



## E-newsletter december 2008

**trESS wishes you all the best for 2009 !**

### Welcome word



Dear trESS friends,

It is my pleasure to present to you the fourth and final newsletter of 2008, the first year of the trESS II project.

2008 has been an interesting and fruitful year.

The trESS website and house-style underwent a major revamping - the results of which are presented further on in this newsletter.

The first half of the year was focused on the training and networking aspects of trESS. 24 seminars were organised, of which 3 bilateral seminars. Our training events reached over 1,000 attendees, which implies an average of 44 participants per seminar.

This year's seminar round has resulted in a significant increase of the number of subscribers to the contact database. Whereas, at the end of 2007, some 800 persons had registered for the contact database, one year later this networking tool incorporates the contact details of more than 1.350 persons from all over Europe who are professionally involved in social security coordination. We invite all of you who have not done so yet, to join our contact database.

Keeping the website up-to-date has of course been a continuous exercise. Throughout the year, seminar details have been included, the different national bibliographies have been updated and new ECJ cases were linked to the relevant Regulation articles in the 1408/71 database. 2008 has also seen the inclusion of some 200 additional national court cases in the national case law section.

The last months of the year were dedicated to the reporting exercise. Both the European Report 2008 and the 2008 Think Tank Reports (on new forms of mobility and on the relation between Regulation 1408/71 and the Residence Directive 2004/38), have been finalised and are available for download on the trESS website. The Think Tank is an expert group established to analyse where the coordination rules need to be adapted in order to fulfil the overall aim enhancing the free movement of persons. Further in this newsletter, the highlights of the latest European Report are presented.

2009 promises to be an important year, as hopefully it will see the adoption of the new implementing Regulation, opening the way to the entering into force of the new Community legal framework on social security coordination. trESS will keep you informed !

I wish you all the best for 2009!  
Yves Jorens - Project Director

### The new trESS website!



As you could read already in the welcome word, the trESS website has undergone a major modernisation exercise.

The new trESS website – which you can find at the usual URL [www.tress-network.org](http://www.tress-network.org) – has been online since the end of November 2008.

Visitors will immediately notice the new style of the website, including a redesigned logo. Whilst still instantly recognisable, the revamped website offers a completely new look and feel.

This does not mean that the update is merely of a cosmetic or visual nature. The new website is also characterised by increased user-friendliness. Some minor usability flaws of the former website have been corrected and several functionalities have been added. For instance, information relating to a given country is now accessible in a centralised way. The new homepage is less “busy with information” and is conceived to help you access information faster and simpler.



The main navigation elements of the new website are Seminars, E-learning, National resources and European resources.

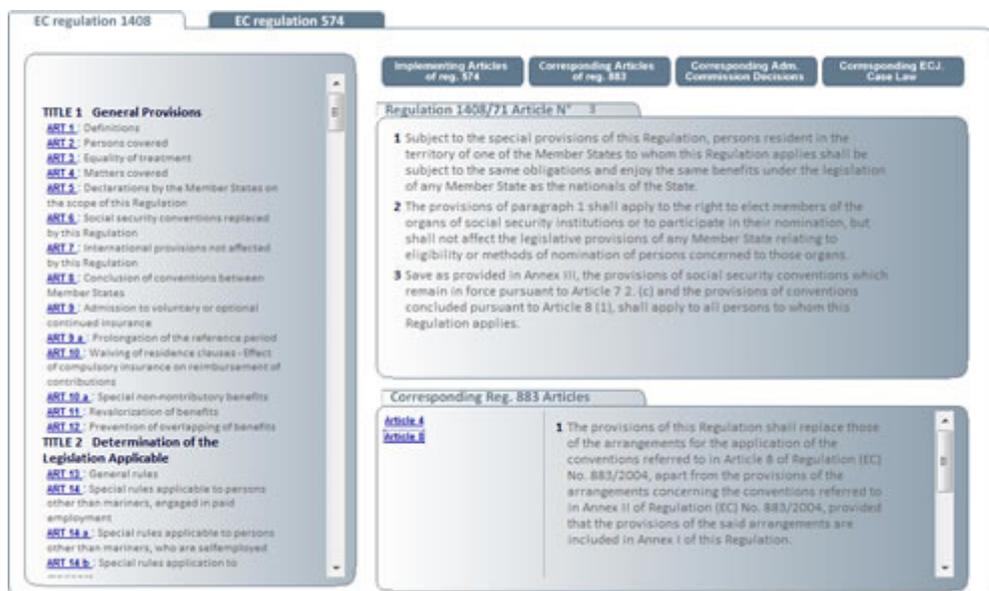
Further navigation is ensured via tabs.

Under “Seminars”, you can find useful information about past and future seminars (calendar, agenda, PowerPoint presentations). The heading “E-learning” allows you to access the e-learning module, which consists of a general introduction into social security coordination and a Q&A section, containing 150 questions and answers structured around a glossary of 63 keywords.

Under “National resources” you can easily retrieve the information relating to a given Member State (i.e. national seminar information, national case law, national bibliography) by clicking on the country’s territory on the map which is shown.

Finally, the section “European Resources” hosts the main reporting outputs of trESS, i.e. the European Reports and the Reports of the Think Tank, as well as the Regulations database. This latter element is one of the substantial novelties of the new website.

Indeed, the new trESS website also features some interesting new content tools. Notably, the 1408/71 database has been extended to become a Regulations database.



It is now possible to link the Articles of Regulation 1408/71 not only with the implementing articles of Regulation 574/72, relevant CASSTM Decisions and relevant ECJ case law, but also with the corresponding articles of Regulation 883/2004. The notion “corresponding article” refers to the article(s) of Regulation 883/2004, if any, which regulate(s) the same subject matter. This implies that the substance of the rules contained in the source article and the target article might differ.

What’s more, the Regulations database now encompasses a Regulation 574/72 database, providing linkage between the Articles of the implementing Regulation and relevant ECJ case law.

As the coordination Regulations are also applied in the EFTA countries, it has been decided to “open up” the website in as far as possible to these countries. In concrete terms, this means that interested persons from Iceland, Liechtenstein, Norway and Switzerland can become members of the contact database, but also that judgments of the EFTA Court dealing with social security coordination are now linked in the Regulations database. Moreover, the flags of the said countries have been added in the “what is trESS?” section, which explains the project and the website in the national languages.

As was the case before, it is possible to subscribe online to the trESS contact database and to the trESS E-newsletters. In addition, it will also be possible to register via the website for the 2009 national seminars. What is new is that the website now also contains a permanent link to the user survey - which featured in an earlier issue of this feedback. You are very welcome to express your opinion about the new website - and the project in general - by filling in this short questionnaire ([hyperlink](#)), which will take only a couple of minutes of your time. Thank you in advance!

## **Highlights of the European Report 2008**

### ***I Background***

The trESS network publishes every year its European Report. This European Report presents an overview of the implementation of Regulations 1408/71 and 574/72 in all 27 Member States. The issues highlighted in the European Report are those identified within the 27 national reports as (potentially) problematic in their respective Member States. New is that the second part of this report contains country sheets, highlighting the main issues of debate and discussion in the Member States concerned.

### ***II Some general cross-cutting issues***

As we celebrate 50 years since the adoption of the EU regulations on social security for migrant workers, the Regulations themselves are at a watershed. Fifty years since they were conceived it is clear that these regulations are among the most important EU instruments, providing for free movement of persons and contributing to the development of European citizenship and social justice. However, they are also one of the most complicated areas of EU law, which is reflected in the high number of cases brought before the ECJ.

It is appropriate to acknowledge the challenges facing policy makers tasked with rationalising and re-designing regulations to coordinate social security across 27 countries in a dynamic and constantly changing environment. The environment in which Regulation 1408/71 operates has changed in several ways since it was introduced in 1971. These include: expanding membership from six to 27 countries; new types of migration, with increasing use of posting; new patterns of work, including increasingly flexible labour markers; demographic and social changes, with people living longer and forming more varied families and partnerships; new social security arrangements, including new arrangements for early retirement and the care of the elderly; and the growing body of ECJ case law.

In the European Report we have identified - within the overarching theme of the changing environment and context of coordination - three inter-related cross-cutting issues: changes to national legislation; the extent to which the Regulations have adapted to the changing environment; and their relationship to other EU instruments.

#### ***II.1 Changes in national legislation or circumstances***

#### - The structure of social security schemes

One important issue concerns the way social protection systems are structured in the Member States and the impact this might have on coordination. Growing problems may be expected. The organisational structure of Member States might itself have an impact on the correct application of EU law. For example, in many countries the organisation, administration and financing of benefits and services, is the responsibility of regional states or even districts, provinces or cities, rather than the (Federal) State itself. Without proper coordination between these various tiers of government, implementation of the Regulations could be adversely affected. In addition the further regionalisation of social protection is likely to present new challenges. While the Regulations currently coordinate national schemes, recent devolutionary trends in some Member States may lead to growing pressure for the application of EU law to intra-state contexts, in part through the growing influence of European citizenship. Should intra-state arrangements become subject to European coordination law, questions will follow about how to apply the principles and framework of coordination in this context.

#### - The Active Welfare State

A second important issue is the influence of the 'active' welfare state on coordination. The promotion of the active welfare state is leading a move away from social security schemes aimed at compensating losses consequent upon the realisation of specified risks and contingencies towards schemes concerned primarily with preventing the risk occurring in the first place. Many employment-related schemes require participation in work-related activities as a condition for entitlement to benefits. This increasingly includes not only employment allowances, but also, for example, invalidity benefits. These developments are likely to raise new issues around the classification of these types of benefits, while cross border participation in work-related activities and rehabilitation measures will present policy makers and administrators with further challenges. The application of the principle that only one legislation is applicable in a situation where a person is performing part-time work in one Member State and receiving part-time sickness allowance or part-time rehabilitation allowance from another Member State, might not always be in the interest of the migrant worker.

#### - Classification of benefits

A third issue is the changing substance and context of national legislation. The material scope of the Regulation is structured around the nine traditional social security risks. Given that this is an exhaustive list, new types of benefits introduced in the Member States must be included under one of these nine categories if they are to fall within the Regulation. New types of benefits may present difficulties of definition and categorisation. One example is long-term care insurance. As the new Regulation, 883/2004, will provide only limited coordination for long-term care it is likely that further policy discussions, perhaps leading to a new separate chapter for long-term care benefits, will need to take place in the near future.

It is perhaps not surprising that the classification of, and distinction between, social security, social assistance and special non-contributory benefits continues to be contested. However, work undertaken within the Administrative Commission and the developing case law of the ECJ has further clarified the demarcation lines between these types of benefits with the content of 'social security' continuing to expand. It is possible that a whole range of benefits and services belonging to the broad concept of social welfare will increasingly be brought within the remit of the Regulations.

However, it is not only the concept and definition of risk that will have to be examined, but also the boundaries of the legislation. As it becomes clear that a growing number of complementary and supplementary schemes, including second pillar pensions, will fall within the material scope of the Regulations, questions about what falls under which Community instrument and to what extent will become more urgent.

#### - Changes in family law

Changes in family law in Member States, as well as definitions and arrangements, can also be expected to have an impact on the application of the Regulations. The impact of divorce and the rights of children and ex spouses raise issues for coordination with respect to family allowances, while questions of custody and the distribution of financial obligations can be complicated in a cross border context. Important questions concerning same sex marriage and partnerships are likely to move up the policy agenda

Discrimination against same sex couples across Europe could present serious barriers to free movement. The impact of the interface of the plethora of partnerships statuses and benefit entitlement conditions could imply that some same sex couples exercising their right of free movement may find their status and entitlement changing as they move between different rights regimes to the detriment of their social security contribution record and entitlement to benefit.

## ***II.2 Relevance of the Regulations' provisions***

The second, related, cross-cutting issue concerns the question: to what extent are the provisions of regulations first introduced over 50 years ago still relevant to today's context and conditions. This question is often raised with reference to the application of the rules to determine applicable legislation.

### **- Flexible Migrant Worker**

One key issue is the extent to which the Regulations are able to respond to increasingly flexible labour markets, with some workers developing highly fragmented and mobile working biographies, accentuated by the growing use of cross-border employment agencies and tele-working. Other examples that national reports suggest challenge the concepts underpinning applicable legislation include workers (for example artists) who frequently carry out successive periods of short-term work in different Member States for different employers, sometimes in different capacities. Other examples include air crew, work performed for companies hiring staff, remote workers who perform their work via the internet or who can perform their work anywhere, such as journalists, photographers, researchers, etc. It has been suggested that these 'new' groups of people challenge the existing rules on applicable legislation. The general discussion extends to whether there is a fundamental conflict between the objectives of the rules determining applicable legislation – whether they are intended to support the market or to protect workers and other mobile individuals, and consequently, what should be the point of departure for revision – the mobile individual or the employer? In a broader sense, the discussion leads to questioning the fundamental principles of applicable legislation on which the Regulations have been built for the past half a century: in particular the rule of the single applicable legislation and the *lex loci laboris*. The question is perhaps not whether *lex loci laboris* should be replaced by another principle, but rather whether the fundamental principle of insurance under one legislation is still appropriate? The uncertainties and problems that highly mobile and flexible workers are confronted with raise a further debate - should additional special rules for specific categories of persons be introduced or are these groups not in practice all that different from other categories of workers?

### **- Need for further clarification/definitions**

Some of the concepts used in Regulation 1408/71 are unclear and/or controversial. For example it is likely that the concept of posting will remain a contested issue in the foreseeable future.

Different interpretations of the rules are not only encountered in the context of posting, but can be found throughout the provisions on applicable legislation such as, for example, simultaneous employment, rules concerning international transport workers and sea-farers, and the application of Article 17. Different national reports raise the need for precise interpretation and guidelines as well as clear instructions.

### **- Smooth functioning of the Regulation**

Regardless of the substantive content of the Regulations, the smooth functioning of coordination depends on effective cooperation between national administrations. Administration - based on E-forms - is sometimes a source of complication and delay and consequent difficulties for migrants in all Member States. It is of the utmost importance that further attention should be paid to the growing concerns about the administrative difficulties encountered when implementing the Regulations. Consequently there is considerable interest in the development of electronic exchange of information. This will not only speed up administration but could also avoid the practical problems identified above. However, effective electronic exchange of information depends on well organised and effective national administrations. Administrative decentralisation that is taking place in some Member States might introduce additional problems due to lack of knowledge of the Regulations at local level combined with lack of clarity about roles and responsibilities.

Although the ECJ attaches considerable importance to good cooperation between the Member States and considers this is often the first way to solve problems, it is nevertheless felt that this cooperation cannot be enforced and cooperation in this field often falls far short of what is required. In addition to effective cooperation between administrations there is also a perceived need for the Administrative Commission – as also pointed out by the ECJ - to play a more active role in resolving specific issues and conflicts in addition to its current role clarifying more general issues. Good administrative cooperation is increasingly viewed as the fifth principle of European social security law. Further cooperation is also envisaged to combat fraud and protect revenue.

### ***II.3 Interface with other aspects of EU law***

The third, related, cross-cutting issue concerns the relationship of the Regulations to other areas of EU law. Recent developments show that Regulation 1408/71 is no longer the only instrument dealing with social security for migrant workers as other areas of European Law encroach.

#### Provisions of the Treaty

People are increasingly relying directly on the Treaty provisions. For example, the influence of internal market rules on health care and ECJ case law on European citizenship are having an increasing impact on social security and consequently an indirect influence on the Regulations. Recent cases before the ECJ suggest that the courts have tried to avoid giving more rights on the basis of Article 18 EC than derived from Regulation 1408/71. However, we can expect further developments in this area as the arguments made by the ECJ are likely to be tested in respect of Article 18 and further developments with reference to Article 18 can also be anticipated over the extent of coverage of non-contributory benefits. An important development taking place is the direct reliance on the general principles of free movement of persons (Article 39 EC) by European workers, in order to combat possible limitations to their fundamental rights, limitations that not only are the result of national rules, but also sometimes follow from the application of the EU Regulations themselves. Recent ECJ cases have made clear that eg. the non-exportability of certain benefits has to be looked at alongside the right of freedom of movement under Article 39 or the European citizenship under Article 18. Under these circumstances, conditions of residence can only be put forward if its object would be justified and proportionate to the objective pursued. This might end up in other results. Examples such as these have made it clear that the Regulations are no longer the only route for coordination of social security for migrant workers.

Source: Jorens, Y. and Hajdu, J., "[Training and reporting on European Social Security - European report 2008](#)", Project trESS (Training and Reporting on European Social Security), European Commission, DG Employment, Social Affairs and Equal Opportunities, Brussels, 2008, 125 p.

---

This e-newsletter has been produced by Malgosia Rusewicz, under the responsibility of Yves Jorens and Michael Coucheir.

If you wish to unsubscribe from the trESS newsletter [click here](#).

Ghent University, Faculty of Law,  
Department of Social Law,  
Universiteitstraat 4,  
B - 9000 Ghent,  
BELGIUM