Analysis of Member States' Bilateral Agreements on Social Security with Third Countries

December 2010

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European Commission

Ordered by the European Commission
Employment, Social Affairs and Equal Opportunities DG

Contract ref. no. VC/2010/0646

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Content

Executive Summary

The European Commission will publish in 2011 a Communication on the international dimension of EU social security co-ordination. To prepare this Communication this study shall add background information and help to take the necessary decisions.

Every strategy which could be envisaged at European level in this respect has to build on existing Agreements concluded by Member States with Third Countries and on the experiences gained from such Agreements. The sample of Agreements made available by the Member States show that many of them are based on the same or closely comparable elements. From a first glance the following principles can be deduced:

- Some Member States conclude fully fledged Agreements which cover all branches of social security, while other Agreements – especially in relation to Third Countries on other Continents – are restricted to pensions and applicable legislation.

- Many of the Agreements cover all persons insured, thus nationality does not play a role; nevertheless there are many special provisions which are restricted to the States' own nationals – therefore the ruling of the ECJ in the Gottardo case is still of relevance.

- The provisions on applicable legislation are based on the same principles as the EU co-ordination rules; nevertheless there are some differences e.g. concerning posting duration or cases of simultaneous activities.

- In the pension field many Agreements follow a "lighter" approach than the EU co-ordination principles.

From these experiences a model for a European approach can be worked out. The next question is for what purpose such a European approach could be helpful.

First, it has to be examined if there are common drivers which urge Member States to conclude bilateral Agreements with Third Countries. A European approach makes sense only if there are common drivers which are valid for all or at least a majority of Member States. Naturally this is not the case for all drivers - but at least globalisation and movement of persons seem to be common for all Member States.

Second it is important to look at the ways in which these common drivers could be dealt with under a European approach. Possible European initiatives range from enhanced co-operation between Member States to binding instruments of the Association-Agreement type. Each of these possibilities has advantages and disadvantages.

Finally it will be a political decision which one of these possibilities is chosen and for what common drivers this selection is made. This study can give some recommendations for that decision but cannot pre-empt it.

Already now it has to be stressed that an activity at European level is necessary. Although the social dimension of Europe is an important issue of internal European politics it is not at all visible for the rest of the world. Therefore including the social dimension also in all external relations of the EU could be a very important message from a political point of view. This study tries to give some elements for that purpose. But at the same time the study could be used immediately as a tool-box for Member States wishing to negotiate with third Countries but also for the Union e.g. if further amendments of Regulation (EEC) No. 883/2004 are prepared.

Introduction

Purpose of the study

This study has to be seen as a preparatory work for a **Communication by the European Commission** envisaged for 2011 on the international dimension of EU Social Security Co-ordination. The main task is to analyse the "sample" of bilateral Agreements made available by Member States with the **following purposes:**

- Identification of common elements;
- Identification of major divergences in the approach demonstrated by these Agreements;
- Indication to which extent the Agreements are limited to the nationals of the Countries bound by the Agreement;
- Assessment of rules which take into account the ECJ ruling in the Gottardo-case;
- Identification of common areas of difficulties in these Agreements with Third Countries;
- Elaboration of aspects where a common European approach might be desirable;
- Elaboration of aspects where a national approach should be maintained.

Preliminary remarks for a better understanding of the study

During the **Spanish Presidency** (first half of 2010) relations of Member States with Third Countries were an important issue. In Council the Decisions for the application of the **Association Agreements** with Algeria, FYROM, Israel, Croatia, Morocco and Tunisia were prepared and the relations in the field of social security between the EU on the one side and **Latin American and Caribbean Countries** on the other side were discussed at a high level conference. This was an impetus for further work for which this study should analyse some elements.

To start with it has to be mentioned that an analysis of the relations Member States have with Third Countries in the field of social security is delicate. Usually this is an issue where **Member States rely on their autonomy to negotiate and conclude Agreements**. Therefore it is very important to stress from the beginning that this study does not intend to interfere with this autonomy.

This paper first has the purpose to give **information on the existing situation**. My intention is to analyse the Agreements concluded by Member States with Third Countries and to look if their autonomy has led to totally divergent models and philosophies or if there is a common denominator. This will be done in the **first analytic part**. It should be clear that such a comparison of the Agreements cannot include all the technical details and each and every single provision but it has to concentrate on the main principles and some important issues. This work will be done by extracting these elements from the bilateral Agreements and putting them into tables (**Annex 1** to this study). This has the big advantage that it makes a comparison much easier. In the text of the analytic part I will try to comment on these elements. The examination of differences and the search for explanations for these differences will be done in this part too.

The results of this analytic work should allow an answer to the question if there are common elements in the Agreements concluded by Member States and if yes, what these elements are.

To make it easier for the reader I have split the analytic part into **different sections** which correspond to the traditional structure of international instruments (horizontal provisions, material scope, personal scope, equal treatment, applicable legislation, pensions and other provisions). As explained further down I have not analysed the other branches of social security (e.g. sickness and maternity, accidents at work and occupational diseases, unemployment or family benefits) because they seem to be of lesser importance at least in relation to Third Countries on other Continents. At the end of each section there will be **a box** which lists the common elements discovered in the section. The text of all these boxes added together in **Annex 2** of this study will be the full list of elements which could be included in a **European Model Agreement**.

It is very important to mention that this "model" cannot be the finalized text for such a European instrument. It will **only be a list of the possible content**. For some provisions the text might already be clear (especially if we could rely on the text of Reg. 883/2004 and Reg. 987/2009), for other issues it might be necessary to further examine the possibilities which I intend to show; in addition I will also give some recommendations in which way to go if the solution is not evident from the beginning.

But this search for a European Model should not be the only purpose of this analytic part. My intention is to give **as much information as possible for interested Member States**. So it could be interesting for a Member State who starts negotiations e.g. with India to look into the tables and find out what other Member States have already agreed with India. Member States could also check in an abstract way if their social policy in relation to Third Countries is in line with what the others do. So this analytic part is meant to serve different purposes.

But anyhow we should not stop with that analytic part. If such work is done at European level there must be also some **European perspective**. These ideas for the future are collected and developed in the **second strategic part**. If anything should be developed at European level the need for such an effort has first to be analysed. Therefore I will start my work with an examination and with a list of the different **drivers** which motivate Member States to conclude bilateral Agreements with Third Countries. This is very important because if every Member State were confronted with different drivers, building a European Strategy would be very difficult. This search for drivers will list many of them but it should be clear that in individual cases there could be even more reasons for the conclusion of a bilateral Agreement than those enumerated.

Under the assumption that there are common drivers I will take the last step and try to think into the future what **ways for initiatives at European level** are possible to deal with those drivers - not with an approach Member State by Member State as in the past but by way of a common effort. Naturally this will be the part which will be read in the most critical way by Member States (as their autonomy could be at stake). But once again I would like to stress that these proposals are only my ideas. It will need a political decision as to how far we want to go.

If at European level further steps should be taken, then we could rely on the analysis done under the first part of that study. Because whatever we do we will need a European Model! So an agreement of all Member States on this elaborated model is also an important part of any future initiative (this links the work done under the first part with the work under the second part).

For any future decisions the necessary information has to be put together. So the arguments which speak in favour but also against the different possibilities should be listed. This will be my task under this last part of the study. Without pre-empting the necessary discussion I would already at this stage like to stress that from my point of view whatever will be done at European level it should always be based on the **principle of voluntary participation** of Member States – so it should be an option but not an obligation.

I hope these preliminary remarks will help the reader to find his/her way through this study.

Method used

First the **Agreements made available** have been analysed and the results of this analysis have been put in tables which can be found in **Annex 1** of this study. From these tables the main findings which are contained in Part I of this study can be deducted.

During the **workshop on 6.10.2010** many additional information was gained which was also included in this study and it became clear with which delegations **additional interviews** would be useful. The interviews were held either during meetings or via e-mail. To sum it up these interviews concentrated on:

- The material scope of Agreements especially with Third Countries on other Continents, problems with Agreements which cover all branches of social security and efforts to combat fraud and error in these Agreements (Interview with a **French expert**);
- The usefulness of a Gottardo clause and its relation to the personal scope of Agreements (Interview with a **German expert**);
- Drivers for the conclusion of Agreements and problems with the Gottardo clause in relation to third Countries which insist on a restricted personal scope of an Agreement as well as different posting durations (Interview with a **Luxembourg expert**);
- National provisions which allow export only in case of control mechanism in place in the Third Country concerned, experiences with such a legislation and analysis of the various control possibilities (Interview with a **Dutch expert**);
- National policy which obliges the conclusion of only cost-neutral Agreements; reaction of Third Countries on such a policy; measures to prevent fraud and error (Interview with a **UK expert**).

All this information, but also my personal experience as Austrian negotiator of bilateral Agreements with Third Countries for years, have been included in this analysis which lead to a summary of common elements of the bilateral Agreements which could form the **nucleus of a future European approach** (put together in one document under **Annex 2**). Especially the many very fruitful elements gained from the workshop have also been used for the second part, the search for **possible future strategies at European level**.

Finally it has to be mentioned that although the texts available (especially the Agreements) contain very often very clear messages, there remains always some residual uncertainty as to whether all the provisions have been understood in the same way the Contracting Countries have intended them. Therefore to be on the safe side it is recommended – if total security on the correctness of my conclusion (which sometimes cannot be separated from my Austrian perspective) is intended – to **send this study to the Member States for final examination and approval** concerning the content of the Agreements they have concluded.

It is true that any European approach will take some time to develop. But this study could also have an **immediate advantage**. All the details analysed and put together could be used as a **tool-box.** Member States wishing to start or to continue bilateral negotiations could be inspired by the information given on the existing Agreements. But also at European level an added value could be gained. If Reg. 883/2004 has to be amended it can be also examined how the issue has been dealt with under the existing bilateral Agreements of the Member States.

Technical guidance

Before starting the work some "**definitions**" seem to be useful to secure a common understanding of the text of this study. Especially the following notions have to be explained at the beginning:

- "**Member State**" refers to the 27 Member States of the European Union (as it is assumed that whatever future work and strategy is planned at Community level this will not extend to the EEA Member States or Switzerland);

- "**Third Country**" refers to Countries outside the EU[1] with which bilateral Agreements have been concluded by Member States or sometimes also to any Third Country as the case may be;

- "**Contracting Country**" refers to the partners of bilateral Agreements on social security between Member States and a Third Country;

- "**Agreement**" refers to the international law text examined irrespective of the fact if the Contracting Countries call it "Agreement", "Understanding", "Convention" or what so ever;

- "**Bilateral Agreement**" refers to the Agreements concluded between one Member State and one Third Country but includes also for the sake of simplification the Ibero-American Agreement – see also Part I Chapter 2.

In the text itself remarks concerning the situation under the various bilateral Agreements are made only in an abstract way. If necessary **concrete references to bilateral Agreements** between a Member State and a Third Country are made in a corresponding footnote.

[1] Including such exotic cases as Jersey and Guernsey in relation to the bilateral Agreement concluded with the United Kingdom.

Part I – Analysis: Lessons to be learnt from the sample of Agreements

1. Introductory remarks

This section constitutes an analytical chapter which aims to examine examples of instruments (bilateral and multilateral Agreements and other instruments of international organisations – see next chapter). Due to the various differences between these texts, this is no easy task, and it is necessary to give the work a structure. It was not possible to compare every specific detail within the given framework. Rather it was decided to focus on some particularly **important aspects.** The main prerogative was to look for common elements which could be used in the future, if further steps are to be planned (whatever they might be) at European level. These elements will be summarized at the end of each section where I will try to build the "**European approach**".

The aspects chosen for comparison reflect **fundamental principles** which are included in nearly every text. The following questions have been analysed in this context (first by way of comparative tables - Annex 1 - and then, building on these tables, in the conclusions of this analytical part of the study):

- Which branches of social security are covered by the Agreements (**Annex 1 Table 2**)?
- What groups of persons are covered by the Agreements and what special features are linked to equal treatment (**Annex 1 Table 3**)?
- What principles are provided to determine the applicable legislation (**Annex 1 Table 4**)?
- How are pensions determined under the Agreements (**Annex 1 Table 5**)?
- Finally, what other important elements (e.g. data protection, rules combating fraud and error) are included in the Agreements (**Annex 1 Table 6**)?

It must be stated at this point that with the exception of the area of **pensions,** the analysis has not gone into detail with regard to the other branches of social security (sickness, accidents at work and occupational diseases, unemployment and family benefits) as, especially with regards to countries outside of the European Continent, Member States usually do not include these branches. Of the 37 bilateral Agreements examined, 12 cover at least some of the other branches, albeit sometimes on a very limited level. As provisions on coverage (**applicable legislation)** are dealt with by nearly all the bilateral Agreements,[2] this is also one of the aspects examined in detail.

This analytical examination of the bilateral Agreements cannot be done in a vacuum. It is necessary to compare the common features by reference to the **content of the EU co-ordination rules**. Reference is made to Regulations (EC) No. 883/2004 and 987/2009 (further "Reg. 883/2004" and "Reg. 987/2009"), although many older bilateral Agreements appeared

[2] Only the Slovenia-Australia Agreement does not include provisions on applicable legislation as this has always been a "special" problem in relation to **Australia**. Under the Australian social security Model Agreement, provisions on applicable legislation are not an issue as the residence based pension scheme covered by the Agreements is only financed through taxation. In order to include provisions on coverage, it is necessary to also include the Australian earnings related Superannuation Scheme. Furthermore, this scheme is governed by strict national legislation giving a clear mandate for bilateral Agreements concluded by Australia. As these principles are laid down by the national Australian legislation (Agreements are only allowed to avoid double coverage but cannot create new cases of competences going beyond national legislation) and are not comparable to the principles under the bilateral Agreements of all the European Member States, it took some time until provisions on applicable legislation were possible in relation to Australia. From my point of view, this is a good example of how the national legislation of the relevant Contracting Partner could influence the content of the bilateral Agreements.

at the time Regulations (EEC) No. 1408/71 and 574/72 (further "Reg. 1408/71" and "Reg. 574/72") were in force.

Once each of the chosen aspects have been analysed, I will conclude by giving some **recommendations for a European approach**. This should be the starting point for any action at Community level, if further steps are to be planned in the future. Therefore these recommendations do not refer to any special type of action (the different possibilities which could be envisaged will be further elaborated under Part II) but should be read only as proposals for the content of any text elaborated at Community level. In this context, it is important to note that there are **two ways to make such a recommendation for further initiatives at the European level**:

- First **Reg. 883/2004 could be regarded as the guiding rule** (and also the underlying principles of the TFEU) – which has been the guiding principle for example, when preparing the Decisions under the Association-Agreements during the first half of 2010. This approach could – from a technical point of view – easily build on a common understanding between the Member States (although it may be different from the common principles that have been deduced from the bilateral Agreements). However such an approach could provoke objections from the beginning by Member States who follow different principles in their bilateral Agreements. It would further raise some problems for the Third Countries – as they might not be willing to accept all the far reaching principles of Reg. 883/2004 as interpreted by the ECJ[3].

- Secondly, a **more flexible approach** could be taken which could deviate – if necessary - from the principles of Reg. 883/2004 and would be more easily acceptable to Member States and Third Countries (such a flexible approach should also allow for special ways of co-ordination for special Countries, without endangering the general principles which may sometimes be a very difficult balance to strike).

This study will focus more on the second approach, by taking into account a common denominator deduced from the Agreements that have been made available. Based on this, I will make my recommendations. In order to better illustrate the content of a possible future approach that could be made at the European level, all the recommendations for the different Chapters of the study are summed up in **Annex 2.** It must already be stressed that this is only a very minimalistic approach. A more detailed study could also analyse the question of whether there should be a difference between different groups of Third Countries – e.g. a more comprehensive and more Reg. 883/2004 orientated approach in relation to European Countries, and another lighter approach in relation to more remote Third Countries, e.g. those on other Continents. Due to the restricted time available for this study, unfortunately this question cannot be dealt with here.

2 Choice of Agreements and instruments

The Agreements analysed by this study have been made available on a voluntary basis by members of the Administrative Commission. 18 members responded to this request. The list of all the different Agreements may be found in **Annex 1 Table 1**. In order to cover all areas which may necessitate a different approach, an Agreement with a Country south of the Sahara has been chosen[4]. In addition, further Model Agreements by the Netherlands with the

[3] It must be remembered that, apart from in relation to the 6 Association Countries dealt with in 2010 which were interested in accepting what the EU proposes to them because they have already applied for accession or are interested in deepening relations with the EU - the EU could be confronted in the future with Third Countries which have already developed a strong national position concerning relations with other Countries in the field of social security (e.g. Australia, Japan, India, Korea etc.) and might not be willing to deviate from it.

[4] French-Congo Agreement (on the homepage of CLEISS).

main purpose of combating fraud and error have been made available thanks to the interviews which took place after the workshop of the 6.10.2010 and these have been also included in the analysis. Thus **bilateral Agreements** between a Member State on the one side, and the following **18 Third Countries** on the other side, have been analysed:

Third Country	Number of examples
Australia	3
Bosnia and Herzegovina	1
Brazil	1
Canada	7
Chile	1
Congo	1
FYROM	1
India	3
Japan	1
Jersey and Guernsey[5]	1
Korea	4
Peru	1
Québec	1
Tunisia	1
Ukraine	1
Uruguay	2
USA	3
Venezuela	1

Geographic distribution: The analysis deals with 4 European countries (this limited number is not so astonishing if one takes into account that EU law is applicable in 31 European countries and thus there is no need for bilateral Agreements between these countries), 3 North American, 5 South American, 2 African, 3 Asian Countries and Australia.

Remarks on the countries chosen: One could question why exactly these 18 Third Countries have been chosen – especially as it turns out that some of these Agreements are quite dated – one Member State has sent Agreements which date from 1979 and 1988[6]. Sometimes the reason behind the choices or omissions are simple, for example it has been asked to send Agreements in the English language[7] – thus e.g. no Agreement with Turkey has been received, although presumably many Member States have concluded an Agreement with Turkey.

Nevertheless, I am of the opinion that the sample is more than sufficient and sufficiently covers all the desired aspects for analysis. Neither is it of importance that examples have not been provided by all Member States as representatives of all of the relevant groups of Member States are present[8]. It is outside of the scope of this study to analyse all the different Agreements which are presently in force between Member States and Third Countries (see Spanish note AC 192/10). The aim is rather to examine the main criteria on which the Member

[5] Although Jersey and Guernsey are separate entities of international law for the sake of systematic I will treat them together.

[6] Italy.

[7] Anyhow this does not explain the choice of Italy as both Agreements sent are not in English in the original versions.

[8] Geographic distribution; representation of various social security philosophies, old and new Member States.

States focus when concluding bilateral Agreements. For these purposes a selection of these Agreements is sufficient.

In addition I have also analysed some international and multilateral texts to give breadth to the study. Foremost of such examples is the **Ibero-American Agreement** which has been recently signed and is open for signature for Andorra, Spain and Portugal and 19 Latin-American Countries. The presentation of this Agreement in the Administrative Commission and at a specific Social Ministers Conference during the Spanish Presidency of the Council[9] has somewhat been the starting point for the discussion of Third Country relations at Community level, setting aside the institutionalized contacts in the ambit of existing bilateral or multilateral relations between the Union and its Member States on the one hand, and Third Countries on the other hand (like the EEA-Agreement, the EU-Swiss Agreement or Association Agreements such as for example, those with the Maghreb Countries, Israel, FYROM and Croatia[10]).

It must be mentioned that several Member States have also provided the texts of the relevant **Implementing Arrangements** (which could be understood more or less as Reg. 987/2009 setting the details for the implementation of Reg. 883/2004) in addition to the Agreements. These Implementing Arrangements usually do not contain any additional basic principles compared to those of the Agreements which I have analysed. Thus the missing Arrangements do not really endanger this study in any way. Nevertheless it could be that some of these Arrangements contain for example, provisions on data protection or provisions aimed at preventing fraud and abuse which thus have not been listed in the tables. Therefore this analysis cannot be said to cover all aspects of the bilateral relations between the selected Member States and the Third Countries.

Another set of international rules are 2 instruments of the **Council of Europe;** the first one is the **Model Agreement**. This could be used as model for members of the Council of Europe when negotiating bilateral Agreements. It could be an interesting task to examine whether the Agreements concluded by the Member States with Third Countries respect this model or not. The comparative tables provided in the annex may constitute a step towards such an analysis. A first comparison shows that in practice, Member States would appear to be more likely to follow their own models than to follow a model elaborated by the Council of Europe.

The second instrument of the Council of Europe which has been analysed is the **European Convention on Social Security**[11] which has the function of a binding multilateral Agreement for members of the Council of Europe[12] who have ratified this Convention[13]. As a preliminary remark it could be said that this Convention generally follows the text of Regulation (EEC) No. 1408/71 in its original version. In this regard, it is of less interest for further analysis as it is dated. Nevertheless, this text has brought some additional elements to the study which may be seen in the annexed tables.

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[9] Conference in Alcala de Henares on 13 and 14 May 2010.

[10] As the topic of this study is more the analysis of international instruments in relation between the Member States as subjects of international law with Third Countries these institutionalized relations have not been further analysed as they are predominantly based on existing EU principles and are also widely influenced by the European Commission. Thus it is of more relevance to rather have a closer look at the texts which are predominantly influenced by Member States.

[11] This Convention replaces the two European Interim Agreements on social security which have also been ratified by some Member States in the past.

[12] Although this is an instrument of the Council of Europe, other countries who do not belong to this Council could also be asked to ratify it (Art. 77 of the Convention). Non members of the Council of Europe such as Australia or Canada, have a long ranging tradition as observers in the Council of Europe social security committees and are thus well aware of the European model on co-ordination.

[13] The following Member States have ratified this Convention and are thus bound by it: Austria, Belgium, Italy, Luxembourg, Netherlands, Portugal and Spain. Turkey is the only country outside of the EU which is bound.

It should also be mentioned that this instrument is somewhat lacking in appeal to countries, given that no new ratifications have been made for so many years. This is particularly remarkable if one notes that, even after the fall of the iron curtain, the newly established democratic countries of Eastern and Middle Europe chose not to use this instrument to quickly achieve relations with other countries, but instead preferred the method of bilateral Agreements which seem better suited for the individual purposes of the countries concerned. This is a lesson we should bear in mind when thinking about further strategies at the European level. Concerning the European Convention, it must also be mentioned that this is an instrument which cannot automatically replace fully fledged bilateral Agreements which cover all the traditional branches of social security. In the fields of sickness, unemployment and family benefits, bilateral Agreements are necessary as the relevant provisions of the European Convention are not self-executing[14]. This might have been one of the explanations for why this Convention has been ignored by many countries in the past. Another reason may be its complexity and the weight of its text. When thinking of a future European approach, these explanations **speak in favour of a lighter approach encompassing a text that is easier to understand**.

Finally I have also analysed two instruments of the **ILO** (which have worldwide geographic coverage), namely **Convention No. 157** on the maintenance of social security rights and **Recommendation No. 167** on the same topic. Furthermore, these instruments have the character of model provisions for bilateral Agreements based on different modules. Once again, it may be interesting to compare the bilateral Agreements concluded between Member States and Third Countries with these model provisions. Therefore these instruments should have more or less the same status in our analysis as the Model Agreement of the Council of Europe, and as they receive worldwide coverage, Third Countries could be inspired by them.

3. Horizontal provisions which do not need special attention

To begin, two sets of provisions must be mentioned which have not been analysed in detail but only where necessary in connection with some of the principles mentioned below:

Firstly, the first part of all Agreements contains **definitions** for the expressions used in their texts. Usually these definitions are more or less in line with the definitions used in Reg. 883/2004[15], and therefore, these could be used as a model wherever necessary in a European approach.

Secondly, all Agreements contain an explicit **export provision** which must be included in any future European approach. Furthermore, the corresponding provision under Reg. 883/2004[16] could be used as model for this provision. In any case, for most of the Agreements analysed, **non-contributory special benefits** are explicitly exempted from export or from the scope of the Agreement – this question will be further elaborated under Chapter 4.5. Another area of interest is the fact that export provisions are **restricted to the nationals** of the two Contracting Countries under some Agreements. This aspect is dealt with in Chapter 5.3. As the analysis has shown that as a preliminary step pensions especially should be dealt with under a European approach (see Chapter 4.1.), these export provisions would therefore predominantly concern pensions only.

If the instrument itself is to stay readable, then it is usually not possible to settle all imaginable problems related to the specific elements of the legislation of more than two Contracting

[14] See e.g. Art. 26 of the Convention for the provisions on sickness benefits.

[15] Art. 1.

[16] Art. 7.

Countries in the instrument itself. Therefore there is always the possibility to include **Country-specific solutions in an Annex** when concerned with multilateral solutions[17]. Thus in any future European approach there should also be the possibility for such an Annex. It is general practice that all Contracting Countries have to agree to insertions or amendments to such Annex-entries[18]. Therefore this solution is closely linked to the question of "comitology" which will be dealt with in Chapter 8.4.

[17] E.g. Annex XI of Reg. 883/2004 or Annex VII (in accordance with Art. 72 of the Council of Europe's European Agreement).

[18] E.g. Art. 73 of the Council of Europe's European Agreement.

3.1. Summary in the form of recommendations for horizontal provisions under a European approach

Definitions

- The following definitions as contained for example in Art. 1 of Reg. 883/2004 should be included:
  - family member (if needed)
  - residence (and stay if needed)
  - legislation
  - competent authority
  - institution
  - competent institution
  - periods of insurance
  - pensions or benefits

Export

- A provision stipulating an obligation to export benefits in cash (pensions) as contained for example in Art. 7 of Reg. 883/2004 should be included.

Annex

- There must at least be an Annex for special provisions for the different Contracting Countries (model: Annex XI of Reg. 883/2004). Additional Annexes (e.g. for special non-exportable non-contributory benefits) have to be examined during the elaboration of the future European approach.

4. Material Scope of the Agreements

Social security is usually understood as covering the risks of sickness and maternity, accidents at work and occupational diseases, invalidity, old age or death (benefits for survivors), unemployment and family benefits (for the "risk" of additional burdens due to family members who cannot support themselves). This list was first established in an important international instrument, namely the ILO Convention No. 102 on social security (minimum standards). Death grants have sometimes also been added to this list (although these one-time payments generally loosing importance if periodic benefits such as survivors pensions gain more importance). Therefore it is not astonishing that the European social security co-ordination instruments also cover these traditional branches or risks (e.g. Art. 4 of Reg. 1408/71). The extension of this list by Reg. 883/2004 (Art. 3) with the addition of paternity benefits (equivalent to maternity benefits) and pre-retirement benefits does not dramatically enlarge the risks covered.

Therefore the list of risks as listed in Reg. 1408/71 or Reg. 883/2004 will act as a yardstick against which to measure the scope of the bilateral Agreements analysed. The details can be seen in **Annex 1 Table 2**.

4.1. General remarks on the material scope of the Agreements

The first important conclusion is that there is a difference between countries in the "neighbourhood" and more remote areas. While Agreements with **European countries** usually cover the **whole package of social security**, Agreements with countries on **other Continents** are, as a rule, restricted to **old age, invalidity and death (pensions)**. Nevertheless, there are exemptions which show that some Member States also try (or tried) to achieve fully fledged

material scopes in their Agreements with Countries on other Continents[19], although covering all branches or risks does not automatically mean that the provisions provided for each of these branches or risks are comparable to the corresponding provisions in Reg. 883/2004. So for example if sickness or unemployment benefits are included, there is sometimes only a provision on aggregation of periods[20] [21], if accidents at work and occupational diseases are included there may be no provisions on benefits in kind[22], or if family benefits are included, there may only be a unilaterally applicable provision concerning family benefits for pensioners[23].

These differences compared to Reg. 883/2004 have to be especially stressed, as in the field of pensions which are covered by all the Agreements analysed there are more or less always the same types of provisions which concern aggregation and calculation of the pensions, although also there differences become visible in some details which will be examined later.

Therefore it would seem to be advisable that as a **first step**, any **approach at a European level** should **concentrate on pensions** as it seems easier to find commonly agreeable principles as Member States[24] which in the past had covered all branches, now tend to be more restrictive and for countries which are far away from each other, these long-term benefits seem to be the most important ones. In case the future European approach should also cover countries which are closer to home (e.g. countries such as successors of former Yugoslavia, or of the former USSR), any extension to other branches of social security has to be made very carefully. In the first place, the extent of the co-ordination under Reg. 883/2004 cannot be transposed to relations with these Third countries[25], and secondly, an inclusion of all of the different branches would make this approach very complicated from a technical point of view. Thus in the event that such a **second step** and **further-reaching approach** were planned, this must be done on a very flexible and open basis, allowing the countries which wish to do so, the possibility of choosing from prepared modules.

It is clear that the material scope is usually first understood in relation to the provisions concerning the granting of benefits under the relevant schemes for these risks. But the inclusion of one of these branches usually also means the inclusion of all other elements of co-ordination which might be linked to these schemes, like for example the question of which

[19] This is especially the case in relation to France, Spain, Italy and Portugal.

[20] E.g. Art. 10 of the Italy-Venezuela Agreement with regard to sickness.

[21] E.g. Art. 18 of the Portugal-Ukraine Agreement.

[22] E.g. Art. 19 of the France-Uruguay Agreement.

[23] E.g. Art. 22 of the Portugal-Australia Agreement.

[24] During the written interview with the French expert, it was pointed out that nowadays **France** also tends to only **cover applicable legislation and pensions.** The reasoning for this was that, especially when taking into account the experiences of the past, if the determination of health care costs is not reliable in the Third Country concerned, then there is no use in concluding provisions on the granting of health care benefits. Furthermore, when speaking of family benefits, the lack of corresponding benefits or of reliable measures to safeguard against people who are not entitled to these benefits receiving them, does not recommend the inclusion of these benefits. In addition, the national French legislation already contains provisions such as the taking into account of the costs of health treatment abroad for posted persons and their family members, thus taking away the pressure for France to conclude bilateral Agreements for these groups of persons. Another very interesting example has been given by **Luxembourg** (in one of the written comments received): At present, Luxembourg is also trying to exclude family benefits from the material scope of its bilateral Agreements. In order to facilitate such a step for the Third Country with which a bilateral Agreement already exists, Luxembourg offers the inclusion of long-term care benefits as a "trade" for deleting family benefits from the scope of its Agreements.

[25] It has to be assumed that a co-ordination of, for example, long-term care benefits would also not be feasible for all Member States in relation to these Third Countries. In addition, it should be mentioned that under Reg. 883/2004 the co-ordination in some branches of social security already leads to many problems in some Member States, and therefore it would block a future European approach if all these branches were included. From my experience in Austria, family benefits are important in that context. **Austria** has in the past denounced all the bilateral Agreements which included provisions on the export of family benefits (in relation to the countries which succeeded Yugoslavia and to Turkey) as this principle of co-ordination lead to results which were not politically acceptable (also see the experiences of France mentioned in the previous footnote).

Contracting Country is responsible for granting coverage and collecting the contributions in respect of the covered schemes (provisions on **applicable legislation**). Only one of the analysed Agreements covered the benefit aspect of pensions exclusively and it did not contain any Chapter on applicable legislation[26]. It is in this context that another issue should be mentioned:

Under the legislation of many countries, **coverage and the collection of contributions are not split in accordance with the different branches of social security** but are rather combined. This collection may also be centralised so as only one institution has the task of distributing the contributions collected to the different branches. For example, in Austria, contributions for sickness, accidents at work and occupational diseases, pensions and unemployment insurance are collected all together by the health insurance institutions. In such cases, the question always arises of how to proceed if an Agreement only covers for example, pensions, but not the rest of the branches of social security. In practice, it is very often the case that if this country is declared competent under the provisions on applicable legislation in the context of an Agreement covering only pensions, this then results in the collection of all contributions (also for the branches not covered by the Agreement). Sometimes the Agreements explicitly say that – although the provisions on the granting of benefits are restricted to pensions – the Chapter on applicable legislation covers all branches of social security[27]. Thus it is safeguarded that contributions can always be collected for all branches to reflect the national legislation.

4.2. Which types of schemes are included?

Under Reg. 883/2004 it is clear that all schemes linked to one of the risks and based on "**legislation**" are covered (where there is a legal entitlement to the benefit in question)[28]. Schemes based on **collective bargaining** are usually not covered unless the Member State concerned makes a corresponding notification. Private schemes are not covered by Reg. 883/2004. The concluded Agreements are also usually based on these principles. Nevertheless, this is sometimes not that clear and there is room for doubt on the material scope of some of the Agreements[29]. In addition, it is possible to interpret the ILO texts in a broader way as the definition of "legislation" covers all social security rules[30]. There are also special provisions for entitlements from provident funds which cover all compulsory savings institutions[31]. Thus it can not be excluded that these texts may also cover schemes based on collective bargaining which are rendered obligatory and which would enlarge the material scope compared to Reg. 883/2004.

Nevertheless this brings to light a very important question for the first time. The further we move away from the traditional European understanding of social security, the more we could be confronted with **different traditions and models of social security**. A good example which is not so far away from the territory of the EU, might be **Kosovo** where the social security scheme had to be re-established after the separation from Serbia and up until now there has

[26] Slovenia-Australia Agreement – see also Footnote 2.

[27] E.g. Art. 2 (1) of the Austria-Korea Agreement.

[28] Art. 3 read in conjunction with the definition for "legislation" under Art. 1 (l) – concerning the condition of link to the risks and legal entitlement see e.g. ECJ 27.3.1985, C-249/83, Hoeckx.

[29] The Ibero-American Agreement contains a definition for legislation which is also part of the material scope of that Agreement - Art. 2 in conjunction with Art. 1 (h). Nevertheless under the provisions for the determination of pension entitlements, there is also a special provision for privately funded schemes – where it might be doubtful if these schemes are still covered by "legislation". On the other hand, it is true that widely privately functioning schemes such as for example the second pillar in Switzerland are covered under the European co-ordination scheme as legislation sets at the minimum a framework for these schemes.

[30] Art. 1 (a) of Annex I to Recommendation No. 167.

[31] Art. 1 (f) and the special rules in Art. 36 – 38 of Annex I to Recommendation No. 167.

been no sickness insurance scheme based on legislation. Some basic benefits are granted to the local population, but officially there is no sickness insurance that could be co-ordinated with other countries. Such situations have to be respected when we think about co-ordination with such countries. So it could be also useful to re-think the tradition that schemes based for example on collective bargaining are excluded if we may start to deal with countries where such schemes play a predominant role and without their inclusion, we would not cover the reality of social security in those countries. On the other hand, such an extension of co-ordination cannot be made unilaterally – so this would also put pressure on the Member States to extend co-ordination to such schemes that have not yet been covered.

However a realistic step by step approach would seem to be the best method for starting. So as not to raise opposition from Member States from the very beginning, it would be advisable to at first **restrict any instrument to the classic legislation** as defined under Reg. 883/2004 and to think about extending it to other schemes only in the future[32].

4.3. Listing abstract risks, concrete national laws or benefits

Another issue of great importance is how the legislation covered by the material scope is described. Some Agreements follow the philosophy of Reg. 883/2004 and list the **risks** which should be covered (e.g. sickness, maternity, old age, invalidity etc). Therefore – as a first reaction - it could be assumed that the material scope of these Agreements is more or less the same as under Reg. 883/2004 (with regard to the risks enumerated in the Agreement)[33]. It is not astonishing that multilateral instruments[34] also follow that approach of listing risks. This is necessary to ensure that all Contracting Countries to that multilateral Agreement include the same type of benefits in the co-ordination, irrespective of their national systems. If these multilateral Agreements chose another approach, e.g. defining the material scope by referring to "pension insurance", this would endanger this harmonized approach as every Contracting Country could interpret such a notion from the view of its national tradition (e.g. retirement schemes of civil servants, minimum pension schemes could be outside the scope of the national notion of "pension insurance").

Nevertheless, it is not certain that the bilateral or multilateral Agreements which **use the same terminology as Reg. 883/2004 really cover the same benefits** as that Regulation. As an example, reference could be made to Agreements including benefits in the case of "sickness" or "family benefits" where it could be assumed that the Contracting Parties did not intend to also include long-term care benefits[35] or maintenance advances[36] by these notions. Therefore it could be argued that despite using the same notions, the bilateral or multilateral Agreements only cover the "core" benefits of social security as it has been understood by the Contracting Countries at the time of concluding the Agreement.

- All these problems do not occur when another approach is followed for the description of the material scope. The majority of the bilateral Agreements analysed define the material scope by references to **specific, clearly defined benefits** or to **specific national laws.** This

[32] The draft on portability of occupational pension rights may also have to be waited for at Community level.

[33] E.g. Art. 2 of the France-Uruguay Agreement.

[34] E.g. Art. 2 (1) of the Council of Europe's European Agreement.

[35] Under Reg. 1408/71 the ECJ has decided that long-term care benefits are part of the benefits against the risk of sickness – 5.3.1998, C-160/96, Molenaar.

[36] Under Reg. 1408/71 the ECJ has decided that maintenance allowances are part of the family benefits – 15.3.2001, C-85/99, Offermanns. In this context it has to be mentioned that **birth grants** could sometimes be explicitly excluded from the notion of "family allowances" – See e.g. Art. 1 (w) of the Council of Europe's European Agreement, but there is no such possibility for exempting **maintenance allowances** which are excluded under Reg. 883/2004 (Art. 1 (z)).

approach usually necessitates a two fold material scope for each of the Contracting Countries. A further analyse of these types of Agreements shows the possibility for further differentiations:

- It could signify a rather broad approach, like for example "the legislation concerning social security pensions"[37], which could cover several benefits under several laws, but covering only social security pensions (not any other benefits) as defined by national laws or systematic.

- If the material scope clearly only refers to a special law then it is already much narrower, for instance a reference to the "Law on State Social Insurance Pensions"[38] covers only benefits (but not necessarily only pensions) under that specific law.

- The most precise definition is a reference not only to the relevant law, but also to the concrete benefit, for example "the Social Security Act related to pension benefits (old age pension, invalidity pension, widow and widower's pension and orphan pension)"[39].

These ways to define the material scope all have their pros and cons. The citing of only the risks has the advantage that all Contracting Countries have to include all the comparable benefits, but this approach also requires an answer to the question of what types of benefits have to be excluded. If such a broad definition is discussed in the **European context** then it has to be assumed that all the extensive interpretation given by the ECJ also has to be incorporated or explicitly excluded – an issue which could be very difficult to explain to the Third Country. If a more restrictive approach is favoured (clear listing of the relevant legislation or benefits of each Contracting Country) which usually would better adapt the material scope to the national legislation of each of the Contracting Countries (without any unintended surprises) then this could be important for the sake of clarity. However this approach would have as a disadvantage the fact that it would be very difficult to safeguard that all Contracting Countries always cover all comparable benefits. Furthermore, such a solution would only be understandable with detailed knowledge of the relevant national situation. Therefore in an attempt to build a European text, the first option **(citing only the risks as under Reg. 883/2004) should be favoured**[40].

4.4. All schemes or only schemes for special groups of insured persons?

Another question which may be important in connection with the material scope is if national legislation provides **several schemes for different groups of insured** persons, are all these different schemes included or are only a part of these schemes included? Very often there is no restriction which would have as a consequence that all schemes are covered. This is very comparable to the material scope of Reg. 883/2004 where all legal schemes are today included and the previous possibility for exemptions for special schemes for the self-employed (e.g. liberal professions)[41] is no longer provided. Therefore if a bilateral Agreement covers the

[37] Art. II (1) (b)(ii) of the Hungary-Canada Agreement.

[38] Art. 2 (1) (a) (i) of the Lithuanian-Canada Agreement, an extensive list of various laws could also be found in Art. 2 (b) of the UK-USA Agreement.

[39] Art. 2 (1) (b) (i) of the Slovakia-Korea Agreement.

[40] If the material scope is restricted to pensions based on legislation under the European approach, such an approach would not be dangerous as there are no real problems with that notion under Reg. 883/2004. The moment other risks such as for example sickness benefits or family benefits are included, more caution will be needed.

[41] Art. 1 (j) in connection with Annex II Part I of Reg. 1408/71.

whole social security scheme but does not exclude these special schemes, it may be taken that they are covered[42].

Contrary to that broad approach, some Agreements **explicitly exclude some groups of persons from the material scope**, for instance "public, civil and military officials"[43], or the special scheme for the notaries,[44] while other Agreements refer only to workers[45] and thus exclude schemes for self-employed persons as a whole from the material scope[46]. Some other Agreements remain quite vague as to the question of whether some special schemes are excluded[47]. Nevertheless, one must be careful here again. If the material scope is only defined by reference to specific benefits or specific national laws, then this could lead to the same exclusion of special occupational groups if the special laws that are applicable to them or the special benefits provided for them are not mentioned. Once again, a detailed knowledge of the national situation is needed in order to understand the whole range of the material scope of all of the Agreements analysed.

Although in the past **some special statutory schemes have generally also been excluded** (civil servants, special schemes for self-employed) under Reg. 1408/71, **these** exclusions have been abolished at European level. Nevertheless, bilateral Agreements still continue to exclude some of these categories in various technical ways[48]. Should a **future European approach** therefore also exclude such special schemes? Taking into account the different nature that some of these schemes still have under a national perspective, I would like to suggest not to include special schemes for civil servants[49] and for the self-employed excluded under Reg. 1408/71 in the first step, but possibly allow countries who wish to do so to include them on a voluntary basis. In such a case the general rules would also become applicable to these special schemes[50].

Another issue which I would also like to deal with under the Chapter concerning the material scope, is the question of whether "all schemes" really signifies that all possible national groups of insured persons are covered (including the **non-active persons**, irrespective of whether they are covered by the general scheme or by a special scheme, in the same way as for instance Reg. 883/2004 has extended its material and personal scope) or if only the **gainfully active persons and their dependants** are covered by the Agreements. Taking into account the content of the Agreements and some explicit restrictions,[51] I would assume that usually purely non-active persons are not covered. This might not be that evident from the text, in particular Agreements which cover only pensions do not have to say this explicitly, as many national pension legislations only cover active persons. Therefore as a first step I would

[42] E.g. Art. 2 (1) (A) of the Spain-Tunisia Agreement - although Spain has excluded special self employed persons under Reg. 1408/71.

[43] Art. 2 (1) (A) of the Spain-Peru Agreement.

[44] Art. 2 (1) (b) (i) of the Austria-Korea Agreement.

[45] Although here caution is also necessary, because sometimes the notion of "worker" also covers the self-employed – e.g. Art. 1 (e) of the Italy-Venezuela Agreement.

[46] E.g. Art. 3 of the France-Congo Agreement.

[47] E.g. Art. 4 (1) (a) (i) of the Portugal-Ukraine Agreement, where the social security schemes "applicable to most employed and self-employed persons" are covered. However this may only be an issue of translation.

[48] Either through explicit exclusion, as in the examples listed above, or by not including the special legislation in the list of enumerated laws.

[49] Before the inclusion in that Regulation.

[50] This approach would also avoid the creation of over-complex rules – taking into account for example special rules for special schemes for civil servants which had to be maintained in Reg. 883/2004 (e.g. Art. 60).

[51] See e.g. Greece-USA Agreement (Art. 2 (1) (b)); France-Congo Agreement (Art. 3 (1) (a)).

recommend to similarly only include schemes for the active persons and their family members or survivors for any **future activities at European** level.

4.5. Special non-contributory benefits

Finally in the context of the material scope, the issue of special non-contributory benefits[52] should also be further analysed. Under Reg. 883/2004, these benefits are covered by the material scope but a special co-ordination[53] measure is also possible for them. Taking into account the lengthy discussions and **political importance** of the question of which benefits fall into this category, an analysis of this issue in the bilateral Agreements may also prove to be interesting. The question we have to examine is the following: do Member States also have the same policy of excluding these benefits from export in their bilateral Agreements or not?

Firstly, it must be mentioned that the approach of the Member States (and also the Third Country partner to the Agreements) is again different. An overview could be gained from **Annex 1 Table 2 Column "Annex X benefits**" where special rules for special non-contributory benefits are listed. With one exemption (Romania), all Member States which have provided examples of their bilateral Agreements have special non contributory benefits in cash included in Annex X of Reg. 883/2004 and thus limit their export. Under the bilateral Agreements, only 6 Member States have excluded some special non-contributory schemes from either the scope of the Agreement[54] or explicitly from export[55]. Some among these 6 Member States have not provided for such a special rule in all the Agreements that have been made available[56]. Does this mean that these benefits are sometimes exported to Third Countries but not to other Member States?

I think the answer will be "no". To begin with, it might be that these non-contributory benefits listed by some Member States in Annex X of Reg. 883/2004 are **covered by a special law**, which is not covered by the material scope of the bilateral Agreement[57]. Secondly, it could be that due to the national system, these special non contributory benefits **are regarded as social assistance** and thus an Agreement covering social security or pension insurance – from the national perspective – cannot cover these special schemes (this might be a good example of a divergence between the interpretation of Reg. 883/2004 and the bilateral Agreements[58]). Other solutions are that **benefits which are not exportable under the relevant legislation** of a Member State are also declared as non-exportable to the territory of the Third Country concerned in a general way without listing them explicitly[59].

It has to be mentioned that under the **multilateral instruments,** special benefits are also exempted from export. A comparison with Reg. 883/2004 makes it evident that the conditions

[52] Under Reg. 883/2004: "special non-contributory benefits in cash"(Art. 70).

[53] Title III Chapter 9.

[54] E.g., Section 3 (4) of the Ibero-American Agreement.

[55] A clear identity is achieved e.g. in the Agreements concluded by Austria (Art. 5 (2) of the Austria-Korea Agreement and Art. 5 (2) of the Austrian Model Agreement) where the same benefit (compensatory benefit) as included in Annex X of Reg. 883/2004 is also excluded from export under the bilateral Agreements.

[56] Although the Ibero-American Agreement includes such a provision, the Agreements provided by Spain do not contain such a specific provision.

[57] So it seems that the Danish legislation on housing allowances mentioned under Annex X is not covered for example, by the laws mentioned in the material scope of the Denmark-Japan Agreement (Art. 2 (1) (b).

[58] E.g. the Greece-Canada Agreement which generally covers social security (Art. II (1) (b) but where no exemption is provided under the export rule although Annex X of Reg. 883/2004, exempts from export special benefits for aged persons in relation to Greece.

[59] E.g. Art. 5 (12) of the Slovenia-Australia Agreement – comparing the Slovenian entry in Annex X of Reg. 883/2004. It seems that under this bilateral provision more benefits are excluded than under Reg. 883/2004.

for excluding a benefit from export are not so strict[60]. On the other hand, such multilateral instruments may contain additional clarification on what "non –contributory" means, excluding benefits which depend on a qualifying period of occupational activity[61]: this is not that explicit under Reg. 883/04. The Council of Europe's European Agreement takes another approach[62] which is worthwhile mentioning as this approach contains a list of categories of benefits which could be excluded from export, which differs from the criteria under Reg. 883/2004:

- Special non-contributory benefits granted to invalids who are unable to earn a living;
- Special non-contributory benefits granted to persons not entitled to normal benefits;
- Benefits granted under transitional arrangements;
- Special benefits granted as assistance or in case of need.

Although there are not many explicit provisions on special non-contributory benefits in the bilateral Agreements, for a **future approach at the European level** there should be the possibility for such an exemption. This is also necessary because Third Countries usually follow the same principles, which has not been analysed in more detail here[63]. At least the benefits which could be listed in Annex X of Reg. 883/2004 should be included in the possible benefits which are not exportable. But it should also be examined if that list could be extended to other benefits which are more linked to the situation in the relevant Contracting Country, and which have not been exportable until now under the Agreements concluded by the relevant Member State[64].

4.6. Summary in the form of recommendations for the material scope under a European approach

Material scope

- It is recommended from a systematic point of view to include a list of abstract risks (like under Reg. 883/2004) and not to list the different benefits covered or the relevant national legislation.
- All schemes for employed and self-employed persons should be included (with the exception of special schemes for civil servants and some special schemes for the self-employed – countries could opt for the inclusion of these excluded schemes).
- The schemes covered (or the personal scope) should be restricted to active persons and their family members (exclusion of purely inactive).
- As a first step, only pensions (risk: old age, invalidity and death) should be covered. If the approach concerns European countries [or other countries with a level of

[60] The Model Agreement of the Council of Europe generally opens the possibility to exclude "special benefits granted as assistance or in case of need" (Art. 5 (2)) – thus from a theoretical point of view also contributory benefits fulfilling these special conditions could be exempted.

[61] Art. 1 (n) of ILO Convention No. 157 and Art. 1 (s) of Annex I to Recommendation No. 167.

[62] Art. 11 (3) – the benefits which fall under this list have to be inserted by the countries concerned into Annex VI of this European Convention.

[63] See e.g. Bosnia and Herzegovina in its Agreement with Hungary (minimum pension – Art. 5 (3)).

[64] Thus it seems that Slovenia excludes more benefits under its bilateral Agreements than under Reg. 883/2004 (see e.g. Art. 14 of the Slovenia-Canada Agreement).

integration that is comparable to that of the Member States], as a second step, the other branches of social security could also be included. In this case, a more flexible approach will be necessary, only giving Member States an option to choose the other branches and to exclude special benefits such as long-term care benefits.

- Special non-contributory benefits should be included, but there should be a possibility to exclude these benefits from export. It might be necessary to take a more flexible and more extensive approach on the question of which benefits should be regarded as non-contributory.
- In addition provisions on applicable legislation should be included.
- For Countries which have a common scheme for coverage and collecting contributions for all branches of social security, the provisions on applicable legislation should be extended to the other branches of social security which are dealt with together under the national scheme.

5. Personal scope and equal treatment

Under this Chapter we will analyse the question of which persons the Agreements apply to and if – or under what conditions – these persons are treated equally. In addition the integration of the so called "Gottardo-principle" into the Agreements will be examined (all these aspects of the personal scope can bee seen in **Annex 1 Table 3**). A most important issue is if the Agreements are restricted to the relevant **nationals** or if they are applicable to all persons who are covered by the schemes included in the material scope, irrespective of their nationality. Although from a strictly technical point of view restrictions of an Agreement, for example only to **workers**[65], are usually also regarded as restrictions of the personal scope[66], this question has already been dealt with under Chapter 4.4. in connection with the material scope, as it does not matter in practice if such a restriction is done explicitly in the personal scope or if the same effect is achieved by citing only the laws applicable to workers.

Another issue which should be clarified from the beginning is that generally speaking, the personal scope covers firstly the persons who are or have been subject to the legislation of the Contracting Countries (as an insured person in traditional insurance based schemes or as a "covered" person in schemes based on residence), and secondly **persons who derive rights** from the former (usually family members for derived rights in the field of sickness and maternity, for additional benefits or increases with regard to nearly all risks and for survivor benefits - pensions, benefits if the death occurred due to occupational accidents and industrial diseases, death grants). Even if the insured/covered persons are restricted to the nationals of the two Contracting Countries, their family members or survivors are usually covered irrespective of their nationality[67]. Nevertheless, the additional special rule which is included under Reg. 883/2004, namely that survivors who have the nationality of a Member State are also covered if the diseased insured person was a Third Country national[68], is not included in any of the available bilateral Agreements[69].

[65] E.g. Art. 3 of the Spain-Peru Agreement.

[66] E.g. Art. 2 of Reg. 1408/71.

[67] As it is also the case under Reg. 883/2004 (Art. 2 (1)).

[68] Art. 2 (2).

[69] Nevertheless this extension of the personal scope to survivors of Third Country nationals is included for example, in the Council of Europe's European Convention (Art. 4 (1) (b)).

5.1. Coverage of nationals or of all persons insured or covered?

From the 38 bilateral Agreements examined[70], the **overwhelming majority includes all persons insured/covered** irrespective of their nationality; only **5 are restricted to nationals** (which corresponds to only 13 %). Although this question of clearly defining the personal should be an easy task, there are some Agreements where the separation between nationals and all persons seems to be blurred[71]. In contrast to that – as also in Reg. 883/2004[72], the Council of Europe's European Convention is restricted to the nationals of one of the Contracting Countries[73], while the Council of Europe's Model Agreement contains two possibilities, one of which restricts the personal scope to the nationals covered, and one which is open to all insured/covered persons[74]. Furthermore, the ILO instruments provide for a module to extend existing bilateral Agreements between Contracting Countries (which are restricted in the personal scope) to the nationals of all Contracting Countries of those instruments[75].

If we take into account all the Agreements concluded by the Member States (not only those made available for this study), the picture of the distribution of non restricted and restricted Agreements looks different. For example, in the Agreements of 16 Member States analysed by the Spanish delegation, 72 Agreements out of 204 were restricted to the relevant nationals[76]. We cannot deduce from the data available if this difference is due to the fact that for the purpose of this study only more recent Agreements have been made available which more often are not restricted, if this is the case because Agreements with Third Countries in relation to which also an English text is available usually are not restricted to nationals or for any other reason.

One could also ask the question if Member States who have concluded Agreements restricted to nationals have done so following their national policy or whether this is the consequence of the principles of the Third Country concerned. As the 5 Member States have all also concluded non-restrictive Agreements with other Third Countries, it seems that it is clearly the **policy of the Third Countries concerned** (Chile, Congo, Tunisia and Ukraine) to only conclude such restricted Agreements. However, as some of these countries have also concluded non-restricted Agreements in exceptional cases it seems that – under some circumstances which unfortunately cannot be deducted from the study – these Third Countries are prepared to conclude non-restricted Agreements[77]. Therefore it could be assumed that a restricted Agreement may very often be the consequence of both Contracting Countries not insisting on an unrestricted personal scope. As we have to take it for granted that some of the Third Countries will also prefer to only conclude Agreements that are restricted to the relevant nationals in the future[78], this option should also be possible under any European approach.

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[70] The torso of the new Germany Model Agreement also contained the provision of the personal scope.

[71] The Germany-Brazil Agreement (Art. 3) where the nationals are directly covered and the persons who derive rights form them are indirectly covered, but in addition Third Country nationals are also explicitly mentioned who are not already directly or indirectly covered. Therefore I have included this Agreement in the number of non restricted Agreements although later on, especially in relation to the Gottardo-clause, we must return to this Agreement.

[72] Art. 2 (2).

[73] Art. 4 (1).

[74] Art. 3.

[75] Annex II to ILO Recommendation No. 167.

[76] Note AC 192/10 REV.

[77] Due to the Spanish note AC 192/10 REV e.g. in relation to Tunisia, 6 restricted and 2 non-restricted agreements have been concluded, and, in relation to Chile, 4 restricted and 5 non-restricted Agreements have been concluded.

[78] I would assume, nevertheless, that Third Countries such as for example, Algeria which have only concluded 2 Agreements with Member States which are both restricted to the relevant nationals, would also be willing to conclude a non restricted Agreement as the neighbours, for example, Morocco or Tunisia also agreed to do so.

If an Agreement is restricted to nationals, then usually **stateless persons and refugees** residing in the territory of the Contracting Countries as well as their family members and survivors are also covered[79]. In a similar way as under the personal scope of Reg. 883/2004, a corresponding extension is also provided towards this group of persons under the personal scope of the Council of Europe's European Agreement[80].

Taking into account that the great majority of Agreements include an unrestricted personal scope and the fact that Member States which have concluded Agreements with Third Countries which are restricted in the personal scope have all also concluded non restrictive Agreements with other Third Countries, the **European approach** should clearly be a **personal scope that covers all persons insured/covered** irrespective of their nationality and their family members and dependents. Nevertheless it could be expected that some of the Third Countries confronted with the European approach would insist on a restricted personal scope. In this case, the European approach could also be restricted to nationals, refugees and stateless persons as well as their family members and survivors of those Third Countries if an Agreement would not otherwise be possible.

5.2. Equal Treatment

With regard to equal treatment, the Agreements differ more than with regard to the personal scope (see also **Annex 1 Table 3 Column "Restrictions to nationals**"). Many Agreements grant equal treatment to all persons covered by the Agreement, thus in the case of Agreements which are not restricted to the nationals concerned, **all persons which fall under the personal scope of the Agreement** can also profit from equal treatment, irrespective of their nationality[81]. Nevertheless, out of the 33 Agreements which are not restricted to the nationality in the personal scope, 8 only grant equal treatment **to the nationals** of the two Contracting Countries[82]. This restricted approach could be based on the position – also encountered during the negotiations in Council on the Migration Directives (e.g. the blue-card Directive or the single-permit Directive) - that equal treatment always should be a matter between the Member State concerned and the Third Country of which the person concerned is a national. Therefore, Member States who chose this way are against equal treatment without safeguarding equal treatment for their nationals in the Third Country concerned[83]. On the other hand, there is no doubt that obligations exist under international law (e.g. the European Human Rights Convention) which also safeguard equal treatment for all, without reciprocity. However, it is outside of the scope of this study to reiterate all the discussions which have taken place around this topic in the past (e.g. also in relation to the new Third Country nationals Regulation extending Reg. 883/2004).

This leads to the complicated question of what should be done under the **European approach**[84]. One could assume that if pensions alone are covered by the European approach, it should not cause so many problems (in the past, other branches of social security, in particular family benefits, have proven to be a problem). So in case of a restricted

[79] E.g. Art. 2 of the Portugal-Ukraine Agreement.

[80] Art. 4 (1).

[81] E.g. Art. 4 of the Belgium-India Agreement, although a restriction is also provided here, namely to persons who are resident in the territories of both Contracting Countries.

[82] E.g. Art. 4 of the Ireland-Korea Agreement, a residence in the other Contracting Country is additionally required.

[83] To make it more concrete: Why should Austria give equal treatment to a Mexican national under the bilateral Austria-Serbia Agreement if Mexico does not treat Austrians in the same way as Mexicans (there is no Austria-Mexico Agreement for the time being)?

[84] This question is especially for me difficult to answer as the Austrian position has always been that irrespective of the obligations which undoubtedly exist under other international instruments (which have to be transposed into the national legislation), equal treatment should always only cover the nationals of the Contracting Countries.

material scope, an **unrestricted equal treatment provision should be proposed**. Nevertheless this is a sensitive area and therefore the possible exemptions mentioned under the following Chapters should also be considered.

5.3. Restrictions to nationals outside the equal treatment provision

Setting aside the general application of the equal treatment provision itself, there are also other special aspects of national legislation where the personal scope has been restricted under the bilateral Agreements (particularly through the exclusion of these aspects from equal treatment and thus **restricting them to the own nationals**). The Agreements analysed show the following examples (see also **Annex 1 Table 3 Column "Restrictions to nationals")**:

- **Representation of the insured persons in the administration and adjudication of social security**: Some bilateral Agreements[85] (and also the Council of Europe's European Convention[86] and the Council of Europe's Model Agreement[87]) contain such restrictions of the equal treatment rule. This exemption builds on a national legislation under which such representation is restricted to countries' own nationals and was also provided for in Reg. 1408/71[88]. Although one could argue that such a limitation under national legislation is dated and that Reg. 883/2004 no longer contains such a restriction, this does not necessarily mean that equal treatment now applies to all these aspects. As Reg. 883/2004 but also the bilateral Agreements cover only the branches of social security enumerated in the relevant material scopes (which includes without doubt, all questions of coverage and benefit entitlements, but not all the other organisational aspects which might be covered by the relevant national laws) one could still argue that the equal treatment obligations under these instruments do not cover these questions of representation. Therefore such a **restriction of the equal treatment provision would also seem not to be necessary** in the **European approach**.

- Another exemption concerns the "**sharing of insurance burdens**"[89] contained in some bilateral Agreements of Contracting Countries with common links in the past. These rules usually contain special rules for the nationals of the relevant Contracting Countries[90] and refer to situations in the past. These special provisions of bilateral Agreements between Member States have been listed in Annex II of Reg. 883/2004 and have also been restricted to the relevant nationals[91]. It might be questioned if such a restriction is really necessary under a European approach, as such an exclusion is neither in Reg. 883/2004 (for clauses on the sharing of insurance burdens in bilateral Agreements with Third Countries) nor for example in the Council of Europe's European Convention. On the other hand, some Agreements already explicitly exclude Agreements with a Third Country from the material scope[92], so in total there are some Member States which exclude the application of the whole Agreement (including the equal treatment provision) in relation

[85] E.g. No. 5 (b) of the Final Protocol to the Germany-Brazil Agreement.

[86] Art. 8 (6).

[87] Art. 4 (2).

[88] Art. 3 (2) but restricted to the representation in the administration of the institutions and not in adjudication.

[89] E.g. No. 5 (a) of the Final Protocol to the German-Brazil Agreement.

[90] E.g. being an Austrian national and having resided on the territory of Austria on 1.1.1956 for the granting of Austrian benefits for Yugoslav periods before that date – Art. 41 (1) of the Austria-Croatia Agreement which has not been made available by Austria but which has been analysed in detail during the discussions in the Administrative Commission concerning the Accession of Croatia.

[91] E.g. in relation between Bulgaria and Austria.

[92] E.g. Art. 2 (3) of the Ireland-Korea Agreement which excludes bilateral Agreements with Third Countries but also Reg. 883/2004 from the legislation covered – see further in **Annex 1 Table 5 Column "Periods in TC".**

to bilateral Agreements with other Contracting Countries or even in relation to Reg. 883/2004. Therefore it could be argued that such a **restriction might be needed**. But as this concerns only a few Member States, it should be left for an Annex. Further aspects of bilateral relations with other Third Countries or even Member States will be dealt with under Chapter 7.2.2.

- One Agreement restricts the **export provision** only to the nationals (and persons deriving rights from these persons)[93]. As it seems that this is not shared by many Member States, such a restriction should not be included in any future European approach[94].

- One Member State also excludes national provisions concerning the **personnel of diplomatic or consular representations of that Member State in Third Countries** from the application of the equal treatment provision[95]. This special provision concerns national legislation which grants insurance coverage for example, only to their own nationals working in an embassy in a Third Country (e.g. Mexico) and via this exclusion the nationals of the other Contracting Countries should not be brought into the same situation (e.g. Korean nationals under the equal treatment provision of the bilateral Agreement concluded by that Member State with Korea). As one could argue that such national provisions are not excluded from the equal treatment provision under Reg. 883/2004 and that no other Member State has such a provision in its bilateral Agreements, it is **not recommended to provide for such an exemption in the European approach**[96].

- Another Member State restricts the **application of all the provisions on pensions** to only the nationals of the other Contracting Country[97]. Thus the whole determination of pensions is different depending on nationality. **It is not recommended to follow this approach**.

- One problem which we already encountered during the preparation of Annex XI of Reg. 883/2004 is the legislation of some Member States which gives special entitlement **to voluntary insurance for its own nationals who reside world-wide**. The bilateral Agreements concluded by these Member States also include an exemption from equal treatment for these voluntary insurance schemes[98]. As such special provisions are also included in Annex XI of Reg. 883/2004 for the Member States in question[99], **a special rule for the voluntary insurance of the own nationals should be maintained in a European approach**. However, this provision could also be left for an Annex entry of these Member States.

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[93] Art. 5 (1) of the Denmark-USA Agreement.

[94] It could also be argued that such a restriction excluding other persons who might have acquired for example, pension rights in the relevant Contracting Country, is contrary to other principles – at least of the EU (e.g. equal treatment under Reg. 883/2004); with regard to **Third Country nationals** who also have a career in another Member State, the Commission also deducts such an obligation from **recital No 13 of the Regulation replacing Reg. 859/2003** (see the paper "The external dimension of EU social security coordination rules" presented at the Workshop on 6.10.2010). But as far as I can remember, this recital was introduced in order to allow the calculation of a pension under Title III Chapters 4 and 5 of Reg. 883/2004 even when the person concerned already resides in a Third Country when claiming a pension (and thus can no longer fulfil the condition of actual legal residence in a Member State) and not in order to guarantee export – but it is true that this could be disputed.

[95] Austria – e.g. Art. 4 (3) (c) of the Model Agreement.

[96] Whatever effect this non-exclusion might have, it could also be argued that the situation of the personnel at Diplomatic or Consular missions in a Third Country are not covered by the material scope e.g. of Reg. 883/2004. If this question is considered to be relevant, then further examination is needed.

[97] Denmark – e.g. Art. 8 of the Denmark-USA Agreement.

[98] E.g. Art. 6 (2) of the France-Congo Agreement (although it is not so transparent, nevertheless in Art. 2 (1) of the France-Uruguay Agreement, this voluntary insurance is totally excluded from the material scope) or No. 5 (c) and (d) of the Final Protocol to the German-Brazil Agreement, which gives persons covered by Reg. 883/2004 the same legal situation as under that Regulation and contains a requirement for Brazilian nationals to have accrued a minimum period of 60 months of insurance in Germany before such a right can be opened.

[99] E.g. Annex XI Germany No. 4 or France No. 1.

- Another interesting and somewhat exotic approach is contained in the Council of Europe's European Convention[100]. Restrictions of equal treatment could be made in relation to **non-contributory benefits** for persons who have not lived in the relevant Contracting Country for long enough (e.g. 10 years in case of an old age benefit). In the case that these conditions are not met, a reduced benefit should be payable (in the cases of invalidity or survivors benefits, the benefit should be paid in proportion to the ratio of the periods of residence actually accrued between the age of 16 and the contingency to 2/3 of the full period between these dates, in the case of old age benefits, the benefit should be paid in relation to the periods of residence actually accrued between the age of 16 and the retirement age and 30). In this light, the provision only grants these benefits for the nationals of the other Contracting Countries in correspondence to the periods of residence actually accrued. Although this is a model which we will encounter in some of the bilateral Agreements concerning the calculation of the benefits (see Point 7.3.4.), **it is not recommended to incorporate these elements into the European approach** as neither the bilateral Agreements nor Reg. 883/2004 include such a special provision.

5.4. Equal treatment concerning the export to Third Countries

An **overwhelming majority of the Agreements** analysed[101] contain an explicit "extension" of the equal treatment provision to national provisions concerning the export of benefits to Third Countries[102]. From a theoretical point of view, this provision helps in cases where a national legislation safeguards export outside of the territory of the Contracting Country concerned only for its own nationals. Therefore it could be assumed that all Member States have such a restriction of the national legislation. However, this is not necessarily the case. Some Member States do not provide such restrictions based on nationality under the national legislation but include these provisions as part of the international standard provisions of social security Agreements[103]. Nevertheless, there is one type of provision which slightly deviates in relation to this clear principle:

Some Member States do not safeguard the payment of benefits to a Third Country by extending the entitlement of its own nationals through equal treatment but also **generally granting an entitlement to benefits** under the relevant Agreement if the beneficiary resides in a Third Country[104]. Such a general export obligation seems strange as it might give better rights to persons who are entitled to a benefit under the relevant Agreement than to those who are entitled only under the national legislation[105].

Naturally it could be questioned why such an extension of the equal treatment provision is necessary at all as equal treatment under the bilateral Agreements is usually not restricted to the nationals who are resident in the two Contracting Countries[106], and therefore the general rule should automatically also cover national legislation concerning export to Third Countries.

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[100] Art. 8 (2) and (3).

[101] Only the Agreements concluded by Denmark and the UK do not contain such a provision.

[102] E.g. Art. 5 (2) of the Belgium-India Agreement.

[103] E.g. Austria: under the Austrian legislation there are no specific export rules only for Austrian nationals. Nevertheless the Agreements contain such a provision. See e.g. Art. 4 (2) of the Model Agreement.

[104] E.g. Art. V (2) of the Cyprus-Canada Agreement.

[105] If, for example, there is no entitlement (also for the country's own nationals) under national legislation for persons residing in a Third Country, then such a provision would lead to a situation in which any person who has only worked in the Contracting Country concerned would not be entitled but the moment there is an entitlement to a benefit under an Agreement with another Contracting Country, such export would have to be granted. There seems to be no connection between the two situations.

[106] However, there are also Agreements which contain this restriction to the nationals. See for example, Art. 4 of the France-India Agreement.

But as this provision is certainly useful, it would not be problematic to also re-iterate the equal treatment principle in this respect.

Taking into account the fact that such a clause extending equal treatment to rules concerning the export of benefits to persons residing in a Third Country fits with the international standard of all the Agreements concluded by the Member States **it should also be included in the European Approach**. Nevertheless, an obligation to export, irrespective of the relevant legislation for countries' own nationals, should not be included.

5.5. The Gottardo principle

Before beginning, it may be helpful to make a short resume of the case[107]. The Italy-Switzerland Agreement is restricted in its personal scope to Italian and Swiss nationals. Therefore a French national cannot, due to the wording of the Agreement, benefit from the aggregation of Italian and Swiss periods for the purposes of qualifying for the entitlement to a pension. The ECJ concluded that such a rule is discriminatory and thus **in contradiction to Art. 39 EC** (now Art. 45 TFEU) and therefore French nationals should also benefit from these provisions. National legislation which contradicts the discrimination principle usually must not be applied. Therefore the discriminated persons can automatically benefit from the advantages provided for the group of persons with which the comparison has to be made[108]. However in the case of bilateral Agreements this is not such an easy matter as the co-operation of the Third Country concerned is usually also necessary (e.g. it has to communicate periods of insurance completed in that country also for persons who are not covered by the personal scope of the Agreement). Thus the principles of the TFEU as a rule cannot be implemented correctly unless there is a specific provision ("Gottardo-clause") in the bilateral Agreement which tries to give all persons covered by free movement under the TFEU the same rights in the bilateral relations as the nationals of the Member State concluding the Agreement with the Third Country (this also includes obligations for the Third Country). Personally, I do not think that a simple provision stating that the obligations of the Member State under European law should not be affected by the bilateral Agreement[109] is as sufficient as an explicit Gottardo-clause as it does not contain any obligations for the Third Country. Therefore the Administrative Commission also recommends the inclusion of such special clauses[110].

Which Agreements should contain such a Gottardo-clause? On a first reading, this obligation concerns **only Agreements restricted to the relevant nationals** as under non restricted Agreements which apply to all persons insured in the two Contracting Countries, the nationals of any other Member State are already covered and thus can benefit from, for example, the aggregation of periods under that Agreement. Thus the obligation under the Gottardo ruling is already fulfilled. If this assumption is correct, then the analysis of the Agreements and the information available demonstrates some quite astonishing results:

From the Agreements made available only 1 (!) has an explicit "Gottardo-clause"[111]. A rough translation[112] of that clause reads: "In relation to [Member State concerned] this Agreement shall also apply to nationals of a country to which Reg. 1408/71 or 883/2004 are applicable."

[107] ECJ 15.1.2002, C-55/00, Gottardo.

[108] With regard to equal treatment of the sexes, see e.g. ECJ 28.9.1994, C-200/91, Coloroll.

[109] See e.g. Art. 40 of the Hungary-Bosnia and Herzegovina Agreement – anyhow in this Agreement a Gottardo-clause is not needed as this Agreement is not restricted to the nationals but rather covers all insured persons.

[110] Recommendation No.1.

[111] No. 4 of the Final Protocol to the German-Brazil Agreement.

[112] The original has been made available only in German.

The analysis of the Spanish delegation of all the Agreements of the Member States does not reveal many "Gottardo-clauses"[113]. Many of the Agreements concerned have not yet entered into force. Thus it may be said that **not many of the bilateral Agreements restricted in the personal scope** concluded by Member States **are extended to the nationals of the other Member States** in accordance with the "Gottardo-principle", for example concerning the aggregation of periods. One reason could be that the relevant bilateral Agreements are too old in that they were concluded before the decision was made in the Gottardo-case.

But there is also another interesting issue. From the Agreements which include a "Gottardo-clause", not all are restricted to the nationals of the two Contracting Countries[114]. Thus the purpose of inserting this clause into these Agreements is really questionable as in any case, the aggregation applies to all covered persons and not only to nationals and so the Gottardo-case could not happen under these Agreements). Due to the available information, the **real Gottardo-problem has not been solved in a satisfactory legal way** (i.e. in an Agreement which is restricted to the relevant nationals). It might be that an explicit "Gottardo-clause" in Agreements which are not restricted to the nationals of the relevant Contracting Countries might have a meaning for some cases, but it does not have a meaning for the issue of aggregation as dealt under the Gottardo case. This assumption was rectified in an interview[115] where it was mentioned that the aggregation of the Agreement concerned applies to all persons covered (as the Agreement is not restricted to the relevant nationals) but that via this clause other provisions of the Agreement for example, equal treatment which is still restricted to the relevant nationals, are also opened to the nationals of the other Member States. Thus these "Gottardo-clauses" have a much more favourable effect than the ECJ declared them to have in the Gottardo case itself.

In any case, in relation to **Agreements restricted to the nationals of the two Contracting Countries involved,** a lot could still be done. In this context it must also be mentioned that the lack of such clauses in a bilateral Agreement is not necessarily the "fault" of the Member State concerned. In many cases the Third Country concerned is against such a clause as it is afraid of an additional administrative burden or, as explained during the workshop on 6.10.2010[116], complains that its nationals are not treated equally by the other Member States. One solution to overcome this unpleasant situation has been developed by Luxembourg through the annexing of a unilateral "Gottardo-Statement" to the bilateral Agreement restricted to the relevant nationals[117].

However on the other hand, the "Gottardo-principle" should not be overestimated! It may be that **in many cases the results** (taking account periods from the Third Country without a legal obligation) **could also be achieved without a clear legal base** (for example if there is

[113] AC 192/10 REV: new Agreements of **Germany** with India, Russia and Ukraine (there is also the intention to include such a clause with Québec); all Agreements of **Greece** (this could not be verified as firstly the Agreement made available by Greece with the USA is not included in the list sent to Spain, and secondly, in the Agreement with Canada (which is mentioned in AC 192/10 REV) of which the full text was made available, no such clause could be found. Thus perhaps the unrestricted personal scope can be understood as acting like a "traditional" Gottardo-clause, which is correct in principle but reveals the need for a definition that must be understood by such a clause); the Agreements of **Luxembourg** with Morocco (there is the intention to also include such a clause with Tunisia); **Norway** with Korea (there is the intention to also include such a clause with India) and **Portugal** with Mozambique.

[114] From the Agreements listed in the previous footnote, all Agreements concluded by Germany, Greece, Luxembourg, Norway and Portugal indicated as containing a "Gottardo-clause" are not restricted in their personal scope (see also the note of Spain AC 192/10 REV).

[115] With the German expert concerning the explicit "Gottardo-clause" in the Germany-Brazil Agreement.

[116] Intervention of the Luxembourg expert.

[117] Such statements could be found in the Luxembourg-Tunisia and Luxembourg-Morocco Agreements and are worded in the following way: « Le Gouvernement luxembourgeois est conscient de ses obligations communautaires issues de la jurisprudence de la Court de Justice européenne dans l'affaire GOTTARDO (référence affaire C 55/00 du 15.1.2002) et appliquera la présente convention sans distinction de nationalité pour les ressortissants de l'Union européenne, pour autant que ceci n'imposera pas de charge à la Partie marocaine/tunisienne. »

enough information available to allow the Member State concerned to decide on the issue without formal notice from the Third Country or if the Third Country communicates the information on periods completed. again without such an obligation. Nevertheless, **a Gottardo-clause should be included** in any **European approach** if the personal scope of the instrument is restricted to the relevant nationals or if some provisions (such as, e.g. equal treatment) are restricted in such a way.

5.6. Summary in the form of recommendations for the personal scope and equal treatment under a European approach

Personal scope

- The instrument should not be restricted to nationals of the Contracting Countries but to all persons covered by the relevant legislation.
- In addition, members of the family and survivors of such persons should be covered.
- If a Third Country (the position of the EU should always be a non-restricted personal scope) insists on a restricted personal scope, then in addition to nationals, refugees and stateless persons residing on the territory of the Contracting Countries the family members and survivors of all these persons should also be covered, irrespective of their nationality.

Equal treatment

- The equal treatment clause should cover all persons covered by the Agreement.
- Exemptions from the equal treatment clause (e.g. concerning its application only to the relevant nationals, voluntary insurance open only to the country's own nationals or provisions on insurance burdens of bilateral Agreements with Third Countries) should not be included in the European approach itself, but rather in unilateral special provisions, e.g. in the form of an Annex.
- There should be an additional rule extending the equal treatment obligation to the export of benefits to other Third Countries.
- The inclusion of a "Gottardo-clause" is recommended if there is a restriction of the personal scope to the nationals or if other restrictions to these persons exist.

6. Applicable legislation

Applicable legislation is one field where the general principles are more or less always the same. All Agreements, with only one exception[118], contain such provisions (for an overview of the most important aspects see **Annex 1 Table 4**). As the principles are very clear, it is also very easy to make comparisons with Reg. 883/2004. In this Chapter it is also very easy to uncover which Member States have orientated their bilateral Agreements on the principles of European legislation. As Reg. 883/2004 has changed in many aspects compared to Reg. 1408/71, older bilateral Agreements very often contain provisions corresponding to Reg. 1408/71. As these have not been taken over into Reg. 883/2004, **these Agreements differ**

[118] Slovenia-Australia Agreement, due to the fact that Australia did not include provisions on applicable legislation in the bilateral Agreements in the beginning, as the Australian basic pension scheme covered by the Agreements is only a residence based tax financed scheme. Only in the case of the inclusion of the occupational superannuation scheme can provisions on applicable legislation also be included. See also footnote 2.

from the approach under the latter Regulation. One good example is the special provisions for transport workers[119] which have not been included in Reg. 883/2004[120]. If the aim of these Agreements has been to have the same rules as under the European rules, all these Agreements have to be re-negotiated after the 1.5.2010.

The general and leading principle under all of the Agreements is, as under Reg. 883/2004[121], the **lex loci laboris principle** which lays down the competence of the Contracting Country where the activity (irrespective if employed or self-employed) is actually exercised[122]. All other special rules have to be understood as an exemption from this general principle. It is true that Reg. 883/2004 contains several exceptions, but as they are arguably the most important, only the posting provisions for employed and self-employed persons and rules for persons simultaneously active in both Contracting Countries will be examined in this context. In addition, as this is an important issue under the bilateral Agreements, special rules for the personnel of diplomatic and consular posts will also be dealt with. To avoid short interruptions in insurance careers or to find solutions which best suit the interest of the active persons concerned, all Agreements also contain provisions to agree on exceptions in individual cases[123]. But as these clauses are not different to the Provision of Reg. 883/2004[124], these provisions have not been further analysed.

Another issue which should be mentioned is the situation of **accompanying family members** (see also **Annex 1 Table 4 Column "Others**"). There are some Agreements where special provisions are made e.g. concerning the family members of persons working at diplomatic or consular missions[125] or generally of all active persons[126], who should be subject to the same legislation as the active person. This type of provision was also requested by Member States with residence based schemes under Reg. 883/2004[127]. But since a stronger emphasis is put on the individualized rights of every person under the new Regulation, it is not recommended to provide such a link to the rights of the active person and their family members in a future European approach.

Therefore we should stick to the **lex loci laboris principle** for employed persons as well as for self-employed persons under a **future European approach.** A provision should also be made for **exceptions** in individual cases by a mutual agreement of the competent authorities of both of Contracting Countries involved.

6.1. Posting rules

Without any doubt, one of the most important exceptions to the lex loci laboris principle is posting. All Agreements which contain rules on applicable legislation also contain a special provision on posting. The most visible differences are the durations for such posting (posting period), but there are also differences with regard to elements under Reg. 883/2004. In this context, it must be remembered that under Reg. 883/2004 posting is **one of the most**

[119] E.g. Art. 9 of the France-Uruguay Agreement which copies Art. 14 (2) (a) of Reg. 1408/71.

[120] Reg. 883/2004 also applies the general rule for persons simultaneously working in more than one Member State (Art. 13) to transport workers.

[121] Art. 11 (3) (a).

[122] E.g. Art. VI of the Hungary-Canada Agreement.

[123] E.g. Art. X of the Hungary-Canada Agreement.

[124] Art. 16.

[125] E.g. Art. 10 (6) of the Belgium- FYROM Agreement.

[126] E.g. Art. 12 of the Belgium-Japan Agreement.

[127] E.g. the wish of Sweden for a corresponding Annex XI entry.

elaborated concepts due to the fact that on the one hand, free movement of services and of labour have to be enhanced, and on the other hand, misuse and social dumping have to be prevented. Therefore the Regulations already contain a list of elements which have to be fulfilled[128], and in addition, Decision No. A2 of the Administrative Commission and the "Posting Guide" contain further clarifications. No bilateral Agreement approaches such detailed definitions of posting. Although it may be assumed that many Member States follow the same concepts of posting under Reg. 883/2004 and the bilateral Agreements, it is not guaranteed a Third Country bound by such an Agreement has the same understanding of it.

The following are some **examples of elements of posting** that can be found in the bilateral Agreements (nevertheless it has to be stressed that no Agreement contains all these Elements):

- The **posted worker** must be covered by (subject to) (insured under) the legislation of the posting Contracting Country before posting[129]; he/she should normally be employed by the posting enterprise[130]; he/she should normally exercise his/her activities in the posting Contracting Country[131] or has to be resident in the posting country[132]; he/she should not replace another posted worker[133]; he/she must not have a separate local labour law contract[134];

- the **employer** has to exercise a significant activity in the posting Contracting Country[135], at least normally carries out activities there[136] or has a place of business there[137]; the headquarters of the posting enterprise must be in the posting Contracting Country[138]; the company must be registered within the posting Contracting Country, however there is also a restriction to only specific economic sectors[139];

- the **work** should be carried out on account of the posting employer[140].

However, a more extensive understanding of posting than that under Reg. 883/2004 could be found in the bilateral Agreements that have been examined: some Agreements also contain a provision for some aspects of **intergroup mobility** and thus employment with an affiliated company of the "original" employer is also regarded as posting if the relevant time limits are respected[141]. The wording to cover these situations differs from Agreement to Agreement[142].

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[128] Art. 12 of Reg. 883/2004 and Art. 14 (1) to (4) and (7) of Reg. 987/2009.

[129] E.g. Art. 8 (1) of the Belgium-India Agreement.

[130] E.g. Art. 6 (2) (a) of the Denmark-USA Agreement.

[131] E.g. Art. 8 (1) of the France-Uruguay Agreement.

[132] E.g. Art. 7 (1) (a) of the Denmark-Chile Agreement. This is a condition which does not apply under Reg. 883/2004.

[133] E.g. Art. 8 (1) of the France-Uruguay Agreement.

[134] E.g. Art. 8 (1) of the Hungary-India Agreement.

[135] E.g. Art. 7 (1) of the Germany- Brazil Agreement.

[136] E.g. Art. 8 (1) of the France-India Agreement.

[137] E.g. Art. VII (1) of the Hungary-Canada Agreement.

[138] E.g. Art. 7 (1) (a) of the Spain-Tunisia Agreement. This again is a condition which deviates from Reg. 883/2004.

[139] E.g. Art. 10 (a) of the Ibero-American Agreement. In this case the restriction concerns professional (? - may be a problem of translation), research, scientific, technical management or similar occupations.

[140] E.g. Art. 8 (1) of the France-Uruguay Agreement.

[141] E.g. Art. 6 (2) (a) of the Denmark-USA Agreement. For further examples, see **Annex 1 Table 4 Column "Others"**.

[142] See e.g. Art. 7 of the Lithuania- Canada Agreement – "work for the same or related employer".

Therefore the question arises of which "posting" notion should be used in a **future European approach**? Since a very detailed and sophisticated posting notion which is also understood and largely harmonized is today already applied by all Member States at the European level, this **existing European notion**[143] should be included. However, there is one aspect which may necessitate further clarification, and this is that the Third Countries involved may have an interpretation of these notions that differs from that of the Member States as they are not "bound" by Decision No. A2 of the Administrative Commission. As posting is always an instrument where misuse is feared, additional safeguards may be necessary. Thus, for example, in cases where the European Union or its Member States conclude a binding instrument, the **content of Decision A2** (and perhaps also the content of the "Posting Guide") could be agreed as a common understanding of the posting notion for example. by a memorandum of understanding, a common Protocol or some other tool. Another issue which might arise is that some Third Countries could also insist on provisions which treat **intergroup mobility** in the same way as posting. Since at the European level there has not yet been an agreement on such a provision[144], it is recommended that an elaboration of such a rule in Reg. 883/2004 should be attained before it is included under any European approach.

A crucial element of all posting provisions is the **duration**. As can be seen from **Annex 1 Table 4 Column "Posting/Period",** there are several possibilities: either 12 months as under Reg. 1408/71[145], 24 months as under Reg. 883/2004[146], or 36, 48 or 60 months. Out of the 36 bilateral Agreements which contain posting provisions, 3 contain a 12 month period, 12 contain a 24 month period, 3[147] contain a 36 month period, 1 contain a 48 month period, and 17 contain a 60 month period. One common element that can be deduced from these 5 quite puzzling possibilities is that the 60 month period is only provided in relation to Contracting Countries on other Continents, however, no harmonisation exists in relation to these Third Countries. In relation to Korea, periods of 36[148] or 60[149] months exist, and periods of 24[150]or 48[151] months exist in relation to Australia. Therefore it could also be concluded that Third Countries are more or less flexible concerning the posting period.

Another issue connected to this period is the question of what happens if in a concrete case, the **posting is intended for longer than this period**? Under Reg. 1408/71 and Reg. 883/2004, it is clear that a posting which has been initially intended longer than 12 or 24 months cannot be posting in the sense of these Regulations, and therefore the legislation of the Member State of employment has to apply from the first day of this activity in that Member State unless both Member States concerned agree on an exception[152]. Many of the bilateral Agreements follow this approach under the relevant posting provision[153]. However others follow a different approach, and in general exempt postings from the application of the

[143] Art. 12 of Reg. 883/2004 and if possible also the additional clarifications under Art. 14 of Reg. 987/2009 should be added.

[144] See the report of the trESS Think Tank on that issue and its rather negative acceptance by the majority of Member States.

[145] Art. 14 (1) (a).

[146] Art. 12 (1).

[147] Particularly interesting is the provision of Art. 6 (2) of the Denmark-USA Agreement which contains two unilateral provisions, one with 60 months for the USA, and one with 36 months for Denmark.

[148] Art. 6 (1) of the Romania-Korea Agreement.

[149] Art. 7 of the Ireland-Korea Agreement.

[150] Art. 5 (2) of the Cyprus-Australia Agreement.

[151] Art. 12 (2) (d) of the Portugal-Australia Agreement.

[152] Under Art. 17 of Reg. 1408/71 or Art. 16 of Reg. 883/2004.

[153] E.g. Art. 8 (1) of the Belgium-India Agreement.

legislation of the Contracting Country of employment for the months of the posting period even if the posting has initially been planned for a longer period[154].

Finally, concerning posting periods, some Agreements also provide for special provisions to **extend the posting beyond the period initially provided.** Under Reg. 1408/71, such a procedure has been foreseen and was commonly known as the E102 procedure[155]. **Annex 1 Table 4 Column "Posting/Extensions"** exhibits the Agreements concerned. However this possibility is not the same for all Contracting Countries. Some of these possibilities do not include any limit[156] while others allow for a prolongation of 12[157] or 24[158] months. But even if such a concrete deadline for the prolongation is set, a parallel does not necessarily exist with the initial posting period[159]. Many of these provisions on prolongation also do not insert a simplified procedure as existed under form E102 (where only the competent authority of the Member State where the employment is exercised must agree), but make the exemption from the legislation of the Contracting Country of employment conditional upon the mutual agreement of both Contracting Countries involved. Thus there is nearly no difference with the ordinary exemption rule[160].

Under a **future European approach,** it may be advisable to limit posting – as under Reg. 883/2004 - firstly to **24 months** without a specific simplified way for extending the posting duration. Experience could thus be collected, and an extension could be examined during a future review. An overly lengthy posting period (e.g. 60 months) could deter some Member States and in cases where these provisions are really misused, control might be easier if the periods are shorter. In cases of longer periods, the general rule on exceptions could be applied. For the sake of a harmonized solution, the condition under Reg. 883/2004 that only the sending of an employee not intended to be for longer than 24 months should be regarded as posting under the approach. Nevertheless, if the Third Country involved insists on a longer posting period, some flexibility could also be recommended.

Some bilateral Agreements also contain provisions for the **posting of self-employed persons** which have been listed in **Annex 1 Table 4 Column "Posting/Self-employed"**. Nevertheless these Agreements are not so many (9 out of 36). Many of these provisions follow the provisions for the posted employed persons, particularly concerning the duration of the posting[161], but there are also differences concerning this question, for example there are Agreements where the posting period for the self-employed is much shorter (6 months) than the period for the posted employed persons (24 months)[162]. There are also some other differences as compared to Reg. 883/2004[163], as the activity should be a self-employed activity ("providing a service"[164] or "temporary work as self-employed person"[165]) and does not also cover a temporary employment contract of the posted self-employed, as accepted

[154] E.g. Art. 7 (1) of the Germany-Brazil Agreement.

[155] Art. 14 (1) (b).

[156] E.g. Art. 8 (2) of the Belgium-India Agreement.

[157] E.g. Art. 5 (1) (a) of the France-Congo Agreement.

[158] E.g. Art. 7 (1) (b) of the Spain-Tunisia Agreement.

[159] So e.g. under the Spain-Peru Agreement the first posting period is 24 months while the prolongation is only 12 months – Art. 8 (1).

[160] Corresponding to Art. 16 of Reg. 883/2004.

[161] E.g. Art. VIII (1) of the Hungary-Canada Agreement.

[162] Art. 9 (1) (b) and (3) of the Portugal-Tunisia Agreement.

[163] Art. 12 (2).

[164] Art. VIII (1) of the Hungary-Canada Agreement.

[165] Art. 8 (4) of the Belgium-Japan Agreement.

as posting for this group of persons by the ECJ[166]. Under the **future European approach,** self-positing of a self employed-person could also be included if a majority of Member States really wish to do so. If this is to be done, then the same duration as for the posting of employed persons should be provided. To limit the scope of this posting provision, it is recommended to include a **restriction to self-employed activities** during posting.

Finally, another special provision concerning posting must be mentioned, that regarding the **posting of civil servants**. While it is true that not all of the Agreements analysed contain such a provision[167], the overwhelming majority do. If such provisions are included, the civil servants usually remain – without any timely limit[168] – subject to the legislation of the Contracting Country which employs them[169], and thus correspond to the relevant provision of Reg. 883/2004[170]. Therefore the **future European approach** should also include such a specific provision for civil servants.

6.2. Rules for simultaneous activities

Taking into account the intense and close economic interdependence in Europe, but also in the vicinity of the Member States, it is clear that provisions for such cases are needed under Reg. 883/2004[171]. But are such provisions also necessary in relation to Third Countries which are sometimes very remote and on other Continents? Out of the 36 bilateral Agreements analysed which contain provisions on applicable legislation, **14 contain such provisions** out of which 11 are with Countries on other Continents (see **Annex 1 Table 4 Column "Simultaneous activities"**). But these Agreements do not contain a harmonized text. Many restrict the provision on simultaneous activities to **self-employed activities**[172]. Therefore, provisions also applicable to persons simultaneously active as employed persons in both Contracting Countries are in fact limited to European Contracting Countries.

On the other hand some bilateral Agreements which are based on the principles of Reg. 1408/71 still also contain provisions on persons **working in the transport sector**[173] and thus cover this aspect by a specific provision which under Reg. 883/2004 is for the time being ruled by the general rule on persons simultaneously active in more countries. Although it might be that there is no need for a fully fledged provision in relation to Contracting Countries on other Continents, some at least contain provisions for **air crew personnel**[174], where for example the Contracting Country in which the headquarters are established is declared as the competent country.

Usually the case of **employment on ships (mariners**) is not understood as provisions concerning people simultaneously active on the territories of both Contracting Countries, but they concern another aspect of international transport: As a rule, the bilateral Agreements

[166] ECJ 30.3.2000, C-178/97, Banks.

[167] E.g. Art. 7 (1)(j) of the Spain-Tunisia Agreement, which only refers to persons posted on co-operation missions to the territory of the other Contracting Country. However, from a realistic point of view, there will not be many civil servants left outside the scope of this rule, and the special provisions for the personnel of the Diplomatic and Consular Missions (Art. 7 (1)(g) to (i) of that Agreement). Therefore it could be assumed that nearly all posted civil servants are thus covered.

[168] E.g. Art. 9 of the Denmark-Chile Agreement which explicitly declares the time limits for posting as not applicable.

[169] E.g. Art. 5 (4) of the Cyprus-Australia Agreement.

[170] Art. 11 (3)(b).

[171] Art. 13.

[172] E.g. Art. VI (1) (b) of the Cyprus-Canada Agreement.

[173] E.g. Art. 9 of the France- Uruguay Agreement.

[174] E.g. Art. 8 (1) (e) of the Spain-Peru Agreement.

contain at least the flag principle[175] which means that persons employed on a ship flying the flag of one Contracting Country should be covered by the legislation of that Contracting Country. In addition, there are also sometimes further provisions for persons **working in harbours** (loading, unloading, ship repair and port security), which are declared subject to the legislation of the Contracting Country where the port is located[176]. Under other provisions, persons providing services to a "**mixed fishing undertaking**" are subject to the legislation of the Contracting Country of which the persons concerned are nationals[177]. The last group was not even dealt with under Reg. 1408/71.

Under a **future European approach,** Reg. 883/2004 should also be the guiding principle with regard to simultaneous activities. Therefore it would first have to be decided whether we really need a provision for all groups of persons which are presently covered under that Regulation[178]. As many Contracting Countries have only included a provision for persons exercising **simultaneously self-employed activities** in both Contracting Countries in the Agreements, in its first steps the European approach should also be limited to self-employed activities as all other cases would without any doubt be very rare and would therefore make the approach too complex. In addition, a provision on **air crews** could be advisable but in this case a further discussion at European level should be held first (e.g. if we agree to include or at least clarify the "home base concept"). For persons employed on board of **ships,** the flag principle should also be established. In any case, flexibility is also recommended for this case. If a Third Country also insists on special provisions for persons employed in the **transport sector** (road/rail/waterways), then the corresponding rules should be examined.

6.3. Special rules for Diplomatic missions and Consular posts

As visible from **Annex 1 Table 4 Column "Diplomatic personnel",** nearly all Agreements[179] contain special provisions for these personnel. This represents a large divergence from Reg. 883/2004 which, despite the rules under Reg. 1408/71[180], no longer contains a specific rule for this group. The bilateral Agreements also reveal differences in this respect.

It would appear that the majority state that "the Agreement **shall not affect the provisions of the Vienna Conventions on Diplomatic and Consular Relations**[181]". Although this is a standard text, its effect is not that clear as the two Vienna Conventions follow a slightly different approach. They provide an exemption for specific groups from the legislation of the State where the Mission or the Post is established[182]. On the one hand, they do not explicitly say that in these cases of exemption, the other State involved becomes competent (thus there could be cases without any coverage at all). On the other hand, persons not exempted from the legislation of the State of establishment of the Mission or Post are also not explicitly exempted from the legislation of the other State involved, therefore double coverage is not excluded. I would favour an explicit rule which determines the applicable legislation and which could also provide for special rules for the different groups of persons treated under

[175] E.g. Art. 7 (3) of the Austrian Model Agreement.

[176] E.g. Art. 8 (1) (f) of the Spain-Peru Agreement.

[177] E.g. Art. 8 (1) (g) of the Spain-Peru Agreement.

[178] Art. 13: Simultaneous activities as an employed person, as a self-employed person and as a mix of employed and self-employed activities and for civil servants who also exercise another activity.

[179] E.g. Art. VI (5) of the Cyprus-Canada Agreement contains only a provision for government officials but not specifically for Diplomatic or Consular personnel.

[180] Art. 16.

[181] E.g. Art. 9 (2) of the Belgium-India Agreement.

[182] E.g. Art. 33 and 37 of the Vienna Convention on Diplomatic relations.

the Vienna Conventions[183] or even allows a choice for the persons concerned[184] as was provided in Reg. 1408/71.

Under a **future European approach,** a special provision for these personnel should be included. Taking into account the vast diversity of rules for the personnel of Diplomatic Missions and Consular Posts provided in the bilateral Agreements, the "old" provision under Reg. 1408/71 could also be incorporated as a common denominator, as all Member States are acquainted with this rule. Nevertheless the relation of this rule to the rule for posted civil servants should be made more explicit, especially concerning the question of which of these two is the general provision and which is the special provision[185]. In cases where the Third Country insists on another model, flexibility is recommended.

6.4. Summary in the form of recommendations for the rules on applicable legislation under a European approach

General principle

- As the leading principle, the lex loci laboris should be established (place where the employed or self-employed activity is exercised) – model Art. 11 (3)(a) of Reg. 883/2004.
- By mutual agreement between the competent authorities or any other designated body, exceptions from all the rules of applicable legislation should be possible in individual cases – model Art. 16 of Reg. 883/2004.

Posting

- The posting notion for employed persons should be the same as under Reg. 883/2004 (Art. 12 (1)). To ensure a harmonized interpretation, the content of Decision No. A2 of the Administrative Commission should also be included, as a memorandum of understanding, additional protocol etc.
- The posting period should be, as under Reg. 883/2004, 24 months without a specific possibility of extending this period.
- If a posting provision for the self-employed also has to be included (with the same duration as for employed persons), this rule should be limited to the exercise of a self-employed activity (difference to Art. 12 (2) which covers any activity in another Member State).
- A provision should be included for civil servants – model Art. 11 (3)(b) of Reg. 883/2004.

Simultaneous activities and other special cases

[183] E.g. Art. 8 of the Ireland-Korea Agreement which, differing to the approach under the provision which only referred to the two Vienna Conventions, excludes persons exempted under these two Vienna Conventions from the personal scope and then provides for explicit competences for the rest of the personnel. Contrary to that, Art. 6 (4) to (6) of the Italy-Uruguay Agreement, for example, provides for clear competences for all persons working at these Missions or Posts.

[184] E.g. Art. 8 (1)(i) of the Spain-Peru Agreement.

[185] If the rule for posted civil servants (under Reg. 1408/71 Art. 13 (2)(d)) is the special rule, then the rule under Art. 16 (1) and (2) of Reg. 1408/71 would only apply to the rest of the personnel which are not civil servants. If on the other hand Art. 16 (1) and (2) of Reg. 1408/71 is the special rule, then civil servants working in that Missions or Posts (including the ambassador) would also be subject to the legislation of the place of work unless they opt for the legislation of their sending Member State.

- If a general rule is really needed, it is recommended that it be restricted to self-employed activities – model Art. 13 (2) of Reg. 883/2004.
- For persons working on board a sea faring vessel, the flag principle should be included.
- [For air crews, a special provision is recommended which should follow, e.g. the home base principle – depending also on future discussions concerning Reg. 883/2004.]
- In relation to closer (European) Third Countries, a special provision on transport workers could also be included – model Art. 14 (2)(a) of Reg. 1408/71.
- For persons employed at Diplomatic Missions and Consular Posts, a special provision should be included – model Art. 16 (1) and (2) of Reg. 1408/71 with additional clarification concerning the relation of this provision to the general rule for civil servants.

7. Pensions

Pensions are the only benefits for which special rules should be included as a first step in a European approach. Pensions cover the risks of invalidity, old age and death. Although there are sometimes **specific rules for invalidity**[186], many texts deal with all three risks in only one part, which is a much simpler approach[187]. As this is also the structure in the instruments of the Council of Europe[188] and does not exclude specific provisions in such a "pension-Chapter" for invalidity benefits[189], I recommend following this simplified way under a future European approach.

Particularly with regards to pensions, the "**periods of insurance**" are of great importance. The analysis of the Agreements made available shows that nearly all of them include a definition for these periods which corresponds to the definition under Reg. 883/2004[190], however, these definitions are sometimes a little simpler[191] as for example, "periods of employment", "periods of self-employment" or "periods of residence" are not relevant. Therefore such a simplified definition would seem to be similarly sufficient in a future European approach. It should also be mentioned in this context that concerning the vivid discussion held at European level on the "**value of periods**"[192], the Agreements analysed do not contain any specific reference to such a value. However it cannot be excluded that the forms used for data exchange in these bilateral relations contain relevant information[193].

[186] Under Reg. 883/2004 Title III Chapter 4, from the bilateral Agreements analysed, e.g. Part III Section 2 of the Belgium-India Agreement.

[187] This is the case, for example, in the Germany-Brazil Agreement (Part II Chapter 2).

[188] Title III Chapter 2 of the European Convention or Part III Section 2 of the Model Agreement.

[189] E.g. Art. 18 of the France-Uruguay Agreement, which forms part of the pensions-Chapter and deals especially with the medical determination of the invalidity.

[190] Art. 1 (t), (u) and (v).

[191] E.g. Art. 1 (1)(q) of the Portugal-Ukraine Agreement.

[192] For entitlement, for calculation or for both.

[193] As under Reg. 1408/71 the E2xx forms.

Another definition which is very important for the pension field (but also for the export-provision – see Chapter 3) is that of "**benefit" or "pension**". Such a definition is included in the Agreements analysed[194]. Thus such a definition, which could be orientated towards the existing definition in Reg. 883/2004[195], should also be included in a future European approach.

7.1. "Unilateralisation" or common provisions?

The first striking thing when analysing the bilateral Agreements made available is that many (nearly all) of them contain extended unilateral provisions concerning the determination of pensions. This can also be seen from **Annex 1 Table 5 Column "Unilateral provisions"**. At one extreme, there are some Agreements which contain totally separated Sections for the determination of the benefits under the legislations of the two Contracting Countries[196]. This is especially astonishing if both Contracting Countries follow the same principles[197]. On the other hand, there are still some Agreements which contain, like Reg. 883/2004, predominantly bilateral provisions which apply in the same way to both Contracting Countries[198].

A valid question is in which direction a **future European approach** should go. If we must follow the "unilateralisation" method, this would make a European approach senseless as all Contracting Countries would have to formulate their own individual approach. Therefore the aim must be to look for principles which are acceptable for all. This does not exclude that details related only to one specific Member State or Third Country concerned could be provided in a special provision, for example in an **Annex** to the European approach[199]. This is especially necessary when one takes into account the sometimes very detailed provisions in the existing Annex XI of Reg. 883/2004[200] which are also reflected in the relevant bilateral Agreements[201].

7.2. Aggregation for entitlement

7.2.1. Aggregation of the periods in the Contracting Countries

One of the fundamental principles necessary for the determination of pensions is the aggregation of periods. This is not usually a horizontal provision for all branches (as under Reg. 883/2004[202]) but a **specific provision for each of the specific branches or risks** concerned[203],

[194] E.g. Art. 1 (1)(b) of the Slovenia-Australia Agreement.

[195] Art. 1 (w).

[196] E.g. Part II and Part III of the Cyprus-Australia Agreement contain totally separated provisions for entitlement and calculation of pensions in Cyprus and Australia.

[197] E.g. the Belgium-India Agreement where, – under different Sections (Part III Chapters 1 and 2), – both Contracting Countries determine at least their old age and survivors pensions under the same principles: aggregation for entitlement; special aggregation in case of entitlements for specific occupations or professions, granting of national amount if aggregation is not needed for entitlement and pro-rata calculation if aggregation is needed.

[198] E.g. Part III of the France-India Agreement. Therefore it seems that India does not insist on unilateral provisions (cf. the previous footnote concerning the Belgium-India Agreement), rather this is a consequence, at least sometimes, of the position of the Member State concerned.

[199] As it is also the case for example, under Reg. 883/2004 in Annex XI to this Regulation or Annex VII (in accordance with Art. 72) of the Council of Europe's European Agreement.

[200] Special reference has to be made to the Annex entries of the Netherlands or the United Kingdom, especially with regard to pensions.

[201] E.g. Art. 9 ff of the United Kingdom – USA Agreement.

[202] Art. 6.

[203] E.g. for pensions Art. VIII of the Cyprus-Canada Agreement, but also Art. 28 of the Council of Europe's European Agreement.

as it was similarly the case under Reg. 1408/71[204]. Therefore a specific aggregation provision for pensions should be included under any future European approach.

In any case, aggregation for pensions is usually more complex than under any other branch for any other risk. Aggregation is needed for the determination of entitlement, but also very often for calculation (especially if a pro-rata-amount has to be calculated). On the other hand, pension schemes of all countries are usually also more differentiated with regard to **special professions and occupations** than any other branch or risk related to social security. Thus if there exist special, generally more advantageous, rights for example for persons who have worked in the mining industry for periods spent under earth, then as a generally accepted principle[205], the periods spent in the other Contracting Country which correspond to periods spent under earth, must also be aggregated for entitlement to such benefits.

In this light, **any future European approach** must state aggregation as the fundamental principle to establish entitlement to a pension. If the existing provisions under Reg. 883/2004 are examined as a model, it must be mentioned that many of them are very casuistic. Therefore, in general, only the most important detailed provisions should be taken over rather than the whole parcel. Concerning aggregation, the general principle under Art. 6 of Reg. 883/2004 should be combined with the additional provisions of Art. 51 (1) and (2) of Reg. 883/2004 concerning periods under a special scheme or in a special occupation or profession. In addition, the provision of Art. 51 (3) of Reg. 883/2004 concerning the fulfilment of insurance clauses should also be included.

Whatever "parties" the future European approach should involve (it might only involve one Member State with a Third Country, some or all Member States with a Third Country or more Third Countries – see further under Chapter 11), it is clear that this obligation to aggregate should always cover the **periods of all the parties of this instrument** which could be periods of more than two countries. The situation in relation to countries that are not bound by this instrument will be dealt with under the following point.

7.2.2. Aggregation of periods with other Countries (which are not bound by the instrument)

Some of the bilateral Agreements analysed also contain a provision which extends the aggregation to **periods in a Third Country** which is not party to the Agreement. These provisions have been entered into **Annex 1 Table 5 Column "Periods in TC**". The taking into account of such periods usually depends on bilateral Agreements concluded by both Contracting Countries with the Third Country[206]. Other Agreements also apply this principle if only one Contracting Country is bound by an Agreement with a Third Country (but naturally, this is only applied by that Contracting Country)[207]. From a European perspective it is also interesting that this is, in only one case, also explicitly declared applicable in relation to periods in another country which applies Reg. 1408/71 or 883/2004[208].

But this is not a general principle of the Agreements analysed (only 19 out of the 37 Agreements contain such a provision). Perhaps such a provision is not always necessary, as without such a provision the Member State concerned also takes into account periods accrued in a Third Country with which it is bound by a bilateral Agreement. So for example, Austria would aggregate periods in any Member State and periods in any bilateral

[204] E.g. Art. 18 for health care, Art. 38 for invalidity benefits or Art. 45 for old age and survivors pensions.

[205] E.g. Art. 11 (2) of the Germany-Brazil Agreement, which formulates this principle in a very abstract way, or Art. 11 (2) of the France- India Agreement, but also Art. 28 (4) of the Council of Europe's European Agreement; under Reg. 883/2004 cf. Art. 51 (1).

[206] E.g. Art. IX of the Cyprus-Canada Agreement.

[207] E.g. Art. 17 (3) of the Hungary-Bosnia and Herzegovina Agreement.

[208] No. 3 (a) of the Final Protocol to the Germany-Brazil Agreement.

Contracting Country for entitlement to a pension, **despite the fact that the bilateral Agreements of Austria do not all contain such an explicit provision**[209]. However some of the Agreements also contain an **explicit exclusion of the taking into account of periods in a Third Country** with which an international instrument is in force[210], sometimes the European co-ordination instruments are also explicitly excluded from the application of the bilateral Agreement analysed, and thus there cannot be an aggregation with periods of insurance in another Member State[211]. It seems that these countries take into account either one bilateral Agreement for aggregating periods or the other one (or the European co-ordination instruments), but never more than one instrument at any time. Such a practice could have severe consequences for mobile persons who have only short careers in several countries and could lead to such persons having no entitlement to a pension despite the fact that the total of all the periods accrued in countries bound by international instruments would be sufficient.

In this context, an element should be mentioned which has been brought up during the workshop on 6.10.2010[212]. This experience reveals that Reg. 883/2004 could also be touched by this practice of Member States. Therefore it was recommended to **include an explicit provision in this Regulation** which obliges the Member State which is bound by a bilateral Agreement with a Third Country to also **aggregate the periods of that Third Country**.

Therefore any **future European approach** should include an **explicit provision** which obliges all parties to take into account periods accrued in any other country with which the Contracting Country is bound either by an Agreement or by Reg. 1408/71 or 883/2004, when aggregating periods. This provision should not be restricted to cases where both (or all) Contracting Countries are bound by an Agreement with the relevant Third Country but should also cover unilateral cases (only one Contracting Country is bound).

7.3. General principles for the calculation of the pension

7.3.1. The same pro-rata-principle as under Reg. 883/2004

With regard to the calculation of the benefit, the Agreements analysed show a greater variety of principles and philosophies than expected. Usually the pro-rata-principle enshrined in Reg. 883/2004[213] is regarded as the most common international principle. So this approach under Reg. 883/2004 has been the model with which to compare all other Agreements with under **Annex 1 Table 5**. To better understand this work, the different steps under Reg. 883/2004 to determine a pension should first be recalled (in this comparison, as a first step, more recent developments, especially those concerning special provisions for funded schemes, have to be disregarded[214]):

- Firstly, the **theoretical amount** must be calculated by each Contracting Country under its legislation by taking into account all the periods accrued in the Contracting Countries[215].

- Secondly, this theoretical amount has to be multiplied by the fraction of the periods completed in the relevant Contracting Country to all the periods in all Contracting

[209] Neither the analysed Austria-Korea nor the new Austrian Model Agreement contain such a provision.

[210] E.g. Art. 2 (2) of the Portugal-Australia Agreement.

[211] E.g. Art. 2 (4) of the United Kingdom – USA Agreement.

[212] Oral intervention by the French expert.

[213] Art. 52 of Reg. 883/2004.

[214] Especially Art. 52 (5) and Art. 65 (1)(d) of Reg. 883/2004.

[215] Art. 52 (1)(b)(i) of Reg. 883/2004.

Countries needed for the calculation of the theoretical amount[216], the **pro-rata amount**. If an Agreement includes this method, it is mentioned in **Annex 1 Table 5 Column "Calculation/Pro-rata"**.

- If entitlement also exists without aggregation, then the **autonomous amount** under the relevant national legislation only taking into account the periods of insurance completed in this Contracting Country has to be calculated[217]. This calculation is mentioned in **Annex 1 Table 5 Column "Calculation/Autonomous amount"**.

- As a last step in cases where an autonomous amount can be calculated as the aggregation is not necessary for entitlement, this amount has to be compared to the pro-rata amount and **the higher of the two amounts** should be granted[218]. This comparison is mentioned in **Annex 1 Table 5 Column "Calculation/Comparison"**.

Out of the 37 Agreements analysed, **only 9 Agreements** are based on all these principles without major adaptations, an astonishingly low number. Out of these 9, 3 have other principles for invalidity benefits[219] so that all these principles apply only in relation to old age and survivors benefits. Generally, it is the comparison between the autonomous amount and the pro-rata amount which is not provided under the Agreements[220]. Therefore it could be said that only less than 25 % of the Agreements wholeheartedly follow the approach of Reg. 883/2004, which should be a reason for further analysing the other solutions found and therefore, duplicating **all the provisions of this Regulation might not be the best solution** under a **European approach**.

7.3.2. Pro-rata amounts and autonomous amounts without comparison

14 Agreements are based on the principles under Reg. 883/2004, but in case an aggregation of periods is not necessary for entitlement, the autonomous amount is paid out without further examination if the pro-rate amount is higher in this case (therefore **no comparison of the two amounts is necessary**). This is a solution which seems to be more favourable than copying all the principles under Reg. 883/2004. The reason behind this is that usually, if enough periods are already completed in a Contracting Country, the persons concerned expect that benefit. In addition, the very complicated and time consuming[221] pro-rata calculation can be avoided and so this provision helps to speed up procedures and is easier to administer.

Austria shows an interesting approach under its new model Agreement. In this text, special provisions concerning the calculation of the Austrian benefits in cases where aggregation is needed for entitlement are no longer contained, but such a provision is replaced by a mere **reference to the calculation under Reg. 883/2004**[222]**. However** it has to be mentioned that this

[216] Art. 52 (1)(b)(ii) of Reg. 883/2004.

[217] Art. 52 (1)(a) of Reg. 883/2004.

[218] Art. 52 (3) of Reg. 883/2004.

[219] The Agreements provided by **Belgium:** In cases of an entitlement without aggregation, this benefit has to be provided; alternatively the pro-rata benefits of both Contracting Countries must also be added, and if this sum falls below the amount of the autonomous Belgian benefit, then a corresponding differential amount has to be granted – Art. 14 (2) of the Belgium-India Agreement.

[220] E.g. under Section 13 (1)(a) of the Ibero-American Agreement.

[221] As always, the information on the exact amount of the periods in the other Contracting Country has to be available in order to make the definite decisions on the benefit.

[222] Art. 13 of the **Austrian Model Agreement**:

"Calculation of the Austrian benefit

new model has yet to be included in an Agreement with a Third Country. Thus it is necessary to wait to see if Third Countries accept such a radical approach which takes away the transparency of how the benefit is calculated and obliges Third Countries to study the provisions of Reg. 883/2004 in detail. In any case, this could be an **alternative** to consider under a **European approach**

7.3.3. No pro-rata, always calculation under national legislation

Another interesting approach is shown by Agreements which generally state that the pensions have to be calculated under national legislation, even if aggregation is needed for entitlement[223]. But it seems that this approach is usually only advisable if the legislation concerned is based on a **linear system** where every insurance month (or any other unit used) gives entitlement to the same amount or where the calculation is not based on timely elements, like for example, funded schemes where only the capital accrued is relevant or pension point schemes where the benefit only depends on the number of pension points collected. This is not a useful solution, for example if in case of invalidity or death, additional (future) periods accrue. Another approach seen in the Agreements is the application of the pro-rata method only as a last safety net if there is no possibility to calculate the amount of the benefit under the national legislation concerned[224].

This concept also corresponds to the new methods of calculation under Reg. 883/2004 for entitlements under schemes where timely elements do not play a role[225]. As not many Member States follow this approach under the bilateral Agreements, it seems that it should **not be recommended** to follow such a method under any future **European approach** for the time being.

7.3.4. Alternative methods in cases where aggregation is needed for entitlement?

Is there a way other than the quite complicated way of calculating benefits under the pro-rata principle which suits more systems than only those which are based on linear elements as examined under the previous point? Let us look for methods which do not need the exact amount of the periods of the other Contracting Country (usually the final decision and communication of these periods takes a very long time, so in the meantime, the other Contracting Country cannot finally determine its benefits and can only grant provisional benefits). The Council of Europe has indeed developed an easier way of calculation in its Model Agreement which might be applicable to many systems[226]. This "**direct calculation**" does not require the periods of the other Contracting Country. But for benefits or parts of benefits which cannot be granted in full in cases where aggregation is needed for entitlement, an "**internal pro-rata**" is applied. Firstly, benefits must always only be based on the periods actually accrued in the Contracting Country concerned[227]. Fixed amounts (parts

(1) Where entitlement exists under Austrian legislation only by totalizing periods […], the competent Austrian institution shall determine the amount of the benefit in accordance with Regulation (EC) No. 883/2004, with periods of coverage in [… Contracting Country…] to be deemed as periods of coverage in another Member State of the European Union.

(2) As an exception from paragraph 1, child raising periods shall only be taken into account for the determination of the benefit in accordance with the Austrian legislation."

[223] E.g. Art. 11 (3) of the Germany-Brazil Agreement or the Agreements concluded by Portugal – e.g. Art. 19 (1) of the Portugal-Australia Agreement.

[224] E.g. Art. 16 (4) of the Slovakia-Canada Agreement – although the exact meaning of this provision remains a little bit unclear compared to the other provisions of that Article.

[225] Art. 52 (5) of Reg. 883/2004 together with Annex VIII Part 2 of that Regulation. But it has to be mentioned that the schemes of the Member States which have concluded such bilateral Agreements are not all mentioned in that Annex, therefore there must also be other schemes for which this way of calculation might be best suited which could be further examined.

[226] Art. 21 of the model Agreement – where as an Alternative to the classic pro-rata-calculation a so called direct calculation is developed.

[227] Art. 21 Second Alternative (2) first sentence.

of benefits or whole benefits which do not depend on the duration of the periods completed)[228] shall be calculated in proportion to the ratio of the periods completed in that Contracting Country up to 30 years[229]. So in cases where only 10 years of insurance have been completed in the Contracting Country, such a fixed amount is reduced by the ratio of 10/30. In the case that future periods have to be taken into account under the legislation of a Contracting Country, another way of calculation has to be applied: these future periods shall only be taken into account in proportion to the ratio of the periods completed in the Contracting Country to two-thirds of the time between the date the person concerned reached the age of 16 and the date on which the contingency occurred[230]. So in cases where a person becomes invalid at the age of 46 (this is 30 years after the age of 16, therefore in order to fully take into account the future periods 2/3 = 20 years of insurance is necessary) and had only 10 years of insurance in the Contracting Country concerned (half of the necessary period) and under the legislation of that Country future periods accrue until the age of 60 (in this case 14 years), only half of these future periods can be taken into account (7 years).

This is not a totally new provision of the Council of Europe's Model Agreement, but has also been included in the Council of Europe's **European Agreement**[231] and the **ILO Instruments**[232]. Finally, it must be mentioned that this calculation has not been restricted to the theoretical models of international organisations but also forms part of **many agreements concluded by Austria**[233]. Experience has shown that this method has contributed significantly to a quick determination of the benefits (much quicker than the pro-rata calculation) as only sufficient periods are needed for the aggregation of periods for the entitlement (usually it does not really depend on the final and exact amount of the periods of the other Contracting Country to determine entitlement) and if entitlement is given, then the final amount can immediately be determined without waiting for the final decision of the other Contracting Country.

Thus this alternative should be considered under a **European approach,** and as it is also an element of other model provisions, it could also be also proposed to the other Contracting Countries.

7.3.5. Special provisions for funded schemes

Whatever solution is taken for a future European solution, this should also reflect new developments in pension schemes (which concern not only the Member States but also many Third Countries) like for example, the development of **funded schemes or pension account or pension point schemes** (this is especially important if we do not follow the way outlined under Chapter 7.3.3.). Furthermore, the Agreements analysed show some special provisions for these schemes[234]. These provisions usually aim at safeguarding that the capital available in a fund should be the base for the calculation of the benefit.

7.4. Periods of less than 12 months

When pensions are calculated under international instruments, there are usually also provisions which **exclude benefits for periods that are too short** (such short periods, as a rule

[228] E.g. under the Austrian experience "child supplements" of a pension are granted under national legislation for every child depending on the pensioner in a fixed amount.

[229] Art. 21 second Alternative (2)(a).

[230] Art. 21 second Alternative (2)(b).

[231] Art. 8 (3) of the European Agreement although this provision is only applicable to special non-contributory benefits.

[232] Art. 8 (4) of Annex 1 of Recommendation No. 167.

[233] E.g. Art. 13 of the Austria-Korea Agreement.

[234] E.g. section 16 of the Ibero-American Agreement.

lead only to very small amounts of benefits). Again we should start with the relevant provision under Reg. 883/2004, which states that a Member State is not obliged to grant a benefit if under its legislation less than 12 months of insurance are completed (unless this short duration of insurance periods already opens an entitlement to benefits under that legislation) and that all other Member States have to accept these short periods for the calculation of the theoretical amount, but not for the determination of the pro-rata factor[235]. Nearly all of the Agreements analysed contain provisions for periods of less than 12[236] months[237] (see **Annex 1 Table 5 Column "<12m"**). However the content of these provisions differs.

12 of the bilateral Agreements contain a **very similar provision to that under Reg. 883/2004** which leads to an obligation of the other Contracting Country to grant benefits for periods of less than 12 months completed under the legislation of the other Contracting Country[238]. Although in some texts it is not totally clear whether these periods are really only added to the periods of the other Contracting Country or if they enter into a pro-rata calculation (as they remain in the calculation periods of the other Contracting Country) which could neutralize the effect of taking such periods into account[239], on the other hand, there is also one case which could lead to overcompensation, as all Contracting Countries must also take these periods of less than 12 months into account for entitlement as well as for the calculation of the benefit[240].

21 Agreements (the majority) also have another special rule for periods of less than 12 months. On the one hand, they also exempt the Contracting Country in which these periods have been completed from the obligation to grant a benefit, but they do not contain an obligation for the other Contracting Country to take these periods into account[241]. So **these periods are lost** as the other Contracting Country does not grant a benefit for these periods.

Under any **future European approach**, there should also be a special provision for periods of less than 12 months. It is better for the person concerned if the model under Reg. 883/2004 is copied, as this avoids that such periods are lost. On the other hand as many Member States seem to prefer a solution under which there is no obligation of the other Contracting Country to take such periods of less than 12 months into account, this solution could also be taken as a model[242].

7.5. Provisions to prevent overlapping

Finally, as pensions are usually long-ranging benefits of quite a considerable amount, the question of the reduction of these benefits in the case of simultaneous entitlement to other benefits or income is also of importance. Under Reg. 883/2004, a full set of very detailed and

[235] Art. 57 of Reg. 883/2004.

[236] Under the Council of Europe's European Convention, there also exists the possibility to extend this exemption from the obligation to grant a benefit to a period of 5 years, depending on the conclusion of bilateral Agreements for that purpose – Art. 32.

[237] Only very few Agreements, such as for example the Belgium-India Agreement, do not contain such a provision and so these Contracting Countries also have to grant benefits if the periods completed are less than 12 months.

[238] E.g. Art. X of the Cyprus-Canada Agreement.

[239] See e.g. Art. 27 of the France- Congo Agreement, which anyhow excludes that the amount of the benefit is reduced by this operation.

[240] Section 14 (2) of the Ibero-American Agreement where all other Contracting Countries have to also take into account periods of less than 12 months in a Contracting Country for the determination of the amount of their pension.

[241] E.g. Art. 34 of the Belgium-FYROM Agreement.

[242] As it has also been provided in the new Art. 57 (4) of Reg. 883/2004 if special schemes listed in Annex VIII Part 2 are involved.

complicated rules deals with this question[243]. A first analysis of the Agreements made available reveals that these bilateral Agreements do not contain comparable complex provisions (see **Annex 1 Table 5 Column "Provisions to prevent overlapping**"). Only the ILO instruments[244] have a provision to prevent overlapping of benefits which is comparable to that under Reg. 883/2004. From the 36 bilateral Agreements, **only 14 contain anti-overlapping provisions** which are usually quite simple, stating that if national legislation provides for the reduction of a benefit in the case of **simultaneous entitlement to another benefit or the receipt of income,** then the corresponding benefits or income received under the legislation of the other Contracting Country should also have the same effect[245]. Only a few extend this assimilation to other aspects such as, for example, entitlement[246] (which has nothing to do with anti-overlapping provisions in the narrow sense, and approaches the provision for general assimilation of facts under Art. 5 of Reg. 883/2004). Other Agreements only reveal a provision which avoids double benefits due to the same period of compulsory insurance[247]. Only in one Agreement it is stipulated that benefits or income from abroad should only be taken into account after the application of the pro-rata factor on these amounts[248]. Contrary to these provisions, one other Agreement explicitly states that national provisions to prevent overlapping must not be applied to professional income gained in the other Contracting Country[249].

Therefore it can be concluded that the Agreements analysed do not really show the necessity for such an anti-overlapping provision under a future **European approach**. If there is really a need for such a provision, it should be kept as simple as possible (e.g. assimilating benefits and income received under the legislation of the other Contracting Country).

7.6. Summary in the form of recommendations for the rules on pensions under a European approach

Definitions (already included in the recommendations under Chapter 3)

- A definition for "periods of insurance" should be included – model Art. 1 (t) of Reg. 883/2004.
- Also a definition for "pension" or "benefit" should be included – model Art. 1 (w) of Reg. 883/2004.

Principles

[243] Art. 5 as the general principle of assimilation of facts, Art. 10 as the rule concerning no entitlement to various benefits due to the same period of compulsory insurance, and Art. 53 to 55 which contain the special provisions for pensions which as a rule restrict the application of the general principle under Art. 5.

[244] Art. 25 and 26 of Recommendation No. 167.

[245] E.g. Art. 6 of the Belgium-India Agreement.

[246] E.g. Art. 6 of the Hungary-India Agreement.

[247] E.g. Art. 7 of the Portugal-Tunisia Agreement.

[248] Art. 7 (9) and (10) of the Greece-USA Agreement.

[249] Art. 33 of the France-Congo Agreement.

- There should only be provisions for all Contracting Countries and not too many unilateral special provisions. However, taking into account the great difference between the pension systems of the Member States, an Annex for such concrete and detailed national provisions seems to be inevitable.

Aggregation for entitlement

- Aggregation of all periods for entitlement should be included, and in addition, specific provisions for special schemes, or special rules for special professions or occupations, and a clause under which insurance or receipt of benefits under the legislation of another Contracting Country are treated equally for entitlement – model Art. 6 and 51 of Reg. 883/2004.

- An additional provision should be included which also extends aggregation to periods in a Third Country with which the Contracting Country concerned is bound by another Agreement or by Reg. 1408/71 or 883/2004.

- [In addition Reg. 883/2004 should also be amended correspondingly to oblige a Member State to aggregate not only periods in other Member States but also periods in a Third Country with which that Member State has concluded a bilateral Agreement under this Regulation.]

Calculation of the pension

- A copy of all the different steps for calculation under Reg. 883/2004 would seem to be too heavy for a future European approach.

- As a lighter model, the following principles could be provided: calculation under national legislation if aggregation is not necessary, and a pro-rata-calculation only for those cases where aggregation is needed. Special provisions should be added to take into account the special situation of funded schemes, pension account and pension point schemes.

- As a far reaching alternative for the cases in which aggregation is needed, the direct calculation as included in the Council of Europe's Model Agreement could also be a solution which should be further examined.

- A provision for periods of less than 12 months should also be included; it has to be decided if such periods should be taken over by the other Contracting Countries as under Reg. 883/2004, or if they should be regarded as lost.

- If an anti-overlapping provision is necessary, it should be kept as simple as possible (e.g. assimilation of benefits and income received under the legislation of the other Contracting Country).

8. Other provisions

If a fully fledged instrument is intended under a European approach, then naturally, all the other provisions which usually form part of an Agreement should also be incorporated. Firstly, these general principles should be recalled. Following this, I wish to analyse a few elements where greater differences can be seen from the Agreements made available and which,

due to the last experiences gained (e.g. during the work on the decisions for the Associations Councils), are of great importance for some Member States.

8.1. General principles which should be included

Usually all Agreements have the following provisions which should also be included under a **European approach**:

- Co-operation between institutions and authorities, designation of liaison bodies for the smooth co-operation between the Contracting Countries[250];
- Official languages which can be used for communication[251];
- Provision on claims which are made in the other Contracting Country (equal effect and safeguarding of deadlines)[252];
- Exemptions from fees and from diplomatic or consular legalisation[253], although not all Agreements contain such a provision;
- Medical examinations, in particular to determine the degree of invalidity[254];
- Transitional provisions concerning events which occurred and periods of insurance completed before the entry into force of the instrument; retroactive effect of claims made after the entry into force within a given period, recalculation of benefits already determined before the entry into force etc.[255];
- Provision on the entry into force and duration of the instrument. Concerning the duration, nearly all Agreements have an unlimited duration – see also **Annex 1 Table 1 Column "Revision clause"**; only very few Agreements provide for a revision after a special period (e.g. after 3 years[256]). Thus it is recommended to provide an un-limited duration in a European approach; however any Contracting Country should have the possibility of denouncing the instrument.

Without any doubt, this is the common denominator which should be included in the European approach, as these rules are included in nearly all of the bilateral Agreements analysed. The following elements have been found **only in some of the bilateral Agreements,** and as this has not very often been the case, it should be further examined if such provisions are really necessary under a European approach:

- Offsetting of overpayments[257];
- Recovery of contributions and benefits not due[258];

[250] Corresponding to Art. 76 (1) to (6) of Reg. 883/2004.

[251] Corresponding to Art. 76 (7) of Reg. 883/2004; Art. 12 of the Model Agreement of the Netherlands is interesting as it defines English as the language of communication between the institutions.

[252] Corresponding to Art. 81 of Reg. 883/2004.

[253] Corresponding to Art. 80 of Reg. 883/2004.

[254] Corresponding to Art. 82 of Reg. 883/2004 and Art. 87 of Reg. 987/2009.

[255] Corresponding to Art. 87 of Reg. 883/2004.

[256] E.g. Art. 25 of the Italy-Venezuela Agreement.

[257] Corresponding to Art. 72 of Reg. 987/2009, see e.g. Art. 41 of the Belgium-FYROM Agreement.

- Damages which give entitlement to insurance institutions[259].

8.2. Data protection

The more information has to be exchanged for the application of an Agreement, the more data protection becomes an issue. EU data protection is ruled by a special set of European rules (especially Directive 95/46/EC), so that Reg. 883/2004 only needs some references to these rules[260]. In relation to Third Countries, this is not the case, so it was important to analyse how data protection issues are taken care of in the bilateral Agreements (see **Annex 1 Table 6 Column "Data protection**"). Out of the 38 Agreements analysed, only 12 do not contain any such provisions.

From the rest of the Agreements, the overwhelming majority have "**basic" data protection rules** which stipulate that information sent under the Agreement to the other Contracting Country shall only be used for the implementation of the Agreement and the national legislation of the receiving Country. This information shall be protected by the laws for the protection of privacy and confidentiality of the receiving Country[261]. Only 3 Member States have "**extensive" data protection provisions** in their bilateral Agreements[262] which repeat all the principles of international data protection in a separate provision. To give an example of these complex provisions, the most elaborated version is annexed as **Annex 3**.

Under a **European approach,** a data protection provision should be included in all cases. Thus the "basic" model is a must, as Third Countries with which instruments will be negotiated will not be bound by the European Data protection provisions[263]. However, the more extensive provisions found in the Agreements of 3 Member States could also be a model. In this case, it has also to be mentioned that such very extensive provisions are difficult to negotiate; as such a proposal can be very easily misinterpreted by the Third Countries concerned as mistrust in their administration and understanding of fundamental rights.

8.3. Fight against fraud and error

Particularly during the work in the Council's Social Questions Working Party on the decisions under the Association Agreements, it turned out that some Member States put great emphasis on measures to avoid fraud and error and to control the recipients of benefits from these Member States while residing in the territory of the Third Country concerned. Therefore, the analysis of the Agreements made available also focused on special measures[264] and provisions for that purpose. The results of this examination can be seen in **Annex 1 Table 6 Column "Fraud and error"**. Surprisingly, only very few Agreements contain specific provisions.

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[258] Corresponding to Art. 84 of Reg. 883/2004 and Art. 75 ff of Reg. 987/2009 (all these procedural and technical details are never provided under a bilateral Agreement), see e.g. Art. 20 of the France-India Agreement.

[259] Corresponding to Art. 85 of Reg. 883/2004, see e.g. Art. 35 of Hungary-Bosnia and Herzegovina Agreement.

[260] Art. 77 of Reg. 883/2004.

[261] E.g. Art. 19 of the France-India Agreement.

[262] Germany, Hungary and Austria.

[263] And also not by other international data protection provisions, such as for example, the Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data from 28.1.1981.

[264] Going beyond the general rules of administrative co-operation which could also be used to control individual cases and thus fight fraud and error.

Firstly, provisions should be mentioned which aim at examining residence (which is also a decisive factor for entitlements and coverage under the bilateral Agreements)[265]. Under these provisions, information has also to be exchanged to **determine the quality and realities of the residence**[266].

Secondly, there are provisions to **assess the income** via administrative co-operation between the institutions, for example for the purpose of calculating the contributions and the amounts of means tested benefits[267].

However, it must be mentioned that one Member States follows another approach: under the national laws of the **Netherlands**[268]**,** benefits are not exportable[269] unless there is a specific Agreement which safeguards that the conditions set under national law which can be controlled inside the Netherlands are also controlled in the same way in the territory of the Third Country concerned. The Netherlands have elaborated special Model Agreements[270] which only contain provisions for that purpose (so no provisions for example, on applicable legislation or the determination of benefits). If a previous Contracting Country was not interested in the conclusion of provisions of that type, then export to this Country was ended. The Netherlands usually makes use of a whole parcel of measures to control and advise their beneficiaries living abroad:

- Measures which help to identify the beneficiaries taken by the institutions of the place of residence;
- Measures aimed at the verification of the status of the beneficiary and of any changes of that status by the institution of the place of residence;
- Possibility for the direct contact of the competent Dutch institution with the beneficiaries[271], which also includes visits by a team of the competent Dutch institution coming to the territory of the Third Country or special attachés at the Dutch embassy in these Third Countries which also visit the beneficiaries (it has to be mentioned that these measures are not restricted to the Netherlands, the UK also indicated that specialised personnel are doing this job in some of the Consulates of the UK[272]);
- Special provisions on medical examinations which also include the possibility to request the persons concerned to come to the Netherlands for that purpose;
- In addition these Models also contain special provisions for the recognition and enforcement of decisions (recovery) and offsetting.

[265] See e.g. Art. 27 (1) to (3) of the France-Uruguay Agreement.

[266] So these provisions are going beyond the scope of Art. 11 of Reg. 987/2009.

[267] E.g. Art. 27 (4) and (5) of the France-Uruguay Agreement.

[268] The details of the legislation and the practice of the Netherlands as well as the new Model Agreements of the Netherlands have been gained during a written interview with the Dutch expert.

[269] Since 1.1.2000.

[270] One Model is unilaterally only for the Netherlands and the other one bilaterally for both Contracting Countries.

[271] Based on a provision which is very similar to Art. 76 (3) of Reg. 883/2004.

[272] Written interview with the UK expert.

In addition, Agreements of the UK which explicitly provide for data matching have also to be mentioned and could be further analysed[273].

Taking into account the great importance which is given to the issue of combating fraud and error, it is recommended that a minimum set of such provisions should also be included under a **European approach**. If the wish is that the European approach should be as broad as possible, and should not exclude any Member State, then the elements included in the Dutch Model Agreements should be considered from the beginning as it is clear that without such provisions, the Netherlands cannot join such an instrument.

8.4. Joint committees and dispute settlement

Finally, it is also interesting to look at how the Agreements deal with disputes, questions of interpretation and further development and amendments of the Agreements. Under Reg. 883/2004, these tasks are given in principle to the Administrative Commission[274]. The way in which the bilateral Agreements solve these institutional questions can be seen in **Annex 1 Table 6 Column "Co-operation and Disputes"**. All Agreements mandate the **competent authorities** to solve disputes[275]. Many have as a second step, a specific **Arbitration Council or Committee** which could be convened ad hoc to solve a specific dispute (so no institutionalized body), for which no detailed rules of procedure are laid down (these rules have to be settled by the Council or Committee)[276] or the provisions already contain such rules of procedure[277].

Only a few Agreements contain a **permanent structure** which also has tasks beyond the settlement of concrete cases of disputes[278]. The committees which are institutionalized as such are more or less comparable to the Administrative Commission.

Concerning dispute settlement, direct contacts between the competent authorities should also be provided as a first step in a **European approach**. However it is certain that any European instrument would also necessitate constant development (e.g. adaptation of the Annex entries) and the solution of questions which arise during the application. A Mixed Committee could be one solution, which would make the whole administration of the instrument quite burdensome and heavy, but could be the forum, for example, for the preparation of Annex changes. Nevertheless it is recommended to look for lighter and more pragmatic approaches. One solution could be that, in the event that many Member States join such a European instrument, one day (an additional day?) of the meeting of the Administrative Commission is dedicated for such questions of interpretation of instruments concluded with Third Countries with the participation of the Third Countries concerned (see also the different proposals under Chapter 11).

[273] Information again gained from the written interview with the UK expert. Due to my experience, when it comes to (automatic) data matching, data protection rules could play an important role and could set some limits to such actions. But it has also to be considered that the understanding of the role of data protection seems to differ widely between the different Member States.

[274] Art. 71 ff of Reg. 883/2004.

[275] E.g. Art. 29 of the France-Uruguay Agreement.

[276] E.g. Art. 22 (2) of the Austria-Korea Agreement.

[277] E.g. Art. XXI of the Greece-Canada Agreement.

[278] E.g. Art. 46a of the France-Congo Agreement and Art. 70 of the Administrative Arrangement to that Agreement which stipulates that this Mixed Commission should meet at least once a year.

8.5. Summary in the form of recommendations for additional rules under a European approach

General rules

- Rules on co-operation, the use of languages, claims in the other Contracting Country, exemption from fees and authentication, medical examinations, transitional and entry into force rules.
- Other general rules such as, for example, offsetting, recovery and those on damages, should first be further analysed before they are included in a European approach.

Data protection

- A basic data protection provision must be included; it should be further examined if additional elements of data protection could also be included in that provision.

Fight against fraud and error

- Special provisions to combat fraud and error should be included which cover at least determination of residence and assessment of income; in addition more rules like e.g. those contained in the Dutch Model Agreements should be considered.

Dispute settlement and Mixed Committee

- A concrete mechanism of dialogue between the competent authorities for dispute settlement should be included.
- In addition, a Mixed Committee should be installed with interpretative power and also the task to prepare amendments to the instrument.

9. Short conclusions of the analytic part

The analysis shows clearly that **there is a common denominator** which could be distilled from the bilateral Agreements made available by Member States. To better identify the common elements of each of the sectors analysed they have been put at the end of each part in a **box**. If all of these elements are added together then we achieve a list which contains already the content for a text of a future European Model Agreement (**Annex 2)**. As stated it is not the final text but only a list of the elements. Depending on the homogeneity discovered in comparing the bilateral Agreements these elements could be easily transposed in a concrete text or need further examination and decisions. Some of the elements could be taken directly from Reg. 883/2004 others could be taken from the Agreements made available. For some questions, a lighter approach than under Reg. 883/2004 with sometimes slightly deviating principles could be advisable.

Some of the results of our analysis (leaving aside the principles which do not need further mention – as e.g. equal treatment or export of benefits) should be recalled as they seem to be very important and should be the pillars of the European Model:

- **All persons irrespective of their nationality** should be covered as this could solve obligations of international law (including the human rights aspects) and also avoids problems with the TFEU (as explained by the ECJ in its Gottardo Judgement).
- As a first step (especially in relation to Third Countries on other Continents) only provisions on **applicable legislation and pensions** should be included.

- The provisions on **pension** should be based on a **lighter approach** and not all the different steps of calculation as contained in Reg. 883/2004 seem to be necessary.

- A **data protection provision** is recommended as third Countries are not bound by the same principles and safeguards as applicable in between the Member States.

The work done under the analytic part leads automatically to the next steps. As already said in the introduction, from my point of view it would not be satisfactory if at the end of our work we can only agree on such a European Model Agreement without any "external" effects. Therefore we have to examine now for what purposes such a model or such European common principles for relations with Third Countries could be used. I want to mention already now that it could be also an important political message if **the EU shows a common philosophy in the field of social security in its external relations**. I would therefore invite the reader to continue reading the study bearing that in mind.

Part II – Strategy: Ideas and Suggestions for future actions

10. Drivers for the conclusion of bilateral Agreements

Under this Chapter the main motivations (drivers) for Member States to conclude Agreements have to be analysed. It is essential under the following Chapter 11 where we will look for ways of a common European approach that these drivers of the Member States are comparable in relation to a specific Third Country or group of Third Countries. Otherwise, a common approach seems not realistic. It is also essential to look at these drivers as a developing effect which changes from time to time.

Taking into account the experiences gained especially during the Workshop on 6.10.2010 and the additional interviews the following elements for **drivers** could be noted[279]:

- **Social reasons**: Let us start with the most idealistic political approach: There should always be a social policy interest to grant equal treatment also to migrants and to safeguard fundamental rights like e.g. the European Convention on Human Rights under which social entitlement are treated as property rights[280]. To safeguard these rights the conclusion of bilateral Agreements is necessary for those persons who have not been long enough members of the social system of the receiving country or who leave this country again.

- **Movements of Labour**: In the past this has been one of the main drivers and Agreements on social security were sometimes connected with labour recruiting Agreements. Traditionally these Agreements were concluded with labour exporting Third Countries – depending on the region of Europe e.g. with ex-Yugoslavia, Turkey or the Maghreb Countries. So these Agreements had the intention first to attract the labour force concerned also by safeguarding entitlements when the migrant workers returned to their home-countries or for family members who remained there during the activity of the breadwinner abroad. These Agreements had a rather extensive material scope covering all risks also covered by Reg. 883/2004. Usually these Agreements did not intend integration in the country of (temporary) work.

- **Movement of State's own nationals**: The next group of Agreements concluded in the past were Agreements for the emigrating nationals who went especially to Third Countries on other Continents (e.g. Australia, USA, Canada); these Agreements have the main purpose to help these persons (usually the nationals of the Member State concerned) when they come back to their country of origin (e.g. when they retire). These Agreements are especially necessary if the Third Country in which sometimes the majority of the working life has been spent does not export its benefits without such an Agreement or has other restrictions in calculating the benefit under the relevant national legislation which can only be overruled by a bilateral Agreement[281]. These Agreements are very often restricted to pensions.

[279] Many of the elements listed below are taken from the intervention of the German and Luxembourg experts at the workshop on 6.10.2010.

[280] See e.g. case 39/1995/545/631 *Gaygusuz against Austria*, as the first case in which the European Court on Human Rights has stipulated this principle.

[281] A good example for such a Third Country is **Australia**. This Country has a very detailed national legislation under which benefits exported from other Countries significantly reduce the Australian benefits and export without an Agreement is confronted with severe restrictions. Also the question which benefits are not taken into account for reducing the Australian benefits can only be settled during the negotiations on a bilateral Agreement. An example could be the following: Under Australian legislation special social benefits which are meant for persons in need are not included in the income and assets test (reduction of the amount of the Australian pension) – foreign benefits have to be included in this national Australian list to have

- **Historic reasons**: A common past could be a strong driver for a bilateral Agreement, especially if e.g. during this common past social security has been covered by only one scheme applicable to the territories of both Contracting Countries. So these Agreements have as a main purpose the apportionment of these insurance burdens by clearly settling which Contracting Country has to pay for what contingencies (where did they occur?) and for what persons (in this respect sometimes nationality plays an important rule). The Agreements made available do not contain such types of provisions, but as an example the bilateral relations between the Czech Republic and Slovakia or Germany and Austria (although all of them are Member States now) but also in between the countries of ex Yugoslavia or the ex Soviet Union could be cited. Such a question could occur in the same way after the separation of former colonies which also has been relevant for some Member States in the past (e.g. Belgium, France, Portugal or the UK). Sometimes the conclusion of an Agreement between these countries is not so easy taking into account the still burdened relationship between the countries involved after the break down of bigger entities. It is clear that such a driver in principle cannot be a motivation for a European approach as it concerns only specific countries.

- **Globalisation**: Today the classic movement of workers is not any longer such a strong driver. Predominantly economic relations are a much stronger motivation. Usually it is industry which requests the conclusion of an Agreement to avoid disadvantages for the enterprises always with a view to safeguard a good position in worldwide competition and to achieve competitive advantages over bidders from other Countries. Therefore e.g. the payment of contributions for internationally working employees in two countries could be very expensive and has to be excluded by an Agreement. Also posting provisions safeguard that personnel sent to work in the other country remains content and therefore is not opposed to work abroad. This applies today e.g. in relation to Japan, Korea, India but also Brazil. Very often such Agreements are in the interest of both Contracting Countries as globalisation goes more and more in both directions. This can be seen e.g. in relations between Austria and Korea where the Agreement was concluded after pressure from both sides; on the one hand Korean enterprises setting up establishments in Austria and on the other hand Austrian firms which had already strong relations and an intensive exchange of manpower with Korea. Therefore in relation to these developing economies the old one-way perspective (labour emigration versus labour immigration countries) is no longer valid. In relation to these Third Countries provisions on applicable legislation are sometimes more important than provisions on benefits.

- **Amendments to national legislation**: This was a driver mentioned by the German expert during the Workshop on 6.10.2010. Reference was made to India, which amended its national legislation in such a way that also personnel sent from employers outside India were made subject to contributions in India without any threshold. Such a legislation forces other countries which have close economic relationship with that country to conclude bilateral Agreements to avoid that consequence e.g. via a posting provision. Very comparable are also amendments to the legislation of some Member States which necessitate a bilateral Agreement to safeguard control for the export of benefits – but as this is a factor in its own right, it will be dealt with later.

- **Political reasons**: Another issue mentioned was the political dimension of a bilateral Agreement. First there is the **"prestige" effect**. Concluding an Agreement with the "big players" (only as an example: Germany, France or the UK) shows the importance of the Contracting Country if it is a smaller one. So it is not excluded that some Agreements are

the same effect. During the negotiations on the bilateral Agreement Austria succeeded in including some Austrian benefits (like e.g. for victims of the war or the long-term care benefits) so that also these benefits were excluded from the income and assets test.

concluded predominantly out of that reason and not because of the economic or migration trends. But this political pressure could also be played the other way around. By "using" one Member State as a gate opener for the intended Agreement with a more potential Member State[282].

- Agreements could also be an important instrument of a **European strategy**. Therefore Member States start negotiations with the Countries of ex-Yugoslavia, Moldova etc. Such Agreements could have a double effect: First it gives the Third countries concerned the feeling of already being part of the European family and second the negotiation process itself and the setting up of administrative structures for the application of such an Agreement could be a very important learning tool and ease the process of accession[283]. Usually these Agreements very closely copy the European co-ordination provisions.

- Finally Agreements could also be used as a means of "**development aid**" – by supporting the social security scheme of the developing Third Country. This could be done via the help to set up administrative structures for the application of the Agreement and thus also for pure national purposes of the Third Country concerned but also via direct or indirect financial aid to the social security scheme of that Third Country[284].

- **International obligations**: Although there are not many, some international obligations exist which oblige countries to enter into bilateral Agreements – although the "obligation" might be different from instrument to instrument. One example would be some of the Association Agreements concluded by the European Union and its Member States, which do not provide for a limited co-ordination themselves[285], but only give incentives for the conclusion of bilateral Agreements if necessary[286]. It is not transparent for the time being what effect these obligations have in reality.

- Another source for such obligations could come from requirements imposed by membership of an organisation e.g. the Council of Europe[287]. But there might be more and more obligations in the future. One striking example is the ongoing negotiation process on **free trade Agreements of the EU** under the GATS obligations, where a specific clause has been included in the texts e.g. in relation to India to accommodate the concerns of India with regard to disadvantages in competition due to the fact that other competing countries have concluded bilateral Agreements (or are bound by the co-ordinating EU-Regulations) and thus have advantages in the field of social security

[282] One example could be drawn from the Austrian experience again. One Latin American Country urged us to conclude an Agreement – it turned out that this Latin American Country was very much interested in an Agreement with Germany. Naturally such reasons are always very difficult to prove, but since the signature of this Agreement nothing has happened and, although already nearly 2 years have passed, the Agreement of Austria with that Latin American Country still is not in force but Germany has already started its negotiation.

[283] Only in this perspective it is understandable why e.g. Austria has concluded bilateral Agreements with Bulgaria and Romania which entered into force only very shortly before 1.1.2007 the day of accession of these two Countries.

[284] Even if this is not explicitly evident one could conclude from the **France-Congo Agreement** that in the field of family benefits such a subsidy of the system of Congo was intended – In relation to family benefits we can see a deviation from the principles under Reg. 883/2004 – benefits have to be granted by the country of residence of the children with (partial) reimbursement by the country of activity of the worker (Art. 10 and 11) – the tariffs of reimbursement differ significantly – see Annex 2 of the Administrative Arrangement to that Agreement. Nevertheless if this is really the case, it would have to be further examined. Another example which might be an indicator for such a subsidy is that for cost refund in relation to Congo only the costs of the University clinic in Brazzaville is taken which presumably has the highest cost of Congo while in relation to France the average of all costs of sickness insurance is taken (Art. 21 of the Administrative Arrangement).

[285] Co-ordination is provided e.g. in the Association Agreement with Algeria – Art. 68 of the Agreement of 22.4.2002 and the Decision of the Association Council for that purpose as agreed between the Member States involved during the Spanish Presidency in the first half of 2010.

[286] E.g. the Association Agreement with Egypt – Art. 62.

[287] E.g. Art. 12 (4) of the Council of Europe's Social Charta which obliges the countries bound by it to conclude Agreements between themselves. Austria had to conclude an Agreement with Iceland due to these obligations.

contributions (no double payment)[288]. This clause states that, where necessary, countries concerned would endeavour[289] to take up negotiations also with India[290]. Such clauses could form part of other Agreements in that context so that more and more international obligations could come from the GATS or WTO field.

- **Measures to avoid misuse and to safeguard control**: At least the legislation of one Member State, the **Netherlands**, necessitates bilateral Agreements to safeguard the export of benefits to the territories of other countries. Without such an Agreement benefits cannot be exported, even if under "old" Agreements an export has taken place it had to be stopped in case of no agreement on such measures[291]. If the Third Country concerned is interested in a (continued) export of Dutch benefits it has to conclude a corresponding Agreement with the Netherlands. In case of reciprocal (bilateral) provisions the Third Country concerned can also profit from such control measures for its beneficiaries residing in the Netherlands[292]. These Agreements are therefore totally different to the standard Agreements analysed[293]. Although this is usually a strong driver it could also deter some Third Countries which are bound by strict data protection provisions or which do not want for other reasons such control of beneficiaries resident on their territories by foreign institutions.

But there might be also factors which block the conclusion of bilateral Agreements, let us call them "**blockers**" to counterbalance them to the "drivers". One of these blockers shall be mentioned now:

- One example of a Member State which has not concluded many Agreements in the last years is the **United Kingdom**[294]**.** Already for nearly 30 years the constraints of the UK are to conclude Agreements only on a cost-neutral base. This means also that benefits paid by the UK outside its territory should not include annual uprating or indexing ("frozen pensions"). Therefore the UK has to insist in bilateral negotiations with Third Countries[295] that no uprating has to be applied to benefits granted to the territory of the Third Country concerned. As this is contrary to the fundamental principles pursued by the majority of countries Agreements usually cannot be concluded.

- The previous case is only one example. It could always happen if one country has **too exotic principles,** like e.g. an exaggerated data protection model or too extensive control provisions that these wishes turn out to be a blocker for international negotiations.

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[288] These concerns are based on the **MFN-Principle** (most favoured national treatment) under which service providers established in one of the GATS Member States should not be in a worse situation than service providers established in another GATS Member State (which could e.g. benefit from provisions in a bilateral or multilateral Agreement under which only one legislation applies and thus the double payment of contributions for service providers and their employees is excluded). Relying on MFN in a very extensive way would mean that the GATS member without such a bilateral Agreement could insist on being treated in an analogous way. Let us make a concrete example: If Austria has concluded an Agreement with the USA which gives service providers from the USA the advantage of a 5 years posting period and thus exempts the personnel posted from compulsory insurance in Austria, Indian employers could insist on the same advantage (even without a social security Agreement with Austria). To exclude such an extensive interpretation the readiness to conclude bilateral Agreements has been included.

[289] Anyhow the wording is not very obliging as there is no "sanction" if an Agreement cannot be concluded.

[290] Annex Mode 4 (Point 4).

[291] The details of the Dutch policy in this regard were made available by the Dutch expert during a written interview.

[292] The Netherlands have a unilateral and a bilateral Model Agreement for that purpose.

[293] See also Part I Chapter 8.3.

[294] The details of the policy of the United Kingdom in this regard have been made available by the expert of the UK during a written interview.

[295] It goes without saying that this freezing of pensions does not apply where international instruments like e.g. Reg. 883/2004, the EEA-Agreement or the EU-Swiss Agreement provide for export including indexation of the benefits paid abroad.

To conclude: There are various drivers. Some of them like especially the historic reasons apply only to specific Member States while others like e.g. the effects of globalisation or political reasons like guiding Third Countries to become part of the European family apply to all Member States in the same way. In the latter cases a **European approach** is possible (the elements which could be included in such an approach have been set out in Part I and the possible ways to achieve that European approach will be analysed in the following Chapter 11).

Although the **drivers might lead to different needs** (for example, being part of the European family could lead to wishes for a fully fledged approach copying Reg. 883/2004 and covering all risks of social security; while in relation to third countries on other continents only a basic approach covering applicable legislation and pensions might be realistic), this is not dealt with further at this stage and only a minimalist set of rules is proposed for further discussion. This is where I think that it should be possible to achieve agreement of all interested Member States. As already said this does not exclude the possibility that in relation to "closer" Third Countries a more integrative European approach is possible.

11. Possibilities for further action in the field of social security relations with Third Countries - room for a European approach?

11.1. Preliminary remarks

Taking into account all the analytic work done under Part I the most important question which remains is the following: What will be the best strategy of the Member States and of the European Commission for the future (may be not during the next months but for the next years)? Will it still be the exclusive task of the Member States themselves to conclude bilateral Agreements or will it be more and more a task that we should resolve together?

First it has to be said that there must be a (strong?) reason for changing the status quo. Therefore the first analysis in this Chapter should concentrate on the situation we have today and the possible shortcomings of this situation.

Once again it has to be recalled that the **following possibilities and proposals are my ideas** – so they are only meant to provide incentives and help for those who want to further examine the issue. I also want to mention already from the beginning that from my point of view whatever will be done at European level it should remain **based on the principle of voluntary participation**. Taking into account the status quo any approach obliging the Member States is not advisable for the time being.

11.2. Status quo and shortcomings

Today all Member States are more or less confronted with the same "drivers" outlined under the previous Chapter (leaving aside special additional drivers which apply only to some Member States). So all have to continue to conclude bilateral Agreements and very often with the same Third Countries (e.g. India, Korea, Japan for the moment – may be in future with China, Malaysia, New Zealand or South Africa?). The crucial question is whether this should be done as up until now autonomously or whether some interaction at European level could be helpful. **Only if we see the necessity or at least the usefulness for enhanced co-operation or even further steps, does this whole exercise make sense**.

Anyhow we must not forget that this question is highly political. Up until now this has been an issue widely dealt with only by the Member States. So whatever initiative comes at European level could be blocked in advance (without really looking into the matter itself) because this could be seen as an **infringement with national autonomy** or the principle of **subsidiary**. We will also be confronted immediately with the **question of a legal base** (at least the moment

we think about binding actions at European level). My proposal is first to look into the needs and the possibilities and forget about the legal base (I am sure that many possible solutions could also be achieved outside the strict legal hierarchy of the EU – therefore some courageous efforts are needed to advance the discussion).

If we **analyse the status quo** many shortcomings are evident. Only the following should be mentioned.

- The analysis of the Agreements made available shows that the **majority follow the same principles**, so there is not really a different approach by the different Member States (but this in itself is not sufficient to change the existing situation).

- A single Member State (especially if it is a smaller Member State) might not be "**strong" enough in relation to big and important Third Countries** – so is it all the time possible for the Member States to conclude Agreements which are totally corresponding to their plans and intentions? As an example posting durations can be taken. Usually strong Third Countries (like e.g. Korea, Japan, India) try to dictate a long posting period (usually 60 months - see under **Annex 1 Table 4**). Also Member States which usually prefer shorter periods (24 months e.g.) very often have to accept these longer periods if an Agreement really has to be concluded.

- All Member States are confronted with the same constraints – **lack of manpower, lack of time** (especially if the same department in the Ministries concerned is competent for bilateral affairs and for EU matters[296]). Therefore if all these experts negotiate with the same Third Countries more or less at the same time it could be analysed as **being not a very economic way to achieve these results** especially as the Agreements follow the same principles or at least some principles acceptable to all could be deducted from the Agreements analysed (see the analytic work under Part I).

- Negotiations usually also take some time (due to my experience as a rule it is impossible to conclude the talks in a shorter period than 3 rounds of negotiations, which corresponds – including the time of travelling – at least to **3 working weeks of at least 3 persons** from the administration of the Member States). As this seems to be the fastest negotiations there are many which take longer, e.g. 5 to 6 rounds of negotiations. Usually lengthy discussions have to be spent also on examining the overarching principles which are the same in all the Agreements analysed.

- The status quo has also a **political shortcoming**. Although inside the EU social security is already a topic of common interest (e.g. the open method of co-ordination used by the Social Protection Committee) and the co-ordination of social security schemes forms part of the fundamental principles already from the beginning of the European integration this message is not that evident in the relation to Third Countries. One could say **that a European identity in the field of social security in the external dimension is still missing**. It is true that also in negotiations with Third Countries the existing co-ordination rules under Reg. 883/2004 can be used as an argument for principles which should be included in a bilateral Agreement – but as this is done only by every individual Member State without any support from the totally of all Member States this is not always a strong argument (e.g. if also the Third Country concerned has a long ranging tradition of bilateral Agreements with many very potential Countries). From my point of view **this lack of "export" of the**

[296] If the person who would be responsible for leading bilateral negotiations is at the same time the nominated member of Administrative Commission and has also to follow the discussions at Council level, then usually there are very few time-gaps for bilateral activities taking into account the involvement with European affairs especially during the last 10 years in preparing the new Reg. 883/2004. It is not guaranteed that this will change in the next years.

strong elements of co-ordination developed inside the EU should be one of the most important "drivers" for a common approach.

To conclude: The existing situation is based on an autonomous approach of every Member State, which takes a lot of time and of resources. Taking into account that also public administration should use synergies and work in the most economic way possible it is useful to further analyse if this situation could be improved. At the same time also from a European policy perspective a stronger emphasis on the common understanding of all Member States of the importance of social security co-ordination should be put also into the relations with Third Countries. Therefore from my point of view it makes sense to think about possibilities for a European approach which could improve this existing situation.

11.3. General remarks on possibilities for a European approach

In this Chapter I will analyse which possibilities exist for a European approach from a theoretical point of view. I will start with the "softest" possibilities like e.g. enhanced co-operation and continue to the maximal European approach which could be seen in a binding Association-like Agreement with a Third Country. Presenting the possibilities I will also give some pros and cons; the decision which way forward is the most appropriate one is an important political decision which has to be taken by the Member States and the European Commission. This decision cannot be prejudiced by this study.

11.4. Enhanced co-operation

11.4.1. Better exchange of information

Something which could easily be achieved is more exchange of information between Member States on their bilateral relations with Third Countries. It turned out that in practice **all Member States are very often confronted with very similar problems** like e.g.:

- **India** changes its national legislation which affects the situation of undertakings established in a Member State and posting personnel to India – which Member State learns first about this?

- Agreements with **New Zealand** up until now have not been possible for the majority of Member States due to the position of New Zealand that every foreign benefit reduces the New Zealand benefit accordingly – which Member State has already experiences with New Zealand?

- After the autonomy of **Kosovo** many Member States continued to apply their "old" bilateral Agreements with Serbia, the Federal Republic of Yugoslavia or Yugoslavia accordingly (depending on the date such an Agreement has been concluded) or try to conclude a new Agreement. Up until now it has been very complicated to find the competent authorities, liaison bodies or institutions in Kosovo or to get information on the new social security system of Kosovo. Experiences of institutions show that very often the old rules cannot be applied any more – which Member State has new information on the authorities in Kosovo? Are there already successful attempts to conclude a new Agreement on social security with Kosovo?

These are only some examples where enhanced exchange of information could be helpful. As a forum the **Administrative Commission** could be used (e.g. half a day during the first meeting in a year). One issue which could also be further analysed is if Third Countries should also be invited to such discussions. But as this would predominantly be an exchange of information between Member States this is not recommended – it could also make the process too heavy and Member States might not be willing to discuss all issues openly. Under

Chapter 11.4.4. further steps will be proposed which involve also the Third Country concerned.

Pros: This approach is easy to achieve without any changes of the legal framework (although the Administrative Commission is not directly mandated to discuss also issues of bilateral relations with Third Countries[297] it could be easily agreed between the European Commission and the Member States to use that opportunity for such discussions by ways of a "gentlemen's agreement"). This was also one of the most favoured alternatives for further approaches during the workshop on 6.10.2010.

Cons: There is almost nothing which speaks against such an exchange of information; should it be the only outcome of an initiative at European level it might be regarded as too "light" for the effort and therefore from a political point of view too weak. So it might be advisable to combine this very useful step with other further reaching solutions.

11.4.2. More vigilance in case of actions in other fields of European legislation

More and more also in other fields of European policy and legislation aspects of socials security are involved. As an example the ongoing negotiations of **Association Agreements** with Third Countries could be cited where – taking into account the huge amount of papers circulating but also very often the difficulties to get knowledge of these processes (usually these issues are under the competence of the Ministries of foreign affairs which sometimes do not see the wide reaching impacts of these instruments) – it could be useful if one Member State which encounters problems with these texts warns the others. It could also be argued that such a warning and information function should be given explicitly to the European Commission (so the best solutions would be whoever learns first about possible problems should inform).

The same could also apply to other texts like e.g. **Free Trade Agreements** concluded by the EU with Third Countries. As an example the Free Trade Agreement of the EU with Korea[298] could be cited where only Cyprus has an exemption of its social security Agreements from the general most favoured national treatment clause[299]. Does this mean that all other Member States opened their bilateral Agreements for Korean service providers? It has to be assumed that this is not the case but anyhow if this issue had been known in advance the other Member States would have been in a position to better react and maybe agree on a common wording for that problem.

Again the **Administrative Commission** could be the place for such discussion. As it is usually a very time consuming issue if all Member States try to keep track of all these processes it could be advisable (if this task is not fulfilled by the Commission) to designate "**leading delegations**" which have the task e.g. to follow closely the development of Association Agreement negotiations and to give warnings the moment the development shows impacts on social security. For an "institutionalisation" in the work of the Administrative Commission the same arguments as under the previous point are valid.

Pros: Also this approach is easy to achieve without any changes of the legal framework (as it concerns European affairs it is even easier to regard it as covered by the mandate of Administrative Commission). The designation of a "leading delegation" could really contribute to a reduction of administrative burdens of all other Member States. If it is a

[297] Art. 72 of Reg. 883/2004 does not contain this exchange of information in the list of tasks of the Administrative Commission.

[298] Council Document 8530/10 WTO 114 SERVICES 21 COMER 63 COASI 69 of 20.8.2010, Annex 7 – C List of exemptions from MFN, p. 17.

[299] Concerning the issue of MFN see also under Chapter 10 "International obligations".

fair sharing of burdens between the various leading delegations it would be an overall advantage for all Member States.

Cons: There is nothing which speaks against such an exchange of information and division of tasks between Member States. As this is something which has to be done anyhow by the Member States it cannot be regarded as a real innovation; therefore also from a political perspective it could be regarded as not enough if it should be the only result of this exercise.

11.4.3. Co-operation between groups of Countries

Another possibility already tried during the meeting of EU Member States, the Commission and Countries of Latin America and the Caribbean in Alcala de Henares (first half of 2010 during the Spanish Presidency of the Council) could be **cooperation between groups or blocks of Countries**. If we consider that the Ibero-American Agreement will enter into force soon which is in its effects comparable to Reg. 883/2004 an exchange of experiences in the application of such multilateral instruments between experts of EU Member States and those of the Latin American Countries could have added values for both sides. It has to be assumed that there will be comparable problems of application and interpretation. Mutual learning and also the search for best practices could be the result of such encounters. This co-operation could cover all the different fields of co-ordination between countries including e.g. also electronic data exchange (which seems to be already very advanced under the Ibero-American Agreement). From my point of view this is an approach **we should further develop**.

Pros: This is another approach easy to achieve and it does not necessitate changes of the legal framework. Without any doubt it would enrich the experiences of both sides and would also contribute to common understanding and interpretation of international principles of co-ordination of social security schemes. It would also fulfil the promises given to the Latin American and Caribbean countries to continue the co-operation started at Alcala de Henares. In this context also enhanced co-operation e.g. with the Council of Europe concerning the European Convention on social security could be started. This could also be regarded as a first step for further going initiatives (e.g. the one outlined under Chapter 11.5.4.).

Cons: Such co-operation could be time consuming. If we start such co-operation with the Latin American and Caribbean countries or the Council of Europe we cannot exclude other groups of countries from such co-operation.

11.4.4. Concerted action of Member States in relation to a Third Country

During the workshop on 6.10.2010 another possibility for co-operation was mentioned: If all Member States are confronted with the **same problems in relation to a specific Third Country** (this could be the result of the better exchange of information mentioned under Chapter 11.4.1.) a common meeting with this Third Country could be useful. As an example **New Zealand** was mentioned. It could be assumed that one Member State alone cannot change the national policy of New Zealand (also under a bilateral Agreement foreign pensions reduce the New Zealand benefit without any limit) but a group of Member States (representing all Member States) could exercise much more pressure. Even if we do not think in these categories of power such encounters could help the Third Country to better understand that its national policy does not raise only problems in relation to singular countries but for all countries which are confronted with its policy. I think this is an **approach we should further examine**. This could also be a good opportunity to export the **European identity** concerning co-operation in the field of social security as outlined under the last bullet point of Chapter 11.2.

Pros: Such encounters with Third Countries are easy to prepare and without any doubt could be very effective. If e.g. such an encounter is prepared before or after a

meeting of the Administrative Commission it would also be easy to bring together all Member States interested. The initiative could come from the Presidency in Council or from any other Member State interested. Without obliging the Commission to participate in such meetings their presence would be also very helpful and could support the Member States in explaining e.g. the Commission's position in comparable situations inside the EU. Even if such meetings do not result in a change of the policy of the Third Country concerned it will be an important tool for mutual exchange of information and learning.

Cons: None.

11.4.5. Opening EESSI for Third Countries

Many Third Countries are more and more interested in **exchanging data under bilateral Agreements electronically** (e.g. Canada but also Australia proposed to their bilateral partners already since some years such data exchange). It would be very much in the interest of the institutions of the Member States to have only one system of electronic data exchange in place. As EESSI is compulsory for data exchange between Member States it would be the easiest way from the point of view of a Member State to open EESSI also for data exchange with such Third Countries.

Although this idea seems to be a convincing way forward from the point of view of the Member States (therefore also during the Workshop on 6.10.2010 this point has been identified as one with strong support from Member States) after further examination there seem to be some problems with that solution.

First there are **technical question** which have to be solved:

- EESSI is running at European level over **sTESTA**. Is it possible to connect also Third Countries over that network? What technical conditions must be met for that purpose?

- Bilateral Agreements sometimes are **based on other principles** (see the analysis under Part I), so it might be difficult to use the same SEDs as under EESSI between the Member States. On the other hand a new elaboration of SEDs would undermine the essential advantages of the use of EESSI (i.e. the same procedures for Member States and Third Countries for the institutions concerned). But it should be further analysed if this is really the case. Very often also under EESSI it will be up to the institutions to read out the information from the SEDs they need for the particular case. So it might also be that the SEDs elaborated for Reg. 883/2004 can be used for a bilateral Agreement and the institution has to use the information for slightly different processes (like e.g. pension calculation without comparing an autonomous amount with a pro-rata-amount – see Part I Chapter 7.3.).

- Another point which could be important is if the Third Countries interested in electronic data exchange are prepared to accept EESSI. Without any doubt this is a question of urgency. The more these Third Countries build their own ways of electronic exchange the less they will be willing to accept EESSI. Therefore decisions on this issue should be taken **as quickly as possible**.

- As EESSI is a system which is financed in the international part by the European Commission there must also be rules concerning **cost sharing by the Third Countries**.

But there are also **legal questions**. Under EESSI it is clear that electronic exchange of information is linked to strong **data protection provisions** in the EU. In relation to Third Countries these data protection principles are not directly applicable. Therefore additional rules on data protection must also be provided to allow electronic data exchange over EESSI with Third Countries (if this is possible from a technical point of view). If EESSI is opened also to already existing bilateral Agreements it is strongly recommended to make such a step

dependent on the proof of data protection rules and principles by the Member State which wants to do that step in relation to a Third Country. This application should be examined e.g. by the European Data Protection Supervisor or the Administrative Commission.

This is an aspect which has to be further elaborated. Although opening EESSI is a very tempting thing it would also mean **a lot of work to be done and a lot of risks**.

Pros: Opening EESSI for Third Countries which have concluded bilateral Agreements with Member States would bring a lot of advantages for Member States. Their institutions dealing with international cases could always use the same system irrespective if it is a case under Reg. 883/2004 or under a bilateral Agreement. This question should be an issue of highest priority which requires a quick decision. If it were accepted this could be regarded as also a politically high-ranking issue which could be easily "sold". Opening EESSI would also allow asking the Third Countries involved participating in financing EESSI which could be interesting for the European Commission from a financial point of view. Balancing these pros with the following cons it is recommended that this issue is further examined as a point of priority.

Cons: Opening EESSI on the other hand is risky. It needs a lot of preparatory work (technical and legal). Without additional data protection provisions – which by the way in such a scenario cannot be any longer bilateral data protection provisions but have to have a European core – such data exchange should not be allowed.

11.5. Possible visions for further steps going beyond enhanced co-operation

11.5.1. Elaboration of a new Model Agreement

As a first possibility for a common approach towards Third Country relations the elaboration of an EU Model Agreement could be envisaged. It would not be the first Model Agreement as already the Council of Europe and the ILO (Decision No 157 and Recommendation No. 167) have Model Agreements. This immediately leads to the first question: What is the **added value of Model Agreements**? From my point of view the existing Model Agreements did not change in real life. The analysis made under Part I did not show a big impact. It is not astonishing that, for example, the way of calculation of pensions under the Council of Europe's Model Agreement is only replicated in Agreements concluded by Austria as at that time the Austrian expert in the Council of Europe played a very important role and therefore could also influence widely this Model Agreement.

Besides that it has also to be acknowledged that the existing Model Agreements are meant as a template for **members participating to one international organisation** (Council of Europe's Model Agreement for the members of the Council of Europe, ILO instruments for the ILO members). An EU Model Agreement would be different: It would be elaborated by the EU but would be a model for relations to Third Countries which do not belong to the EU. Therefore these Third Countries could question why they should be obliged to respect such a model which they could not influence during its preparation.

From a technical point of view such a Model Agreement seems not too burdensome to achieve. The elements elaborated under Part I and put together under **Annex 2** could already be regarded as the core of a European Model Agreement.

Therefore such a Model Agreement could only make sense in another direction. If according to one of the following possibilities a Member State or a group of Member States makes an Agreement with a Third Country such a model could be the **mandate for that Member State or these Member States**. In such a scenario it would be more of an internal than an external model.

Pros: An EU Model Agreement for the relations with Third Countries could be quite easily achieved. Such a Model Agreement would show for the whole world the principles the EU and its Member States try to achieve in bilateral relations. At the same time it could be a mandate for a Member State or a group of Member States which have the task to negotiate a bilateral Agreement with a Third Country.

Cons: The added value of Model Agreements is not easy to discover in practice. There is the danger that – although after a first analysis the content seems to be clear - a lot of energy and time is wasted in the preparation of all the details of such an Agreement.

11.5.2. One Member State negotiates a bilateral Agreement which is a model for all other Member States

One could also imagine an agreement between Member States that one Member State (the one with the strongest links or the biggest interest – this Member State could be mandated by the Administrative Commission as "**leading delegation**") negotiates a bilateral Agreement with a Third Country which is an "ice breaker" for similar Agreements between this Third Country and other Member States interested. For such an approach it is necessary that the Third Country knows about this role of the "leading delegation". As it is a bilateral Agreement of only one Member State it will more reflect the peculiarities of this Member State and not a European Model (it seems not realistic that a leading delegation would do the negotiating job when it is mandated to base the negotiations on a European Model which sometimes could deviate from the aims of that Member State).

Although this could ease the negotiations of the other Member States this does not make such negotiations superfluous. Every **other Member State interested will have to make his own Agreement** – e.g. taking into account the special features of its national legislation. So e.g. if Denmark elaborates an Agreement with a Third Country which takes into account especially also the Danish residence based scheme, Member States with a Bismarckian scheme would have to include sometimes totally different elements into an Agreement. Therefore, for the other Member States this approach would only take away some of the time-consuming aspects of bilateral negotiations (no discussions on elements which are already included in the bilateral Agreement of the leading delegation).

Pros: If a Member State can base its negotiations with a Third Country on an Agreement concluded by another Member State this can slightly shorten the negotiating process.

Cons: As it can be assumed that the leading Member State is more interested in concluding an Agreement which takes into account its own interests it is not guaranteed that this Agreement is always useful as a model for other Member States. Also for the Third Country it could not be that evident that this could be used by other Member States. Nothing would exclude e.g. that the Third Country tries to achieve different results in relation to different Member States. From that perspective this solution seems not to bring a lot of added value compared to the existing situation.

11.5.3. Elaboration of a multilateral Agreement with a Third Country

This is one step further compared to the solutions mentioned before. Under this approach the "negotiator" (be it one Member State, a group of interested Member States or Member States together with the European Commission) negotiates a multilateral Agreement. Also on the other side there could be one ore more Third Countries. There are several ways how this could be done:

- It could be a real **conference of all the potential partners** (this would mean all Member States which are interested and the Third Country or Third Countries concerned) come together to elaborate the text of such an Agreement. The Ibero-American Agreement could be an example.

- A **smaller group of negotiators** (or only one negotiator) negotiates with one Third Country or more Third Countries a Multilateral Agreement which is also open for ratification for Member States (or Third Countries?) which have not taken part in the negotiating process.

It is clear that this approach has to be based on the **principle of voluntary participation** – so there is no obligation for the Member States (it is not excluded that a Member State which is not content with the outcome of these negotiations concludes a separate bilateral Agreement with the Third Country concerned). As the result of these negotiations will be more or less fixed concerning the content it could be useful to base the negotiations on a European Model. Member States which are interested in joining this Agreement will not be in a position to change the text of the Agreement – special provisions (e.g. non export of specific non-contributory benefits or special rules which are necessary because of the national legislation of the Member State concerned) have to be included in **Annexes** to this Agreement (comparable to the Annexes of Reg. 883/2004 – such insertions have to be accepted by all partners of the Agreement).

Such a multilateral Agreement has to be seen very narrowly linked with the **drivers** as analysed under Chapter 10 above. Therefore it would be most suitable in relation to Third Countries with which a majority of Member States wish to conclude an Agreement based on the reasons outlined above. But it would not be suitable in relation to Third Countries with which only one Member State or a few Member States want to conclude a bilateral Agreement e.g. because of historic reasons.

From a technical point of view this could be a **text which is ready for ratification** or only a **framework Agreement** which would necessitate that every Country which wants to participate has to conclude a detailed Agreement within that framework. The second alternative would take away many of the advantages which the first alternative could bring and therefore I would not recommend it.

Pros: This would be a solution with a European identity – therefore it could have a very important political message. It would safeguard the voluntary character (so no obligation for a Member State which does not agree with the Agreement to join it). For Member States which want to join, it could be a very efficient and quick way to join – without any rounds of negotiations it would just be once getting the Annex entries accepted and then national ratification could start. So this would save 3 to 5 rounds of negotiations which are usually necessary for an Agreement and thus 2 to 3 years.

Cons: Having to negotiate an Agreement on a European model which would be a profit for the other Member States is a heavy burden for the negotiator. Therefore a balanced situation where the negotiator in relation to Third Country A could benefit from the negotiations of another Member State which is the negotiator in relation to Third Country B is necessary. Such multilateral Agreements are usually rather complex (with Annexes) and not very flexible if quick amendments are necessary.

11.5.4. Synergies between different international instruments

It could also be considered to **bring together** already existing multilateral instruments, like e.g. **combining Reg. 883/2004 with the Ibero-American Agreement** or the **Council of Europe's European Agreement**. As it has been made evident in the comparison of these instruments under Part I they do not always follow the same approach. Therefore such a merger would first necessitate a detailed analysis of both text and their differences and finally maybe a synchronisation of the texts. As an example we should think of the calculation of pensions because there usually the application of two different instruments could cause many problems. Let us assume a person of German nationality **has completed periods of insurance in Germany, Spain, Argentina and Chile**. Under an ideal framework or umbrella Agreement covering Reg. 883/2004 as well as the Ibero-American Agreement and also building a bridge

between the two multilateral instruments all 4 Countries should take into account the periods completed in the respective 3 other Countries and afterwards calculate the pension under the same principles (as the Ibero-American Agreement is more or less based on the same principles as Reg. 883/2004 – **see Annex 1 Table 5** - this seems to be not that difficult to achieve).

Even if the principles of two instruments are comparable, combining them is a **technically demanding** tasks as a separate international law act (a new Agreement) is needed which clearly lays down how the different existing instruments have to be applied (as a rule by extending the respective personal scope and also laying down the principles under which each of the different instruments has to be applied – this could e.g. also be done via Annexes allowing the different Contracting Countries to provide for exceptions). As an example the **Quadrilateral Agreement (Bodensee-Agreement) between Austria, Germany, Liechtenstein and Switzerland** could be cited. This Agreement is only an "umbrella" over the 6 bilateral Agreements which exist between all 4 Countries. So it does not contain all the provisions of a typical bilateral Agreement but provides with which extensions the relevant bilateral Agreements have to be applied (e.g. some of them have a personal scope restricted to the respective nationals) and contains also **provisions for multilateral pension calculation**. From the Austrian experience I can say that this umbrella Agreement is very complex and not easy to read (as always also the underlying 6 bilateral Agreements have to be read and applied); nevertheless it works in practice.

Pros: An umbrella Agreement over existing multilateral instruments seems to be an easy way to reach co-ordination between lots of new Contracting Countries. It also safeguards the application of the same principles in relation to all the countries involved.

Cons: Such an umbrella Agreement usually is very complex and not very transparent as it does not give the full picture of all the provisions to be applied – the provisions of the international instruments (e.g. Reg. 883/2004) underneath always remain applicable. In case of frequently changing international instruments (like e.g. Reg. 883/2004) the process of adapting the umbrella Agreement to these amendments usually is time consuming and burdensome. If not the organisations representing the group or blocks of Contracting Countries (e.g. the EU – which could mean the Council) are competent to agree on such amendments every Contracting Country has to follow usual "ratification procedures" as in relation to any other international Agreements.

11.5.5. Elaboration of an Association-type Agreement

This is the most stringent and invasive solution. The European Commission would have to follow the usual way to come to such an Agreement and Council would later have to transpose this Agreement. "Association-type" Agreement might not be the best technical expression. But it would cover Agreements which are comparable to the real Association Agreements like e.g. with the **Maghreb Countries** but also much more integrative examples like e.g. the **EEA-Agreement** or the **EU-Switzerland Agreement**.

Anyhow such an approach would immediately call for a correct **legal base** (which could be avoided for the previous approaches), it would also endanger that not all Member States would be entitled to join[300]. It is supposed that such an approach would also need a quite **heavy institutional structure** like e.g. Association Councils which can take decisions for the application and development of these texts.

[300] If also for that approach Art. 79 (2)(b) TFEU should be the correct internal legal base, Denmark would be excluded and Ireland and the UK would have only the possibility to opt into that instrument as it has been the case in relation to the 6 Third Countries bound by Associations Agreements (preparation of Decisions of the Association Councils during the Spanish Presidency during the first half of 2010).

Nevertheless also innovative and more flexible ways should be further analysed. Would it e.g. be possible to make the participation in such an Agreement **voluntary** or has it to be compulsory? As to the content such a solution could be comparable to the EU-Switzerland or the EEA Agreement where more or less **Reg. 883/2004 is declared applicable** or it could be a lighter text where e.g. the Model for a European approach as elaborated under Part I could be the base. Usually such Agreements have only been concluded as covering more aspects than only co-ordination of social security schemes – as a rule also some other aspects of co-operation but also aspects of free movement have been included in the past. Would it therefore from a political point of view be acceptable to limit such an Association-type Agreement only to co-ordination?

Pros: Without any doubt this would be the most European way. It would safeguard a unified solution for all Member States which would be bound by the legal base chosen if it is made compulsory; even if it would remain voluntary there might be a big political pressure to join this act. It would also put a greater pressure on the Third Country to accept the European approach.

Cons: Although there are prejudices (e.g. EEA Agreement) it might be regarded as transfer of too much power to the EU (Member States lose the autonomy they had up until now). It would be a very heavy procedure which needs also institutional structures (if more such Agreements would be concluded the necessary decisions e.g. of the Association Councils to take into account changes would mean an administrative overkill. Member States could also be reluctant to accept this solution taking into account the very difficult process we encountered during the negotiation of the Association Council decisions in Council during the first half of 2010. Disputes could easily arise on the correct legal base. Such a solution would presumably also be under the jurisdiction of the ECJ which might make Member States even more cautious and reluctant to accept this solution as they could not any more influence the interpretation of this instrument.

12. Some ideas what the next steps could be

Having analysed the various drivers for the negotiation and the conclusion of bilateral Agreements with Third Countries, I think that there are **many common drivers** which concern all, or at least a majority of, Member States. Globalisation and movement of persons are in particular common challenges for most Member States - very often in relation to the same Third Countries.

Therefore an examination of possibilities for further steps at **European level** from my point of view would be useful. As shown in this study, there are various alternatives for such a European approach. Each one has advantages and some of them also have disadvantages. For future deliberations it is not necessary to select one of these options alone. The solution could also be a combination of a number of these possibilities.

I think that the examination of the pros and cons of certain possibilities, e.g. of enhanced co-operation, opening EESSI and the elaboration of multilateral Agreements open for ratification by every Member State which wants to do so, could be continued. It should also be considered if, for this purpose, a European Model Agreement would be useful. However, this part of my study on strategic possibilities is only intended to outline the possibilities available to help decision-makers. It is in no way intended to pre-empt any of these decisions.

Annex 1

Comparison of the Agreements made available

Contract ref. no. VC/2010/0646

Table 1: Agreements examined

Member State (MS)	Third Country (TC)	Date of signature	Revision clause
Belgium (BE)	India	3.11.2006	No limitation[1]
	Japan	23.2.2005	No limitation
	FYROM	13.2.2007	No limitation
Cyprus (CY)	Australia	12.5.1992	No limitation
	Canada	24.1.1990	No limitation Review mechanism[2]
Denmark (DK)	USA	13.6.2007	No limitation
	Chile	8.3.1995	No limitation
Germany (DE)	Brazil	3.12.2009	No limitation
	* New model	--.--.----	-----
Greece (EL)	USA	22.6.1993	No limitation
	Canada	10.11.1995	No limitation
France (FR)	India	--.--.----	No limitation
	Uruguay	--.--.----	No limitation
	Congo[3]	11.2.1987	2 Y + automatic prolongation
Ireland (IE)	Korea	31.10.2007	No limitation
Spain (ES)	Peru	18.1.2005	No limitation
	Tunisia	26.12.2001	No limitation
	Ibero-American	10.11.2007	Revision after 1 Y[4]
Italy (IT)	Uruguay	7.11.1979	No limitation
	Venezuela	7.6.1988	Revision after 3 Y
Lithuania (LT)	Canada	5.7.2005	
Hungary (HU)	Canada	4.3.2002	No limitation
	India	2.2.2010	No limitation
	Bosnia & Herzegovina	12.6.2008	No limitation
Netherlands (NL)	*New model[5]		No limitation
Austria (AT)	Korea	23.1.2010	No limitation
	*New model		No limitation
Poland (PL)	Canada	2.4.2008	No limitation
Portugal (PT)	Australia	3.9.2001	No limitation Review mechanism[2]
	Ukraine	7.7.2009	1 Y + automatic prolongation
	Tunisia	9.11.2006	1 Y + automatic prolongation
Romania (RO)	Korea	--.--.----	No limitation

[1] "No limitation" means that the Agreement is not concluded for a specific period, nevertheless all Agreements provide for a denunciation by one Contracting Country within specified time limits.
[2] If one Contracting Country requests a review.
[3] This Agreement has not been provided by France but has been chosen to include also a Country south of the Sahara – Text from the homepage of CLEISS.
[4] In case of later amendments they are only binding for those Contracting Parties which ratify them – this leads to various layers of legislation which might make the future application very complex.
[5] Unilateral and bilateral Model Agreement to combat fraud and error – sent by the Dutch expert during the written interview.

Member State (MS)	**Third Country (TC)**	**Date of signature**	**Revision clause**
Slovakia (SK)	Korea	--.--.----	No limitation
	Canada	21.5.2001	No limitation
Slovenia (SI)	Australia	19.12.2002	No limitation Review mechanism[2]
	Canada	17.5.1998	No limitation
	Québec	11.5.2000	No limitation
United Kingdom (UK)	USA	13.2.1984	No limitation
	Jersey and Guernsey	8.8.1994	No limitation
Council of Europe (CE)	European Convention[6]	14.12.1972	No limitation
	*Model	--.--.----	No limitation
ILO	Convention 157[7] [8]	2.6.1982	Denounciation only after 10 Y
	Rec. 167[9]	20.6.1983	

[6] In force between Austria, Belgium, Italy, Luxemburg, Netherlands, Portugal, Spain and Turkey; the Committee of Minsters of the Council of Europe could invite also Countries not belonging to the Council of Europe to join the Agreement.
[7] Convention 157 contains general principles which should apply in the relation between the ILO members.
[8] Provisions need bilateral or multilateral Agreements to be set in force. Nevertheless some provisions (like e.g. aggregation of periods of insurance in more Countries which are all bound by bilateral Agreements) apply directly.
[9] Recommendation 167 contains some additional general principles and model provisions for bilateral Agreements.

Table 2: Material scope

MS	TC	Material scope[1]					
		S	A	P[2]	U	FB	Annex X benefits[3]
BE	India			X			
	Japan			X			
	FYROM	X	X	X	X	X	
CY	Australia			X			
	Canada			X			
DK	USA			X			
	Chile			X			
DE	Brazil		X[4]	X			
EL	USA			X[5]			
	Canada			X			
FR	India			X		X[6]	No export of non-contributory benefits
	Uruguay	X[7]	X[8]	X		X	No export of non-contributory benefits
	Congo	X[9]	X	X		X[10]	No export of non-contributory benefits [11]
IE	Korea			X			
ES	Peru	X	X	X		X	
	Tunisia	X	X	X		X	
	Ibero-American			X	X[12]		Non-contributory schemes excluded from material scope
IT	Uruguay	X	X	X	X[12]	X	
	Venezuela	X[7]	X[13]	X			
LT	Canada			X			
HU	Canada			X			
	India			X			
	Bosnia & Herzegovina	X	X	X	X		Specific benefits from BiH no export
AT	Korea			X			No export
	*New model			X			No export
PL	Canada		X	X			Benefits under special conditions no export
PT	Australia	X[14]	X[15]	X	X[12]	X[16]	Benefits of non-contributory

[1] „S“ means sickness and includes maternity; „A” means accidents at work and occupational diseases; “P” means pensions covering invalidity, old age and survivors; “U” means unemployment; “FB” means family benefits.
[2] Some Agreements provide only special provisions for pensions; nevertheless as insurance coverage is usually regarded as parcel under national legislation especially for applicable legislation also all other branches of social security are covered.
[3] Are there special references to benefits excluded from the obligation to export which are special and sometimes are included in Annex X of Reg. 883/2004 (especially exemptions from the export provisions)?
[4] Only concerning benefits in cash.
[5] Although social security as a whole is included there are only special provisions for pensions.
[6] Restricted co-ordination: family benefits by the State where activity is carried out under national conditions.
[7] Only aggregation.
[8] No provision for benefits in kind.
[9] Very detailed provisions which sometimes are based on other principles than Reg. 883/2004 – e.g. maintenance of coverage of the competent Country in case of transfer of residence for 6 months, export of benefits in kind (cost-refund), direct provision of health and maternity benefits in kind under French legislation for posted workers still subject to French legislation etc.
[10] Very detailed provisions which sometimes are based on other principles than Reg. 883/2004 – e.g. sharing of costs of family benefits etc.
[11] Special Protocol for these benefits; special allowance for elderly workers exportable.
[12] Only export and provision which Country is competent.
[13] Applicable only after notification that national legislation has been adopted accordingly.

MS	TC	Material scope[1]					
							scheme no export
	Ukraine	X[17]	X	X	X[18]	X	
	Tunisia	X	X	X	X	X	
RO	Korea			X			
SK	Korea			X			Invalidity benefits for students no export
	Canada			X			
SI	Australia			X			Benefits not exportable under SI legislation no export
	Canada			X			Special additional benefits no export
	Québec			X			Special additional benefits no export[19]
UK	USA			X			
	Jersey and Guernsey	X[20]	X	X	X[18]	X	
CE	Euro.Conv[21]	X[22]	X	X	X[22]	X[22]	Non-contributory benefits, benefits under transition arrangements, assistance in case of need
	Model	X	X	X	X[12]	X[23]	Special benefits granted as assistance or in case of need
ILO	Conv. 157[24] + Rec. 167	X[25]	X	X + provident funds[26]	X	X[22]	Export of non-contributory benefits and benefits under a transitional scheme can be excluded If non-contributory benefits are exported a special calculation formula is provided[27]

[14] Unilaterally only for PT – aggregation.
[15] Unilaterally only for PT.
[16] Unilaterally only for PT – FB for pensioners.
[17] Aggregation + entitlement to benefits for workers in Country of residence.
[18] Only aggregation; sometimes it is not clear if the 1-day rule is applicable.
[19] Although usually the Agreements with Canada and Québec are more or less the same the list of non exportable benefits of SI differs in these two texts – may be due to amendments of national legislation in between the conclusion of the 2 instruments.
[20] In principle only aggregation and export.
[21] The model leaves it open which branch is included in a concrete Agreement.
[22] Only aggregation directly applicable, rest of principles needs bilateral Agreement to become effective.
[23] One alternative is that family benefits are paid under the legislation of the Country of residence of the family members with reimbursement by the competent Country or another alternative is that family benefits are only granted under the legislation of the Country of residence.
[24] Bilateral Agreements to be concluded may determine the branches they cover, but at least pensions, accidents at work and occupational diseases and sickness and maternity should also be covered for the purpose of applicable legislation to avoid double coverage.
[25] In case of scheduled treatment abroad (S2-cases under Reg. 883/2004) authorisation has to be given if the treatment cannot be given in the Country of residence.
[26] Unique provisions for the transfer of entitlements in between compulsory provident funds (might be also schemes not based on legislation?) but also between normal social security schemes and provident funds.
[27] In case of invalidity or death in relation of the years of residence to 2/3 of the possible career between 15 and the contingency and in case of old age in relation to 30 years.

Table 3: Personal scope and equal treatment

MS	TC	Personal scope[1]		Gottardo clause[2]	Restrictions to nationals	Equal treatment export[3]
		Nation.	All			
BE	India		X			X
	Japan		X			X
	FYROM		X			X
CY	Australia		X			
	Canada		X			X[4]
DK	USA		X		Equal treatment; Export; Pension provisions[5]	
	Chile	X			Pension provisions[5]	
DE	Brazil		X	X	Equal treatment; Sharing of insurance burdens; Representatives in institutions[6]; Voluntary insurance[7]	X
	* New model		X			X
EL	USA		X			
	Canada		X			X[4]
FR	India		X			X
	Uruguay		X			X
	Congo	X[8]			Representatives in institutions[6]; Voluntary insurance	
IE	Korea		X		Equal treatment[9]	X
ES	Peru		X		Equal treatment	X
	Tunisia	X				X
	Ibero-American		X			X
IT	Uruguay		X[10]			X
	Venezuela		X		Equal treatment	
LT	Canada		X			X
HU	Canada		X			X
	India		X			X[11]
	Bosnia &		X		Representatives in	X[4]

[1] Although in case of "all" all persons covered by the national legislation are included (irrespective of their nationality) the equal treatment clause sometimes is restricted to nationals – see Column "Restriction to nationals".
[2] EU-nationals have to be treated as nationals of the contracting Member State.
[3] Equal treatment of nationals of other Contracting State for export to Third Country.
[4] No equal treatment clause but obligation to export to Third Country.
[5] Apply only to US/Chilean nationals.
[6] If insured persons or employers are represented only under the condition of nationality in the boards and committees of the insurance institutions or e.g. in courts dealing with social security issues equal treatment should not extend to these functions.
[7] Special reference also to provisions of Reg. 883/2004.
[8] In principle applicable only to workers; special Protocol for students.
[9] Who reside in the territory of the other Country.
[10] Only workers.
[11] No explicit treatment as own nationals and reference to national conditions – but could be interpreted as all other rules mentioned in that column.

MS	TC	Personal scope[1]		Gottardo clause[2]	Restrictions to nationals	Equal treatment export[3]
	Herzegovina				institutions[6]; Sharing of insurance burdens in bilat. Agreements; Personnel in dipl. Missions in other Countries; Unemployment benefits	
AT	Korea		X		Equal treatment; Representatives in institutions[6]; Apportionment of insurance burdens[12]; Personnel in dipl. Missions in other Countries;	X
	*New model		X		See AT-Korea	X
PL	Canada		X			X
PT	Australia		X			X[4]
	Ukraine	X				
	Tunisia	X				X[4]
RO	Korea		X		Equal treatment	X
SK	Korea		X			X
	Canada		X			X[4]
SI	Australia		X			
	Canada		X			X
	Québec		X			X
UK	USA		X			
	Jersey and Guernsey		X			
CE	Euro.Conv	X			Representatives in institutions[6]	
	Model	X[13]	X[10]		Equal treatment ; Representatives in institutions[6]	
ILO	Conv. 157 + Rec. 167		X[14] [15]		Export[16]	

[12] For provisions which share the insurance burdens between Countries by taking into account the nationality of the person concerned.
[13] Template for an Agreement restricted in the personal scope and one for an unrestricted scope.
[14] The persons to be covered by a bilateral Agreement should at least cover employed persons and their dependents with the exemption of persons which are exempted from the legislation of the Country concerned by virtue of international Agreements.
[15] Under the Recommendation 167 bilateral Agreements should be extended to other members of the ILO (for this purpose there is also a specific template for such an extending Agreement.
[16] If a bilateral Agreement is concluded extension to other persons possible.

Table 4: Applicable legislation

MS	TC	Posting			Simult. act.[1]	Dipl. pers[2]	Others
		Period	Extension[3]	Self-empl.			
BE	India	60 M	X[4]			X	Also fam-members[5]
	Japan	60 M	X[4]	60 M[6]		X	Also fam-members[7]
	FYROM	24 M	X[4]		X	X	Also fam-members[8]
CY	Australia[9]	24 M				X	
	Canada	24 M	X[4]		X[10]		Periods also for fam-members
DK	USA	60 M/36 M[11]				X	Also fam-members[7]; intergroup[12]
	Chile	24 M	X[4]			X	
DE	Brazil	24 M		24 M[13]		X	
EL	USA	60 M				X	Intergroup[12]
	Canada	60 M			X[10]	X	
FR	India	60 M				X	Also fam-members of civil servants
	Uruguay	24 M				X	
	Congo	12 M	+ 12 M			X	
IE	Korea	60 M	X[4]		X[10]	X	Intergroup[14]
ES	Peru	24 M	+ 12 M	24 M		X	
	Tunisia	24 M	+ 24 M			X	
	Ibero-American	12M[15]	+ 12 M	12 M		X	
IT	Uruguay	24 M	X[4]			X	
	Venezuela	24 M	+ 12 M			X	
LT	Canada	60 M			X[10]	X	
HU	Canada	60 M		60 M		X	
	India	60 M				X	
	Bosnia & Herzegovina	24 M		60 M		X	
AT	Korea	60 M				X	Intergroup[14]
	*New model	60 M				X	
PL	Canada	60 M			X[10]	X	Intergroup[14]
PT	Australia	48 M				X	Intergroup[16]
	Ukraine	12 M	+ 12 M	6 M	X[17]	X	

[1] Is there a competence for only one State comparable to Art. 13 of Reg. 883/2004?
[2] Special provision for the Diplomatic or Consular personnel – e.g. reference to the Vienna Conventions.
[3] Extension of posting period separated from general exception rule.
[4] Without any further limitation as to time.
[5] Same competence for accompanying family members as for active persons, but restricted to posting.
[6] Other than Art. 12 (2) of Reg. 883/2004 restricted to the exercise of a self-employed activity.
[7] Same competence for accompanying family members as for active persons.
[8] For diplomatic personnel.
[9] Unilateral provision in relation to CY.
[10] Only for self-employed persons.
[11] Differing posting provisions for USA (5 years) and DK (3 years).
[12] In relation to the USA also intergroup mobility (with a new labour law contract) is treated as posting.
[13] For other persons than employed persons who are covered by the legislation which forms part of the material scope.
[14] Intergroup mobility (to employer's affiliated or subsidiary companies) is treated as posting.
[15] Only applicable to specific groups of economic active (e.g. researchers, scientist, technical management).
[16] Treated like positing + definition of intergroup relationship.
[17] Only for simultaneously employed and self-employed.

MS	TC	Posting			Simult. act.[1]	Dipl. pers[2]	Others
	Tunisia	24 M	+ 12 M	6 M	X	X	Special rule for students + competence of Country of studies
RO	Korea	36 M	+ 24 M		X[18] [19]	X	Intergroup[14]
SK	Korea	60 M		60 M		X	Intergroup[14]
	Canada	60 M			X[10]	X	Possibility for residence in both Contracting Countries
SI	Australia[20]						
	Canada	60 M			X[10]		Intergroup[14]
	Québec	60 M	X[4]		X[10]		
UK	USA	60 M	X[4]		X[10]	X	
	Jersey and Guernsey	36 M			X		
CE	Euro.Conv	12 M	X		X	X[21]	
	Model	12 M / 24 M[22]		12 M / 24M[22]	X[10]	X	
ILO	Conv. 157 + Rec. 167	open[23]	X	X			

[18] Only for simultaneously self-employed and simultaneously employed/self-employed situations (so no provision for simultaneously employed persons).
[19] Rule also for international rail and road transport which seems a little bit unrealistic in relation between Romania and Korea.
[20] No provisions on applicable legislation.
[21] Persons covered by the Vienna Conventions are excluded from the personal scope as a whole.
[22] Optional duration of posting.
[23] Has to be fixed by mutual agreement.

Table 5: Pensions

MS	TC	Calculation			< 12 m[1]		Unilateral provisions[2]	Prov. to prevent overlapping[3]	Periods in TC[4]
		Pro-rata	AA[5]	Comp[6]	yes	no			
BE	India	X	X[7]	X	[8]		Extens UP[9]	As Art. 5[10]	
	Japan	X	X[7]	X	[8]	X[11]	Extens UP	As Art. 5[10]	
	FYROM	X	X[7]	X		X	Extens UP	As Art. 5[10]	X[12]
CY	Australia	X	X	No		X	Extens UP		
	Canada	X[13]	X	No	X		Extens UP		X
DK	USA		X[14]			X	Extens UP		excluded
	Chile		X[14]			X	Extens UP		
DE	Brazil	No[15]	X	No		X	Extens UP		X[16]
EL	USA	X	X	No		X[17]	Extens UP	As Art. 5[10] + pro-rata[18]	excluded
	Canada	X	X	No		X	Extens UP		X
FR	India	X	X	X	X			As Art. 5[10]	X
	Uruguay	X	X	X	X			As Art. 5[10]	X
	Congo	X	X	No	X[19]			Exclusion of national AC-prov.[20]	
IE	Korea	X	X	No	X		Extens UP		excluded[21]
ES	Peru	X	X	X	X		Limited UP	X[22]	
	Tunisia	X	X	X	X		Limited UP	X[22]	
	Ibero-	X	X[23]	X[24]	X[25]			X[26]	

[1] Are periods under 12 months taken into account by the other Contracting State?
[2] Is the calculation of benefits provided for under bilateral provisions or are there unilateral provisions for each of the 2 Contracting States? In the latter case only the calculation for the Member State is analysed.
[3] Although the provisions to prevent overlapping might also have impact on other benefits than pensions their major impact could be expected in relation to pensions so that these provisions are listed here.
[4] Are periods in another Country than the two Contracting Countries also taken into account?
[5] Autonomous amount in case of entitlement without aggregation.
[6] Comparison between pro-rata and autonomous amount and granting of highest amount.
[7] Deviation for Invalidity benefit.
[8] As there is no specific provision it seems that benefits are paid also for shorter periods.
[9] Although also for the benefits under Indian legislation the same principles apply.
[10] Only assimilation of benefits for reduction or suspension – as Art. 5 of Reg. 883/2004.
[11] Only for invalidity benefits.
[12] Only for FYROM.
[13] Only in relation to the basic benefit; supplementary benefit calculated only on the base of the Cypriot periods.
[14] There is no specific rule concerning the calculation of the benefits, so it has to be assumed that always the calculation has to be done under DK national legislation.
[15] Benefits are always calculated on the base of national legislation (pension points collected under DE legislation).
[16] Periods of other Member States bound by Reg. 883/2004.
[17] No benefit if less than 300 days.
[18] In case of pro-rata benefit also income or benefits of USA only multiplied with pro-rata-ratio – as Art. 55 (1)(b) of Reg. 883/2004.
[19] It seems that the periods from the other Country inferior to 12 months is taken into account as well for the determination of the theoretical amount as for the pro-rata amount which could lead to no increase of the amount for these periods (nevertheless lesser amount is excluded).
[20] National provisions on suspense of a pension in case of exercise of a gainful activity not applicable in case of gainful activity in other Contracting Country.
[21] EC co-ordination Regulations and other bilateral Agreements explicitly excluded from “legislation”.
[22] Only in relation to income.
[23] Special provision for funded schemes – calculation under national scheme + additional provision for minimum benefits and transfer of funds between funded schemes.

MS	TC	Calculation			< 12 m[1]		Unilateral provisions[2]	Prov. to prevent overlapping[3]	Periods in TC[4]
	American								
IT	Uruguay	X	X	X	[8]				X
	Venezuela	X	X	No	X				
LT	Canada		X[27]			X	Extens UP		X
HU	Canada	X	X	No		X	Extens UP		X
	India	X	X	No		X		As Art. 5[28]	X
	Bosnia & Herzegovina	X[29]	X	No		X		As Art. 5[10]	X[30]
AT	Korea	No[31]	X	No		X	Extens UP		
	*New model	X[32]	X	No		X	Extens UP		
PL	Canada	X	X	X		X	Extens UP		X
PT	Australia	No[33]	X	No		X	Extens UP		excluded
	Ukraine	No[33]	X	No	X			As Art. 5[10]	X
	Tunisia	No[33]	X	No	X		Limited UP	X[34]	X
RO	Korea	X	X	No	[8]				X
SK	Korea	X[35]	X	No	X[36]		Limited UP	As Art. 5[10]	X
	Canada	X[35]	X	No	X[36]		Extens UP		X
SI	Australia	X	X	No		X	Extens UP		X[37]
	Canada	X	X	No		X	Extens UP		X
	Québec	X	X	No		X	Extens UP		X
UK	USA	X[38]		No		X	Extens UP		excluded[21]
	Jersey and Guernsey	X[38]	X	No		X	Extens UP		excluded[21]
CE	Euro.Conv	X[29 39]		No[40]	X[41]			As Art. 5[10]	
	Model	X[42]	X	No	X			As Art. 5[10]	
ILO	Conv. 157 + Rec. 167	X[39 43]	X[44]	No[40]	X			Extens provision[45]	X[46]

[24] If requested by the person concerned.
[25] Such periods of less than 12 months have to be taken into account by all other Contracting Countries which leads to overcompensation.
[26] Only concerning the exercise of an occupation.
[27] Calculation only on the base of LT periods – in case of invalidity internal pro-rata LT periods actually completed in relation to periods required for a full pension.
[28] General assimilation of facts not restricted to reducing of benefits.
[29] If possible (schemes where amount can be determined on the base of the periods completed in that Country) no pro-rata calculation but calculation directly on the base of the periods acquired.
[30] Also if only one of the 2 Countries has concluded an Agreement.
[31] Benefits are calculated only on the base of the AT periods directly - same principles as in the Council of Europe-model as an alternative – see FN 42.
[32] Calculation under Reg. 883/2004 declared applicable.
[33] Benefits are calculated only on the base of PT periods directly.
[34] Only exclusion of benefits for the same periods.
[35] Only if a calculation is not possible under national legislation on the base of the relevant national periods.
[36] Unilateral provision only applicable to SK.
[37] Only for SI.
[38] Complicated unilateral provisions which are only understandable with a detailed knowledge of the UK national legislation; nevertheless the pro-rata principle is the base for the calculation of many benefits.
[39] In case of non-contributory benefits the theoretical amount can be limited under a specific formula which includes the elements outlined in FN 42.
[40] Supplement if autonomous amount is higher than the sum of all pro-rata amounts.
[41] Possibility to share also periods less than 5 Y, depends on bilateral Agreement.
[42] As an alternative to the pro-rata-calculation also in case of aggregation the benefits should be calculated only on the base of the national periods with an additional provision for fixed amounts (pro-rata to 30 Y) and for future periods (pro-rata to 2/3 of the period between 15 and the contingency).
[43] Pro-rata calculation is only one alternative; the other one is the integration principle under which only one Country (Country of residence or in case of invalidity and death type-A co-ordination) has to grant the benefit.
[44] Applicable also in cases in which aggregation is needed but only if the calculation formula is linear.

Table 6: Other provisions

MS	TC	Data protection	Fraud and error[47]	Cooperation Disputes	Special provisions[48]
BE	India	basic[49]		Disp: CA[50]	
	Japan	basic[3]		Disp: CA	
	FYROM	no		Disp: CA	
CY	Australia	no		Disp: CA	Suspension of benefit if no claim in other State[51]
	Canada	no		Disp: CA	
DK	USA	basic[3]		Disp: CA	
	Chile	no		Disp: CA + AC[52]	
DE	Brazil	extensive		Disp: CA + AC	
EL	USA	no		Disp: CA	
	Canada	basic[3]		Disp: CA + AC	
FR	India	basic[3]	Examination of residence + assessment of income	Disp: CA	
	Uruguay	basic[3]	Examination of residence + assessment of income	Mixed Committee; Disp: CA	
	Congo	No		Mixed Committee meets once a Y; Disp: CA + AC	Benefits for more widows shared
IE	Korea	basic[3]		Disp: CA	
ES	Peru	no		Disp: CA+ AC	
	Tunisia	no		Disp: CA + AC	Pensions for more widows shared
	Ibero-American	Some details[53]	Information on change of residence	Technical Administrative Committee[54] Disp: CA + AC	
IT	Uruguay	no		Disp: CA + AC[55]	
	Venezuela	no		Disp: CA	

[45] As Art. 5 of Reg. 883/2004 but including also elements of Art. 53 ff of Reg. 883/2004.
[46] If the application of more international instruments would lead to more benefits of the same nature only the most favourable one has to be granted.
[47] Only if the Agreement made available contains special provisions – it might be that such measures are contained in additional implementing Agreements so this list might be incomplete.
[48] Interesting various provisions which should be mentioned (usually they are quite exotic and not provided under Reg. 883/2004).
[49] „basic“ means a simple reference to national data protection provisions and very often the rule that data received should only be used for social security purposes.
[50] Dispute-settlement at the level of the competent authorities, or sometimes between the Contracting Countries (which could include contracts at Diplomatic level).
[51] If benefit is not claimed which could affect the amount of benefit in other Country the last benefit is suspended until the claim is lodged (provision applicable to pensions comparable to Art. 76 (2) of Reg. 1408/71).
[52] Arbitration Council as second level to resolve disputes (the names of this Council vary but the function is usually everywhere the same – e.g. ad hoc Committee).
[53] More details than the basic model explained under FN 2.
[54] Same role as Administrative Commission.
[55] The arbitration procedure has to be permanent and not only ad hoc.

MS	TC	Data protection	Fraud and error[47]	Cooperation Disputes	Special provisions[48]
LT	Canada	basic[3]		Disp: CA + AC	
HU	Canada	extensive		Disp: CA + AC	Benefits under territoriality principle excluded from export[56]
	India	extensive		Disp: CA	Obligations under EU membership shall not apply[57]
	Bosnia & Herzegovina	extensive	Data exchange also on personal status and residence	Disp: CA + Dipl.	Obligations under EU membership shall not apply[11]
NL	*model	basic[3]	Extensive: Identification, verification of applications and payments, medical examinations.	Disp: CA	
AT	Korea	extensive		Disp: CA + AC	
	*New model	extensive		Disp: CA + AC	
PL	Canada	basic[3]		Disp: CA	
PT	Australia	no		Disp: CA	
	Ukraine	basic[3]		Disp: Dipl + AC	
	Tunisia	no		Disp: CA + AC	
RO	Korea	basic[3]		Disp: CA	
SK	Korea	basic[3]		Disp: CA	
	Canada	basic[3]		Disp: CA + AC	
SI	Australia	basic[58]		Disp: CA	
	Canada	basic[3]		Disp: CA + AC	
	Québec	basic[3]		Disp: CA + AC	
UK	USA	basic[3]		Disp : CA	No frozen pensions for residence in USA
	Jersey and Guernsey	basic[3]		Disp: CA + AC	
CE	Euro.Conv			Disp: CA + Committee of Ministers + arbitrator	
	Model	basic[3]		Disp: CA + AC	
ILO	Conv. 157 + Rec. 167			Disp: CA + AC	Social services should be developed to assist migrant workers

[56] Relates probably to the „old" Agreements between the Communist Countries where pensions had to be paid by the Country of residence also for the periods completed in the other Contracting Country.
[57] The Agreement should not be interpreted in such a way to affect the obligations of HU under EU laws.
[58] Further transmission of personnel data only with the consent of the person concerned.

Annex 2

Possible content of a European Model Agreement

Contract ref. no. VC/2010/0646

PART I – GENERAL PROVISIONS

Definitions

- The following definitions as contained for example in Art. 1 of Reg. 883/2004 should be included:
  - family member (if needed)
  - residence (and stay if needed)
  - legislation
  - competent authority
  - institution
  - competent institution
  - periods of insurance
  - pensions or benefits

Export

- A provision stipulating an obligation to export benefits in cash (pensions) as contained for example in Art. 7 of Reg. 883/2004 should be included.

Annex

- There must at least be an Annex for special provisions for the different Contracting Countries (model: Annex XI of Reg. 883/2004). Additional Annexes (e.g. for special non-exportable non-contributory benefits) have to be examined during the elaboration of the future European approach.

Material scope

- It is recommended from a systematic point of view to include a list of abstract risks (like under Reg. 883/2004) and not to list the different benefits covered or the relevant national legislation.

- All schemes for employed and self-employed persons should be included (with the exception of special schemes for civil servants and some special schemes for the self-employed – countries could opt for the inclusion of these excluded schemes).

- The schemes covered (or the personal scope) should be restricted to active persons and their family members (exclusion of purely inactive).

- As a first step, only pensions (risk: old age, invalidity and death) should be covered. If the approach concerns European countries [or other countries with a level of integration that is comparable to that of the Member States], as a second step, the other branches of social security could also be included. In this case, a more flexible approach will be necessary, only giving Member States an option to choose the other branches and to exclude special benefits such as long-term care benefits.

- Special non-contributory benefits should be included, but there should be a possibility to exclude these benefits from export. It might be necessary to take a more flexible and more extensive approach on the question of which benefits should be regarded as non-contributory.

- In addition provisions on applicable legislation should be included.

- For Countries which have a common scheme for coverage and collecting contributions for all branches of social security, the provisions on applicable legislation should be

extended to the other branches of social security which are dealt with together under the national scheme.

Personal scope

- The instrument should not be restricted to nationals of the Contracting Countries but to all persons covered by the relevant legislation.
- In addition, members of the family and survivors of such persons should be covered.
- If a Third Country (the position of the EU should always be a non-restricted personal scope) insists on a restricted personal scope, then in addition to nationals, refugees and stateless persons residing on the territory of the Contracting Countries the family members and survivors of all these persons should also be covered, irrespective of their nationality.

Equal treatment

- The equal treatment clause should cover all persons covered by the Agreement.
- Exemptions from the equal treatment clause (e.g. concerning its application only to the relevant nationals, voluntary insurance open only to the country's own nationals or provisions on insurance burdens of bilateral Agreements with Third Countries) should not be included in the European approach itself, but rather in unilateral special provisions, e.g. in the form of an Annex.
- There should be an additional rule extending the equal treatment obligation to the export of benefits to other Third Countries.
- The inclusion of a "Gottardo-clause" is recommended if there is a restriction of the personal scope to the nationals or if other restrictions to these persons exist.

PART II – APPLICABLE LEGISLATION

General principle

- As the leading principle, the lex loci laboris should be established (place where the employed or self-employed activity is exercised) – model Art. 11 (3)(a) of Reg. 883/2004.
- By mutual agreement between the competent authorities or any other designated body, exceptions from all the rules of applicable legislation should be possible in individual cases – model Art. 16 of Reg. 883/2004.

Posting

- The posting notion for employed persons should be the same as under Reg. 883/2004 (Art. 12 (1)). To ensure a harmonized interpretation, the content of Decision No. A2 of the Administrative Commission should also be included, as a memorandum of understanding, additional protocol etc.
- The posting period should be, as under Reg. 883/2004, 24 months without a specific possibility of extending this period.
- If a posting provision for the self-employed also has to be included (with the same duration as for employed persons), this rule should be limited to the exercise of a self-

employed activity (difference to Art. 12 (2) which covers any activity in another Member State).

- A provision should be included for civil servants – model Art. 11 (3)(b) of Reg. 883/2004.

Simultaneous activities and other special cases

- If a general rule is really needed, it is recommended that it be restricted to self-employed activities – model Art. 13 (2) of Reg. 883/2004.
- For persons working on board a sea faring vessel, the flag principle should be included.
- [For air crews, a special provision is recommended which should follow, e.g. the home base principle – depending also on future discussions concerning Reg. 883/2004.]
- In relation to closer (European) Third Countries, a special provision on transport workers could also be included – model Art. 14 (2)(a) of Reg. 1408/71.
- For persons employed at Diplomatic Missions and Consular Posts, a special provision should be included – model Art. 16 (1) and (2) of Reg. 1408/71 with additional clarification concerning the relation of this provision to the general rule for civil servants.

PART III – PROVISION ON BENEFITS (PENSIONS)

Principles

- There should only be provisions for all Contracting Countries and not too many unilateral special provisions. However, taking into account the great difference between the pension systems of the Member States, an Annex for such concrete and detailed national provisions seems to be inevitable.

Aggregation for entitlement

- Aggregation of all periods for entitlement should be included, and in addition, specific provisions for special schemes, or special rules for special professions or occupations, and a clause under which insurance or receipt of benefits under the legislation of another Contracting Country are treated equally for entitlement – model Art. 6 and 51 of Reg. 883/2004.
- An additional provision should be included which also extends aggregation to periods in a Third Country with which the Contracting Country concerned is bound by another Agreement or by Reg. 1408/71 or 883/2004.

Calculation of the pension

- A copy of all the different steps for calculation under Reg. 883/2004 would seem to be too heavy for a future European approach.
- As a lighter model, the following principles could be provided: calculation under national legislation if aggregation is not necessary, and a pro-rata-calculation only for those cases where aggregation is needed. Special provisions should be added to take into account the special situation of funded schemes, pension account and pension point schemes.

- As a far-reaching alternative for the cases in which aggregation is needed, the direct calculation as included in the Council of Europe's Model Agreement could also be a solution which should be further examined.

- A provision for periods of less than 12 months should also be included; it has to be decided if such periods should be taken over by the other Contracting Countries as under Reg. 883/2004, or if they should be regarded as lost.

- If an anti-overlapping provision is necessary, it should be kept as simple as possible (e.g. assimilation of benefits and income received under the legislation of the other Contracting Country).

PART IV – MISCELLANEOUS AND TRANSITIONAL PROVISIONS

General rules

- Rules on co-operation, the use of languages, claims in the other Contracting Country, exemption from fees and authentication, medical examinations, transitional and entry into force rules.

- Other general rules such as, for example, offsetting, recovery and those on damages, should first be further analysed before they are included in a European approach.

Data protection

- A basic data protection provision must be included; it should be further examined if additional elements of data protection could also be included in that provision.

Fight against fraud and error

- Special provisions to combat fraud and error should be included which cover at least determination of residence and assessment of income; in addition more rules like e.g. those contained in the Dutch Model Agreements should be considered.

Dispute settlement and Mixed Committee

- A concrete mechanism of dialogue between the competent authorities for dispute settlement should be included.

- In addition, a Mixed Committee should be installed with interpretative power and also the task to prepare amendments to the instrument.

Annex 3

Example for an extensive data protection provision
(taken from the Austrian Model Agreement)

Contract ref. no. VC/2010/0646

Data protection

1. Insofar as personal data are communicated pursuant to this Agreement and in conformity with domestic law, the following provisions shall apply taking into consideration other binding provisions of the respective Contracting States:

   a. For the implementation of this Agreement and the legislation referring thereto, personal data may be communicated to the responsible bodies of the receiving State. The respective receiving bodies shall not use these data for other purposes. Onward transmission of personal data within the territory of the receiving State to other bodies is admissible in conformity with the domestic law of the receiving State insofar as it serves social security purposes including related court procedures. Even in the case of disclosure of information in public court proceedings or in judicial decisions confidentiality of personal data shall only be subject to those restrictions which are necessary to safeguard overriding legitimate interest of another person or overriding substantial public interests.

   b. Any personal data communicated in whatsoever form between the responsible authorities, institutions and other bodies concerned pursuant to this Agreement or to any arrangement implementing this Agreement are treated as secret in the same manner as like information obtained under the domestic law of the receiving State. These obligations shall apply to all persons fulfilling tasks under this Agreement and also to persons bound themselves by the obligation of secrecy.

   c. In specific cases the receiving body shall give information upon request of the communicating body about both the use of the data received and the results, which had been achieved by this data.

   d. The communicating body shall guarantee that the personal data communicated are accurate and up-to-date. Before initiating any communication of personal data the communicating body has to examine whether or not the communication is necessary and proportionate with regard to the purpose of the communication in question. This is to be done with due consideration to prohibitions on communication existing in the relevant domestic laws. In the case of communication of inaccurate data or data which should not have been communicated under the domestic law of the communicating State the receiving body must be informed thereof without undue delay. The latter shall carry out the necessary deletion or correction of the data immediately. If the receiving body has reason to suppose that communicated data might be inaccurate or should be deleted, this body shall immediately inform the communicating body thereof.

   e. Every person concerned, who proves his identity in an appropriate manner, shall be provided by the body responsible for the data processing with information about the data relating to him which have been communicated or processed, about their origin, the recipients or categories of recipients of communications, the purpose of the use of data as well as its legal basis in an understandable form. The information shall be given without undue delay and - in principle - free of charge. Moreover the person concerned shall have the right to correction of incomplete or inaccurate data and to deletion of unlawfully processed data. Further procedural details relating to the enforcement of these rights are subject to domestic law.

   f. The Contracting States shall provide every person concerned whose right to data protection has been violated with an effective remedy before a national court or another independent authority. Furthermore, the Contracting States shall ensure that

any person concerned by an unlawful processing of data is entitled to receive compensation for the damage suffered.

g. Personal data communicated shall be deleted, if found to be inaccurate, or unlawfully obtained or communicated, or if lawfully communicated data have to be deleted at a later date pursuant to the domestic law of the communicating State, or if data are no longer needed for the fulfilment of the task and if there is no reason to suppose that the deletion could endanger a person's interests deserving protection in the field of social security.

h. h) Both the communicating body and the receiving body shall be obliged to register purpose, subject and date of any communication of personal data as well as the communicating and receiving body.

i. Both the communicating body and the receiving body shall be obliged to effectively protect the received personal data against accidental or unauthorized destruction, accidental loss, unauthorized access, unauthorized or accidental modification and unauthorized disclosure.

2. The provisions of paragraph 1 of this Article shall apply accordingly to trade and business secrets.