trESS Training and reporting on European Social Security

Merry Christmas and a Happy New Year !

E-newsletter December 2010

Welcome word

Dear **trESS** friends,

It is my pleasure to present to you the latest issue of the **trESS** E-newsletter, the last one of 2010, and indeed the last one of our three-year contract period. I add immediately that next year we will be back with a quarterly update of **trESS** activities and news on the wider field of social protection for migrant persons. I am indeed very happy to announce that our team has won the new contract for training and reporting on, and expertise in, social security coordination! I can already tell you that a lot of the current **trESS** activities will be reiterated in the new project, but that there will also be several completely new tasks and deliverables. More details on the new project will follow in the next issues of our newsletter!

In retrospect, we can look back on three successful years – six years if we also consider the previous contractual period– filled with trESS activities. Some figures may illustrate this. Since 2005, trESS has organised an impressive 162 training seminars. The number of participants attending these seminars increased each year: from 25 in 2005 over 45 in 2008 to 60 in 2010. Concretely, this implies that trESS has trained some 4000 people in the past three years! Probably even more significantly, the annual trESS seminars have become one of the main events where players at national level in the field of social security coordination meet and discuss with each other. In connection with this, the number of trESS contact database subscribers has nearly tripled: from 793 end 2007 to 2038 members in November 2010. You, dear readers, are also increasingly numerous to receive this quarterly E-newsletter; whereas the 2005 E-newsletter was sent to 530 subscribers, the 2007 issue reached already 1732 mailboxes, and the present, sixteenth issue is received by as much as 3210 registrants. The **trESS** website was constantly updated and consistently featured new developments. The Regulations database, the E-learning module, and the national case law and bibliography sections are welcome tools for everybody who wishes to learn more about social security coordination. Throughout the years, the **trESS** website has turned into one of the chief online sources of information on EU social security coordination.

Over the past six years, **trESS** has written a huge number of reports – a good deal of which are downloadable from our website – informing the European Commission and other stakeholders on issues and problems connected with the implementation of the coordination Regulations, and reflecting on possible ways to solve these. The reporting output includes, inter alia, 6 European Reports, an equal number of Think Tank reports and some specific reports, such as a thematic report on cross-border healthcare.

As far as the 2010 **trESS** reports are concerned, these are currently being edited and will be published on our website soon. As announced earlier, the European Report 2010 is a short ad hoc report focusing mainly on the first months of implementation of two aspects of the new Regulations, i.e. information to the citizens and transitional rules. The Think Tank reports are dedicated to a legal analysis of five concepts of particular importance in the new regulatory framework (i.e. residence, member of the family, child-raising periods, long-term care and assimilation of facts) and of the topic of healthcare during a stay abroad for persons not fulfilling the conditions for statutory healthcare coverage.

In the present issue of the **trESS** E-newsletter, you will find a variety of news items pertaining to social security coordination, conveniently classified according to the institution to which they relate. Especially the Court of Justice has been very active in the past months, with not less than six judgements rendered in the field which is of concern to us.

I wish you a pleasant read, and above all a merry Christmas and a happy New Year!

Best wishes,

Yves Jorens
Project Director

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I. News from the Commission

See www.ec.europa.eu/social

> Commission requests UK to end discrimination on other nationals' right to reside as workers

The European Commission has requested the United Kingdom to end supposedly discriminatory conditions on the right to reside as a worker which exclude from certain social benefits nationals from eight of the ten Member States (Czech Republic, Hungary, Slovakia, Slovenia, Latvia, Lithuania, Estonia, Poland) that joined the EU in 2004.

The Commission considers these rules to be in breach of transitional arrangements on free movement of workers, as well as the obligation to ensure equal treatment on the basis of nationality. The request takes the form of a 'reasoned opinion' under EU infringement procedures. The United Kingdom has two months to bring its legislation into line with EU law. Otherwise, the Commission may decide to refer the UK to the EU's Court of Justice.

According to the UK Worker Registration Scheme, nationals from the Czech Republic, Hungary, Slovakia, Slovenia, Latvia, Lithuania, Estonia and Poland who stop work before completing one year with an authorised employer do not have the right to reside as a worker. This right to reside is one of the

conditions of UK legislation to qualify for Housing Benefit, Council Tax Benefit, Crisis Loans, and allocation of social housing and provision of homelessness assistance.

Without this right to reside ("Right to Reside Test") nationals from the above-mentioned Member States are currently excluded from receiving these benefits. The Commission considers that this is contrary to the transitional arrangements on the free movement of workers which allow the United Kingdom to restrict nationals from the above-mentioned Member States the right to move to the UK to work until the end of April 2011. These transitional arrangements allow the UK to restrict the right to reside as workers under certain conditions but they do not allow discrimination when paying benefits.

> Commission asks Cyprus to end discrimination against Community seafarers

The European Commission has asked the Republic of Cyprus to abolish the requirement for Community seafarers working on Cypriot boats to be residents of Cyprus in order to join its social security scheme.

According to Cypriot law, only seafarers residing in Cyprus may join the Cypriot social security system. On the other hand, Community seafarers working on a vessel flying the flag of Cyprus but whose place of residence is still in another Member State are not eligible to join the Cypriot social security system. They are automatically excluded from it. According to EU social security coordination regulations, persons working on a vessel flying the flag of a Member State are subject to the social security legislation of that Member State, even if it is not their country of residence.

The Commission is of the opinion that the residence requirement is contrary to European law due to its indirect discriminatory effect: residence in Cyprus as a condition for entitlement to Cypriot social security is more easily met by Cypriot than by Community seafarers.

The Commission has decided to send a reasoned opinion to the Cypriot authorities indicating that Cypriot legislation infringes Community law, and asking them to take the necessary measures to comply with European regulations within two months. Failing a satisfactory response, the Commission may decide to bring Cyprus before the European Court of Justice.

> New campaign on social security coordination

The European Commission is launching an EU-wide information campaign to ensure that people are aware of their social security rights when living, working, studying, travelling or retiring in other EU countries.

With a theme of ‘Europe is your playground’, a media campaign started in November and will be continued till the end of December 2010. A series of adverts in the print and online media will let people know how they can preserve their right to social security benefits when moving to a different EU country thanks to social security coordination. Various information material is available in 22 languages.

> Joint report on Pensions

The report analyses pension systems in the EU, assesses the pension reforms in the light of aggravated challenges and develops an updated agenda for delivering adequate and sustainable pensions. The Economic Policy Committee together with the Ageing Working Group and the Social Protection Committee together with the Indicators Sub-Group, in cooperation with Commission services (Economic and financial affairs and Employment, social affairs and equal opportunities) have carried out a joint analysis of pension systems in the EU focussing on the:

- results of the last decade of reforms;
- impacts of the crisis;
- long term perspectives beyond the crisis.

The aim was to re-assess the pension reforms in the light of aggravated challenges and develop an updated agenda for delivering adequate and sustainable pensions.

The report notes that ensuring that public policies cater for sustainable, accessible and adequate retirement incomes now and in the future remains a priority for the EU.

II. News from the ECJ

See www.curia.europa.eu/

> (Case C-296/09) Vlaamse Gemeenschap v. Maurits Baesen

The reference for a preliminary ruling concerned the interpretation of the term 'civil servants and persons treated as such' within the meaning of Article 13(2)(d) of Regulation 1408/71. The reference has been made in proceedings between Mr Baesen and the *Vlaamse Gemeenschap* (the Flemish Community) concerning a claim for compensation for social security contributions which, it is alleged, were wrongly paid in Belgium.

The Court ruled that the meaning of 'civil servants' and 'persons to be treated as such', as referred to in Article 13(2)(d) of Regulation 1408/71, is to be determined solely by reference to the national law of the Member State to which the administration employing the person concerned is subject, and a person who, in a Member State, is subject partly to the social security scheme for civil servants and partly to the social security scheme for employed persons, may thus be subject, in accordance with the provision made by Article 13(2)(d) of Regulation 1408/71, only to the legislation of the Member State to which the administration employing that person is subject.

> (Case C-247/09) Alketa Xhymshiti v. Bundesagentur für Arbeit – Familienkasse Lörrach

This reference for a preliminary ruling concerned the interpretation of Regulation 1408/71, Regulation 574/72, Regulation 859/2003 and the 1999 Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons (EU-Switzerland Agreement). The reference has been made in the context of proceedings between Mrs Xhymshiti, an Albanian national legally resident in Germany and the spouse of a Kosovan national legally resident in Germany and working in Switzerland, and the *Bundesagentur für Arbeit – Familienkasse Lörrach* (Federal Employment Agency – Family Allowances Office, Lörrach) concerning the refusal by the latter to grant an amount corresponding to the difference between Swiss child allowance and German child allowance in respect of her two children, who are German nationals.

The Court ruled that in the case in which a national of a non-member country is lawfully resident in an EU Member State and works in Switzerland, Regulation 859/2003 does not apply to that person in his Member State of residence, in so far as Regulation 859/2003 is not among the Community acts mentioned in section A of Annex II to the EU-Switzerland Agreement. Consequently, there is no obligation on the Member State of residence to apply Regulations 1408/71 and 574/72 to that employee and his spouse.

The Court went on to say that Articles 2, 13 and 76 of Regulation 1408/71 and Article 10(1)(a) of Regulation 574/72 are irrelevant in respect of a national of a non-member country in the situation of the claimant in the main proceedings, in so far as her situation is governed by the legislation of the Member State of residence. The fact that that national's children are citizens of the European Union cannot, by itself, make the refusal to grant child allowance in the Member State of residence unlawful where the statutory conditions which must be satisfied for the purposes of such a grant are not fulfilled.

> (Case C-345/09) J.A. Van Delft et al. v. College voor Zorgverzekeringen

The reference for a preliminary ruling concerned the interpretation of Articles 28, 28a and 33 and provisions of Annex VI, section R, point 1(a) and (b) of Regulation 1408/71, Article 29 of Regulation 574/72 and Articles 21 TFEU (ex Article 18 TEC) and 45 TFEU (ex Article 39 TEC). The reference has been

made in proceedings between Mr van Delft, Mr Ramaer, Mr van Willigen, Mr van der Nat, Mr Janssen and Mr Fokkens and the *College voor zorgverzekeringen* (Health Care Insurance Board) concerning the payment of contributions due under the compulsory statutory sickness insurance scheme applicable in the Netherlands.

The Court decided that the abovementioned Articles of the Regulation and Article 21 TFEU must be interpreted as not precluding legislation of a Member State under which recipients of pensions payable under the legislation of that State who reside in another Member State in which they are entitled under Articles 28 and 28a of Regulation 1408/71 to the sickness benefits in kind provided by the competent institution of the latter Member State must pay, in the form of a deduction from their pension, a contribution in respect of those benefits even if they are not registered with the competent institution of their Member State of residence.

On the other hand, Article 21 TFEU must be interpreted as precluding such national legislation in so far as it induces or provides for – this being for the national court to ascertain – an unjustified difference of treatment between residents and non-residents as regards ensuring the continuity of the overall protection against the risk of sickness enjoyed by them under insurance contracts concluded before the entry into force of that legislation.

> (Case C-16/09) Gudrun Schwemmer v. Agentur für Arbeit Villingen-Schwenningen – Familienkasse

This reference for a preliminary ruling concerned the interpretation of Article 76 of Regulation 1408/71 and Article 10 of Regulation 574/72. The reference has been made in the context of appeal proceedings between Mrs Schwemmer and the *Agentur für Arbeit Villingen-Schwennigen – Familienkasse* (Villingen-Schwennigen Employment Agency – Family Allowances Office), regarding a refusal to pay Mrs Schwemmer the full amount of family benefits in Germany as from January 2006. Essentially, the dispute in the main proceedings concerns the question whether the German authorities are entitled to reduce the child benefit to which Mrs Schwemmer is entitled under German legislation in respect of the children concerned – such right not being subject to conditions of insurance, employment or self-employment – by an amount corresponding to the family benefits which would be due in Switzerland, according to those same authorities, to the former husband of Mrs Schwemmer working in Switzerland, if only he applied for them.

The Court ruled that, on a proper interpretation of Article 76 of Regulation 1408/71 and Article 10 of Regulation 574/72, a right, which is not subject to conditions of insurance, employment or self-employment, to benefits under the legislation of a Member State in which one parent resides with the children in favour of which those benefits are granted, cannot be partially suspended in a situation in which the former spouse, who is the other parent of the children concerned, would in principle be entitled to family benefits under the legislation of the State in which he is employed, either simply by virtue of the national legislation of that State, or in application of Article 73 of the said Regulation 1408/71, but does not actually draw those benefits because he has not made an application for them.

> (Case C-173/09) Georgi Ivanov Elchinov v. Natsionalna zdravnoosiguritelna kasa

This reference for a preliminary ruling concerned the interpretation of Articles 49 EC and 22 of Regulation 1408/71 The reference has been made in proceedings between Mr Elchinov and the *Natsionalna zdravnoosiguritelna kasa* (national social security fund; 'NZOK') concerning its refusal to authorise him to receive hospital treatment in Germany.

The Court ruled that:

• Articles 49 EC and 22 of Regulation 1408/71 preclude a rule of a Member State which is interpreted as excluding, in all cases, payment for hospital treatment given in another Member State without prior authorisation.

• With regard to medical treatment which cannot be given in the Member State on whose territory the insured person resides, Article 22(2) of Regulation 1408/71 must be interpreted as meaning that the authorisation required under Article 22(1)(c)(i) cannot be refused:

- if, where the list of benefits for which the national legislation provides does not expressly and precisely specify the treatment method applied but defines types of treatment reimbursed by the competent institution, it is established, applying the usual principles of interpretation and on the basis of objective and non-discriminatory criteria, taking into consideration all the relevant medical factors and the available scientific data, that the treatment method in question corresponds to types of treatment included in that list, and
- if no alternative treatment which is equally effective can be given without undue delay in the Member State on whose territory the insured person resides.

That article precludes the national bodies called upon to rule on an application for prior authorisation from presuming, in the application of that provision, that the hospital treatment which cannot be given in the Member State on whose territory the insured person resides is not included in the benefits for which reimbursement is provided for by the legislation of that State or, conversely, that the hospital treatment included in those benefits can be given in that Member State.

• Where it is established that a refusal to issue the authorisation required under Article 22(1)(c)(i) of Regulation 1408/7, was unjustified, when the hospital treatment has been completed and the related expenses incurred by the insured person, the national court must oblige the competent institution, in accordance with national procedural rules, to reimburse that insured person in the amount which it would ordinarily have paid if authorisation had been properly granted. That amount is equal to that determined in accordance with the provisions of the legislation to which the institution of the Member State on whose territory the hospital treatment was given is subject. If that amount is less than that which would have resulted from application of the legislation in force in the Member State of residence if hospital treatment had been provided there, complementary reimbursement corresponding to the difference between those two amounts must in addition be made by the competent institution.

> (Case C-512/08) Commission v. French Republic

The Commission brought an action against France before the Court for failure to fulfil obligations, taking the view that some provisions of national law relating to the reimbursement of certain planned treatment abroad are contrary to European Union law. The complaints of the Commission were twofold:

In the first place, the Commission considered that the provisions of the French Social Security Code making reimbursement in respect of treatment planned, outside a hospital setting, in another Member State subject to prior authorisation by the competent French institution when that treatment requires the use of major medical equipment are contrary to the freedom to provide services.

In that regard, the Court recalled that the receipt of medical treatment in another Member State falls within the scope of the freedom to provide services and that prior authorisation requirements for reimbursement of the costs of medical treatment constitute a restriction of this freedom. The Court continued by saying that, regardless of the setting, hospital or otherwise, in which it is installed and used, it must be possible for the major medical equipment exhaustively listed in the Public Health Code to be the subject of planning policy, such as that defined by the French legislation, with particular regard to quantity and geographical distribution, in order to help ensure throughout national territory a rationalised, stable, balanced and accessible supply of up-to-date treatment, and also to avoid, so far as possible, any waste of financial, technical and human resources. Consequently, having regard to the dangers both to the organisation of public health policy and to the balance of the financial social security system, the requirement of prior authorisation for that kind of treatment is, as European Union law now stands, a justified restriction. However, the Court reiterated that for this to be the case, prior authorisation schemes must present certain procedural and substantive guarantees.

In the second place, the Commission maintained that France had not given effect to the Court's decision in the *Vanbraekel* case, regarding additional reimbursement in case the level of cover in the State of stay is lower than that in the State of affiliation.

On that point, the Court observes that the French legislation provides that a patient may receive, in respect of hospital treatment provided in another Member State, reimbursement on the same conditions as if the treatment had been received in France, and within the limits of the costs actually incurred by the person insured. Thus those provisions include entitlement to an additional reimbursement to be paid by the competent French institution when there is a difference between the levels of social cover in the State of affiliation and the State of the place of the hospital treatment, as referred to in the Court's case law.

Consequently, the Commission's action against France is dismissed in its entirety.

III. News from the Council

> Coordination of social security systems - EU and Switzerland

At the 3053rd Employment, Social Policy, Health and Consumer Affairs Council meeting, held in Brussels on 6-7 December 2010, The Council adopted a decision on the position to be taken by the EU in the joint committee established with Switzerland under their agreement on the free movement of persons as regards the replacement of annex II to that agreement on the coordination of social security schemes.

> Coordination of social security systems with six third countries

At the 3039th Employment, Social Policy, Health and Consumer Affairs Council meeting, held in Luxembourg on 21 October 2010, the Council adopted a decision establishing the EU position to be taken in the respective (Stabilisation and) Association Councils between the European Union and six third countries (Algeria, Croatia, the Former Yugoslav Republic of Macedonia, Israel, Morocco and Tunisia)

The Czech and Maltese delegations abstained on the decision concerning Israel, Croatia and the Former Yugoslav Republic of Macedonia.

By adopting its position, the EU seeks to agree with the six partner countries on implementing provisions which are not already covered by regulation 859/2003. This concerns, in particular, the export of certain benefits to one of the six partner countries as well as the granting of equal treatment to third-country workers legally employed in the EU and to their family members. Moreover, the EU position seeks to ensure that the provisions on the export of benefits and the granting of equal treatment also apply, by way of reciprocity, to EU workers legally employed in one of the six partner countries and to their family members (see also the July 2010 issue of the **trESS** E-newsletter).

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