



## E-newsletter April 2011

### Welcome word



Dear **trESS** friends,

It is with great pleasure that I present to you this **trESS** E-newsletter, the first one of the new **trESS** project. Indeed, as I already indicated in the December 2010 issue, our team at Ghent University has successfully bid for a third term of the project on training and reporting on European social security.

As you will read further on in this E-newsletter, the new project is not a mere copy of its predecessors. While the various **trESS** activities under the former project (seminars, European and Think Tank reports, website etc.) are maintained - with a number of changes - a range of other activities is added to our workplan.

One "traditional" **trESS** product that goes unchanged is the E-newsletter. In the years to come, you will continue to receive a quarterly update on **trESS** matters and on developments at EU level in the field of European social policy in general and social security coordination in particular.

The present issue features a short introduction to the new **trESS** project, its activities and structure. As usual in the first issue of the year, we also include the calendar of **trESS** seminars, which this year will start on 20 May with a seminar in Oporto. You will also find some news items stemming from the Commission, the European Parliament and the Council, next to a summary of two recent ECJ cases dealing with Regulation 1408/71 and of one ECJ case in the field of citizenship which might have an important impact on social security coordination. Finally, outside the realm of this project, we also included a notice on the launch of a new journal in the field of European social law, in which several **trESS** team members, including myself, are involved.

I wish you a very pleasant read, and I hope you will find this newsletter informative.

Kind regards,  
Yves Jorens Project Director

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## I. News from trESS

### > trESS 2011 and beyond

The **trESS** network, coordinated by Ghent University, has been awarded a new contract by the European Commission to carry out a project on training and reporting on, and expertise in, social security coordination.

Many activities are transferred from the previous **trESS** project, but at the same time a lot of new activities will be undertaken. In the following lines, we will briefly describe the **various tasks of trESS** under the new project, focusing on the changes and novelties.

- **reporting:** **trESS** will continue to produce yearly reports on the actual implementation of the coordination Regulations in Europe. What is new is that these “implementation” reports will alternate between traditional European Reports, covering application of the Regulations as a whole, and Thematic Reports, focusing on a specific topic of social security coordination. 2011 will see the production of a European Report;
- **website and networking:** the different sections of the **trESS** website, including its resource base, will continuously be updated. Furthermore, the resource base will gradually benefit from further technical and content-related developments. In 2011, Regulations 883/2004 and 987/2009 will be fully integrated into the Regulations Database, and the National Resources-section will accommodate the three EEA States and Switzerland. The contact database will be further maintained, as will the quarterly E-newsletters;
- **seminars:** there will no longer be a **trESS** seminar covering each country every year; instead, there will be a balanced seminar package, determined following a procedure of “internal call for proposals”, covering an average of ten countries. Seminars dedicated to a specific target group and/or a specific topic are encouraged, and so are bilateral seminars and seminars in cooperation with other associations dealing with social security coordination. The seminar calendar 2011 is included further on in this newsletter;
- **legal analysis:** a reflection group within **trESS**, called Think Tank, will continue to analyse potential gaps or shortcomings of the current coordination rules and to identify where these rules need to be adapted in order to fulfil the overall aim of fostering the freedom of movement of persons. There will be only one topic of analysis per year, which will be determined by the Commission among a range of strategic questions requiring long-term legal analysis. The topic of the Think Tank in 2011 is long-term care;
- **new tasks:** in addition to the above activities, the **trESS** Network is expected to carry out a number of other tasks, dealing with, in particular, statistical analysis and analytical support. Both are intended for the European Commission and not, at least not directly, for the stakeholder community. As a result, the outputs stemming from these tasks will not be made available on the **trESS** website. The task of **statistical analysis** encompasses two sub-tasks; the first consists of the writing of a national report on monitoring the use of the European Health Insurance Card, on the basis of questionnaire replies from the national delegations in the Administrative Commission. The second sub-task in turn consists of different elements, notably the writing of a yearly statistical report. The task of **analytical support** also covers several sub-tasks, whose extent largely depends on the needs of the European Commission in a given year. In 2011, this task will notably imply the writing of a study on the coverage of non-active EU citizens moving within Europe.

Even though the **trESS team members** are largely the same as in the former project, the Network is joined by several persons bringing specific types of expertise, allowing it to properly fulfil the new tasks and responsibilities. For one thing, as the new contract also extends to the three EEA countries and Switzerland, our team now includes experts covering these countries. For another, the Network now accommodates a Statistical Team, composed of renowned experts in the field. Also the **trESS team structure** is adapted to take account of the new tasks and the increased need for flexibility. In particular, a crucial management role is now reserved for the Steering Group, headed by the Project Director and composed of seven members who are each responsible for the operational coordination of a specific project task.

### > trESS seminar calendar 2011

This seminar calendar can also be found at the seminar section of our [website](#). The agenda of the different seminars will be posted ca. four weeks prior to the seminar date. Soon after the seminar, the PowerPoint presentations used at the seminar will be linked in the agenda.

You can register for participation in a seminar until three weeks before its date by completing an online subscription form on the website.

Participation in **trESS** seminars is free of charge. Any travel and accommodation expenses cannot be borne by **trESS**.

## II. News from the Commission

### > Commission publishes call for proposals for actions for cooperation and information on social security coordination

The DG EMPL unit dealing with social security coordination (B/4) has recently published a call for proposals "Actions for Cooperation and Information on Social Security Coordination" (VP/2011/004).

The objective of the call is to support:

- 1) initiatives and actions with a transnational dimension, which aim at developing cooperation between social security institutions and/or at improving information of the public about their rights and obligations deriving from the coordination Regulations when exercising the right of free movement;
- 2) national initiatives and actions aiming at preparing and implementing the system for electronic data exchange (EESI).

The full text of the call, together with the application form, is available [here](#). The deadline for applications is 31 May 2011. Questions should be sent to: [EMPL-B4-CALLS-PROPOSALS@ec.europa.eu](mailto:EMPL-B4-CALLS-PROPOSALS@ec.europa.eu).

### > Commission takes Spain to the ECJ as regards access to sickness benefits in kind for EU pensioners on temporary stay in Spain

Under Article 27 jo. 19 of Regulation 883/2004, pensioners temporarily residing in another Member State can make use of their European Health Insurance Card (EHIC) to receive necessary healthcare under the same conditions as pensioners insured under the sickness insurance scheme of the Member State of stay.

The Spanish authorities refuse free medication to EU pensioners because the EHIC does not indicate that they are pensioners. Spain requires EU pensioners to present a supplementary document issued by their national social security services certifying in the Spanish language that he or she is in receipt of a state pension.

In the Commission's view, the refusal of the Spanish authorities is contrary to the coordination rules and discriminates EU pensioners temporarily residing in Spain. Moreover, the Commission argues, the requirement to present such a supplementary document is contrary to the purpose of the EHIC, which aims at simplifying procedures and reducing red tape for insured persons when they need health care during a temporary stay in another Member State.

See [www.ec.europa.eu/social](http://www.ec.europa.eu/social)

### > Commission takes Belgium to the ECJ as regards uprating of pensions payable to EU nationals

Some 200 non-Belgian European citizens who worked in the Belgian Congo or Ruanda-Urundi and contributed to the Belgian social security system do not enjoy the same social rights as their Belgian colleagues, the Commission holds. According to the complaints received in the early 2000s, their Belgian pensions payable by the Office de Sécurité sociale d'Outre-mer (OSSOM) were not index-linked, unlike those of their Belgian colleagues also living outside the EU. Under Belgian legislation, the benefits payable to recipients living outside the territory of the Union were adjusted to the cost of living only in the case of Belgian nationals and nationals of countries which had signed a reciprocity agreement with Belgium.

Following the Commission's reasoned opinion in 2004, Belgium removed the residence condition which prevented the indexing of pensions, but only from 1 August 2004. The change therefore did not remove the alleged discrimination the complainants had suffered throughout the period prior to 1 August 2004, during which they were deprived of part of their pension. Following a supplementary reasoned opinion sent to the Belgian authorities in 2010, the Commission has decided to take Belgium to the Court of Justice.

The Commission considers that these European citizens are still the victims of discrimination and asks the ECJ to rule that Belgium has failed to comply with European law.

See [www.ec.europa.eu/social](http://www.ec.europa.eu/social)

### > Commission publishes a [proposal](#) for a regulation amending Regulations 883/2004 and 987/2009

This proposal [COM 2010 (794)] supplements, clarifies and updates some of the provisions of the coordination Regulations to reflect changes in Member States' national social security legislation and changed patterns of mobility affecting the coordination of the social security systems.

It includes proposals from the Administrative Commission for the Coordination of Social Security Systems made in accordance with Article 72(f) of Regulation 883/2004.

The proposed changes mainly concern the determination of the legislation applicable and unemployment benefits.

The amendment in the latter field addresses the situation where a self-employed person has been insured for unemployment in the Member State of last activity and, once unemployed, returns to his/her Member State of residence which does not have any unemployment insurance for self-employed persons. In this situation, the self-employed person is to receive benefits in accordance with the legislation of the State of last self-employment.

In the field of applicable legislation, the amendments concern in particular the provisions dealing with simultaneous employment in two or more Member States, notably the extension of the criterion of "substantial part of the activity" (which would also apply to persons who normally pursue an activity for various undertakings or employers in two or more Member States) and the concretisation of the notion of "registered office or place of business".

The proposal, dated 20 December 2010, has been transmitted to Council and European Parliament.

See [www.ec.europa.eu/social](http://www.ec.europa.eu/social)

### III. News from the ECJ

#### > [\(Case C-440/09\) ZUS Oddział w Nowym Saczu v Stanisława Tomaszewska](#)

The reference has been made in the context of proceedings between the Zakład Ubezpieczeń Społecznych Oddział w Nowym Saczu (Social Security Institution – Nowy Sacz Branch) (ZUS) and Ms Tomaszewska concerning the consideration of periods completed abroad for the purposes of entitlement to a Polish retirement pension.

When Ms Tomaszewska applied for an early retirement pension, she had completed, in Poland, contribution periods of 181 months, non-contribution periods of 77 months and 11 days and periods of employment on her parents' agricultural holding of 56 months and 25 days. She had also completed, in the former Republic of Czechoslovakia, contribution periods totalling 49 months. Ms Tomaszewska's application for a retirement pension was rejected by the ZUS on the ground that she had not completed the mandatory minimum 30-year insurance period prescribed by Polish law. Since, under the relevant legislation, the non-contribution periods may not exceed one third of the contribution

periods completed in Poland, the ZUS credited her with only 181 months in respect of contribution periods and 60 months and 10 days in respect of non-contribution periods.

The refusal was challenged by Ms Tomaszewska and the case was eventually referred to the ECJ, which was asked, in substance, whether Article 45(1) of Regulation 1408/71 is to be interpreted as meaning that, in the determination of a qualifying period for a retirement pension, the competent institution of the Member State concerned must take into consideration, for the purposes of determining the limit which non-contribution periods may not exceed in relation to contribution periods, only the contribution periods completed in that Member State or all insurance periods completed in the course of the migrant worker's career, including those completed in other Member States.

In this case, the ECJ noted that the ZUS had recognised the Czechoslovak contribution periods for the purpose of determining the qualifying period required for acquiring entitlement to a retirement pension, but not for the purpose of determining the one-third maximum limit for non-contribution periods in relation to contribution periods. As a result, Ms Tomaszewska was placed in a less favourable position than a worker who has completed all of his/her contribution periods in Poland; had she completed all of her contribution periods in Poland, she would have been able to rely on a non-contribution period of 76 months and thus have satisfied the 30-year qualifying period.

The ECJ therefore observed that the application of Polish law by the ZUS is liable to impede the free movement of workers and undermines the application of the aggregation rules laid down in Article 45 of Regulation 1408/71. Moreover, it did not accept the justification ground advanced by the Polish government, i.e. the prevention of administrative difficulties and other practical problems, stating that impediments of the free movement of workers may be justified only by the derogations laid down expressly in the Treaty.

In the light of the above, the ECJ replied that although Polish law may impose a minimum contribution period for the purpose of acquisition of entitlement to a retirement pension and for determining the nature of and limits on contribution periods which may be taken into account, it may do so solely on condition that contribution periods completed in another Member State are taken into consideration under the same conditions as those completed in Poland, which implies that the contribution periods completed by Ms Tomaszewska in any other Member State must be included in the calculation for determining the one-third limit which non-contribution periods may not exceed in relation to contribution periods.

### > [\(Case C-34/09\) Gerardo Ruiz Zambrano v. Office national de l'emploi \(ONEm\)](#)

This reference for a preliminary ruling concerns the interpretation of Articles 12 EC (non-discrimination), 17 EC and 18 EC (citizenship), and also Articles 21, 24 and 34 of the Charter of Fundamental Rights of the EU. It has been made in the context of proceedings between Mr Ruiz Zambrano and the Office national de l'emploi (National Employment Office) concerning the refusal by the latter to grant him unemployment benefits under Belgian legislation.

Mr Ruiz Zambrano and his wife, both Columbian nationals, applied for asylum in Belgium due to the civil war in Columbia. The Belgian authorities refused to grant them refugee status and ordered them to leave Belgium. While the couple continued to reside in Belgium while waiting for their applications to have their residence situation regularised, Mr Ruiz Zambrano's wife gave birth to two children who acquired Belgian nationality.

Although he did not hold a work permit, Mr Ruiz Zambrano signed an employment contract for an unlimited period to work full-time with a company established in Belgium. Consequently, at the time of the birth of his first child to hold Belgian nationality, he had sufficient resources from his working activities to provide for his family. Through his work, statutory deductions made for social security and the payment of employer contributions.

Mr Ruiz Zambrano then had a number of periods of unemployment and accordingly applied for unemployment benefit. Those applications were refused because, in the view of the Belgian authorities, he did not comply with the foreigners' residence requirements under Belgian legislation and he was not entitled to work in Belgium.

Mr and Mrs Ruiz Zambrano also lodged an application to take up residence in Belgium, in their capacity as ascendants of a Belgian national. The Belgian authorities rejected that application, however, taking the view that they had intentionally omitted to take the necessary steps with the Columbian authorities to have their children recognised as Columbian nationals, precisely in order to regularise their own residence in Belgium.

Mr Ruiz Zambrano brought legal proceedings challenging the decisions refusing his applications for residence and unemployment benefit on the ground that, as an ascendant of minor Belgian children, he is entitled to reside and work in Belgium. The Brussels Employment Tribunal, before which the proceedings challenging the rejection decisions were brought, asked the Court of Justice whether Mr Ruiz Zambrano may rely on EU law to reside and work in Belgium. By that question, the Belgian court asks whether EU law is applicable in the present case, even though Mr Ruiz

Zambrano's children have never exercised their right of free movement within the territory of the Member States.

In its judgment, the Court observes that while a Member State has sole jurisdiction to lay down the conditions for the acquisition of the nationality of that Member State, it is common ground that Mr Ruiz Zambrano's children were born in Belgium and have acquired Belgian nationality. They accordingly enjoy the status of Union citizens, which is intended to be the fundamental status of nationals of the Member States.

In those circumstances, the Court continued, EU law precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union. A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.

It must be assumed that such a refusal would lead to a situation where those children would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to the parents, they would risk not having sufficient resources to provide for themselves and their family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those children would, as a result, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.

In those circumstances, the Court states that EU law precludes a Member State from refusing a third country national upon whom his minor children, who are Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of Union citizen.

See [www.curia.europa.eu](http://www.curia.europa.eu)

### > [\(Case C-516/09\) Tanja Borger v. Tiroler Gebietskrankenkasse](#)

This reference for a preliminary ruling concerns the interpretation of the term "employed person" within the meaning of Article 1(a) of Regulation 1408/71. It has been made in the course of proceedings between Ms Borger and the *Tiroler Gebietskrankenkasse* concerning the latter's refusal to grant Ms Borger childcare allowance during the additional six months of unpaid leave which she took after the statutory two-year period following the birth of her child had expired.

Following the birth of her son on 7 January 2006, Ms Borger, an Austrian national living in Austria, took unpaid leave until 7 January 2008. With her employer's agreement, she subsequently extended her unpaid leave for a further six months up to 6 July 2008. In March 2007, Ms Borger moved with her son to Switzerland, where her husband had been working since 2006.

The *Tiroler Gebietskrankenkasse* paid Ms Borger childcare allowance for the period from 5 March 2006 to 28 February 2007, and a compensatory benefit for the period from 1 March 2007 to 6 January 2008. Ms Borger's application for childcare allowance and the maintenance of entitlement to social security for a further six months was, however, refused. By decision of 18 January 2008, the *Tiroler Gebietskrankenkasse* revoked, with effect from 7 January 2008, entitlement to the benefit in compensation for childcare allowance on the ground that Ms Borger was not in a de facto employment relationship in Austria, and therefore responsibility for paying family benefits lay with the Swiss Confederation, where Ms Borger's husband was working and where all members of the family were living. Ms Borger challenged this decision, contending that the fact of simply being covered by a branch of social security, in her case the retirement insurance scheme linked to child benefits, is sufficient to confer the status of "worker" for the purposes of Regulation 1408/71.

The case ultimately came before the *Oberster Gerichtshof*, which decided to stay proceedings and to make a reference for a preliminary ruling, asking in essence whether a person in a situation such as that of Ms Borger must, during the six-month period of extension of her unpaid leave following the birth of her child, be recognised as having the status of an "employed person" within the meaning of Article 1(a) of Regulation 1408/71.

The ECJ answered in the affirmative and made clear that the classification as an employed person is not affected by the three factors referenced to by the referring court, that is (i) the fact that Ms Borger's coverage by a social security

scheme is unrelated to any past or current professional activity, (ii) the fact that she deliberately extended her unpaid leave, with her employer's agreement, solely in order to be able to continue to receive childcare allowance, and (iii) the fact that the period of child rearing which entitled Ms Borger to partial cover under the Austrian retirement insurance scheme may never be taken into account under the Austrian social security system if Switzerland - as State of residence - would be responsible for the pension payments.

The ECJ ruled that, whether or not a person comes within the scope *ratione personae* of Regulation 1408/71 depends, not on the materialisation of the contingency covered, and thus on the issue of determining in which of the two States those periods will be taken into account at the time of retirement, but rather on the fact of being actually covered, even if only in respect of a single risk, on a compulsory or optional basis, by a general or special social security scheme covered by the Regulation. Also the existence of an employment relationship is irrelevant in this regard, as are personal reasons for extending unpaid leave. Whether Ms Borger held such actual coverage is a matter for the national court to determine.

#### IV. News from the Council and the European Parliament

##### > Directive on cross-border healthcare adopted

At a session of the Transport, Telecommunications and Energy Council on 28 February 2011 in Brussels, the Council approved the European Parliament's amendments on the draft directive concerning the application of patients' rights in cross-border healthcare. The European Parliament's amendments of 19 January 2011 reflect a second-reading-compromise reached between the Belgian Presidency and representatives of the European Parliament in an informal trilogue on 15 December 2010. In line with article 294 TFEU, the directive has now been adopted and the Member States will have 30 months to transpose its provisions into national legislation.

The overall aim of the Directive is to establish a clear and coherent framework for the reimbursement of healthcare costs within the EU, where the care is provided in a Member State other than the country of affiliation (cross-border healthcare). This followed ECJ case law confirming that independently of the rights to scheduled treatment in another Member State as granted by Regulations 883/2004 and 987/2009, insured patients benefit from the freedom to receive medical treatment in another Member State, under Article 56 TFEU.

In order to achieve this objective, the proposal is structured around three main areas: (1) guarantees enabling patients to receive safe and high quality healthcare, (2) rules clarifying the rights to reimbursement of cross-border healthcare, and (3) EU cooperation on healthcare in the area of recognition of prescriptions, European reference networks, health technology assessment and eHealth.

See [www.consilium.europa.eu](http://www.consilium.europa.eu)

#### V. Other news

##### > New journal on European social law launched!



The growing influence of European Union law on labour law, social security law and welfare law cannot be ignored. There is an increasing awareness that fundamental constitutional questions recur concerning the tensions between national welfare states' institutional autonomy and the process of European integration. One of the topical issues of the European debates, are the *liaisons dangereuses* between, on the one hand, the development of an integrated market through the exercise of essential economic freedoms and through the functioning of competition rules and on the other hand, the preservation of an adequate sphere of social sovereignty for the national welfare states.

In order to offer a forum for the dissemination of international research and disciplinary reflection on developments, trends and challenges regarding the new place European social law has gained in the European integration process, a group of scholars from different European and international universities (amongst which several trESS members) have decided to publish a new journal, the **European Journal of Social Law (EJSL)**.

EJSL will focus both on the theoretical as well as constitutional dimensions of these developments and on the

systematic analysis of legislation, case-law and new policy trends in European labour law and social security law.

The contributions published in the inaugural issue reflect the ambitions of this new journal. It will hopefully contribute to cultivating and promoting reflections on and analyses of the general evolution of the European Union's legal order and the European social law developments, and reflections on the impact of these general principles and policies of the European Union on national and European social values and rights.

We hope that this journal might be of interest to you and your institution and we would be grateful if you would be willing to distribute this information to your colleagues and or libraries.

For more data on this journal, published by the publishing house die Keure, we refer to its website [www.ejsl.eu](http://www.ejsl.eu), where you can also find a [flyer](#) dedicated to this new journal.

We thank you for your interest in this new initiative.  
Yours faithfully,

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This e-newsletter has been produced under the responsibility of Yves Jorens.

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