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Sailing the seven seas

Vonk, Gijsbert

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Sailing the seven seas: A schematic overview of mechanisms that can be used to strengthen the social security protection of persons moving in and out of the EU

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Gijsbert Vonk

Universiteit Groningen, the Netherlands

Abstract

The purpose of this final contribution is to offer a broad schematic overview of ‘mechanisms’ that can be used to strengthen the social security protection of persons moving in and out of the EU. Seven mechanisms have been selected for discussion: national unilateral standards, EU unilateral standards, bilateral agreements, EU coordination of bilateral agreements, EU third country agreements, multilateral co-operation and global standards. The existence of this plethora of mechanisms, each with its own merits and shortcomings, casts a shadow over the possibility of a uniform EU regime for external social security relations. Any attempt to introduce such an approach can immediately be contradicted by alternative approaches and mechanisms which can be used both by the EU and by the individual Member States. It is suggested that more coherence in external EU social security coordination can perhaps be found in a conceptual way, by layering the seven mechanisms in a logical manner.

Keywords

social security co-ordination, EU immigration policy, relations with third states, unilateralism, bilateral social security agreements, global standards

Corresponding author:

Gijsbert Vonk, Department of Administrative Law and Public Administration, University of Groningen Oude Kijk in't Jatsstraat 26, 9712 EK Groningen, the Netherlands.

E-mail: g.j.vonk@rug.nl

Introduction

As has become clear from the previous contributions to this Special Issue, a coherent coordination regime between the EU and other countries and regions of the world has not come into being. There is a patchwork of approaches and instruments, involving both bilateral solutions, EU agreements with third countries and some (limited) EU unilateral standards.

The purpose of this final contribution is to offer a broad schematic overview of ‘mechanisms’ that can be used to strengthen the social security protection of persons moving in and out of the EU. Below I discuss the merits and shortcomings of each of these mechanisms in terms of their contribution to social security protection for migrants, using the previous contributions to this Special Issue as points of reference. In this way, this contribution aims to provide a synthesis and food for thought on the future of the external dimension of EU social security coordination.

The term ‘mechanism’ is intended to refer to methods involving certain legal characteristics, such as unilateralism, bilateralism, multilateralism, etc. The overview does not limit itself to mechanisms in the strict EU sense of the word, but also looks at national efforts of the Member States themselves. I have selected seven mechanisms for discussion.

1. National unilateral standards
2. EU unilateral standards
3. Bilateral agreements
4. EU coordination of bilateral agreements
5. EU agreements with third countries
6. Multilateral co-operation
7. Global standards

Before sailing these seas in seven successive sub-sections, I wish briefly to discuss the rationale of strengthening the social security protection of persons moving in and out of the EU. The article concludes with a short reflection and some recommendations for further research.

The rationale of strengthening the social security protection for persons moving in and out of the EU

Looking for ways to strengthen the external dimension of EU social security protection is a challenge in these days of ‘new nationalism and the rise of the populist right in the west’.¹ With popular resentment against immigration and some Member States even trying to crack down on intra-EU coordination achievements, it seems somewhat far-fetched to search for further ways to extend the EU coordination efforts beyond its borders. Some will perceive this as an exercise in moving the deck chairs on the Titanic. But is it really?

There are many reasons why States may wish to protect the social security rights of migrants² and to enter into international obligations for this purpose, some of which may be completely selfish. Thus, for example, in this Special Issue, *Pennings* and *Spiegel* refer to bilateral agreements entered into by the Netherlands and by Austria that aim to strengthen the position of these countries’ own national citizens overseas. Also, *Strban* stresses that bilateral social security

1. Cf. <http://www.bbk.ac.uk/events-calendar/the-new-nationalism-the-rise-of-the-populist-right-in-the-west>

2. For an overview, see *Spiegel* (2010: 56-60).

agreements often reflect national policy priorities. Furthermore, national political preferences and the quality of neighbourly relations may be at stake, as is apparent in *Vankova's* contribution that is concerned with the bilateral agreements of Poland and Bulgaria with Eastern partnership countries. In other words, it is possible to look at the international protection of social security rights of migrants simply as a reflection of national interests, national policy objectives or even of national identity.³

Yet, the rationale for enhancing the external dimension of EU coordination law does not necessarily have to be described in these 'selfish terms'. Thus, for example, in their 2011 ILO publication, *Hirose, Nikac and Tamagno* point out that protecting the right of migrant workers to social security may go beyond securing equality of treatment in social security for migrant workers:

'Increasing social security coordination between countries through bilateral and multilateral agreements and the ratification of relevant international Conventions should be a high priority of social policy as the well-being of millions of migrant workers and their families are at stake. Furthermore, the portability of social security rights does not only bear significance for the workers and their families, but undoubtedly facilitates the free movement of labour within and across economic zones and is, therefore, indispensable for the proper functioning of integrated labour markets'.⁴

My preference would be to formulate the rationale for extending social security coverage in a more abstract manner as part of the universal ambition of the project of social security itself, or indeed of the notion of social security as a human right.⁵ The growth of a body of international coordination law has kept pace with the extension of the scope of protection of social security systems in general. As the system has gradually opened its gates to all sorts of groups of non-wage earners who were previously unprotected e.g. farmers, fishermen, home workers, the self-employed and their spouses- so it has expanded to include the various categories of migrants who, for one reason or another, are unable to reap the full benefits of the existing schemes. The very existence of the network of international coordination treaties emphasises the universal character of the right to social security. Ultimately, worldwide Conventions within the framework of the ILO for the protection of migrant workers in social security⁶ alongside all sorts of other Conventions that set minimum standards for social security, support this line of reasoning.

3. This is the thesis of a dissertation prepared in the MPI for social law and social policy in Munich by Stefan Stegner, entitled *Non-nationals in the welfare State and the genesis of transnational social rights: Poland and the German social insurance from 1918 to 1945*, available at <http://www.mpisoc.mpg.de/1160985/Dissertationen>

4. Hirose, Nikac and Tamagno (2011: 2).

5. The universal character of the right to social security is also expressed by the specific phrasing of this right in international texts on human rights. For example, the Universal Declaration on Human Rights confers the right to social security on everyone, as members of society (Art. 22). Similarly, the International Covenant on Economic, Social and Cultural Rights expresses the right of everyone to social security (Art. 9). For a reflection on the inclusion of migrants in this notion of universality, cf. Vonk (2002).

6. For example, ILO Conventions No 19 of 1925 (equal treatment in accident insurance), No 48 of 1935 (maintenance of acquired rights), No 118 of 1962 (equal treatment of foreign nationals in social security) and No 157 of 1983 (maintenance of social security rights).

Sailing the seven seas

National unilateral standards

One of the founding fathers of the post-war Dutch social security system, Veldkamp, the politician-later-turned-academic, considered national law as a source of international social security law, next to international Treaties.⁷ In this context, he referred specifically to national legislation relating to the principle of territoriality, the special provisions dealing with non-nationals, employment abroad and residence abroad. Veldkamp was right not only from a technical point of view, but also, to some extent, from the point of view of realising the objective of protecting migrant workers' interests. In the national social security law of many countries, we find provisions that may, in their own way, contribute to, for example, avoiding positive and negative conflicts of law and the portability of pensions. In this way, each country has its own national standards for protecting migrants, some more generous than others.

The unilateral standards of national treatment are often biased in favour of the position of national or resident citizens. Examples are the German scheme which allows for the provision of emergency social assistance specifically designed for German citizens who are stranded abroad⁸ and the British pension regime which only allows automatic indexation of the pension rates for those who reside in Great Britain.⁹ Diminished standards of national protection may run contrary to European human rights, especially when they are based on the direct exclusion of non-nationals, as became apparent in the famous *Gaygusuz* case of the ECtHR.¹⁰ The human rights tolerance for portability restrictions (leading to a difference of treatment on grounds of the country of residence) is a bit murkier, in view of seemingly contradictory case law on this matter by the ECtHR.¹¹

Interestingly, in recent decades, the potential of national law to unilaterally protect migrant workers has gained considerable attention in international fora. This is particularly the case from the point of view of labour-sending countries, which are not attached to an extensive network of bi- and multi-lateral social security relations. This is a reality for many developing countries, in which western-style social insurance schemes have never come into being. Some of these countries have been developing their own social security programmes for protecting overseas workers. For example, the Albanian social insurance system provides an opportunity for emigrants to remain affiliated to the system on a voluntary basis, creating protection for the hundreds of thousands of Albanians who work abroad, often in undeclared work and/or without the authorisation of the immigration authorities. Another example is the Filipino OWWA scheme, an institutionalised welfare fund that seeks to protect migrant workers abroad. OWWA is funded by a mandatory membership fee payable by Filipino emigrants and by government grants. It offers support services for participation in pre-departure orientation seminars, public assistance programmes for people in need, on-site services at embassies and consulates, and an OWWA identification system. Other such examples can be found in Jordan, Pakistan and Sri Lanka.¹²

7. Veldkamp (1980: 269).

8. Paragraph 24 *Sozialgesetzbuch XII*.

9. Section 150 of the Social Security Administration Act 1992.

10. ECHR, Case 17371/90, of 16.09.1996, *Gaygusuz v. Austria*.

11. For a discussion of the case law of the ECtHR in particular the cases of ECtHR, Case 42184/05, of 16.03.2010, *Carson and others v. the United Kingdom* and ECHR; Case 10441/06, of 7.11.2013, *Pichkur v. Ukraine*, cf. Slingenbergh (2015: 68-70).

12. Van Ginneken (2008); Hirose, Nikac and Tamagno (2011: 13-14).

In this way national unilateral standards clearly have a role to play in extending the international protection of migrants. Perhaps they could even be made part of strategy for the external dimension of EU social security coordination, by offering EU support for overseas workers schemes in the developing third countries. Such support could be given as a form of development aid, for example, by helping to strengthen the administrative infra-structure of such schemes or by providing direct or indirect financial support.¹³

However, the reliance on purely unilateral national standards of EU Member States as predominately labour immigration countries is less obvious for a coherent strategy for the external dimension of the EU social security coordination. I suggest two reasons for this.

Firstly, it should not be forgotten that the corpus of international coordination law was born out of the inability of national law to properly protect migrants in terms of offering them equal treatment on grounds of nationality, taking into account insurance periods completed abroad, allowing portability and solving conflicts of law. Many coordination techniques that have been developed to realise such goals invariably require an element of co-operation between the institutions of two or more States.

Secondly, and more importantly, the standards of national treatment in some European countries are slipping. Contemporary legislative change is increasingly geared towards a rejection of transnational social security law. This is visible, *inter alia*, in the raising of new obstacles to access to social security protection for non-citizen migrants, particularly for those with a weak immigration status, and in diluting the portability regimes.¹⁴ Examples are the imposition of an export ban for all social security benefits in the Netherlands; the hardening of the 'habitual residence test' for access to benefits for certain groups of immigrants in the UK; the introduction minimum waiting periods for certain non-contributory benefits in Denmark; and the recently planned introduction of a system of reduced child benefit rates for children residing abroad in Austria. What is interesting is that these 'new policies of national withdrawal' do not necessarily work in the same way for all immigrants. When the quality of national provisions for migrants is falling, then the contrast between those who are protected by international agreements and those who are not becomes more apparent. While restrictive legislative measures are often partly, or even fully, mitigated by EU law and to a lesser extent by bilateral social security agreements, they apply in full force to migrants from countries with which Member States have not entered into any social security obligations. And intentionally or otherwise, these happen to be developing countries that produce the immigration pressures which many member States are endeavouring to curb.

The conclusion is that extending social security protection for persons moving in and out of the EU who have hitherto been without protection, cannot be left up to the sole unilateral national initiative of EU Member States.

EU unilateral standards

The EU has no competence to extend any protection to third-country nationals, except on the basis of Title IV, Chapter 2, which deals with a common immigration policy for the Union (border checks, asylum and immigration), Articles 77–80 TFEU). On the basis of Title IV, a growing body of Directives has come into being which have an impact on access to social security for third-

13. Cf. by analogy Spiegel (2010: 56 under the bullet point 'development aid').

14. Vonk and Van Walsum (2013).

country nationals residing in Member States of the EU. Many of these Directives protect well-defined, limited groups of persons such as researchers (Directive 2005/71/EC), asylum seekers (Directive 2013/33 EU), victims of human trafficking (Directive 2011/36/EC) and migrants who are engaged in return proceedings to their home countries (Directive 2008/15/EC). Three Directives stand out as having a more general scope of application. These are the permanent long-term residents (Directive 2003/109/EC), the so-called blue card holders applying to highly qualified third-country workers (Directive 2009/50/EC) and the so-called ‘Single Permit’ Directive (Directive 2011/98/EU).

All these Directives contain clauses dealing with the quality of social security protection for persons moving in and out of the EU, pertaining to the equality of treatment, including equal treatment regarding the transfer of benefits to a third country. The realisation of these norms is not necessarily dependent on co-operation with the third States in question. In other words, equal treatment can be provided unilaterally by States, without entering into external coordination relations. In fact, these clauses bring about a degree of harmonisation of unilateral national standards discussed in the previous subsection.

The equal treatment clauses have been systematically analysed by *Verschuere*n in this EJSS Special Issue. He highlights the inconsistencies in the approaches taken by the EU labour migration Directives which result from the sectoral approach on labour migration conducted by the EU. Yet, the importance of this patchwork regime should not be underestimated. Firstly, it created a precedent for harmonising unilateral national standards. Without this regime, the unilateral standards of protection applied by the individual Member States would be untouched by EU law, which in some cases could mean no breakfast at all, never mind a dog’s breakfast. Secondly, the equality of treatment clauses can be invoked by persons moving to the EU, even if they have not migrated within the European Union, thereby adding something significant to the internal freedom of movement regime for third country nationals. In other words, the EU unilateral standards are not bound by the migration criterion of Regulation 883/2004 (and Regulation 1231/2010, as discussed by *Cornelissen* in this Special Issue). Thirdly, the equal treatment clauses have the potential to reach out to people coming from parts of the world where social security systems have not yet come into being, where there is little prospect for coordination instruments in the classical sense of the word. For these very poor migrants who find their way to Europe and then return to their home countries, there is little prospect of reciprocal social security protection. Nonetheless, I agree with *Verschuere*n’s overall conclusion that the EU unilateral standards for protecting persons moving in and out of the EU are in need of a more ‘uniform and common approach’. I return to this later in the article.

Bilateral agreements

Reportedly, there are more than 350 bilateral agreement concluded between EU and non-EU States.¹⁵ As *Strban* points out in this Special Issue, bilateral social security agreements are not only the oldest but also remain the most important international instruments of social security coordination between EU and third countries. They are promoted by multilateral agreements of international organisations like the ILO and the Council of Europe, are influenced by EU social security coordination law and may well be relied upon in relation to the UK after Brexit.’

15. See Melin’s article in this Special Issue, with reference to *Verschuere*n (2016).

The flexibility of social security agreements and their capacity to adapt to the needs and priorities of individual Member States is one of the strengths of a bilateral regime. But the flipside is that such regimes will not lead to the uniform and comprehensive protection of persons moving in and out the EU. Furthermore, as was pointed out in the 2012 European Commission Communication on the external dimension of EU social security coordination, EU Member States usually negotiate bilateral agreements without reference to what their partner EU countries are doing.

According to the European Commission:

‘The process is highly fragmented. In practice, certain EU countries may be pinpointed by the EU’s main trading partners for the conclusion of agreements, whilst other countries are left out. There is no mechanism for harmonising approaches, and similarly no mechanism whereby EU countries can get together to solve common problems they face with a particular country. Moreover, the country-specific nature of these national bilateral agreements means that migrants and businesses based in third countries not only deal with fragmented social security systems when moving between EU countries, but are also confronted with distinctive national bilateral agreements when moving into and out of the EU.’¹⁶

This complaint of the European Commission about a lack of internal transparency and co-operation on the part of Member States (or indeed the lack of solidarity) has apparently been solved, at least to some extent, by using the Administrative Commission for the Coordination of Social Security as a platform for exchanging information about the ‘bilateral conduct of each the Member States. But whether this leads to joint strategies in respect of certain third countries, as the Commission’s Communication aspires, is not known.’¹⁷

EU coordination of bilateral agreements

The EU coordination Regulation has always included a regime that governs the relations between this Regulation and other coordination instruments that apply between Member States. This is now included in Art. 8. Regulation 883/2004. According to this Article, the Regulation replaces any social security Convention that applies between Member States falling under its scope. However, certain provisions of social security Conventions entered into by the Member States before the date of application of this Regulation continue to apply provided that they are more favourable to the beneficiaries or if they arise from specific historical circumstances and their effect is limited in time. Furthermore, two or more Member States may, as the need arises, conclude agreements with each other based on the principles of this Regulation and in keeping with its spirit.

This exemplifies the formal, internal EU coordination of bilateral agreements. The CJEU extended this type of coordination further to agreements that were concluded between the Member States and third countries. This happened in the *Gottardo* case,¹⁸ which dealt with a French woman who made a claim under the Italian-Swiss social security Convention, which is only applicable to nationals of the Contracting Parties. The Court ruled that when a Member State concludes a bilateral international Convention on social security with a non-member country, the fundamental principle of equal treatment requires that the Member State should grant nationals of other Member

16. European Commission (2012) ‘Communication on the External Dimension of EU Social Security Coordination, 30 March, COM (2012) 153: 3.

17. The debates and the results from the debates in the Administrative Commission are not publicly available.

18. *Gottardo*, Case C-55/00, ECLI: EU: C:2002:16.

States the same advantages as those its own nationals enjoy under that Convention unless it can provide some objective justification for refusing to do so. EU agreements with third States include formal coordination provisions dealing with the relation with bilateral agreements concluded between the Member States and the third State in question.

In its Communication on the external dimension of EU social security coordination,¹⁹ the Commission went two steps further by suggesting the conclusion of a new EU social security agreement that would offer the possibility of integrating possible bilateral particularities between a Member State and the third country concerned. According to the Communication, such new agreements would allow a more flexible approach to social security coordination than is possible under association agreements and could also be concluded with third countries with which no association or cooperation agreement exists. The application of such EU agreements can be made optional for the Member States.

The proposed new EU agreements obviously exceed the merely formal coordination of bilateral agreements concluded by the Member States. They would presumably replace the existing bilateral treaties, although the optional participation of the Member States would still allow for national bilateral leeway. In reality, a new EU agreement for third countries as envisaged in the 2012 Communication of the European Commission, has not come into being. As Eisele concludes in this Special Issue, reality points to a piecemeal approach to social security coordination with third countries, which are not new countries but, rather, countries with which the EU has established association and stabilisation relations.

Perhaps the Commission should soften its aim of developing a common approach to bilateral relations, by preparing model bilateral agreements, or formulating an EU standard, which could be used as a source of inspiration by Member States when they attempt to realise new or reshape existing bilateral relations with third States. This approach has successfully been adopted by the OECD in the field of double taxation treaties. As a matter of fact, a concept for a model agreement has been developed by Spiegel in his excellent 2010 analysis of Member States' bilateral agreements on social security with third countries, a study commissioned by the European Commission.²⁰ However, this concept has not been given any formal status. Neither has a practice emerged that one Member State negotiates a bilateral agreement which then serves as a formal model for the conclusion of similar agreements by other Member States, as Spiegel suggests. It is submitted that the model agreements should, perhaps, differ according to the best practices that have already come into being or according to the needs and specific characteristics of the regions. Indeed, from this view point, an EU bilateral model agreement could be inspired by Melin's comparative legal analysis of the Member States' social security agreements in relation to India, as explained in her article in this Special Issue.

EU agreements with third countries

Establishing formal social security relations in EU bilateral agreements has so far been the preferred way of strengthening the external dimension of social security coordination. The state of

19. European Commission, *supra* note 16.

20. Spiegel, B. (2010) *Analysis of Member States' Bilateral Agreements on social security with Third Countries*, report for the European Commission, Contract ref. No. VC2010/0646, available at <http://ec.europa.eu/social/BlobServlet?Annex 2>.

affairs relating to these agreements has been extensively analysed in this Special Issue by Eisele. In summary, this is the state of affairs as she describes it.

Euro-Mediterranean Association Agreements (EMAAS) were signed with, *inter alia*, Algeria, Morocco and Tunisia around the turn of the century to replace the previously existing cooperation agreements. In 2010, a series of draft Decisions on the coordination of social security were adopted by the Council of the EU, in relation to these countries. None of these Decisions have been formally adopted by the Association Councils of the EMAAS.

As for the Stabilisation and Association Agreements with the Balkan countries, the Council of the EU adopted two identically worded draft Decisions on the position of the EU concerning the coordination of the social security systems with Croatia and with Macedonia (FYROM). Further draft Decisions for the coordination of the social security systems were adopted in 2012 with regard to Albania and Montenegro. Likewise, none of these drafts Decisions have been formally adopted by the Stabilisation and Association Agreements.

On 6 December 2012, the Council of the EU decided on a new Decision (Council Decision 2012/776/EU) to replace Decision No 3/80 but this Decision not been formally accepted. In other words, so far the new initiatives on third countries have not yet born any fruits. Were it not for Turkish Decision 3/80 and the case law of the CJEU on the mother agreements themselves, EU relations with third countries would have remained an empty shell. Interestingly, according to Eisele, it is not so much the reluctance of the Member States, but rather of the partner countries, that explains the lack of progress. For Turkey, this can be explained by the fact that Decision 3/80 remains a better deal. For other countries, the explanation is not entirely clear. Perhaps third States prefer to negotiate agreements with individual Member States rather than with the powerful EU block as a whole. This is reportedly the case for Morocco, which has never been a strong supporter of EU efforts to reach any coordination instrument under the Euro-Mediterranean Association Agreement, but it could apply to other countries as well.

Multilateral co-operation

Another possibility for extending the coordination network is trying to link EU coordination law with similar coordination instruments that exist elsewhere in the world. A unique possibility that could be considered is to create a link between EU coordination law and the 2007 Ibero-American Multilateral Agreement on Social Security.²¹ This Agreement entered into force in 2011 between Spain and Portugal and a number of ratifying South American States (Argentina, Brazil, Bolivia, Chile, Ecuador, El Salvador, Paraguay, Uruguay and Venezuela). Creating a link between the two co-ordination instruments was suggested by Spiegel in 2010. He considers the situation of a German national who has completed periods of insurance in Germany, Spain, Argentina and Chile and then wishes to move:

'Under an ideal framework or umbrella agreement covering Reg. 883/2004 as well as the Ibero-American Agreement and also by building a bridge between the two multilateral instruments, all four countries should take into account the periods completed in the respective three other countries and afterwards calculate pension under the same principles.'²²

21. Fernandez (2014).

22. Spiegel (2010: 68 and 69).

Creating a link between the EU and the Multilateral Agreement is a possibility for a number of reasons.²³ In the first place, the Multilateral Agreement would be set up almost completely along the lines of the latest EU Regulation 883/2004. This would make it technically feasible to establish a liaison between the two instruments. In the second place, two EU Member States, Spain and Portugal, are already covered by both coordination regimes. However, due to the large number of participants in the Multilateral Agreement, it is not very likely that alternative bilateral relations can be created with individual EU Member States and all the South American countries involved. Thirdly, an EU-Ibero-American coordination zone would be beneficial to all the parties, as the migration streams run not only from South to North, but, since the economic crisis, also from North to South, thus creating a true equilibrium of interests.

In the most minimal form, an EU-Ibero-American coordination pact could codify the *Gottardo* principle that already applies for Spain and Portugal *vis-à-vis* persons who fall under the scope of Regulation 883/2004. Suppose a French citizen has completed periods of insurance in France, Spain and Argentina. The Spanish authorities are now under an obligation to consider the insurance periods in all three countries for the purpose of calculating a Spanish pension for our Frenchman living in the EU. In other words, through the intervention of the *Gottardo* principle, a single EU-Iberian-American coordination area has been created. Of course, there are still important lacunae. For example, the EU export rule does not apply between Europe and the South American agreement members. Also, the *Gottardo* principle may not invoke new obligations for South American countries. These extra steps are waiting for an intercontinental coordination effort between the EU and the signatories of the multilateral agreements. If this principle were to be reciprocal, this would mean that Spain and Portugal would also have to take into account periods of insurance completed in other EU Member States while calculating a pension under the Ibero-American Multilateral Agreement.

A further option would be to assume a general obligation for all the States involved to take into account periods of insurance completed in the entire coordination zone, while calculating pensions under either the Ibero-American Agreement or under Regulation 883/2004. For pensions, the overarching rule would be quite straightforward: when Regulation 883/2004 applied, the Member States would take into account American periods of insurance and vice versa, when the Ibero-American applied, the Contracting States would take into account EU periods of insurance. This principle should probably be accompanied by a conflict rule in case both coordination instruments apply simultaneously to one person. Such overlapping of instruments could easily occur where the Ibero-countries are involved, especially taking into account the Court of Justice's ruling in *Gottardo*. This problem could be solved by giving preference to the most favourable instrument for the person concerned. Along the same lines, it could be stipulated that the Euro-Ibero-American coordination pact should not affect any rights and obligations arising from existing or future bilateral agreements concluded between any of the States involved.

Of course, the coordination pact should then also include provisions on administrative co-operation between the competent authorities, the exchange of forms, etc. Indeed, if a Euro-Ibero-American pact could be established, it would be the first multilateral intercontinental coordination instrument in history.

23. This argument has been made in an earlier contribution in Vonk (2015). Spiegel (2010: 68 and 69) also refers to this possibility.

Global standards

There are global standards on the social security protection of migrant workers. The most important and far-reaching instruments mentioned here are the 1982 ILO Convention No 157 on the Maintenance of Social Security Rights and the 1990 UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. The ratification record of both Conventions is dismal: four countries for ILO Convention No 157 and 45 for the UN Migration Workers Convention, none of which are from the North or from large middle-income countries, except Mexico and Turkey.

In view of this blatant lack of interest from national States, it is perhaps time for international organisations to start to exercise some mild pressure. For example, the European Parliament and the European Commission could place a Member State's membership of these Conventions on the agenda. If it is not possible for the EU to become a signatory to UN Migrant Workers Conventions, then at least the EU could refer to this Convention in future migration legislation, for example in the Preamble.

The social security clause adopted in Art. 24, regulates the two areas of unilateral EU standards in the field of its immigration policy, i.e. equal treatment and portability:

1. 'With respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. The competent authorities of the State of origin and the State of employment can at any time establish the necessary arrangements to determine the modalities of application of this norm.
2. Where the applicable legislation does not allow migrant workers and members of their families a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances.'

It can be argued that, for the EU, these UN standards may function as a small stick that prevents the quality of immigration conditions applied by the EU and its Member States from slipping and that promotes the uniform and common approach advocated by Verschueren in this Special Issue. It should not go unnoticed that the stabilisation and association agreements with the Balkan countries do not even include any reference to the equality of treatment in the field of social security.

Conclusion

It follows from the arguments presented here that there are many strategies that the EU and its Member States can follow to strengthen the social security position of persons moving in and out of the EU, and each of them has its own merits and shortcomings. This casts a shadow over the possibility of realising a single, uniform EU regime for external social security relations. It is as if any attempt to introduce such a regime can immediately be challenged by alternative approaches and mechanisms that can be used both by the EU and by the individual Member States.

It is possible to just accept this patchwork reality or even to celebrate it as part of our heterogeneity and diversity. We are Europeans, after all! But from the point of view of rational EU governance, this is not very satisfactory: how can all these differences in the treatment of migrant

workers be justified and who is responsible for the gaps in social security protection that continue to exist for many migrant groups? As a matter of fact, these are exactly the concerns raised in the 2012 European Commission Communication on the external dimension. Striving towards more coherence remains a holy mission.

It may be instructive to look at some of this coherence in a conceptual way, by means of 'layering' of the seven approaches to protecting the social security interests of migrant workers in a logical manner. What is the relationship between these layers? If more abstract human rights were to be positioned at the top of the construction and the unilateral standards of national protection at the bottom, would it be possible to logically position the other layers in between (multilateral co-operation, EU third country agreements, EU coordination bilateral agreements, bilateral agreements and EU unilateral standards)? From higher to lower, from more abstract to more concrete, from general rule to exception? Perhaps such a logical construct of international coordination law already exists, but it is not generally understood in this way? How can such an ordering be made more explicit so as to realise a higher degree of coherence? What mechanisms are best suited for migrant groups with particular characteristics (regional background, professional status, etc.)? Which mechanisms are best suited to take into account the interests of the EU Member States? What role does each group of actors have to play in this: the UN, the ILO, the EU, or Member States? These are profound questions that cannot be addressed by politicians or civil servants alone. They also need to be studied by academics. It is hoped that this Special Issue will encourage specialists and a new generation of enthusiasts to carry on the research in the field.

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