trESS Training and reporting on European Social Security

E-newsletter July 2011

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Welcome word

Dear **trESS** friends,

It is with great delight that I present to you this **trESS** E-newsletter. In this period of summer holidays, we are happy to inform you that the renewed **trESS** project - "**trESS** III" - is running smoothly.

As to the activities of the project, already four seminars have been organised under the new formula and each of these seminars can be called very successful. At the same time, different reflective and analytical reports are in preparation under the "reporting and analysing" activities of **trESS**. You will certainly find the result of these efforts on the **trESS**-website at the end of the year. It goes without saying that we will keep you informed via the newsletter. Also the **trESS** website has undergone some updates lately and will be further elaborated in the coming months.

This newsletter also features some news items stemming from the Commission and the programme of the Polish Presidency (July 2011 - December 2011) in the field of social security. The political agenda promises to bring about a very dynamic period in the near future.

Also the ECJ has been very active in the social security field over the past period, as we can offer you a summary of five recent ECJ cases dealing with Regulation 1408/71. The Stewart case (C-503/09), undeniably "hot from the press", is not only very recent case law brought to you, but also clearly represents an important new step in the relationship between the coordination regulations and the Treaty provisions on Union citizenship.

I wish you a very pleasant read and I hope you have enjoyed or will enjoy your summer holiday.

Kind regards,
Yves Jorens
Project Director

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I. News from trESS

> trESS III up and running

The third edition of the **trESS** project is well up and running.

The series of national seminars has started in May 2011 and will continue until November 2011. Four seminars have already taken place and six other seminars are planned in the near future. They are organised under the new formula of "targeted seminars". The previous system of at least one **trESS** seminar in each country every year has been replaced by a balanced seminar package, determined following a procedure of "internal call for proposals", covering an average of ten countries per year and guaranteeing at least one seminar in each country over the project period. These seminars are preferably dedicated to a specific target group and/or a specific topic. Also bilateral seminars and seminars in cooperation with other associations dealing with social security coordination are encouraged under this new constellation. According to the first experiences in 2011, this new modus operandi has proven to be very fruitful.

The seminar calendar 2011 is included further on in this newsletter, to remind you of the dates.

Next to the seminar activities, the entire **trESS**-team is currently also preparing the production of different reports, in accordance with the "reporting and analysing aims" of the project. These activities consist in the writing of the national reports by our national experts, which will eventually result in the **trESS** European report 2011 on the implementation of the coordination regulations in the Member States. The reporting and analysing tasks however also comprise the work of other teams of experts, working on specific legal analyses within the project. Under that umbrella, the **trESS** project will present analytical reports on very hot topics in the field of social security coordination, e.g. on the coordination of long-term care insurance or on the transitional coverage of non-active persons moving to another Member State.

Finally, the **trESS** website is, as always, continuously further developed. The project description on the homepage has been adapted in all languages in accordance with the new tendencies of the third edition of the project. You are warmly invited to check them out, in order to remind you of the aims and activities of the project or perhaps to introduce it to other persons interested in the field. You will also find an updated version of the ' who is who ' in the **trESS** network, where you will find who exactly is involved in **trESS**.

In the coming period, the website team will - next to the regular information updates - focus its efforts on integrating Regulations 883/2004 and 987/2009, together with the relevant Decisions from the Administrative Commission, in the well-used 'Regulations database'. Specific attention will also be dedicated to the flagging, within the Regulations database, of "historical leading ECJ cases" relating to Regulation 1408/71 and 574/72.

> 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

> Free movement: workers from eight Member States that joined EU in 2004 finally enjoy full rights

1 May 2011 marked the removal of restrictions on the right to work in any Member State for citizens from the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia and Slovakia.

All workers from the countries that joined the EU in 2004 will now be able to take up employment freely in those Member States as well where labour market restrictions have been in place until the very end of the seven year transitional period ending April 30 th 2011. The Commission does not expect huge flows of workers from the EU-8 countries as many wanting to move to work in an EU-15 Member State have already done so. Experience and studies show that the impact of any future mobility is likely to be positive, contributing to economic growth and filling existing labour market shortages.

Looking ahead, the Commission does not expect a significant new wave of workers moving from EU-8 to EU-15 countries after 1 May 2011. According to current estimates, the total stock of nationals from EU-8 countries living in EU-15 Member States will increase to 3.3 million in 2015 and 3.9 million in 2020 and their share in the total population from currently 0.6% to 0.8% in 2015 and a bit less than 1% in 2020.

Massive inflows are also not to be expected to Germany and Austria. Any future mobility is likely to be a positive development in these countries in particular which have the lowest unemployment rates and high numbers of job vacancies.

> Commission requests Germany to pay beneficiaries full pension granted under bilateral agreements

The European Commission has requested Germany to pay pension beneficiaries the full amount of pensions granted under a bilateral agreement when a citizen moves to another EU country.

The Commission contacted the German authorities after receiving a complaint from a former Bulgarian, now German national, who has lived in Germany for 50 years. Since 1988 he has been receiving a German old-age pension however the German pension institution has informed him that if he takes up residence in Bulgaria, the amount of his pension transferred to Bulgaria would be reduced by more than one third, from over €650 to less than €400.

This agreement established between Bulgaria and Germany (before Bulgaria joined the EU in 2007), provides for the payment of a differential supplement. To calculate this supplement, a comparison is made between the work periods acquired in Bulgaria and in Germany and the theoretical amount which is based on a calculation as if all periods were acquired in the country of residence. According to Germany, if the citizen moves to Bulgaria, he loses this differential amount since Germany is no longer the state of residence.

The Commission's request takes the form of a 'reasoned opinion' under EU infringement procedures. Germany has two months to inform Commission of measures it has taken to bring its legislation into line with EU law. Otherwise the Commission may decide to refer Germany to the EU's Court of Justice.

> Commission requests Belgium to pay pensions directly to bank accounts where beneficiaries reside

The European Commission has requested Belgium to end complex procedures for paying pensions to beneficiaries residing in another EU country.

By refusing to pay pensions directly to a bank account and using cross border payments, Belgian pensions beneficiaries in 19 EU countries suffer delayed access to their pension, as well as disproportionate costs and other inconveniences. This contravenes the EU right to move freely to and receive their pension in another EU country.

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> Report on Europe 2020's social dimension

The Social Protection Committee has issued a report on the Social dimension of the Europe 2020 strategy that examines actions to promote inclusion and reduce poverty, in line with the strategy's headline targets. The report details the challenges in fighting poverty and social exclusion in the EU and assesses policy options for addressing them. It analyses actions focusing on:

- Sustainable and adequate reforms of social protection systems
- Active inclusion strategies
- Well-designed universal and targeted benefits for families and groups at risk
- Future pension adequacy and long-term financial sustainability of pensions
- Increased effectiveness of health care and long-term care

It also outlines findings of the SPC work carried out in 2010 on:

- Following the social consequences of the crisis
- Deepening the policy dialogue on the issue of pension sustainability and adequacy
- Social services of general interest

The Social Protection Committee is a policy forum for EU countries and the Commission. Opinions and other working documents produced by the SPC are also available online.

See www.ec.europa.eu/social

III. News from the ECJ

> (Case C-537/09) Bartlett et al. v. Secretary of State for Work and Pensions

The reference for a preliminary ruling concerns the interpretation of Article 4(2)(a) of Regulation 1408/71 and the validity of Article 10(a) of Regulation 1408/71 and of Regulation 1408/71, as amended by Regulation 647/2005 (hereinafter: "Regulation 1408/71, as amended"). It was made in separate sets of proceedings between Mr Bartlett, Mr Gonzalez Ramos and Mr Taylor, respectively, and the Secretary of State for Work and Pensions concerning the withdrawal of their entitlement to the mobility component of Disability Living Allowance ('DLA') on the ground that

they no longer satisfied the conditions of presence and domicile in Great Britain. DLA is mentioned as a special non-contributory benefit in Annex IIa to Regulation 1408/71 and to Regulation 1408/71, as amended, to which Article 10(a)(1) of those regulations refers.

When the case came before the Upper Tribunal, it decided to stay the proceedings and to ask the ECJ whether Article 4(2)(a) of Regulation 1408/71 and of Regulation 1408/71, as amended, must be interpreted as meaning that the mobility component of DLA constitutes a special non-contributory cash benefit within the meaning of that provision. The national tribunal also questioned the Court as to the validity of Article 10a of Regulation 1408/71 and of Regulation 1408/71, as amended, inasmuch as it allows the award of the mobility component of DLA, should that constitute a special non-contributory cash benefit within the meaning of Article 4(2)(a) of Regulation 1408/71 and of Regulation 1408/71, as amended, to be made subject to conditions as to residence and presence in Great Britain.

The ECJ first wanted to determine whether the mobility component of DLA could be regarded as a 'benefit' on its own account within the meaning of Article 1(t) of Regulation 1408/71 and of Regulation 1408/71, as amended. The answer was positive, as the Court already held, in Case C-299/05 *Commission* v *Parliament and Council* , that the mobility component of DLA is severable, with the result that that component alone could be included on the list in Annex IIa to Regulation 1408/71, as amended, if the United Kingdom decided to create an allowance which concerned that component alone.

Next, the ECJ investigated whether the mobility component of DLA could be regarded as a 'special benefit' within the meaning of Article 4(2)(a) of Regulation 1408/71, as amended, and of Regulation 1408/71. From Case C-299/05 *Commission* v *Parliament and Council* , it already follows that the mobility component of DLA may be such a special benefit within the meaning of Article 4(2)(a) of Regulation 1408/71, as amended. It also follows from the Court's case-law that a special benefit is defined by its purpose.

In that regard, the mobility component of DLA seeks to provide specific protection for disabled persons within the meaning of Article 4(2)(a)(b) of Regulation 1408/71 and of Regulation 1408/71, as amended, since it pursues solely the objective of promoting the independence and social integration of disabled persons and also, as far as possible, of helping them to lead a life similar to that of non-disabled persons. Thus, it is the disability itself which gives rise to entitlement to that benefit and which, depending on the level of the mobility problems suffered by the person concerned, allows the amount of the benefit awarded to be determined. This amount, which is determined by the costs connected with the mobility problems suffered by the beneficiary in the Member State concerned, is also closely linked to the social environment of that person in that State. Furthermore, the mobility component of DLA most frequently benefits persons suffering from a disability which seriously affects their mobility and, of necessity, it follows that, although the national legislation does not lay down any criteria as to means, that benefit is awarded in the overwhelming majority of cases to persons who cannot work because of their disability.

In that light, the ECJ held that the mobility component of DLA must be regarded as a special benefit within the meaning of both Article 4(2)(a) of Regulation 1408/71, as amended, and of Article 4(2)(a) of Regulation 1408/71. The listing of the concerned benefit in Annex IIa to Regulation 1408/71, as amended, could not be put into question either, as the mobility component of DLA is included among the benefits listed in Annex X to Regulation 883/2004. The same goes for its listing in Annex IIa to Regulation 1408/71, since DLA has always had two components clearly identified in the national legislation at issue. Consequently, the mobility component of DLA constitutes a special non-contributory cash benefit and does not have to be exported.

The Treaty rules on the free movement of workers (giving specific expression to the rules on the free movement of citizens, which were consequently not adjudicated on) cannot change that conclusion by questioning the validity of Article 10(a) in either one of the versions of Regulation 1408/71, inasmuch as this allows the award of the mobility component of DLA to be made subject to conditions as to residence and presence in Great Britain. The ECJ reiterated that it is permissible for the European Union legislature to adopt, in the course of implementation of Article 48 TFEU, provisions derogating from the principle of the exportability of social security benefits. In particular, the grant of benefits closely linked with the social environment may legitimately be made subject to a condition of residence in the State of the competent institution.

> (Case C-206/10) European Commission v. Federal Republic of Germany

By its application, the European Commission requests the Court to declare that, by making the grant of benefits for the blind, the deaf and the disabled under Länder legislation conditional, in respect of persons for whom the

Federal Republic of Germany is the competent Member State, upon the recipient being resident or habitually resident in the German Land concerned, the Federal Republic of Germany has failed to fulfil its obligations under Article 7(2) of Regulation 1612/68 and under Article 4(1)(a) of Regulation 1408/71, in conjunction with Title III, Chapter 1 of that regulation.

As to the infringement of Regulation 1408/71, the Commission mainly submitted that, although the benefits in question are listed in Annex II, Part III, of Regulation 1408/71, they are not special non-contributory benefits within the meaning of Article 4(2)(c) of that regulation, but sickness benefits within the meaning of Article 4(1)(a) and therefore exportable. The Federal Republic of Germany does not dispute that, at the end of the period laid down in the supplementary reasoned opinion, the contested legislation did not comply with Regulation 1408/71. In addition, when Regulation 883/2004 was adopted, the German delegation did not seek the inclusion of these Länder benefits in Annexes X and XI to that regulation.

The ECJ agreed with the Commission's point of view and repeated its previous case law, stating that benefits granted objectively on the basis of a statutorily defined position and intended to improve the state of health and quality of life of persons reliant on care have as their essential purpose supplementing sickness insurance benefits and must therefore be regarded as 'sickness benefits' for the purpose of Article 4(1)(a) of Regulation 1408/71.

This is the case for the benefits paid by the Länder since they are intended to compensate, in the form of a flat-rate contribution, for the additional everyday expenditure resulting from the recipients' disability. Since those benefits are sickness benefits within the meaning of Article 4(1)(a) of Regulation 1408/71, they must in consequence be granted irrespective of the Member State in which the recipient is resident, in accordance with the provisions of Title III, Chapter 1, of that regulation.

With regard to the infringement of Regulation 1612/68, the Commission submitted that any advantage awarded by a Member State to its citizens because of their objective status as workers or by virtue of the mere fact of their residence on the national territory falls within the scope of Article 7 of Regulation 1612/68, with the result that cross-border workers must also benefit from those advantages on the same basis as any other worker resident in the Member State of employment.

The ECJ followed again. The Länder benefits constitute a social advantage within the meaning of Article 7(2) of Regulation 1612/68, which prohibits both overt and covert forms of discrimination on grounds of nationality. Unless it is objectively justified and proportionate to the aim pursued, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage. That is the case with the residence condition laid down in the contested legislation, which can be more easily satisfied by German workers than by those from Member States other than the Federal Republic of Germany.

By making the grant of benefits for the blind, the deaf and the disabled under the contested legislation conditional, in respect of persons for whom the Federal Republic of Germany is the competent Member State, upon a condition of residence or habitual residence in the Land concerned, the Federal Republic of Germany has failed to fulfil its obligations under Article 4(1)(a) of Regulation 1408/71, in conjunction with Title III, Chapter 1 of that regulation, and under Article 7(2) of Regulation 1612/68.

> (Case C-399/09) Marie Landtová v. Ceská správa socialního zabezpecení

This reference for a preliminary ruling concerns the interpretation of Article 12 EC and Articles 3(1), 7(2)(c), 10 and 46 of Regulation 1408/71 and point 6 of Annex III(A) to Regulation 1408/71. It has been made in proceedings between Ms Landtová, a national of the Czech Republic who is resident in that Member State, and the Czech Social Security Authority (hereinafter 'the CSSA'), concerning the amount of the partial retirement pension which she was granted.

Ms Landtová, a Czech national who resides in the territory of that State, worked from 1964 until 31 December 1992 in the territory of the Federal Czech and Slovak Republic. After the dissolution of that State, Ms Landtová first worked in the territory of the Slovak Republic, and afterwards in the territory of the Czech Republic. The CSSA awarded to Ms Landtová a partial retirement pension. The amount was set in accordance with the Social Security Agreement between the Czech Republic and the Slovak Republic, according to which the value of the period of insurance completed by Ms Landtová up to 31 December 1992 had to be determined under the rules of the Slovak social security scheme since the headquarters of her employer were in the territory of the Slovak Republic, a provision maintained in force by point 6 of Annex III(A) to Regulation 1408/71. Ms Landtová challenged the

amount of the old age benefit, taking the view that the CSSA had failed to take into account all the periods of insurance completed by her.

The decision of the CSSA was indeed first annulled by the Prague City Court, basing its decision on a Constitutional Court judgment, which held that where a national of the Czech Republic satisfies the statutory conditions for entitlement to an old age benefit and under national law is entitled to a benefit greater than that calculated in accordance with the Social Security Agreement, the CSSA is bound to award a benefit which is equivalent to the higher entitlement and thus to adjust the amount to the amount she could have expected if she had completed the entire period of insurance under the Czech Republic social security scheme.

When this case reached the Supreme Administrative Court, the latter wanted to ascertain whether the provisions of point 6 of Annex III(A) to Regulation 1408/71, read in conjunction with Article 7(2)(c) thereof, preclude a national rule, which provides for the payment of a supplement to old age benefit where the amount of such benefit, awarded under the Social Security Agreement, is lower than that which would have been received if the retirement pension had been calculated in accordance with the legal rules of the Czech Republic. It also questioned whether the judgment of the Constitutional Court, which allows the payment of the concerned supplement solely to individuals of Czech nationality residing in the territory of the Czech Republic, constitutes discrimination which is prohibited under Article 12 EC and the combined provisions of Articles 3(1) and 10 of Regulation 1408/71.

The ECJ held that point 6 of Annex III(A) does not preclude the national rule providing for the payment of the supplement, as this does not come down to the award of a parallel Czech old age benefit, nor one and the same period of insurance being taken into account twice. It merely results in the elimination of an objectively established difference between benefits from different sources. Such an approach avoids 'the overlapping of national legislations applicable', in accordance with the objective set out in the eighth recital of the preamble to Regulation 1408/71, and does not run counter to the criterion for the allocation of competence established in the Social Security Agreement as maintained by Annex III(A).

The ECJ however also ruled that the Constitutional Court judgment, by allowing the payment of the supplement only to Czech nationals residing in the Czech Republic, involves a direct discrimination based on nationality and indirect discrimination based on nationality, as a result of the residence test, against those who have made use of their freedom of movement. Consequently this judgment clearly runs counter to Article 3(1) of Regulation 1408/71.

As to the practical consequences of its judgment, the ECJ instructed additionally that EU law does not, provided that the general principles of EU law are respected, preclude measures to re-establish equal treatment by reducing the advantages of the persons previously favoured. However, before such measures are adopted, there is no provision of EU law which requires that a category of persons who already benefit from supplementary social protection, as was the case for Ms Landtová, should be deprived of it.

> (Case C-388/09) Joao Filipe da Silva Martins v. Bank Betriebskrankenkasse – Pflegekasse

This reference for a preliminary ruling concerns the interpretation of Articles 27 and 28 of Regulation 1408/71 and of Articles 39 EC and 42 EC. It was made in proceedings between Mr da Silva Martins and Bank Betriebskrankenkasse – Pflegekasse (hereinafter 'Bank BKK') concerning his optional continued affiliation to the German care insurance scheme and his entitlement to a German care allowance.

Mr da Silva Martins, a Portuguese national, after working for a short period in Portugal, settled in Germany and worked there for the rest of his working life. He was insured with Bank BKK for sickness insurance from 1974 and for care insurance from the introduction of that insurance in Germany in January 1995. He drew a German and a Portuguese retirement pension. Bank BKK granted him care benefits in kind. However, when Bank BKK learnt that Mr da Silva Martins had definitively left Germany to reside in Portugal, it cancelled his care insurance and ordered him to repay to it the care allowance already paid whilst staying in Portugal. Mr da Silva Martins was convinced EU law was infringed.

When this case came before the German Federal Social Court, it decided to stay proceedings as it wanted to know whether Regulation 1408/71, in particular Articles 27 and 28 of that regulation, or Articles 45 TFEU and 48 TFEU preclude a person, who draws retirement pensions from both his Member State of origin and the Member State in which he spent most of his working life and has moved from the latter to his Member State of origin, from continuing, by reason of optional continued affiliation to a care insurance scheme in the Member State in which he spent most of his working life, to receive a cash benefit corresponding to that affiliation, in particular where

benefits relating to the specific risk of reliance on care do not exist in the Member State of residence.

The ECJ first examined whether Article 15 of Regulation 1408/71 on voluntary or optional continued insurance could be of influence by precluding the optional continued affiliation in Germany, but it came to the conclusion it did not. In accordance with Article 15(1), the rules on applicable legislation, which include the 'single social security legislation principle' of Article 13 of Regulation 1408/71, are not to apply to voluntary or optional continued insurance unless, in respect of one of the branches referred to in Article 4 of the regulation, there exists in any Member State only a voluntary scheme of insurance. That was not the case, since German care insurance is generally a compulsory insurance scheme. Moreover, Article 15(2) is not intended to apply to a situation in which the optional continued and compulsory contributions relate to risks which, although they may be equated with each other for the purposes of Regulation 1408/71, are not identical, namely the risk of reliance on care and the risk of sickness within the strict sense of Article 4(1)(a) of that regulation.

As to the interpretation of Article 28 of Regulation 1408/71, the ECJ held that, having regard to that case law under which social security benefits relating to the risk of reliance on care are to be treated as 'sickness benefits' within the meaning of Article 4(1)(a) of Regulation 1408/71, the conclusion must be that Article 28 of that regulation cannot apply to a situation in which a person who is entitled to a retirement pension under the legislation of his Member State of residence is entitled to sickness benefits stricto sensu under that legislation.

Applying Article 27 of Regulation 1408/71, the ECJ stated that, where a former migrant worker is entitled to pensions under the legislations of two or more Member States, including that of his Member State of residence, it is in principle for the Member State of residence to provide, if necessary, benefits relating to the risk of reliance on care. Having regard to their specific character, the ECJ continued, in the absence of provisions in Regulation 1408/71 concerning specifically the risk of reliance on care, Article 27 must, in circumstances such as those at issue in the main proceedings, be interpreted in the light of the objectives underlying the regulation, taking into account the particular features of benefits relating to the risk of reliance on care as opposed to sickness benefits stricto sensu .

In that regard, the ECJ decided that it would be inconsistent with the aim pursued by Article 48 TFEU, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers, if a former migrant worker were to lose, simply because he is entitled pursuant to Article 27 of Regulation 1408/71 to sickness benefits stricto sensu under the legislation of his Member State of residence, all advantages representing the counterpart of contributions paid by him in a former Member State of employment in respect of a separate insurance scheme relating not to the risk of sickness within the strict sense of Article 4(1)(a) of Regulation 1408/71 but to the risk of reliance on care. It would be all the more so in the situation where cash social security benefits relating to the risk of reliance on care do not exist in that Member State of residence.

The ECJ consequently concluded that Articles 15 and 27 of 1408/71 must be interpreted as not precluding a person who draws retirement pensions from both his Member State of origin and the Member State in which he spent most of his working life and has moved from that Member State to his Member State of origin, from continuing, by reason of optional continued affiliation to a separate care insurance scheme in the Member State in which he spent most of his working life, to receive a cash benefit corresponding to that affiliation, in particular where cash benefits relating to the specific risk of reliance on care do not exist in the Member State of residence, that being a matter for the referring court to ascertain.

Above this, if the referring court finds out that cash benefits relating to the risk of reliance on care are provided for under the legislation of the Member State of residence, but only at a lower level than that of the benefits relating to that risk from the other pension-paying Member State, Article 27 of Regulation 1408/71 must be interpreted as meaning that such a person is entitled, at the expense of the competent institution of the latter State, to additional benefits equal to the difference between the two amounts.

> (Case C-503/09) Lucy Stewart v. Secretary of State for Work and Pensions

This reference for a preliminary ruling concerns the interpretation of Articles 4(1)(a) and (b) and 10(1) of Regulation 1408/71. The reference has been made in proceedings between Ms Stewart, a national of the United Kingdom residing in Spain, and the Secretary of State for Work and Pensions, concerning the latter's refusal to award her short-term incapacity benefit in youth.

Ms Stewart is a British national who has Down's Syndrome. She moved with her parents to Spain in August 2000 and they have lived there since then. She has retrospectively been awarded disability living allowance. Ms Stewart's mother, as her daughter's appointee, made a claim for short-term incapacity benefit in youth for her

daughter. The claim was refused by the Secretary of State for Work and Pensions on the ground that Ms Stewart did not satisfy the condition of presence in Great Britain. Ms Stewart indeed satisfied all the conditions for the award of short-term incapacity benefit in youth, except those connected with “ordinary residence”, “past presence” and “presence in Great Britain on the date on which the claim was made”.

When her case appeared before the Upper Tribunal, the latter decided to stay the proceedings and ask the ECJ three questions for a preliminary ruling. First, it wanted to know whether short-term incapacity benefit in youth is, for the purposes of Regulation 1408/71, a sickness benefit or an invalidity benefit. Secondly, it posed several sub-questions on the coordination rules to would be applied if the benefit was to be treated as a sickness benefit. Thirdly, the referring court asked in essence, whether, if the benefit was to be treated as an invalidity benefit, Article 10(1) of Regulation 1408/71 is to be interpreted as precluding a Member State from making the award of that benefit subject to conditions requiring the claimant's ordinary residence or past presence in that Member State.

As to the nature of the benefit, it was not disputed that the benefit at issue is a social security benefit since its grant depends on objective criteria legally defined in national law, the competent authorities do not have the power to assess the individual needs of the claimant and the benefit is intended to cover, according to the particular case, the risks of sickness or invalidity. With regard to determining its precise nature and in order to distinguish between different categories of social security benefit, the ECJ reiterated that the risk covered by each benefit must be taken into consideration.

According to the ECJ, it was clear from the contents of the file submitted to the Court that if short-term incapacity benefit in youth is awarded, it is converted, at the end of the period for its payment, into long-term incapacity benefit, on the sole condition that the claimant's disability persists. However, the claimant cannot be entitled to long-term incapacity benefit from the outset, even if it is accepted, in the light of the permanent or long-term nature of the disability, that he or she is eligible for it. Therefore, where the claimant has a permanent or long-term disability, short-term and long-term incapacity benefits in youth necessarily form part of a continuum. Consequently, in circumstances where it is established, at the time of the claim, that the claimant has a permanent or long-term disability, short-term incapacity benefit in youth has the characteristics of an invalidity benefit within the meaning of Article 4(1)(b) of Regulation 1408/71. Given this answer, there was no need to reply to the second question. The ECJ thus concentrated on the three residence requirements attached to the grant of the UK benefit.

Primo, as to the “ordinary residence condition”, the short-term incapacity benefit in youth, as an invalidity benefit under Regulation 1408/71, comes within the scope of Article 10 of that regulation, which holds the principle of the waiving of residence clauses. It follows from that principle not only that the person concerned retains the right to receive benefits referred to in that provision acquired under the legislation of one or more Member States even after taking up residence in another Member State, but also that the acquisition of such entitlement may not be refused on the sole ground that he or she does not reside in the Member State in which the institution responsible for payment is situated.

The fact that short-term incapacity benefit in youth is a non-contributory benefit, since it is awarded irrespective of the record of contributions by claimants, does not affect that consideration. As the principle stated in Article 10a of Regulation 1408/71 under which special non-contributory benefits are not exportable does not apply to the benefit at issue in the main proceedings and since no other provision of that regulation allows Member States to derogate, in a situation such as that of Ms Stewart, from the export principle enshrined in Article 10(1), it follows that invalidity benefits are, as a rule, exportable to a Member State other than that in which the institution responsible for payment is situated.

Secundo, as the “past presence condition” is concerned (a condition of presence in Great Britain for a period of, or for periods amounting in aggregate to, not less than 26 weeks in the 52 weeks immediately preceding the date on which the claim to entitlement to the benefit in question was made, with that condition having to be met only on the date of that claim), this was not necessarily a ‘residence clause' within the meaning of Article 10(1) of Regulation 1408/71, so the Court examined its conformity with the provisions on the free movement of Union citizens in Article 21 TFEU. It concluded in that regard that the national legislation at issue, which disadvantages some nationals of a Member State simply because they have exercised their freedom to move and to reside in another Member State, amounts to a restriction on the freedoms conferred by Article 21(1) TFEU on every citizen of the Union.

Whereas the existence of a continuous effective link between the Member State and the recipient of the benefit and the financial balance of the national social security system constitute legitimate objectives capable of justifying restrictions on the rights of freedom of movement and residence under Article 21 TFEU, they could not in the case at hand.

While the rules for applying the “past presence condition” do not, in themselves, appear to be unreasonable, none the less that condition is too exclusive in nature. By requiring specific periods of past presence in the competent Member State, the condition unduly favours an element which is not necessarily representative of the real and effective degree of connection between the claimant to short-term incapacity benefit in youth and that Member State, to the exclusion of all other representative elements. The ECJ found such other representative elements in the relationship between the claimant and the social security system of the competent Member State and in the claimant's family circumstances. According to the Court, these elements appear ‘in casu' to be capable of demonstrating the existence of a genuine and sufficient connection between the appellant and the competent Member State. The same considerations also apply with regard to the objective of guaranteeing the financial balance of the national social security system.

Tertio, with regard to the condition of presence on the date on which the claim is made, the ECJ also held that the fact that claimants must be present in the competent Member State on the date on which their claims are made for short-term incapacity benefit in youth enables neither a genuine link to be established between those claimants and the competent Member State nor the financial balance of the national social security system to be preserved.

The ECJ consequently concluded in the case at issue that Article 10(1) of Regulation 1408/71 precludes a Member State from making the award of short-term incapacity benefit in youth, such as that at issue in the main proceedings, subject to a “condition of ordinary residence”, while Article 21(1) TFEU precludes a Member State from making the award of such a benefit subject to a condition of past presence of the claimant in that State to the exclusion of any other element enabling the existence of a genuine link between the claimant and that Member State to be established, or to a condition of presence of the claimant in that State on the date on which the claim is made.

See **www.curia.europa.eu**

IV. Programme of the 2011 Polish Presidency in the field of social security

From 1 July to 31 December 2011, Poland holds the Presidency in the Council of the European Union for the first time since joining the European Union.

The Polish Presidency will take actions in the field of social security on the level of the Administrative Commission and on the level of the Council.

> In the Administrative Commission

The Polish Presidency will introduce a few new topics on the level of the Administrative Commission. These topics - important from the point of view of the Polish Presidency – are presented below:

• Aggregation of insurance, employment and self-employment periods for the purpose of granting unemployment benefits under Article 61 of Regulation 883/2004

This issue will be analysed in depth in order to facilitate the work of the institutions, which reported problems with the application of the above provision. The Polish Presidency hopes that the discussion will lead in a longer term to adopting a common position by the Member States on the types of periods that should be taken into account for aggregation purposes.

• Implementation of the Recovery chapter of Regulation 987/2009

Since these provisions are completely new, there is a need for opening a discussion on their practical application, as well as developing a general approach to them to be followed by all Member States. The Polish Presidency intends to devote the Working Party of the Administrative Commission in November to this topic.

• Creation of the Dictionary of Personal Identification Numbers in EESSI for sectors

The Polish Presidency reported the need for the creation of the Dictionary of Personal Identification Numbers in EESSI for sectors in order to facilitate obtaining the required identification numbers from persons concerned for the purposes of the competent institutions. The Presidency welcomes the opinions of the Member States on this

initiative, especially as far as the data scope of the Dictionary is concerned.

The Polish Presidency is also planning to continue work on topics, which have already been discussed, i.e.:

- Interpretation and implementation of the principle stipulated in Article 44 of Regulation 987/2009 (child raising periods);

- Draft Decision on the application of Article 65 (6) and (7) of Regulation 883/2004 (draft Decision U4);

- The relationship between Regulation 883/2004 and Directive 2004/38;

- The relationship between EU social security coordination and bilateral agreements;

- The Electronic Exchange of Social Security Information (EESSI).

During the Polish Presidency further actions on the implementation of EESSI are planned. The Polish Presidency intends to be committed to this process in the best possible way and to stimulate and moderate discussion on this topic in order to find a proper balance of time and quality, between the need for being ready with the EESSI system as soon as possible and putting into operation a really efficient and well-functioning tool.

Within the scope of health care, the relations between the Directive on patients' rights in cross-border healthcare and the coordination regulations will be discussed (this topic will also be discussed at the Working Party of the Administrative Commission in October). Other discussions in this field will related to organ donation - particularly concerning coverage of the costs of benefits in kind on the donator's side - and health care provided to uninsured persons during their temporary stay in another Member State.

> In the Council

The Polish Presidency intends to continue the work taken up under the Hungarian Presidency on the proposal for a regulation of the European Parliament and of the Council amending Regulation 883/2004 on the coordination of social security systems and Regulation 987/2009 laying down the procedure for implementing Regulation 883/2004 ("Miscellaneous Amendments 2010", see the E-newsletter of March 2011), with the aim of reaching a general approach in the Council.

See http://pl2011.eu/en

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