trESS Training and reporting on European Social Security

E-newsletter November 2011

Welcome word

Dear **trESS** friends,

With great pleasure I present you this "autumn **trESS** E-newsletter". In this period of the falling of the leaves, we are still eager to inform you on the most recent developments in the field of EU social security coordination.

As to the activities of the project, already 9 out of the planned 10 **trESS** 2011 seminars have taken place and, to our great satisfaction, these seminars were all described as very lively and fruitful. The new formula of organising targeted seminars can thus be called a success. At the same time, different reports have been finalised under the reporting and analytical branch of the project. One of them ("The social security coverage of non-active persons moving within the EU" – Analytical Study) has already been presented to the Administrative Commission for the coordination of social security systems and another report ("The coordination of long-term care benefits" – Think Tank report) will be presented at the December meeting of this assembly. You will find the fruit of this work on our website.

Also the **trESS** website will be subjected to some interesting updates, providing you with new information linkages for Regulations 883/2004 and 987/2009.

This newsletter also features a lot of news from the Commission, which has recently been very active in requesting certain Member States to end allegedly discriminatory and free movement hindering behaviour. We can also present you one new case from the European Court of Justice on social security coordination, in particular with regard to the coordination of family allowances.

Finally, we also included a short interview with Bruno De Pauw, Chair of the relatively new "Conciliation Board" of the Administrative Commission. In this talk, he introduces us to the main goals and activities of this new body in the institutional spectrum of EU social security coordination.

I wish you a very pleasant read and I am looking forward to come back to you right before the start of 2012.

Kind regards,
Yves Jorens
Project Director

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I. News from trESS

> trESS Analytical Study presented to the Administrative Commission

On 18 October 2011, a report from the **trESS** network was presented at the 328th meeting of the Administrative Commission for the coordination of social security systems. It was the result of an analytical study by **trESS** experts, mandated by the European Commission in April 2011.

The analytical study is related to the social security coverage of non-active persons moving between Member States and is in actual fact a follow-up of an earlier **trESS** Think Tank report on the relationship between Regulation 883/2004 and Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. The interdependence of these two instruments has caused considerable concern and confusion in the Member States, which were expressed in several notes in the Administrative Commission. This topic recently even reached the highest political level, as it was discussed during the Council meeting of 17 June 2011.

The study was based on the replies from the Member States to a questionnaire that was sent out by the Commission and was predominantly aimed at gathering factual information on potential issues in the Member States that are related to the subject. The final report contains the result of this fact-finding analysis, enriched by an overview of the relevant legal framework, a mapping of residence based social security benefits in the Member States, an evaluation of the current state of EU law in this area and some possible routes for the future.

In December, the **trESS** Think Tank report on the coordination of long-term care benefits will also be presented to the Administrative Commission.

> New developments on the trESS website

As you already know, the **trESS** website is always further developed in order to provide the full potential of 'information sharing' with regard to the coordination of social security in the EU. Soon, the website will be enriched with some important links to the past as well as to the future.

The link to the past will be made by the flagging of "historical leading ECJ cases" in the well-used Regulations database. Doing so, the most important case law of the Court of Justice with relation to Regulation 1408/71 and 574/72 will be easy to trace.

The step into the future will be done by inserting new linkages in the Regulations database. Regulation 883/2004 will be linked with the corresponding Articles of Regulation 987/2009, which will in its turn be linked to the corresponding provisions of Regulation 574/72. Both current Regulations will also be linked to the corresponding Decisions of the Administrative Commission. Check the website regularly, as these changes will be implemented within the coming weeks.

II. News from the Commission

> Commission publishes guides on social security systems on its website

The guides on the social security systems of the 31 countries in which the regulations on social security coordination apply are now online in 22 languages on the EC website.

> Commission accepts that Spain can temporarily restrict the free movement of Romanian workers

Following a request from the Spanish authorities on 28th July 2011, the European Commission has approved Spain's request to restrict its labour market to Romanian workers until 31 December 2012 due to serious disturbances on its labour market. These restrictions will apply to activities in all sectors and regions. However it shall not affect Romanian nationals who are already active on the Spanish labour market.

These temporary restrictions are authorised by the European Commission in view of the current economic situation in Spain. The unprecedented fall in GDP (3.9% between 2008 and 2010) has resulted in the highest unemployment rate in the EU, over 20% since May 2010. Moreover, the analysis by the Commission has established that Romanian nationals living in Spain are strongly affected by unemployment, as 30% of them are unemployed. 191 400 Romanian citizens working in Spain were unemployed in the first quarter of 2011, i.e. the second highest number after Spanish nationals. This number was only 80 100 three years earlier. In the same period, the number of employed Romanians fell by nearly 24 %. Despite a fall in the number of Romanian national coming to work in Spain in recent years, probably due to the economic recession, the inflow remains at high levels. The number of Romanian nationals usually resident in Spain has increased from 388 000 on 1 January 2006 to 823 000 on 1 January 2010. As Spain had already opened its labour market to all EU-citizens, any restriction of the free movement of workers constitutes a derogation and can only be temporary. The European Commission will monitor closely the situation in Spain and will have the possibility of modifying or revoking the decision at any time it sees fit.

In general, free movement of workers has had a positive economic impact at the European scale and has produced economic growth in the receiving countries. Recent estimates suggest that the long-term impact of the population flows between 2004 and 2009 on the GDP of the EU-15 was an extra 0.9%. The European Commission will now inform the Council of its decision and any Member State may request the Council to amend or annul the Commission's decision on the suspension of EU law within two working weeks.

> Commission requests United Kingdom to end discrimination of EU nationals residing in the UK regarding their rights to specific social benefits

EU nationals who habitually reside in the UK are subject to the so-called 'right to reside' test to qualify for certain social security benefits. As this test indirectly discriminates non-UK nationals coming from other EU Member States, it contravenes EU law. This is why the European Commission has requested the United Kingdom to stop its application. The request takes the form of a reasoned opinion under EU infringement procedure. The UK has two months to inform the Commission of measures it has taken to bring its legislation into line with EU law. Otherwise, the Commission may decide to refer the UK to the ECJ.

Regulation 883/2004 allows the UK to grant social benefits only to those persons who habitually reside in the UK, however Article 4 of this Regulation prohibits indirect discrimination through the requirement for non-UK citizens to pass an additional right to reside test. Any discrimination in providing social security benefits (including non-contributory cash benefits) also constitutes an obstacle to free movement guaranteed by Article 21 of the Treaty.

Under UK law, certain social security benefits - namely Child Benefit, Child Tax Credit, State Pension Credit, Income-based Allowance for Jobseekers, Income-based Employment and Support Allowance - are only granted to persons with a 'right to reside' in the UK. While UK nationals have the right to reside solely based on their UK citizenship, other EU nationals have to fulfil additional conditions in order to pass a so-called 'right to reside' test. This means the UK indirectly discriminates against nationals from another Member State.

> Commission requests Slovakia to end discrimination in calculating migrant workers' pensions

The European Commission has requested the Slovak authorities to end discriminatory practices in determining the level of certain social security benefits, namely that of old-age pensions.

The Slovak authorities determined the amount to calculate the pension of a Slovak migrant worker who worked in Slovakia from 1959 until 1986 and until 1994 in Austria solely on the basis of the level of wages she received in Slovakia from 1982-1986. While the level of wages rose between 1986 and 1994 by 118 % in Slovakia, the amounts taken for the calculation of the person's pension were not updated and reviewed by the Slovak authorities so as to correspond to the pay she might reasonably have been able to earn had she continued to work in Slovakia. This means that, as an EU citizen, she was put in an unfavourable position compared to a person with a similar career path, completing all their insurance periods under Slovak legislation.

As laid down in abundant case-law from the EU Court of Justice, this contravenes the EU right to move freely and the obligation to ensure that the amount of a migrant worker's' social benefits is not reduced when exercising their right to free movement. This is why the Commission takes the view that, by failing to update and revise the complainant's pay as the basis for calculating their pension, the Slovak authorities did not comply with the requirements of EU law.

The request takes the form of a reasoned opinion under EU infringement procedures. Slovakia now has two months to inform the Commission of measures it has taken to bring its legislation into line with EU law. Otherwise, the Commission may decide to refer Slovakia to the ECJ.

> Commission requests Greece to end obligation for Greek pensioners to maintain Greek bank accounts

The European Commission has requested Greece to end its practice of requiring foreign workers benefiting from a Greek old-age pension to open and keep a bank account at the National Bank of Greece S.A. (NBG). This practice puts migrant persons at a disadvantage compared to those residing in Greece as people living in another EU country may be forced to travel personally to Greece to open a bank account and therefore face additional travel and accommodation costs. According to EU law, conditions which can be more easily fulfilled by national workers than by migrant workers constitute indirect discrimination and can affect a person's decision to exercise their right to move freely within the Union. The request to Greece takes the form of a 'reasoned opinion' under EU infringement procedures. Greece now has two months to inform the Commission of measures it has taken to comply with EU law. Otherwise, the Commission may decide to refer Greece to the EU's Court of Justice.

The complainant, a German citizen, was obliged to open a bank account at the National Bank of Greece in order to have her Greek pension exported to her German bank account. In the Commission's view, the obligation to maintain an account in a specific Member State is unnecessary and could be perceived as an obstacle to the free movement of capital and workers. By failing to remove this particular condition for the payment of an old-age pension to a person residing in another Member State, the Greek authorities are in breach of their obligations EU law to not discriminate, directly or indirectly, against migrant workers.

> Commission requests Italy to pay family benefits to frontier workers

The European Commission has requested Italy to comply with its obligations under EU law to pay certain family allowances granted by the region of Trentino-Alto Adige and the province of Bolzano to people working there but living in Austria. The current refusal of the Italian authorities to pay these allowances to the workers is based on the fact that the workers do not reside in Trentino-Alto Adige or Bolzano. According to EU law, frontier workers (persons who work in one Member State but reside in another to which they return daily or at least once a week) are covered by the social security system of the country where they work and not by the system of the country where they reside. Italy's current residence conditions for family allowances are therefore an obstacle to the free movement of workers.

The Commission's request takes the form of a reasoned opinion under EU infringement procedures. If Italy does not bring its legislation into line with EU law within two months, the Commission may decide to refer Italy to the ECJ.

> Commission requests Luxembourg to end suspension of unemployment benefits

The European Commission has requested Luxembourg to end the practice of denying unemployment benefits due, solely on the basis of its national legislation, to persons receiving a pension from another EU Member State. For the Commission, this practice is in breach of EU rules on social security coordination and, as clarified by the case law of the EU Court, prevents workers from exercising in full their right to free movement between Member States.

In general, EU law allows for the application of national rules to prevent people getting the same benefits from more than one Member State. However, such rules cannot be applied if the benefit due to the claimant is on the basis of national rules alone, and not on the basis of EU social security coordination rules. For example, a woman lost her job after working for ten years in Luxembourg and was entitled to receive unemployment benefits on the basis of Luxembourg law. However, under Luxembourg law, the award of unemployment benefits to recipients of an old-age pension is prohibited. As the claimant was in receipt of a small French old-age pension (amounting to €83 per month), her claim for unemployment benefits was rejected. If, on the basis of EU rules, the women's periods worked in France had been taken into account when awarding the unemployment benefit, Luxembourg could have applied anti-overlapping rules. This is not the case as the complainant contributed for enough years to be entitled to unemployment benefits exclusively on the basis of Luxembourg law.

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

See www.ec.europa.eu/social

III. News from the ECJ

> (Case C-225/10) Juan Perez Garcia e.a. vs. Familienkasse Nürnberg

This reference for a preliminary ruling concerns the interpretation of Articles 77 and 78 of Regulation 1408/71. It was made in four sets of proceedings between Mr Pérez García, e.a., and the Familienkasse Nürnberg concerning the latter's refusal to grant them the benefit of the allowances for dependent children in respect of their handicapped adult children.

All applicants are Spanish nationals residing in Spain who worked in Germany as migrant workers. On that basis, each of them received an old-age and/or invalidity pension both in Spain and in Germany, the latter State granting them the right to a national pension on the basis of German law alone. Each of them is or was the father of a handicapped child of over the age of 18 years. In respect of the handicap of their children, the "Spanish non-contributory benefit for handicapped persons" is granted, but not the "Spanish dependent child allowance". The applicants had chosen not to apply for the latter benefit, as they would then be deprived of the former, which is declared incompatible with the "Spanish dependent child allowance" under national law. Besides this, the Familienkasse Nürnberg also refused or revoked payment to the applicants of the "German dependent child allowance", on the ground that they were entitled in Spain to family allowances (the aforementioned "Spanish dependent child allowance") that exceed the corresponding benefit which is paid to them in Germany and that they may therefore at any time apply for those allowances.

When this case reached the Sozialgericht Nürnberg, it decided to stay the proceedings and ask the Court, in essence, whether Articles 77(2)(b)(i) and 78(2)(b)(i) of Regulation 1408/71 must be interpreted as meaning that recipients of old-age or invalidity pensions, or the orphan of a deceased worker, having been subject to the legislation of several Member States, but whose pension or orphan's rights are based on the legislation of the former Member State of employment alone, are entitled to claim from the competent authorities of that State the family allowances provided for by that legislation for handicapped children, even though they did not in the Member State of residence seek the comparable, higher, allowances under the legislation of that latter State, because they had opted to be granted another benefit for handicapped persons that is incompatible with those.

To answer these questions, the Court first wanted to know whether at least one of the social benefits at issue falls within Articles 77 and 78 of Regulation 1408/71. Where this was not the case for the "Spanish non-contributory benefit for handicapped persons" (a special non-contributory benefit included in Annex IIa of Regulation 1408/71), this was however the case for the "German dependent child allowance" and the "Spanish dependent child allowance". This was derived from the respective declarations made under Article 5 of Regulation 1408/71.

That being ascertained, the Court went further and reiterated that under Articles 77(2)(b)(i) and 78(2)(b)(i) of Regulation No 1408/71, where a pensioner or a deceased worker has been subject to the laws of more than one Member State, the allowances in question are to be paid in accordance with those of the State in whose territory the pensioner, or the orphan of the deceased worker, resides. However, according to the very wording of those provisions of Regulation 1408/71, it is only when a right to family allowances is 'acquired' under the legislation of the Member State of residence that the latter

is designated by Regulation No 1408/71 as the competent State. Whereas the assessment of that condition of an 'acquired right' is a question of national law and a matter for the national court, the referring court sought precisely to determine the scope of the word 'acquired' for the purpose of Articles 77and 78 of Regulation 1408/71.

The ECJ elucidated this subject immediately and repeated its position that he recognition of such a right requires that the interested person should fulfil all the conditions, as to both form and substance, imposed by the national legislation of that State in order to be able to exercise that right, which may in some cases include the condition that a prior application must have been made for the payment of such benefits. It consequently came to the decision that where family allowances provided by the national rules of the Member State of residence may not be requested by the interested persons because they have chosen another benefit, the grant of which excludes payment of those allowances, it follows that the right of those persons cannot be considered to be 'acquired' for the purposes of Articles 77(2)(b)(i) and 78(2)(b)(i) of Regulation No 1408/71. Indeed, those interested persons do not meet all the conditions of form and of substance to be granted those allowances.

In those circumstances, Articles 77 and 78 of Regulation 1408/71 cannot be interpreted as meaning that the former Member State of employment may refuse to pay to the interested persons the family allowances acquired under the legislation of that State alone, on the sole ground that those interested persons ought to have applied for the higher family allowances in their Member State of residence. Consequently, given that it is common ground that the right to family allowances is not 'acquired' by interested persons under the legislation of the Member State of residence, it is for the competent institutions of the former Member State of employment, in which a right to such family allowances was acquired on the basis of the legislation of that State alone, to pay the entire amount of those allowances according to the conditions and limits set by that legislation.

The response given by the Court in the preceding paragraph applies mutatis mutandis to a situation in which the interested persons are not able, under the legislation of the Member State of residence, to choose payment of family allowances in that State, on the ground, for example, that the children concerned can no longer be considered as being dependent on their parents.

See www.curia.europa.eu

IV. Interview with Bruno De Pauw, Chair of the Conciliation Board of the Administrative Commission for the coordination of social security schemes

In this October **trESS** e-newsletter, we present you an interview with Mr. Bruno De Pauw, who is working as an Advisor (Head of Dept.) in the Department for International Relations of the Belgian National Social Security Office. He has a long standing theoretical and practical experience in the field of coordination of social security, especially with regard to the determination of the applicable legislation. He is the author of a substantial number of publications in legal reviews.

At the European level, he has been appointed as Chair of the Conciliation Board of the Administrative Commission for the coordination of social security schemes. We asked him to introduce us briefly to this new body, which has been created in the womb of the Administrative Commission, predominantly based on developments in ECJ case law (e.g. Case C-02/05, *Rijksdienst voor Sociale Zekerheid vs. Herbosch Kiere NV*) and of the enhanced administrative cooperation (e.g. Article 76(6) Regulation 883/2004 or Decision A1 of the Administrative Commission) under the current Regulations.

Mr. De Pauw, what is the objective of this new "assembly within an assembly"?

In fact, the goal of this new body is quite straightforward. Its purpose is to assist the work of the Administrative Commission in cases of differing interpretation between members with respect to the provisions of Regulation 883/2004 and Regulation 987/2009, including the provisions of Regulation 1408/71 and 574/72 as far as they are still applicable. Consequently, the main objective of the Conciliation Board is to reconcile different interpretations between members of the Administrative Commission arising from provisions of the Regulations. This includes e.g. issues as referred to in paragraph 1 of Decision No A1. Furthermore, if requested, it will provide the Administrative Commission with a Legal Opinion on such issues.

What will be the concrete activities of the Conciliation Board then?

The Conciliation Board shall only deal with the aforementioned issues at the request of the Administrative Commission and if all parties involved agree that the issue is to be dealt with by this body. At any stage, at the request of one of the parties involved, the Chair or the Commission, the issue can be referred back to the Administrative Commission.

It consists of a maximum of 12 volunteers nominated by the national Administrative Commission delegations and appointed by the Administrative Commission for a term of 24 months. However, the members of the Conciliation Board do not act as members of their delegation, but they act on the basis of their personal expertise in an impartial manner. That is of crucial importance of course. A member must therefore abstain from any work on an issue which concerns his or her country of origin or when his or her impartiality could be compromised in any other way. The Board works in a system of 3/4 groups, composed of 3/4 members and a Commission representative each, taking account of the experience of members in certain sectors and with certain national social security systems.

The work of the Conciliation Board is coordinated by the Chair and supported by the Secretariat. The Chair of the Conciliation Board reports to the Administrative Commission at least once a year on its activities. The functioning and the mandate of the Conciliation Board shall be reviewed at the latest by the end of the 2nd year following its inauguration.

It is important to mention that all Legal Opinions of the Conciliation Board shall be drafted by consensus. If there can be no consensus reached on a certain issue, the minority view has to be stated clearly in the Opinion submitted to the Administrative Commission.

Does the Conciliation Board have specific internal working rules or rules of procedure you can share with us?

Yes, amongst other internal rules, it was agreed that the possibility to hold a hearing should certainly not be excluded. A hearing may sometimes allow for a better understanding, especially of the underlying positions of the parties. The Conciliation Board also strongly recommends that cases be submitted to it in an anonymous form. Of course, the members also agreed that, in any case, they are bound to respect the privacy of personal data. This means that any information on a specific case should not be made available to third parties which are not involved in the case. Rather, it should only be available to those who have a need to know.

As to rules of procedure, it was agreed that no such rules had to be drafted. This was decided in order to enable the Conciliation Board to adopt a more flexible approach at a first time.

An important last question: has a case already been presented before the Conciliation Board?

Well, in fact, the answer is yes and no, as a case was indeed ready to be presented to the Administrative Commission recently and scheduled to be referred to the Conciliation Board, but the Board eventually did not have to tackle it, as the Member States concerned ultimately reached an agreement and the case

was withdrawn.

It was certainly an interesting case, concerning a dispute between two Member States ("MS A" and "MS B") relating to certificates E101 for a company in Member State B. The MS B competent institution had retroactively issued certificates E101 for the employees working in the international transport sector and providing transport services in different EU Member States according to Article 14(2)(a) Regulation 1408/71. The MS A competent institution asked to withdraw these certificates stating that the drivers were actually employed with a MS A branch or permanent representation of the MS B company. After examining the information provided by the MS A institution, the MS B competent institution decided to revoke the certificates E 101. This decision was appealed by the employer and after examination, the initial decision was revoked because it was not enough motivated in legal terms.

After written communication between the MS A and MS B competent institutions, the competent authorities could not reach an agreement. Their different viewpoints mainly concerned the treatment of the MS B company's activities in MS A, i.e. whether such activities constituted a branch. Another question under the dispute was whether the MS B social insurance institution had the competence to answer the qualification question on whether the company's activity in Germany should be treated as a branch or a permanent representation.

However, the case was – as already mentioned – not dealt with by the Conciliation Board, as the parties involved have managed to find an agreement on the issue before the Board could bend over it. To a certain extent, this is a pity as we have missed the opportunity to deal with our first real case. On the other hand, this also means that the new Conciliation Board can be regarded as a good stimulus for the Member States to settle the matter between themselves, even in sometimes difficult or sensitive issues. And this is in the end what it's all about.

Thank you for informing us and good luck.

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

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