member States with a view to ensuring that they are treated no less favourably than each State's nationals with regard to living and working conditions (recruitment, travelling, residence permit, work permit, keeping the family together, working conditions, exercise of trade-union rights, etc.).

It establishes equality of treatment for migrant workers (although not frontier-zone or temporary workers) and their families with nationals of the contracting party, the preservation of rights being acquired and those already acquired, and sending benefits abroad.

Only Council of Europe Member States may be party to this Convention, thereby barring the ratification by third countries that is possible in the case, for example, of the European Convention on Social Security.

A brief reference to the European Social Charter is also appropriate in relation to its possible application to migrant workers and their families. It requires States proposing to ratify it to conclude bilateral or multilateral agreements on Social Security that guarantee equality of treatment between national and migrant workers, and provides for a system of coordination to ensure observance of the pertinent rights.

3. Cooperation or Association Agreements between the EU and Third Countries

In this section we analyse the Community's international agreements that are specifically intended, exclusively or not, to regulate matters pertaining to employment, including the coordination of Social Security legislations with a view to protecting migrant workers.

We refer first to agreements with regional international organisations before going on to consider agreements with various States, agreements with countries in Central and Eastern Europe and agreements with Mediterranean countries.

3.1 Agreements with Regional International Organisations

In this section on agreements with regional international organisations relating to Social Security, we consider first the Agreements with the European Free Trade Association (EFTA) and, second, the Agreements with the countries of the Africa, Caribbean and Pacific (ACP) Association.

3.1.1 Agreements with the EFTA countries

The Council and Commission of the European Communities adopted on 13 December 1993²³ a joint decision relating to enacting the Agreement on the European Economic Space between, on the one hand, the Communities and their Member States and, on the other hand, Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland.

This Agreement concerns the creation of the "European Economic Area" (EEA) and takes as its objectives the four freedoms on which the founding Treaties of the Communities are based, viz. the free movement of goods, services, capital and people.

The relevant portion of the Agreement with regard to the Social Security protection of migrants is Chapter I of Part III concerning the free movement of people, services and capital, which guarantees free movement of employed or self-employed workers between Member States of the Communities and EFTA. The parties thus assure such workers, and those entitled through them, of the following rights:

- First, aggregation of the periods taken into consideration by the various national legislations for acquiring and preserving entitlement to social benefits, and for the calculation of such benefits, entailing no discrimination on nationality between workers from Member States of either organisation with respect to employment or remuneration.
- Second, the exporting of benefits, entailing their payment to persons residing within the territory of contracting parties.

Some of the countries affected have of course since joined the EU (Austria, Sweden and Finland), entailing direct application of Community Regulations under the aegis of the founding Treaties rather than as a result of the Communities' external commitments.

As to the other countries, it should be noted that the transition period for the effective application of freedom of movement for Switzerland and Liechtenstein ended on 1 January 1998. Moreover, special Social Security measures were established for the transitional periods, particularly as regards unemployment protection of seasonal workers (Protocols nos. 15 and 16).

Also of great significance with regard to Social Security is Annex VI to the Agreement, which establishes the application of Regulations 1408/71 and 574/72 to the countries of the European Economic Area. It refers to the particular features of applying these Community Regulations to EEA countries, viz. scope of personal application, regimes of self-employed workers, special non-contributory benefits excluded, particular rules of application for certain Member States, and cases where a person is subject simultaneously to the legislation of two Member States. The application of Community Regulations is also extended to countries going through the "transition period".

3.1.2 Agreements with the countries of the Africa, Caribbean and Pacific (ACP) Association

The Council and Commission both adopted on 25 February 1991 a decision relating to the enactment of the ACP-EEC Convention²⁴, the fourth agreement made with the countries concerned.

The portion of this Convention that is of particular relevance is Annex VI, which provides employed or paid workers with equality of treatment and freedom from discrimination with regard to working conditions and remuneration. It nevertheless does so without granting them freedom of movement.

Equality of treatment is granted to such workers provided that they engage in paid activity, and to family members living with them, with respect to Social Security benefits tied to employment. In addition, equality of treatment is to be understood to apply not only to national legislations on Social Security but also to Community Regulations, at least as regards benefits tied to employment and not those gained by mere residence. It is also necessary that this principle be accompanied by application of the mechanisms for preservation of rights acquired or being acquired that are referred to in Community Regulations, particularly in 1408/71.

The importance of the ACP Convention lies above all in the large number of countries which are affected by its Annex VI and for which, at least in the case of Spain, no other kind of protection is provided, since no bilateral conventions have been signed and there is no ILO Convention that would oblige us to protect them²⁵.

3.2 Agreements with Various States

3.2.1 *Countries in Central and Eastern Europe*

We distinguish here between two groups of countries, those which belonged to the Soviet bloc and those which have become subjects of international law since the break-up of the former USSR.

3.2.1.1 *Countries that belonged to the Soviet Bloc*

1993 and 1994 saw the publication of Council and Commission decisions relating to the association with the European Communities of Hungary²⁶, Poland²⁷, Romania²⁸, Bulgaria²⁹, the Czech Republic³⁰ and the Slovak Republic³¹.

At the end of 1995, all these Association Agreements were supplemented by the adoption of Additional Protocols enabling the associated countries to participate in framework programmes, specific programmes, projects and other actions of the Community in a number of areas, including social and health policy³².

Regarding the specific field of Social Security protection of migrant workers, no equality of treatment is established for workers working legally or residing legally in the country responsible for providing benefits. Domestic legislation has to be invoked to prove that this principle applies to foreigners for the purposes of obtaining Social Security benefits. What does seem clear, however, is that migrants who are nationals of States that are legally within the territory covered by an Association or Cooperation Agreement must have access to Social Security benefits, at least those referred to in the particular Agreement, since the principles of preservation of rights result, one way or another, in the person concerned being included within the scope of the Social Security system of the country of immigration or destination.

Another primary objective of the Agreements is coordination of Social Security regimes for workers employed or working legally in any of the territories, and for their family members residing legally therein, without prejudice of course to the conditions and rules applicable in each State. This coordination has three aspects:

- a) Establishing aggregation of periods of secure employment or residence of such workers. The periods concerned are added together not only for the purposes of entitlement to health assistance for the worker and his family but also for determining pensions or annuities arising from retirement, invalidity and death.
- b) Exportability of acquired benefits, meaning the possibility of pensions or annuities arising from retirement, death, industrial accidents, occupational diseases or consequent invalidity (with the exception of contributory benefits) being transferred freely according to the percentage applied, if any, under the laws of the Member State or States.
- c) Family protection, applicable to the worker's family members residing legally within the territory within which he does his work.

Achievement of this objective will certainly have to wait until the various Association Councils adopt appropriate provisions in this respect. In any case, such rules will not affect the rights and obligations arising from bilateral conventions

between the various associated countries and Member States of the Communities in cases where such agreements grant more favourable treatment to the persons concerned.

3.2.1.2 *Countries that have become subjects of international law since the break-up of the former USSR*

The Collaboration and Cooperation Agreements between the European Communities and the States that came into being as a result of the dismemberment of the former USSR (Estonia, Latvia, Lithuania, Moldavia, Ukraine and Russia) were published in the BOE in 1998³³.

As regards Social Security, as in the case of the group of countries referred to above, we note the lack of enshrinement of one of the principles of international law coordination, namely equality of treatment. Two different forms of coordination are established:

a) The conventions with Estonia, Latvia and Lithuania state, in relation to nationals of these States who are employed within the territory of the Community, and their family members residing legally therein, that Community States will arrange preservation of rights acquired and being acquired with respect to certain benefits. Accordingly, Community countries will allow free transfer of pensions catering for occupational and general contingencies arising from retirement, permanent disability and death, with the exception of non-contributory benefits.

Family benefits are also governed by specific rules whereby a worker is entitled to them, but only to cover his family members residing legally with him within the territory of the Community State that grants them.

All that Estonia, Latvia and Lithuania are responsible for due to their association with the Community is preservation of rights acquired and family benefits for nationals of Community countries.

b) The form of coordination enshrined in the conventions signed with Moldavia, Russia and Ukraine entails these States having to enter into agreements to enable workers who are nationals of both parties to be protected by the Social Security system of the country to which they migrate.

This involves the countries concerned signing bilateral or multilateral *ad hoc* agreements with Community countries to guarantee, as a minimum, the preservation for workers of those States of both rights acquired and those being acquired.

In such conventions, Moldavia, Russia and Ukraine will only be obliged to commit themselves to guaranteeing, as a minimum, the preservation for workers of Community nationality of rights acquired with respect to contributory pensions catering for occupational and general contingencies.

3.2.2 *Mediterranean Countries*

3.2.2.1 *The Agreement with Turkey*

The Association Agreement with Turkey was signed on 12 September 1963³⁴. The Social Security protection of migrants is governed by Regulation 270/72³⁵, as a Protocol to the Association Agreement with Turkey, in which Part II provides for free movement of people.

It also requires the Council to adopt Social Security provisions in favour of Turkish workers and their families residing within the Community. The measures concerned are as follows:

- a) Aggregation of all periods of insurance or employment within the various Community States, for the purposes not only of health benefits for workers and their families but also for pensions arising from retirement, death and invalidity. In no case may provisions adopted entail any obligation upon Community States to take periods in Turkey into consideration.
- b) Exportability to Turkey of pensions arising from retirement, death and invalidity.
- c) As regards family benefits, the intention is to guarantee payment of family allowances in cases where the worker's family reside within the Community.

These measures are set out in Decision no. 3/80 dated 19 December³⁶, which embodies in a reduced form the original content of Regulation 1408/71, although it includes the most important mechanisms with regard to the protection of migrant workers.

However, there is ECJ caselaw which not only recognises that the contents of Association Council decisions form part of Community law but also states that although the Agreements have essentially pragmatic provisions, this does not prevent the possibility of Association Council decisions having direct effects as regards the application of certain matters. These Councils do in fact have capacity for adopting binding enactments.

Accordingly, the ECJ³⁷ affirms that "a provision of an agreement between the Community and third countries has to be deemed directly applicable in cases where, in the light of its tenor, its subject matter and the nature of the agreement, it contains a clear and precise obligation whose implementation and effects are not contingent upon the adoption of a further enactment".

3.2.2.2 *The Agreements with the Maghreb countries*

The Agreements with the Maghreb countries³⁸ (Algeria, Morocco and Tunisia) are not Association Agreements but Cooperation Agreements. The similarity between all three enables us to do a joint analysis of them.

The first point to note is that these Agreements do not provide for freedom of movement. This means that it is up to the States, by virtue of their internal competence pertaining to entry to and stay within their territories, to determine for these purposes the eligibility for a worker to be employed and also for his family members.

As regards Social Security, Community or Maghreb nationals, and their family members residing legally and being with them, have the benefit of the same conditions as nationals of the Member States in which they are employed.

In addition to equality of treatment, the principle of preservation of rights is provided for in both of its aspects:

- a) Preservation of rights being acquired. Aggregation of all periods of insurance or employment in the various Member States is allowed for the purposes not only of health benefits for the worker and his family but also for pensions arising from retirement, death and invalidity. In contrast, the Maghreb countries are under no aggregation obligation.
- b) Preservation of acquired rights. Exportability of pensions arising from retirement, death, invalidity, industrial accident and occupational disease is established. Such exporting depends in any case on the exchange rates applied by the legislation of the Member States responsible for paying such pensions.

c) As regards family benefits, the intention is to guarantee the payment of family allowances in cases where the migrant's family reside within the Community, and in cases where a Community worker works in any of the Maghreb countries.

Regarding the coordination of Social Security systems, the Cooperation Council pertaining to each Agreement has two important functions:

- First, it has to adopt provisions to enable application of the principles mentioned above. Such provisions may not affect rights and obligations arising from bilateral conventions between Community members and the Maghreb States in cases where such bilateral agreements contain provisions more favourable to workers covered by them.

- Second, administrative cooperation measures or rules must be adopted to provide the management and control guarantees required for effective coordination between Social Security legislations.

No such provisions have yet been adopted, but there is integrating ECJ caselaw in this respect, e.g. the *Kziber case*³⁹. Mrs. Kziber, living with her father, a Moroccan retired in Belgium, applied for the unemployment benefit available to young people who have completed their education or occupational training but have not found employment. She was denied this benefit because of her nationality. The Cooperation Agreement with Morocco states that the prohibition on maintaining discriminatory measures based on a worker's nationality may only be varied with respect to family benefits and the aggregation and export of benefits, and within the limits laid down for the latter. The ECJ stated that this means, conversely, that such reservations may not be construed "to the effect of depriving the prohibition on discrimination of its unconditional character with respect to any other matter that arises within the Social Security sector". The Court further indicated by way of clarification that where these Cooperation Agreements mention Social Security, the concept applied has to be, by analogy, that stated in Regulation 1408/71. All this resulted in Mrs. Kziber being granted unemployment benefit.

3.2.2.3 The Euromediterranean Association Agreement with Israel

This Agreement⁴⁰ adopts under the heading "Social matters" various precepts pertaining to Social Security protection.

The aim here is coordination of Social Security systems to prevent lack of protection of migrant workers, although the Agreement does not include one of the fundamental principles of coordinating international law, namely equality of treatment.

For the coordination of Social Security legislations, two fundamental rules are stated as regards rights acquired or being acquired:

a) Regarding the preservation of rights being acquired, Israelis employed legally within the territory of the Community and their families residing legally therein are entitled to have the Community States in which they reside take all periods of insurance or employment in the various Member States into account for the purposes not only of health benefits for the worker and his family but also for those of pensions arising from retirement, permanent disability and widowhood.

b) Regarding the preservation of acquired rights, the exportability of pensions arising from retirement, permanent disability and widowhood is establis-

hed. In addition, Israeli workers who meet the appropriate requirements are entitled to non-contributory benefits when they are legally in a Community country whose legislation so provides.

All that Israel is responsible for in consequence of its Association with the Community is the preservation of acquired rights and family benefits of nationals of Community countries.

Finally, as usual in Associations of this kind, a Cooperation Council is created and is assigned two important functions in the coordination of Social Security legislations:

- First, it has to adopt provisions to enable application of the principles mentioned above. Such provisions may not affect rights and obligations arising from bilateral conventions between Community members and the Maghreb States in cases where such bilateral agreements contain provisions more favourable to workers covered by them.

- Second, the organising of administrative cooperation procedures such as to provide the necessary management and control guarantees for achieving effective coordination between Social Security legislations.

This means that pending a specific resolution of the Association Council, the application of these principles may be complicated, but in this context we refer to the ECJ ruling with respect to the Agreements with the Maghreb countries.

Notes

- 1 Consolidated version, published in DOCE C 325 of 10 December 1992.
- 2 DOCE L 74 of 27 March 1972.
- 3 Convention on applying Social Security to Spanish and Andorran workers of 14 April 1978 (BOE 20.07. 25.10), Administrative Agreement for applying the Convention of 14 April 1978 (BOE 20.07.78, 25.10.78) and Agreement on rules for applying certain precepts of the Convention and Administrative Agreement of 10 November 1983 (BOE of 13 May 1983).
- 4 Convention on Social Security between Spain and the Argentine Republic of 28 May 1966 (BOE 16.09, 19.10), Administrative Agreement for applying the Convention of 18 May 1966 (BOE 10.11.67) and Supplementary Agreement to the Buenos Aires Convention of 21 April 1969 (BOE 05.07.69).
- 5 Convention of 25 April 1994 (BOE 17.03. 95), Administrative Agreement on Social Security for applying the Convention of 28 November 1994 (BOE 17.03.94).
- 6 Social Security Administrative Agreement of 8 May 1978 (BOE 03.05.78).
- 7 General Convention on Social Security of 25 June 1959 (BOE 18.04.60), Administrative Agreement for applying the General and Supplementary Conventions (BOE 19.07.75) and Supplementary Convention of 2 May 1972 (BOE 04.10.74).
- 8 Convention on Social Security of 24 July 1964 (BOE 02.09.69), Administrative Agreement for applying the Convention of 24 November 1978 (BOE 12.06.85)
- 9 Convention on Social Security of 28 January 1997 (BOE 25.03.98), Administrative Agreement for applying the Convention of the same date.
- 10 General Convention on Social Security of 1 April 1960 (BOE 23.10.62), Administrative Agreement for applying the Convention of 5 December 1986 (BOE 13.04.82, 29.06.86) and Additional Convention of 8 May 1974 (BOE 29.07.75).
- 11 Convention on Social Security of 16 May 1991 (BOE 15.01.96, 20.04.96).
- 12 Administrative Agreement on Social Security of 21 June 1979 (BOE 05.11.79) and Resolution approving development rules of 2 September 1982 (BOE 12.11.82)
- 13 Convention on Social Security of 12 May 1988 (BOE 07.07.90), Administrative

- Agreement for applying the Convention of 5 May 1989 (BOE 07.07.90).
- 14 Convention on Social Security of 10 February 1990 (BOE 11.07.91), Administrative Agreement for applying the Convention of the same date.
 - 15 Convention on Social Security of 10 November 1986 (BOE 01.12.87, 02.02.88), Administrative Application Agreement of same date and Protocol to the Convention on Social Security of 19 October 1995 (BOE 08.02.85) and Supplementary Agreement to the Buenos Aires Convention of 21 April 1969 (BOE 05.07.69).
 - 16 Convention on Social Security of 30 September 1986 (BOE 01.12.87, 02.02.88), Agreement on reciprocity with regard to Social Security of 21 October 1966 (BOE 29.10.66) and Administrative Agreement for applying the Convention, signed on the same date as the Convention.
 - 17 Convention on Social Security of 20 May 1988 (BOE 11.10.89, 10.11.89), Administrative Agreement for applying the Convention of 21 May 1991 (BOE 14.07.91)
 - 18 Social Security Convention and Administrative Application Agreement, both of 19 December 1985 (BOE 14.07.85).
 - 19 Convention on Social Security of 11 April 1994 (BOE 24.02.96), Administrative Agreement of 12 May 1995 (BOE 24.02.96).
 - 20 This Convention came into force on 1 March 1977 generally and for Spain on 25 April 1983, and was ratified by Instrument of 10 January 1986 and published in the BOE of 12.11.86
 - 21 Ratified by Spain on 10 January 1986 (BOE 12.11.86), came into force in Spain on 25 April 1986. The Convention took effect generally on 1 March 1977, having been adopted in Paris on 14.12.72.
 - 22 Spain signed the first one on 09.02.81, ratifying it on 31.01.84 (BOE 21.03.84), and ratified the second on 15.01.87 (BOE 08.04.87).
 - 23 DOCE L 1 of 03.01.94.
 - 24 DOCE L 229 of 17 August 1991.
 - 25 In reality, their coverage was confined to what reciprocity would allow, which in the majority of cases was nothing.
 - 26 DOCE L 347 of 31 December 1993
 - 27 DOCE L 348 of 31 December 1993.
 - 28 DOCE L 357 of 19 December 1994.
 - 29 DOCE L 358 of 19 December 1994.
 - 30 DOCE L 359 of 19 December 1994.
 - 31 DOCE L 360 of 19 December 1994.
 - 32 DOCE L 317 of 30 December 1995 covering Council and Commission Decisions 95/558 to 562 referring respectively to Bulgaria, Hungary, Poland, Romania and the Czech Republic. The Slovak Republic is covered by Decision 93/300 of 22 April 1996, DOCE L 115 of 9 May 1996.
 - 33 Respectively of 6-3-98, 6-3-98, 11-3-98, 26-6-98, 30-1-98, 8-5-98.
 - 34 DOCE L 217 of 29 December 1964
 - 35 DOCE L 297 of 19 December 1972
 - 36 DOCE of 25 April 1983.
 - 37 Including: ECJ judgement of 14 April 1989, Greek Republic v. Commission, C-30/88, ECR 1989; ECJ judgement of 20 October 1990, C-192/89, ECR 1990-9 page 3503)
 - 38 Published in DOCE L 263, 264 and 265 of 27 September 1978 in the form of Council Regulations nos. 2210, 2211 and 2212 of 26 September 1978 instituting Cooperation Agreements between the EEC and the respective States in the order listed.
 - 39 ECJ judgement of 31 January 1991, case C-18/90, ECR 1991-1, page I. 199)
 - 40 Although the Agreement was made in 1985, it was not published in the BOE until 4.7.00.