

National Report Greece

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I. Comparison of the National Social Security Systems and Tax Systems

1. Overview of Social Security System in Greece

The Greek social security system (*systema koinokon asfaliseon*) consists of three sectors: social insurance (*koinoniki asfalisi*) aiming at the protection of the working population (employed or self-employed), social assistance (*koinoniki pronoia*) aiming at providing care to persons in need, and the National Health Care system (*Ethniko Systema Ygeias-ESY*) covering the entire population resident in Greece.

The constitutional basis of social security¹ is to be found in Art. 22 §5 of the Greek Constitution, providing that "The State will care for the social insurance of the working people, as law prescribes". Social assistance and the National Health Care System find their constitutional basis in Art. 21 §3, providing that "The State will care for the health of the citizens and will adopt special measures for the protection of young people, the elderly, invalids, as well as for assistance to the needy". From an administrative point of view the social insurance system is administered by the Ministry of Labor and Social Protection while social assistance and the National Health Care System are administered by the Ministry of Health and Social Solidarity.

Social insurance has been the main axis of the Greek social protection model since its establishment at the 1950s. It is a system of statutory main and supplementary insurance schemes, covering the main risks that working persons face, that operates on the basis of many different autonomous social insurance bodies. These bodies form the first pillar of social security in Greece. Legislation permitting the setting up of occupational schemes forming the second pillar in Greece was recently enacted² but up to now no such scheme has been set up. Social insurance is mainly financed through contributions, but other means of financing are also provided for.

The National Health Care System (ESY) was first introduced in early 1980s and its aim is to provide health care without charge to the entire

¹ K. Kremalis, *Dikaio Koinonikon Asfaliseon* (Social Security Law, in Greek), Athens 1985, pp. 38 et seq.

² Law 3029/2002.

population residing in Greece³. Social insurance bodies provide also health care services to persons covered by them through their own systems. The National Health Care system is entirely financed through taxation.

The social assistance system provides a safety net of minimum protection to persons in need that are not covered by social insurance. There is no general social assistance scheme; instead there exist group-targeted protection programs that were first established in the 1960s and were expanded throughout the 1980s. Social services are also provided to a smaller scale through the local authorities and through a net of volunteers' organizations and NGOs that are mainly active in the protection of children, refugees and disabled persons⁴. The rather limited importance of the social assistance schemes is related to the existence of the so called "mixed social security benefits", i.e. benefits that are granted by certain social insurance schemes that do not grant a subjective right to the benefit as well as benefits with an assistance character that are granted by the administrative bodies of social insurance schemes⁵. Social assistance is financed entirely through taxation.

In general, Greece has a mixed system of social security, based both on the Bismarck and Beveridge principles⁶. Social insurance is applicable to the working population, irrespective of nationality⁷, on the basis of the principle of territoriality⁸. Social assistance and the national health care system are applicable to the entire population living in Greece. However, the ben-

³ Major modernization of the legislation concerning the ESY has been effected by Law 2519/1997, Law 2889/2001 and Law 2955/2001.

⁴ Law 2646/1998 has modernized the social assistance system through the National System of Social Care project, based on government services, private not-for-profit bodies and volunteers' organizations.

⁵ D. Pieters, *Introduction into the social security law of the member states of the European community*, Bruylant-MAKLU Uitgevers, 1993, pp. 133.

⁶ K. Kremalis, op. cit., pp. 19 et seq.

⁷ Nationality becomes a requirement in the case of Greek persons living abroad and wishing to be subject to optional insurance in Greece (only Greek nationals or nationals of other countries but of Greek origin are entitled to insurance coverage in Greece). It is also important in cases of non-nationals that are pursuing only a temporary activity in Greece: these persons are also excluded from social insurance in Greece. The exclusion of non-citizens applies only to citizens of countries other than members of the EU and countries with which Greece has signed a SSC. K. Kremalis, op. cit. pp. 102 et seq.

⁸ The principle of territoriality was only established in 1982, by Law 1305/1982.

eficiaries of mixed social insurance benefits (i.e. the minimum pension⁹) can only be Greek citizens.

The tax system, on the other hand, is operating on the worldwide income principle: according to the Income Tax Code (*Kodikas Forologias Eisodimatos-KFE*) residents of Greece are subject to tax on their entire income, irrespective of whether it is derived by sources in Greece or abroad; income derived by sources in Greece is also subject to Greek income tax, irrespective of the State of residence of the recipient.

Social insurance appears for the first time in 1836, with the establishment of the Mariners Fund that first operated not until 1861. In 1922 social insurance is statutorily established with the enactment of Law 2868/1922 "on compulsory insurance of workers and employees", followed by Law 6298/1934 "on social insurance". The compulsory insurance of all wage-earners by the Social Insurance Institute (*Idryma Koinonikon Asfaliseon-IKA*) was established in 1935.

Although IKA remains by far the most important statutory scheme for wage-earners, there also exist several independent institutions of public and private law aiming to protect certain groups of people against certain risks. In 1988 there were as many as 325 social insurance institutions, each of them being more or less different from the others. This number has been brought down to 170 social insurance institutions in 2002, supervised by five different ministries¹⁰ that can be divided into four main categories covering, respectively, (i) private sector employees, (ii) farmers, (iii) self employed and liberal professions and (iv) public servants.

All social insurance schemes are operating mainly on the basis of the pay-as-you-go system. Occupational schemes belonging to the second pillar (will) operate on the capitalization system¹¹.

The first pillar is basically financed on a tripartite basis: employees' contributions, employers' contributions and State funds out of the general

⁹ The pension for each Greek citizen who is older than 68 years of age, living in Greece, not entitled to any insurance benefit and whose income is below a certain level.

¹⁰ The Ministry of Labor and Social Protection supervises over: 22 institutions covering private sector employees; 10 institutions covering banking sector employees; 12 institutions covering employees of public companies; 6 institutions covering self-employed persons; 11 institutions covering liberal professions; 6 institutions covering employees working in the press; one institution for farmers and 17 institutions for public servants.

¹¹ The occupational schemes provided for by Law 3029/2002 operate on the basis of the capitalization system.

budget¹². Special financing sources are also provided for several schemes of certain categories of persons that were deemed unable solely by their own contributions to sustain a decent level of social insurance benefits, the so-called "social financing sources" (*koinonikoi poroi*)¹³. The bodies administering the social insurance schemes can also be financed through the exploitation of their assets (movable and immovable property). The second pillar is financed only by employees' and/or employers' contributions.

Social security contributions are not taxes. The "social financing sources" are various economic burdens imposed on any person, irrespective of their quality as insured or not, making use of a certain service or being engaged in a certain activity and they are used to fund specific social insurance bodies¹⁴. The nature of "social financing sources" is not always clear; in certain cases they are referred to as (indirect) taxes, in other cases their nature seems closer to that of a retributive duty and sometimes they can also be considered as contributions.

Since social insurance is based on the territoriality principle, there is a risk for persons moving from Greece to work in another country. When the link between the worker and the country is severed, these persons risk losing their entitlement to benefits. In order to eliminate such undesirable and burdensome consequences for the insured persons, States have signed bilateral Social Security Conventions (SSCs). Within the European Union the protection against such a risk has been the subject of extensive regulation: Regulations 1408/1971 and 574/1972 provide for the application of social security schemes to employed persons, to self employed persons and to members of their families moving within the Community. According to a specific provision contained in Reg. 1408/71, all existing bilateral

¹² This is valid for the private sector employees' scheme; the farmers' scheme, the self-employed and liberal professions' schemes are financed through contributions of the insured persons and state funds, at different analogies for the different categories of schemes. According to Ministry of Labor and Social Solidarity data, the social insurance bodies that are supervised by this Ministry were financed, in the year 2002, as follows: 33.24% by the insured persons' contributions; 29.82% by employers' contributions; 24.16% by social financing sources; 5.65% by State subsidies; 4.93% by revenues from the assets, and 2.20% by other revenues.

¹³ D. Pieters, op. cit. p. 150.

¹⁴ J. Anastopoulos- Th. Fortsakis, *Forologiko Dikaio* (Tax Law, in Greek), 2nd edition, Athens 2003, p. 55.

SSCs are replaced by the regulation, after its entry into force, with certain exceptions¹⁵.

2. Bilateral Social Security Conventions

Greece has signed a rather limited number of bilateral Social Security Conventions (SSCs)¹⁶, compared to the network of the Double Taxation Conventions (DTCs). Greece has signed 39 DTCs¹⁷ whereas there are much fewer SSCs. Of course it has to be taken into account that the SSCs Greece had signed with EU Member States have now been replaced by EC Regulation 1408/1971¹⁸. Currently there are in force (a) eight classical or general SSCs with: the USA, Canada, Quebec, Argentina, Brazil, Venezuela, Uruguay and New Zealand and (b) seven *sui generis* or partial SSCs with: Egypt, Libya, Ontario, Quebec, Poland, Romania and Syria.

SSCs are ratified according to the provisions of Art. 28 of the Greek Constitution, providing for the ratification of international conventions. According to these provisions, after their entry into force they are ranked higher than statute in the norm hierarchy, prevailing over any domestic law provision that regulates the subjects regulated by the SSC differently¹⁹.

¹⁵ See Art. 6 of Reg. 1408/71.

¹⁶ Greece has also signed two co-operation Protocols in the field of Social Security, with Albania (entry into force: 2003) and Moldavia (signed in 2004; not yet in force) that provide for the exchange of experience and know-how as well as for meetings of experts on social security matters.

¹⁷ With the USA, the UK, Sweden, France, India, Germany, Cyprus, Belgium, Austria, Finland, the Netherlands, Hungary, Switzerland, Czech Republic, Slovakia, Norway, Italy, Poland, Denmark, Bulgaria, Romania, Luxembourg, Korea, Israel, Croatia, Uzbekistan, Albania, Portugal, Armenia, Spain, Georgia, Ukraine, Russian Federation, Slovenia, South Africa, Ireland, Turkey (not yet in force), China (not yet in force) and Kuwait (not yet in force). Further special conventions have been signed regarding the avoidance of double taxation with regard to income from shipping and aviation (21 DTCs) and the avoidance of double inheritance taxation (5 DTCs).

¹⁸ Greece had also signed SSCs with France, the Netherlands, Austria, Poland, Slovakia, Finland, Sweden, Belgium, Czech republic, Germany, Cyprus and Switzerland; these SSCs have been replaced by Regulation 1408/1971.

¹⁹ In a case of conflict between domestic legislation and SSC provisions, the supremacy of the SSC provisions was confirmed by a decision of the *Dioikitiko Protodikeio Athinon* (Administrative Court of First Instance of Athens- DPrAth- decision No 12768/2003). The dispute regarded the SSC between Greece and the USA. The Greek social security institution (IKA) refused to take into account for the establishment of the right

The classical (or general) SSCs are based on the following insurance principles:

- Equality of treatment of persons employed in the contracting states
- Preservation of social security rights in case of transfer of residence or work from one contracting state to the other
- Aggregation of all periods of insurance under the legislation of each of the contracting states both for the purpose of acquiring the rights and for the calculation of benefits
- Pro rata calculation of the benefits, according to the time of insurance completed in each contracting state
- Exportability of benefits to the country of residence of the beneficiary

The *sui generis* (or partial) SSCs cover only specific social insurance matters, in a specific way, for specific categories of workers only.

3. Multilateral Social Security Conventions and Reg. 1408/71

Greece has ratified the following instruments of the United Nations:

- - the International Covenant of 1966 on Economic, Social and Educational Rights (Law 1532/1985)
- - the Convention of 1979 on the elimination of any kind of discrimination against women (Law 1342/1983) and
- - the Convention of 1990 on Children's Rights (Law 2101/1992).

Greece has also ratified the following instruments of the Council of Europe, containing provisions for the protection of social security rights:

- - the European Social Chart of 1961 (Law 1426/1984)
- - the European Code of Social Security of 1964 (Law 1136/1981; Greece has ratified only part of the provisions of the Code). Greece has signed both the Revised European Social Chart of 1966 and the Revised European Code of Social Security of 1990, but has not ratified them yet. However, the three protocols of the European Social Chart have already been ratified: the Supplementary Protocol of 1988 (Law 2595/1988), the Amending Protocol of 1991 (Law 2422/

to an invalidity pension periods of insurance completed in the USA. The Court ruled that under the provisions of the SSC between Greece and the USA the periods of insurance completed in the two contracting states must be aggregated in order to find out whether the insured person is entitled to a benefit.

1996) and the Protocol of 1996 on the system of collective denunciations (Law 2595/1998).

Greece has also ratified seven multilateral I.L.O. Conventions, concerning the various social security subjects, among them the ILO Convention N° 102 on the minimum standards of social security (Law 3251/1955).

As a result of Greece's accession to the European Union effective since 1-1-1981, Greece is bound by the *acquis communautaire* in the field of social security. Since 1-1-1981 the Regulation 1408/1971 and its implementing Regulation 574/1972 have become fully effective in Greece. The ECJ has delivered two rulings regarding cases referred to it by Greek courts: Case C-443/93, *Vougioukas* and Case C-326/00, *Ioannidis*.

In the case C-443/93, the Court dealt with the application of Reg. 1408/71 to special schemes of civil servants at a time when the Regulation was not yet applicable to them. The ECJ did not go as far as to declare Art. 4 para. 4 of the Regulation incompatible with the Treaty provisions, recognizing that the Council has a wide discretionary power as to the scope and the time of coordination²⁰. It found, however, that there is a discrimination when the national legislation takes into account only periods of employment in one Member State and not the periods of employment completed in another Member State²¹. This discrimination affects only persons who have exercised their freedom of movement and it is not justified under community law²².

In the Case C-326/00 the ECJ dealt with the interpretation of Arts. 31 and 36 of the reg. 1408/71. The Court held that pensioners do fall under the scope of application of Art. 31 Reg. 1408/71²³ and that this article does not provide for a procedure of prior approval by the social security authority of the social security benefits. Therefore, a domestic law provision that imposes such a requirement in order to grant the benefit is incompatible with Art. 31 Reg. 1408/71²⁴. In regard of the provisions of Reg. 574/72, and namely the application of Art. 31 Reg. 574/72, the Court held that the German social security authority, requesting from the IKA the form E112

²⁰ C-443/93 *Vougioukas*, para. 35.

²¹ C-443/93 *Vougioukas*, para. 39-42.

²² After the ECJ had ruled, the case was referred to the Greek Court, which issued the decision 916/1996 in conformity with the ECJ ruling. The *Vougioukas* case law has also been used in subsequent decisions of the ES; see ES 209/2001 and ES 844/2003.

²³ C-326/00 *Ioannidis*, para. 34.

²⁴ C-326/00 *Ioannidis*, para. 42-43.

that is not required for the application of Art. 31 Reg. 1408/71, in practice denied the application of the latter²⁵. In this case, the competent authority of the state of residence (i.e. Greece) has the obligation to reimburse the person for the costs that were not covered by the social security body in the state of stay, facilitating thus the application of the Regulation 1408/71²⁶.

The entry into force of community regulations resulted in the replacement of previously existing bilateral SSCs between countries that are members of the EU. In a series of cases the ECJ has dealt with the relationship between Reg. 1408/71 and SSCs.

Initially the ECJ accepted based on a strict literal interpretation of the relevant provision of the Regulation that all existing SSCs concluded between Member States and already in force before the entry into force of the Regulation are replaced by the Regulation, unless there is an explicit exception. The fact that the provisions of a bilateral SSC are more advantageous for the migrant workers than the provisions of the Regulation did not constitute for the Court enough ground to justify an exception that is not provided for by the Regulation itself²⁷.

This strict interpretation adopted in the *Walder* case was soon abandoned by the ECJ that relied on the provision of the Treaty itself in order to justify such exceptions, even though they are not specifically provided for in the Regulation. The starting point for the ECJ is that the purpose of the Treaty provisions regarding the free movement of workers is to guarantee that a migrant worker should not find himself in a worse situation after he has exercised his freedom of movement. Therefore if a worker, after moving to another Member State, loses any advantages that he would otherwise enjoy, then he is found to be in a less favorable situation that constitutes an obstacle for his freedom of movement²⁸. Based on these thoughts, the ECJ concluded that a Regulation provision that creates such a situation is incompatible with the Treaty²⁹ and therefore not applicable. These arguments adopted in the *Petroni* case, when regarded in combination with other rulings declaring provisions of the Regulation incompatible with the Treaty, makes the *Petroni* ruling very radical. Even though the

²⁵ C-326/00 *Ioannidis*, para. 49.

²⁶ C-326/00 *Ioannidis*, para. 61.

²⁷ C-82/72, *C.J. Walder v. Bestuur der Sociale Verzekeringsbank*.

²⁸ C-24/75, *Teresa & Silvana Petroni v. ONPTS*, para. 13.

²⁹ C-24/75, *Teresa & Silvana Petroni v. ONPTS*, para. 21.

declaration of a provision as incompatible with the Treaty can be regarded as another way of promoting coordination, when this is done through the case law it is not without risks³⁰.

Later, the Court changed its position and the effects of the *Petroni* case were mitigated by the *Roefeldt* case law: instead of openly declaring a Regulation provision incompatible with the Treaty, it opted for a teleological interpretation of the relevant provisions, restricting their scope of application and completing the Treaty protection of the freedom of movement of workers. In this regard, when it found that the application of a certain provision of the Regulation would lead to the loss of social security advantages that a person would enjoy under the application of a SSC³¹, it ruled that such an interpretation (the interpretation, not the provision itself) could not be compatible with the purposes of the Treaty. Therefore, the relevant provisions of the Regulation must be interpreted in the light of the Treaty provisions guaranteeing the freedom of movement of workers and in conformity with their aim. On these grounds, the Court ruled that the loss of a social security advantage that was acquired under a SSC, as a result of the application of community legislation, would substantially restrict the scope of the principle of free movement of workers and therefore cannot be accepted. The Court, in reality, applied a teleological interpretation of the Regulation provision replacing existing SSCs between member states with Reg. 1408/71, after the entry into force of the latter: it held that the Community legislator in drafting this provision was expressed broader than the aim of the Regulation would permit. In this case, the Court did not replace the Community legislator in its powers, but instead it functioned in parallel.

³⁰ The role of the ECJ is certainly decisive in the course of the evolution of social security law but there is always the danger that this practice will turn the ECJ into a "judge-legislator", a court that is usurping legislative power. This was made even more obvious with the ECJ case *Pinna I* (C-41/84); see analysis in A. Stergiou, *O koinotikos dikastis kai o syntonismos ton systimatou koinonikis asfaleias* (The EC judge and the coordination of social security systems-in Greek), Thessaloniki 1997, pp. 90 et seq. Declaring a provision incompatible with the Treaty and setting it aside as null, the Court creates a gap that has to be filled. But the Court does not have the power to fill a gap, for which a unanimous decision is required. The Court's counterargument was that as long as the Council does not take the appropriate measures in order to implement the Treaty provisions, the Court will have the right to rule according to the Treaty (*Pinna II*, C-359/87).

³¹ C-227/89, *Roefeldt*, para. 20.

The *Roenfeldt* case law has also been subject to criticism. The main argument of this criticism is that the application of the *Roenfeldt* case law would create chaos of applicable legislative social security provisions making the administration of the claims even more burdensome and time-consuming for the migrant workers³². Such an argument however, is not sufficient, in our view, to support the loss of social security advantages, contrary to the aims of the Treaty and the Regulation.

Greek courts have made use of the *Roenfeldt* case law in a few cases. In 1992, the *Symvoulío tis Epikrateias* (Greek Conseil d'Etat – StE), in its plenary session, delivered a decision concerning the application of the SSC between Greece and Germany and the Reg. 1408/71. It ruled, making direct reference to the *Roenfeldt* case law, that the provisions of the SSC, creating more advantages for a salaried person that has worked both in Germany and in Greece than the application of Reg. 1408/71, must be regarded as still valid and not replaced by Reg. 1408/71, irrespective of the provisions of Art. 6 of the latter³³.

After the *Roenfeldt* case, the Court went into the other direction and put some limits to the effects on its own case law with subsequent judgments. Firstly, it did not go as far as to extend the same interpretation to SSCs concluded between a Member State and a non-Member State. In the case C-23/92 (*Maria Grana-Novoa*), regarding the treatment of a Spanish worker that had completed periods of insurance under the German and the Swiss legislation, the Court put a limit on the application of the Regulation: for periods of time before the accession to the EU, the SSC between Germany and Spain is not covered by the Regulation and it should not be taken into account. The ECJ essentially rejected the application of a non-discrimination contained in the SSC concluded between a Member State (Germany) and a non-Member State (Spain, at that time) that would result in a most favored nation clause, extending thus the advantages of the Regulation to persons not initially covered by it. The Court did not deal with the question whether such denial of an advantage is incompatible with the non-discrimination principle of the Treaty, since at the time of the reference to the ECJ Spain had become a member of the EU. Whatever the answer to that latter question could have been, it seems that the Court

³² A Stergiou, *O koinotikos dikastis*, op.cit., p. 82.

³³ StE (OI) 2397/1992; see also StE 3250/1996 regarding the SSC between Greece and Belgium and DPrAth 1251/2000 regarding the SSC between Greece and Germany.

intended to limit the effects of its own case law only to periods of insurance completed by nationals of Member States at the same time.

With its judgment in the *Thevenon* case³⁴ the ECJ put another limit on the *Roenfeldt* case effects in 1993. In fact, in the *Thevenon* case the Court tried to find a balance between two landmark cases: the *Walder* case, excluding any application of an SSC after the entry into force of the Regulation, and the *Roenfeldt* case, ruling that more advantageous domestic law provisions are applicable even after the entry into force of the Regulation. In this respect, the Court affirmed that the application of SSCs after the entry into force of the Regulation is not allowed; therefore, one cannot invoke the provisions of a SSC for a period of time during which it is no longer valid and claim a benefit, even though his position would be more advantageous than under the Regulation. This ruling points towards the right direction: a person moving to another country after the entry into force of the Regulation is not losing any advantage, since the SSC is not applicable any more; therefore he is not put into a less favorable situation than if he had not move. If, on the other hand, a worker had already exercised his freedom of movement before the entry into force of the Regulation, when the SSC was still applicable, then he has an advantage that he should not lose because of the entry into force of community legislation³⁵.

The Court continued to limit the scope of application of the Regulation in respect of SSCs with its ruling in the *Rodriguez* case³⁶. In this case, the court said in fact that when both the SSC and the Regulation are applicable, the comparison must be made only once; when the choice has been made, it cannot be changed later. This is justified, as there is no loss of any advantages under a SSC when a person has already made a choice and opted for the application of the Regulation at a given time. The purpose of the coordination is not to ensure the highest possible benefits resulting from the application of any possibly applicable legislation, but merely to ensure the freedom of movement by not putting the migrant worker and his family into a less advantageous situation than he would be in if the legislation of only one state were applicable.

³⁴ C-475/1993.

³⁵ This decision was judged as positive, since, from a practical point of view, it made things easier especially in connection with calculating the amount of pensions; A Stergiou, *O koinotikos dikastis*, op.cit., pp.82-83.

³⁶ C-113/96.

In its judgment in the *Thelen* case³⁷ the Court once again moved towards the limitation of the scope of application of the Regulation by limiting the effects of Art. 6 of the Regulation: it held that a SSC is still applicable if it is more favorable for the person, provided that the person has exercised his freedom before the entry into force of the Regulation not only in regard of pension benefits but also in regard of unemployment benefits.

This case law was subsequently clarified by a judgment of the Court in the case C-277/99 (*Kaske*) that affirmed the application of the *Ronfeldt* case law to unemployment benefits. The Court ruled, based on the special nature of unemployment benefits, that if a person had used periods of insurance to receive unemployment benefit under the provisions of a SSC, he or she can no longer use the same insurance periods in order to receive again the unemployment benefit after the entry into force of the Regulation. This person's right to receive the unemployment benefit for periods of insurance after the entry into force of the Regulation will be granted if the conditions of the Regulation are met. Furthermore, the Court reaffirmed the position that national legislation which is more favorable than community legislation is still applicable, provided that it is in conformity with community legislation.

Greek courts have relied on this principle in a few cases regarding the granting of social security benefits. In its decision 4370/1995, the Greek Conseil d'Etat dealt with the problem of medical treatment outside Greece and the reimbursement of costs incurred in that other state. The Court held that as long as the person entitled to medical treatment in another Member State did not rely on the provisions of Reg. 1408/71, then the domestic law provisions are applicable. The costs incurred in that other Member State must then be reimbursed by the domestic social security institution according to the domestic legislation³⁸.

³⁷ C-75/99.

³⁸ The dissenting opinion of this decision suggested that a preliminary question should be sent to the ECJ on the matter whether Art. 22 of the Reg. 1408/71 leaves any room for the parallel application of domestic legislation providing for the insurance coverage of emergency medical care provided in a Member State other than the resident state on different conditions than those set in the Regulation. The majority ruled in favor of the insured person, based on grounds of sound administration: since the costs have been incurred and the insured person is entitled to reimbursement under domestic legislation, Reg. 1408/71, which is applicable in principle but it was not applied in this situation, cannot set aside the more favorable domestic provision.

The Greek Supreme Administrative Court again followed the same principle in its judgment 1606/1999: it held that even though the provisions of Reg. 1408/71 and Reg. 574/72 are of a higher normative power in comparison with the relevant domestic law provisions, they permit the application of domestic legislation that completes them in order to guarantee wider protection to the insured persons³⁹. In other words, the domestic law provisions creating a more favorable situation for the insured persons are not set aside by the application of Reg. 1408/71. Therefore, even in the case where after the application of Reg. 1408/71 costs are still incurred in the course of medical care provided in the other Member State that have not been paid by the Greek social security institution to the foreign social security institution, the insured person has a right to claim the reimbursement of such costs, based on the domestic law provision⁴⁰.

II. Personal and Material Scope of DTCs and SSCs

1. Personal Scope

Both the DTCs and the SSCs apply in principle to residents of the contracting states. The common decisive criterion for the determination of the personal scope of application of SSCs is the status of “employee” and its connection with a social security legislation. The scope of application of the SSCs that Greece has signed include the persons who are subject to social security legislation in the contracting states, irrespective of their citizenship, as well as the members of their families. Besides the insured persons and the members of their families the personal scope of application of the Greece-USA SSC includes also the citizens of the contracting

³⁹ In this regard the Court made reference to the ECJ case law, namely to the C-69/79 decision, *W. Jordens-Vosters*; StE 1606/1999, para. 8.

⁴⁰ Lower courts have also followed the Conseil d’Etat case law; the decision 936/1999 of the *Dioikitiko Protodikeio Peiraias* (Administrative Court of First Instance of Piraeus) repeated the wording used in StE 2320/1998; the decision 329/1999 of the *Dioikitiko Protodikeio Herakliou* (Administrative Court of First Instance of Heraclion) declared a domestic law provision making the maternity benefit dependent upon the condition that the mother is resident of Greece during the period of time following immediately after the delivery incompatible with the Treaty.

states⁴¹. Most of the partial SSCs Greece has signed are applicable only to citizens of the contracting parties⁴². The persons covered are the employees, self-employed and farmers; civil servants and mariners are excluded. The personal scope of application of Reg. 1408/71 is defined in Art. 2 of the Regulation. According to these provisions, as amended, the Regulation applies:

- - to workers (employed and self employed) and the members of their families and their dependants, as well as stateless persons and refugees (Reg. 1408/71 as amended by Reg. 1390/81)
- - to civil servants (Reg. 1606/98 that extended the scope of application of Reg. 1408/71)
- - to students and other persons still in vocational training that are not in gainful employment (Reg. 307/99 that extended the scope of application of Reg. 1408/71)
- - nationals of third countries, provided that they are legally resident on the territory of a Member State (Reg. 895/2003 that extended the scope of application of Reg. 1408/71).

The original Reg. 1408/71 has been subject to numerous amendments⁴³ that have made it a very complex piece of legislation that was difficult to handle. With a view to simplifying its application, the Council has proposed its replacement by a new Regulation, Reg. 883/2004⁴⁴ that has entered into force since 20 May 2004⁴⁵ but remains inoperative as it will be applicable only after its Implementing regulation has entered into force⁴⁶.

⁴¹ The SSC between Greece and Switzerland (Legislative Decree 20/7-9-1974) that has been replaced by Community reg. 1408/71 and Reg. 574/72 since 1 June 2002 provided that it would be applicable only to citizens of the contracting states. The SSC between Greece and Cyprus (Law 1910/1990) that has been replaced by Community reg. 1408/71 and Reg. 574/72 since 1 May 2004 provided also that it would be applicable only to citizens of the contracting states.

⁴² The SSCs with Egypt, Libya, Syria and the Complementary Agreement with Quebec.

⁴³ I was able to count 27 Regulations that have amended the original Reg. 1408/71 and the considerable amount of case-law of the ECJ should also be taken into account.

⁴⁴ Published in OJ L 166 of 30 April 2004.

⁴⁵ According to Art. 91 first indent of Reg. 883/2004 "*This Regulation shall enter into force on the 20th day after its publication in the official journal of the European Union*".

⁴⁶ Art. 91 second indent provides that the Regulation "*shall apply from the entry into force of the Implementing Regulation*".

The new Reg. 883/2004 will be applicable to all nationals of Member States who are covered by the social security legislation of a Member State. This means that not only the active working population but also inactive persons will be covered.

2. Material Scope

Greece has signed SSCs that belong to two categories: the classic (or general) SSCs and *sui generis* (or partial) SSCs. Their material scope of application is different. The general SSCs usually cover the risks of old age, invalidity and death. The SSCs signed with the countries of South America (Argentina, Brazil, Venezuela and Uruguay) also cover sickness, maternity, accidents and disease. The partial SSCs have a limited material scope of application as they intend to cover only specific risks and matters: the transfer of contributions and pensions (Egypt and Libya), accidents, diseases (Ontario) and sickness (Quebec), the insurance of posted workers and medical care (Poland), the transfer of contributions and payment of pensions to political refugees (Romania) and posted employees (Syria).

SSCs concluded by Greece contain mainly provisions regulating the right to benefits and the payment of such benefits. They do not make explicit reference to the obligation of paying contributions. However, in most cases, they provide that the persons covered by the SSCs will be subject only to one jurisdiction that is only to one social security legislation of the two contracting states. This jurisdiction is usually the place where the employment is carried out. This provision guarantees that the covered persons will be paying contributions only to one contracting state, that whose social security legislation is applicable.

Compared with the SSCs, Reg. 1408/71 has a wider material scope of application. According to Art. 4, the branches covered by the Regulation are: Sickness and maternity benefits, invalidity benefits, old age benefits, survivors' benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits and family benefits. The new Reg. 883/2004 has an even broader material scope of application compared to Reg. 1408/71. The main difference is that statutory pre-retirement schemes are also covered.

Social security contributions are not taxes and therefore they do not fall under the material scope of application of DTCs. Social security contribu-

tions are levied on persons pursuing working activity and, unlike taxes, they are characterized by the principle of reciprocity: the insured person has rights to certain benefits in return. Social security contributions are determined differently for different categories of persons and they have a specific aim: to finance the social security institutions they are provided for. Taxes, on the other hand, are characterized by the lack of such specificity; their aim is to create the necessary funds for the State, in order for the latter to finance its various functions.

The qualification of an economic burden as a social security contribution or as tax may have significant practical importance, as the ECJ cases C-34/98 *Commission v. France* and C-169/98 *Commission v. France* show. If the contribution is qualified as tax, then it is not covered by the scope of application of Reg. 1408/71 and therefore the Community has no competence, as the Member States have reserved all competencies in the field of fiscal policy and taxation; if, on the other hand, the contribution is qualified as a social security contribution, then it falls within the scope of application of Reg. 1408/71 and the Community is competent to rule and the ECJ may exercise its control.

III. Distributive Rules and Coordination of Benefits

DTCs contain two main categories of rules: distributive rules, allocating taxing rights between the contracting states and method articles, dealing with the practical application of the treaties. SSCs contain exhaustive provisions regarding the benefits, they usually contain a clause defining the applicable legislation, which functions as a distributive rule, and they include some provisions concerning procedural matters. Regulation 1408/71 also follows a comparable structure: the general provisions are followed by provisions that determine the applicable legislation (in fact distributive rules) and in the end there are method articles, regulating various matters.

As already mentioned, the provision regarding the determination of the applicable legislation that is found both in SSCs and in Reg. 1408/71 functions as a distributive rule. By determining one and only one applicable legislation, the competent legislation according to which contributions are collected and benefits are paid is determined and the payment of double contributions or the payment of double benefits is avoided quite effec-

tively. In cases where the Regulation is not applicable, the ECJ achieved the same result by applying the Treaty provisions. In its judgment C-53/95, *INASTI v. Kemmler*, the Court ruled that the freedom of establishment of a self-employed person is prohibited when this person is required to pay social security contributions in the hosting country, whereas such contributions would not afford him with additional social protection than the one he already enjoys under the social security scheme of his place of residence.

Regarding the practical application of these provisions, there is a strong similarity between the residence certificate that is required in the field of DTCs in order to establish the state of residence and the certificate that a social security institution must issue, verifying that a person is subject to its legislation. They both constitute proof that the person concerned is subject to the provisions of the DTC or SSC, respectively, and they prohibit the other state from applying its legislation to the same person, unless otherwise specified.

As mentioned before, SSCs follow the territoriality principle and usually provide that the applicable legislation is that of the place of work. However, residence is also an important factor, especially when it comes to payment of benefits. SSCs usually do not contain a definition of the term "residence", making thus a silent reference to domestic legislation; in other cases the reference to domestic legislation is explicit.

The Regulation contains a very short definition of the term "*residence*"; according to Art. 1(h) "*residence means habitual residence*". Residence is distinguished from "*stay*", which is defined as "*temporary residence*" (Art. 1(i) Reg. 1408/71). In this respect, both SSCs and Reg. 1408/71 differ to a great extent from DTCs: DTCs contain a quite elaborate definition of the term "*residence*" for treaty purposes (Art. 4 para. 1 of the OECD MC) but also contain a list of rules according to which any conflict should be resolved.

The ECJ has dealt with the definition of "*residence*" for the purposes of Reg. 1408/71 in its judgment C-76/76, *Di Paolo*. In order to identify the place of residence of a person the Court made use of several criteria, three objective ones and one subjective. According to the Court's ruling the residence of a person is determined according to these criteria:

- (i) The length and continuity of residence before the person has moved
- (ii) The length and purpose of his absence
- (iii) The nature of the occupation found in the other Member State

- (iv) The intention of the person concerned as it appears from all the circumstances.

The definition of “*residence*” for the application of Reg. 1408/71 has also been the subject of the decision 936/1999 of the *Dioikitiko Protodikeio Peiraia* (Administrative Court of First Instance of Piraeus). The Greek Court relied on the domestic legislation in order to define the meaning of the term “*resident*”. It used the provisions of the *Astikos Kodikas* (Greek Civil Code; hereafter: AK), according to which “*a person has its residence at the place where he maintains his main and permanent establishment*” (Art. 51 AK) and “*if the place of the last residence of a person cannot be determined, it shall be deemed that this place is the place of his habitual place of abode*” (Art. 53 AK). In interpreting those provisions, the Court held that the term “*residence*” is defined as the legal link of a person to a certain territory, which thus becomes the element linking him to various legal obligations on the one hand and, on the other hand, an element of individualization of the person. This link is created by the fact that a certain place becomes, with the intention of the person, the center of his vital, i.e. his social, economic etc, relations. On the contrary, the place of habitual abode is defined as any place at which the person may stay, even overnight, without the intention of establishing a permanent establishment at that place. According to this definition, the Greek Court ruled that a pensioner living in Greece and visiting his son once a year for a month, had maintained his place of residence in Greece, since he was able to prove that he had maintained the center of his vital relations in Greece.

According to a dissenting opinion of this decision, it was proposed that the term “*residence*” for the purposes of Reg. 1408/71 is not to be defined according to domestic law but is a community law term, defined by the ECJ as the “usual or permanent center of the interests of a person”. The dissenting opinion is closer to the ECJ case law but was not so much of practical importance in this case, since even by following this opinion, the place of residence would not change given the facts of the case.

IV. Interpretation and Qualification Conflicts concerning SSCs and DTCs

Double tax conventions drafted along the OECD MC contain in Art. 3 a list of definitions of terms used in the DTCs and a general interpretation

rule. SSCs have a rather short article containing definitions, while the Regulation contains a rather long list of definitions. Reference to domestic law is also made in both cases. Reference to national law contained in SSCs can only be supplementary to the provisions of the SSCs. Since the SSCs are international conventions that are ratified according to the Constitution and are ranked higher than statute, any reference to domestic law should be aligned to the aims and spirit of the SSCs and not lead to contrary results. The reference to domestic legislation of the contracting parties certainly creates the risk that the definitions or interpretations given may vary, since domestic legislations can differ greatly, especially in cases where the SSCs are concluded between states of a different legal tradition.

In order to avoid this effect, to the extent possible, SSCs contain some provisions aiming at enhancing the cooperation between the contracting parties. In this respect the contracting parties are required to communicate with each other, to provide each other with the required information and, in general, to assist each other with any request they may have. In addition, there is a special provision establishing the resolution of disagreements on the interpretation or application of the SSCs through negotiations between the competent authorities of the contracting states.

In the case of Reg. 1408/71, the coordination achieved through the Regulation has unified the rules to a great extent, but there remain substantial differences among the various social security systems of the Member States that are not yet harmonized. Regarding the application and interpretation of the Regulation, the ECJ and its case law play an important unifying role. The Regulation provides its own mechanisms as well. In this respect Reg. 1408/71 provides for the establishment of an Administrative Commission on Social Security for Migrant Workers (Administrative Commission-Arts. 80 et seq.), an Advisory Committee on Social Security for Migrant Workers (Advisory Committee- Arts. 82 et seq.) and of the cooperation between competent authorities (Arts. 84 et seq.). The Administrative Commission and the Advisory Committee play also an important role in the unification of the relevant legislation, as regards the interpretation and the application of the Regulation.

Greek courts rarely deal with the interpretation of SSCs provisions⁴⁷. On the other hand, there is abundant jurisprudence on the interpretation of

⁴⁷ See decision DPrAth 12768/2003 regarding the SSC between Greece and the USA.

terms used in DTCs and there is also a considerable number of cases dealing with the interpretation of provisions of Reg. 1408/71⁴⁸.

V. Specific Provisions

1. Cross-border workers and posted workers

Greek SSCs do not contain special rules on cross-border workers; the case of posted workers, however, is regulated in detail. The Conventions usually provide that posted workers that are subject to the social security legislation of their place of work continue to be subject to the same legislation, even in the case where they are posted by their employer in the other contracting state. This exception depends upon a time limit: the activity pursued in the other contracting state must be of temporary nature. It is provided that the exception will be granted in some cases for a duration of up to 12 months (e.g. Brazil), or up to 24 months (e.g. Quebec); in certain cases this duration is set to 5 years (e.g. USA, New Zealand). It is provided that the initial time can be extended, either due to unpredictable events that result in a prolongation of the project or by agreement; in any case the consent of the host country is required.

The situation of posted workers is regulated similarly in Reg. 1408/71: Art. 14 provides that posted workers that are employed in one Member State but pursue activities in another Member State, continue to be subject to the legislation of the first Member State. The definition of posting is clarified by Resolution 181 of the Administrative Commission dealing with the application of regulations. The duration of posting can be up to 12 months, which can be extended once for another 12 months⁴⁹.

⁴⁸ Besides the case law already mentioned, see also the following cases that apply various provisions of Reg. 1408/71: StE 883/2004, StE 5296/1987, ES 838/203, ES 1059/2002, ES 1376/2002, DPrAth 187/2000, DPrAth 1228/1994, DPrAth 12663/1991, DPrThess 1153/2004, DPrThess 2904/2002, DPrThess 3305/1995 and DPrThess 1001/1993.

⁴⁹ The special rules for posted workers, extending essentially the application of social security legislation of a state beyond the boundaries of its territory, can be easily

⁴⁹ subject to abuse. In comparing cases C-212/97 *Centros* regarding the freedom of establishment of a letterbox company and C-404/98 *Josef Plum* regarding the posting of workers employed by such a letterbox company, it appears that the ECJ is much less flexible in the cases involving migrant workers.

In the field of taxation, DTCs also follow a similar approach regarding the taxation of income from employment in the case of posted workers. Art. 15 of the OECD MC is usually included in the Greek DTCs. As a rule, the income from employment is taxed in the state of residence, unless the employment is carried out in the other contracting state; in that case, the other contracting state may also tax the income from such employment. In the case of posted workers, Art. 15 para. 2 provides for the 183-days rule: if the worker is present in the other state for a period not exceeding 183 days in any 12-month period, then he continues to be subject to taxation in his state of residence, provided that the other conditions laid down in that article are also met.

Although the regulations of both DTCs and SSCs follow the same philosophy, due to the differences in the time requirements a posted worker may be subject to the social security legislation of his country of origin, while he is taxed in the state of his employment.

The Certificate of Posting or Form E 101 is used by posted workers to prove to the competent authority in the Member State of the location of posting that they remain insured under the sending country's social security system and that they are therefore exempt from the social security laws of the Member State of the location of posting. Form E 101 in itself does not grant an entitlement to health care services.

The Certificate of Residence issued under DTCs and the Certificate of Posting (form E 101) issued under Art. 14 reg. 1408/71 have similar functions. According to the information they contain, they facilitate the application of the relevant provisions.

In a recent decision of the EFTA Court (Judgment of 14 December 2004 in case E-3/04), the EFTA Court dealt with the significance of form E-101. The question referred to the EFTA Court by a Norwegian Court regarded the case of 17 Greek mariners, residents of Greece, employed and remunerated by a Greek shipping company but working on board Greek owned vessels registered with the Norwegian International Ship Registry, to whom the exemption from the Norwegian social security legislation was denied on the basis of Art. 14b(4) of Reg. 1408/71.

The competent Norwegian Social Security Institution (FFU) sent a request the competent Greek institution to issue form 101 for those Greek mariners. The Greek institution issued E 101 forms for most of the Greek mariners, but not for all of them, and not for any of the Plaintiffs. The Norwegian Social Security Institution found that it was for the Greek

social security authorities to make a factual determination, and to provide confirmation that the conditions for the application of Art. 14b(4) of Regulation 1408/71 were fulfilled and issue the relevant documentation. In the absence of such documentation, Norwegian legislation is to apply pursuant to Art. 13(2)(c) of Regulation 1408/71. The case was brought before a Norwegian Court and the latter decided to refer the question to the EFTA Court. That question concerns the role of the host State in the assessment of conditions established in Art. 14b(4) and in particular, to what extent this State is obliged to take into account evidence other than form E 101.

In principle, where form E 101 has been issued, the evaluation made is binding on other States⁵⁰. This follows from the principle of sincere cooperation and the aims of the choice of law rules contained in Title II of Regulation 1408/71⁵¹. The same consideration should apply where the State of residence does not issue form E 101. If the competent institution of the flag State doubts the correctness of the issued form, the competent institution of the State of residence is obliged to reconsider whether the form was properly issued and, if appropriate, may withdraw it⁵².

However, the aim of Form E 101 is to facilitate the implementation of Regulation 1408/71, and thereby the free movement of workers⁵³. The EFTA court decision points out that Form E 101 or any other equivalent statement is not a legal precondition for the application of the rule in Art. 14b(4).

Based on these grounds the EFTA Court ruled that "It is not compatible with the choice of law rules contained in Title II of Regulation (EEC) 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and as referred to in Annex VI, point 1 to the EEA Agreement, that a flag State proceeds from the premises that a State of residence must have issued a form E 101 or a statement containing equivalent information, for the legislation of the State of residence to apply in accordance with Art. 14b(4), and that in the absence of such doc-

⁵⁰ This has been the case law of the ECJ in Cases C-178/97 *Barry Banks and Others v Théâtre Royal de la Monnaie* para. 40; and C-202/97 *Fitzwilliam Executive Search v Bestuur van het Landelijk Instituut Sociale Verzekeringen* para. 53.

⁵¹ C-202/97 *Fitzwilliam*, paras. 52 to 53; and C-178/97 *Barry Banks*, paras. 39 to 40.

⁵² C-202/97 *Fitzwilliam*, para. 56; and C-178/97 *Barry Banks*, para. 43.

⁵³ C-202/97 *Fitzwilliam*, para. 48.

umentation, the legislation of the flag State shall apply in accordance with Art. 13(2)(c)."

2. Pensions

According to the Greek SSCs, if a person is entitled to receive a pension, then if he has established the right based only on insurance periods completed under the Greek legislation, the amount of pension to be paid is calculated according to the domestic law provisions. If the person does not acquire the entitlement to a pension under the domestic legislation, then the periods of insurance completed in the other contracting state are aggregated, as long as they are different from the those completed under domestic legislation. When the aggregation is applied, the amount of pension is calculated according to special provisions contained in the SSCs, providing for the *pro rata* calculation of the payable amount. A minimum pension is guaranteed in every case, but there are also thresholds for the establishment of the entitlement to the pension. Regulation 1408/71 provides also for the aggregation of insured periods and the *pro rata* payment of the pensions.

Greek DTCs follow the Art. 18 OECD MC provisions regarding the taxation of pensions. According to this provision, only the state of residence has the right to tax the pension.

3. Anti-discrimination clauses

Anti-discrimination clauses in DTCs are contained in Art. 25 of the OECD MC. Greek DTCs include provisions similar to those of the non-discrimination Art. of the OECD MC. The non-discrimination clause is applicable to nationals of the contracting states; Art. 25 OECD MC is one of the few articles contained in DTCs that do not apply to residents of the contracting states but to their nationals. The material scope of application of the non-discrimination clause contained in DTCs is also different for the material scope of application of the DTCs: it applies, notwithstanding the provisions of Art. 2 OECD MC to taxes of every kind and description. Therefore, the scope of application of the non-discrimination clause in DTCs is wider than the scope of application of the DTCs.

SSCs also include a non-discrimination clause. According to this provision, the persons covered by the personal scope of application of SSCs are, irrespective of their nationality, subject to the legislation of one con-

tracting state and they have, under the same conditions, the same rights and obligations as the citizens of that state. There are basic differences between the two clauses: (i) the SSC non-discrimination clause is applicable only to the rights and obligations related to the social security legislation covered by the SSC, while the material scope of application of the non-discrimination clause of DTCs is much broader than that of the DTCs; (ii) the personal scope of application of the DTC non-discrimination clause is also different than that of the DTC in general (nationals as opposed to residents) while the personal scope of application of SSCs is usually the same as the one determined for the application of the SSC.

Regulation 1408/71 also contains an anti-discrimination clause: Art. 3 Reg. 1408/71 provides for the equality of treatment between the residents of a Member State and its nationals. The ECJ does not seem to follow a consistent line in its case law regarding the application of the non-discrimination clause of the Regulation. In the case C-23/92, *Maria Grana-Novoa* rejected the application of a non-discrimination contained in the SSC concluded between a Member State (Germany) and a non-member (Spain, at that time) that would result in a most favored nation clause, extending thus the advantages of the Regulation to persons not initially covered by it. Later, in the case C-55/00 *Elide Gottardo* the Court changed its position, accepting that a bilateral SSC applicable to nationals of the contracting parties is also applicable to nationals of other Member States, when there is no a valid justification for the opposite. This ruling essentially leads to creating an MFN clause since it is extending the application of the network of bilateral SSCs a Member State has entered into to the nationals of all Member States.

On the other hand, in the field of direct taxation, the application of MFN clause is not accepted. This was affirmed by the ECJ in its recent decision regarding the D case (Case C-376/03). The ECJ ruled that Arts. 56 EC and 58 EC do not preclude a Member State from according, pursuant to a bilateral DTC, only to residents of the other contracting State an allowance, which it grants to its own residents, without extending it to residents of the other Member States.