AN OVERWIEW OF REGULATION 883/2004 AND THE IBERO-AMERICAN MULTILATERAL AGREEMENT ON SOCIAL SECURITY[1]

SINOPSIS DEL REGLAMENTO 883/2004 Y EL CONVENIO MULTILATERAL IBEROAMERICANO DE SEGURIDAD SOCIAL

Prof. Dr. Cristina Sánchez-Rodas Navarro
University of Sevilla
Spain

ABSTRACT

Regulation 883/2004 and the Ibero-American Multilateral Agreement on Social Security both have the same objective: the coordination on Social Security systems. The second one is the first international instrument of its kind within the Ibero-American Community.

KEYWORDS: Coordination; Ibero-American Multilateral Agreement on Social Security; Social Security; Regulation 883/2004; OISS; Ibero-American Social Security Organization.

RESUMEN

El Reglamento 883/2004 y el Convenio Multilateral Iberoamericano de Seguridad Social tienen por finalidad la coordinación de sistemas de Seguridad Social. Este último se caracteriza porque es el primer instrumento internacional de estas características que se adopta en el seno de la comunidad Iberoamericana.

PALABRAS CLAVE: Coordinación; Convenio Multilateral Iberoamericano de Seguridad Social, Seguridad Social; Reglamento 883/2004; OISS; Organización Iberoamericana de Seguridad Social.

[1]Work carried out in the frame of the Project Red de Excelencia "Coordinación de los Sistemas de Seguridad Social en la Unión Europea e Iberoamérica" (DER2015-69364-REDT) financed by the Spanish Ministry of Economy and Competitivity.

SUMMARY

I. REGULATION 883/2004 ON THE COORDINATION OF SOCIAL SECURITY SYSTEMS

A. BACKGROUND

B. OBJECTIVES

II. GENESIS OF MULTILATERAL IBEROAMERICAN SOCIAL SECURITY AGREEMENT

III. PARALLELS AND DIVERGENCES BETWEEN REGULATION 883/2004 AND MULTILATERAL IBERO-AMERICAN SOCIAL SECURITY AGREEMENT

IV. APPROACH TO THE CONCEPT OF COORDINATION

V. PILLARS OF COORDINATION IN THE REGULATIONS 883/2004 AND MULTILATERAL AGREEMENT ON IBEROAMERICAN SOCIAL SECURITY

A. UNIQUENESS OF THE APPLICABLE LEGISLATION

B. EQUALITY IN TREATMENT

C. AGGREGATION OF PERIODS

D. WAIVING OF RESIDENCE RULES

VI. SUBJECTS PROTECTED BY THE MULTILATERAL AGREEMENT AND REGULATION 883/2004

VII. SCOPE OF MATERIAL APPLICATION

A. EXCLUDING SPECIAL SCHEMES CONTAINED IN ANNEX I

B. EXCLUSION OF BENEFITS INCLUDED IN ANNEX II

VIII. CONCURRENCE OF MULTILATERAL CONVENTION AND OTHER INTERNATIONAL INSTRUMENTS

IX. CONCURRENCE OF REGULATION 883/2004 AND OTHER INTERNATIONAL INSTRUMENTS

X. PERSONAL DATA PROTECTION

XI. CONCLUSIONS

I. REGULATION 883/2004 ON THE COORDINATION OF SOCIAL SECURITY SYSTEMS

A. BACKGROUND

In order to facilitate the right to free movement of workers, Article 51 of the Treaty establishing the European Community, now Article 48 of the Treaty on the Functioning of the European Union, proclaims that the European Parliament and the Council will adopt with regards to social security, the necessary measures to provide freedom of movement for workers, creating, in particular, a system which will secure the following for employed and self-employed migrants and their dependents:

a) the accumulation of all periods taken into consideration by the various national laws to acquire and retain the right to social benefits as well as the calculation of them.

b) payment of benefits to persons resident in the territories of the Member States.

This mandate was developopped by Regulations 3/58 and 4/58 which were replaced by Regulations 1408/71 and 574/72, which in turn were repealed with the entry into force in 2010 of Regulation 883/2004 on the coordination of social security systems and its implementing Regulation 987/2009. These Regulations effectively deployed in all States in which European Union law applies[2].

B. OBJECTIVES

Among the causes that led to the enactment of Regulation 883/2004 it should be noted that successive and frequent reforms that Regulation 1408/71, underwent throughout the decades during which it was in effect, caused the resulting text to be not only lengthy but extremely complex and difficult to understand.

The adaptation of the Regulation not only to changes in national legislation, but also to the jurisprudence of the Court of Justice of the European Union were additional needs. This is easily illustrated by the fact that the preliminary ruling 290/00 (Duchon) inspired the wording of Article 5 of Regulation 883/2004; the 368/96 (Vanbraeckel) Article 26.7 of Regulation 987/2009; and 178/97 (Banks) Articles 5.1 and 6.3 of Regulation 987/2009.

Other reason that prompted the adoption of Regulation 883/2004 was the need to modernize, clarify, simplify, and strengthen administrative cooperation between States and increase the rights of individuals.

Regulation 883/2004 also aims to increase the rights of citizens in the field of European coordination which is embodied, for example, in Articles 2 and 3 of Regulation 987/2009.

Besides, the effort is evidenced by implementing more efficient administrative procedures, improving reimbursement procedures, strengthening cooperation and streamlining the exchange of information between administrations.

[2]Judgment of the Spanish Surpreme Court from 13.7.1991. (RJ.5985): from 1.1.1986, date on which the Treaty of Accession became effective, Spain took on the same duties as the rest of member States.

Not only in all member States of the European Union Regulation 883/2004 on the coordination of social security systems is directly applicable, but also in Iceland, Norway, Liechtenstein and Switzerland.

II. GENESIS OF MULTILATERALIBEROAMERICAN SOCIAL SECURITY AGREEMENT

Since its inception, the Multilateral Agreement has been closely linked to the Ibero-American Social Security Organization (ISSO). It was precisely at the congress that the latter organized in 2004 where the idea of its drafting arose.

The idea began to materialize from 2005 on the occasion of the V Ibero-American Conference of Ministers/Heads of Social Security, held in Segovia, in order to "have a single instrument for coordinating national legislation on pensions with full legal certainty, guarantees the rights of migrant workers and their families protected under the Social Security schemes of the different Ibero-American States".

The draft Multilateral Agreement was adopted two years later, on the occasion of the VI Ibero-American Conference of Ministers and Heads of Social Security in Chile in 2007. The final text was approved that same year during the XVII Ibero-American Summit of Heads of State and Government held in Santiago de Chile.

It is written in Spanish and Portuguese, both being equally authentic. Its structure,comprises 35 articles, divided into 6 Titles and 5 Annexes.

As far as Spain is concerned, the Multilateral Ibero-American Social Security Agreement was ratified in 2010 and published, together with its Implementing Agreement (2009) in the Official State Bulletin (BOE) of 8 January 2011. It entered into force in Spain on 1 May 2011.

III. PARALLELS AND DIVERGENCES BETWEEN REGULATION 883/2004 AND MULTILATERAL IBERO-AMERICAN SOCIAL SECURITY AGREEMENT

The Multilateral Agreement does not aim to harmonize or even unify the Social Security systems of the signatory States, but has a much narrower purpose: to coordinate contributory Social Security benefits of the signatory countries (15 States have signed it, 12 have ratified it, and it is in force currently in 9 countries)[3].

It is an international instrument to facilitate the free movement of workers within the Ibero-American Community.

There is no doubt that the wording of the articles of the Multilateral Agreement is inspired by Regulation 883/2004, as there are numerous items in the first which copy precepts verbatim from the second[4].

[3]It is legally necessary for the application of the Multilateral Convention signing the instrument of implementation by Signatory States, as far as it is not enough with the ratification of this Convention.

[4]Cfr. Arellano Ortiz, P., "Reception of Social Security Coordination in the Ibero-American Region. A process following the European Experience" in: Sánchez-Rodas Navarro, C.; (Dir.); Good Practices in Social Law. Thomson-Aranzadi. 2015; pp.251-165.

However, unlike the rules of the European Union to coordinate Security Systems, the Ibero-American Agreement is a "pioneering experience that aims to reach an agreement on social security in an area where there is no prior political association to providea legal substratum which could provide support"[5].

Another obvious divergence between the Regulation 883/2004 on the coordination of Social Security systems and the Multilateral Agreement is the different territorial scope of each. In fact there are only two States of the European Union where the Multilateral Convention applies: Spain and Portugal.

Also, in terms of law sources, it should be noted that Regulation 883/2004 is a provision of secondary legislation emanating from the institutions of the European Union, in which the notes of primacy and direct effect are preached; while the Multilateral Agreement is an international Treaty whose implementation in the signatory States received by the national law is needed.

For practical purposes the most remarkable difference in terms of the interpretation and application of both instruments of coordination lies in the fact that at the level of the European Union there is a supranational Court (the Court of Justice of the EU) which is the ultimate interpreter of EU law and whose decisions must be respected by national courts. As far as the Multilateral Agreement is concerned, national courts shall have exclusive jurisdiction to apply it.

IV. APPROACH TO THE CONCEPT OF COORDINATION

Neither within the scope of European Union law or the articles of the Multilateral Convention is there a legal definition of coordination.

Although from the jurisprudence of the Court of Justice of the EU it is inferred that coordination[6] is characterized by the following notes:

-Coordination does not mean unification and harmonization of Social security systems.

-Nor does it entail the repeal, reform or amendment of national Social Security systems that remain coordinated with all their peculiarities.

-It does not ban sovereign powers of States from legislatingin the field of Social Security.

-Coordination is not an end in itself but a tool to facilitate the free movement of workers within the Iberoamerican Community (with regards to the Multilateral Agreement) and in the area of the Union European with regard to Regulation 883/2004.

---

[5] Jiménez Fernández, A.; "Convenio Multilateral Iberoamericano de Seguridad Social" in: El Futuro de la Protección Social. Laborum. 2010; p.375.

[6] Compared with the traditional term coordination Miranda Boto intends to use a new terminology "joint Social Security systems". See Miranda Boto, J.M.; "El Estadio Previo: Algunos Problemas Terminológicos de la Seguridad Social Comunitaria" in: Sánchez-Rodas Navarro, C.; (Dir.); El Reglamento Comunitario. Nuevas Cuestiones. Viejos Problemas. Laborum. 2008; pp. 26-28.

-Coordination allows the safeguarding of acquired rights and prospective entitlement of those by migrants in the field of social security, preventing migrant workers see their social security rights and/or expectations of them depleted.

-Through coordination both Regulation 883/2004 as the Multilateral Agreement guarantee subjects included within their respective scopes of treatmentequal to that given to nationals.

V. PILLARS OF COORDINATION IN THE REGULATION 883/2004 AND MULTILATERAL AGREEMENT ON IBEROAMERICAN SOCIAL SECURITY

In both legal instruments the coordination principle is built around four key pillars:

A. UNIQUENESS OF THE APPLICABLE LEGISLATION

In order to avoid overlapping of national legislations with subsequent problems involved for migrant workers and national social security institutions, Article 9 of the Multilateral Agreement and Articles 11-16 of the Regulation 883/2004 opt for the principle of a single applicable law.

This implies that migrant workers are subject to a single legislation, which as a general rule will be that of the State in which the employee performs services as an employee or self-employed ("lex loci laboris").

B. EQUALITY IN TREATMENT

Migrant workers who were subject to the legislation of a country different from theirs would not find themselves at disadvantage compared to nationals.

It is enshrined in Article 4 of the Ibero-American Multilateral Agreement and Article 4 of Regulation 883/2004, respectively.

C. AGGREGATION OF PERIODS

When the recognition of a Social Security benefit is subordinated by national law to comply with periods of of insurance, employment or self-employment, migrant workers are in crucial need of mechanisms to prevent that, simply because they have exercised an activity in various States they are undermined their rights regarding Social Security acquired, or in the course of being acquired under the legislation of one or more Member States[7].

Hence it is vital that all contribution periods accredited under many national laws can be computed, if necessary, for the recognition of the provision of requested Social Security. In such cases, as a rule, the economic benefit will be paid by the respective States in proportion to the periods completed under different legislations.

This matter is governed by Article 5 of the Multilateral Agreement and by Article 6 of Regulation 883/2004, respectively[8].

---

[7]Rojas Castro, M.; Derecho Comunitario Social. Guía de Trabajadores Migrantes. Comares. 1993; p.97.

[8]Not applicable to pre-retirement benefits coordinated by Regulation 883/2004.

D. WAIVING OF RESIDENCE RULES

It is also known as the principle of export of benefits.

It translates into a ban on reduction, suspension, modification, withdrawal or confiscation of a Social Security benefit by the mere fact that the beneficiary has taken up residence in a Member State of which lies the institution.

The suppression of the residence clause is therefore intended to promote the free movement of workers by protecting those concerned from any loss that could result from transferring their residence from one Member State to another[9].

It is regulated in Article 6 of the Multilateral Convention and Article 7 of Regulation 883/2004.

VI. SUBJECTS PROTECTED BY THE MULTILATERAL AGREEMENT AND REGULATION 883/2004

The Multilateral Agreement shall apply to persons who are or have been subject to the legislation of one or more States Parties, as well as their beneficiaries (Article 2 Multilateral Agreement).

According to its Article 2.1, Regulation 883/2204 shall apply to nationals of a Member State, 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 the members of their families and to their survivors.

Article 2.2 Regulation 883/2004 declares that it shall also apply to the survivors of persons who have been subject to the legislation of one or more Member States, irrespective of the nationality of such persons, where their survivors are nationals of a Member State or stateless persons or refugees residing in one of the Member States.

Since the enactment of Regulation 3/58, through Regulation 1408/71 to the current Regulation 883/2004, the numerous reforms in the personal scope of the Regulations on the coordination of Social Security systems culminated in the inclusion of all insured persons, whether active or not.

The most remarkable difference in this point between the Multilateral Agreement and Regulation 883/2004 is that there is no reference whatsoever into the Multilateral Agreement to the nationality requirement. Instead it is required by Regulation 883/2004.

Therefore, the necessary conclusion to be drawn is that the personal scope of the Multilateral Agreement is not limited to nationals of the States Parties, but it will also be applicable to foreign nationals of Third States, refugees and stateless persons, who are or they have been subject to the Social Security legislation of any/s of the States Parties.

One might therefore consider that the text of the Multilateral Agreement is more progressive than that of Regulation 883/2004.

[9] Sánchez-Rodas Navarro, C.;"La Nueva Regulación de las Prestaciones No Contributivas. La Aplicación de Cláusulas de Residencia". Noticias de la Unión Europea nº 157/1998.; pp.57-66.

But this conclusion is erroneous after a systematic reading of the Multilateral Agreement: although not expressly mentioned in the Article 2 Multilateral Agreement foreigners could only invoke the provisions of this Agreement when they are "legal" or "regular" workers. It follows from the fact that such a requirement is necessary to be subject protected by contributory social security schemes of the States parties in which the Multilateral Agreement applies.

Second, the European provisions on the coordination of Social Security systems currently in Regulation 883/2004 also apply to foreigners from Third States. Also, under the express provisions of Regulation 1231/2010, its application of this group is subordinate to "the person concerned being already legally resident in the territory of a Member State". Being legally resident is therefore a prerequisite for the implementation of Regulation 1231/2010.

In view of the foregoing, the conclusion reached is that nationality is not a compulsory requirement to apply the rules of existing coordination in the European Union as neither is to be included in the scope of Ibero-American Multilateral Agreement on Social Security.

By contrast, in both cases it will be necessary that the persons included under their scopes have the status of migrants in regular or legal situation.

On another note, and in relation to the personal scope of the Multilateral Agreeemt and Regulation 883/2004 it can be seen how both lack one thing: they do not specifically address the question of whether family members and dependents of the subjects covered by the Multilateral Agreement and by Regulation 883/2004 may invoke the rights conferred by them as their own rights or as derived precisely from such a condition of relatives or heirs.

In the framework of the European Union this has generated a contradictory jurisprudence in the European Court of Justice[10].

VII. SCOPE OF MATERIAL APPLICATION

Undoubtedly the material scope of Regulation 883/2004 is much larger than the Multilateral Agreement.

Firstly, it should be noted that while Regulation 883/2004 coordinates both contributory and non-contributory Social Security benefits, the Multilateral Agreement only includes contributory benefits.

Also the list of contingencies coordinated by Regulation 883/2004 is much higher than the Multilateral Agreement since the latter applies only to “the branches of social security relating to provision of invalidity; economic old-age benefits; economic survivors' benefits; and economic benefits of workplace accidents and occupational diseases”(Article 3.1).

It is also worth noting that the Multilateral Agreement shall only apply to Social Security benefits of a financial nature, excluding benefits in kind. While Regulation 883/2004 coordinates both economic benefits and benefits in kind.

[10] Sánchez-Rodas Navarro, C.; “El Impacto de la sentencia Cabanis sobre la Protección dispensada por el Derecho Comunitario a los Familiares del Trabajador Migrante”. Temas Laborales nº 45/1997; pp. 167-180.

The Multilateral Agreement excludes from its scope the application of material medical benefits, and it establishes in Article 3.1 *in fine* that “the medical benefits provided for in the laws of the States Parties are excluded from this Convention, notwithstanding the provisions of paragraph 5 of this article”. Article 3.5 provides that “two or more States Parties to this Convention may extend the objective of the field, extending it to services or regimes excluded in principle. Bilateral or multilateral agreements by which that extension and the effects thereof will proceed to be entered in the Annex III”. For now, that Annex III is devoid of content.

Despite the exclusion of medical services from the scope of the Multilateral Agreement and as far as Spain is concerned, we must remember the Organic Law 4/2000 on rights and freedoms of foreigners in Spain and their social integration, which it has been the subject of successive legal reforms. In accordance with Article 12 “foreigners are entitled to health care under the terms provided in the legislation on health”, which brings us to Article 3b of Law 16/2003 on Cohesion and Quality of the National Health System, introduced by Royal Decree-law 16/2012.

A. EXCLUDING SPECIAL SCHEMES CONTAINED IN ANNEX I

Under the stated in Article 3.2 of the Multilateral Agreement, Spain has notified in Annex I the “special schemes for civil servants of the State, the Armed Forces and the Administration of Justice”.

Excluding these schemes leads to the exclusion of an extense group of civil servants from the personal scope of the Multilateral Agreement (but not of the Regulation 883/2004, which does apply to them).

B. EXCLUSION OF BENEFITS INCLUDED IN ANNEX II

In accordance with Article 3.3. Multilateral Agreement “this Agreement shall not apply to financial benefits outlined in Annex II, that under no circumstances may include any of the branches of social security referred to in paragraph 1 of this article”'. It is in Annex II where Spain reported the death grant.

VIII. CONCURRENCE OF MULTILATERAL AGREEMENT AND OTHER INTERNATIONAL INSTRUMENTS

Article 8 of the Multilateral Agreement provides that it “will fully apply in all cases where there are no bilateral or multilateral existing Social Security Conventions among States Parties. If there are bilateral or multilateral agreements the provisions that are most favorable to the beneficiary shall apply. Each State Party shall inform the General Iberoamerican Secretariat, through the General Secretaryof the ISSO, bilateral and multilateral agreements that are in force between them, then, the General Iberoamerican Secretariat which shall register them in Annex IV to this Agreement. Once this agreement in force, States Parties of bilateral or multilateral agreements included in Annex IV determine the most favorable provisions thereof and shall inform the Secretary General of the ISSO”.

From that provision it follows that the Multilateral Agreement does not affect existing international agreements signed by the States Parties. Moreover, if the provisions of the latter are more favorable to migrant workers these shall prevail against the regulations contained in the Multilateral Agreement itself.

It also follows that when making the most favorable comparison it has not been opted for the technique of “conglobamento” (more favorable on the whole) but that of “gleaning” (more favorable provisions of each international instrument) .

IX. CONCURRENCE OF REGULATION 883/2004 AND OTHER INTERNATIONAL INSTRUMENTS

Regulation 883/20004, in simplifying the content of Article 1, which contains definitions of the most relevant concepts, omits any definition of a “Social Security convention”.

In all events, and bearing ECJ case law in mind, it must be concluded that Social Security conventions are included in the wideranging Community concept of legislation which should be considered to refer to the body of national measures applicable in this field.

Article 8 of Regulation 883/2004 reads “this Regulation shall replace any social security convention applicable between Member States falling under its scope. Certain provisions of social security conventions entered into by the Member States before the date of application of this Regulation shall, however, continue to apply provided that they are more favourable to the beneficiaries or if they arise from specific historical circumstances and their eff ect is limited in time. For these provisions to remain applicable, they shall be included in Annex II”.

This rule can be deemed deficient, since due to their vagueness: to appreciate what is “more favourable to the beneficiaries” is a subjective question on which Member States and the persons included in the personal scope of these Social Security conventions may not agree, especially when ECJ case law has accepted the “most favourable interpretation” criterion, not a global assessment, to determine what is most favourable to the migrant.

In all events, and despite the clarity of Article 8 of Regulation 883/2004, from which can be inferred without any doubt whatsoever the preferential application of the quoted Regulation rather than any provisions of a Social Security convention not included in Annex II, we must wait and see how this Article is applied by the ECJ and whether or not it maintains the Rönfeldt doctrine.

Moreover, it must be pointed out in this field the Recommendation No H1 of 19 june 2013, according to which the advantages enjoyed by a State's own nationals under a bilateral convention on Social Security with a non-member country must also be granted to workers who are nationals of other member States. In particular, the Administrative Commission recommends to the competent services and institutions that:

> “In accordance with the principle of non-discrimination between a State's own nationals and the nationals of other Member States who have exercised their right to move freely pursuant to Article 21(1) and Article 45(1) of the Treaty on the Functioning of the European Union, the provisions under a convention on social security with a third country shall in principle also apply to nationals of the other Member States who find themselves in the same situation as the State's own nationals.
>
> New bilateral conventions on social security concluded between a Member State and a third country should in principle make specific reference to the principle of non-discrimination, on the grounds of nationality, against nationals of another Member State who have exercised their right of free movement to or from the Member State which is a party to the convention concerned.

> The Member States should inform the institutions in the countries with which they have signed social security conventions, whose provisions apply only to their respective nationals, about the implications of this Recommendation. Member States which have concluded bilateral conventions with the same third countries may act jointly in requesting such cooperation. This cooperation is clearly essential if EU law is to be complied with".

X. PERSONAL DATA PROTECTION

Both Regulation 883/2004 and the Agreement on Implementation of Multilateral Iberoamerican Agreement devote a separate article to the question of the protection of personal data (Article 7 in the first case, Article 5 on the second).

Both instruments are inspired by the same premise: when the communication of personal data to another foreign institution is necessary in order to implement the Regulation or Multilateral Agreement, such communication shall be governed by the legislation on protection of personal data of the issuing state.

By contrast, the law on data protection of the receiving State of such communications with regard to protection, registration, modification or destruction of data will be the one to prevail.

XI. CONCLUSIONS

The wording of the Ibero-American Multilateral Agreement on Social Security is undoubtedly inspired by the body of the Regulation 883/2004.

Both of them are aimed at the coordination of social security systems .

The personal and material scope of the Multilateral Agreement is narrower than that of Regulation 883/2004.