trESS Training and reporting on European Social Security

**E-newsletter October 2009**

## Welcome word

Dear **trESS** friends,

Today, 30 0ctober 2009, is an important day for Europe. Two key regulations making up the new regulatory framework of social security coordination are published in today's Official Journal.

The amended Regulation 883/2004 and its implementing regulation, Regulation 987/2009, will become applicable as of 1 May 2010. They constitute the third set of regulations governing social security coordination since the inception of the European Community in 1958, following Regulations 3/58 and 4/58 and the current Regulations 1408/71 and 574/72. Further in this newsletter, some of the main changes of the new regulatory framework are highlighted.

The adoption of the new Regulations should not divert our attention from the fact that the provisions of Regulation 1408/71 continue to be interpreted by the European Court of Justice. In the past weeks, the ECJ has rendered two significant rulings in the field of coordination, *Von Chamier-Glisczinski* and *Leyman*. A summary of both judgments is presented in this newsletter.

As for **trESS**, autumn traditionally means finalising the various reports that will be presented to the European Commission, i.e. the European Report 2009 and the Think Tank reports on intra-group mobility and on healthcare and pensioners. These reports will be available for download on our website in December. Our next newsletter will be dedicated to these outputs.

I hope you will find this e-newsletter informative and interesting.

Best regards,
Yves Jorens
Project Director

## Contents



## I. Legislative Developments at EU Level

**New rules for the coordination of social security systems**

On 27 July 2009, the Council approved two social security regulations, one amending Regulation 883/2004 (Regulation 988/2009) and the other one representing the latter's implementing regulation (Regulation 987/2009). On 16 September 2009, these Regulations were signed by the European Parliament and the Council. Both Regulations are published in the OJ L 284 of 30 October 2009. The new rules will become applicable as of 1 May 2010.

Regulation 883/2004 will introduce a number of changes to the way mobile persons' social security position within the EU is determined. Some major changes are:

> The updated coordination has a broader scope. It now covers all citizens who are subject to the social security legislation of a Member State. Its scope also extends to new benefits such as equivalent paternity and pre-retirement benefits, so as to adapt to developments in social security legislation at national level. Simplifications have been made in the different branches of insurance covered by coordination, such as family benefits.

> For persons who are working simultaneously in the country where they reside and in at least one other Member State for the same employer, there will be a requirement of substantial employment in the home country in order to be subject to the social security scheme of that State.

> While updated coordination entails new rights for individuals, the essential role of the new regulations is to establish instruments and structured procedures to improve service to users. A new information network will be launched, the so-called called EESSI (Electronic exchange of social security information) network. This will enable institutions in different countries to engage in dialogue using electronic means. Paper forms will disappear and the formalities to be completed by citizens will be streamlined.

> Another innovation is temporary affiliation. Whenever the institutions of different Member States are unable to agree on a given individual's status with a view to identifying the social security legislation applicable to him/her, provision is made for temporary affiliation to a social security scheme, with payment of benefits. For the person concerned, this offers access to treatment and sickness insurance benefits under a statutory scheme during this period. Citizens will therefore no longer have to suffer the consequences of the complexity of social security schemes.

The new Regulation, like the current one (Regulation 1408/71 and its implementing Regulation 574/72), does not create any new entitlements to social security but guarantees that rights in the area of sickness insurance, pensions, unemployment and family benefits are preserved in the event of moving within Europe.

The Member States and their institutions have until 1 May 2010 to implement the new regulation. Work is well under way on the creation of the EESSI network and the preparation of the electronic messages containing the information required for the calculation and payment of benefits. To take account of the needs of certain Member States to adapt their own systems, provision has been made for a transition period of two years for the electronic exchange of data. By May 2012, however, all of the Member States should be using this technique to exchange information between social security institutions and for all areas covered by coordination.

Regulation 883/2004 also provides for a transitional period of maximum 10 years during which a person remains subject to the legislation of a Member State determined in accordance with Title II of Regulation 1408/71, in cases where the application of the corresponding Title of Regulation 883/2004 designates another legislation applicable, provided the relevant situation remains unchanged and unless the persons concerned asks to be subject to the legislation applicable under the new Regulation.

It is important to note that the provisions of Regulation 1408/71 will continue to apply with regard to third-country nationals, as the new Regulation will only apply to them once the Member States have agreed to enlarge the scope of application to that extent. The provisions of Regulation 1408/71 will also continue to apply in relation to Norway, Iceland, Liechtenstein and Switzerland, as agreements with those countries still have to be concluded with regard to the application of Regulation 883/2004 for workers moving within the EEA and Switzerland.

**Draft directive on the application of patients' rights in to cross-border healthcare**

Last year, as part of the Renewed Social Agenda, the Commission adopted a draft directive on the application of patients' rights in to cross-border healthcare. This draft directive is intended to provide a Community framework for safe, high-quality and efficient cross-border healthcare, by reinforcing cooperation between Member States and providing legal certainty over the rights of patients to seek healthcare in another Member State.

On the basis of a Presidency progress report (10026/09) and questions suggested by the Presidency (10345/09), the Council held this summer a public debate on the draft directive.

Motivated by a desire to find the right balance between patient freedom, the sustainability of public

health systems and the right of the Member States to organise their own health systems, ministers in general welcomed the direction the discussions took under the Czech Presidency, in particular with regard to the restructuring of the text, the clarification of the responsibilities of the Member States and prior authorisation. With reference to the national competences of Member States to organise their health system, a large number of delegations wished to add Article 152 of the EC Treaty as a legal basis for the proposal. Many ministers wished to exclude long-term care from the scope of the draft directive. As regards the scope of the draft, views differed on whether the scope should be limited only to healthcare providers contracted to public health insurance or otherwise recognised by the public system, or also extended to private healthcare providers not thus recognised. Ministers agreed that cooperation in the field of healthcare is needed. However, a large number of delegations opposed the use of comitology procedures for such cooperation.

Commissioner for Health Androulla Vassiliou agreed to include Article 152 in the legal basis and to exclude long-term care from the scope of the directive. She suggested further discussions however on prior authorisation and the possible exclusion of some healthcare providers. The Presidency concluded the debate by stressing the need for prior authorisation under certain conditions, as long as the relevant case law of the European Court of Justice is respected. With regard to the scope of the draft directive, the Presidency suggested that quality and safety standards might be used as criteria to decide which healthcare providers are covered. Work on this file continues under the Swedish Presidency.

## II. Case law of the ECJ

**Case C-208/07 von Chamier-Glisczinski, 16 July 2009**

This reference concerns the refusal of the *Deutsche Angestellten-Krankenkasse* (German employee sickness insurance fund, 'DAK') to pay certain costs relating to care received by Mrs. von Chamier-Glisczinski in a specialised establishment in Austria.

Mrs. von Chamier-Glisczinski, a German national resident in Munich (Germany) and reliant on care, received from DAK, the social security organisation with which she was insured through her husband, combined benefits consisting of care insurance as provided for in Paragraph 38 of SGB XI, corresponding to category III. Her husband, Mr. von Chamier-Glisczinski, was employed in Germany from 1 March 1987 to 30 June 2002, but was released from his obligation to work with effect from June 2001, pursuant to an amendment terminating his contract of employment. On 27 August 2001, Mr. von Chamier-Glisczinski requested DAK to provide the care insurance benefits to which Mrs. von Chamier-Glisczinski was entitled under German legislation, in the form of full in-patient care provided for by Paragraph 43 SGB XI, in a care home in Austria in which she wished to stay.

By decision of 31 August 2001, DAK rejected the request of 27 August 2001, in particular on the ground that, in cases such as Mrs. von Chamier-Glisczinski's, Austrian law makes no provision for the grant of benefits in kind to members of the social insurance scheme of that Member State. According to DAK, Mrs. von Chamier-Glisczinski was nevertheless entitled to the care allowance referred to in Paragraph 37 of SGB XI for category III, namely DEM 1,300 per month. From 17 September 2001 to 18 December 2003, Mrs. von Chamier-Glisczinski stayed in a care home established in Austria, to which she had moved. By decision of 20 March 2002, DAK rejected the objection made against its decision of 31 August 2001, on the grounds that, in substance, the full in-patient care in a care home provided for in Paragraph 43 of SGB XI could not be exported, since it concerned a benefit in kind. According to DAK, by virtue of the judgment in *Molenaar*, only the care allowance, as a cash benefit, could be provided in Austria.

The case eventually came before the *Bayerisches Landessozialgericht* (Regional Social Court of the Land of Bavaria), which decided to stay the proceedings and to refer to the ECJ for a preliminary ruling.

By its **first question**, the national court wanted to know whether Regulation 1408/71, where appropriate in the light of Articles 18 EC, 39 EC and 49 EC and taking into account Article 10 of Regulation 1612/68, is to be interpreted as meaning that a person reliant on care, insured as a member of the family of an employed or self employed person, is entitled to obtain the provision of benefits in the form of repayment or assumption of costs by the competent institution, where, unlike the social security system of the competent State, that of the Member State where that person resides makes no provision for its insured persons to receive benefits in kind in situations of reliance on care such as that of the person concerned.

The ECJ began by stating that the situation of Mr. and Mrs. von Chamier-Glisczinski was covered by the coordination Regulation, in particular as they fell within the scope *ratione personae* of Regulation 1408/71. First, when DAK took its decisions to refuse to grant the full benefits applied for and, subsequently, to reject the objection made against its initial decision, Mr. von Chamier-Glisczinski was insured on an optional basis with DAK. Second, Mrs. von Chamier-Glisczinski was insured with DAK through her husband. The ECJ went on to say that the benefits provided under the German care insurance scheme, even if they have their particular characteristics, are sickness benefits within the meaning of Article 4(1)(a) of Regulation 1408/71, since they are essentially intended to supplement the sickness insurance benefits to which they are, moreover, linked at the organisational level, in order to improve the state of health and the quality of life of persons reliant on care.

Referring to previous case law, the ECJ also noted that care insurance benefits consisting in the direct payment or reimbursement of the costs of a specialised home entailed by the insured person's reliance on care, fall within the definition of benefits in kind within the meaning of Title III of Regulation 1408/71, those benefits including, among other things, full in-patient care as provided for in Paragraph 43 of SGB XI.

There, the ECJ ruled that, regardless of whether the case at hand was governed by Article 19 or Article 22(1)(b) of Regulation 1408/71, in accordance with the mechanisms introduced by one or other of those provisions, where the legislation of the Member State of residence of the socially insured person concerned does not provide for the provision of benefits in kind in order to cover the risk in respect of which entitlement to such benefits is claimed, Regulation 1408/71 does not, of itself, require that those benefits be provided outside the competent State by or on behalf of the competent institution. Article 10 of Regulation 1612/68 cannot have any effect on that interpretation. However, it would be both to go beyond the objective of Regulation 1408/71 and to exceed the purpose and scope of Article 42 EC to interpret the Regulation as prohibiting a Member State from granting workers and members of their family broader social protection than that arising from the application of that Regulation.

By its **second question**, the national court – referring to the situation in which provision is made for benefits in kind for persons insured as members of the family of an employed or self employed person who, like Mrs. von Chamier Glisczinski, are reliant on care by the social security system of the competent State, but not by that of the Member State of residence – wishes to know whether Articles 18 EC, 39 EC or 49 EC preclude legislation such as that introduced by Paragraph 34 of SGB XI, on the basis of which a competent institution refuses to pay, independently of the mechanisms introduced by Article 19 or, as the case may be, Article 22(1)(b) of Regulation 1408/71 and for an unlimited period, the costs linked to a stay in a care home situated in the Member State of residence up to an amount equal to the benefits to which the person concerned would have been entitled if he had received the same care in a home – party to a service agreement – situated in the competent State.

The ECJ first reiterated its established case law according to which Community law does not detract from the power of the Member States to organise their social security systems but that Member States, when exercising that power, must comply with the Treaty provisions on free movement of workers, free provision of services and citizenship. Furthermore, the ECJ recalled that, by adopting Regulation 1408/71, the Council, bearing in mind the wide discretion that it enjoys with regard to the choice of the most appropriate measures for achieving the result envisaged in Article 42 EC, has in principle fulfilled the obligation arising from the task entrusted to it by that article of setting up a system allowing workers to overcome any obstacles which may arise for them from national rules in the field of social security. The mechanisms laid down by Articles 19 or 22 of Regulation 1408/71 reflect the Community legislature's intention to favour a solution according to which, with regard to sickness benefits provided in kind, the insured persons may gain access, in the State of residence or stay, to care corresponding to their state of health on an equal footing with persons insured with the social security system of that Member State.

Having noted that its interpretation of Regulation 1408/71 in response to the first question must be understood without prejudice to the solution which flows from the potential applicability of provisions of primary law, the ECJ then examined the compatibility of the legislation at issue with Articles 39, 49 and 18 EC. It found that only the latter article could apply to the situation concerned.

The ECJ considered that, since Article 42 EC provides for the coordination, not the harmonisation, of the legislation of the Member States, substantive and procedural differences between the social security systems of individual Member States, and hence in the rights of persons who are insured persons there, are unaffected by that provision. In those circumstances, Article 18 EC cannot guarantee to an insured

person that a move to another Member State will be neutral as regards social security. Such a move may, depending on the case, be more or less advantageous or disadvantageous for the person concerned, according to the combination of national rules applicable pursuant to Regulation 1408/71.

The situation in which Mrs. von Chamier Glisczinski found herself following her move to a care home in Austria resulted rather from the combined application, in accordance with Regulation 1408/71, of the German and Austrian legislation on the risk of reliance on care than from the legislation appearing in Paragraph 34 of SGB XI. As both States may freely choose the mode of organisation of their sickness insurance schemes, one of those schemes cannot be considered to be the cause of a discrimination or a disadvantage for the sole reason that it has unfavourable consequences when it is applied, in accordance with the coordination mechanisms laid down in application of Article 42 EC, in combination with the scheme of another Member State.

Having regard to the above, the ECJ ruled that Article 18 EC does not preclude, in a situation such as that of Mrs. von Chamier Glisczinski, legislation such as that introduced by Paragraph 34 of SGB XI.

**Case C-3/08 Leyman, 1 October 2009**

*For a description of the factual background and of the Opinion of the Advocate General, please refer to the March 2009 issue of the trESS E-newsletter.*

The national court asks essentially whether Articles 39 and 42 EC are to be interpreted as precluding a condition such as that laid down in Article 93 of the Law of 1994, in compliance with Article 40(3)(b) of Regulation 1408/71, in that it results in a situation where a person such as Ms. Leyman, who, after having lived and worked in Belgium – a Member State whose legislation is of type A – moved to Luxembourg, whose legislation is of type B, being deprived of any allowance paid by the competent institution of the first Member State for the first year of incapacity to work and in that it thus creates discrimination to the detriment of a worker who exercises his right to freedom of movement.

The ECJ first expands on the differences between the Belgian and the Luxembourg invalidity schemes. The first does not draw a distinction with regard to the worker's incapacity as between temporary incapacity, such as illness, on the one hand, and definitive incapacity, such as invalidity, on the other. Temporary incapacity and invalidity are distinguished only by the fact that the latter constitutes a prolongation beyond a period of one year of the worker's incapacity. Conversely, the Luxembourg system distinguishes between sickness insurance and invalidity insurance so that, if the worker is deemed to be temporarily incapable of work, he is covered by the sickness insurance scheme which entitles him to sickness allowances, whereas if he is deemed to be definitively or permanently incapable of work, he is covered by an invalidity insurance scheme which entitles him to invalidity allowances. It follows that, in systems where sickness insurance and invalidity insurance are combined, such as the Belgian system, there is no provision for the recognition of invalidity without there first being a period of incapacity and, consequently, that recognition granted in another Member State, such as Luxembourg, presents difficulties in the coordination of the social security systems where, as in the main proceedings, payments must be made under the different systems by application of the rules in Articles 40 and 46 of Regulation 1408/71. Although, under the Luxembourg legislation, the right to invalidity allowance is acquired from the first day of incapacity to work, payment of that allowance does not begin, under application of the Belgian legislation, until one year has expired, during which time a worker resident in Belgium who is incapable of work receives a primary incapacity allowance. According to the Belgian authorities, in those circumstances, Article 40(3)(b) of Regulation 1408/71 must be interpreted as meaning that the right to Belgian invalidity benefit is acquired after expiry of the period of primary incapacity of one year. In addition, those authorities do not grant workers any allowance in respect of that incapacity.

Article 40(3) of Regulation No 1408/71 covers the situation of a worker who was subject in a Member State to type A legislation, which makes the grant of invalidity benefits subject to the condition that, for a specified period, the worker has received cash sickness benefits or has been incapable of work, where that worker suffers from incapacity to work leading to invalidity while subject to the legislation of another Member State. The rule laid down in Article 40(3)(a) merges and groups the events which occurred in the periods completed under the legislation of the second Member State in order to establish whether the conditions set by the legislation of the first Member State for acquisition of the right to invalidity benefits are met. On the other hand, the rule set out in Article 40(3)(b) fixes a time-limit for the acquisition of the right to invalidity benefits in the first Member State by recognising, in particular, that that State may make the grant of those benefits subject to the expiry of an initial period during which the person concerned has either been incapable of work or has received cash

sickness benefits, which entitlement the Belgian legislature has used by providing, in Article 93 of the Law of 1994, for the expiry of a period of primary incapacity of one year before the right to such benefits is acquired.

Having recalled, firstly that substantive and procedural differences between the social security systems of individual Member States are unaffected by Article 42 EC, and secondly that the aim of Article 39 EC would not be met if, through exercising their right to freedom of movement, migrant workers were to lose social security advantages guaranteed to them by the laws of a Member State, the ECJ considered that even though Belgian legislation at issue does not draw a distinction between workers who have exercised their right to freedom of movement and those who have not done so, its application nevertheless causes a disadvantage for the first year for workers who are in a situation such as that of Ms. Leyman compared with workers who are also definitively or permanently incapable of work but who have not exercised their right to freedom of movement. Indeed, although the latter workers have the right to primary incapacity allowance in Belgium, Ms. Leyman has the right neither to that allowance nor to another analogous allowance in Luxembourg. What's more, application of the relevant Belgian legislation means that workers such as Ms. Leyman have paid social contributions on which there is no return so far as the first year of incapacity is concerned. Such application of the Belgian legislation is contrary to Community law.

The ECJ drew attention to the fact that, in accordance with Article 40(4) of Regulation 1408/71 and given the concordance provided for in Annex V, a decision taken by the competent authorities in Luxembourg concerning that degree of invalidity is to be binding on the competent authorities in Belgium.

The ECJ further considered that application of the Belgian legislation at issue to a migrant worker in the same way as to a non-migrant worker gives rise to unforeseen consequences, hardly compatible with the aim of Article 39 EC and attributable to the very fact that the migrant worker's entitlement to invalidity benefits are governed by two different bodies of legislation. Where such a difference in legislation exists, the principle of cooperation in good faith laid down in Article 10 EC requires the competent authorities in the Member States to use all the means at their disposal to achieve the aim of Article 39 EC.

In the light of all the foregoing, the ECJ ruled that Article 39 EC must be interpreted as precluding application by the competent authorities of a Member State of national legislation which, in accordance with Article 40(3)(b) of Regulation 1408/71, makes acquisition of the right to invalidity benefits subject to the condition that a period of primary incapacity of one year has elapsed, where such application has the result that a migrant worker has paid into the social security scheme of that Member State contributions on which there is no return and is therefore at a disadvantage by comparison with a non-migrant worker.

## IV. Other News

**BELGIAN AND DUTCH EMPLOYERS' MEMORANDUM – "Sticking points in practice with regard to the introduction of Regulation 883"**

On 25 September 2009 the Belgian and Dutch federations of employers sent a memorandum to the Commission with the request to put it on the agenda of the Advisory Committee on Social Security for Migrant Workers of 16 October.

The aim of this memorandum was to encourage a discussion on the new coordination rules that will come into force in May 2010. The document emphasises that in some Member States the information process concerning the introduction of Regulation 883/2004 has recently got under way, which has led to disquiet both among companies with employees working in different Member States and among the employees themselves. The parties bringing this memorandum before the Advisory Committee on Migrant Workers aim to use this memorandum to instigate a solution to the problems that are expected to arise in practice. The main problems presented in the memorandum are the following.

> Regulation 883/2004 introduces the concept of a "substantial part of the activities carried out in the country of residence". "Substantial" is defined as 25% or more of the working time and/or remuneration. One of the consequences is that the country in which a worker is insured depends on the

degree of mobility. This can cause a yo-yo effect, which is undesirable. For that matter, in practice it is also not easily possible to determine (beforehand or subsequently) precisely how many hours or days a worker has resided in a particular Member State ("workers don't have a chip built into them"). This problem will only increase in the years to come, in part due to the increasing flexibility in labour relations (such as telework, flexible working hours, and so on).

> The exception in Regulation 1408/71 for the transport sector is not included in Regulation 883/2004, meaning that international transport has to abide by the general rules and the aforementioned 25% provision. Depending on the route taken by international drivers, they are insured in the country where the employer is established or in the country of residence. Moreover, the rules demand that a tally be kept not only of working times and driving times, but also of the times a driver crosses a border. This creates impossible and unacceptably high administrative costs for the employer and causes a great deal of legal uncertainty.

> Article 87(8) of Regulation 883/2004 sees to it that the applicable legislation does not change purely and simply due to the entry into force of the new Regulation. People continue to be subject to this applicable legislation "as long as the relevant situation remains unchanged". The text reproduced in italic is very vague.

> Article 16 of Regulation 883/2004 offers the possibility of exceptions, whereby the assumption is that the person concerned can submit requests to this end. This can lead to unpleasant surprises for companies.

> In principle the (implementation) Regulation gives rise to changes that have to be applied at any time during the year – a situation that leads to extra administrative costs.

This e-newsletter has been produced by **Malgosia Rusewicz**, under the responsibility of **Yves Jorens** and **Michael Coucheir**.



Ghent University, Faculty of Law,
Department of Social Law,
Universiteitstraat 4,
B - 9000 Ghent,
BELGIUM