trESS training and reporting on European Social Security

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Dear **trESS** Friends,

Addressing for the first time the readers of this e-newsletter, and as a newcomer in the field of the coordination of social security schemes, I would like to briefly present myself and to pay attention to the points which, in my view, are important for the period in front of us.

My experience within the European Commission, both in the field of employment and in that of industrial relations, has not been unconnected with social security coordination. In the same way, this work involved letting work together services, organisation and players from different cultures and backgrounds.

This was the case when it comes to employment policy where, even before the invention of the open method of coordination, groups of representatives of national administrations gathered regularly in Brussels to exchange views on the policies that were implemented and to try to seek common ways. Obviously, that was also the case for the European social dialogue, the development of which I accompanied and which today generates agreements which are being implemented all over Europe.

Trust is at the heart of this cooperation mechanism. Its power cannot be overestimated. Suffice it to consider how strongly a loss of trust impacts on today's' society, regardless of whether the stock market or whether safety is concerned. Conversely, increasing trust generates opportunities and boosts the efficiency of collective action.

The coordination of social security systems, established in 1959 and gradually reinforced ever since, undoubtedly constitutes the most advanced example of what trust is capable of producing. It is a unique illustration of a complex construction based on a strong commitment of national social security institutions, with continuous support from the European Commission.

I have the privilege to join this particular field of social policy at a time when preparations are underway for one of the big leaps of the coordination, i.e. the transition from Regulation 1408/71 to 883/2004. The former Regulation has been modified on numerous occasions in the course of its existence. The process which is ongoing, however, constitutes a turning point, in that it provides coordination with the means to change gear, not only simplifying and specifying certain provisions, but also imposing a technological mutation through the electronic exchange of information.

Seen from that perspective, the role of the **trESS** network – which has become established over the past four years – is more important than ever.

In the months and years to come, we need to organise and feed debates in each of the Member States to inform and to raise awareness about social security coordination. The national seminars must become strong events of exchange and should widely disseminate in close partnership with civil society organisations. Coordination is one of the first and greatest successes of European social policy. It brings concrete advantages for citizens moving around in Europe. We must increase the knowledge on the rights and step up informational activities in the field.

The analytical and networking tools developed by **trESS** are unique and widely recognised. I await in particular the outcome of the work which will be undertaken to link the articles of Regulation 1408/71 and related case law with those of the new Regulation.

2009 will be the year of the preparation for the applicability of the new Regulation. In order to ensure a smooth transition in 2010, we shall have to prepare the training tools for the institutions and the public. We will have to invest a lot of effort in this and I count on the support of the **trESS** network and its experts to assist us in this endeavour.

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Content of this newsletter

I. Recent Commission initiatives

The Commission's work-life balance package

On 3 October 2008 the European Commission has released new proposals intended to strengthen the working rights and protection of women taking maternity leave.

The Package includes a proposal amending the directive on pregnant workers (92/85/EEC), a proposal amending the directive on equal treatment of the self-employed (86/613/EEC) and a report on the provision of childcare services in the Member States. A Communication explains the background and context.

The Commission proposal on maternity leave would increase the minimum period of leave from 14 to 18 weeks and recommend to pay women 100% of their salary beyond the current minimum of paying at least equivalent to sick pay. In addition, women will have more flexibility over when to take the non-compulsory portion of their leave (before or after childbirth) and would thus no longer be obliged to take a specific portion of the leave before childbirth, as is presently the case in some Member States.

There will also be stronger protection against dismissal and a right to return to the same job or an equivalent one after maternity leave. Finally, a right to ask the employer for flexible working patterns during or after the end of maternity leave will be introduced although the employer will have the right to refuse this request.

The other proposal – on self-employed women, will provide equivalent access to maternity leave as for employees, but on a voluntary basis. At the same time, spouses and life partners (recognised as such in national law) who work on an informal basis in small family businesses such as a farm or a local doctor's practice (so-called 'assisting spouses') will have access to social security coverage on at least an equal level of protection as formally self-employed workers.

Both proposals will be discussed by the European Parliament and the Member States, and it is hoped that agreement will be reached during 2009. EU countries would then have two years to introduce the legislation into national law.

As part of the same package, the Commission also issued a report on the provision of childcare in the European Union and the performance of each Member State with regard to the targets set by EU leaders in Barcelona in 2002.

On 17 September 2008, the social partners at European level launched negotiations on parental leave with a view to revising the existing EU legislation, itself based on a framework agreement concluded by European employers' and trade unions' representatives. The negotiations could also address other forms of family leave, such as paternity leave (a short period of leave for fathers around the time of the birth or adoption of a child), adoption leave (leave similar to maternity leave around the time of adoption of a child) and filial leave (to care for dependent family members). The aim is to conclude negotiations within nine months.

COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS on a Commission Recommendation on the active inclusion of people excluded from the labour market

On 3 October 2008 the European Commission has also put forward a set of common principles to help guide EU countries in their strategies to tackle poverty. The recommendations are centred around three key aspects: adequate income support, inclusive labour markets and access to quality services. National governments will be encouraged to refer to these common principles and define policies for active inclusion on this basis so as to step up the fight against exclusion from society and from the labour market.

The common principles set out by the Commission represent a voluntary framework for Member States when designing or revising their policies. They were, however, prepared through a wide-ranging consultation with Member States and with all relevant actors.

They will be formally discussed by national governments at the Employment and Social Affairs Council in December 2008 that will draw conclusions on follow-up actions.

II. Interview with Mr. Jörg TAGGER, Member of the Commission DG EMPL Unit E/3 dealing with social security coordination, Secretary-General of the Administrative Commission on Social Security for Migrant Workers

***trESS** : Can you describe briefly what the Administrative Commission on Social Security for Migrant Workers (often known by its French acronym CASSTM) is and what its tasks are? And what precisely is your role as the Secretary-General of the CASSTM?*

Jörg Tagger: The CASSTM is a very special committee under Community law, different from most of the many other existing committees at EU level. Based directly on Regulation 1408/71, the CASSTM is a unique committee ("sui generis") tasked in particular with dealing with all administrative questions and questions of interpretations arising from the coordination Regulations. To this end, it can adopt interpretative Decisions and Recommendations which are published in the Official Journal. The reasons for this special status are historically related to the adoption of the first social security Regulation No 3 in 1958 and reflect the special nature of the coordination of social security systems within the Community legal framework.

The post of a Secretary-General is another feature of the CASSTM which underlines its special character. This function is clearly separated from that of the Commission representative and has a number of operational tasks described in the Rules of Procedures of the CASSTM. I personally see my role as a facilitator to ensure, together with the Presidency, a smooth functioning of the CASSTM and the timely delivery of required results. This also includes long-term strategic planning and the constant review and, if necessary, adaptation of the working methods of the CASSTM to meet the always changing challenges ahead, such as currently the preparations for the application of the new Regulations and the introduction of the electronic data exchange. To this end, however, I am not working alone, but as part of a team of excellent lawyers and assistants from the competent Commission unit who form what is commonly known as The Secretariat.

***trESS** : One of the key points of Regulation 883/2004 and its future implementing regulation is to improve administrative cooperation by providing for the electronic exchange of information. The CASSTM has been entrusted with the task of preparing for this electronic data exchange. Can you give an overview of what has happened in this respect and what still needs to be done?*

Jörg Tagger: The replacement of the current exchange of paper forms by a full electronic data exchange between Member States in the social security field is one of the major challenges for the CASSTM. A multiannual Work Programme on this subject was adopted in 2006 which, amongst other things, also led to the creation of a Task Force on electronic data exchange with the specific remit of driving through this Work Programme. This Task Force is made up of experts from the Administrative and Technical Commissions which ensures closer working on all legal, policy, administrative and technical issues concerning electronic data exchange. In addition, special Ad hoc groups have been or are still working on specific questions under the auspices of the Task Force.

Some milestone achievements have already been reached, such as the agreement on a Common European Architecture and the list of all required business flows and data for what we call now the EESSI (**E**lectronic **E**xchange of **S**ocial **S**ecurity Information) project. However, a lot of work is still lying ahead of us, in particular as all relevant aspects related to the new electronic system will have to be underpinned by CASSTM Decisions or Recommendations in time for when EESSI becomes operational. This concerns such important issues as the new Master Directory containing the electronic list of institutions, the methods of operation of EESSI and the details of any transitional periods.

***trESS:** Apart from the electronic data exchange, does the CASSTM have other tasks connected with the future applicability of Regulation 883/2004? What will happen with the decisions and recommendations adopted on the basis of Regulations 1408/71 and 574/72?*

Jörg Tagger: There are a number of actions apart from the electronic data exchange which the CASSTM still has to take before the date of application of the new Regulations. Regulation 883/2004 and the new Implementing Regulation, for example, already refer to further actions to be taken by the CASSTM, such as the list of long term-care benefits. In addition, the Council transferred during the negotiation process a number of issues for clarification to the CASSTM. A particularly important issue is also the establishment of a training and information plan for institutions and citizens, which also includes the drafting of instructions as well as training and information material with regard to the new Regulations.

In order to ensure that all the required actions are taken in time, a new system of Leading Delegations was set up, whereby one CASSTM delegation is responsible for the process and timely conclusion of a certain action. So far, this new system has proven to be very successful.

With regard to the existing Decisions and Recommendations, I strongly believe that we have to create as much legal certainty as possible for both the social security institutions and the citizens concerned. The CASSTM is therefore currently reviewing all of these Decisions and Recommendations in the light of the provisions of the

new Regulations. Our aim is to publish in time in one single Official Journal all those Decisions and Recommendations which have been adapted with regard to the new Regulations, together with a framework Decision clarifying which of the current Decisions and Regulations will be repealed and which of them will be adapted at a later stage.

III. Recent case law of the European Court of Justice (ECJ): Case C 228/07 Petersen, 11 September 2008

Facts

The reference has been made in the course of proceedings between Mr Petersen and the *Landesgeschäfsstelle* des *Arbeitsmarktservice Niederösterreich* (Regional Office of the Lower Austria Employment Service, the 'Employment Service') regarding the latter's refusal to continue to pay him, following the transfer of his residence to Germany, the advance granted to unemployed persons who have applied for the grant of a benefit under the statutory pension and accident insurance scheme on the ground of reduced capacity to work or incapacity to work.

Jörn Petersen, a German national, worked as an employed person in Austria. In April 2000 he applied to the Austrian *Pensionsversicherungsanstalt* (Pension Insurance Institution) for an incapacity pension under the Austrian statutory retirement pension scheme. His application was refused and Mr Petersen brought an action before the courts. Pending the judicial proceedings, the Employment Service granted Mr Petersen advance unemployment benefit. Through that benefit, Austrian law provides individuals who are unemployed and have applied for an incapacity pension with a guaranteed minimum income while the procedure is taking place.

After the advance had been granted, Mr Petersen notified the Austrian authorities of his intention to move to Germany, in the expectation that the benefit would not be subject to suspension or modification. However, on 28 October 2003, the authorities withdrew the benefit on the ground of his change of residence. Mr Petersen brought another action before the courts.

Questions referred

In the light of the above circumstances, the Austrian *Verwaltungsgerichtshof* decided to refer the following two questions to the Court for a preliminary ruling:

1. In its first question, the national court is seeking to determine the nature of a benefit such as the one at issue in the main proceedings. It asked, essentially, whether such a benefit is to be regarded as an "invalidity benefit" within the meaning of Article 4(1)(b) of Regulation 1408/71 or an "unemployment benefit" within the meaning of Article 4(1)(g) thereof.

2. In its second question, the national court is asking, essentially, whether Article 39 EC is to be interpreted as preventing a Member State from making the grant of a benefit such as the one under consideration – provided it is to be classified as an unemployment benefit for the purposes of the Regulation – subject to the condition that the recipients must be resident on the national territory of that State, prohibiting the exportability of such a benefit to another Member State.

Answer of the ECJ

The ECJ began by establishing that the Austrian advance payment to unemployed persons constituted a social security benefit, as it is granted without any individual and discretionary assessment of personal needs, on the basis of a legally defined position and relates to one of the risks expressly listed in Article 4(1) of Regulation 1408/71. To determine whether the benefit at issue is intended to cover the risk of invalidity or unemployment – and hence is governed by the invalidity or unemployment chapter of the Regulation – the ECJ recalled that social security benefits must be regarded, irrespective of the characteristics peculiar to different national legal systems, as being of the same kind when their purpose and object as well as the basis on which they are calculated and the conditions for granting them are identical. On the other hand, characteristics which are purely formal must not be considered relevant criteria for the classification of the benefits.

After having scrutinised both the purpose and entitlement conditions of the Austrian advance benefit, the ECJ concluded that, notwithstanding its link with an application for an invalidity pension, it is directly related to the risk of unemployment and hence constitutes an unemployment benefit within the meaning of Article 4(1)(g) of Regulation 1408/71.

To reach that conclusion, the ECJ took into account that the benefit was aimed at permitting the person applying for an invalidity pension to remain in the employment market during the period of uncertainty so as to avoid

making a subsequent return more difficult if the application for an invalidity pension is rejected. Thus, like all unemployment benefits, the benefit concerned – which is also paid by the authorities competent in the matter of unemployment – is essentially to replace the remuneration lost by reason of unemployment and thereby provide for the maintenance of the unemployed person.

The ECJ continued that this is not altered by the fact that the benefit is linked to the application for an invalidity pension: although under Austrian legislation, for the purposes of granting the advance benefit, entitlement to such an invalidity pension must be probable, the lack of paid employment must, on the other hand, be established, since unemployment is an essential condition for the grant of the benefit. As the ECJ already held in De Cuyper (C-406/04), a benefit granted if the risk of loss of employment materialises and which is no longer payable if that situation ceases to exist as a result of the claimant's engaging in paid employment must be regarded as constituting an unemployment benefit.

The ECJ went on to find that, pursuant to the relevant Austrian legislation, the conditions for granting and the rules for calculating the advance benefit were similar to those governing unemployment benefit.

Finally, the fact that the eligibility conditions regarding the advance payment did not include the requirement for the applicant to show that he is capable of working, willing to work and available for work, is not such as to rule out the classification of the benefit at issue as an unemployment benefit. Indeed, although such requirements could constitute an important characteristic of the conditions of eligibility for unemployment benefit, the sole fact of being dispensed from fulfilling those conditions in a particular case cannot affect the very nature of the advance benefit.

Second question

With regard to the second question, the ECJ pointed out that, insofar they are not mentioned in Article 10 of Regulation 1408/71, unemployment benefits are in principle not exportable. Furthermore, as Mr Petersen is not in the situations referred to in Articles 69 and 71, Regulation 1408/71 does not contain any provisions governing cases such as his.

Subsequently, the ECJ recalled that the aim of freedom of movement of workers would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the social security advantages guaranteed them by the legislation of one Member State, especially where those advantages represent the counterpart of contributions which they have paid. Such a consequence might discourage Community workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom.

Hence, the ECJ examined whether the rules applicable to the Austrian advance benefit were compatible with Article 39 EC.

The ECJ first had to determine whether Mr Petersen was to be qualified as a worker for the purposes of that fundamental freedom. It ruled that, as a Member State national who leaves his Member State of origin to work as an employed person in another Member State, Mr Petersen had to be regarded as exercising the right of freedom of movement for workers provided for in Article 39 EC.

This conclusion is not called into question by the fact that, upon his transfer back to Germany, Mr Petersen was unemployed and had applied for an invalidity pension. Indeed, as the ECJ has already held, migrant workers are guaranteed certain rights linked to the status of worker even when they are no longer in an employment relationship, notably as regards benefits the payment of which is dependent on the prior existence of an employment relationship which has come to an end and is intrinsically linked to the recipients' objective status as workers. Since, as the Advocate General points out in point 72 of his Opinion, such a benefit is linked to the risks of both unemployment and invalidity, it flows directly from an 'employment relationship' within the meaning of Article 39 EC.

The ECJ continued by considering that the residence condition for the grant of the benefit at issue was indirectly discriminatory, in that it could be more easily met by national workers than by those from other Member States, since the latter workers above all, particularly in the case of unemployment or invalidity, tend to leave the country in which they were formerly employed to return to their countries of origin.

The Austrian government did not attempt to provide objective justification for the residence condition. However, in order to provide the national court with a useful answer, the ECJ nevertheless elaborated on the issue.

The ECJ stated that the risk of seriously undermining the financial balance of a social security system – which may constitute an overriding reason in the general interest – would be difficult to establish since by granting the benefit to applicants for an invalidity pension residing in the national territory, the competent authorities have in fact demonstrated their capacity to bear the economic burden of that benefit until such time as a definitive decision has been adopted in regard to it.

In addition, the ECJ said, the residence requirement in the present case seems disproportionate, as it is imposed in respect of a benefit which is intended to be paid for a limited period – pending the decision on the grant of an invalidity pension – and during which period the applicants are not required to be capable of working, willing to work and available for work. If, at the end of that waiting period, the invalidity pension is granted, that benefit is exportable anyway, pursuant to Article 10 of Regulation 1408/71. If the invalidity pension is denied, in which case the advance benefit must be changed to the entitlement to unemployment benefit, the competent authorities are no longer required to pay the benefit unless Article 69 of the Regulation applies.

In addition, the residence requirement also seems disproportionate in that its recipients are not subject to any particular checks by the employment service of the Member State concerned, since they are dispensed from the obligations concerning capacity to work, willingness to work and availability for work. In any event, even if such checks were provided for, it would still have to be ascertained whether it was not sufficient to request that the recipient go to the Member State concerned for the purpose of undergoing such checks, if necessary, on pain of suspension of payment of the benefit in the event of unwarranted refusal.

The ECJ concluded that, with regard to the grant of the Austrian advance benefit and inasmuch as the file submitted to the Court does not contain any factor which might objectively justify a residence requirement, that requirement must be regarded as incompatible with Article 39 EC.

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