Chapter III
EC Regulations and International Conventions on Social Security

Dr. Cristina Sánchez-Rodas Navarro
University of Seville

I. From the concept of Social Security convention under Regulation 1408/71 to the silence of Regulation 883/2004

According to Article 1.k) of Regulation 1408/71,"social security convention means any bilateral or multilateral instrument which binds or will bind two or more Member States exclusively, and any other multilateral instrument which binds or will bind at least two Member States and one or more other States in the field of social security, for all or part of the branches and schemes set out in Article 4 (1) and (2), together with agreements, of whatever kind, concluded pursuant to the said instruments".

On the other hand, 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 wide-ranging Community concept of legislation[13] which should be con-

13 Article 1.l) Regulation 883/2004:"legislation means, in respect of each Member State, laws, regulations and other statutory provisions and all other implementing measures relating to the social security branches covered by Article 3(1).

sidered to refer to the body of national measures applicable in this field[14].

II. ECJ case law on the application of the most favourable Social security conventions

until 1991, the ECJ had been of the opinion that, within the scope of EC Regulations on social security, such Regulations should take precedence over social security conventions concluded before their entry into force between Member States. This is because the principle of replacement by the Regulations of the provisions of social security conventions between Member States was mandatory and did not allow for exceptions, save for the cases expressly set out in the Regulations themselves[15].

However, the ECJ recognised that in the case of concurrence with an international social security convention which had expressly been declared applicable in Annexe III of Regulation 1408/71, the social security convention would take precedence unless the Regulation was more beneficial, in which case the Regulation would be applicable.

A. Rönfeldt, Kaske and Wachter case law

Surprisingly, in a radical change from previous case law, in the Rönfeldt[16] case, the ECJ held that "although it was clear from Articles 6 and 7 of Regulation 1408/71 that the replacement by the regulation of the provisions of social security conventions between Member States was mandatory in nature and did not allow of exceptions, save for the cases expressly set out in the regulation, nevertheless, consideration had to be given to whether, when such replacement has the effect of placing workers in a less favourable position as regards some of their rights

14 ECJ Bozzone (31.3.1977, case C-87/76).
15 ECJ Walder (7.6.1973, case C-32/72).
16 ECJ Rönfeldt (1991, case C-227/89).

than was accorded to them under the previous system, it is compatible with the principle of freedom of movement for workers under Articles 39 EC and 42 EC. Those Articles must be interpreted as precluding the loss of social security advantages for the workers concerned which would result from the inapplicability, following the entry into force of Regulation 1408/71, of conventions operating between two or more Member States and incorporated in their national law."

It can be inferred from the context of the Rönfeldt judgement that, furthermore, the comparison to be made between the Regulation and the bilateral social security convention is not just an overall comparison, but a comparison of each and every one of the coordination rules contained in the Regulation and in the convention, in order to apply the provisions which are most favourable to the worker. That is, the ECJ opts for the "most favourable interpretation" criterion.

The Rönfeldt doctrine is also applied in the Wachter case[17], in which the ECJ declares that "in the case in the main proceedings, it is not disputed that the person concerned had settled in Austria in order to live and work there before the entry into force in that Member State of Regulation 1408/71, whose provisions, save as otherwise provided, replace those of the 1966 German-Austrian Convention. It cannot be accepted that such replacement can, in some circumstances, deprive a person in the position of Mr. Wachter of the rights and advantages accruing to him under the 1966 German-Austrian convention".

As the Kaske case[18] makes clear, the reply given in the Rönfeldt judgment "relates to all social security advantages covered by Regulation 1408/71, whether they are acquired once and for all or whether they cover the insured for a temporary period. In that connection it must be observed that, whilst the principles laid down in Rönfeldt relate to retirement benefits, which are undoubtedly characterised by immutability, they also apply to invalidity benefits which, like unemployment benefit, can vary and, in certain cases, be temporary. There is there-

17 ECJ Wachter (18.12.2007, case C-450/05).
18 ECJ Kaske (5.2.2002, case C-277/99).

fore no real qualitative difference between those various benefits in terms of their classification in Rönfeldt as social security advantages".

B. The Thévenon case

With the Thévenon[19] judgement, the ECJ modified its doctrine without invalidating the conclusions that we have inferred from the Rönfeldt case.

The fact is that in the Thévenon case, the applicant had never exercised his right to freedom of movement before the entry into force of Regulation 1408/71, which is why the ECJ rejected his demand that the Franco-German convention replaced by Regulation 1408/71 be applied to him. In other words, the Court made clear that the Rönfeldt principle could not, however, apply to workers who did not exercise their right to freedom of movement until after the entry into force of that Regulation".

In the Thévenon case, therefore, the ECJ limited itself to recognising a question which the Rönfeldt judgement did not resolve: in the future, can workers who have not been subject to a social security convention before it was replaced by EU Regulations invoke the application of more favourable clauses of such a convention?

The ECJ denies such a possibility. This is logical since, otherwise, it would be impossible to repeal some bilateral conventions, which would be an absurd situation.

III. Regulation 883/2004 and Annex II

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

19 ECJ Thévenon (9.11.1995, case -475/93).

historical circumstances and their effect is limited in time. For these provisions to remain applicable, they shall be included in Annex II…".

In essence, there is no radical difference between Article 8 of Regulation 883/2004 and Article 6 of Regulation 1408/71, given that, in both, the application of social security conventions is subject to their inclusion in by Member States in a specific Annex.

Secondly, the new rules in this field can also 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.

This matter is particularly sensitive in the case of Spanish migrants, as can be seen by the number of judgements given by the Spanish Supreme Court accepting the demands of migrant workers that their benefits be calculated under the terms of the most favourable bilateral social security conventions and not EU Regulations.

IV. Bilateral conventions between a member State and third countries

A. The Grana-Novoa case

In Grana-Novoa[20] the applicant, who was a Spanish national, had performed work subject to compulsory social insurance, first in

20 ECJ Grana-Novoa (2.8.1993, case C-23/92).

Switzerland and subsequently in Germany. The German authorities refused her a German invalidity pension on the ground that she had worked for an insufficient number of years in Germany. Mrs Grana-Novoa sought to rely on the provisions of a convention concluded between the Federal Republic of Germany and the Swiss Confederation, application of which was limited to German and Swiss citizens, in order to have account taken of the periods of insurance which she had completed in Switzerland.

The ECJ found that "Articles 3(1) and 1(j) of Regulation 1408/71 must be interpreted as meaning that the concept of "legislation" referred to in those articles does not cover the provisions of international social security conventions concluded between a single Member State and a non-member State. That interpretation is not invalidated by the fact that such conventions have been incorporated as statute law into the domestic legal order of the Member State concerned".

B. The Gottardo case

The judgement of the ECJ of 15.1.2002, in C-55/00 (Gottardo) radically modified the doctrine laid down in the Grana-Novoa case.

Mrs Gottardo, who is Italian by birth, renounced that nationality in favour of French nationality following her marriage to a French national. She worked as a teacher in Italy, Switzerland and France and paid social security contributions in each of those three countries. Her wish to obtain an old-age pension in Italy, however, could not be realised because - even if the Italian authorities were to take account of the periods which she had completed in France - aggregation of the Italian and French periods would not enable her to achieve the minimum period required under Italian law. She would, however, be entitled to an Italian old-age pension if account were also taken of her Swiss contributions in the overall calculation of her contributions pursuant to the aggregation principle which underlies the 1962 Italo-Swiss convention on social security.

The application made by Mrs Gottardo in Italy was, however, rejected on the sole ground that, as a French national, the Italo-Swiss convention did not apply to her.

According to the Court, the case thus involves a difference in treatment based on nationality. It further points out that, when giving effect to commitments assumed under international agreements, Member States are required to comply with their obligations under Community law.

Consequently, when a Member State concludes a bilateral international convention on social security with a non-member country which provides that account is to be taken of periods of insurance completed in that non-member country for the purpose of acquiring entitlement old-age benefits, the fundamental principle of equal treatment requires that that Member State grant nationals of other Member States that are not parties to that convention the same advantages as those which its own nationals enjoy under that convention.

Although the facts of the Grana-Novoa and Gottardo cases are substantially similar, in the Gottardo case the ECJ held that "the competent social security authorities of one Member State are required, pursuant to their Community obligations under Article 39 EC, to take account, for purposes of acquiring the right to old-age benefits, of periods of insurance completed in a non-member country by a national of a second Member State in circumstances where, under identical conditions of contribution, those competent authorities will take into account such periods where they have been completed by nationals of the first Member State pursuant to a bilateral international convention concluded between that Member State and the non-member country".

In the face of this disparity of criteria held by the ECJ, we can only share the sentiments of the Advocate General, Mr. Dámaso Ruíz-Jarabo Colomer when he admitted that "I find it worrying that differing solutions are provided when the circumstances are practically the same and the Community provisions in force are identical"[21].

21 Conclusions presented on 5.4.2001, paragraph 31.

This is, without doubt, a serious problem in the application of Community Law, since the highest authority in the matter is the ECJ. It has been seen how, too frequently and within a short space of time, the ECJ changes its own case law without giving legal justification for the change in criteria, all of which creates a profound sense of legal uncertainty.

1. The Gottardo judgement and the recommendation of 12 june 2009 of the Administrative Commission for the coordination of Social Security Systems

The Recommendation concerns the Gottardo judgment in which the Administrative Commission recommends "to the competent services and institutions that:

> "1. In accordance with the principle of equal treatment and 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 39 of the EC Treaty, the advantages as regards pensions which are enjoyed by a State's own workers (employed and self-employed persons) under a convention on social security with a non-member country are also, in principle granted to workers (employed and self-employed persons) who are nationals of the other Member States and are in the same situation in objective terms.
> 2. New bilateral conventions on social security concluded between a Member State and a non-member country should 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 in the Member State which is a party to the convention concerned.
> 3. The Member States should inform the institutions in countries with which they have signed social security conventions whose provisions apply only to their respective nationals about

the implications of the Gottardo ruling and should ask them to cooperate in applying the ruling of the Court. Member States which have concluded bilateral conventions with the same non-member countries may act jointly in requesting such co-operation. This cooperation is clearly essential if the ruling is to be complied with.

It must be underlined that the content of this recommendation adopted on the basis of Article 71(2) of Regulation 883/2004 reproduced, word for word, the text of Recommendation Nº 22, of 18 June 2003, adopted on the basis of Regulation 1408/71".