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Coordination of social security schemes between the European Union and Euromed countries

STUDY



European Economic and Social Committee



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Summary

The European Union (EU) has issued a series of laws (Directives) on the subject of social security and the equal treatment of EU citizens and third-country nationals. Regulations 859/2003 and 1231/2010, which extend Regulations 1408/71 and 883/04 to third-country nationals, have also been adopted. Mediterranean (MED) country nationals in European territory are therefore protected, but without taking the career path of those citizens in their country of origin into account. As a result, to give the right to a retirement pension in a Member State that requires 15 years of contribution periods, for example, the person concerned can add together all the periods paid in European countries. However, any insurance periods that the worker has paid in their own country will not be taken into account. There is no EU rule allowing those periods to be aggregated or added together.

The way in which EU social security policy in relation to third-country nationals has been developed is closed and inward-looking, with a distinct lack of reciprocity, bilateralism and mutual recognition. It has never officially negotiated with third countries. The EU may recognise certain rights held by the citizens of MED countries, but those countries have no reason to recognise the same rights for European citizens working there.

This study cites several examples of this, which demonstrate the shortcomings that exist and the continuing lack of protection, not only for third-country nationals in Europe, but also for European citizens who work in the MED region. Businesses can also experience significant economic disadvantages that limit their competitiveness.

Until now, some of the problems set out in this study have been resolved through bilateral agreements signed between some Member States and a few MED States. However, this national approach means that each Member State defends its own interests and those of its nationals, and only signs bilateral agreements with MED countries that are of interest according to its own criteria. That said, it is practically impossible for the 28 Member States to enter into negotiations with all of the MED countries separately, or vice versa. Bilateral agreements have a limited scope in terms of both the people covered, which in some cases only includes workers from the signatory countries, and the matters covered. As a result, not all migrants are protected and even those who are protected are not fully safeguarded.

This must also influence the posting of workers to provide services. To take an example: workers are sent by their company from Member State A to a third MED country to work. The legislation of the Member State (Spain, for example) may require the payment of contributions into its social security system if no bilateral social security agreement exists (for example, Spain and Egypt). It may also be obligatory to pay contributions in the third country (Egypt), resulting in double contributions and increased costs. This could reduce competitiveness.

At least until now, the EU has not acted as a single intermediary and has allowed Member States to have a separate monopoly on their external relations with regard to social security. However, a

trend is gradually emerging towards calling for the EU to negotiate and sign international agreements offering fuller bilateral or multilateral protection than the bilateral agreements. Legally, this option is covered in Article 216 of the Treaty on the Functioning of the European Union (TFEU). However, Member States and probably some MED States are very reluctant to lose their competences in international relations. A slow process of persuasion will therefore need to begin in order for that route to be explored in the foreseeable future.

The Council of the European Union has taken the first steps on European policy by adopting the Decisions on the coordination of social security systems deriving from the Association, Stabilisation and Cooperation Agreements with Israel, Tunisia, Algeria, Morocco, Croatia, the former Yugoslav Republic of Macedonia, San Marino, Albania and Turkey. These decisions must be approved by the respective Association and Stabilisation Councils.

As a result, the idea of a European approach that supersedes a strictly bilateral line of action is beginning to gain ground. This approach could appeal to many Member States and MED States and be of great interest in avoiding bilateral negotiation, which demands enormous effort and yields relative results. In reality, bilateral negotiation is incomplete and other alternatives are emerging, the best examples of which are Regulation (EC) No 883/04 and the Multilateral Ibero-American Social Security Agreement. The protection of European citizens or those from MED States who work in Europe or in MED States would be better guaranteed through multilateral European agreements with MED States, or an overall social security agreement in the Euromed space. So, for example, an Egyptian worker who has worked in Egypt, Morocco and Spain could add together all of their contribution periods in those three countries and acquire the right to a pension. However, the reality is that many migrant workers lose their rights and future entitlements because no multilateral agreement exists.

With the Multilateral Ibero-American Social Security Agreement, the Ibero-American Community has been the forerunner in this kind of overall, unitary protection for Ibero-American citizens, which could act as an example and guide to Euromed.

This study establishes a roadmap with immediate, short-term, medium-term and long-term actions. Lastly, it sets out a series of recommendations to be presented to the Euromed Summit of Economic and Social Councils and Similar Institutions on 24 and 25 October 2016.

The study's final conclusion can be summarised in two sentences: the Euromed space would be much more social and much fairer with a Euromed agreement on social security. Workers and business people would be more closely involved in the political and social dimension of Euromed and have a better understanding of the benefits.

1. Introduction

Economic globalisation (or an increasingly worldwide economy) has generated a quantitative and qualitative increase in the exchange of merchandise, goods, services and, most importantly, human beings. Migration for work, family or personal reasons effectively requires the development of economic and social policies that allow the links between societies, states and continents to be tightened and strengthened. This would guarantee a series of benefits and rights for businesses and citizens that could create a fairer and more competitive international – in this case Mediterranean – space.

Europe has become a primary magnet for a huge influx of refugees and asylum seekers, who are fleeing growing political instability in certain regions near our continent in search of security in the EU Member States. Political and economic migration, particularly from the Mediterranean basin, are actually two sides of the same coin. This often makes more difficult the task of establishing clear dividing lines or borders between one type of emigration and another. For that reason, this report is intended to develop an overall approach that takes into account the factual and legal situation of all people coming from the Southern Mediterranean, regardless of the reason for their cross-border movements. It will also take into account the problems that are arising or could arise now and in future, especially in relation to social security.

The political Arab Spring and its direct and indirect consequences led to intensification of the European Neighbourhood Policy with Southern Europe in May 2011, the aim of which was, and is, to build prosperity and stability in that region. The idea of the European Commission and the European External Action Service has been to focus on strengthening Europe's commitments to its southern neighbours, particularly at regional level. This perspective could be summarised as *'more funds for more reforms'*. The basic principle of this policy has been founded on deepening democracy, sustainable economy, social development and building a regional partnership through coherent action and an effective programming framework. The EU is therefore working with its southern neighbours to achieve the closest possible association and the highest degree of economic integration, sharing the values of democracy, respect for the law, human rights and social cohesion.

To achieve those objectives, it is important to emphasise that the instruments prioritised by the European Commission and European External Action Service (which tie in with the purpose of this report) are essentially: economic integration and support, access to markets and the removal of obstacles to moving to EU territory insofar as possible.

The migratory aspects themselves, along with the neighbourhood policy with Southern Europe, demand practical application which, specifically in social security, enables businesses and citizens to be guaranteed (as far as possible) a series of rights that pave the way for a fairer and more competitive Mediterranean space, supporting people's rights and benefits for economic

investment between states. That will involve better interaction between societies, states and continents, with reciprocal benefits.

2. Socio-labour aspects

Before exploring social security itself in more depth, specifically from the perspective of coordinating social security schemes, the socio-employment situation in the EU and some countries in the Southern Mediterranean (MED) must be addressed.¹

Firstly, it is important to highlight the differing demographic trends in Europe and the MED countries, given that this information could provide explanations that improve our understanding of migratory flows. So, while population increase in the EU is no more than 0.25 % a year and looks likely to decrease in the near future, the figures of growth in Egypt (2.2 % per year), Algeria (1.8 % per year) or Morocco (1.2 % per year) show a clear difference between an ageing population (Europe) and a much younger population in the Southern Mediterranean countries. However, distribution by age is even more significant. The population aged more than 65 in the EU is 18.2 %, while it is 4.5 % in Egypt, 5.6 % in Algeria, 6 % in Morocco and 7.4 % in Tunisia. By contrast, the population pyramid is inverted when referring to the population less than 15 years of age. The percentage is 31 % in Egypt, 28 % in Algeria, 26.2 % in Morocco and 22.9 % in Tunisia. However, in the EU, this segment of the population only represents 15.6 %. As a result, it seems logical to think that migration could be a way to ease the shortfalls and imbalances for both parties.

In many cases, poverty is a leading driver of migration. The statistics are extraordinary in some countries on the southern coast of the Mediterranean, especially when the concept used to assess poverty is the lack of resources to meet vital basic needs. The figures to 2013 are also very high (Egypt 32.4 %, Israel 18.6 %, Palestine 25.8 % and Tunisia 15.5 %). However, although there is a downward trend in many countries, in Egypt (the most populous country), poverty increased by nearly six percentage points between 2003 and 2013.

The activity rate in EU Member States reached 72 % in 2013 and has increased slightly in the last few years. By contrast, the activity rate figures for some MED States are much lower: Morocco 51.3 %, Egypt 51.2 %, Algeria 46.5 %, Lebanon 54 %, Palestine 46.4 %.

Unemployment in the EU reached around 11 % in 2013, with a slight reduction after that date. However, the results of some MED countries reveal figures which, although not overly negative,

¹ Information taken from the publication *Euro-Mediterranean Statistics*. 2015 edition . Eurostat Luxembourg .Publication Office of the European Union.

present a series of unknowns owing to the fact that they relate to recorded unemployment, especially given that there is a thriving informal sector. Unemployment data must therefore be looked at with caution: Morocco 9.2 %, Egypt 13.4 %, Algeria 9.8 %, Israel 6.3 %, Jordan 12.6 %, Lebanon 10 %, Tunisia 15.9 % and Palestine 23.6 %.

Significant differences between women and men appear when looking at the activity rate by gender. In 2013, the average activity rate for females in the 28 EU Member States was 66 %, while in the Southern Mediterranean (MED), the percentage of active women did not exceed 30 % anywhere except in Israel. That means that only a quarter of the female population has been incorporated into the labour market in those countries.

This is also the case for the labour mobility of workers from those countries. Most migrants from the MED region are men. For example, of the 195 542 Moroccan workers who are members of the Spanish social security system, 142 562 are men and 52 980 are women.

With regard to sectors of economic activity in the MED region, the primary sector (agriculture) is still the predominant activity; in other countries such as Israel, Lebanon and Tunisia, the services sector is better represented. It is also important to highlight the predominance of low-skilled jobs which prevail in the agriculture, fishing and construction sectors. This produces higher rates of unemployment among more highly educated people, in contrast to what is happening in Europe.

3. Migration data by country².

Some 20 million third-country nationals live in Europe, the highest percentage being made up of citizens from Morocco, Turkey, Algeria, Tunisia and North Africa. Below is a breakdown of MED countries, which offers a structured overview of the migratory phenomenon³:

Morocco:

According to 2012 data, 90.6 % (3 000 000) of a total of 3 500 000 Moroccan migrants live in Europe. The main destinations for this migration are France with 1 200 000 (35 %), Spain with around 700 000 (19.9 %) and Italy with around 500 000 (14.4 %). The flow of Moroccan migrants to countries in Western Europe has been ongoing since the 1970s and represents one of the biggest groups of foreigners, particularly in France, Spain, Italy and Belgium. Generally the proportion of women tends to be lower than that of men. For example, more than 60 % of migrants in Spain and Italy are men. With regard to education, 80 % of migrants in Europe have a low-skill professional profile and an elementary level of education, meaning that they have

² European University Institute. Robert Schuman Centre for Advanced Studies. Migration Policy Centre. EU Neighborhood Migration Report 2013.

³ All figures are approximate, and they may be distorted by dual nationalities.

access only to modestly skilled occupations. By contrast, 50 % of Moroccan migrants to the US and Canada have medium and high levels of education.

Algeria

In 2011, the number of migrants from Algeria in OECD countries totalled 1 000 000. Of those in the EU, 750 000 travelled to France, 60 000 to Spain, 25 000 to Italy and 22 000 to the UK. As concerns gender, 54 % were men and 45 % were women. The age group with the highest representation is 15-64, at 67.4 % With regard to education levels, 51 % have primary or elementary, 29 % secondary and 19 % attained higher education. The cultural and linguistic links that Algeria has with its mother country explain the traditional choice of France as the preferred destination for migrants. In many cases, this is not just for reasons of work but also for family reunification, given the large Algerian population that arrived as a result of decolonisation.

Tunisia

Migration from Tunisia has traditionally been directed towards countries in Western Europe – mainly France, Belgium and Germany. However, a significant number of Tunisians had also been in Libya before they were expelled for political reasons in 1985. Since then, Tunisian migration has diversified, with new European destinations such as Spain and Italy being chosen. Consular records from 2009 estimate that there were 1 000 000 Tunisians in Europe, of whom 600 000 were in France, 150 000 in Italy and 90 000 in Germany. In the last decade, the traditional migration to France has slowed significantly and is now divided among other Member States. As a result of events in 2011 and 2012, the number of migrants to Europe doubled, reaching 50 000 individuals in that period. Political instability in the country has had an impact on the professional profile of migrants, which has shifted away from being of mostly elementary-level education to being university-graduate level in 58 % of cases.

Turkey

Turkey has been a country of transition and migration in recent decades, with hundreds of thousands of workers, professionals, students and refugees abandoning the country, essentially for economic reasons. According to the Turkish Ministry of Labour and Social Security, in 2010, the diaspora accounted for 3 800 000 people, of whom 3 100 000 were based in EU Member States, with 43 % in Germany. In recent years, Turkey has experienced a structural and qualitative change in that, for the first time, the number of migrants entering the country from other nations is higher than the number of Turkish citizens who emigrate. The profile of a Turkish migrant has shifted from having a low level of education and low-skilled jobs in factories and industrial businesses to being highly skilled with university-level studies and an international outlook.

Egypt

Labour movements by Egyptian citizens to other countries have not stopped since the 1970s. It is worth highlighting that migration increased markedly, firstly as the result of the introduction of the 1971 Constitution. This lifted many of the restrictions and limitations on leaving the country that were legally in force until that date. Secondly, the massive increase in oil prices in 1973 had a significant impact in attracting Egyptian workers and professionals to all the oil-producing countries in the Arab world, particularly Saudi Arabia, the Gulf States, Iraq and Libya. Migration to North America and Australia, particularly by qualified professionals and technicians, has been stable and ongoing over recent decades. According to consular records, it is estimated that the total number of temporary and permanent Egyptian migrants has increased to 6 500 000 people, whose destinations have mainly been: Libya (2 000 000), Saudi Arabia (1 300 000), US (635 000), Jordan (525 000), Kuwait (480 000), UAE (280 000), Canada (148 000), Oceania (106 000) and Qatar (88 000). In the EU Member States, there are a total of 800 000 Egyptian citizens spread mainly throughout the following countries: UK – 250 000, Italy – 190 000, France – 160 000, Greece – 80 000, Germany – 30 000 and Holland – 30 000. Temporary migration tends to be mostly to Arab countries, while permanent migration is predominantly to Europe, America and Oceania. Differences also apply to gender: while 96 % of migrants to Arab countries are men, in the case of migration to Europe, the number is more balanced, with 58 % being men and 42 % women. The level of qualification also varies, with those who are better educated going to OECD countries (86 % with a medium or high level of education), while those who emigrate to Arab countries mostly have a lower level of education (only 24 % have a medium or high level of qualification).

Although the figures are not equivalent, migration by European citizens to MED States has increased markedly, particularly since the economic crisis. As a result, Spanish, French and Italian nationals, whether salaried workers, professionals or self-employed workers, are increasingly choosing to work in MED States. There has also been a considerable increase in the number of businesses in EU Member States that establish themselves in MED States. The resulting flow of posted workers generates new needs and problems that also require effective alternative solutions.

4. Social security systems in some MED States ⁴

Tunisia⁵

⁴ For a study of social security systems in EU Member States, see the MISSOC comparative tables.

⁵ Information about MED pension systems has been collated in the publication *Social Security Programs throughout the World: Africa*. United States. Office of Retirement and Disability Policy. The French publication CLEISS (Centre des Liaisons Européennes et Internationales de Sécurité Sociale) has also been taken into consideration.

The Tunisian social security system is fundamentally a state system, although in healthcare cover it is also complemented by the private sector. Workers and employees are also represented in the administrative authorities. More than 80 % of the population is protected under the public system. Coverage under the social security system is evolving to include a higher proportion of citizens, especially those with lower incomes. Only seasonal agricultural and domestic workers are excluded from social security system coverage. There are special social protection schemes for civil servants, military personnel and self-employed workers. The system's main benefits are designed to cover the risks of old age, maternity, illness, permanent disability and death. Family benefits are also recognised. The system is financed through contributions of 26.15 % to 29.75 % of salaries, with 9.18 % coming from the worker and the rest from the employer.

Morocco

Social security in Morocco is made up of four separate schemes: public sector, private sector, temporary workers and local civil service. Self-employed workers are excluded from the system. Contributory and non-contributory disability and retirement pensions are also recognised. The maximum pension is 4 200 dirhams (approximately EUR 420) and the minimum is 1000 dirhams (approximately EUR 100). A total of 75 % of pensions are less than the national minimum wage (around EUR 250). Social security only pays pensions to 2 million pensioners, representing 26 % of the active population. The limited coverage that this system provides is its main problem, as around 75 % of Moroccan citizens are excluded from the public pension system. As concerns healthcare, there are two systems in Morocco. The contributory AMO (l'Assurance maladie obligatoire) system is for all workers, professionals and pensioners with a monthly income of more than 500 dirhams (approximately EUR 50), which covers illness, maternity and accidents. The RAMED (Régime d'assistance médicale) system is for less privileged people who are excluded from the contributory system. Moroccan social security system benefits cover the risks of illness, maternity, disability, old age and death. It also provides for family benefits and compensation for loss of employment. The contributions for salaried workers are 26.96 %, of which 20.48 % comes from the business owner and 6.48 % from the worker.

Algeria

Algeria's social security system is run by the Ministry of Labour, Employment and Social Security, which supervises the institutions that manage the economic funds for pensions, unemployment, disability, family support, death, survivorship and healthcare. There is a separate welfare system for civilian and military personnel. Self-employed workers are not included in the system. The system is financed through 34.5 % of gross salaries, with 9 % coming from salaried employees and the rest from employers. In Algeria, a single retirement scheme is in place and the government subsidises part of the minimum pension. The retirement age has recently been set at 60, except for professions with special working conditions, women and war veterans, for whom it is 55, if they have made at least 15 years of contributions. A 100 % loss of working capacity is

required for a permanent disability pension. The system also includes benefits for illness, widow/widowers' and orphans' pensions, maternity and unemployment, but only for workers in industry, trade and the services sector in the case of the latter. Healthcare covers primary care, medical specialities and hospitalisation in public centres. For certain illnesses and conditions, the person who is ill has to make a copayment, usually of around 20 %.

Turkey

In Turkey, social security is obligatory for workers in industry, trade and the services sector. It is financed by taking 34.5 % from salaries, 22.5 % from the employer and 12 % from workers. It provides benefits for illness, maternity, occupational accidents, occupational illness, disability, old age, death and unemployment. To retire, workers must be aged 55 or older in the case of men and 50 in the case of women, and must have paid contributions for at least 15 years. Beneficiaries of the system have free access to the public healthcare system, which includes primary care, hospitalisation and medical specialities. There is a copayment of 20 % of the cost of medicines, which is reduced to 10 % in the case of pensioners. In the event of redundancy, the business owner is obliged to pay 30 days' salary for each year of work and the employee receives no unemployment benefit.

Egypt

The Egyptian social security system is contributory and based on the contributions that business owners and workers pay to the body responsible for managing the system: the National Social Insurance Authority. There are six different categories, each with distinct protection systems that differ not only in their requirements but also in how benefits are calculated. It is obligatory for employers (public institutions and businesses) to join the system, but it is optional for temporary workers and those who work abroad. However, the informal sector, which represents 44.5 % of workers, is not included in the system. Business owners and workers must pay 26 % of salary costs into social security. The system's benefits include retirement pensions, healthcare, maternity, illness, accident, disability and unemployment. Healthcare is free in public centres. The retirement pension can be accessed after the age of 60 with a minimum contribution of 240 months, and it is usually worth 67 % of an employee's fixed salary, on average. However, the pension is not regularly adjusted in line with inflation, meaning it usually decreases in value after a few years. For illness and maternity, people have the right to 75 % of their monthly salary, while 60 % of the salary is paid over 28 weeks for unemployment.

Libya

Libya's social security system was established in 1980 and excludes only armed forces personnel, who have their own system. The retirement pension can be accessed from the age of

65 for men, and 60 for women. The exclusion period for healthcare is six months. For some healthcare benefits, the patient has to make a copayment.

Overall, it can be confidently stated that social security systems in the MED States are perfectly suitable to being included in the matters covered under a multilateral agreement for the coordination of social security systems in the Euromed Space.

5. The existing legal structure of European harmonisation.

A number of legal instruments approved by the EU Legislator have had an impact in the area of social security, particularly through regulation of the principle of equal treatment for nationals and third-country citizens. The legal apparatus adopted by the Parliament and the Council includes the following:

Council Directive 2009/50/EC of 25 May 2009⁶ on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment. Article 14 sets out that: *'EU Blue Card holders shall enjoy equal treatment with nationals of the Member State issuing the Blue Card, as regards [...] provisions in national law regarding the branches of social security as defined in Regulation (EEC) No 1408/71.'*

Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011,⁷ on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State. Article 12 establishes that: *'Third-country workers [...] shall enjoy equal treatment with nationals of the Member State where they reside with regard to [...] branches of social security, as defined in Regulation (EC) No 883/2004'*. Paragraph 4 of that provision states that: *'Third-country workers moving to a third country, or their survivors who reside in a third country and who derive rights from those workers, shall receive, in relation to old age, invalidity and death, statutory pensions based on those workers' previous employment and acquired in accordance with the legislation referred to in Article 3 of Regulation (EC) No 883/2004, under the same conditions and at the same rates as the nationals of the Member States concerned when they move to a third country.'*

Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014⁸ on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers. Article 23 states that: *'Seasonal workers shall be entitled to equal treatment with nationals of the host Member State at least with regard to (d) branches of social security, as defined in Article 3 of Regulation (EC) No 883/2004' [...] 'Seasonal workers moving to a third*

⁶ Official Journal of the European Union (OJ), L 155/17 of 18 June 2009.

⁷ Official Journal of the European Union L 343 of 23 December 2011

⁸ Official Journal of the European Union, L 94/375 of 28 March 2014

country, or the survivors of such seasonal workers residing in a third-country deriving rights from the seasonal worker, shall receive statutory pensions based on the seasonal worker's previous employment and acquired in accordance with the legislation set out in Article 3 of Regulation (EC) No 883/2004, under the same conditions and at the same rates as the nationals of the Member States concerned when they move to a third country.'

As a result, from a purely European perspective and bearing harmonisation rules in mind, Member States are obliged to recognise equal treatment with regard to social security for third-country nationals and, where appropriate, the export of certain benefits where their legislation recognises that for their own nationals. According to harmonising European rules, citizens from MED countries who work in any EU Member State have the right to equal treatment with regard to social security and the export of pensions. However, in many Member States, the legislation does not recognise that exportability, even for nationals, meaning that third-country citizens do not enjoy that right either.

European provisions are not based on reciprocity, so it could be the case that a national of third State A (MED) who works in Member State B has all the social security rights of State B, while a citizen of State B who works in State A (MED) does not have any rights. This is because State A's legislation does not recognise the principle of equal treatment for foreigners and, as a result, that person is excluded from the persons covered by that country's social security system. The export of pensions might not apply to them either, even if the MED State recognises that for its own nationals.

6. The existing structure of European coordination

The EU has developed a number of measures for the coordination of social security systems in Member States. Most of these actions, although not all, are the result of establishing and developing the free movement of workers. It is important to acknowledge that the lack of harmonisation between European social security systems could be a serious obstacle to cross-border labour movements. That is precisely the overall purpose of the coordination rules. They are designed to ensure that migrant workers or people who move around do not lose their rights or future entitlements when they relocate from one country to another and are subject to different social security systems as a result. The Treaties therefore ⁹establish a set of overarching principles on the issue of coordination: equal treatment, a single system of applicable legislation, the maintenance of rights acquired (exportability of benefits), preservation of rights that are in the process of being acquired (aggregation of insurance periods) and administrative collaboration.

⁹ See Article 48 of the TFEU:

When discussing the coordination of European social security regimes, reference is immediately made to Regulation 1408/71¹⁰, Regulation 574/72¹¹ and their successors Regulations 883/04 and 987/09¹², which may collectively be considered one of the most celebrated achievements in European social/labour law and the citizens' Europe. With particular reference to relations with MED States, the persons covered by these legislative instruments are limited, as they do not include third-country nationals (except refugees, stateless people and the relatives or survivors of EU nationals). As a result, around 20 million third-country nationals living in the EU were excluded from the personal scope of the Regulations. This seemed to be illogical in a single market in which the principle of equality favours workers, and a barrier to eliminating unfair competition between businesses. A series of examples can be given of inconsistencies that resulted, in the past, from the fact that the coordination regulations did not apply to third-country nationals working in the EU.

- A Moroccan national working legally in Spain who travelled to France to visit family. Could not use the health insurance card if he fell ill in France.
- An Egyptian worker who has worked in France and Germany. Would not be able to aggregate their French and German periods when calculating their German and French pension.
- A Tunisian worker who works in Spain but whose children live in Portugal. Would not have the right to Spanish family benefits.
- A Jordanian worker working in the UK whose company wants to post them to Germany for two years. Could not remain part of the British social security system, whilst their colleagues, who are European citizens, would continue to be members and pay British social security contributions.

However, reality has won out over injustice, and third-country workers who are legally established in the EU have finally been included in the persons covered in the Regulations, through a strange legal formulation. For that reason, Regulation No 859/2003¹³ and No 1231/2010¹⁴ were adopted, extending the persons covered under Regulation No 1408/71 and

¹⁰ Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (Consolidated version – OJ No L 28 of 30.1.1997), 1. 1997)

¹¹ Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (OJ L 074 of 27.03.1972).

¹² Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166 30.4.2004, p. 1).

¹³ Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to third-country nationals who are not covered by those provisions solely on the grounds of their nationality. (OJ L 124/1 20.5.2003)

¹⁴ Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the grounds of their nationality (OJ L 344, 29.12.2010, p. 1).

No 883/04 to include third-country nationals who work legally in the EU. In an exclusively European cross-border context, the equal regulation and treatment of third-country (MED) nationals and EU citizens has been achieved. However, the abovementioned Regulations interact only with the systems in EU Member States and not with social security systems in the MED States. It seems logical to think that a MED-country citizen who has proved that they paid contributions in their country of origin should maintain their future entitlements without those contributions being lost or being ineffectual. However, European rules do not recognise aggregation of those insurance periods, which causes serious problems when it comes to the recognition of pensions.

7. The sum of European harmonisation and coordination

In Europe, a principle of equal treatment of third-country nationals and EU citizens for social security purposes currently exists, and it is based on the harmonisation rules referred to in previous sections. When MED third-country nationals residing legally in Member State A move (holidays, studying, etc.) to Member State B and, for example, need medical care or have worked in Member State A and Member State B, they are covered under the EU coordination rules. They can therefore receive healthcare in State B or request that their insurance periods paid in State A and State B be aggregated for recognition of their pensions. It is also important to remember that third-country nationals who hold pension rights will receive their legal pension for old age, disability or death from their employment when they move back to their country of origin. This will be under the same conditions and at the same level as nationals of the Member States in question.

8. Gaps and deficits

Much has been established in the EU for third-country nationals when it comes to social security. Nevertheless, the European legal apparatus has been set up in a way that is inward-looking and unilateral, with a notable lack of reciprocity. With regard to the Regulations, Directives and rules analysed, no criteria exist for bilateralism or mutual recognition. No official negotiation with third countries has ever taken place. The EU legislates within its own competences and from an internal perspective. It understands, in general, that its scope of action is the EU and its Member States' social security systems. People who work or live in that region, whether EU or non-EU (MED) nationals, have a series of rights that we could call internal or Community rights. However, they are diluted when the social security system or territory of a third country is involved. For example, an Egyptian worker who works in Poland will be insured (principle of equal treatment) in Poland on the basis of the Directives mentioned in Section 5. Furthermore, in accordance with Regulation No 1231/10, if their children live or study in France, Poland must

recognise family benefits. Based on Regulation No 1231/10, the Egyptian worker in question could also receive healthcare in France, if required as a result of their temporary movement to that country, with Poland assuming the relevant costs. Similarly, when it comes to receiving a pension, if they paid ten years in France, for example, and 15 years in Poland (the minimum period in Poland is 25 years), all the French and Polish periods would have to be aggregated to acquire a French and Polish pension. These French and Polish pensions could also be exported to Spain, for example, if the person in question could prove that they live there legally. However, these rights are only recognised within the EU. Let us move away from that perspective and come back to a slightly different version of the previous example. The Egyptian worker who works in Poland and whose children live in Egypt would not have the right to Polish family benefits. This is because the European rules do not cover such circumstances and there is no bilateral social security agreement between Poland and Egypt. The worker would not receive healthcare covered by Poland either if they got ill while visiting Egypt. Furthermore, despite having paid 15 years of contributions in Poland and ten years of insurance in Egypt, those periods would not be taken into account (aggregation) when it comes to calculating the Polish or Egyptian pension, thus they would be denied that benefit. Lastly, in the event that the Egyptian worker was able to access any kind of pension as a result of the years of contributions paid in Poland, they would only have the right to export it if Polish legislation provides for its own nationals to do that.

There are clear limitations to the European rules, which are developed in Europe, for Europe, and require an external dimension to cover very common situations that occur outside of the EU.

As these European rules do not have a bilateral and reciprocal purpose, they do not protect the rights of European citizens when they have worked or are working in third countries. Here is an example to illustrate the problem that exists. A worker from a third country (MED) is working legally in a Member State. Based on EU rules, that worker must enjoy the same rights to social security as a worker who is a national of that Member State. Similarly, if the Member State's legislation allows its own nationals to export pensions to third countries (MED), the third-country national will also enjoy that right. However, following on from the earlier example, if the European rules do not apply to the EU citizen of the Member State in question who works in a third (MED) country, the third country's legislation might not recognise any rights for the EU citizen. Or, where relevant, it might not allow the export of recognised pensions if the person wants to return to their country of origin.

From another perspective, it must have an impact on the posting of workers in order to provide services. To give another example: workers posted by their company from Member State A to a third (MED) country to work. The legislation of the Member State (Spain, for example) may require the payment of contributions into its social security system if no bilateral social security agreement is in place (for example, Spain and Egypt). It may also be obligatory to pay contributions in the third country (Egypt), resulting in double contributions and increased costs. This could reduce competitiveness.

The task therefore cannot be deemed finished, nor the circle complete. Globalisation requires additional effort and commitment in this area, essentially for three different reasons. Firstly, to safeguard the rights of migrant workers from third (MED) countries who work in the EU in the long term and can prove that they have an insurance history in their country of origin as well. Secondly, to protect EU nationals who move outside of the EU for reasons of work, whether as posted workers or migrants in the stricter sense. Thirdly, to strengthen cooperation between the EU and neighbouring MED States, and to develop a fairer and more socially active Mediterranean space that brings values, principles and interests closer together.

9. The Association Agreements and Decisions on coordination.

The first use of bilateralism, reciprocity and an external dimension to the coordination rules is essentially seen in Euro-Mediterranean Agreements, Association Agreements, Stabilisation Agreements and, to a minimal, almost non-existent degree, through certain Trade Agreements. The Association or Stabilisation Agreements between the EU and Algeria, Israel, Morocco and Tunisia, and the Association or Stabilisation Agreements between the EU and the former Yugoslav Republic of Macedonia, Montenegro, Turkey, Albania and Bosnia Herzegovina, contain provisions for limited coordination between the social security systems of Member States and of those the third countries mentioned. A good example of this is Article 65 of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part. It states that: *‘Subject to the provisions of the following paragraphs, workers of Moroccan nationality and any members of their families living with them shall enjoy, in the field of social security, treatment free from any discrimination based on nationality relative to nationals of the Member States in which they are employed. The concept of social security shall cover the branches of social security dealing with sickness and maternity benefits, invalidity, old-age and survivors’ benefits, industrial accident and occupational disease benefits and death, unemployment and family benefits. All periods of insurance, employment or residence completed by such workers in the various Member States shall be added together for the purpose of pensions and annuities in respect of old-age, invalidity and survivors’ benefits and family, sickness and maternity benefits and also for that of medical care for the workers and for members of their families resident in the Community. . The workers in question shall receive family allowances for members of their families who are resident in the Community. The workers in question shall be able to transfer freely to Morocco, at the rates applied by virtue of the legislation of the debtor Member State or States, any pensions or annuities in respect of old age, survivor status, industrial accident or occupational disease, or of invalidity resulting from industrial accident or occupational disease, except in the case of special non-contributory benefits. Morocco shall accord to workers who are nationals of a Member State and employed in its territory, and to the members of their families, treatment similar to that specified in Sections 1, 3 and 4.’*

The other agreements referred to in the preceding paragraph contain similar provisions.

In 2010 and 2012, the Council of the European Union reached¹⁵ a political agreement on the draft Decisions on the position that the EU should take in the respective Stabilisation and Association Councils between the EU and Algeria, the former Yugoslav Republic of Macedonia, Israel, Morocco, Tunisia, Turkey, Montenegro and Albania. Only the Council's position on the case of Bosnia and Herzegovina remains to be established.

These Decisions have resolved some of the shortcomings described in the previous paragraphs, such as bilateralism and reciprocity with regard to equal treatment and the export of pensions.

Certain clauses in those Agreements, have already been fulfilled with the approval of Regulations 859/2003 and 1231/2011 (for example, '*all periods of insurance, employment or residence completed by such workers in the various Member States shall be added together*' and '*the workers in question shall receive family allowances for members of their families who are resident in the Community*'). In this respect at least, the EU could claim to have met its commitments, albeit somewhat late.

However, most of the provisions in these Agreements could not be considered immediately applicable, and required regulatory implementation through ad hoc instruments. In relation to the

¹⁵ Council Decision of 6 December 2012 on the position to be taken on behalf of the European Union within the Stabilisation and Association Council established by the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of **Albania** of the other part, with regard to the adoption of provisions on the coordination of social security systems (2012/773/UE) 13.12.2012 Official Journal of the European Union L 340/1. Council Decision of 21 October 2010 on the position to be taken by the European Union within the Association Council set up by the Euro-Mediterranean Agreement establishing an association between the European Community and its Member States, of the one part, and the People's Democratic Republic of **Algeria**, of the other part, with regard to the adoption of provisions on the coordination of social security systems (2010/699/UE) 23.11.2010 Official Journal of the EU L 306/14. Council Decision of 21 October 2010 on the position to be taken by the European Union within the Association Council set up by the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of **Israel**, of the other part, with regard to the adoption of provisions on the coordination of social security systems (2010/700/UE) 23.11.2010 Official Record of the EU DECISION No .../... OF THE ASSOCIATION COUNCIL set up by the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of **Morocco**, of the other part, with regard to the provisions on the coordination of social security systems contained in the Euro-Mediterranean Agreement 23.11.2010 OJ L 306/2 Council Decision of 6 December 2012 on the position to be taken on behalf of the European Union within the Stabilisation and Association Council set up by the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of **Montenegro**, of the other part, with regard to the adoption of provisions on the coordination of social security systems (2012/774/UE) Official Journal of the European Union L 340/7, 13.12.2012 DECISION No .../... OF THE ASSOCIATION COUNCIL set up by the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of **Tunisia**, of the other part, with regard to the provisions on the coordination of social security systems contained in the Euro-Mediterranean Agreement Official Journal of the European Union L 306/9, 23.11.2010 Council Decision of 6 December 2012 on the position to be taken on behalf of the European Union within the Association Council set up by the Agreement establishing an association between the European Economic Community and **Turkey**, with regard to the adoption of provisions on the coordination of social security systems (2012/776/UE) Official Journal of the European Union L 340/19, 13.12.2012

EU alone, this requirement materialised through the Decisions approved by the Council in 2010 and 2012.

The content of these Decisions focuses on the export of certain benefits by EU Member States to the countries that have signed the relevant agreements, as well as on recognition of the equal treatment of workers from the third country in question who are legally employed in the EU, together with their family members. They also guarantee that provisions on the export of benefits and the granting of equal treatment are applied reciprocally to EU workers who are legally employed in partner third countries, together with their family members.

It is important to highlight that, for these provisions (Decisions) to take effect, they must be adopted and endorsed by the relevant Stabilisation and Association Councils. However, to date, no Stabilisation or Association Council has adopted the EU proposal, meaning that these rules are in legal limbo, which does not benefit migrant workers from the EU and MED at all. However, it is hoped that there will be a positive reaction from the relevant Stabilisation and Association Councils in the near future.

The example of the Association and Stabilisation Agreements referred to has, unfortunately, not been followed in other similar cases. The agreements with Egypt, Lebanon, Jordan and Syria do not contain coordination provisions equivalent to those in the agreements with Algeria, Morocco and Tunisia, for example. In fact, there have been some setbacks which must be resolved. For purely informational purposes, below is Article 62 of the Euro-Mediterranean agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part: *‘The Parties reaffirm the importance they attach to the fair treatment of their workers legally residing and employed in the territory of the other Party. The Member States and Egypt, at the request of any of them, agree to initiate talks on reciprocal bilateral agreements related to the working conditions and social security rights of Egyptian and Member State workers legally resident and employed in their respective territory.’* Article 65 of the abovementioned legal instrument also sets out that: *‘With a view to consolidating cooperation between the Parties in the social field, projects and programmes shall be carried out in any area of interest to them. Priority will be given to: (a) reducing migratory pressures, notably by improving living conditions, creating jobs, and income generating activities and developing training in areas from which migrants come; (d) improving the social protection system; (e) improving the healthcare system.’*

This minimal social security provision is not reproduced in other Agreements (Jordan, Lebanon) that make minimal or no reference to social security and do not even reach the level that exists in the agreement with Egypt.

10. Bilateral coordination

Many of the problems that exist with regard to social security scheme coordination are being resolved through the negotiation of bilateral agreements. This is, in principle, although not

entirely, the responsibility of Member States. The social security situation for citizens who are originally from signatory parties (Member State and third country) has essentially been regulated through bilateral instruments, when there has been labour migration between the States that have signed the agreement. This national line of action inevitably brings with it a ‘variable geometry’ scenario in which each Member State defends its own interests and signs bilateral agreements based on its own criteria. However, it is practically impossible for the 28 EU Member States to enter into negotiations with all the MED States separately. This bilateral negotiation process is uncoordinated and unsystematic because, in practice, Member States act unilaterally without taking into account the interest of other Member States or the measures being developed in this area. Sometimes, not all the demands of Community regulations are met either. As a result, there is no harmonised approach or criteria. This, in turn, leads to a lack of transparency and interconnection, to the detriment of workers and businesses.

Bilateral agreements also have limited scope with regard both to the persons covered, which in some cases only includes workers from the signatory countries, and to material scope (benefits covered).

Bearing in mind that bilateral agreements can differ enormously precisely because they are bilateral, let us take the Spain-Morocco social security agreement¹⁶ as an example. Its essential characteristics, which extend to all agreements in general are as follows:

- **Persons covered:** Spaniards and Moroccans who work or have worked in both countries, and their relatives and survivors.
- **Matters covered** *In relation to Spain:* Healthcare for maternity, common or occupational illness, and accidents, whether occupational or otherwise. Benefits for temporary disability and maternity. Benefits for permanent disability, old age, death and survivorship. Family protection Re-education and rehabilitation of disabled people. Social welfare and social services *In relation to Morocco:* Legislation on the social security system. Legislation on occupational accidents and occupational illness. The provisions agreed by the public authorities in relation to private social security schemes in as far as they cover salaried or assimilated workers and relate to the risks and provisions of the social security systems.
- **Specifically:** to acquire the contributory benefits set out in the agreement, the insurance periods paid in Spain and Morocco may be added together. Contributory financial benefits may be received independently of whether or not the person in question lives or is in Spain or Morocco. Each country will pay their own benefits directly to the beneficiary. People who

¹⁶ Social Security Agreement between Spain and the Kingdom of Morocco of 8 November 1979, amended by the additional Protocol to the Agreement of 27 January 1998. Official Spanish Gazette No 245 of 13 October 1982 (and Official Spanish Gazette No 282 of 24 November 2001).

meet all the requirements of the legislation in both countries to gain the right to a contributory pension may receive the pension from each of them.

It is interesting to analyse, from a Euromed perspective, some of the problems and shortcomings that could arise as a result of the bilateral nature of the agreements themselves and their limitations in terms of persons and matters covered. The Spain-Morocco agreement referred to has been taken as a starting point for that very reason, and a series of examples have been drawn from it.

- A worker of Algerian nationality who has worked in Morocco (8 years) and Spain (10 years). As the persons covered only include Moroccan and Spanish nationals, even though the worker can prove 18 years of contributions, they would not have the right to a Spanish pension (15 years of contributions) nor a Moroccan one (3 240 days) because it is not possible to aggregate those periods.
- A worker who is a citizen of the EU and is in the same situation as the previous case. Would not have the right to a Moroccan or Spanish pension ¹⁷.
- A Moroccan or Spanish worker who has worked for seven years in Spain, seven in Portugal and one in Morocco. Spain will apply Regulation No 883/04 and add together their Portuguese contributions. They would not have the right to a Spanish pension. The Moroccan contributions would be counted separately, under application of the bilateral Spain-Morocco agreement. They would not have the right to a Spanish pension. In contrast, if they were able to add together their Portuguese, Spanish and Moroccan contributions, the worker in question would be able to access the respective pension. Unfortunately, the Spanish Government does not incorporate the agreement with Regulation No 883/04, as that would require an instrument linking the EU to Morocco, or a social security agreement for the Euromed space.

Although the fact that there is an agreement does not guarantee all rights, as has been demonstrated in the previous examples, the absence of a bilateral agreement causes even bigger problems. To understand the problem better, let us take another example.

- A Moroccan worker who has worked in Morocco (8 years) and Poland (21 years). Despite the worker being able to prove 29 years of contributions, they would not acquire the right to a pension in Poland (25-year contribution period) or in Morocco (3 240 days) as no bilateral agreement is in place, meaning the periods cannot be aggregated. By contrast, if the

¹⁷ By applying the Judgement of 15 January 2002 in Case C-55/00, *Elide Gottardo v Istituto nazionale della previdenza sociale (INPS)*, Rec. 2002, p. I-413, Spain could grant a benefit calculated on a pro rata basis if Morocco provided information about the contributions paid by the German national. As the agreement only covers Moroccan and Spanish citizens, Morocco can refuse to provide that information.

circumstances were the same but the countries involved were Spain and Morocco, their right to a Moroccan and Spanish pension would be recognised.

- Businesses established in EU Member States A and B, Spain and Poland, that send their workers to a MED State (such as Morocco) for two years. . The legislation of that MED State demands the payment of contributions by anyone who works within its territory. Furthermore, the legislation of Member States A and B requires the payment of contributions for posted workers. State A has signed a bilateral agreement with the MED State, meaning that contributions are only paid in the country of origin and no payment is required in the country of employment. By contrast, the business in State B will have to pay double contributions: in their own state and in the MED State. In this last example, the business that posts its workers would become less competitive as a result of having to take on a greater social cost.
- Workers from EU Member States (A and B) who work for 20 years in a Euromed State (C) which does not cover membership for foreigners or the export of pensions in its social security legislation. State A has signed a bilateral agreement that includes equal treatment and the preservation of rights acquired (export of pensions). State B has not signed an agreement with State C. The situation of workers from States A and B is completely different. Whereas the former has the right to social security from State C and, if they are entitled to a pension, will be able to receive it in State A if they return, the worker from State B would not have any pension rights, and even if they did, they would not be able to receive their pension in their country of origin.

In any case and given that the action taken on social security system coordination has essentially been taken through bilateral negotiations, the bilateral social security agreements between Member States and MED States are listed below:¹⁸

- **Germany:** Bosnia and Herzegovina, Israel, Morocco, Montenegro, Tunisia and Turkey
- **Austria:** Bosnia and Herzegovina, Israel, Montenegro, Tunisia and Turkey
- **Belgium:** Algeria, Bosnia and Herzegovina, Israel, Morocco, Montenegro, Tunisia and Turkey.
- **Slovakia:** Bosnia and Herzegovina, Israel, Montenegro and Turkey.
- **Spain:** Morocco and Tunisia.
- **France:** Algeria, Bosnia and Herzegovina, Israel, Morocco, Mauritania, Monaco, Montenegro, Tunisia and Turkey.
- **Italy:** Bosnia and Herzegovina, Israel, Monaco, Montenegro, Tunisia and Turkey.
- **Luxembourg:** Bosnia and Herzegovina, Montenegro, Tunisia and Turkey.

¹⁸ Information taken from Bernhard Spiegel European Commission European Commission **Employment, Social Affairs & Equal Opportunities** Analysis of Member States' Bilateral Agreements on Social Security with Third Countries Ordered by the European Commission Employment, Social Affairs and Equal Opportunities DG Contract ref. no VC/2010/0646

- **Poland:** Bosnia and Herzegovina, Montenegro.
- **Portugal:** Morocco and Tunisia.
- **UK:** Bosnia and Herzegovina, Israel, Montenegro and Turkey.
- Sweden: Bosnia and Herzegovina, Israel, Morocco and Turkey.
- **Bosnia and Herzegovina (11):** Germany, Austria, Belgium, Slovakia, France, Italy, Luxembourg, Norway, Poland, UK and Sweden.
- **Turkey:** Germany, Austria, Belgium, Slovakia, France, Italy, Luxembourg, Norway, UK and Sweden.
- **Israel:** Germany, Austria, Belgium, Slovakia, France, Italy, Norway, UK and Sweden.
- **Montenegro:** Germany, Austria, Belgium, Slovakia, France, Italy, Luxembourg, Poland and UK.
- **Tunisia:** Germany, Austria, Belgium, Spain, France, Italy, Luxembourg and Portugal,
- **Morocco:** Germany, Belgium, Spain, France, Portugal Sweden.
- **Algeria:** Belgium and France.
- **Monaco:** France and Italy.
- **Mauritania:** France

11. The European Court of Justice (ECJ) *Gottardo* Judgement. The limitations of bilateralism

One of the arguments supporting joint action by the EU on social security system coordination, as opposed to developing it in strictly bilateral way, is the declaration made in the ECJ's judgement in the case of *Elide Gottardo*¹⁹ versus the Italian National Social Welfare Institute (INPS). The French plaintiff worked successively in Italy, Switzerland and France and was able to prove insurance periods in those countries. Both France and Switzerland recognised the corresponding pensions without the need for the periods to be aggregated. However, Italy rejected the pension because, although the French insurance periods could be added together (application of Regulation No 1408/71), the minimum contribution period required by Italian legislation was not reached. The only option was therefore to take the Swiss periods into account as well. For Italy to offer her a pension, the agreement between Switzerland and Italy would need to have been applied. However, the agreement was only open to nationals of the signatory States and the applicant was French. This is reminiscent, for example, of the points made about the Spain-Morocco agreement and others, under which the scope of persons covered only includes nationals of the signatory States. This judgement has repercussions for Euromed and must not only be considered applicable to relations between EU Member States.

¹⁹ Case 55/00

The jurisdictional ruling was conclusive. To quote part of it: ‘*With regard to a bilateral international treaty [...] Member States [...] may not disregard Community rules but must exercise their powers in a manner consistent with Community law. [...] It follows from that case-law that, when giving effect to commitments assumed under international agreements, be it an agreement between Member States or an agreement between a Member State and one or more non-member countries, Member States are required [...] to comply with the obligations that Community law imposes on them. The fact that non-member countries, for their part, are not obliged to comply with any Community-law obligation is of no relevance in this respect. [...] It follows from all of the foregoing that, when a Member State concludes a bilateral international convention on social security with a non-member country...*’ (a MED State, for example) ‘*which provides for account to be taken of periods of insurance completed in that non-member country for acquisition of entitlement to old-age benefits, the fundamental principle of equal treatment requires that Member State grant nationals of other Member States the same advantages as those which its own nationals enjoy under that convention, unless it can provide objective justification for refusing to do so.*’

Let us return to the previous example of a German national who has worked in Spain and Morocco and to whom the Spain-Morocco agreement cannot be applied because the persons covered in that instrument are limited to nationals of the signatory States (Spain and Morocco). Spain would be obliged to apply the Gottardo judgement but, as set out in the judgement referred to, the legal obligations deriving from it only apply to the Member State, and not the third country. The latter would be unaffected by a court that does not have authority over it and cannot be required to comply with an order that does not apply to it. In the case of the German citizen, the judgement referred to would not result in reciprocal or shared obligations for the two States (Spain and Morocco), but instead represents a one-way approach that is binding for one party (Spain) and neutral for the other (Morocco). However, from a legal standpoint, it opens up an unknown that should make us think. How can a judgement be implemented by the defendant when the involvement and collaboration of a third party that has no obligation is required for that implementation? Let us come down from the world of ideas into the world of action. It is possible that many third (MED) countries might refuse to handle administration, formalise procedures, complete forms, issue communications, follow through on actions, respond to written communications, or accept requests relating to persons not covered in the agreement. Of course, in many cases, these agreements purposefully only cover nationals of the signatory States. To conclude, there are two options on the horizon: either a policy of reciprocity with other non-EU partners (in this case the MED States) is developed through the European Court of Justice with the aim of meeting the obligations that the EU has imposed on itself, or the commitments made, which derive from the EU’s own laws, will not be met.

As a result, this judgement stresses the need to work more closely with other third countries (MED) to coordinate social security systems and open the door to overcoming the bilateral formula in order to support European coordination – and Euromed coordination, for that matter.

12. European coordination versus bilateral coordination

At least until now, the EU has not acted as a single intermediary and has allowed Member States a monopoly, through bilateral agreements, on their external relations with regard to social security. However, a trend is gradually emerging towards calling for the EU to negotiate and sign international agreements offering fuller bilateral or multilateral protection than the bilateral agreements. It is therefore worth pointing out that bilateral negotiation is currently coming up against a series of problems, some of which have been explained in previous paragraphs. These are precisely what multilateral instruments such as Regulation No 883/04 or the Multilateral Ibero-American Social Security Agreement are intended to avoid or overcome. Emigration is no longer limited to two countries (traditional migration), but can be in multiple directions and affect several states and continents. That is why the absence of multiple aggregation or the ability to supersede the scope of persons covered which, in some cases, is limited to nationals of the signatory states, requires new approaches that are more versatile and suited to new migratory flows.

A decisive step still needs to be taken. Is it possible to sign EU social security agreements with third MED States or develop a common Euromed social security space? In that regard, it should first be pointed out that this option is already covered in general in Article 216 of the TFEU, which states that: *'The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.'* This option could therefore be feasible, at least from a strictly legal point of view. However, Member States and probably some MED States are very reluctant to lose their competences in international relations. It must be emphasised that this route can only be pursued if there is consensus between Member States and MED States.

Perhaps that is why we should analyse, at EU level, whether this line of action could have any trajectory other than a merely theoretical approach. As already demonstrated in the earlier sections of this study, the level of migration by citizens from MED States to Europe has been massive and there should be an obligation and commitment on the part of Euromed as a whole to protect them. Furthermore, migratory flows are starting to emerge in both directions and a large number of European citizens are deciding to move to MED-State job markets for reasons of work. Lastly, economic investments require clear social security rules that ensure fair competition and eliminate most of the obstacles that exist.

It is pertinent to look at the different positions taken by the European Institutions on this matter. The first of these is the European Commission which, in 2012, issued a very important Communication on the matter: '*The External Dimension of EU Social Security Coordination*.'²⁰ In it, the Commission makes the overall argument for a common European strategy on the coordination of social security schemes with regard to third countries. It states that this strategy must complement national approaches and enable the EU to strengthen its role in the rest of the world.

In the Communication, the Commission starts from the understanding that Member States have regulated social security in relation to labour migration separately, through bilateral agreements. The Commission claims that a national line of action leads to a scenario in which each Member State protects its own interests. Following that line of argument and adapting it for the MED States, it points out that it is practically impossible for the 28 EU Member States to enter into negotiations with all of the MED States separately. While they might be prepared to do so, they would probably come up against considerable reluctance in view of the tremendous amount of effort that bilateral negotiations demand. Many of the MED States would face a similar problem if they wanted to open bilateral negotiations with the 28 Member States.

The current state of non-unitary bilateral negotiations is markedly fragmented, as the Commission points out in its Communication. As a result, there is no harmonised approach or criteria. This, in turn, leads to a lack of transparency and coordination, to the detriment of workers and businesses. In view of that, the Commission is advocating a line of action that takes the interests of the EU as a whole into account, as a complementary and/or alternative approach. To that end, the route of EU social security agreements could be taken. These EU agreements could be signed, for example, to address matters associated with double social security contributions or the export of pensions and, according to the Commission, their application could be **voluntary for Member States**. The Communication envisages that these kinds of instruments could be concluded, in particular, with states that experience a significant movement of workers.

The European Parliament has also been active and has declared itself clearly in favour of overcoming the bilateral approach in order to extend the existence of EU policy on social security. At this stage, it is apt to quote from some of the declarations in the Resolution of 14 March 2013²¹ on the integration of immigrants, its effects on the labour market and the external dimension of EU social security coordination. '*The European Parliament [...] whereas it will be impossible for individual Member States to conclude reciprocal bilateral social security agreements with all third countries, and seeking to do so would result in a fragmented system with inequalities in the treatment of EU citizens; whereas action at European level is therefore necessary; [...] calls on the Commission to take action to address the issue of social security coordination for third-country*

²⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – The External Dimension of EU Social Security Coordination' COM(2012) 153 final

²¹ European Parliament Resolution of 14 March 2013 on the integration of migrants, its effects on the labour market and the external dimension of EU social security coordination (2012/2131(INI)).

nationals, and especially the preservation of rights when leaving or re-entering the EU, and to accompany the EU's migration policy with adequate measures addressing the acquired social security rights of migrants; [...] stresses that the rights of EU citizens must also be protected outside the EU and in cases where they work or have worked in third countries; Calls, therefore, for a uniform and reciprocal EU approach to social security coordination vis-à-vis third countries to be adopted, covering all EU citizens and third-country nationals, without prejudice to the rights of third-country nationals deriving from association agreements and developed by the European Court of Justice.'

Adapting these declarations for the Euromed space.

The Council, which is perhaps the institution most reluctant to adopt non-EU social security measures, has taken a very big leap forward by approving the Decisions on coordination of social security schemes referred to in Section 8 of this study. This represents the first steps along a path that could lead somewhere in the future.

Probably the clearest indications on this issue have come from the European Economic and Social Committee. On 14 November 2012, it approved an Opinion ²² on the matter, which included the following points: *'However, it must be recognised that the Council has begun to take the first steps, albeit slowly and unhurriedly, on the external dimension of coordination rules by approving the Decisions on social security system coordination in the Association and Stabilisation Agreements. These instruments improve EU social security policy at the bilateral level (EU/other state signatory) by establishing and regulating the principle of equal treatment and the export of pensions.'* *This affects the reciprocal obligations and rights of EU citizens who work or have worked in any of the abovementioned countries and of the nationals of States that have signed one of these agreements who work or have worked in the EU.'* *These are not unilateral EU laws, applicable in one direction. They are international agreements that benefit both signatories.'* *Furthermore, this type of agreement and the corresponding implementing decisions can reduce the effort involved by accomplishing through a single legal act what would otherwise take multiple bilateral agreements to achieve.'* *'Any third state, regardless of their political or economic importance, would find it difficult and costly to negotiate bilateral agreements with the 28 EU Member States, as the latter would with all of the third states. That demonstrates that bilateralism has material and formal limits, and that alternatives must therefore be sought to complement and substitute it.'* *There is also still some reticence about the bilateral approach in business, as it has not been entirely appropriate or suited to the new circumstances to date. 'In a globalised and interconnected market, the need to avoid social cost benefits (double contributions), depending on whether or not a bilateral instrument is in place, requires a new, more integrated and universal approach.'* *'The EESC realises that Member States have developed bilateral and multilateral policies on the coordination of social security systems through international agreements with third*

²² Opinion of the European Economic and Social Committee on the 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — The External Dimension of EU Social Security Coordination' COM(2012) 153 final.

countries. Nevertheless this approach may suffer from being fragmentary and incomplete because in many cases it focuses exclusively on the protection of the nationals of the signatory States or responds to concrete interests which are not always shared by all Member States.’ ‘The EESC believes that although the importance of this edifice of international bilateral rules has to be recognised, it can lead to a scenario where not all third-country nationals are entitled to the same rights or guarantees within the EU. This is why the EESC calls for a period of discussion on the need to strengthen a unified EU approach in the area of international social security through EU agreements or reciprocal cooperation policies with other global players.’

Thus the idea of a European approach that overcomes the strictly bilateral one is beginning to gain strength among the European Institutions. Bilateral negotiation is incomplete and other alternatives are emerging, the best examples of which are Regulation No 883/04 and the Multilateral Ibero-American Social Security Agreement. The protection of European citizens who work in MED States would be better guaranteed through multilateral European agreements with MED States, or a general social security agreement in the Euromed space.

The MED States want to protect all of their migrant citizens who work in the EU in the best way possible. In reality, only some of them are protected in one country by a bilateral agreement (which, in many cases, is inadequate), while a large number of migrants lack international protection because no bilateral agreement is in place. This leads to unequal treatment, which must be stopped. The contents of the preceding paragraph would therefore also apply in this case. In fact, a comprehensive rather than a bilateral approach provides better protection and is more efficient. The biggest problem is the political/technical difficulty in making it happen. However, this process is not going to happen overnight and will demand time and, most importantly, work to increase awareness and understanding.

13. Legal aspects of potential multilateral social security coordination by the EU and MED countries.

The signing of EU social security agreements with third countries is covered in general terms in Article 216 of the TFEU, which sets out that: *‘The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.’*

As a result, and as indicated in earlier paragraphs, this option could therefore be feasible, at least from a strictly legal point of view. However, Member States are very reluctant to lose their competences in international relations. A slow process of persuasion will therefore need to begin in order for that route to be explored in the foreseeable future. It is important to remember that, according to the European Court of Justice, exclusive *ad intra* competences are also exclusive *ad*

extra, and shared *ad intra* competences become exclusive *ad extra* (in order to conclude international agreements), in accordance with Article 3.2 of the TFEU²³. To be specific: ‘*the Court held that the competence of the Community to conclude international agreements arises not only from an express conferment by the Treaty but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions; that in particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules; that as and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal order; and that to the extent to which Community rules are adopted for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope. If the Member States were free to conclude international agreements affecting the common rules, that would compromise the attainment of the objective pursued by those rules as well as the Community’s tasks and the objectives of the Treaty.*’²⁴

If this jurisdictional failure is combined with the judgement in the Gottardo case, which was examined in Point 11, we can conclude (with the permission of the Legal Services of Commission, Council and Parliament) that this idea has a foundation and defense. However, logically, the EU Institutions have the last word when it comes to interpreting the Treaty and how to apply it.

It is also vital for the MED countries to examine their internal regulations with a view to analysing the legal viability of a comprehensive agreement on the coordination of social security schemes that creates a link between EU Member States and MED countries within the Euromed space.

14. The Multilateral Ibero-American Social Security Agreement

The Multilateral Ibero-American Social Security Agreement is an international standard agreed by several states on the American continent to coordinate their national pensions legislation (old age, disability or death). It regulates the consequences of being an employed or self-employed worker in two or more states that have signed the agreement, as long as they can prove contribution, insurance or employment periods in those states. The agreement is a legislation

²³ *The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.*

²⁴ Case C-266/03. Commission of the European Communities v Grand Duchy of Luxembourg

‘coordination’ instrument, meaning it does not alter (as it is not a harmonisation rule) the social security legislation in each State that is party to the agreement. This provision establishes common rules that protect the social security rights of citizens, regardless of their nationality. The agreement, in effect, applies to people from any country who are, or have been, subject at any time to the social security legislation of two or more States that are party to it, as well as their family members, beneficiaries and dependants. The States party to the agreement are the Ibero-American States that have ratified the agreement. It applies to the economic social security benefits for a) disability; b) old age; c) survivorship; d) occupational accidents and occupational illness. The basic principles of the agreement (similar to those in Regulation No 883/04) are the following: a) equal treatment of nationals and foreigners who provide services in a certain State; b) definition of a single applicable law; c) preservation of future entitlements that are in the process of being acquired, through the aggregation of periods and application of the ‘pro-rata’ rule; d) preservation of rights acquired, through ‘*exportability of benefits*’; e) administrative collaboration.

The Multilateral Ibero-American Social Security Agreement was signed on 10 November 2007. It came into effect on 1 May 2011 after the Agreement and its Administrative Agreement were ratified by seven states. To date, the conditions have been met by Spain, Argentina, Bolivia, Brazil, Chile, El Salvador, Ecuador, Paraguay, Portugal and Uruguay. Most of the Ibero-American states are part of this agreement, although some of them have yet to ratify it.

The multilateral agreement finds its counterpart in Regulation No 883/04, with which it shares principles, provisions and legal technicalities. This instrument is, particularly in a multilateral context, a paradigm for the protection of the rights of migrant workers. This formula or model could therefore be the route to follow in other scenarios and other spaces, such as Euromed.

15. Roadmap

On the basis of the analysis in the preceding paragraphs, it can be concluded that social security in the EU and MED countries has been, and still is, a burning issue which, unfortunately, continues to be dealt with through a fundamentally territorialist and nationalist approach. However, economic globalisation and the resulting increase in labour flows between countries and continents requires new, more universal and decisive action to be taken. This action must aim to prevent migrant workers from finding themselves in a situation in which they are not protected, and to enable businesses to operate across borders under equal conditions in order to improve free competition. Social security is therefore a cohesive element for societies and people, and an essential factor in economic progress and for national and international social peace. Social security can unite what is divided and act as a glue in a space such as Euromed, which is in need of projects and actions to strengthen mutual understanding and common interests. Logically, when drawing up a roadmap, it is important to bear in mind that the prudence of specific actions must not restrict the depth of the approaches taken; it must involve willingness and realism, a can-do mentality, ambition, progress and consolidation. That is why

this approach must go hand in hand with minimums and maximums, and these should, in principle, be reflected in the roadmap, which could be broken down as follows:

A) Immediate actions

- Presentation of this document at the Euromed Summit of Economic and Social Councils and Similar Institutions on 23 and 24 October 2016, with an emphasis on the recommendations that it contains.
- Analysis of the recommendations in this study at the Euromed Summit of Economic and Social Councils and Similar Institutions on 23 and 24 October 2016.
- Approval, as appropriate, and submission of all or part of them to the next Euromed summit.

B) Short-term actions

- Creation of a working group formed of experts from Euromed countries to prepare a conference on social security in the Euromed region, with a focus on the coordination of social security schemes in the Euromed space.
- Holding of a conference at which experts debate different aspects of social security as a fundamental element of social peace and a factor in economic development, along with the need to promote the integration of social security schemes in the Euromed countries. This would be designed to achieve coordination that improves protection for migrant workers and removes unnecessary burdens for businesses in the Euromed space.

C) Medium-term actions

- Development of an instrument for the coordination of social security schemes in the Euromed countries that enables the social security schemes of countries in the Euromed space to be coordinated, much like Regulation No 883/04 and the Multilateral Ibero-American Social Security Agreement, on which it would be based.
- Promote this project to the EU Institutions and Euromed countries.

D) Long-term actions

- Approval of the project, as appropriate.

16. Recommendations

This report would be incomplete if it did not make a series of recommendations (linked to the roadmap in the previous section) that establish a line of action designed to develop the social aspects of Euromed, strengthen relations between Euromed countries and, more specifically, promote social security protection for migrant workers and their relatives. The following recommendations are presented, some of which are very general and others very specific; some have bilateral or multilateral repercussions, some are simply reformative and others innovative. Logically, they must be developed over time, at different moments and opportunities. However, it is important to emphasise that they all respond to the overall objectives set out in this study:

- Strengthening the social dimension of Euromed, specifically through the development of social security in the Euro-Mediterranean area, through comparative studies, meetings of experts and conferences that reinforce institutional collaboration and enable better protection for migrant workers who have worked in different Euromed countries.
- Ensuring that the subjective scope of persons covered in existing bilateral social security agreements between Euromed countries, and those that might be signed in future, extends to all people that are insured, regardless of their nationality. This would enable all migrant workers who have worked in the signatory States of the respective bilateral agreement to be protected.
- Inclusion in Trade Agreements and Association or Stabilisation Agreements of social security clauses similar to those in the Association Agreements with Morocco, Tunisia and Algeria. These agreements enable the principle of equal treatment to be applied to social security and the export of different pensions between the EU and the third signatory state.
- Adoption by the corresponding Stabilisation and Association Councils between the EU and Tunisia, Algeria, Morocco, Israel, the Former Yugoslav Republic of Macedonia, Turkey, Albania and Montenegro of the Decisions on social security system coordination. The draft Decision on Bosnia and Herzegovina should also be drawn up and subsequently approved.
- Holding a meeting of experts from the Euromed countries on social security to examine the experiences of the bilateral agreements that have been signed, the achievements of Regulation No 883/04 and the Multilateral Ibero-American Social Security Agreement, and the possibility of transferring that experience to the Euro-Mediterranean region.
- Drawing up the text, based on Regulation No 883/04 and the Multilateral Ibero-American Social Security Agreement, of a multilateral agreement to coordinate social security schemes in the Euromed space, to which any country that so wishes can adhere voluntarily. This text must take different scenarios into account and consider the

possibility of a draft that can gradually evolve from the basic coordination of social security schemes into a more complete and developed text.

- Examination of the draft, submission of changes, debate, approval and ratification of the text, as appropriate, by the States that wish to do so.

17. Conclusions

In theory, EU Member States and MED States have tried to protect their migrant workers by signing bilateral agreements with those States with which they maintained closer relations, or with which they had more significant migratory flows. However, a purely bilateral approach is beginning to become obsolete in view of the complexity of the current migratory phenomenon, which is moving away from traditional concepts such as stability and settling in the new country of employment. It is now generating new modalities (circular, multiple, successive migrations, temporary movement of workers, etc.) and establishing directional geographic trends that do not follow traditional patterns. It must be recognised that, with regard to the Euromed space, the solution of negotiating bilateral instruments between all States is not viable. Even if it were possible, not all eventualities and needs would be covered, as has been demonstrated in preceding sections. In fact, bilateralism has its material and formal limits, meaning that alternatives must therefore be sought to complement and substitute it.

There is also still some reticence about the bilateral approach in business, as it has not been entirely appropriate or suited to the new circumstances to date. In a globalised and interconnected market, the need to avoid social cost benefits (double contributions) depending on whether or not a bilateral instrument is in place, requires a new, more integrated and universal approach.

It is precisely this new approach that the Coordination Regulation No 883/04 and the Multilateral Ibero-American Social Security Agreement address. They have very successfully tried and managed to overcome bilateralism in order to establish more multilateral landscape based on political and economic integrations, and on belonging to a culture, identity or geographical space.

With an emphasis on this point, and taking into account the available figures on nationals from MED countries in Europe and EU citizens in MED countries, it would seem reasonable to accept that the current situation could be improved. Small changes could be introduced, which will always be positive, but a significant leap must be made towards multilateral rather than merely bilateral protection. This must be based on comprehensive approaches and coordination instruments whose scope of persons and territories covered is in line with the current needs of the Euromed space. Issues such as the aggregation of periods (which is very important for the right to a retirement pension), preservation of rights acquired, and a single system of applicable legislation are vital in this era of globalisation. Migratory flows have been growing geometrically in multiple directions without the traditional bilateral coordination rules providing a solution to these new demands and problems.

Given the clash and tension between the formal and informal economy, the existence of adequate coordination rules could be an instrument for standardisation. It could help migrant workers and employers to value the benefits that social security offers and proceed with the relevant memberships and payment of contributions for those migrant workers as a result.

On the other hand, nobody should forget that it will take a very long process of willingness, persistence and patience for those coordination rules to materialise. It is a road full of obstacles and one that demands tenacity, perseverance and, above all, a piecemeal approach to goals and objectives.

It can be said that it is fundamentally political reasons (not to underestimate the technical reasons) that must be overcome in Europe – where there will be the greatest opposition because of the refusal of some States to transfer their own competences to the EU – as well as in the MED countries. It would be advisable to clear all the potential legal conflicts and difficulties that might ultimately make the alternative of a Euromed agreement on social security coordination run aground.

The possibility of a multilateral agreement should not be an obstacle to improving the current situation. That is why this study's recommendations are based on a dual perspective of improving the existing instruments and drawing up an innovative alternative that is designed to respond to the challenges posed by economic globalisation and the intensity of new migratory flows. .

As concerns the content of the potential agreement, it would be useful to work with the idea of willingness rather than obligation, as in the case of the Multilateral Ibero-American Social Security Agreement, so that those MED States and Member States that do not want to join the project do not boycott or directly oppose it. As a result, once the international Euromed instrument has been finalised, individual opt-out could be permitted or there could be an opt-in arrangement following a formal request.

With regard to the content of the potential agreement, taking a piecemeal approach is a line of action to bear in mind. The whole process could begin with a limited framework agreement that covered provisions on applicable legislation and the export of pensions. This would cover common and specific interests for Europe (such as avoiding double contributions) and Euromed countries. (Payment of pensions without geographical restrictions). Once mutual trust has been built up, this initiative could be extended to include the aggregation of insurance periods for the acquisition and calculation of pensions. As a final phase, the remaining provisions (illness, accidents, family subsidies, unemployment, etc.) could be included in the scope of matters covered if there is a desire to do so. This piecemeal approach is not obligatory or imperative. The best option would undoubtedly be an instrument that covers applicable legislation and pensions (export and aggregation). That would make the Euromed space much more social and much fairer. Furthermore, workers and business owners would be much more involved in the political and social dimension of Euromed.



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