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National Approaches by EU Member States to Concluding Bilateral Social Security Agreements with Third Countries: Hungarian Experiences

ABSTRACT

In this study we are looking for the answer to the question of what kind of Hungarian specific aspects can be identified and what national interests and circumstances determine the Hungarian legislation, when concluding bilateral agreements on social security coordination. Not only EU membership itself, but the preparation for it had an important impact on the Hungarian regulatory goals, the applied tools and the formation of the room to manoeuvre in this field. We can conclude that EU principles essentially define the rules and tools of modern Hungarian bilateral agreements.

The fast development of the EU legislation in the field of social security also soundly defines the national room for manoeuvre when concluding agreements at bilateral level with third countries. Taking the *Gottardo* case into consideration in particular, we can see that there is a very clear EU impact on those rules. We analysed several specific issues that are relevant in modern Hungarian agreements in respect of the EU law impact:

- the scope of the agreements (material, personal);
- the applicable legislative rules and some specific benefits under the scope of the agreements;
- the principles in the agreements and the assimilation of facts especially.

In conclusion it is clear that Hungary has an effective bilateral system of tools that protect the rights of those affected by mobility. This is a stable set of tools and altogether a system that can operate for many decades. However, it is also clear that it worth building on, and on this basis to develop the system of agreements further.

KEYWORDS: bilateral social security agreements, protection of social security rights, EU and agreement principles, *Gottardo* case, applicable legislation

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I. INTRODUCTION

There are many different approaches for securing the rights of citizens and aiming at avoiding conflicts of law in the field of social security. It is not surprising when a person is obliged to accept that his or her situation is not only covered by the national rules of his or her country, but also the rules of another country. Having said that, it creates a lot of challenges that need to be faced.

For a country that is a Member State of the European Union, or at least a member of the Council of Europe, providing protection in respect of social security rights outside of its own territory is a much more complex challenge. In these organisations, membership not only entails providing rights for the members but these countries also need to accept the obligations arising from supranational law,¹ or the relevant international law² in respect of the basic principles and rules in the field of social security.

In 2018, a special volume of the *European Journal of Social Security* was devoted to reporting several very important contributions by experts from legal practice and science under the umbrella of a conference to explore the external dimensions of social security coordination.³

In this article, inspired by this volume and especially by the contributions related to national approaches of EU Member States in concluding bilateral social security,⁴ I would like to present the Hungarian approach and practical experiences in this respect.

II. THE EUROPEAN LEGISLATIVE ENVIROMENT

In EU law, as a result of a complex development process the so-called social security coordination rules⁵ provide the highest possible level of protection for the practical

¹ Although in principle bilateral agreements do not have to be literally in conformity with the overriding Treaty provisions on the free movement of workers' EU social security, there are nevertheless some very important fields where it is not appropriate not to take into consideration some relevant principles arising from EU law. For this, see the EU social security coordination rules.

² European Social Charter of the Council of Europe, <https://www.coe.int/web/european-social-charter/home> (Last accessed: 31 July 2019).

³ (2018) 20 (2) *European Journal of Social Security*, 1–216.

⁴ See especially: F. Pennings, National approaches of EU Member States in concluding bilateral social security agreements with third countries: The case of the Netherlands, (2018) 20 (2) *European Journal of Social Security*, 162–172. <https://doi.org/10.1177/1388262718771787>; B. Spiegel, National approaches of EU Member States in concluding bilateral social security agreements with third countries: The case of Austria, (2018) 20 (2) *European Journal of Social Security*, 148–161. <https://doi.org/10.1177/1388262718780747>; G. Strban, Member States' approaches to bilateral social security agreements, (2018) 20 (2) *European Journal of Social Security*, 129–147. <https://doi.org/10.1177/1388262718771789>

⁵ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004, Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (Text with relevance for the EEA and for Switzerland).

implementation of the four fundamental freedoms, in particular the free movement of workers, and then persons in general.⁶ As a cornerstone of EU law, it is essential that, in addition to enshrining and protecting freedom of movement, the Treaty on the Functioning of the European Union (hereinafter TFEU) specifically provides for the protection of the social security rights of workers under Article 45 TFEU.

At the same time, even the EU itself has not created a substantive EU law that applies uniformly to EU citizens, providing the same level of benefits and eligibility rules in all countries.

As far as adequate protection is concerned in the EU, the development of a system of rules for the coordination of national legal systems and their conflict-free cooperation was already established in 1958.⁷ Its dynamic and continuous development since then has been decisive for the development of EU citizens' rights today.

The EU does not provide exclusively EU-level social security benefits, but the coordination rules of the EU guarantee that the persons concerned enjoy equal treatment and full protection throughout the Union in the application of all relevant national legislation as regards the principles of portability of benefits and aggregation and preservation of acquired rights. It has now become clear that it is particularly important for national legislators to pay attention to the implementation of Articles 18 and 45 of the TFEU. That is to say, respect for the principle of equal treatment and the fact that the obligation to prohibit discrimination against workers can only be waived if very strict conditions for dismissal are met are the cornerstones of all social security legislation.⁸ These are guaranteed to citizens by EU law for all social security risks.⁹

Having said that, it is also true that even EU Member States have much more freedom and more control over where, when and how to accept international obligations when creating bilateral social security agreements with third countries. Traditionally, it seemed undisputable that States are free to conclude bilateral agreements in any way they find appropriate. Their freedom in this process is not controlled by others, just the contracting states, and the courts the contracting states are empowering in this respect, even if those are national courts or some kind of board of arbitration.

⁶ Gellérmé Lukács É. and Gyulavári T., Szociálpolitika és foglalkoztatás, (2009) (különszám) *Európai Tükör*, 199.

⁷ Regulations (EEC) No 3 and No 4 from 1958 were replaced by Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community for EEA/EU nationals and by Regulation (EEC) No 574/72 implementing the Regulation (EEC) No 1408/71. Then, with effect from 1 May 2010, Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 on its implementation replaced the previous rules.

⁸ Case C-55/00, *Gottardo* (European Court of Justice of 15 January 2002) point 35.

⁹ A.-P. van der Mei, P. Melin, Z. Vankova and H. Verschuere, The external dimension of EU social security coordination, (2018) 20 (2) *European Journal of Social Security*, (81–85) 81. <https://doi.org/10.1177/1388262718771734>

As a starting point, it seems to be a simple case; however, the reality turns out to be more complex.

In respect of every bilateral relationship involving EU Member States, it needs to be taken into consideration that although sovereign nations, at the same time our countries are members of the European Union, which not only in principle but also in practice seriously affects our bilateral relationships with non-EU Members.

EU law can be interpreted as binding law primarily in relation to the law of the Member States of the European Union and their territories. However, there are cases where not only the territory of the Union is affected by existing Union law. It might happen that it is necessary to be considered the applicable law, when the person concerned is not and never has been living in a Member State (e.g. in some special cases of export of pensions). It might also happen that the direct effect of some legal instruments goes beyond the internal rules of the Member States.

One of the aims of this article is to explore and highlight a distinct part of these kinds of cases and their impact on the national room to manoeuvre in the field of social security agreements.

EU Member States, and thus Hungary, provide and develop the network of social security protection established jointly with non-EU member states and third countries primarily through bilateral agreements. Today, this area of law is also significantly influenced by the development of EU law.

Therefore, in order to get a complete picture and fully understand this complex issue, it is worth examining exactly how EU law affects the bilateral social security relations of the European Union member states, and thus Hungary, in this area of traditionally exclusive national competence.

This article also aims to analyse the bilateral agreements on social security concluded by Hungary in the light of the relevant international and especially the supranational rules (EU rules).¹⁰

III. WHY IS IT IMPORTANT TO CONCLUDE SOCIAL SECURITY AGREEMENTS?

To answer why it is necessary for an EU Member State to conclude bilateral agreements, we need to take into account the following. Cooperation and association agreements, in the field of social security, have been concluded by the EU itself with a number of partners to date. However, their success in practice is more than questionable;¹¹ even if

¹⁰ See especially the Regulation EC No 883/2004.

¹¹ For a systematic review of this, see K. Eisele, Social security coordination in Association Agreements: Is a common EU approach with third countries in sight?, (2018) 20 (2) *European Journal of Social Security*, 116–122. <https://doi.org/10.1177/1388262718771785>. After acknowledging the initial

more or less successful, they are in no way a real substitute for the conclusion of bilateral agreements. The failure of these agreements also provides us with an opportunity to see that some key specific and sensitive topics can help to identify the theoretical and practical implications of EU law on national contracting.

One of the most striking effects of EU law on bilateral conventions is the case law arising from Member States' obligations, which points to the limits of regulatory freedom, and in particular the judgment in Case C-55/00, *Gottardo* (European Court of Justice of 15 January 2002). This judgment shed light on the extent to which Member States' contracting practices cannot be independent of EU law obligations. In 2012, József Hajdú reviewed the situation of Hungary's bilateral agreements in connection with the interpretation of this specific case.

Based on his systematization, of the concluded agreements, it is obvious that Hungary has a comprehensive circle of agreements. According to him, the Hungarian agreements can be typified in many ways. The developments of the agreements can be identified from a period to a period on the basis of historical, political and economic reasons. We can take several tipifying principles into account, namely the circle of states with those the first agreements were concluded (Member States of the Council for Mutual Economic – COMECON) and the reasons, to review those after 1990, the preparations for the EU accession, or the membership position in the EU after 2004, the review of the legislation in respect of the rights of persons with Hungarian origins living in the neighbouring countries as minorities and so on.)

Of course the aim is not to analyse in depth the structure of each of the Hungarian bilateral agreements and make a systematically widespread examination of the different rules of those in respect of the rules of Regulation 883/2004. The aim of this paper is to highlight the trends and turning points of the development of the legal provisions of this specific field.

There are several so-called social security agreements. Several new instruments,¹² and also the process of renewing some earlier instruments fell into the period of the accession and the early years of Hungary's EU membership, and most of our legislative experiences in this field are based on this period. Taking this into consideration, the present examinations aim to put an emphasis on the EU legislation inputs and interactions between social security-related EU and bilateral level norms.

success of the agreements, the author points out that, according to their very nature, they seek to address the acquisition of rights by third-country nationals staying (working) in the EU, in particular the preservation of these rights. However, the recent EU-advocated revision or drafting aimed at protecting the rights of EU citizens in a third country no longer encounters particularly strong support from relevant partners (e.g., even in the case of Turkey).

¹² Hungary has a long tradition of concluding bilateral social security agreements with third countries. Although today agreements with several European and overseas countries are in force or have at least been signed, (at about 20) the total number of agreements signed at one time is much higher.

There is not a single static driver behind social security agreements; the motives of the states are naturally different, and are changing constantly. From time to time, the emphasis shifts according to the new challenges that states face. Nevertheless, it is not a mistake to identify some leading factors that need to be considered as serious or basic drivers, including the number of people immigrating from or emigrating to a specific country, and the economic relationships and special needs of specific partner countries.

With respect of the Hungarian development process of the social security legislation in the field of international relationships, not taking the traditional historical roots from before the second world war into consideration, we can speak of a mainly-three step process.

As a first step, the COMECON countries, at the end of the 1950s and the beginning of the 1960s, established a system of a bilateral social security agreement net between each others. The main motivation behind these agreements could be defined as purely political, namely to strengthen the association between the socialist countries; nevertheless, though it did not occur often, where there were some movements between countries, those agreements provided a special kind of protection for the persons concerned.

Second, upon opening in a way to the Western European countries, especially in respect of benefits in kind, new kind of agreements were introduced in the 70s and 80s.¹³ These could have real effect only in respect of short-term stays in other countries in emergency health situations.

The third period started after the dissolution of the Soviet bloc, when the central and eastern European countries joined the Council of Europe, and established open economies. Progress was not very strong to begin with and stalled for a decade, but the opportunities of joining to the EU provided a strong impetus to renew the system of Hungarian bilateral social security agreements around 2000. It was at this point that we could talk in real terms of defining the rights of citizens, and European principles for providing protection for those attracted by the free movement opportunities, namely some kind of “European-like benefits”.

The first of the new kind of agreements (before EU accession) could be called European-type agreements, and the processes of negotiating them had two aims, first, to establish modern relationships and real, living coordination mechanisms with our

¹³ E.g., the Finnish and British health agreements, see:

1) a Magyar Népköztársaság Kormánya és a Finn Köztársaság Kormánya között Budapesten, az 1978. évi június hó 27. napján aláírt, az egészségügy, az orvostudomány és a társadalombiztosítás területén történő együttműködésről szóló Egyezmény kihirdetéséről szóló 15/1979. (IV. 15.) MT rendelet;
2) a Magyar Népköztársaság Kormánya és Nagy-Britannia és Észak-Írország Egyesült Királysága Kormánya között Budapesten, az 1978. évi november hó 1. napján aláírt, az orvostudományi és az egészségügyi együttműködésről szóló egyezmény kihirdetéséről szóló 21/1979. (VI. 26.) MT rendelet.

neighbour countries, our European partners¹⁴ based on the principle of insurance (protection of acquired rights; social security services are provided by the competent state based on acquired rights in its social security system); second, to prepare the country for the challenges of social security coordination in the EU well in advance of accession. This specifically meant adopting and using the coordination rules and mechanisms of the EU at bilateral level with both EU members and third countries alike.

After renewing relations with our neighbours, exchanging the former socialist-type agreements with Council of Europe and the European Union principle-based modern agreements, and gaining a lot of experience, as a Member State of the EU, the world definitively opened for Hungary. Several overseas countries became interested in establishing legally formed cooperation mechanisms, and concluding agreements as legal instruments in the field of social security with Hungary. This second group of agreements could be classified broadly as overseas-type agreements.

Modern agreements (being in the third group) need to be analysed in greater depth in order to understand the effects of EU law on Hungarian agreements. In this respect, we do not present a full picture here of all of the legal instruments (those that are more interesting from a historical point of view, and not from the perspective of our present goal), but it is a very complex picture in itself to compare the development of these modern agreements with the evolution of EU law.

To understand the impacts, we need to take into consideration the process of the evolution of the direct impact of EU legislation on the bilateral agreements of the Member States.

IV. THE EVOLUTION OF THE DIRECT IMPACT OF EU LEGISLATION

For this reason, the case-law decisions of the Court of Justice of the European Union are worth examining, as the most significant indicator of the development of EU law. Starting from identifying the importance of case law, we need to take into consideration the relationship between EU secondary law, in particular Community regulations and bilateral agreements. On this basis, we can conclude that this is a very complex issue. It cannot be stated that Community law always takes precedence in the event of a conflict of norms, even if the agreement concluded is, as a general rule, subject to that primacy.

Clearly, with regard to issues of conflict between bilateral agreements and Community law, the Court first examined the agreements concluded between the

¹⁴ The only exception was the case of Canada, with whom a so-called overseas type agreement was concluded in 2003 (Act 49 of 2003) (hereinafter, when citing a Hungarian social security agreement I refer it by the name of the country and citing the Hungarian Act that promulgated it [e.g. the Canadian agreement (Act IL of 2003)].

Member States before their accession (intra-EU relations). Here we can see a well-outlined development curve, with the broadening interpretation of citizens' rights in the *Wader, Rönfeldt and Kaske* cases, which are consumer-friendly decisions, then in the cases of *Thévenon and Rodriguez*, which further clarified the earlier broadly defined rights (namely, by narrowing them).¹⁵

In essence, no social security agreement concluded by a Member State with a non-member country was examined by the Court until the *Grana Novoa* case (1992¹⁶). Even so, its decision did not affect the Member States' full freedom of interpretation in respect of the rules of the agreement with the third country, nor did it identify a restriction justified by Community law.

The *Gottardo* judgment¹⁷ fundamentally changed this situation in 2000. Although it was decisive and clear that Member States should treat nationals of other Member States in the same way as their own nationals when applying their bilateral conventions, a case from 2018¹⁸ (*EU* case) before the Court showed that, more than a decade and a half after the former decision, it was far from clear that the Member States' authorities have a general obligation¹⁹ to apply the *Gottardo* rule, treating nationals of other Member States in the same way as their own nationals.

Taking the *Gottardo* case into consideration as well, we can identify which provisions of bilateral agreements are primarily affected by the judgment, and through it by EU legislation, either directly or only indirectly. When trying to establish those principles and rules of the EU – and also appearing in the bilateral conventions – that are fundamentally affected, it is worth paying particular attention to the following issues:

1. personal scope; the separation of open and closed personal scope social security agreements and the relationship of personal scope to the principle of equal treatment, which also show the extent to which the application of the *Gottardo* clause²⁰ is mandatory and where it makes sense at all;
2. to regulate the assimilation of facts, which typically results from the development of EU law;
3. the limits of equal treatment, (issues of exemption, objective justification);
4. institutional cooperation with a third country, its openness to cooperate.

¹⁵ Relevant ECJ Cases: *Walder* Case C-82/72, ECLI:EU:C:1973:62; *Rönfeldt* Case C-227/89, ECLI:EU:C:1991:52; *Kaske* Case C-277/99, ECLI:EU:C:2002:74; *Thévenon* case C-475/93, ECLI:EU:C:1995:371; and *Rodriguez* Case C-113/96, ECLI:EU:C:1998:203.

¹⁶ *Grana Novoa* Case C-23/92, ECLI:EU:C:1993:339.

¹⁷ See the *Gottardo* case cited above.

¹⁸ *EU* case C-801/18, ECLI:EU:C:2019:684.

¹⁹ Taking into consideration the *Gottardo* judgment and, more broadly, the consequences of case law decisions, we can point out that the EU institutions, in particular the Commission, quickly identified the significance of the *Gottardo* judgment and encouraged the Member States to apply the principle fully (not only in respect of pensions, but in a much broader context of social security benefits).

²⁰ See later in VI.2. first paragraph.

From this perspective, the following issues are worth taking into account in the modern Hungarian agreements:

- the scope of the agreements (material, personal),
- applicable legislation,
- principles in the agreements,
- assimilation of facts,
- institutional cooperation especially in specific cases (data protection issues, *Gottardo* clause, interpretation).

Taking into consideration this framework of the necessary (required) minimum progress of the Hungarian agreements in the last two decades, we can see the following general characteristics in them.

V. THE SPECIFIC CHARACTERISTICS AND THE DEVELOPMENT OF HUNGARIAN BILATERAL AGREEMENTS

1. The scope of Hungary's bilateral agreements

According to the general characteristics of Hungarian agreements, we can distinguish two groups, territorial and insurance-based agreements. Being part of the first group, the social policy agreements with Poland, Bulgaria for example basically belong(ed) to the group of territorial agreements, the essence of which is that, as a general rule, the country in whose territory the person concerned resides provides the benefits at his own expense.

Before the accession to the EU the most important goal was to be prepared for it, and be prepared in practice for the obligations arising from the obligatory introduction of the EU level social security coordination system. This meant that the Hungarian negotiating positions, especially with EU Member States or accessing countries, were determined by the direct objective of approaching the bilateral rules to the EU legislation as closely as possible. Of course, it did not mean that the EU regulations as whole could be introduced, but the intention was very clear; to conclude agreements as broad in their scope as possible and create insurance-based agreements.

Following the accession to the European Union, other driving principles on the Hungarian side have further nuanced Hungarian interests. Thus, in particular, the replacement of the old territorial agreements, the renewal of existing relations with neighbouring countries, and the settlement of the situation of the Hungarian minority living outside the borders of Hungary as advantageously as possible were very important. However, it can be stated in general that, in the first decade of the third millennium, the Hungarian side aimed not only to regulate the rights of workers and their family members moving from one country to the other in order to have employment there, but

even more broadly, in respect of as many (pensioner, students, etc.) persons as possible. As such, we can say that, during this period (namely the pre-accession period, and the early years in the EU), the EU and bilateral regulatory trends, although not identical, were definitely pointing in the same direction.

That it was to be changed was made very obvious when Hungary, as an EU Member State, became a possible important regional partner for some important big countries that were more or less only economically interested in our Central European area (USA, Japan, India, South Korea). This not only meant stepping back to the protection of the interest of workers only as a first target, but it also meant reducing the targeted social security benefits (and the national legislation) under the scope of the agreements. This was especially visible in respect of benefits in kind, as we will see at a later stage of our analysis.

An attempt can be made to group the Hungarian bilateral instruments on the basis of who is covered by the personal scope of the agreement. Socialist conventions basically cover the citizens of the contracting parties.²¹

With regard to modern agreements, the scope of the agreement is extended by Hungary to all persons entitled to benefits under Hungarian law (insured persons, persons entitled to cash benefits and, in some cases, persons entitled to health care in kind). In the case of these agreements, it is not the Hungarian citizenship that is decisive, but the scope of the Hungarian social security legislation applied.²² This principle is essential, because all our agreements seek to ensure equal treatment of all those subject to Hungarian law.

2. Specific questions of the applicable legislation rules in the agreements

In the modern Hungarian agreements, the second part regulates the clear definition of the applicable law in the case of employment or residence in the territory of another country. As a general rule, the employed person is subject to the legislation of the place of employment, with precisely defined exceptions.²³

Among the rules of applicable law relating to employment in the territory of another country, the agreements state, as a general rule and in accordance with

²¹ Thus, for example, entitlement to health care in kind does not have to be proved by a document certifying the existence of an insurance relationship, but simply by a passport proving the nationality of the other country, as is the case today, for example in respect of Ukraine.

²² In this respect, it could be defined as “open” personal scope agreements as was introduced by Spiegel according to the Austrian legislation: Spiegel, *National approaches of EU Member States...*, 152.

²³ See for example the German–Hungarian social security agreement (Act XXX of 2000) as a very EU characteristic example (Article 11), or the USA agreement (Act XXIX of 2015) where the detailed applicable legislation issues were definitely in the focus because of their economic importance (Article 5).

European standards and the principle of equal treatment, that the employee's insurance obligation is governed by the law of the Contracting State where the person concerned is gainfully employed.

In contrast with the clear but very short general rules, the exception rules are visibly longer in the agreements. Exceptions to the general rule are, *inter alia*, persons employed in the public services but fulfilling their work obligations in the territory of the other Contracting Party, workers posted by the employer to the territory of the other country (self-employed persons also in most cases), or persons employed in international transport. The agreements generally provide for the possibility for the national competent authorities to grant certain further exceptions to the rules of the agreements in respect of certain persons, subject to the application of the law of one of the Contracting States. In the case of countries that are relatively far from Hungary, from an economic point of view, these exception rules are of fundamental importance. These "economy-led" agreements very clearly try to handle a sometimes stronger, sometimes less pronounced, but nevertheless important economic issue, namely defining the special cases where it is possible not to apply the general rule when determining the applicable law.

The bilateral agreements, in line with modern international forms of employment and investment relations accepted in Europe,²⁴ allow the insured person to be posted to the territory of the other Contracting Party for a longer period (from 12 to 60 months, but usually the latter) For that period, the employed/self-employed person remains under the legislation of the sending State.

This also means that the posted person retains his/her insurance relationship in the sending State (fulfilling his/her social security obligations, in particular the payment of contributions). This is in stark contrast to the EU approach, which applies a much stricter rule in relations between EU Member States. However, we need to emphasise that this approach has a significant impact on economic investment and major industrial and industrial developments. There can be several understandable reasons for granting an exception.²⁵

However, these exemptions are always well-defined exceptions to the *lex loci laboris* principle in the agreements. To apply them in a proper way requires close cooperation with the authorities of the host country.

The in-depth regulation of this right will continue to be important in the future in the agreements, even though the EU Member State approach to regulating postings

²⁴ 12 months under the scope of the regulation 1408/71 EEC, 24 months under the scope of Regulation 883/2004 EC.

²⁵ It is sometimes difficult, for example, to find a professional who undertakes to work abroad in a senior or middle management position, or in highly specialised work processes of special importance to the activities of a given company or group of companies, by falling out of the scope of its country's social security legislation and having his or her employment contract still with the company in the sending country.

will have to take into account the growing restrictions on national freedom, taking into its obligations as a Member State of the Union into consideration.²⁶

One of the important limits is the case of EU law primacy. With regard to the legal status of posting involving several EU Member States, it is no longer disputed that, if this condition is met, the applicable legislation shall no longer be governed by the rules of the bilateral agreement, but by EU coordination regulations. The trends of curtailing the limitless freedom of Member States and the need to develop the protection of the rights of workers was very visible in the last decade. The EU itself has taken very important steps to improve its own position and tools further, to help the Member States in their cross-border disputes and difficulties of cooperation regarding their labour markets. For this, we can recall the example of the establishment of the European Labour Authority.²⁷

At the same time, even if an agreement is concluded for the purpose of economic importance alone (it is clearly targeted, for example, in the cases when China starts negotiations), in addition to the positive economic effects, the persons covered by the agreement, who could be many more than the posted workers, may benefit from the existence and application of the agreements when those agreements can cover at least some basic benefits. If it could be achieved by concluding an agreement to cover at least the long-term benefits (for examples pensions), it is worth concluding an agreement.²⁸

On the Hungarian side, special questions of interpretation regarding the rules of posting usually arise with those overseas countries that can show the limits of the possible impacts of the EU legislation principle.

Where there are already explicit economic reasons behind the agreement, the rules of applicable law are very often decisive, when deciding whether to conclude an agreement or not, especially when the Hungarian law giving a unilateral provision that is opposite to the more flexible rules in the agreements on posting creates a much less flexible framework for investor companies. The Hungarian law allows for a maximum

²⁶ The rule is not unilateral; not only the person sent to Hungary, but also the person sent from Hungary is exempted from the application of the law of the host country, but there is a clear limit for the application of the agreement when the EU law prevails, because the conditions are fulfilled (for example the person from a third country pursues its activity in two Member states during the time of being posted to Hungary).

²⁷ The social security coordination mechanisms have direct cooperation with the European Labour Authority (ELA) when the ELA signals the social security posting issues for further management to the relevant EU institution, namely the Administrative Committee functioning under the scope of the 883/2004 Regulation: for further in depth analysis of the ELA see É. Gellérné Lukács, European Labour Authority: The guardian of posting within the EU?, (2018) 5 (1) *Magyar Munkajog/Hungarian Labour Law*, 1–21.

²⁸ See the South Korean agreement (Act LXXIX of 2006).

of two years,²⁹ whereas, as we mentioned earlier, especially with overseas states, this is usually extended by agreements for a much longer period (5 years).

Several specific issues could arise during negotiations. For some concrete example let us see some issues from practice.

The legal situation of a person already on secondment who is further posted from a third country to the territory of one of the Contracting States may be a sensitive issue. That is, for example, by terminating the posting of a Japanese worker in Ukraine for 3 years on 30th June, is it possible for the person to move into Hungary under the scope of the Japanese agreement for the period of the maximum 5 years specified in the agreement and start to work there on 1st July of the same year? Technically, it is a fact that the person concerned physically moves only between Ukraine and Hungary. Even though the answer is yes, because it is irrelevant under the scope of the Japanese–Hungarian agreement where the person physically comes from, Hungarian law does not preclude it. From the perspective of the agreement, the posting of this person starts on 1st July, regardless of what happened earlier. Therefore, Hungarian law does not pose an obstacle. This is of course not the case under the scope of the EU law.

Another question is whether you can send another posted worker from the company to the same position, replacing the former posted worker. It essentially means a continuous posting (replacement posting). The answer is that the agreement does not exclude it, and so it is not excluded by Hungarian law, when at the same time it is an essential issue in the EU that replacement posting shall be avoided and forbidden.

Can the receiving company (the company of the place of secondment) conclude a second employment contract with the posted worker, and could the person generally be excluded from the Hungarian insurance system? The answer is that there is a clear possibility for it, if this is expressly permitted and regulated by the agreement.³⁰ This is also not a welcome approach according to the EU law.

These practical issues can be satisfactorily resolved bilaterally in terms of a common interpretation, although they do require careful consideration in formulating

²⁹ See Section 17(2) of Act CXXXII of 2019 on the Eligibility for Social Security Benefits and the Funding for these Services, which regulates the legal relationships those are not covered by the insurance under the scope of the Act (i.e. posting, secondment or temporary staff for a maximum two years in respect of a foreign worker).

³⁰ For this a very good analogical example introduced by Spiegel was the Canadian posting rules interpretation where, in the cases of the new labour contracts within the same group of undertakings, when the person is sent from a mother company to the daughter company in another country, the new labour contract in this daughter company shall not change the legal status of the original posting. See Spiegel, *National approaches of EU Member States...*, 156. It was almost the Hungarian case in respect of the USA, and therefore there was a clear need to include a special rule in the agreement as Article 5 paragraph 2 handling the posting between the mother and daughter company. On the contrary, Regulation 883/2004 EC excludes the conclusion of a new labour law contract in the country of activity, or using another text to cover such cases with a new labour law contract under the posting provision.

common provisions to ensure the two authorities and institutions applying the agreement really mean the same thing.

However, the limits can be very visible if the EU rules should be taken into consideration. It is all the more surprising for partners if these rules above are interpreted quite differently because of the involvement of a third country which is another EU Member State (for example working in Hungary but living in Slovakia). In this case, it is no longer the bilateral rules that apply, but the EU posting rules. On the basis of these, replacement posting is prohibited. Forwarding from one state to another can only be interpreted as a posting if the permitted time abroad is not exceeded; that is, the EU limit of 24 months in total applies immediately. Furthermore, it is not possible to conclude an employment contract with the employer at the place of posting, subject to the provisions of the Community Regulation.³¹

It is obvious that this part of the agreements is not only very essential, but at the same time a very sensitive issue to conclude as an EU Member State with third country partners.

3. Principles in the agreements

The Hungarian regulatory principles are clearly intended to ensure that the agreements grant the closest possible alignment with the European Union coordination principles, especially the following:

- the right of persons subject to the law of both Contracting Parties to equal treatment and equal treatment of the facts;
- the maintenance of rights already acquired under the law of both Contracting Parties;
- access to benefits outside Hungary and the country providing the benefits, i.e. anywhere in the world (export principle);
- a clear definition of the applicable law shall ensure, on the basis of coordination rules, the elimination of double insurance – and the associated double payment of contributions – and, as far as possible, the exclusion from insurance schemes (conflict of law);
- the aggregation of periods of entitlement already acquired under the law of both Contracting Parties;
- the application of the reimbursement (accounting) principle; that is to say, benefits and, in particular, their financing are, in principle, the responsibility of the institution whose law is applicable, namely the obligation of the so-called competent institutions;

³¹ A new labour law contract excludes posting under Article 12(1) of Regulation 883/2004/EC.

- a proportionate burden on the social security systems of the Contracting Parties and the provision of adequate administrative systems for smooth implementation.³²

In its bilateral agreements, Hungary aims to lay down the principle of equal treatment, rules on the transfer of benefits abroad, the avoidance of overlapping benefits and assimilation of the facts.

The purpose of these provisions is to ensure that beneficiaries are treated with the same rights and obligations as regards their benefits when applying the social security legislation of the two countries. Thus, for example, conventions guarantee the security of the transfer of benefits abroad: benefits are paid to persons in the territory of the other Contracting State in the same way as to persons in the territory of the State of payment and they may not be reduced, suspended or refused on the grounds that the insured person is in the territory of the other country when providing the benefit.

As it is the case in several EU Member State (for example, Austria³³) we see an important difference between equal treatment under EU law and under the bilateral agreements concluded by Hungary. It is that the provisions under the bilateral agreements rule only against direct discrimination, while it is a well-known obligation in the EU to avoid even indirect discrimination. The bilateral agreements are not so deeply sophisticated. The reason behind it is almost the same as, for example, in the case of Austria,³⁴ namely the Hungarian social security scheme is not a nationality-based but an insurance-based system. Being so, it is quite clear that, on the basis of nationality, discrimination is not real threat for migrant workers.

The principle of assimilation of facts is a very widely used rule in agreements involving Hungary and is defined in the EU legislation.³⁵ It is connected to the principle of equal treatment, according to the juridical development work of the Court of Justice.³⁶ We can often find this basic rule of principle in the Hungarian agreements after the accession of Hungary to the EU.³⁷

³² Pauline Melin defines five driving principles in respect of EU coordination: conflicts of law, equal treatments, aggregation of periods of insurance or employment, export of benefits and administrative cooperation. P. Melin, *The External Dimension of EU Social Security Coordination – Towards a Common EU Approach*, (Brill–Nijhoff, Leiden–Boston, 2019) 302. <https://doi.org/10.1163/9789004415331> However, I felt it important to give those guiding principles in a little broader context.

³³ Spiegel, *National approaches of EU Member States...*, 153.

³⁴ *Ibid.*

³⁵ Under Article 5 of the Regulation 883/2004 EC this principle could be found as an explicit rule of the principle of assimilation of facts.

³⁶ Spiegel mentions the good example of *Carlos Mora Romero v Landesversicherungsanstalt Rheinprovinz* Case (Case C-131/96, ECLI:EU:C:1997:31). In its judgement the Court decided that German legislation under which an orphan's pension is prolonged by the duration of military service in Germany has also to be extended by a military service in another Member State. See Spiegel, *National approaches of EU Member States...*, 154. fn. 31.

³⁷ For example see the serbian agreement (CCXXXIV of 2013) Article 6.

Respecting the export of benefits principle at the same time, and taking into consideration the possible restrictions according to EU legislation, it is a valid question whether there is not a possible practical reason for narrowing the material scope of the agreements. Definitely, with regard to special non-contributory benefits, family benefits and unemployment benefits, it is understandable (not only from the Hungarian but from the partner point of view) that the negotiating parties are not ready to include these kinds of benefits. The acceptable hesitation is understandable, taking into consideration the fears within the EU those leading to the Brexit for example in respect of family benefits export cases.³⁸

Hungarian agreements exclude general social assistance (means tested benefits of a social nature) from the scope of the export of benefits principle. The general rule is that they are not to be exported. The objective reasoning for this, accepted by the Council of Europe approach too, is that the income status of a person living or staying in the territory of another state cannot be precisely determined or controlled by the state providing the benefits.

There is a limited number of agreements that go further in respect of the material scope of insurance-based long-term cash benefits, namely pensions. Moreover, the export clause in pension agreements has no real impact on Hungarian bilateral agreements. The Hungarian system – because of its open, insurance-based approach, necessarily provides for all entitled persons to move and receive their benefits abroad.³⁹

Considering short-term cash benefits, especially in respect of sickness insurance (sickness, maternity) the real intention, to coordinate them under the scope of the agreement, has been even more limited. We can only see it between EU Member States and countries seeking accession to the EU. In those cases, the real driving force is their intention to prepare for the EU coordination rules, otherwise they are not very keen to even consider the opportunity to involve such rules among the negotiated measures.

³⁸ The decisions adopted by the European Council on 18–19 February 2016 entitled “Re-regulating the situation of the United Kingdom in the European Union” were clearly intended to retain the United Kingdom in the EU addressing the direct causes of the planned Brexit referendum. One of the political starting point of the Brexit referendum was in part the issue of social dumping. For example the obligation of sending abroad the full british family benefits even when the child was not staying together with the parent working in the UK, but in his or her home-country with the other parent. The Council tried to address definitely this issue. See Official Journal of the European Union C1-69/1, 23.2.2016.

³⁹ Thus, the national rules in Hungary fulfill the obligations based on the European Convention on Human Rights (see: ECHR, Case 10441/06, of 7.11.2013, *Pichkur against the Ukraine*) and in most cases there is not a real need from the Hungarian point of view to have bilateral agreements to provide the option to export pensions. However, as a basic principle in the COE model, and the EU legislation is always laid down in the Hungarian agreement, and it is very important to see, that this principle could have a very important added value when the other Contracting State depends only on its own national legislation and forbids the export of pensions (which was the case for example in the agreement with Russia).

4. Some specific benefits under the scope of the agreements

In the Hungarian agreements with European countries, in line with the practice of geographically close countries, a quite similar wording has been developed with partners to help address the risks associated with working in the other country on a comprehensive basis. Hence, in many cases, the scope of the agreements extends to the coordination of rules on benefits and entitlements in relation to accidents at work and occupational diseases as well.⁴⁰

The presence of rules for coordinating unemployment benefits is a complex issue; the opportunity for including them is much narrower. In Hungary, a significant proportion of foreigners can only be employed with a work permit, and this is also true for most partner countries – in contrast to EU law – therefore, in principle, it is only possible to mutually recognise insurance periods in an international agreement, but not to coordinate access to the benefits. Under Hungarian law, if employment is terminated, the permit is revoked by the employment authority. In this case, the foreign citizen therefore does not have the necessary conditions to establish an employment relationship in the same way as a person who is registered as resident in Hungary, and he therefore cannot be considered unemployed or receive unemployment benefits under the scope of the Hungarian law. Although it would in principle be possible to recognise the fact and duration of work performed in another country, in most cases the national rules on unemployment benefits are not coordinated, not even in this area. This is because national efforts are aimed at and enable the return of workers to the national labour market, and in most cases the partners do not see this as the goal of social security-type coordination. This is especially true for agreements adopted in the current decade, although there is an exception to this, because in 2013 there was an agreement that included such a provision, namely the Serbian social security agreement.⁴¹

In respect of granting of sickness benefits in kind to persons residing or staying outside the competent State, it is only provided by some agreements and only concluded with European states, exactly as happened in the case of Austria.⁴² An important area in the field of cooperation between European countries is the benefits provided in the event of a temporary change in the state of health of persons. A situation like this significantly affects earning capacity and the ability to take care of oneself, and therefore

⁴⁰ See the following social security agreements of Hungary: the Austrian agreement (Act CXXXIII of 2000) Articles 16–18; German agreement (see above) Articles 20–24; Romanian agreement (Act II of 2006) Articles 17–19; Croatian agreement (Act CXXV of 2005) Articles 26–29; Bulgarian agreement (Act I of 2006) Articles 16–17; agreement with Montenegro (Act LXXII of 2008) Articles 25–26; agreement with Bosnia and Herzegovina (Act II of 2009) Articles 23–24; Serbian agreement (see above) Articles 29–30; Albanian agreement (Act XVIII of 2015) Articles 20–23; North Macedonian agreement (Act XXIII of 2015) Articles 18–21; Turkish agreement (Act XXX of 2015) Articles 20–22.

⁴¹ See the Serbian agreement (see above) Article 31.

⁴² See Spiegel, National approaches of EU Member States..., 157.

what kind of range of benefits in kind and in cash related to illness and maternity will be provided for them when working or living abroad is an essential question for migrants. This is absolutely in line with the EU principles of free movement.

Having said that, an examination of the coordination rules of this benefit can always be useful, because it highlights the potential and the natural limitations of EU law and practice having *effect on* bilateral agreements.

Clearly, one of the most important questions when drafting the agreements based on the European Union legal background is the opportunity to incorporate the rules concerning benefits in kind into the sphere of the accepted material scope. This is not an easy target to achieve, first because they are not the generally accepted type of benefits, namely not cash benefits. Instead, they are service in nature. The services are provided by the national health care system, in a country where the person stays only for temporarily without changing its original insurance status. However not this system is responsible for the final financing of the health-care treatment. (Staying for a holiday in another country somebody does not change his/her social security health insurance, but if there is an agreement between the two respective countries anybody would like to have an opportunity to receive the necessary health treatment during his/her stay in the other country on behalf of his/her insurance system, without paying for it directly to the health care provider). The inclusion of this benefit is especially sensitive in the case of countries outside of Europe. Second, it is one of the most sensitive questions in practice and it is not rare that disputes arise between the institutions, even when the favourable political will is strong between the contracting states.⁴³ These leads to the obvious conclusion that to include these kind of benefits into the agreements tends to be extraordinary rather than ordinary practice (EU Member State status or expected accession can be a real driving force in the political will).

For most countries, in addition to laying down the rules of applicable law, it is crucial to manage benefits for persons entitled to old-age and death (survivors') pension benefits. In general, the coordination of eligibility rules for cash benefits in the event of invalidity is a similar issue, and both European and non-European partners more or less want to deal with. With regard to these, the EU principles used as a starting point by the Hungarian side can be interpreted and accepted easily by its partners. These are important for almost all countries. Therefore when the possibility was examined within the EU, as early as 2010, of the possibility of unilateral EU action in relations between the European Union and third countries, even considering an EU level social

⁴³ See for example the conclusion made by Spiegel in his Article, stating: "If such disputes continue and cannot be solved in the sense that Austria and all other EU Member States interpret these provisions in the same way, a termination of the sickness rules of the agreements in relation to these contracting countries will have to be considered." Spiegel, National approaches of EU Member States..., 157.

security agreement, the proposal suggested in the EU's common reflection process was that the first common EU regulatory concept should be limited to these benefits only.⁴⁴

The Hungarian agreements contain these rules appropriately. Contrary to the first generation agreements concluded with Comecon countries in the 1950s and 1960s, when, for the person moving her or his residence from one country to the other, the competent state was changed, obliging pensions to be paid in the state where the person resided, in modern agreements the guiding principles are based on those of the CoE and especially on EU legislation.⁴⁵ In the field of pension insurance, the pension shall, as a general rule, be determined in accordance with the applicable legislation of the Contracting State concerned. The Hungarian agreements provide for the possibility of aggregating periods of entitlement in cases where a period of insurance completed in one of the Contracting States alone would not entitle the person concerned to a pension.⁴⁶ In these cases, the so-called "pro rata" principle, i.e. the pro rata pension calculation, applies. Both countries also take into account periods of insurance completed in the other country to determine the theoretical amount of pension, but only determine pensions in proportion to the period of insurance completed in their own country. This solution ensures that the burden is borne proportionately and that those concerned receive benefits in line with what they have established for themselves in the country's social security scheme.

It is an interesting experience that, instead of a common rule (one rule for both of the countries), overseas countries seek to lay down unilateral rules on entitlement to benefits and on the determination of benefits themselves. It is definitely not the common approach of the European countries in seeking simple coordination mechanisms as solutions.⁴⁷

After 2012, a new approach in Hungarian legislation introduced the replacement of the existing pension-like invalidity benefits with new rules. The national rules on benefits of persons with changed working capacity required new coordination rules in the agreements. In most cases under the legislation of the partners, the general benefits based on the risk of invalidity continued to be determined and paid under the pension insurance scheme.⁴⁸ This is not the case under the scope of the Hungarian legislation. In order to harmonise these standards with Hungarian rules, in accordance with EU principles, the agreements regulate the specific rights and procedures for determining

⁴⁴ B. Spiegel, *Analysis of Member States' Bilateral Agreements on social security with Third Countries, report ordered by the European Commission*, Contract ref. No. VC2010/0646, 2010. 23–24., <http://ec.europa.eu/social/BlobServlet?docId=6645&langId=en> (Last accessed: 31 July 2019).

⁴⁵ Not trying to introduce such a kind of complex system that is put down by relevant Regulation rules: Arts 44–60 in 883/2004, 987/2009 but respecting the rights of the persons concerned tries to find a simpler solution but based on the same principle.

⁴⁶ See for example the Croatian agreement Article 18 paragraph 1.

⁴⁷ See for example the Japanese agreement (Act CLII of 2013) Articles 14–17 for the Japanese rules, and 18–21 for the Hungarian rules.

⁴⁸ See for example the Serbian agreement Article 22.

the benefits of persons with changed working capacities (i.e. become disabled).⁴⁹ The coordination rules laid down in the agreements on benefits for disabled persons include solutions to national efforts that will make it possible to return workers to the national labour market, therefore the coordination rules in the agreements are primarily also to support these targets.

VI. OTHER SPECIFIC ISSUES OF THE EU LAW IMPACT ON THE BILATERAL AGREEMENTS

1. Data Protection

A characteristic example of the direct effect of EU law is the development of the data protection rules in bilateral agreements. In the last two decades, one of the most significant development of the articles of bilateral agreements has been the data protection provisions with a clearly growing number of direct rules (paragraphs or even article numbers).

The consideration of the EU data protection provisions after accession (first direct impact) was followed by the expansion and tightening of EU standards within the EU itself as a second impact.⁵⁰ Today, the national Hungarian law on the right to self-determination in information and freedom of information, which transposes EU standards, as a piece of detailed legislation, has a clear affect on agreements, requiring numerous rules in the agreements as well. This was an increased task in particular for negotiations concluded after the entry into force of the national legislation.⁵¹ However, we need to keep in mind the fact that these requirements are conducted from EU level GDPR legislation.⁵²

National data protection standards differ significantly between EU and non-EU countries, even in principle. In many cases, this can lead to serious conflicts of law in the implementation of the agreements, which can even be obstacles to institutional co-operation in achieving the objectives of the agreement.

⁴⁹ See for example Article 28 of the Serbian agreement.

⁵⁰ Regulation 2016/679 EC on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016, L 119, 1) and especially Art. 44 et seq. of the General Data Protection Regulation, imposing the obligation on MS to also apply these rules in relationships with third countries, including those cases when there is a data exchange between a MS and a third country under the scope of a bilateral agreement.

⁵¹ Act CXII of 2011.

⁵² EU directive on data protection (GDPR) see above.

A very typical problem is, for example, that no data can be transferred or processed, or vice versa, for example, if the institution of the other party uses the data and information transferred within the framework of the agreement in order to enforce tax law interests. This question was particularly interesting, for example, due to differences in attitudes in the Hungarian–American context. In the United States, information provided under agreed information exchange provisions is generally confidential, but may be provided by the competent social security institutions to courts and other administrative bodies involved in the determination of taxes/contributions and benefits, the collection of taxes/contributions, and the payment of benefits. If, in a manner that does not infringe its own law, the US competent authority might release the information it has received from the Hungarian institution in the implementation of the agreement to the US tax authority, this type of non-conventional use will immediately conflict with the GDPR-based Hungarian legislation.

However, these two fundamentally different conceptual approaches create situations that seem insoluble in the event of a conflict between the national provisions. This can force the authorities to choose between the provisions of national legislations and international agreements. It can involve the question of what to do if the reporting authority or institution obviously asks for information other than what is allowed to be provided according to the Hungarian laws, and is in line with the principles of the agreement. That is, it is visible, directly or indirectly, from the request that the purpose of the data processing is not expected to be related strictly to the implementation of the social security agreement. As such, although it is formally lawfully requested under the scope of the agreement, in practice it is visible or at least unavoidable that the institution will handle and even forward it to an unauthorised body, which is illegal according to Hungarian (and EU) law.

If these issues are not properly regulated in the agreement, violations cannot be prevented or properly repaired. That is why, for objective reasons and based on the obligations of EU Member States as contracting states, we cannot be too flexible in this regard. And it is true, even at the cost of ultimately not concluding the agreement, no matter how beneficial it may be to settle relations otherwise. Whether, in the end, the non-conclusion of the convention is more detrimental than the potential data protection risks or not, cannot be the subject of a political decision. In respect of these rules the room for manoeuvre is more limited than in the case of the possible range of benefits coordinated and provided under the scope of the agreement. In the case of the latter the freedom of the political will of the national decision makers is almost unlimited. In the former, it is not possible to make compromises without violating our own constitutional rights and EU obligations and so it is absolutely vital that these cooperation frameworks will be enshrined as precisely as possible in the agreements, that inaccuracy does not lead to difficult disputes at a later stage due to the improper handling of personal data.

This particular dilemma draws our attention to the limitations of fragmented international treaty solutions. At the same time, it must be seen that, for many non-European partners, it is difficult to interpret and accept a social security agreement with the level of data protection rules that Hungary, or even Austria and Germany apply in view of their EU obligations.

It is not easy to make partners to concede these rules only at the request of Hungary. However, if an overseas country negotiates not only with Hungary but also with other – large – European states, and already accepts these complex rules as a common basis for cooperating with an EU Member State (as Japan did in its negotiations with Germany, for example), for those relations it can be a great help to adopt the Hungarian proposals to introduce a detailed system of data protection rules in the agreement.

This can make us conclude that this can be further facilitated by a relatively standardised wording model used by all EU Member States, as indicated, for example, by the Austrian Chief Negotiator in relation to the Austrian conventions, especially in respect of specific rules on agreements, which are very strictly defined (impacted) by EU law.⁵³

At the same time, the example of data protection also points to the need to increase the role of the European Union in this area. At present, it may not be realistic for the European Union to formally conclude social security agreements on its own, even in the context of closer economic cooperation.

Although based on an assessment of the content of the cooperative frameworks, it is not completely ruled out in special cases: see Switzerland, Norway, Iceland and Liechtenstein, and for the future in the case of the United Kingdom, it is generally too futuristic to imagine a rapid growth of this kind of cooperation form, creating several new agreements.

However, it could be very useful if the EU could, in respect of some type of rules of the agreements such as data protection, establish a system of cooperation with major partners that can provide such a level of protection in general, not only for social security conventions but also much more broadly in the system of economic cooperation. This would significantly simplify the fulfillment of the current EU obligations, which are compartmentalised and often difficult for partners to interpret, resulting in a different wording in each agreement. If only a reference to such an EU agreement had been applicable in the agreements instead of introducing complicated rules from agreement to agreement, it would not only be much simpler, but would also ensure a much higher level of protection in respect of EU citizens rights.

This shows, by way of example, that EU strategies and action can indeed have a place and added value, while preserving the independence of national legislative activity concerning the external dimension of social security.

⁵³ See Spiegel, *National approaches of EU Member States...*, 159.

2. The direct impact of EU case law on agreements, in particular the *EU Gottardo* case law

As mentioned in part II, one of the most striking effects of EU law on bilateral agreements is the case law arising from Member States' obligations, because it clearly highlights the limits of Member States' regulatory freedom. In this respect, the so-called issue of the *Gottardo* clause⁵⁴ in Hungarian conventions is certainly remarkable. Although not an EU regulation, the rule on the enforcement of Hungary's EU obligations is usually contained in a direct provision in Hungarian bilateral agreements. According to it, Hungary directly expresses its commitment to treat all citizens of the European Union under the same conditions in all cases, regardless of whether they are citizens of Hungary or another European Union Member State. Contained in a separate article of the agreements as a so-called EU clause, albeit not always with the same wording, it clearly states in substance that the agreement does not affect the obligations arising from Hungary's membership of the European Union. If the partner deems it necessary due to the accession of the EU, it is advisable to make an EU reference in this regard as well.⁵⁵

With this unilateral declaration, by displaying it in the agreement, Hungary is formally fulfilling its accountable EU obligation. However, in practice, this is also a living obligation in those cases where this clause is not included in the text because the partner cannot accept this kind of restrictive provision in the agreement.⁵⁶ It is a real issue when the partner wishes to limit the personal scope of the agreement to the citizens of the contracting parties only (perhaps including the homeless, and refugees).

Not only can the principle-approach create havoc between contracting states. In respect of the implementation of this rule, it is clear that a unilateral commitment will only work if the competent institutions of the partner are prepared to provide administrative assistance to the EU Member State contracting party making the unilateral declaration in the agreement. Otherwise, from a practical point of view, the agreement can create a situation where direct discrimination could be demonstrated with regard to non-hungarian EU citizens. It does not mean, of course, that the partner should provide benefits under its legislation, but without its help even

⁵⁴ An important element of the European Court of Justice case law was the judgment in Case C-55/00, *Gottardo* (European Court of Justice of 15 January 2002) on which the so-called *Gottardo* clauses (EU clauses) in the agreements were introduced.

⁵⁵ See the Turkish agreement Article 46.

⁵⁶ Which is definitely the case in the latest agreement by Hungary, namely the Hungarian–Russian social security agreement in preparation. (An interesting question to be examined further could be the situation of a Russian citizen living in Russian-occupied Ukrainian territory in Crimea, or whether the EU could make a decision not to allow Member States to apply Russian agreements in respect of this territory. There could be a real threat in a similar situation for an Israeli citizen who is resident in the Golan, when there is an agreement between Israel and an EU MS.)

the EU Member States cannot decide upon and provide the proper benefits according to their legislation.

However, in the implementation of this rule, it is clear that unilateralism only works if the contracting partner is ready to provide administrative assistance to the contracting party making the unilateral declaration.

If a non-EU Member State's contracting partner is, in principle, prepared to conclude an agreement only in respect of nationals of the two countries and interprets it strictly in all cases, an EU Member State would not be able to conclude the agreement lawfully, (namely the third country's institutions not applying it in any way, not even helping to fulfill the obligations of the other country's partner institutions).

As stated in the *Gottardo* judgment, a Member State of the European Union may not discriminate against a person who acquires a right in an EU Member State (e.g. a national of another EU State who has completed a period of insurance). That is, a Member State cannot apply the agreement only to its own nationals and not applying to nationals of another EU state at the same time. However, in order for the agreement to be properly applied to nationals of another EU Member State, it is necessary to have the appropriate information, namely the rights and entitlements of the persons concerned acquired in the territory/under the law of the other Contracting Party need to be known in order to take them into account. It is therefore necessary for the competent institutions to obtain information and in some cases certificates, which requires at least the full cooperation of the administrative bodies of the other country, without which the EU Member State cannot fulfill its obligation to take due account in respect of the the acquired rights or the relevant facts in practice. In this way, the importance of this case is indisputable and highlights very specifically the direct effect of EU case-law in the process of concluding bilateral agreements.

This question highlights a very interesting question of principle. If it is known that a third country is not ready to cooperate with the Member State to help it fulfill its obligations, even if it happens indirectly (only seen in practice), or expressed it directly, even during the negotiations before concluding the agreement, what shall the Member State do in a situation like this? Is it possible that it is not allowed to conclude the agreement? Must it terminate the concluded agreement, because the partner's institutions are not able to fulfill their obligations in respect of the EU citizens? There is no clear answer to these questions and there are differing opinions in this respect.

Cortazar points out very precisely that EU Member States are faced with two options for dealing with an agreement with a reluctant third country, in order to meet the obligations that EU Member States must fulfill themselves through a ruling by the Court of Justice of the European Union. The first is to develop a reciprocity policy with non-EU partners at European level (in his case study, such an agreement with Morocco is therefore proposed). Or, in the second case (do nothing), the Member States of the

European Union knowingly infringe their obligations under EU law. That is, in essence, in his view, they could not have legally entered into an agreement.⁵⁷

However, Spiegel takes a different view.

Of course, EU Member States under EU law remain free to conclude bilateral agreements with third countries and can also choose the content of such agreements (provided they respect the principle of equal treatment of all EU citizens). The obligations stemming from the Gottardo judgement (see footnote 20) led only to a recommendation of the Administrative Commission (Recommendation No H1 concerning the Gottardo judgment, 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 (OJ 2013, C 279:13). Of course, if the contracting partner rejects an agreement based on such principles this should not hinder the Member State to conclude such an agreement as long as it can prove its attempts to include the principles developed by that judgement.⁵⁸

In this respect, a specific case by the Court of Justice has not yet been examined; the two practical approaches have not been ruled by it, and in any event it what position the Court of Justice will take in such a specific case will be an interesting question. In my view, however, Cortazar's position is closer to what we can predict as the Court's position, because it is more in line with the Court's approach to protecting the EU citizens in line with the principle of equal treatment.

3. Interpretation – using a common language

A third issue that warrants further investigation is consistent interpretation, the issue of comprehension of the texts of the agreements. In Europe, thanks to the creation of a common legal language for social security and its coordination by the Council of Europe and the European Union (both concepts and technical language), such difficulties of understanding are rare. In the preparation and implementation of agreements with non-European countries, it is a very serious challenge to identify whether the two parties really understand the same when interpreting a specific coordination rule, especially with regard to the proper implementation of the relevant national rules. This challenge will inevitably have to be faced by EU Member States negotiating with Japan, South Korea, or even Canada and Russia. In these cases, it

⁵⁷ C. G. de Cortázar Nebreda, El Acuerdo de Asociación de la UE y Marruecos y sus implicaciones en el ámbito de la protección social, In M. D. Ramírez Bendala (ed.), *Problemas Actuales De La Seguridad Social En Perspectiva* (Ediciones Laborum, 2019, 1–36) 24.

⁵⁸ Spiegel, National approaches of EU Member States..., fn. 60.

is advised to introduce the meaning of the principles and the terms of the EU legal language of coordination very precisely in order to have the same understanding by the parties.

VII. SUMMARY AND CONCLUSIONS

Looking for the answer to the question of what kind of Hungarian specific aspects can be identified and what national interests and circumstances determine the Hungarian legislation, we identified a complex picture regarding concluding bilateral agreements on social security coordination. We can state that not only EU membership itself, but the preparation for it had an important impact on the Hungarian regulatory goals, the applied tools and the formation of the room to manoeuvre in this field. We can conclude that EU principles essentially define the rules and tools of modern Hungarian bilateral agreements. And it is true, even though in specific cases when an EU MS concludes an agreement with an overseas country, the basic principles are to be found in the agreements. The development of the EU legislation in the field of social security also soundly defines the national room for manoeuvre when concluding agreements at bilateral level with third countries.

In order to understand the Hungarian possibilities and regulatory conditions, it was necessary to review the following issues in the first part of the study:

- European legislative environment;
- Why is it important to conclude social security agreements?;
- The evolution of the direct impact of EU legislation.

Taking the *Gottardo* case into consideration in particular, which gave us a very clear legal framework to establish the room to manoeuvre when concluding bilateral agreements, we can see that there is a very clear EU impact on those rules. The bilateral agreements were primarily affected by the judgment, and through it by the EU legislation. When we tried to identify those principles and rules of the EU appearing in the bilateral conventions that are fundamentally affected, it became clear that, in several aspects, we can highlight direct visible affects, especially in the fields of the scope of the agreements; how to regulate the assimilation of facts in them, the questions of equal treatment; institutional cooperation with the third country, the and other country's openness to cooperate.

From this perspective, we analysed several specific issues that are relevant in modern Hungarian agreements in respect of the EU law impact:

- the scope of the agreements, (material, personal);
- the applicable legislative rules and some specific benefits under the scope of the agreements;
- the principles in the agreements and the assimilation of facts especially.

A special analysis was introduced in respect of the difficulties of institutional cooperation, especially in specific cases (data protection issues, *Gottardo* clause, interpretation – common language) according to the impact of EU law on bilateral agreements.

Taking into consideration this framework of the necessary (required) minimum progress over the last two decades, we can see the following general characteristics of the development of Hungarian agreements.

Overall, there is a significantly recognisable system and are clearly identifiable principles in Hungarian agreements. This is a good way to create a safety net, even if that does not provide the level of protection provided by EU legislation.

For the questions

- a) does Hungary respond to the challenges of mobility with third countries; or
 - b) do the means used ensure effective action / response from a legal perspective; and
 - c) can we discover the elements of a structured system in the legal solutions used
- the answer is a resounding yes in all three cases.

Hungary has an effective system of tools that protect the rights of those affected by mobility. This is a stable set of tools and altogether a system that can operate for many decades.⁵⁹ However, it is also clear that it worth building on, and on this basis to develop the system of agreements further.

However, it is clear that, in the case of relations outside the European Economic Area, there are greater differences between the contracting parties' systems, which narrow the opportunities for cooperation. In Europe, EU law plays a leading and exemplary role in helping countries to conclude the widest possible conventions within Europe.

Outside Europe, however, there has been less room for manoeuvre in recent decades, driven by the economic interests of the partners rather than the highest level possible of protection of citizens' social security rights and advantages.

Moreover, this room has always been narrow due to the generally greater economic weight of the partners and their stronger bargaining power.

The contributions in the special volume of the European Journal of Social Security in 2018 highlighted the importance not only the issue itself, but the natural limits and at the same time the opportunities and merits of a possible European approach on the basis of EU-level cooperation.

I share this vision. More room for manoeuvre for the future can only be imagined if we at national level can sit down at the negotiating table in some form, acting on the experience gained from EU membership and supported and backed by

⁵⁹ So far, no modern agreement has been amended, although there are agreements in between them almost twenty years old.

EU recommendations, in order to give our citizens agreements even better serving their interests, as EU law does at EU level.

It is obvious that the conditions for this need to be created, but Hungary does not have to start out alone; it is worth thinking together with the other EU Member States and the European Commission in order to expand our room for manoeuvre together for future negotiations.