# "Double Taxation Conventions and Social Security Conventions"*

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*This article provides a systematic and broad analysis on the main issues deriving from cross-border social security situations, at an internal, European and international treaty law level. The tax system is contrasted against the social security system, and a particular emphasis is given to Social Security Conventions, in particular when compared to Double Taxation Conventions, as well as to the consequences, for migrant workers and multinational employers, deriving from the European Community Law,*

*Este artigo procede a uma análise sistemática e global das principais questões que se colocam ao nível das situações plurilocalizadas no domínio dos Direitos interno, europeu e internacional convencional da Segurança Social. Confronta-se o sistema fiscal com o sistema de segurança social, sendo dado um especial enfoque às Convenções de Segurança Social, em particular quando comparadas com as Convenções de Dupla Tributação, bem como às implicações, para os trabalhadores migrantes e seus empregadores, derivadas do Direito Comunitário Europeu, quer por via regulamentar, quer por meio da jurisprudência desenvolvida pelo Tribunal de Justiça das Comunidades Europeias.*
*either through regulations or through the European Court of Justice jurisprudence.*

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

#### a) Overview

The Bismarck system[1], created by a series of three Acts in the 1880s (the Health Insurance Act of 1881, the Accident Insurance Act of 1884 and the Disabled and Old-Age Insurance Act of 1889) by the namesake German

[1] Neves, *Direito da Segurança Social – Princípios Fundamentais numa Análise Prospectiva* (hereafter "*Direito da Segurança Social*"), 1996, pp. 149-157; Costa Cabral, *O financiamento da Segurança Social e suas implicações redistributivas – Enquadramento e Regime Jurídico* (hereafter "*O financiamento da Segurança Social*"), 2001, pp. 51-6.

chancellor is based on an individual right to social security (instead of on the former State and private discretionary action) and on an insurance principle, sustained by the capitalisation of worker and employer compulsorily paid premiums. Thus, only contributors (hence workers) had access to the system, its goal being to replace lost work income.

The Beveridge system, proposed by William Henry Beveridge in his Social Insurance and Allied Services Report, and implemented in the United Kingdom after World War II, is also based on an individual right to social security but has a much larger scope, since it advocates a universal protection, with all citizens being beneficiaries of the system, and supplying protection against a substantially broader range of social risks. This implies an extensive financial participation of the State, as well as the creation of supplementary private insurances, in order to allow for individuals to insure themselves against other risks or for higher amounts.

Due to constitutional impositions of universality and unification[2], the Portuguese social security system is of a more complex nature, gathering characteristics of both Bismarck and Beveridge typical systems. It is currently based on a General Law on Social Security[3] (*Lei de Bases da Segurança Social*) which comprises in itself three different systems of social protection: the Public Social Security System (*Sistema Público de Segurança Social*), the Social Action System (*Sistema de Acção Social*) and the Supplementary Social Security System (*Sistema Complementar*)[4]. To add to this complexity, the current Financing Regime Law (*Lei do Regime de Financiamento*)[5] (approved by a previous centre left-wing government), is highly inconsistent with the regime established by the existing GLSS, since it was created when a former General Law on Social Security[6] (approved by the same centre left-wing government) was still in force and has not yet been revised.

The Public Social Security System is divided in three smaller pillars or subsystems: the Providential or Insurance Subsystem (*Subsistema Previdencial*), the Solidarity Subsystem (*Subsistema de Solidariedade*) and the Family Protection Subsystem (*Subsistema de Protecção Familiar*). The first one is for employed and self-employed workers[7] and is financed by the contributions of workers and employers[8]. Its aim is to insure workers against the

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[2] See Art. 63 of the Constitution of the Portuguese Republic.

[3] Law 32/2002, of 20 December (hereafter "GLSS").

[4] Neves, *Lei de Bases da Segurança Social Comentada e Anotada*, 2003, p. 18

[5] Decree-Law 331/2001, of 20 December (hereafter "LFR").

[6] Law 17/2000, of 8 August.

[7] See Art. 28 (1) of the GLSS.

[8] See Art. 4 (3) of the LFR.

loss of work income[9]. Persons who do not pursue an occupational activity or, even though pursuing it, are on that ground not compulsorily covered, may opt to be covered by the Providential or Insurance Subsystem.[10] This subsystem includes the general social security scheme, which covers most employed and self-employed persons, and the special schemes.[11] The Solidarity Subsystem is intended for Portuguese citizens, although foreigners, refugees and stateless residents may also be eligible for benefits[12]. It is of a far more redistributive nature and funded solely by state budget transfers[13], its aim being to reach out to all those not covered by the Providential or Insurance Subsystem[14]. The Family Protection Subsystem has the same nature, but it is directed at all residents in Portugal, regardless of nationality[15] and its aim is to provide compensation for increased family expenditures arising from legally typified situations[16]. It is funded by the contributions of workers and employers, as well as by transfers from the State Budget[17].

Apart from this, there is a special regime for State employees managed by the General Retirement Fund *(Caixa Geral de Aposentações*) [18].

The Social Action System deals with general situations of social vulnerability[19], and its functions are performed not only by the State, but also by municipalities and private social security institutions[20].

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[9] See Art. 27 of the GLSS.

[10] See Art. 28 (2) of the GLSS.

[11] See Art. 31 of the GLSS.

[12] See Art. 52 (1) of the GLSS.

[13] See Art. 4 (1) of the LFR.

[14] See Art. 50 (1) of the GLSS.

[15] See Art. 62 of the GLSS.

[16] See Art. 61 of the GLSS.

[17] See Art. 4 (2) of the LFR.

[18] Freitas Pereira/Teixeira, Taxation of Cross-Border Pensions – Portugal, *European Taxation*, Vol. 41, No. 13, 2001, pp. 58-S-63-S.

[19] See Art. 82 (1) of the GLSS.

[20] See Art. 86 (1) of the GLSS.

The Supplementary Social Security System comprises private insurance for risks not covered by the two other systems and/or for higher amounts, although it is not strictly optional. There are three kinds of supplementary regimes: legal (these are compulsory regimes)[21], contractual (usually maintained by employers that establish pension plans for the benefit of their employees)[22] and optional (these are of purely individual initiative)[23].

With regard to the dual dimensionality of the Social Security System, we could say that, at a first glance, the Portuguese system seems to be funded mostly by individual contributions and quotas instead of taxes, such as transfers from the State budget or a percentage of VAT consignment, as the chart below shows. This is not really the case, since contributions and quotas are mostly sustained by the employers, in what employed workers and board members are concerned[24] [25].

| **2006 Social Security Budget (as executed) € Millions** | |
|---|---|
| Balance from the Previous Year | 297.8 |
| **1. Current Revenue** | 19 383.2 |
| Contributions and Quotas | 11 614.4 |
| VAT Additional | 633 |
| Transfer from Central Government | 5680.9 |
| Transfer from European Social Fund | 791.4 |
| Other Current Revenue | 663.6 |
| **2. Capital Revenue** | 34.4 |
| Transfers from the State Budget | 14.8 |
| Other Capital Revenue | 19.6 |
| **Total Revenue** | 19 417.7 |
| Balance from the Current Year | 715.8 |

Source: *Boletim Informativo de Execução Orçamental* (Janeiro 2007)
Budget Execution Informative Bulletin (January 2007)

[21] See Art. 94 (2) and 96 of the GLSS.

[22] See Art. 94 (3) and 97 of the GLSS.

[23] See Art. 94 (4) and 98 of the GLSS.

[24] Without a contributory ceiling, employers bear 23.75% of the 34.75% Social Security contribution of employed workers (see Art. 3 of Decree-Law 199/99, of 8 June) and 21.25% of the 31.25% Social Security contribution of board members (see Art. 13 of Decree-Law 199/99, of 8 June).

[25] Freitas Pereira/Teixeira, Taxation of Cross-Border Pensions – Portugal, *European Taxation*, Vol. 41, No. 13, 2001, pp. 58-S-63-S.

http://www.dgo.pt/Boletim/0107-bol.pdf#page=23 (Quadro 9)

There is a relevant doctrinal debate about the legal nature of these contributions. The majority of the doctrine tends to see both employers' and the employees' contributions under a single category, but they are divided as to whether they are para-fiscal impositions having the nature of fees[26], regular taxes[27] or special contributions[28]. The Supreme Administrative Court (*Supremo Tribunal Administrativo*) found in a decision of 3 December 1997 that Social Security contributions have the nature of taxes under the Portuguese Constitution of 1976[29]. In accordance with this thesis, there is also a Portuguese Constitutional Court Case, nr. 363/92, of 8 April 1993. The most recent decisions of the Supreme Administrative Court, of 5 June 2002, of 11 February 2004 and of 29 June 2005 tend to qualify contributions to social security as fiscal or para-fiscal charges considering that the disputes between individuals and Social Security Administration related to the payment of these contributions should be discussed in tax courts. The thesis which gathers more supporters is that of the para-fiscal nature of social security contributions, where these are qualified as "financial social impositions, with some technical and juridical characteristics identical to taxes but with a specific purpose (social protection), autonomous financial regime and a particular legal framework".[30]

Other authors believe contributions comprise two different categories, making a distinction between employers' contributions, which they qualify as true taxes[31], and the employees' contributions, which they qualify as public law compulsory insurance premiums[32] or as para-fiscal impositions[33]. The practical consequences of the different classifications of such contributions will be dealt with below.

Social security contributions are today subject to creation by law – although this requirement has been somewhat softened, as the Government has been allowed, by virtue of its own competence, to reduce or exempt Parliament-

[26] Sérvulo Correia, Teoria da Relação Jurídica do Seguro Social, *Estudos Sociais e Cooperativos*, Ano VII, 1968, no. 27, p. 309 et seq.

[27] Leite de Campos/Leite de Campos, *Direito Tributário*, 2000, pp. 69-70.

[28] Sousa Franco, *Finanças do Sector Público – Introdução aos Subsectores Institucionais (Aditamento de Actualização)*, 2003, pp. 92-5; Neves, *Direito da Segurança Social*, 1996, pp. 352-67.

[29] Quoted in Leite de Campos/Rodrigues/de Sousa, *Lei Geral Tributária - Comentada e Anotada*, 2003, p. 55.

[30] Neves, *Direito da Segurança Social*, 1996, p. 366

[31] Sá Gomes, *Manual de Direito Fiscal*, 2000, pp. 87-90; Faveiro, *O Estatuto do Contribuinte – A Pessoa do Contribuinte no Estado Social de Direito*, 2002, pp. 298-300.

[32] Sá Gomes, *Manual de Direito Fiscal*, 2000, pp. 87-90.

[33] Faveiro, *O Estatuto do Contribuinte – A Pessoa do Contribuinte no Estado Social de Direito*, pp. 298-300.

approved maximum rates, and to develop the Parliament-approved basis of impositions - and the social security budget is integrated into the State Budget[34].

Nevertheless, it is also true that they involve groups of people and not citizens at large, although they can ultimately cover an undetermined number of beneficiaries[35], on the basis of a presumptive benefit, a somewhat bilateral and commutative charge, yet without any direct relation with the benefits one will be entitled to receive (individual benefits)[36]. Social security contributions are not subject to the ability to pay principle of the Personal Income Tax (IRS – *Imposto sobre o Rendimento das Pessoas Singulares*) but to the benefit or equivalence principle, evidenced in the consignation of receipts[37], under special budgetary rules[38], to specific purposes and expenses, managed by public entities different from the State[39].

Art. 32 (3) of the GLSS sets that except for international instruments, the affiliation with the Providential or Insurance subsystem is compulsory for persons (dependent or independent) working in Portugal for the period to be established by law. The relevant link to the Portuguese social security system is therefore territoriality, whereas the general link of the Portuguese Tax System is residence (there are definitions of residence in Art. 16 of the IRS Code, based on the 183-day rule and the presumptive habitual abode for individuals[40] and in Art. 2 (3)

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[34] Saldanha Sanches, *Manual de Direito Fiscal*, 2002, pp. 27-30; Casalta Nabais, *Manual de Direito Fiscal*, 2003, pp. 30-1; Costa Cabral, *O Financiamento da Segurança Social*, pp. 63-5; Cimourdain de Oliveira, *Lições de Direito Fiscal*, 1997, p. 114.

[35] See Franco, *Finanças do Sector Público – Introdução aos Subsectores Institucionais (Aditamento de Actualização)*, pp. 94-5. Somewhat close to this position, see Costa Cabral, *O financiamento da Segurança Social e suas implicações redistributivas*, pp. 63-5.

[36] Even considering that, for the calculation of some benefits, the amount of contributions paid will be determinant. The principle of Art. 30 of GLSS, stating that the Providential or Insurance Subsystem shall be fundamentally self-financed on the basis of a direct sinalagmatic relationship between the legal obligation of making contributions and the right to benefits seems highly doubtful considering, for instance, that some benefits are financed through budget transfers, that benefits are not lost when contributions are not paid by the employers, and the existence of non-contribution schemes, amongst others.

[37] On the budgetary principle of non-assignment of revenue and its exceptions, see Franco, *Finanças Públicas e Direito Financeiro*, 1999, pp. 354-5. According to such principle, all collected revenue should be at disposal of the State so as to be used in the expenses it considers preferable.

[38] According to Art. 7 (1) of Law 91/2001, "The sum of revenues shall not be assigned to determined expenses." Art. 7 (2) (c), of the same Law, relating to the Social Security Budget, is an exception.

[39] Vasques, Remédios Secretos e Especialidades Farmacêuticas, *Ciência e Técnica Fiscal*, no. 413 (Janeiro – Junho 2004), pp. 160-3 and 181-4.

[40] A person is also considered as resident in the Portuguese territory provided that any of the persons to whom the direction of the family unit belongs is a resident therein (residence by attraction) as per Art. 16 (2) of the IRS Code. From 1 January 2006 onwards this residence rule corresponds to a *juris tantum* presumption avoided if

of the IRC Code, based on the location of the head-office or the effective management for companies). For IRS and IRC purposes, territoriality (permanent establishment, source of the income) is only relevant for non-residents.

There are examples of articulation between the social security and the tax system with regard to the objective nature of work. Employed workers, including board members, are both compulsorily included in the general regime established by Decree-Law 199/99 of 8 June[41], as they are both subject to IRS Category A – Dependent work, under Arts. 2 (1) (a) and 2 (3) (a) of the respective Code. Self-employed workers are integrated into the same regime under the terms established by Article 6 (1) of Decree-Law 328/93 of 25 September[42], which refers to Articles 3 and 4 of the IRS Code and 6 (4) (a) of the Corporate Income Tax (IRC – *Imposto sobre o Rendimento das Pessoas Colectivas*) Code. In this way, employed workers and self-employed workers with professional or entrepreneurial (commercial, industrial, agricultural) income and members of the board of professional companies will be integrated into the general regime of the Providential or Insurance Subsystem (Public Social Security System) on a mandatory basis.

As for the other two subsystems, the Solidarity Subsystem and the Family Protection Subsystem, the relevant link is residency in the Portuguese territory, as we have already discussed.

Six main problems arise from the relation between the tax system and the social security System in regard of a person migrating into another country: (i) the possibility of inbound or outbound posted or seconded workers being subject to personal income tax and to social security contributions in different States; (ii) the possible discrimination on tax deductions applicable to local and foreign social security contributions; (iii) the lack of parallelism between the concepts of "social security contribution" and "tax"[43], (iv) and of parallelism between conflict rules regarding taxes and social security contributions; (v) the lack of tax representatives for temporary expatriates in Portugal and of mechanisms to allow the payment of taxes to be anticipated to the time the worker exits the country; (vi) the consideration of contributions made in Portugal by Portuguese workers that subsequently emigrated to European countries, and the difficulties arising from the problematic decolonization process, that implied the loss of many ex-colonist's social contribution records[44].

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the person proves the non-existence of a link between the substantial part of his economic activities and the Portuguese territory, according to Art. 16 (3) of the IRS Code.

[41] See Art. 28(1) of the GLSS.

[42] With the amendments made by Decree-Law 240/96, of 14 December.

[43] See Commission *vs.* France (Case C-34/98, of 15 February 2000) and Commission *vs.* France (Case C-169/98, of 15 February 2000) of the ECJ.

[44] Only recently Portugal has begun to enter SSCs with its ex-colonies; for example, SSCs signed with Angola

The usual aim of SSCs concluded by Portugal is thus to determine in which social security system the posted or seconded workers will be enrolled, to which country they must make their contributions, and how these contributions can be taken into account in their countries of origin. Administrative questions are also dealt with, such as determining the competent entity to certify that the worker is already contributing in one of the countries. Portuguese SSCs are not based on any model treaty.

General scholarship on social security is scarce and there is, to our knowledge, no developed doctrinal approach to SSCs in Portugal. There is, nevertheless, some work regarding broader international social security articulation[45] and the EC Regulation 1408/71[46], as well as a collection of ECJ social jurisprudence[47].

**b) SSCs and Reg. 1408/71**

Until December 2006, Portugal had signed 50 DTCs with Argelia, Austria, Belgium, Brazil, Bulgaria, Cape Verde, Canada, Chile, China, Cuba, Czech Republic, Denmark, United States of America, Estonia, Finland, France, Germany, Greece, The Netherlands, Hungary, Iceland, India, Indonesia, Ireland, Italy, Latvia, Lithuania, Luxemburg, Macau, Malta, Morocco, Mexico, Mozambique, Norway, Pakistan, Poland, United Kingdom, Romania, Russia, Singapore, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, Tunisia, Turkey, Ukraine and Venezuela. Most of the provisions of those DTCs are based on the OECD-MC. Those with Cuba, Indonesia, Turkey and Pakistan had not yet entered into force.

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and with Guinea-Bissau are still not in force.

[45] Neves, *Direito da Segurança Social*, 1996, pp. 168-85.

[46] Pizarro, *O Direito Comunitário sobre Segurança Social dos Trabalhadores Migrantes e as suas Implicações no Sistema de Segurança Social Português,* 2005 (with further references); Pizarro, *A Incidência do Regulamento (CEE) nº 1408/71 sobre a Legislação Portuguesa de Segurança Social*, 1998; Soares, *Os Problemas Específicos de Aplicação do Reg.º (CEE) n.º 1408/71 sentidos pelas Instituições Portuguesas de Segurança Social*, 1998; Leite/Liberal Fernandes/Réis, *Direito Social Comunitário*, Tomo I – *O Direito de Livre Circulação dos Trabalhadores Comunitários: O mercado europeu de trabalho*, 1998, pp. 119-48.

[47] Leite/Liberal Fernandes/Reis, *Colectânea de Jurisprudência Social Comunitária*, *Tomo II: 1986-91*, 1997. The period covered by this collection ends in 1991. For an appraisal of subsequent periods, see Moore, Freedom of Movement and Migrant Worker's Social Security: An Overview of the Case Law of the Court of Justice, 1997-2001, *Common Market Law Review,* Issue 39, 2002, pp. 807-39, and Moore, Freedom of Movement and Migrant Worker's Social Security: An Overview of the Case Law of the Court of Justice, 1992-1997, *Common Market Law Review,* Issue 35, 1998, pp. 409-57.

By comparison, until the same date Portugal had only 16 general-scope SSCs: Andorra, Angola, Argentina, Australia, Brazil, Cape Verde, Canada, Canada-Québec, Chile, Guinea-Bissau, United States of America, Morocco, United Kingdom (referring to the Channel Islands of Jersey, Guernsey, Herm, Jethou and Man), São Tomé and Princípe, Uruguay and Venezuela. The SSC with Angola had not yet entered into force[48]. Four of these SSC are currently being (re)negotiated: Argentina (SSC and Administrative Agreement), Cape Verde (SSC), Brazil (additional Agreement) and Uruguay (review of Administrative Agreement). A new SSC with Tunisia is being negotiated and preliminary conversations are taking place in order to sign SSCs with South Africa, Mozambique and Bulgaria.

This difference is to some extent deceiving, as Portugal previously had SSCs with Belgium, Denmark, France, Spain, Germany, Luxembourg, Norway, United Kingdom, Sweden, and Switzerland, which have been replaced by the EU common regulation, according to Art. 6 of Reg. 1408/71.

Portugal also concluded 4 SSC with limited-scope, merely derogating, complementing or expanding Reg. 1408/71. These are the SSCs with *Denmark* (renouncing the refund of expenses made with benefits in kind of health and maternity insurance, work accident and professional illness, granted by an institution of a Member State on account of the competent institution of the other Member State, and with administrative and medical controls); *Germany* (simplifying the inventory procedure for Portuguese family members of Portuguese workers insured in Germany which are entitled to benefits, and the health insurance computation and payment procedures by the Portuguese institutions to be refunded by German institutions); *Luxembourg* (on the recognition, by a Contracting Party, of the decisions taken by the institutions of the other Contracting Party in relation to the disability status of pension applicants); and *The Netherlands* (with different valuation methods and procedures on refund of expenses with maternity and illness than standard ones).

Portugal has no multilateral DTCs or SSCs. To our knowledge and research, Portuguese national courts have not yet dealt with SSCs. In 1989 and 1991 the Social Security Administration issued two rulings on Reg. 1408/71, on the determination of the applicable legislation and the recruitment of workers to be seconded to other Member States[49], both mentioning some relevant Advisory Committee on Social Security for Migrant Workers decisions.

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[48] The full text of the SSCs in force is available at: http://secomunidades.pt/gabinete.php.

[49] Circular do Departamento de Relações Internacionais e Convenções de Segurança Social da Secretaria de Estado da Segurança Social n.º 1/89, de 14.8.1989, sobre "Disposições relativas à determinação da legislação aplicável - Artigos 13º a 17º do Reg. (CEE) 1408/71 e 11º a 14º do Reg. (CEE) 574/72"; 1ª Circular do Departamento de Relações Internacionais e Convenções de Segurança Social da Secretaria de Estado da Segurança Social complementar da Circular n.º 1/89, de 14.8.1989, de 21.5.1991, sobre "Destacamento de trabalhadores no quadro dos artigos 14º - Nº 1, completado pela Decisão 128 da CASSTM, e 17º, do Regº. (CEE) 1408/71".

## II. Personal and Material Scope of DTCs and SSCs

### a) Personal Scope

Portuguese SSC are applicable to workers[50] or other individuals who are or have been subject to the social security legislation of one of the Contracting States, provided (in some of them) that they are legally considered nationals of one of such States[51], along with the members and survivors of their families[52] [53]. Social security legislation of the Contracting states normally uses the place of exercise of the economic activity as the connexion element in defining its territorial scope[54].

The SSC signed with Australia is a particular case, as it defines its personal scope (from the Australian perspective) with reference only to the residence in Australia, and therefore regardless of the nationality element[55]. SSCs with Chile, Brazil, United States, Canada, Venezuela, Andorra and United Kingdom (including the Channel Islands) also do not demand the nationality or citizenship requirement.

The normal scope of SSCs is usually broadened by an equal treatment clause, whereby an treatment identical to that of national workers shall be granted to non-nationals resident in a Contracting Party[56].

[50] In the case of the Spain SSC, only dependent workers and their families are included - Art. 3 (1). However, see our remarks *infra* considering this SSC.

[51] See, for instance, Art. 2 of the Cape Verde SSC and Art. 2 of the Morocco SSC. In the Cape Verde SSC, the nationality element is used, moreover, to ensure equal treatment in cases where the national of one of the States is resident in a third State.

[52] Resident refugees and stateless persons are included as well. This was not the case, though, with the Spanish SSC.

[53] The definition of "family member" or "dependent" is usually the definition stated in the applicable legislation, which may differ from State to State.

[54] As an example, see Art. 2 of the Cape Verde SSC.

[55] See Art. 3 (b).

[56] See Art. 3 of the Cape Verde SSC, as an example.

By comparison, DTCs, unlike SSCs, have a wider personal range and their application includes any residents of the Contracting States[57], regardless of their nationality[58]. Indeed, citizenship is not usually a relevant element in DTCs signed by Portugal. Conversely, the non-discrimination principle contained in Art. 24 of the OECD-MC and in DTCs entered into by Portugal, applies to all nationals of the Parties, notwithstanding their residence[59].

These significant differences lead us to the conclusion that the personal scope of DTCs is broader than that of SSCs, as the latter ones do not segregate the requirement of nationality from that of the place of exercise of the activity. Moreover, the payment of benefits recognized through the SSCs can lead to the disregard of the residence element. That is to say that benefits may be paid to nationals of the Contracting Parties (regardless of the fact that they are non-residents of those Parties), if such treatment is granted to the nationals of one of the States[60].

This conclusion is somewhat identical with regard to Reg. 1408/71, wherein, according to Art. 2, only nationals of Member States subject to social security law within the EU can apply for its benefits. Its scope, although apparently similar, was rendered broader by the ECJ decisions, namely in non-discrimination situations and the violation of the free movement of workers' rule.

The personal scope of Reg. 1408/71[61] was subsequently expanded by Reg. 859/2003 that, following lively discussions on the subject, extended the effects of the former Regulation to non-EU nationals[62].This last

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[57] Some DTCs have an even broader scope, merely referring to "taxpayers" – see Commentary 1 to Art. 1 of the OECD-MC. This is not the case in any of the DTCs signed by Portugal. On the personal scope of DTCs, see Xavier, *Direito Tributário Internacional*, 1993, pp. 225 et seq. and Van Raad, *Cursus Belasting Recht – Internationaal Belasting Recht*, 2003, pp. 51 et seq..

[58] However, nationality might be relevant, through the application of the *tie-breaker test*, in situations of dual residence – see Art. 4 (2) (c) of the OECD-MC.

[59] This was not clear from the wording of Art. 24 (1) of the OECD-MC 1963, though. See Commentary 2 to Art. 24 of the OECD-MC.

[60] See Art. 6 (3) of the Cape Verde SSC.

[61] On the Reg. 1408/71, its implementation and reform, see: Jorens/Schulte, The Implementation of Regulation 1408/71 in the Member States of the European Union, *European Journal of Social Security*, Vol. 3, Issue 3, 2001, pp. 237-55; Pennings, The European Commission Proposal to Simplify Regulation 1408/71, *European Journal of Social Security*, Vol. 3, Issue 1, pp. 45-59; Eichenhofer, How to Simplify the Co-ordination of Social Security, *European Journal of Social Security*, Vol. 2, Issue 3, 2000, pp. 231-40 (also dealing with alternative proposals on the subject); Verschueren, Financing Social Security and Regulation (EEC) 1408/71, *European Journal of Social Security,* Vol. 3, Issue 1, 2001, pp. 7-24.

[62] Note that according to Art. 90 (1) (a) of Reg. 883/2004, Reg. 1408/71 will remain in force for non-EU nationals.

Regulation extends the provisions of Reg. 1408/71 and Reg. 574/72 to third States nationals, family members and survivors as long as they have legal residency in a Member State and their situation relates with two or more Member States of the EU or to a third State with which there is an SSC.

Portuguese Social Security Authorities[63] qualify as a legal resident in Portugal a foreign citizen who holds a residence title issued after the due residence authorisation[64].

Currently, the following persons are covered by Reg. 1408/71: i) employed and self-employed persons who are or have been insured under the legislation of one of the States belonging to the EU or European Economic Area (EEA)[65]; ii) civil servants[66]; iii) students[67]; iv) pensioners, even if they had already became pensioners before their country joined the EU or EEA; v) members of families and survivors of the above persons, regardless of their nationality[68]; vi) third country nationals.

Reg. 883/2004 has an apparently identical personal scope, with one subtle difference – workers are no longer the unique beneficiaries of the social security systems. That is to say that any individual that is submitted to social security legislation inside the EU will be covered by Reg. 883/2004. This produces natural consequences in the material scope of the Regulation as well, meaning that the entire social security systems, in all their variants, can potentially be considered as having a common regulation at a European level, thus covering non-active individuals.

Another distinctive element of Reg. 883/2004 relates to the introduction of a single and comprehensive tie-breaker rule in order to determine the only applicable legislation where activity is exercised in two or more Member States (Art. 13). However, this is more closely connected with the determination of the applicable legislation than with the personal scope.

**b) Material Scope**

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[63] Opinion of the Foreign Services remitted to the Social Security and Solidarity Institute, quoted by Pedro Duarte Silva in the study of February 2005, *A Protecção Social da População Imigrante – Quadro Legal, Estudo Comparado e Proposta de Reforço,* from the Observatório da Imigração.

[64] Decree-Law 34/2003, of 25 February

[65] Including Switzerland since 1 June 2002 under a bilateral agreement between this country and the Community.

[66] Council Regulation (EC) 1606/98, of 29 June 1998.

[67] Council Regulation (EC) 307/99, of 8 February 1999.

[68] As a rule, the status of a family member is defined in the legislation of the State of Residence.

The GLSS, containing the essential structure of the Portuguese social security legislation, states on Art. 25 (1) that:

"The State promotes the conclusion of international instruments of coordination relating to Social Security in order to guarantee the equality of treatment to people and their families pursuing an activity or with their residence in the other States, in what concerns rights and obligations arising from the applicable law, as well as the conservation of rights formed or under formation"[69].

Such a rule, although not binding on the Administration, gives a clear idea that the Portuguese legislator believes that SSCs can apply to the entire social security system, in its three components[70]: the Public Social Security System (*Sistema Público de Segurança Social*), which encompasses the 3 above-mentioned subsystems – Providential/Contribution, Solidarity/Non-Contribution and Family Protection; the Social Action System (*Sistema de Acção Social*) and the Supplementary Social Security System (*Sistema Complementar*) [71].

Practice, on the other hand, is not as straightforward. Firstly, the matters that could arise relating to the Social Action System are not considered in the SSCs concluded by Portugal. Although it can be argued that, by their very nature, they are not expected to interact with international connecting links, it must be noted that such situations might, in effect, actually arise[72]. The Supplementary System is also ignored in the SSCs concluded by Portugal, which is of growing concern as the second and third pillars of the social security system play an increasingly important role in the financing of modern systems[73].

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[69] On Art. 34 (2) of the GLSS, the aggregation of periods according to such international instruments is considered admissible, while Art. 44 (2) ensures that the transfer of residence by any beneficiary included in the Contribution System does not preclude the payment of the due pensions, unless an international instrument states otherwise.

[70] Art. 5 of the GLSS.

[71] The Supplementary System envisages a supplementary level of social protection for the beneficiary, and operates beyond a certain minimal level of compulsory contributions according to the Public Social Security System. On this topic, see Neves, *Direito da Segurança Social*, 1996, pp. 821-3.

[72] At the universities, for instance, one can question whether a foreign student (non-national, or non-resident) should be entitled to the benefits of having discounts on books, meals or accommodation, granted to national students.

[73] See European Commission, *Communication to Counsel, European Parliament and Economic and Social Committee*, 19 April 2001, p. 4.

As for the Public System, it is considered on the basis of all of its sub-systems and even the access to the health system is also added to the scope of some SSCs (for instance, those with Cape Verde or Brazil) [74].

However, each SSC defines in a specific article the legal regimes and/or benefits covered by it. Therefore, we may find substantial differences between each of the SSC signed by Portugal.

As significant examples, we may point that the specific Public Servants system is excluded from SSCs signed with Australia, USA, Cape Verde and São Tomé. The Solidarity/Non-Contribution regime is also excluded from some SSCs or included just for the purpose of pension benefits, as it is the case of the SSCs with São Tomé, Cape Verde and Guinea-Bissau.

Any other new benefits created within the Public System though, require a special agreement so as to be included in their scope.

The definition of material scope is therefore rather different from the definition included in the Reg. 1408/71 since the latter specifies in its Art. 4 that it shall apply to all legislations concerning all the traditional branches of social security. Each State should make a declaration on legislation and schemes included in the material scope of the Regulation and list the special non-contribution benefits excluded[75].

All the above-mentioned aspects of the material scope of SSCs are, however, mainly considered from the beneficiary rights' point of view. In fact, rules governing workers and other beneficiaries' financial obligations are usually only indirectly dealt with, through the definition of the applicable legislation. When determining the applicable legislation, SSCs consider the entire bilateral social security legal relation covering benefits and contributions, but only the former are usually extensively regulated. Computation of contribution periods[76], granting of identical prerogatives in the collection of credits derived from contributions due to a Social Security institution of the other State[77], and of identical exemptions from fees and taxes to nationals of both Contracting States[78], are some of the few directly regulated aspects relating to social security contributions.

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[74] Unlike Reg. 1408/71 - see Art. 4 (4).
[75] The list made by Portugal of benefits included in Art. 4 is quite comprehensive. See the Declaration in OJ C 107, of 2 April 1987. Although not updated, the ECJ jurisprudence considers that any Declaration implies, automatically, the later changes to the definition of legislations included in Reg. 1408/71.

[76] See Arts 12 and 20 of the Cape Verde SSC.

[77] See Art. 42 of the Cape Verde SSC.

[78] See Arts. 18 (1) and 19 (1) of the Argentina SSC.

Accordingly, the possibility of double payment of contributions is real. For instance, under the legislation of most countries posted workers are usually subject to the legislation of the seconding State if the stay abroad is merely temporary; therefore, the payment of contributions is demanded in that State[79]. However, legislation of the employment State will tend to demand the payment of its SS contributions immediately after the arrival of the worker, unless the worker proves that he is already paying an equivalent contribution in the seconding State[80]. Portugal has approved unilateral measures - Decree Law 64/93, of 5 March -, applicable to workers posted to a country with which Portugal has not concluded a bilateral agreement on social security by an undertaking whose registered office is situated in Portugal, or to workers posted in Portugal by an undertaking whose registered office is situated in a country with which Portugal has not concluded a bilateral agreement on social security in the same conditions. This Decree-Law applies only to posted workers and for short posting periods.

This means that, because there are two potentially applicable legislations (seconding or "habitual residence" State and employment or "temporary source" State), the worker might be asked to make contributions to both States, until unilateral, bilateral or multilateral measures solve this problem[81]. Or, in a different case, if an individual works for the same employer in two different countries, he will normally have to pay contributions in both countries.

In this context, one must conclude that, while not entirely prevented by SSCs (unlike with the Reg. 1408/71 rules[82]) these problems can lead to awkward situations where payment of contributions is due in both countries, whereas benefits shall be granted only in one of them, according to the SSCs. Notwithstanding, most SSCs that include overlapping rules exclude from the latter the pension benefits. This means that it is possible to receive pension benefits from two countries, even if they refer to the same person and work period, provided that contributions were legally due and paid for the two countries' social security systems.

A global legal solution in SSCs, regulating both aspects of the social security relation – contributions and benefits – is, therefore, most needed[83]. It can be argued that compulsory social security is, by its very nature, based on

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[79] This is the case, under the Portuguese legislation, if the stay abroad does not exceed 12 months – Art. 2 of Decree-Law 64/93.

[80] See, in Portugal, Art. 5 of Decree-Law 64/93.

[81] Nonetheless, one should keep in mind the financial impact on the workers' pocket arising from this situation because the worker will be asked to pay the accrued contributions in the employment State until the double contribution problem is solved.

[82] On this topic, see Verschueren, Financing Social Security and Regulation (EEC) 1408/71, *European Journal of Social Security,* Vol. 3, Issue 1, 2001, pp. 9-11.

[83] For a theoretic approach to the Social Security juridical relations, see Neves, *Direito da Segurança Social*, pp.

solidarity (or on group or generation solidarities) and therefore these problems might just be a false question, since it is not clear that those who pay should necessarily be compensated *via* benefits, and especially *via* benefits in accordance with the amounts paid. Nevertheless, one should keep in mind that, unlike taxes, social security contributions will always have some sort of direct relation with the benefits received, at least in the Portuguese Providential or Insurance Subsystem[84].

The possibility of regulating the conflict between two legislations claiming the payment of contributions could also be solved with the support of DTCs, if these were applicable. In this matter, the determination of the nature of a social security contribution must be called upon, and eventually, the financial support of the system might be decisive[85]. In fact, Portugal envisages a double source for the financing of the system. While retirement pensions, unemployment, work accidents, death, maternity and other situations related to work are financed by contributions in the Providential/Contribution subsystem, the Solidarity/Non-Contribution and Family Protection subsystem of the Public Social Security System a well as the Social Action System are financed by transfers of the State Budget, and ultimately by taxes[86].

Focusing on the nature of social security contributions, many different opinions arise in Portugal, as we tried to show in I.a) above. The above-mentioned Art. 30 of the GLSS seems to suggest their qualification as a commutative and bilateral charge. It should be kept in mind that legislator definitions may not necessarily be binding. Conversely, one must consider the entire legal data, and only then take a position.

This position leads to the conclusion that, from a theoretical point of view, neither contribution-financed nor tax-financed social security systems are necessarily incompatible with the use of DTCs to regulate conflicts of laws in these cases, as evidenced by the *contribution pour le remboursement de la dette sociale* and the *contribution sociale généralisée* in the ECJ Cases C-34/98 and C-169/98, which were taxes for purposes of the French domestic law and its DTCs and Social Security charges for purposes of Reg. 1408/71[87]. This is so despite the apparently contrary position of the OECD-MC point 3. of the Commentary to Art. 2: "*Social security charges, or any other charges paid where there is a direct connection between the levy and the individual benefits to be*

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299-651.

[84] See Art. 30 of the GLSS: "The contribution system should be mainly self-financed, according to a direct relation between the binding obligation to contribute and the right to benefits".

[85] Concerning the financing of the Portuguese Social Security, see Costa Cabral, *O financiamento da Segurança Social e suas implicações redistributivas*, pp. 63 et seq. and 156 et seq..

[86] See Art. 110 of the GLSS.

[87] On this topic see Lang, "Taxes Covered" – What is a "Tax" according to Article 2 of the OECD Model, *Bulletin for International Fiscal Documentation*, Vol. 59, Issue 6, 2005, pp. 217-8.

*received, shall not be regarded as "taxes on the total amount of wages*", since, as we tried to show above, such direct relation may be more apparent than real, at least in the case of employers, and therefore, in their deep nature, similar[88].

In Portugal employers bear 23.75% and employees 11% of the 34.75% social security of dependent workers and 21.25% of the 31.25% social security of board members[89]. It may be said that, for employers, contributions are a consumption tax (on the payroll expenses), under an *a contrario* reasoning derived from the VAT Code, whereas for employees contributions work as a proportional tax on income, as a compulsory insurance premium, or as a *tertium genus* para-fiscal charge.

If employers' contributions are considered as consumption taxes, the DTCs are not likely to cover them, according to Art. 2[90], except for the deductions of such amounts for the purposes of Art. 24 (4) of the OECD-MC (see V.c) below). Differently, DTCs can potentially cover employees' contributions, if their nature as taxes is accepted. Nevertheless, the fact that DTCs usually contain a comprehensive list of the taxes covered might clear out this doubt.

In regard of the structure of the taxes covered by the OECD-MC, we tend to consider it as not being a problem for the application of DTCs, namely because of the significant fact that the taxable base is identical both in income taxes and in the most significant social security contributions in the case of dependent workers. This may be different in the case of the members of the boards to whom a plafond applies, and to independent workers whose contribution basis is optional, ranging from 1,5 and 12 minimum salaries. It is true, in addition, that the rates of income taxes are normally progressive[91], while social security contributions are typically proportional.

Under a practical point of view, though, the conclusion should be different. In fact, it seems wiser to regulate the entire social security relation (contributions and benefits) under the same international instrument (a SSC). This is particularly significant for the contributions due by the employees, where there is a closer relation with the benefits to be received, and particularly if there is a strict juridical relation between them. On the other hand, the regulation of the relations between taxes and Social Security contributions/benefits should be delivered to DTCs,

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[88] Nevertheless, point 1. of the I – Ad Article 2 of the Protocol in appendix to the DTC between Portugal and the Netherlands, states: "It is understood that the term «taxes on the total amount of wages or salaries» does not include social security premiums.

[89] See footnote 24 above.

[90] According to Art. 2 (1) of the OECD-MC "This convention shall apply to taxes on income and on capital...".

[91] See Art. 104 (1) of the Portuguese Republic Constitution.

focusing, among others, on the topics of the deductibility of the contributions paid on the taxable income of an individual and on the taxation of pensions.

The use of unilateral measures in the Portuguese social security legislation is limited, covering exemption situations, along with reduced payment of contributions.

For instance, foreign teachers working for a Portuguese private institution can choose not to pay contributions under the general rules – charges to the *Caixa Geral de Aposentações* – but their employer will nevertheless pay a 10% contribution[92]. On the other hand, as far as board members, dependent workers, and independent workers are concerned, unilateral mechanisms eliminate double payments of contributions for posted workers[93]. Many other potential double contribution payment situations remain unregulated.

The main differences on the material scope of Reg. 1408/71 by comparison to Reg. 883/2004 regard the inclusion, on the latter, of pre-retirement and paternity benefits. Another important aspect relates to the creation of a more favourable clause relating to the application of SSCs, in line with ECJ jurisprudence. In cases where the application of the latter turns out to be more advantageous for the beneficiaries, Reg. 883/2004 will not replace them.

In cases C-34/98, of 15 February 2000, and C-169/98, of the same date, relating to the payment of the two above-mentioned special charges according to the French legislation, the ECJ upheld the Commission's position according to which those payments were to be considered social security contributions, and therefore needed to respect Reg.1408/71, under which the State of Residence could not levy social security contributions.

According to the ECJ's opinion, quoting the case *Rheinhold & Mahla* (C-327/92), Reg. 1408/71 covers the entire national social security systems, and therefore, although under the French legislation those contributions could be regarded as *taxes*, the fact that they were ultimately assigned to social security expenses, demonstrated a direct and sufficiently relevant link with the French system of social protection[94], rendering them *contributions*. The funding of the system, and not the very nature of the payments, was the critical reason for the Court's decision on these proceedings[95]. The exception to the budgetary principle of non-assignment of revenues to a

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[92] Art. 20 of Decree-Law 199/99.

[93] See, respectively, Art. 8 of Decree-Law 327/93, Arts 12 (independent workers posted abroad) and 16 (foreign independent workers) of Decree-Law 328/93, and Art. 4 of Decree-Law 64/93.

[94] See paragraphs 35-39 of Case C-34/98 and paragraphs 33-37 of Case C-169/98.

[95] See paragraph 40 of Case C-34/98 and paragraph 38 of Case C-169/98.

particular kind of expenses (social security expenses, in the case at hand) proved relevant in solving both cases against the French Republic. The consequences of this ECJ jurisdiction may be to generate qualification conflicts between domestic law – and, *a fortiori*, DTCs – and EC law, namely Reg. 1408/71, *vis-à-vis* certain charges.

**III. Distributive Rules and Coordination of Benefits**

The division normally drawn in respect of the classification of rules in International Tax Law separates conflict (indirect) and material (direct) rules[96]. The latter regulate, in substance, a precise situation of life, whereas the former simply point to the application of a determined material rule and, in this sense, are ultimately dependent on these[97]. Others prefer the designation of distributive rules and method rules, in describing this distinction.

Such distinction, regardless of the terms used, can be found in SSCs as well, for the very reason that one can also find situations of conflicts of laws therein.

General and special provisions found on SSCs defining the applicable legislation are typical international social security conflict (or distributive) rules[98].

As an example we may state the following conflict rules included in SSCs:

- posted workers, who may remain subject to their social security system of origin, as long as there is a labour relation between worker and enterprise, on which the former must "normally depend" and the expected duration of work is temporary (rule included in all the SSCs signed by Portugal);

- persons normally employed in the territory of the two States at the service of the same employer are subject to the legislation of the State of residence (rule included in the SSCs signed with SãoTomé[99], Australia[100], Cape Verde, and the USA[101]).

On the other hand, rules governing the computation of periods of contribution, the payment of pensions due according to the legislation of both Contracting States, the grant and reimbursement of pensions paid by the

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[96] Xavier, *Direito Tributário Internacional*, pp. 49-50. See also the table on p. 60.

[97] Xavier, *Direito Tributário Internacional*, p. 50.

[98] Internal conflict rules can also be found in many legislations – see below in II. the unilateral measures adopted by Portugal, either cumulating or waiving the application of Portuguese legislation.

[99] See Art. 9 (4).

[100] See Art. 9.

[101] See Art. 5.

institutions of one State on behalf of another State, the calculation of their amounts, are fine examples of international social security material (or method) rules.

In our opinion, the biggest difference between SSCs' and DTCs' rules results from their purpose and nature. While DTCs relate to taxes (who pays what to whom), SSCs also decide on benefits (who gets what from whom).

This is of significant importance as benefits usually arise from contributions or facts that take place in certain periods of time, which means that material rules, regulating directly the situations giving rise to those benefits, are more important in SSCs.

DTCs[102], on the other hand, depend more on conflict rules, in order to allocate taxation powers among States.

This is also a result of the principle governing SSCs according to which one legislation (and only one) is rendered applicable, and therefore the main question remains how to adapt that chosen legislation to an international situation. In DTCs, on the contrary, the cumulative application of tax legislations is a normal rule, as it is up to the State of residence to apply the exemption or credit method to reduce the overall tax burden of its residents. Because these methods are usually straightforward, the major task will usually be to decide on the distribution of competences and not on the material regulation of taxation.

Two other important factors should be mentioned. One concerns the diversity of benefits in modern social security systems, each one with its own characteristics[103]; the other concerns the "harmonization" of the cornerstone principles of direct taxation at a global level[104], something which seems absent from Social Security.

All Portuguese DTCs have an autonomous definition of "residence", applicable in both Contracting States, which prevails over the domestic legislation (primary source of the definition).[105].

In SSCs, the residence and the habitual place of abode of an individual often play a determinant role, both in conflict as well as in material rules. Thus, the determination of the applicable legislation or the way a certain

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[102] Most Arts. on DTCs are conflict rules. Material rules are an exception – see, however, Arts. 7, 9, 23-A and 23-B, and 24 (4) of the OECD-MC.

[103] Sometimes even with no match or equivalent in the other Contracting State.

[104] Principles such as the world-wide taxation of residents and the territoriality taxation of non-residents are a clear example for this.

[105] On this topic, see Courinha, A tributação dos cidadãos portugueses trabalhadores no estrangeiro à luz do Artigo 15.º do Modelo de Convenção OCDE, *Fiscalidade*, No. 17, 2004, pp. 55-71.

situation is decided frequently depends on an individual being considered "resident", and not merely "present", in a certain State. This is of course the case with Portuguese SSCs, but strangely there is no consistency in how they approach this subject.

Some of those SSCs (Australia, Brazil, Canada, Norway, UK, Sweden, Uruguay and Venezuela) determine this concept by application of the domestic law of each country. In Portugal, there is no clear definition of what "residence" means in social security law. This would apparently lead to the application of the General Tax Law (*Lei Geral Tributária*), as Art. 3 renders it applicable to any financial contributions made to public entities, therefore including social security contributions.

Art. 19 (1) (a) of the General Tax Law deals with the concept of "fiscal domicile", which, in the case of individuals, is the "place of habitual residence". However, "fiscal domicile" seems to be limited to taxes, and probably only to IRS and IRC, and "domicile" and "place of habitual residence" may be concepts different from that of "residence"[106]. There are definitions of residence in Art. 16 of the IRS Code - and in Art 2 (3) of the IRC Code - (see I.a) above), but these do not seem applicable beyond the limited scope of income taxes.

Moreover, Arts. 82 et seq. of the Civil Code only define "domicile". The most important ideas are that a general voluntary domicile exists at the place of habitual residence; in case of alternate residences, there is domicile in both [Art. 82 (1)]. In the absence of an habitual residence, domicile is established at the occasional residence or at the place of stay [Art. 82 (2)]. However, a person has a professional domicile where his profession is exercised [Art. 83 (1)]; if professional activities are exercised in more than one place, both places are domiciles for the respective relations [Art. 83 (2)]. In conclusion, the concept of "residence" is not defined by any general rule, as far as Portugal is concerned.

In other SSCs (Andorra, Cape Verde, Chile and Morocco) residence is defined as the "habitual residence", and in the remaining SSCs, the concept is totally absent (Argentina and France), and should be determined through the application of the rules expanded on the VCLT.

The GLSS, in its Art. 55 on the Solidarity Subsystem (*Subsistema de Solidariedade*) and in its Arts. 64 and 65, on the Family Protection Subsystem (*Subsistema de Protecção Familiar*), uses the concept of residence as "legal residence"[107].

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[106] See Cordeiro Mesquita, "Domicílio Fiscal ou Residência ?", *Estudos dedicados ao Prof. Doutor Mário Júlio de Almeida Costa*, 2002, pp. 1045 et seq..

[107] Neves, *Lei de Bases da Segurança Social, – Comentada e Anotada*, 2003, p. 151.

"Legal residence" should be envisaged as the holding of a residence title, after the granting of a residence permit, for the purposes of Decree-Law 34/2003, of 25 February[108].

Reg. 1408/71 defines *residence* as opposed to *stay*. Residence is defined as "habitual residence", while "stay" is defined as "temporary residence"[109]. This is an unnecessary hermeneutical twisting by the legislator, as a definition must not carry in itself the concept it is intending to determine[110].

Because this definition is of no help to the interpreter, the ECJ was forced to explain, in connection with the *Silvana de Paolo* case[111], what residence should mean according to a particular rule of the Reg. 1408/71 – Art. 71 (1) (b) (ii). It presented some criteria for the judges of the *Cour de Cassation* to consider, although without any preference order – see paragraphs 13-22[112].

One problem remains unsolved, nevertheless. In fact, for the application of many rules under Reg. 1408/71 - in the case of the *Silvana de Paolo* judgement, Art. 67 (3) along with Art. 71 (1) (b) (ii) -, one exclusive residence will be required. Therefore, no dual residence is acceptable. The use of such criteria can lead to different results in a case-by-case approach, according to the criterion considered relevant in a particular case. Hence, this will, apparently, remain an open issue.

Even the ECJ decision on the *Kemmler* Case[113] might not be enough to change this state of affairs. As a matter of fact, in this dual residence case, the ECJ favoured the habitual residence of an individual to any other, but under what evidence? The number of days spent in Germany, the economic centre of his activity, his personal interests, or a mix of all of them? What about cases where no clear decision can be reached, using all these elements and the application of each of them leads to different results?

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[108] Duarte Silva, "A Protecção Social dos Trabalhadores Migrantes – Quadro Legal, Estudo Comparado e Proposta de Reforço", Estudo promovido pelo Observatório da Imigração, 2005, p. 16.

[109] Art. 1 (h) and (i).

[110] On this, see Engish, *Introdução ao Pensamento Jurídico*, 1988, pp. 205 et seq..

[111] Case 76/76, of 17 February 1997, Silvana Di Paolo *vs.* Office national de l'emploi.

[112] Unlike Art. 4 (2) of the OECD-MC.

[113] Case 53/95, of 15 February 1996, Inasti v Hans Kemmler.

Another aspect of the connection between residence and benefit entitlement was raised in the *Swaddling* Case (Case C-90/97, of 25 February 1999), where the claim against France marks a departure from the traditional reliance on exportability as the means for protecting migrants' rights.

The Court held that, since the amendment of Reg. 1408/71 in 1992, residence has become a crucial factor in the coordination system for social security. It follows that it cannot be acceptable to have "marked differences in the meaning ascribed by the various national systems to the concept of residence. [...] [T]he concept of residence is a Community notion and as such its meaning cannot be adapted to suit the unilateral and uncoordinated preferences of the various national systems" (Opinion of Advocate General Saggio, of 29 September 1998, paras. 15-16). For example, the UK guidance on the habitual residence test states that a person may be habitually resident in more than one State or in none whereas the use of residence as a coordinating concept is incompatible with a person having no State of habitual residence.

There are four main principles that structure SSCs *vis-à-vis* the coordination of benefits (material rules):

- the furtherance of periods and events in both countries as if having taken place in one single State;
- the contributions shall take place in the Competent State, typically the State of employment;
- the payment of benefits (due by the Competent State) shall be carried by the institutions of the State of Residence, in case they are in kind, and according to the scope and categories of such State, except in cases of significantly expensive benefits (where a case by case authorisation might be required)[114];
- the payment of benefits shall be carried directly by the Competent State, in case such benefits are in cash.

Such principles, common in most Portuguese SSCs, are not necessarily identical in all of them, and vary, although, as Reg. 1408/71 inspired them, no significant differences can be acknowledged.

Reg. 883/2004 will replace Reg. 1408/71, presumably during 2007, when its implementing Regulation will be adopted.

[114] In both cases, a reimbursement will then take place.

As far as we can see, the new Regulation will not introduce significant changes to the principles set by Reg. 1408/71, as interpreted by the ECJ for the last 30 years.

It will be applicable to all nationals, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to members of their families and to their survivors.

This new Regulation simplifies solutions and suppresses many derogations, both on contributions and on benefits:

- A person will only be subject to the legislation of a single Member State at the same time. Therefore, contributions will be made in one Member State even when the person works as an employee and as self-employed individuals (no more exceptions as in the former annex VII to Reg. 1408/71).

- Contributions will be made in the State of residence of the insured person if he works substantially in that State and in other Member States (probably, in order to avoid artificial linkage to the State of residence).

- Employees and self-employed individuals can be seconded to another Member State for a 24-month period, which can be extended by common agreement by the authorities of the two Member States concerned.

- Benefits (sickness benefits in kind, unemployment benefits) will be provided in the Member State where the person resides.

- It will however be possible in some cases to seek treatment in the competent State (for frontier workers or members of their family) or in another Member State (in case of temporary stay or under certain conditions, when the treatment is not available in the State of residence).

- Unemployment benefits may be provided up to 6 months by the competent State to the unemployed worker seeking a job position in another Member State.

**IV. Interpretation and Qualification Conflicts concerning SSCs and DTCs**

All Portuguese SSCs in force have a list of terms, usually more extensive than that of Art. 3 OECD-MC (*autonomous interpretation*). Additionally, 11 of the Portuguese SSCs (Angola, Australia, Andorra, Brazil, Canada, Chile, Guinea-Bissau, Morocco, United Kingdom, Uruguay and Venezuela) include a clause on the interpretation of non-defined terms, different from that of Art. 3 (2) OECD-MC (*renvoi clause*). There are 9 different wordings of that clause. Only 3 SSCs have an exactly identical wording[115]. These are the different formulations:

- In the application of the present Convention by a Party, a term not defined in the same will have, save a contrary provision, the meaning attributed in the legislation of that Party (Art. 1(2) of the SSC with Australia);

- Any other term used in the present Convention will have the meaning which is attributed to it by the corresponding legislation (Art. 1(p) of the SSC with Andorra);

- The remaining terms used in this Agreement have the meaning which results from the legislation of the Contracting State at stake (Art. 1(2) of the SSC with Brazil);

- The terms not defined in the present article have the meaning which is attributed to them under the applicable legislation (Art. 1(p) of the SSC with Andorra);

- Other terms or expressions used in the present Convention have the meaning which is attributed to them by the applicable legislation (Art. 1(2) of the SSC with Chile);

- Other terms and expressions used in the present Convention have the meaning which is attributed to them by the applicable legislation (Art. 1(2) of the SSCs with Angola, Guinea-Bissau and Morocco);

- Other terms and expressions used in the present Convention have the meaning which is respectively granted to them by the legislation at stake (Art. 1(2) of the SSCs with the United Kingdom).

- Any other term or expression not defined in the present Agreement or in the Convention [The Quito Ibero-American Social Security Convention, of 26 January 1978] will have the meaning which is attributed to it by the applicable legislation (Art. 1(p) of the SSC with Uruguay);

[115] See Arts. 1(2) of the SSCs with Angola, Guinea-Bissau and Morocco.

- Any other term or expression not defined in the present Convention will have the meaning which is attributed to them by the applicable legislation (Art. 1(2) of the SSC with Venezuela).

In our view, with the exception of the SCC with Australia, all other SSCs clauses are ambiguous: one can challenge, in practice, what the "legislation of the Contracting State at stake", "the legislation at stake", or the "applicable legislation" in fact is. This seems a *lex causae* approach, and the interpretation of the State with the closer connection to the issue would prevail. Only the SSC with Australia clearly determines that *lex fori* is the criteria for non-defined terms.

A *lex causae* (closer connection) approach is a satisfactory solution, in theory, as it points to only one legislation; it may not be a satisfactory solution, in practice, as it will generate litigation and different interpretations if both States claim *lex causae*. On the other hand, a *lex fori* approach is not a satisfactory solution, even in theory, because if both States apply the SSC, each will interpret non-defined terms under its domestic legislation, and this will lead to different interpretations[116].

Finally, 4 of the Portuguese general SSCs do not have a *renvoi clause*, and therefore they are liable to a more extensive relevance of the VCLT.

As for qualification or characterization issues, these may arise due to differences in legislation. For instance, a person who contributes to two different countries and systems (mixed career) may apply for two different disability pensions[117]. However, diverging criteria may consider him as (sufficiently) fit in one country and disabled in the other, with the corresponding denial and attribution of pensions. The wide discrepancies among national criteria for determining the degree of invalidity or to calculate the amount and entitlement to disability benefit - namely regarding countries that calculate invalidity pension based on the length of insurance periods and those where the amount of the pension is independent of the length of the insurance period, but generally require actual insurance at the moment the invalidity occurs - can have severe consequences as the amount of pension usually varies with the degree of invalidity and only in a few special cases is the decision of one institution binding on the decisions of all other States involved.

[116] Some of the proposals put forward by Van Raad, International Coordination of Tax Treaty Interpretation and Application, *Intertax*, Vol. 29, Issue 6-7, 2001, pp. 212-18, could also be adapted to Social Security issues.

[117] See Pizarro, A Incidência do Regulamento (CEE) nº 1408/71 sobre a Legislação Portuguesa de Segurança Social, 1998, p. 3.

Another type of conflict has arisen under Art. 14 (a) of Reg. 1408/71 as to whether a posted person is an employee or self-employed, and which legislation, that of the posting State or that of the employment State, is to be applicable[118].

The SSC with Luxembourg specifically deals with such qualification conflicts. It aims at the recognition, by a Contracting Party, of the decisions taken by the institutions of the other Contracting Party in relation to the disability status of pension applicants.

It envisages the dependent and self-employed workers to which Reg. 1408/71 applies and which have been subject to the legislation of both Contracting Parties (Art. 1). The decision taken by an institution of a Contracting Party in relation to the disability status of an applicant, under the terms of the legislation of that Party, is binding upon the institution of the other Contracting Party, provided that the agreement of conditions relating to the disability status between both legislations is recognized [Art. 2 (1)]. Nevertheless, decisions taken by an institution of a Contracting Party do not bind the institution of the other Party in the cases where the disability status is temporary or results from work accident or professional illness [Art. 2 (2)]. There is a deemed agreement of conditions relating to the disability status if the disability rate for the work done at the last place and for any other work adequate to the skills of the applicant exceeds two thirds [Art. 3 (1)]; otherwise Reg. 1408/71 applies [Art. 3 (2)].

The SSC is only partially and formally a *qualification conflict solving mechanism* as this is subject to a prior minimum standard of agreement of conditions among the legislations involved (*harmonization*).

The institution of the Contracting Party which has the role of instructing the procedure is the sole competent body to take the decision [Art. 4 (1)]; when that institution does not belong to one of the Contracting Parties, and the legislation of both Contracting Parties is at stake, the institution of the Contracting Party to whose legislation the applicant has been liable in the last place assumes the role of instructing institution for the purposes of the SSC [Art. 4 (2)]. Therefore, the SSC allows decision-taking by only one State (*international competence*).

The binding system does not jeopardize the right of the bound institution to submit the applicant to medical control according to its own legislation [Art. 5]. The SSC therefore allows fact-checking by both States (*no definite relevance of foreign public acts of control*).

[118] See Zeben/Donders, Coordination of Social Security: Developments in the Area of Posting, *European Journal of Social Security,* Vol. 3, Issue 2, 2001, p. 115.

As for the Reg. 1408/71, the Portuguese Social Security Administration takes into account the decisions issued by the Advisory Committee on Social Security for Migrant Workers and takes an active view in influencing, studying and criticizing those decisions[119].

## V. Specific Provisions

### a) Cross-border workers and posted workers

Portugal's only DTC with a clause on frontier workers is obviously that with Spain[120]. Under Art. 15 (4) of that DTC, remuneration of dependent work carried out in one Contracting State by a frontier worker – defined as a worker who has his habitual abode in the other Contracting State to which he normally returns every day – shall be taxed only in that other State. No similar rules existed in the SSC with Spain (replaced by Reg. 1408/71). Therefore, it is clear that a frontier worker resident in Spain but carrying out activity in Portugal may very well be liable for Portuguese social security while the exclusive right of taxing his income belongs to Spain.

An interesting rule in the SSC was that of Art. 5 (2) (b) – see also Art. 14 (2) of Reg. 1408/71 –, where workers of transport and communication enterprises with the head office in the territory of one of the Contracting Parties who worked in the territory of the other Party as passage or ambulant personnel would be subject to the legislation of the Contracting Party where the enterprise had its head office. Nevertheless, when the enterprise had a branch or permanent representation in the territory of the other Party, the workers employed therein, with permanent character, were subject to the legislation of the Party where the said branch or representation is located.

Therefore, the applicable social security legislation depended both on the type of work (passage or ambulant *vs.* permanent) and also on the source of payment (head office or PE).

Portuguese SSCS normally grant posted workers the possibility of remaining subject to their social security system of origin, as an exception to the idea of territoriality (liability to the social security of employment State).

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[119] See Pizarro, A Incidência do Regulamento (CEE) nº 1408/71 sobre a Legislação Portuguesa de Segurança Social, 1998; Soares, Os Problemas Específicos de Aplicação do Reg.º (CEE) n.º 1408/71 sentidos pelas Instituições Portuguesas de Segurança Social, 1998.

[120] On frontier workers, see Weerepas/Daniels, A.H.M., *Travailleurs frontaliers: les pionniers du marché unique – Une enquête sur la problématique des travailleurs frontaliers entre la Belgique et les Pays-Bas,* Maas-Rijn, 1997.

The criteria for benefiting from this waiver of Portuguese SS contributions vary, but the main ideas incorporated in the SSCs are as follows[121]:

- The existence of a labour relation between worker and enterprise, on which the former must "normally depend";
- The worker cannot be the "replacement" of a previous posted worker;
- The "expected duration" of the work cannot exceed a certain length;
- The work cannot exceed a certain scope;
- The worker must be "seconded" by that enterprise to carry out work "on behalf" of that enterprise.

The first term of waiver is usually either 12 months or 24 months, depending on the SSC, the exceptions being Brazil, with the initial term of 60 months, the USA, where the initial term is 5 years, Australia, with 4 years, and Morocco and Chile, with 36 months.

There are usually extensions available if the "effective length" of the work exceeds this first term, the exception being Andorra, where no extension is envisaged. Such extensions comprise 12 or 24 months in some SSCs, although other SSCs do not envisage any specific limit for the second term. By way of exception, special regimes may be designed in the interest of the workers.

Portugal has a unilateral regime for Portuguese workers posted abroad or for foreign workers posted in Portugal under short-term situations (Decree-Law 64/93, of 5 March). Short-term is defined in terms of the "expected duration" of the work, which cannot exceed 12 months (although there is the possibility of recognizing longer stays as short-term in "duly sustained cases"). There is an extension available if the "effective length" of the work exceeds this first term of an additional 12 months. In case it is anticipated that the duration of the work is to exceed 24 months, a special authorization may be required, renewable annually, up to the conclusion of the work.

[121] Compare with Zeben/Donders, Coordination of Social Security: Developments in the Area of Posting, *European Journal of Social Security,* Vol. 3, Issue 2, 2001, p. 110 *vis-à-vis* the conditions for posting under Reg. 1408/71, and the difficulties arising from such conditions.

The criteria for benefiting from this waiver of Portuguese Social Security contributions do not literally include the idea that the worker must "normally depend" on an enterprise; the requirement is just that a worker is "at the service" of his employer. Nevertheless, the worker cannot be the "replacement" of a previous posted worker that has terminated his own period of secondment.

As for DTCs, Portugal usually follows Art. 15 OECD-MC. Therefore, it may be possible that a person is subject to the social security legislation of the country of secondment, but that he becomes (solely) a resident in the country of employment, which would have exclusive competence to tax (Art. 15 (1) OECD-MC). Additionally, the DTCs concluded by Portugal provide for a short stay period in the State of source granting the exclusive taxing right to the State of residence of either 183 days in a calendar year or 183 days in a 12 month-period (see Art. 15 (2) (a) OECD-MC) whereas the short-stay that allows liability to the social security legislation of the country of secondment is measured in months and is usually longer[122]. Additionally, the fact that there is a PE bearing the cost of the remuneration of the worker allows for a cumulative taxation by the State of residence and the State of source (see Art. 15 (2) (c) OECD-MC) whereas the existence of that PE is normally not relevant for the determination of the applicable social security legislation (see Art. 14 (2) of Reg. 1408/71, as an exception).

Under point 6. of Decision 181, of 13 December 2000, of the Administrative Commission of the European Communities on Social Security for Migrant Workers, the E 101 Form should preferably be issued before the beginning of the period concerned; it may, however, be issued during this period or even after it has expired, in which case it may have retroactive effect[123].

With regard social security shopping, the ECJ positions have been consistent. In the Case C-202/97, *Fitzwilliam* Executive Search Ltd *vs.* Bestuur van het Landelijk Instituut Sociale Verzekeringen, of 10 February 2000, the ECJ ruled that Article 14(1)(a) of Reg. 1408/71, is to be interpreted as meaning that, in order to benefit from the advantage afforded by that provision[124], an undertaking engaged in providing temporary personnel which, from one Member State, makes workers available on a temporary basis to undertakings based in another Member State, must normally carry on its activities in the first State. That requirement is met where the undertaking habitually carries on significant activities in the State in which it is established.

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[122] Another difference derives from the "effective" duration of the period for application of Art. 15 (2) of the OECD-MC, distinct from the mere "expected" duration relevant for Social Security purposes. This is, apparently, due to the manner in which taxes (annual base) and contributions (monthly base) are levied.

[123] On the ECJ jurisprudence on form E 101, see Zeben/Donders, Coordination of Social Security: Developments in the Area of Posting, *European Journal of Social Security,* Vol. 3, Issue 2, 2001, p. 112.

[124] Which, derogating from the rule that a person is to be subject to the legislation of the Member State on whose territory he is employed, allows the undertaking to which he is normally attached to keep him registered with the social security scheme of the Member State on whose territory it is established.

Previously, in Case C-35/70, *Manpower*, of 17 December 1970, the ECJ did rule that the assignment provisions are also applicable to interim labour posted in another Member State. Employer's authority should however continue to be exercised by the interim agency, at least in terms of ultimate employer authority (dismissal, sanctions in case of malperformance, payment of salary),whereas the user - based in the other Member State - could exercise day-to-day authority. In the context of interim labour, it has been argued that the maintenance of a 'direct' or even an 'organic link' with the sending interim agency is hardly conceivable.

Decision 162, of 31 May 1996, of the Administrative Commission of the European Communities on Social Security for Migrant Workers requires that the posting employer develops a substantial part of its activity in the territory where it is established[125].

Both the ECJ Case C-212/97, Centros Ltd *vs.* Erhvervs - og Selskabsstyrelsen, of 9 March 1999, and the ECJ Case C-404/98, Josef Plum *vs.* Allgemeine Ortskrankenkasse Rheinland, of 9 November 2000, raise issues of competition[126]. In the first case, an English letterbox company is fully accepted to avail itself of the right of establishment for the purposes of opening a branch in Denmark, and to circumvent the Danish more stringent requirements of minimum social capital. In the absence of harmonization of such rules, the incorporation of Centros might not be considered an abusive use of the right of establishment (see paragraphs 27. and 28.). In the second case, a Dutch letterbox company – with some substance, although only internal management activities (see paragraph 9.), whereas Centros had none (see paragraph 3.) – was not qualified as an undertaking for purposes of the freedom to provide services by posting workers to Germany while keeping their liability to the Dutch social security, even in the case where the workers were resident in the Netherlands (see paragraph 8.). Therefore, both types of competition, of corporate-shopping and Social Security-shopping, are not viewed in an equivalent way by the ECJ[127].

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[125] See 1ª Circular do Departamento de Relações Internacionais e Convenções de Segurança Social da Secretaria de Estado da Segurança Social complementar da Circular n.º 1/89, de 14.8.1989, de 21.5.1991, sobre "Destacamento de trabalhadores no quadro dos artigos 14º - Nº 1, completado pela Decisão 128 da CASSTM, e 17º, do Regº. (CEE) 1408/71".

[126] See also Zeben/Donders, Coordination of Social Security: Developments in the Area of Posting, *European Journal of Social Security,* Vol. 3, Issue 2, 2001, pp. 107-16, with references to the ECJ Case C-202/97, *Fitzwilliam*, of 10 February 2000.

[127] On the economics of Social Security, see Meulman/de Waele, Funding the Life of Brian: Jobseekers, Welfare Shopping and the Frontiers of European Citizenship, *Legal Issues of Economic Integration,* Vol. 31, Issue 4, 2004, pp. 275-88 (on the ECJ *Collins* Case C-138/02, of 23 March 2004, concerning social tourism and non-discrimination claims to the benefit of the economically inactive); Vonk, Migration, Social Security and the Law: Some European Dilemmas, *European Journal of Social Security,* Vol. 3, Issue 4, 2002, pp. 315-32 (on the impact on the Social Security system of immigration policies - favourable, unfavourable or ambiguous - pursued by governments of the host State); Marino, Social Protection and European Integration: an Unfinished Process,

**b) Pensions**[128]

Portugal tends to follow Arts. 18 and 19 of the OECD-MC. There are some notable exceptions for social security pensions (even if not related to government service), granting either an exclusive (Brazil) or cumulative (Bulgaria, Canada, Cape Vert, Luxembourg) right to the State of Source on Art. 18.

Interesting provisions that try to re-establish, in a response to the ECJ jurisprudence, some level of international macro-coherence and inter-State equity between the State of deduction of contributions and the State of taxation

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*European Journal of Social Security,* Vol. 1, Issue 3, 1999, pp. 283-94 (especially pp. 285-8) on whether economic integration also entails that of social protection schemes.

Parallel problems in social (labour) law are raised by the Directive 96/71/EC, of 16 December, and by the so-called "proposed Bolkestein Directive on Services", namely the combat of social dumping and the application of host State's labour law standards to regulate the relation between home State's employer and employee, when the latter is posted to work in the host State in the framework of a provision of services. See Davies, Posted Workers: Single Market or Protection of National Labour Law Systems?, *Common Market Law Review,* Issue 34, 1997, pp. 571-602.

Additionally, the OECD and the EU are similarly concerned about triangular situations and "international hiring out of labour"/posting of staff engaged with a view to being posted. On the subject, see: De Broe et al., Interpretation of Article 15 (2) (b) of the OECD Model Convention: "Remuneration Paid by, or on Behalf of, an Employer Who is not a Resident of the Other State", *International Bureau of Fiscal Documentation Bulletin – Tax Treaty Monitor*, Vol. 54, No. 10 (October), 2000, pp. 503-21; De Kock, International Hiring-Out of Labour: Field Experience in the Netherlands, *International Bureau of Fiscal Documentation Bulletin – Tax Treaty Monitor*, Vol. 53, No. 6 (June), 1999, pp. 243-7; Züger/Lechner/Treer, Tax Consequenes for Expatriates Coming to Austria to Work, *International Bureau of Fiscal Documentation Bulletin*, Vol. 58, No. 12 (December), 2004, pp. 566-72, namely pp. 567-8; Pötgens, Article 15 (2) of the OECD Model: Problems Arising from the Residence Requirement for Certain Types of Employers, *European Taxation*, Vol. 42, No. 6-7 (June-July), 2002, pp. 214-27; OECD, Proposed clarification of the scope of Paragraph 2 of Article 15 of the Model Tax Convention (5 April 2004, A public discussion draft); and the Decisions 181, of 13 December 2000, 162, of 31 May 1996, and 128, of 17 October 1985, of the Administrative Commission of The European Communities on Social Security for Migrant Workers, and also Zeben/Donders, Coordination of Social Security: Developments in the Area of Posting, *European Journal of Social Security,* Vol. 3, Issue 2, 2001, pp. 107-16.

[128] On pensions, see Avery Jones, The OECD Discussion Draft on Tax Treaty Issues Arising from Cross-Border Pensions, *International Bureau of Fiscal Documentation Bulletin* – Tax Treaty Monitor, Vol. 58, No. 4, 2004, pp. 181-2; Avery Jones, A Framework for Evaluating the Commission's Tax Proposals for Occupational Pensions in the European Union, *European Taxation*, Vol. 41, No. 13 (December), 2001, pp. 27-S-33-S; Prats, The Tax Treatment of Cross-Border Pensions from an EC Law Perspective, *European Taxation*, Vol. 41, No. 13 (December), 2001, pp. 12-S-27-S; Gutmann, Tax Treatment of Pensions – A Comparative Analysis, *European Taxation*, Vol. 41, No. 13 (December), 2001, pp. 8-S-12-S; Hanlon, Pensions Integration in the EU and Tax Harmonisation: The ECJ to the Rescue?, *European Business Law Review*, Vol. 14, Issue 6, 2003, pp. 673-88; Marshall/Butterworth, Pensions Reform in the EU: The Unexploded Time Bomb in the Single Market, *Common Market Law Review*, Issue 37, 2000, pp. 739-62; Weerepas, Taxation of Pensions in Europe: A Summary of the Report of the Committee on International Pensions, *EC Tax Review*, Issue 3, 2000, pp. 172-87; Williams, The Taxation of Cross-Border Pension Provision, *European Taxation*, Vol. 41, No. 13 (December), 2001, pp. 2-S-8-S.

of the pensions can be found in the DTCs between Portugal and Denmark[129], of 14 December 2000, and Portugal and The Netherlands[130], of 20 September 1999.

SSCs regulate the *payer* of the pension (eventually totalizing contributions to different countries) and benefits in kind – which is normally the institution of the residence country of the pensioner - and who bears the expenses of such payments (the *debtor*). The distinction of whether the pensioner is resident or not resident in the country

[129] Article 18 (Pensions, social security payments and similar payments): 1 — Payments received by an individual, being a resident of a Contracting State, under the social security legislation of the other Contracting State, or under any other scheme out of funds created by that other State or a political or administrative subdivision or a local authority thereof, may be taxed in that other State. 2 — Subject to the provisions of paragraph 1 of this article and paragraph 1 of article 19, pensions and other similar remuneration arising in a Contracting State and paid to a resident of the other Contracting State, whether in consideration of past employment or not, shall be taxable only in the other Contracting State, unless: 1) Contributions paid by the beneficiary to the pension scheme were deducted from the beneficiary's taxable income in the first-mentioned Contracting State under the law of that State; or 2) Contributions paid by an employer were not taxable income for the beneficiary in the first-mentioned Contracting State under the law of that State. In such case, the pensions may be taxed in the first mentioned Contracting State. (…)

[130] Article 18 (Pensions, annuities and social security payments): 1 — Subject to the provisions of paragraph 2 of article 19, pensions and other similar remuneration paid to a resident of a Contracting State, in consideration of past employment, as well as annuities paid to a resident of a Contracting State, shall be taxable only in that State. Any pension and other payment paid out under the provisions of a social security system of a Contracting State to a resident of the other Contracting State shall be taxable only in that other State. 2 — Notwithstanding the provisions of paragraph 1, a pension or other similar remuneration, annuity, or any pension and other payment paid out under the provisions of a social security system of a Contracting State, may also be taxed in the Contracting State from which it is derived, in accordance with the laws of that State: a) If and in so far as the entitlement to this pension or other similar remuneration or annuity in the Contracting State from which it is derived is exempt from tax, or the contributions associated with the pension or other similar remuneration or annuity made to the pension scheme or insurance company were deducted in the past when calculating taxable income in that State or qualified for other tax relief in that State; and b) If and in so far as this pension or other similar remuneration or annuity is in the Contracting State of which the recipient thereof is a resident not taxed at the generally applicable rate for income derived from dependent personal services, services, or less than 90 per cent of the gross amount of the pension or other similar remuneration or annuity is taxed; and c) If the total gross amount of the pensions and other similar remuneration and annuities and any pension and other payment paid out under the provisions of a social security system of a Contracting State, in any calendar year exceeds the sum of 10 000 euro. 3 — Notwithstanding the provisions of paragraphs 1 and 2, if this pension or other similar remuneration is not periodic in nature, is paid in respect of past employment in the other Contracting State and is paid out before the date on which the pension commences, or if a lump-sum payment is made in lieu of the right to an annuity before the date on which the annuity commences, the payment or this lump-sum may also be taxed in the Contracting State from which it is derived. 4 — A pension or other similar remuneration or annuity is deemed to be derived from a Contracting State if and insofar as the contributions or payments associated with the pension or other similar remuneration or annuity, or the entitlements received from it qualified for tax relief in that State. The transfer of a pension from a pension fund or an insurance company in a Contracting State to a pension fund or an insurance company in another State will not restrict in any way the taxing rights of the first-mentioned State under this article. (…) See also XVII – Ad Article 24 of the Protocol in appendix to the DTC between Portugal and the Netherlands.

where the benefit in kind is required is irrelevant in the first place. The *debtor* institution then refunds the *payer* institution.

In what concerns SSCs and according to the principle of the retention of rights in the course of acquisition, migrant workers are deemed to have a unified record on periods of insurance, even though they have been subject to both countries' legislation. Such legislation often makes the acquisition and extent of entitlement subject to a qualifying period. The length of this period varies according to the contingency being 15 years for old age pensions[131] and 5 years for invalidity pensions[132] in Portugal. However, social security regimes such as the public servants and the banking sector ones establish different rules.

Therefore, SSCs include a specific clause relating to the acquisition of rights - and in certain cases to the extent of these rights - by persons who have successively come under the legislation of two countries. The periods completed under these countries' systems must be treated as if they had been completed under one and same system. The procedure is designed to determine whether the conditions regarding length of insurance, employment or occupational activity provided for in a country's legislation for the acquisition of rights or the extent of entitlement have been fulfilled by taking account, as far as necessary, of periods of insurance, employment or occupational activity completed in other countries. It thus becomes possible to add together periods completed in two countries, having regard to how these periods are defined (which often depends on the relevant legislation), and the rules for conversion which are laid down by mutual agreement in the applicable instruments.

This aggregation for the purpose of calculating a pension is based on the principle that the amount of a benefit, particularly a pension, payable under contribution and certain non-contribution schemes, may depend on the length of the periods completed.
All SSCs signed by Portugal include a basic aggregation clause stating that, when the entitlement to benefits is conditional upon the completion of periods of insurance, the institution which applies that legislation of a Contracting State shall take into account, to the extent necessary, the periods of insurance completed under the corresponding legislation of the other Contracting State, in so far as they do not overlap, as if they were periods completed under the legislation of the first State. Generally, SSCs signed by Portugal also include a clause regarding the aggregation for the purpose of entitlement to benefits when contributions are made for special schemes.[133]

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[131] Art. 21 of Decree-Law 329/93, of 25 September.

[132] Art. 16 of Decree-Law 329/93, of 25 September.

[133] Art. 20 (4) of the SSC with Cape Verde extends aggregation to periods of contribution under a third State legislation as long as this legislation is aggregated by any of the Contracting Parties to which the SSC is applicable. On the contrary, the SSCs with Australia, Chile and USA exclude their applicability to periods of contribution under the legislation of third States with which any of the Contracting Parties has signed a SSC.

Art. 45 of Reg. 1408/71 sets the aggregation of insurance or residence periods completed under a legislation to which an employed or self-employed person was subject for the acquisition, retention or recovery of the right to benefits. The rules included in this article are similar to, but more detailed than, the rules of SSCs.

We may point out a difference between aggregation in SSC and EU regulation, for the purpose of entitlement to early retirement benefits. Early retirement benefits, in the General Social Security Scheme, were approved by Decree-Law 9/99, of 8 January, and entitles the access to a pre-retirement pension, as long as the applicant has a minimum period of 30 years of contributions at the age of 55, and from this age onwards. This period of 30 years may be completed through insurance periods in the EU Member States under Reg. 1408/71. However, this is not the case with the aggregation clauses of SSCs signed by Portugal since early retirement is not a benefit expressly included in the material scope of those SSCs.

Regarding the calculation of benefits, the majority of SSCs stipulate a generally accepted co-ordination approach (the so-called "pro rata" method), whereby the competent institution of each Contracting State concerned determines the theoretical amount of the pension which would be payable to the person concerned under the legislation it applies, if all the periods taken into account under the aggregation principle had been completed under that legislation, and then calculates the amount actually payable by itself on the basis of the periods completed under this legislation as a proportion of the total periods completed under the various countries' legislations to which the person concerned has been subject.

However, when a Contracting State's legislation sets that the amount of the pension is proportional to the length of the periods completed, the State's competent institution may calculate the pension directly.

This is the case of Portugal since Portuguese pensions are calculated as a percentage of the individual's average earnings over the period of his life, multiplied by the number of calendar years during which contributions were paid.

The statutory Portuguese pension scheme is mandatory for all employed and self-employed workers in the private sector.

Special schemes exist for civil servants – *Caixa Geral de Aposentações* - [134], police and the military, the financial sector and lawyers. There is also a voluntary scheme that is open to residents in Portugal who are not covered

[134] According to Law 60/2005, civil servants admitted from 1 January 2006 onwards will be subject to the General Statutory Scheme and excluded from the special scheme of the *Caixa Geral de Aposentações*.

by the Portuguese social security system; Portuguese nationals who reside or work abroad can also enrol in this scheme.

Pension contributions to the statutory scheme are not separated from contributions for other benefits provided by the general social security scheme which covers sickness, maternity, occupational diseases, unemployment, disability, old age and survivors (family allowances are residence based). Of the total 34.75% contributed by the insured person and employer[135], 16.01% is allocated to old-age benefits, 3.42% to disability benefits and 3.67% to survivor benefits. For the self-employed, 25.4% of reference incomes are for mandatory coverage (old age, disability, maternity, occupational diseases and survivors) and 32% for the voluntary scheme (covering sickness).

The basic rules for calculating pension benefits within the statutory scheme are stated in Decree-Law 329/93, of 25 September, as amended lately by Decree-Law 35/2002, of 25 February.

Since 1999, in the statutory scheme, the legal retirement age is 65 for both men and women, with exceptions at 55 for a limited number of professions. The Government has approved Law 60/2005, of 29 December, effective from 2006 onwards, to increase the retirement age for civil servants, currently 60, gradually by 6 months a year in the next 10 years until it reaches 65.

Under the statutory scheme, to be entitled to an old-age pension, social security beneficiaries need to have completed a qualifying period of 15 years of insurance, with at least 120 days per year of registered earnings. Since 2002, pensions will be calculated for civil servants (new entrants from 1993 onwards) and private employees on the basis of the earnings over the whole insurance career, subject to a maximum of 40 years (since 1994 they were computed on the basis of the average income of the best 10 years over the last 15). There is a transition period (from 2002 to 2016) during which the most favourable method of calculation will be used to determine the pension level. The possibility of reducing the transition period is being envisaged and will probably be implement already during 2007.

Concerning the convergence of pension systems, the government proposed and approved, through Law 60/2005, of 29 December, to gradually increase the years of insurance for civil servants, currently 36 years, by 6 months a year until it reaches 40 years.

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[135] See footnote 24. above.

In the banking and telecommunications sector, occupational schemes exist as a substitute for the general scheme (these schemes represent about 4% of the population in employment while about 1.5% of the population in employment is covered by individual provisions).

An individual is entitled to a pension in case of disability with a minimum period of contributions of 5 years. The minimum retirement age may be anticipated to 57 years if the individual is a long term unemployed and has received unemployment subsidy until its term.

The amount of pensions is calculated as follows:

**1. Decree-Law 329/93, of 25 September**

Corresponds to **R / 140**, whereby:

**R =** Sum of all earnings of the 10 calendar years with the highest earnings within the last 15 years, after they have been adjusted

**140 =** 10 years x 14 months of earnings

**ANNUAL RATE**
It corresponds to 2% for each calendar year with earnings registration.

**GLOBAL RATE**
It corresponds to the product of **2%** and **the number of calendar years with earnings registration**. It can neither be lower than **30%** nor higher than **80%**.

**2. Decree-Law 35/2002, of 19 February** (in force from 1 January 2002, and applicable to new pensioners after 1 January 2017)

Corresponds to **TE / (nx14),** whereby:
**TE** – sum of all annual earnings after they have been adjusted
**n** – number of calendar years with earnings registration up to the limit of 40

**ANNUAL RATE**
Depending on the number of years with earnings registration, it may vary from 2% to 2.3%

However, new changes in these calculation rules are expected to be introduced during 2007 and the disability or old age pension will be calculated as a percentage of the individual's average earnings over a working life of 40 years.

The minimum period of contributions may result from the aggregation with contribution periods to special social security schemes, public servants scheme and foreign schemes in accordance with international instruments

which Portugal is a Party to[136]. In this case, the calculation of the pension shall be made in accordance with the rules stated in that international instrument.[137]

As mentioned, SSCs signed by Portugal stipulate a direct calculation of the pension, stating that, where the person concerned satisfies the conditions of pension entitlement under the legislation of either Contracting Party without regard to the provisions of aggregation, the competent institution of that Contracting Party shall calculate the benefits solely on the basis of the periods completed under the legislation it applies. The SSC with the USA[138], specifically states that, where a person satisfies the conditions required by Portuguese law for entitlement to benefits solely by virtue of periods completed under the Portuguese legislation, the institution of Portugal shall calculate the amount of the benefits to which the person is entitled on the basis of (a) the periods of coverage completed exclusively under Portuguese law and (b) the person's average earnings credited exclusively under Portuguese law.

Reg. 1408/71 includes special provisions for the calculation of old-age and survivors pensions in case of people who have been subject to the legislation of two or more Member States in Title III, Chapter 3 (Art. 46 and seq.).

Article 46 of the Regulation regulates how benefits are to be calculated.
Article 46 (1)(a) regulates that in the case of entitlement without aggregation with qualification periods in other Member States, each Member State makes a benefit calculation according to:

i) its national legislation; as well as
ii) a *pro rata temporis* calculation according to Article 46 (2).

After these calculations have been made, the higher of those two amounts applies [Art. 46 (3)].

The *pro rata temporis* calculation can be waived with, however, if it is equal to or smaller than the amount resulting from the calculation according to national legislation [see Article 46 (1) (b)]. In Annex IV, part C, to the Reg. 1408/71 Portugal has listed Invalidity, Old Age and Widows' pensions, as cases in which a *pro rata temporis* can be waived with.

[136] Art. 14 of Decree-Law 329/93, of 25 September.

[137] Art. 39 (2) of Decree-Law 329/93, of 25 September.

[138] See Art. 10 (2).

In case of aggregation of insurance periods, according to Art. 46 (2) (a), a theoretical amount which the person concerned would be entitled to, if all the periods of insurance and/or residence completed by him in Member States had been completed in the Member State in question, must first be calculated.

If the national legislation of that Member State provides that a credited period after the insurable event is taken into account for the fixation of the amount of benefit due, such period is also to be taken into account for the calculation of the theoretical amount[139].

Afterwards, the actual amount must be calculated according to Art. 46 (2) (b):
The actual amount = theoretical amount x (actual insurance period in the Member State concerned / total of actual insurance periods in all Member States concerned)

This represents the actual period of insurance before the materialisation of the risk according to the legislation of the Member State calculating the benefit.

The person shall be entitled to the highest amount calculated in accordance with the previous two methods.

Furthermore, all SSCs signed by Portugal specify that if a Portuguese resident becomes entitled to benefits from the Contracting States under the SSC, and the amount of the combined benefits is less than the benefit amount which would be payable based on the minimum basic benefit amount payable under Portuguese laws, the competent institution in Portugal shall pay, in addition to the pro rata amount, a supplement equal to the difference between the amount of such combined benefits and the amount of benefits which would be payable to the person based on such minimum basic benefit amount.

Moreover, if the amount which the person concerned may claim under a Contracting State's legislation is greater than the sum of the elements of the pension calculated on a proportional basis, a supplement equal to the difference must be paid by the competent institution which applies this legislation. However, it should be noted that some bilateral instruments do not always use this system. In the absence of this safeguard, they allow those

[139] Whereas not for the calculation of the actual amount. See Decision 95, of 24 January 1974 of the Administrative Commission of The European Communities on Social Security for Migrant Workers).

concerned to opt for the separate payment of pensions under the various countries' legislations to which they have been subject, instead of joint payment. [140]

[140] We transcribe below Article 21 of the Model Provisions for a Bilateral Social Security Agreement and Explanatory, Report Committee of Experts for the application of the European Convention on Social Security, SS-AC (98) 6, approved by the Council of Europe.:

Article 21

Award of benefits

*Alternative 1:* ("Pro rata temporis" calculation)

1. Where a person has been subject successively or alternately to the legislation of both Contracting Parties, the institution of each Party shall determine, in accordance with the legislation it applies, whether such person or his survivors qualifies or qualify for benefit, having regard, where appropriate, to the provisions of Article 20.

2. Where the person concerned satisfies the conditions specified in paragraph 1 of this Article under the legislation of either Contracting Party without regard to the provisions of Article 20, the competent institution of that Contracting Party shall calculate the benefits solely on the basis of the periods completed under the legislation it applies.

3. Where the person concerned satisfies the conditions specified in paragraph 1 of this Article under the legislation of either Contracting Party, regard being had only to the provisions of Article 20, the competent institution of this Contracting Party shall calculate the benefit as follows:

(a) the competent institution shall calculate the theoretical amount of benefits payable if all the periods completed under the legislation of both Contracting Parties had been completed solely under the legislation which that institution applies;

(b) however, in the case of benefits the amount of which does not depend on the length of periods completed, that amount shall be taken to be the theoretical amount referred to in the preceding sub-paragraph;

(c) the competent institution shall then calculate the actual amount of benefit payable by it to the person concerned on the basis of the theoretical amount calculated in accordance with the provisions of sub-paragraph a or of sub-paragraph b of this paragraph, as appropriate, and in proportion to the relationship between the periods completed before the contingency arose under the legislation it applies and the total of the periods completed before the contingency arose under the legislation of both Contracting Parties;

(d) if the total of the periods completed under the legislation of both Contracting Parties before the contingency arose exceeds the maximum period required by the legislation of either Party for the receipt of full benefit, the institution of that Party shall, when applying the provisions of sub-paragraph a of this paragraph, take this maximum period into account instead of the total of the periods completed, without however being obliged to grant greater benefit than the full benefit provided for in the legislation it applies.

4. 4. Where the legislation of either Contracting Party provides that the amount of benefit, with the exception of means-tested benefit ensuring a minimum income, shall vary with the number of members of the family, the competent institution of that Party shall also take into account the members of the family resident in the territory of the other Contracting Party as if they were resident in the territory of the first Party.

*Alternative 2:* (Direct calculation)

1. Where, under the legislation of either Contracting Party entitlement to benefit also exists without the application of Article 20, the competent institution of that Party shall determine the amount of payable benefits solely on the basis of periods of insurance completed under that legislation.

2. Where, under the legislation of either Contracting Party entitlement to benefit exists only with the application of Article 20, the competent institution of that Party shall determine the amount of payable benefit solely on the basis of periods of insurance completed under that legislation and the following provisions:

**c) Anti-Discrimination Clauses**

Portugal usually follows Art. 24 OECD-MC, and in particular Art. 24 (6), and therefore the material scope of the non-discrimination clause is more extensive than that set out in Art. 2.

Irrespective of the nature of the employees' contributions - a tax (on the consumption of work or on the payroll expenses) or a fee, mandatory insurance premium, or para-fiscal contribution -, social security charges may be liable to scrutiny under Art. 24 (4) and (1), respectively.

As costs of an "enterprise", individual or corporate[141], the amounts paid by the employer qualify as "other disbursements" and are therefore deductible for the calculation of the taxable profits. The principle of neutrality supports such a conclusion. In fact, if costs incurred for the use of capital granted by a non-resident entity, namely interest and royalties, are entirely deductible under this rule (provided such treatment is ensured for payments to resident enterprises), work costs, whether salaries or social security charges, should have an identical treatment (again, provided such treatment is ensured for payments to resident enterprises). A conclusion to the contrary would mean that enterprises producing capital-intensive products would benefit therefrom and enterprises producing work-intensive products would be prejudiced. In this case, Art. 24 (4) provides protection to the taxpayer, and a level-playing field in the acquisition of production factors by resident enterprises.

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(a) benefits or parts of benefits the amount of which, under the legislation of either Contracting Party, does not depend on the duration of the periods of insurance completed shall be calculated in proportion to the ratio of the duration of the periods of insurance reckonable for the calculation under this legislation up to 30 years, but at most up to the full amount.

(b) where, under the legislation of either Contracting Party, subsequent to

periods the occurrence of the contingency are reckonable for the calculation of invalidity or survivors' benefits, those periods shall be reckoned only in proportion to the ratio of the duration of the periods of insurance to be taken into account for the calculation under this legislation

to two-thirds of the time between the date on which the person concerned reached the age of 16 and the date on which the contingency occurred, but at most up to the full period.

(c) sub-paragraph a shall not apply to:

(i) benefits resulting from supplementary insurance,

(ii) means-tested benefits ensuring a minimum income.

3. Where the legislation of either Contracting Party provides that the amount of benefits, with the exception of means-tested benefits for ensuring a minimum income, shall vary with the number of members of the family, the competent institution of that Party shall also take into account the members of the family resident in the territory of the other Contracting Party as if they were resident in the territory of the first Party

[141] See Art. 7 (1) OECD-MC, where it is evident that the term "enterprise" "applies to the carrying of any business" [as per Art. 3 (1) (c)] and refers indistinctively to corporations or individuals, particularly since the elimination of Art. 14 (see Commentary on the latter). The same conclusion is, therefore, valid for purposes of Art. 24 (4).

Individuals which are nationals of the other Contracting State cannot be discriminated openly, but a different treatment of individuals which are not "in the same circumstances, in particular with respect to residence", on the other hand, is admissible, under Art. 24 (1) OECD-MC. The provision seems to admit that there are circumstances, other than residence, that may provide a ground for distinctions. The lack of coherence between contributions and benefits, timing and taxpayer of taxable deductions and taxable income, and types of social security systems, may enable the tax authorities to argue that a non-national resident is not being directly discriminated if his foreign social security contributions are, for example, not deductible for purposes of his personal income tax. This would be especially true if the same principle applies to national residents *vis-à-vis* contributions to foreign social security systems, or if the non-national resident is a temporary (e.g. posted worker) resident.

This will create certain effects. If a country's system is structured in a way that the whole or main burden of the contributions is borne by employers, the corporate income tax deductibility and economic efficiency would be ensured by the OECD-MC, whereas in systems where part or all of the contributions are paid by the employees, and contributions to foreign Social Security systems are not deductible for purposes of personal income tax at the level of non-national residents, an effective financial burden would arise to them.

However, this might prove untrue in view of the ECJ jurisprudence in connection with the *Schumacker*[142], *Wielockx*[143] and *Danner*[144] cases. In accordance with the reasoning underlying these cases, the amounts paid by the taxpayer to the social security system of another EU country should be considered deductible for personal income tax purposes in case the taxpayer is a national of the latter, due to the prohibition of indirect discrimination on grounds of nationality (*Wielockx* case), or since the failure to allow this deduction would restrict the free provision of social security services by private or public entities (*Danner* case). And this conclusion is valid not only for the Residence State but also for the Source State, if a significant percentage of the salary is borne in such State (*Schumacker* case)[145].

Portugal's Ruling 14/2001, of 28 September, states that expenses incurred abroad in connection with alimony, retirement homes and insurance premiums, *inter alia*, are deductible for personal income tax (IRS) purposes.

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[142] Case C-279/93, Finanzamt Köln-Altstadt *vs.* Schumacker.

[143] Case C-80/94, Wielockx *vs.* Inspecteur der Directe Belastingen.

[144] Case C-136/00, Rolf Dieter Danner *vs.* Siilinjärven verotuksen oikaisulautakunta.

[145] On the *Schumacker* and *Wielockx* cases, see Pinheiro, *A Fiscalidade Directa na União Europeia*, 1998, pp. 136 et seq. and Noiret Cunha/Vasques, *Jurisprudência Fiscal Comunitária Anotada*, 2002, pp. 69 et seq..

However, interest and rental expenses in connection with housing are only IRS-deductible if the immovable is located in Portugal[146], and the sales proceeds of a permanent residential home to avoid IRS capital gain taxation can be reinvested only if the immovable in which the reinvestment is made is located in Portugal[147], provisions which hinder the freedom of movement of workers.

An Order of 30 May 1989 states that foreigners resident in Portugal that prove coverage by the mandatory social security of their State, have the right to deduct their contributions. However, another Order of 29 April 1991 considers that mandatory contributions to a foreign social security system are deductible for the computation of the dependent workers' IRS income provided that the taxpayer is not a beneficiary of the Portuguese social security.

This last condition seems to contravene the ECJ decisions, as it makes the deduction of social security contributions more burdensome for non-nationals, albeit resident in Portugal and subject to the IRS worldwide-income taxation principle, than for national residents. Furthermore, the enjoyment or non-enjoyment of benefits in Portugal paid by the Portuguese social security, or the accumulation of deductions to different EU social security systems should not be considered as a justification for not allowing the deduction of the contribution paid to a foreign mandatory system under the IRS, when that results from the application of Reg. 1408/71 or of SSCs. That is so because in such cases there will no longer be any internal coherence to justify such a discrimination (as in the *Bachmann*[148] case), but diversely an international coherence[149]. Given such international coherence, the decision of the *Bachmann* case will no longer be applicable, and the national relation between contributions and benefits is of no relevance. Finally, this conclusion is compatible with the solidarity nature of social security, namely that whatever one pays and receives is not necessarily equivalent, but, on the contrary, will be used for the benefit of others according to their needs.

The Case C-23/92, Maria *Grana-Novoa vs.* Landesversicherungsanstalt Hessen of 2 August 1993 was clearly overruled by Case C-55/00, Elide *Gottardo vs.* Istituto nazionale della previdenza sociale (INPS) of 15 January 2002. The latter case is in line with Case 235/87 *Matteucci* and Case C-307/97 *Saint-Gobain ZN*. In all these

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[146] See Adelaide Passos/Brito da Mana, Fundamental Freedoms for Citizens, Fundamental Restrictions on National Tax Law? – Portugal, *European Taxation*, Vol. 40, No. 1-2 (January-February), 2000, p. 71.

[147] See Commission press releases IP/04/938, of 16 July 2004 and IP/05/36, of 13 January 2005 (http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm).

[148] Case C-204/90, Bachmann *vs.* Belgian State.

[149] On the *Bachmann* case, see Pinheiro, *A Fiscalidade Directa na União Europeia*, pp. 132-33 and Noiret Cunha/Vasques, *Jurisprudência Fiscal Comunitária Anotada*, pp. 47 et seq..

cases, a person (company in *Saint-Gobain*, individuals in *Matteuci* and *Gotardo*) is entitled to derive benefits from a treaty concluded by a Member State other than his own. In spite of not having the normal entitlement to such treaty (residence in *Saint-Gobain*, nationality in *Matteuci* and *Gotardo*), the person is engaged in an economic activity (branch in *Saint-Gobain*, resident work in *Matteuci* and *Gotardo*) in a Member State party to the treaty which he tries to rely on, and therefore seeks *national treatment* (with the residents in *Saint-Gobain*, with the nationals in *Matteuci* and *Gotardo*). In Case C 376/03, the now famous *D* Case, the Dutch revenue authorities refused to grant D, who was resident in Germany, a wealth tax allowance on the 10% of his fortune that was held in the Netherlands. D claimed that this was discriminatory because Belgian residents were entitled to the allowance, according to the terms of the Netherlands-Belgium DTC. The ECJ said that a taxpayer who keeps a small part of his wealth in a Member State other than the one in which he lives is not in the same situation as the citizens of that Member State, and that in the context of the Belgium-Netherlands DTC, a Belgian tax resident was not in the same situation as a taxpayer that did not live in Belgium regarding wealth tax on property in the Netherlands, therefore denying the *most-favourable-nation concept*[150]. No inconsistency of the *D* Case with the former jurisprudence seems to exist.

[150] Therefore, the *Gottardo* Case, in view of the *D* Case, may not (fully) fulfil the possibility envisaged by Eicker, Recent Developments Regarding Cross-Border Pensions: Landmark Decision by the ECJ in the Case C-55/00 Gottardo, *Intertax*, Vol. 30, Issue 4, 2003, p. 156: "Although decided in the specific area of cross-border pension systems this ECJ ruling may serve as a door-opener to a more far-reaching doctrine – the doctrine of Community preference. According to this doctrine, which can be developed from Art. 10 of the EC Treaty, a Member State is generally required to grant all bilateral concessions concluded in an international treaty with a non-Member State to all other Community citizens outside the scope of this international treaty".

**d) Dispute Settlement**

Portugal has, is some cases, entered into Administrative Agreements (hereafter, AAs)[151] so as to establish liaison entities between the Social Security Administrations and implement the SSCs application.

Under some SSCs and AAs, any disputes that result from the application of the Convention are to be solved within a 6-month period[152], through direct contacts between the competent authorities. If these contacts do not solve the dispute, a special arbitration commission, subject to the procedure, composition and deadline rules to be agreed by the administrations[153], will be installed to decide it definitely.

In a second group of cases, there are mere statements of intention by the States on settling the dispute according to the purpose of the Convention[154]. However, it should be pointed out that this is not only characteristic of SSCs. DTCs concluded by Portugal have either too long terms for a final decision by the competent authorities as well, or no terms whatsoever.

The application of these mechanisms very much depends on the contacts between the competent liaison entities. In Portugal, this entity is the *Departamento de Relações Internacionais e Convenções de Segurança Social* (former designation) or *Departamento de Acordos Internacionais de Segurança Social* (current designation).

However, except for the first group of cases, there are apparently no directly applicable rules that individuals can avail themselves from, so as to claim the resolution of the problem affecting them. Without such rules, the individuals cannot demand a precise problem-solving behaviour from the Administration.

Considering the other group of cases, since there are no rules on the timing and procedures to designate the special arbitration commission that will ultimately solve the dispute[155], the individual will have no protection during the period of the dispute[156].

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[151] Among others, Australia, Chile, Sweden and Venezuela.

[152] Sometimes a fixed period is not established. See, for instance, Art. 27 of the Argentina SSC or Art. 35 of the UK SSC. In the Norway SSC, this period is reduced to 3 months.

[153] In the UK SSC, some of those rules are already defined on Art. 35.

[154] For instance, see Art. 29 of the Australia SSC, Art. 22 of the Canada SSC, Art. 23 of the Brazil SSC or Art. 37 of the Morocco SSC.

[155] Except for the UK SSC, it is clear that the vague rules resulting from most SSCs are insufficient.

[156] In some limited cases, e.g. benefits where, by their nature, the delay in solving the problem might have a

Although through the application of the general administrative procedure rules[157], namely a claim, the individual can obtain a decision on its application[158], he will most likely need to take legal action in court against the Administration[159].

As far as the exchange of information and assistance are concerned, SSCs signed by Portugal have a generally detailed regulation. Such regulation encompasses the exchange of information in particular cases (especially to avoid non-admitted double benefits by an individual), statistics on payments incurred in the other State, control of benefits and checking the fulfilment of requirements set out in the other State's legislation[160], and generally any relevant information[161].

The exchange of information can be directly established between the liaison entities or, indirectly, through the diplomatic channels. In the latter case, the representation of nationals is not dependent on any special power of attorney[162].

In conclusion, as far as dispute settlement is concerned, one can consider that the matter is more extensively regulated and potentially effective in the SSCs concluded by Portugal than in its DTCs[163].

significant impact on the individual, a preference in favour of granting those benefits to the individual would be recommendable.

[157] See Art. 77 of the GLSS.

[158] It shall be given priority to the analysis of such a claim, according to Art. 77 (3) of the GLSS. One very common legal right recognized by most SSCs entered into by Portugal concerns the validity of documents, claims or requests timely presented by an individual to the administration of one State with respect to the other country's legislation/administration.

[159] According to Art. 78 of the GLSS, the competence is attributed to the Administrative Courts.

[160] For instance, medical examinations or certificates.

[161] In some SSCs such as those with Sweden and Norway, the language used in the exchanged information is alternatively English or French.

[162] See, among others, Art. 33 of the Norway SSC.

[163] On this subject, see Silveira da Cunha, Settlement of Disputes in Portuguese Tax Treaty Law in *Settlement of Disputes in Portuguese Tax Treaty Law* [ed.(s.): Lang/Züger], 2002.