



training and reporting on **European Social Security**

trESS e-newsletter July 2008

Dear **trESS** Friends,



It is my pleasure to present to you this year's second issue of the **trESS** e-newsletter, which keeps you up-to-date on recent developments at Community level in the field of social security coordination as well as on project matters.

In this newsletter you will find, in addition to our regular overview of new EU legislation and ECJ case law, a short presentation of the Renewed Social Agenda, adopted by the Commission early July and encompassing an ambitious package of initiatives aimed at ensuring that EU policies respond effectively to today's economic and social challenges. You will also find a summary of the Mobility Communication, in which the Commission refers to the analytical work undertaken in the framework of **trESS** and sets out its future plans for our project.

Furthermore, we feature an interview with Ms. Jana Lovsin, president of the Administrative Commission during the first six months of 2008. Ms. Lovsin tells you about the achievements and challenges of the Slovenian presidency in the area of employment and social affairs. This issue also gives the floor to Mr. Jean-Claude Fillon, current president of the Administrative Commission, who describes the plans and expectations of the French presidency in the matters which concern us.

trESS has been very busy these past months organising training seminars all over Europe. As many as 24 seminars have taken place, of which 3 bilateral seminars. You can find the materials of all these seminars on our website. In the second half of the year, we will focus our activities on reporting about coordination, with the 2008 European Report and Think Tank Reports being finalised towards the end of the year.

In the months to come, we will also revamp our website in order to make it visually more attractive and to improve its user-friendliness. In autumn, we will present you a website with a new look and feel, while maintaining and even expanding the resource base on social security coordination. As already announced in our previous e-newsletter, we would like to actively involve you in this exercise. We are very interested in your opinion regarding the project in general and the website in particular, and we would like to collect it via a user survey to which you will find a link further on in this e-newsletter. I kindly invite you to participate in this survey, which should only take a couple of minutes to complete. Your feedback will help us to perfect the **trESS** website and the various activities undertaken in the framework of **trESS**.

I hope you will find this e-newsletter informative and interesting, and wish you a wonderful holiday season.

Best regards,
Yves Jorens
Project Director

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I. New legislation

[REGULATION \(EC\) No 592/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 June 2008 amending Council Regulation \(EEC\) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community](#)

This Regulation is the result of the Commission proposal "Miscellaneous Amendments 2007" [COM(2007) 159 final] and updates some of the annexes of Regulation 1408/71 to reflect changes in Member States' national social security legislation. It is intended to be the last act amending Regulation 1408/71 before the application of the new Community coordination framework.

Amendments concern Austria (Annexes III and IV); Germany (Annex III); Denmark (Annex VI); France (Annex II); Hungary (Annexes I, III, IV); Ireland (Annexes I, IIa, IV, VIII); the Netherlands (Annexes IV and VI); and Poland (Annex II).

II. Commission initiatives

Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of The Regions: [Mobility, an instrument for more and better jobs: The European Job Mobility Action Plan \(2007-2010\)](#), Brussels, 6 December 2007, COM(2007) 773 final

Labour market mobility either between jobs or between Member States or regions is considered to be an essential part of the Lisbon objectives and an important component of Europe's response to demographic change and globalisation. This Communication aims to present a more integrated approach to worker mobility as a means both to create employment and to help individual personal development. To that effect, it lists 15 concrete actions for the period 2007 to 2010 involving national, regional and local as well as European authorities. They cover four main domains:

1. Improving existing legislation and administrative practices on social security coordination and on the portability of supplementary pensions
2. Ensure policy support from authorities at all levels, for example by supporting the implementation of the European Qualifications Framework
3. Reinforce EURES (European Employment Services) as the one-stop shop for job mobility in Europe, notably by improving its services to targeted groups such as long-term unemployed, young workers, older workers, women, researchers, self-employed workers, seasonal workers
4. Increase awareness of the possibilities and advantages of job mobility among the wider public, amongst other things by organising European job fairs and supporting pilot projects.

When it comes to the first strand, the Commission will consider whether there is a need to adapt Regulation 883/2004 and its future implementing Regulation and related administrative practices, taking account of changing patterns of worker mobility. A decision in that respect will be taken in the second half of 2009, following a systematic investigation on the scope and characteristics of the new mobility patterns. An inventory of problems that can arise under the current legislation has already been developed and a consultation with stakeholders carried out in 2007. The investigation will be carried out by the trESS network, more specifically by the Think Tank established within the framework of trESS (cf. our e-newsletter 2008/1). A report on this matter will be delivered by the end of 2008.

Moreover, the Commission intends to strengthen the status and analytical capacity of the trESS network by proposing to include a specific provision in Regulation 883/2004. The activities of the network would then be focused on three main tasks:

1. to enhance the knowledge of Community regulations among specific groups of stakeholders (civil servants, lawyers, judges, trade unions);
2. to publish regular reports on the application of social security regulations within Member States;
3. and to provide expert advice on the evolution of existing regulations and practices in order to meet the changing needs of EU migrant workers.

The Commission is furthermore committed to intensifying the streamlining of national administrative practices and cooperation, in particular through electronic consultation and exchange of information, and the launch of an electronic version of the European Health Insurance Card.

Renewed Social Agenda

The Commission adopted on 2 and 3 July an ambitious and comprehensive package of initiatives, the Renewed Social Agenda. It aims to adapt the EU's policies to new social realities and trends, without changing the fundamental goals of social Europe: harmonious, cohesive and inclusive societies respecting fundamental rights in healthy social market economies. The Renewed Social Agenda is built around opportunities, access and solidarity and focuses on empowering and enabling individuals to realise their potential while at the same time helping those who are unable to do so.

The Renewed Social Agenda brings together 19 initiatives in the areas of employment and social affairs, education and youth, health, information society and economic affairs. These initiatives are centred on the following priorities:

1. Preparing for tomorrow: children and youth
2. Investing in people: managing change
3. Supporting longer and healthier lives
4. Fighting discrimination
5. Strengthening instruments
6. Shaping the international agenda
7. Combating poverty and social exclusion

To achieve these objectives, the Commission proposes a mix of different policy tools, including legislation, cooperation between Member States, social dialogue and EU funding.

Among the legislative initiatives are proposals for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation beyond the workplace [[COM\(2008\) 426 final](#)] and for a Directive of the European Parliament and the Council on the application of patients' rights in cross-border healthcare [[COM\(2008\) 414 final](#)]. The latter, long-awaited proposal aims 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. The proposal for a Directive on cross-border healthcare would put in place an alternative mechanism based on the principles of free movement and building on the principles underlying decisions of the ECJ, alongside the existing framework of the coordination of social security schemes.

Insofar as cooperation between Member States is concerned, the Commission is committed, *inter alia*, to improve, reinforce and further develop the Open Method of Coordination in the field of social protection and social inclusion [see the relevant Communication [COM\(2008\) 418 final](#)].

III. Interview with Ms. Jana LOVSIN, Head of the International Cooperation and EU Affairs Service within the Slovenian Ministry of Labour, Family and Social Affairs

1. What are the overall achievements of the Slovenian presidency in the social policy field?

The Slovenian Presidency started its work with the following idea: If we wish to work for the future, we have to invest in people and their potential as well as in the systems and structures by which Europe will continue to be the best place in the world to live and work. The Presidency was trying to follow that guideline in the legislative and policy field.

In the **legislative area**, the Presidency strove for maximum progress in acts under discussion. The Presidency managed to reach an agreement on two Directives which are of key importance to European workers, since they govern the area of working time and the rights of temporary agency workers. The **Directive on Temporary Agency Workers** ensures that workers employed through agencies enjoy rights equal to those of other employees from the first day of their employment; exemptions are only permitted if the social partners come to an agreement nationally. The **Directive on Working Time** limits exemptions concerning the organisation of working time, strengthens the security of workers and allows working hours to be adjusted to the needs of the working process in agreement with social partners, and at the same time contributes to easier reconciliation of family, professional and personal life. During the Presidency, a great deal of time was devoted also to the package of regulations on **coordination of social security systems**, which will simplify and modernise rules and procedures for efficient use of different systems of social security for migrant workers and members of their families.

Apart from progress in the legislative field, **three important topics** were addressed within the framework of different events and activities organised by the Presidency: 1) **flexicurity and employment of young people**, 2) **facing demographic challenges**, and 3) **ensuring equal opportunities for all**. Flexicurity is an appropriate approach to facing the challenges of the 21st century. However, it requires a comprehensive strategy of coordinated policies and measures, taking into account the historical, social and economic conditions of individual Member States on the one hand, and the characteristics, limitations and advantages of certain population groups on the other. Young people are the most flexible group in the labour market. However, they also need security and stability in order to make full use of their potentials and contribute to social development. For sustainable development of society solidarity between generations is of the utmost importance. Therefore it must be promoted and integrated into all relevant policies and measures at the European, national, regional and local levels. Solidarity is a common European value and an integral part of all European social security systems. Solidarity should not be understood in merely financial terms. Equal importance should be attributed to cooperation, understanding and coexistence between generations, since all three generations constitute a single family and a municipal, national, European and global community.

2. Can you describe the achievements of the Slovenian presidency with regard to the proposal for an implementing regulation of Regulation 883/2004? What is the outcome of the Council discussions on the other proposals regarding social security coordination currently examined in the Council?

During the Slovenian Presidency a lot of time and efforts were given to the area of social security coordination in order to put modernised and simplified rules in practice as soon as possible. The Working Party on Social Questions of the Council worked on the following files:

- Finalisation of "Miscellaneous Amendments" 2006; first reading agreement was reached in January 2008,
- Proposal for a Regulation amending the annexes to Regulation (EC) No 883/2004 on the coordination of social security systems; the EPSCO Council reached a general approach on 9 June 2008,
- Proposal for a Regulation laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems:
 - o Title IV Chapter III - Recovery of benefits provided but not due, recovery of provisional payments and contributions, offsetting and assistance with recovery; the EPSCO Council reached partial general approach on 9 June 2008;
 - o Title III, Chapter II - Benefits in respect of accidents at work and occupational diseases, and III - Death grants; substantial progress was made in the negotiations.

Most of the Working Party's time was devoted to Articles 71 to 81a of the Financial provisions of the implementing Regulation – Recovery of benefits provided but not due, recovery of provisional payments and contributions, offsetting and assistance with recovery. Intensive and thorough negotiations were held on this politically sensitive and technically difficult Chapter. The aim of this chapter is to strengthen procedures between institutions for mutual assistance in recovery of social security claims in order to ensure more effective recovery and smooth functioning of the co-ordination rules. Moreover, effective recovery is also a means to prevent and tackle abuses and frauds and a way to ensure sustainability of social security schemes. The basic rule is that wherever possible recovery of claims shall be done by way of an offsetting procedure and if not possible, through the recovery procedure.

3. Which progress was made in the field of electronic data exchange, which is to replace to current paper E-forms?

During the Slovene Presidency substantive progress has been achieved regarding the field of electronic data exchange:

It has been agreed that all the institutions or bodies mentioned in Article 83 of the Implementing Regulation will be listed in the **Master directory**, which will be based on the TESTA network. Member States started to identify their listings in the spring of 2008, and Member States will input their listings by November 2008. The sender of the Structured Electronic Documents (SED) must use its best efforts to locate the right institution using the search engines of the Master Directory to avoid dispatch to the wrong institution or rejection. Also, it has been agreed that the sender shall only use the nominated liaison body or institution of the sector of social security as a last resort bearing in mind that it has already been agreed by the Administrative Commission that automatic routing is based on the address. Member State may not list all the institutions when the list is not stable (for example, employers or insurance companies) or a body is nationally designated and must create and list a coordinating body which would in turn take on the responsibility of passing the SED onto the appropriate and relevant address. The Master Directory will also contain a search engine that can be used by the clerks and the public to find individual institutions.

Several recommendations of the ad hoc groups "pensions", "sickness", "occupational diseases and accidents at work", "unemployment benefits" and "family benefits" have been approved, as well as the **business flows** and data identified by the Task Force. All the business flows will be attached as an Annex to the call for tender for the EESSI project. All delegations have been invited to carry out a last check of the number of business flows until the launch of the call for tender, and examine the related data until summer 2008

A revised version of a draft Decision replacing Decision 182 concerning the establishment of a common framework for the collection of data on the settlement of pension claims has also been adopted.

4. Are there any new developments in the Council discussions on the proposal on supplementary pension rights?

During the Slovene Presidency all the efforts have been made to achieve the agreement on the main outstanding issue that has remained unresolved since the end of the Portuguese Presidency, namely the length of the vesting period. The Slovene presidency has focused only on this question while the rest of the text as it was tabled last December in the EPSCO council remained the same. Based on bilateral discussions the Slovene presidency tabled a compromise suggestion in April this year which got a relatively broad consensus of majority of Member States in the light of the compromise. Although bilateral discussions continued till the

EPSCO council in June 2008 an agreement could not be reached. Further actions regarding this file depend on the French Presidency.

5. Slovenia is a small country and the first “new” Member State to hold the presidency of the EU Council. How did your country prepare for and experience this huge and challenging task ?

Preparing for the Presidency and holding the Presidency was quite a challenge for Slovenia with around 2 million inhabitants and a small public administration. But it was also very exciting. Our preparations started in 2005 by setting up an organisational structure at national and ministerial level. After identification of the required human resources in 2006 we started with the training of public servants for the various roles they would play during the Presidency. We were exchanging knowledge and practices with ex-presidencies and the Council Secretariat. Their suggestions were most valuable. We were often listening to the following “advises”:

1. Good preparation is 90 percent of work to be done!
2. Be ambitious, but realistic when setting presidency priorities!
3. Clear division of work and a good information flow between the capital and Brussels is essential!
4. Personal commitment of people involved is a precondition for success!

After six months of holding the Presidency we can simply say: “Yes, it’s true!” But we can also add: “In the preparation phase, learn a lot about stress management and be inventive during the Presidency!”

IV. Expectations and plans of the French presidency in the field of employment and social affairs, by Mr. Jean-Claude FILLON, current president of the Administrative Commission, Deputy Head of the Community and International Affairs Division (DSS/DACI) within the French Ministry of Health, Youth and Sports

When it comes to the coordination of social security systems, the French presidency will first and foremost take particular care to continue the work that was “inherited” from former presidencies.

The beacon project is of course the completion of the proposal for a new implementing regulation of Regulation 883/2004. The aim is to carry through this project before the end of the year, so as to enable a final adoption of the text by the end of year – before the renewal of the European Parliament – and eventually the applicability of the new legislative package in 2010.

This implies:

- finishing the examination in the Council of this proposal (the chapter on accidents at work and occupational diseases, examined under Slovenian presidency; the final Title containing miscellaneous, transitional and final provisions; Annexes 1 and 3 which are currently empty; horizontal provisions and provisions that were deferred during the examination of other parts of the proposal; and the recitals);

- completing also the examination in the Council of the two proposals for a regulation determining the content of Annex XI to Regulation 883/2004, amending and complementing its other annexes and amending or complementing some of its articles;

- reaching an agreement on a common position on these proposals. The European Parliament will deliver its opinion on the proposals in July. Subsequently, the Commission will present an amended proposal taking into account Parliament’s opinion.

Given these priorities, it might not be possible to begin / carry on with the examination of the proposals for a regulation extending the provisions of the two new regulations to third-country nationals, on the one hand, and for Association Council decisions concerning the Agreements with Algeria, Morocco, Tunisia, FYROM, Albania, Croatia and Israel, on the other. If there is not enough time, these proposals will be left to following presidencies.

Another “inherited” exercise that will be carried on is the amended proposal for a directive on improving the portability of supplementary pension rights. However, as attempts to reach a compromise were unsuccessful – lastly under Slovenian presidency – it is unlikely that this proposal will be adopted in the near future. Its fate is doubtful.

Beyond this continuation of work started under previous presidencies, the French presidency will also support the initiatives of the Commission published early July, i.e. the guidelines of the new Social Agenda and the accompanying legislative package.

The proposal for a directive on cross-border health care – the publication of which has been postponed several times – is part of this package. The French presidency will initiate without delay the Council examination of this text.

Finally, when it comes to the two topics taken on by the French presidency, i.e. preventing illegal employment and social fraud, priority will be given to administrative cooperation and exchange of information. As regards social fraud, increased cooperation will be based on the provisions included to that effect in the new

coordination regulations and on a network of supplementary bilateral agreements. A working group on the fight against fraud and errors, which has been set up within the Administrative Commission on Social Security for Migrant Workers, will present its conclusions at the end of September and should propose a model bilateral convention.

Moreover, two conferences on these topics will mark the semester: the first conference, on the fight against illegal employment, will take place in Marseille on 13-14 October; the second, on strengthening the cooperation between Member States for a better application of the European coordination of social security schemes in order to avoid fraud and errors, will be held in Paris on 17 and 18 November.

V. Case Law

[Case C-352/06 Bosmann](#)

This reference for a preliminary ruling concerns the interpretation of Article 13(2)(a) of Regulation 1408/71 and was made in the course of proceedings between Mrs. Bosmann and the *Bundesagentur für Arbeit – Familienkasse Aachen* concerning the latter's refusal to grant child benefits.

Mrs. Bosmann, a Belgian national resident in Germany, brings up her two children, born respectively in 1983 and 1985, on her own. They also reside in Germany where they are students. Mrs. Bosmann was entitled to German child benefits which were granted by the *Bundesagentur*.

After Mrs. Bosmann took up employment in the Netherlands, the *Bundesagentur* ceased payment of those benefits, arguing that Mrs. Bosmann is subject only to the legislation of the Member State of employment, namely that of the Netherlands, and hence that Germany cannot be regarded as the competent State liable to pay those benefits.

Mrs. Bosmann is not entitled to the corresponding child benefits in the Netherlands in view of the fact that Dutch legislation does not provide for them to be granted for children aged over 18.

The national court in essence asked the ECJ whether Article 13(2)(a) of Regulation 1408/71 permits Mrs. Bosmann, who is subject to the legislation of the Member State of her employment, to receive child benefit in the Member State where she resides, if it is established that she cannot, because of the age of her children, be granted such a benefit in the competent Member State.

Having recalled the aim of the Regulation's rules determining the legislation applicable, the ECJ held that, pursuant to Articles 13(2)(a) and 73, Mrs. Bosmann is in principle subject to the legislation of the Member State of her employment, i.e. the Netherlands. It went on to state that the fact that the law applicable to the situation of an employed person in one of the situations covered by the provisions of Title II of Regulation 1408/71 is to be determined in accordance with those provisions, does not necessarily preclude the application of provisions from another system of legislation.

Referring to Article 10(a)(1) of the Implementing Regulation, the Commission argued that the question referred for a preliminary ruling should be answered in the affirmative. In particular, the Commission contended that the existence of a link of attachment to two Member States, namely that of residence and that of employment, permits the overlapping of rights to benefits. Therefore, so the argument goes, under the said provision, in view of the lack of comparable entitlement to family benefits in the State of employment, they should be granted without limitation by the State of residence.

This argument was not upheld by the ECJ. The Court observed that Article 10(1)(a) of Regulation 574/72 – which is intended to resolve cases of overlapping of rights to family benefits where they are due, simultaneously, irrespective of conditions of insurance or employment, in the State of residence and, in application of Article 73 of Regulation 1408/71, in the State of employment – does not apply to the case at hand, in which there is not such type of "overlapping" of family benefits, for lack of entitlement in the Netherlands.

The ECJ went on to find that the situation of Ms. Bosmann is neither covered by Article 10(1)(b)(i) of Regulation 574/72, which provides that the State of residence, whose legislation does not subject entitlement to conditions of insurance or employment, has to pay family benefits in situations in which a professional or trade activity is carried out in that State, by the spouse of the person entitled to benefits in the other State.

As the specific attachment rules of the Implementing Regulation are not applicable, Ms. Bosmann's situation is subject to the general rule of Article 13(2)(a) of the basic Regulation. It follows that Community law does not require the competent German authorities to grant Ms. Bosmann the family benefit in question. However, neither can the possibility of such a grant be excluded, because, under the German legislation, Ms. Bosmann may be entitled to child benefit solely because of her residence in Germany, which is for the national court to determine.

Indeed, in the ECJ's view, Germany cannot be deprived of the right to grant child benefit to those resident within its territory. To rule as it did, the ECJ recalled that the provisions of Regulation 1408/71 must be interpreted in the light of Article 42 EC, which aims to facilitate freedom of movement for workers and entails, in particular, that migrant workers must not lose their right to social security benefits or have the amount of those benefits reduced because they have exercised the right to freedom of movement conferred on them by the

Treaty.

In the light of the above, the ECJ ruled that while, under Article 13(2)(a) of Regulation 1408/71, a person employed in the territory of one Member State is to be subject to the legislation of that State even if he resides in the territory of another Member State, the fact remains that the purpose of that regulation is not to prevent the Member State of residence from granting, pursuant to its legislation, child benefit to that person.

This ruling spawned some concern among commentators. Although there is general satisfaction with the outcome of the case at hand, many wonder whether this judgement will herald an end to the exclusive effect of the coordination rules on the determination of the legislation applicable.

[Case C-103/06 Derouin](#)

This reference for a preliminary ruling concerns the interpretation of Regulation 1408/71 and was made in the course of proceedings between Mr Derouin and the *Union pour le recouvrement des cotisations de sécurité sociale et d'allocations familiales (Urssaf) de Paris – Région parisienne* concerning account taken for the purpose of calculating the *contribution sociale généralisée (CSG)* and the *contribution pour le remboursement de la dette sociale (CRDS)* payable by Mr Derouin as a self-employed person subject to French legislation of income earned in another Member State and taxable in that State under a double-taxation convention.

Mr. Derouin is residing in France where he practises as a lawyer in a self-employed activity. He is a partner in *Linklaters*, a partnership governed by UK law with an office in Paris. Mr. Derouin performs all his work as a lawyer for the Paris office and is remunerated by receiving a share of the results of each office. He is resident for tax purposes in France and is taxed there and in each country where the partnership is established on his share of the results of the office. He is also covered by compulsory sickness insurance in France and is registered with the Urssaf as a self-employed person.

Mr. Derouin challenged payment of the CSG and CRDS claimed by the Urssaf insofar as they were calculated on his UK source income, on the grounds that they constitute taxes and that, under the Double Taxation Convention between France and the UK, only taxable income in France can be subject to the CSG and CRDS.

Urssaf, on its part, contended that the CSG and CRDS are social security contributions which come within the scope of Regulation 1408/71 and hence should be calculated on the whole of Mr. Derouin's income, whether earned in the UK or in France.

The national court asked whether Regulation 1408/71 is to be interpreted as precluding the Double Taxation Convention from providing that income received by workers resident and socially insured in France is excluded from the base on which the CSG and the CRDS are assessed.

The ECJ began by noting that Mr. Derouin, who simultaneously pursues self-employed activities in the UK and in France and who resides in the latter country, is subject to French legislation on account of Article 14a(2) of Regulation 1408/71. The ECJ also recalled its previous case law according to which the CSG and the CRDS are social security contributions for the purposes of Regulation 1408/71 ([Cases C-34/98](#) and [C-169/98](#)).

The ECJ went on to consider that, since Regulation 1408/71 is a means of coordination and not of harmonisation, Member States have the power to determine the tax base for contributions such as the CSG and the CRDS, provided they comply with Community law. It follows that a Member State is entitled to forego the inclusion in the tax base for contributions such as the CSG and the CRDS of income earned in another Member State by a resident self-employed person such as Mr. Derouin. Indeed, although it is established that Regulation 1408/71 does not prohibit a Member State from calculating the amount of social contributions of a resident on the basis of his total income, clearly no provision of the Regulation requires it to do so. However, the ECJ stressed, such exclusion cannot affect the worker's right to receive all of the benefits provided for by the applicable legislation.

In such circumstances, the ECJ decided that Regulation 1408/71 is to be interpreted as meaning that it does not preclude a Member State whose social legislation is alone applicable to a resident self-employed worker, from excluding from the tax base for contributions such as the CSG and the CRDS income earned by the worker in another Member State, by application, in particular, of a convention for the avoidance of double taxation with respect to taxes on income.

[Case C-212/06 Government of the French Community and Walloon Government](#)

This reference for a preliminary ruling concerns the interpretation of Articles 18, 39 and 43 EC and of Regulation 1408/71 and was made in the course of proceedings before the Belgian Constitutional Court concerning the affiliation conditions of the Flemish care insurance scheme.

By Decree of the Flemish Parliament of 30 March 1999, a care insurance scheme was set up in the Dutch-speaking region and in the bilingual region of Brussels-Capital, in order to improve the state of health and living conditions of persons whose autonomy is reduced by serious and prolonged disability.

That decree has been amended on several occasions, in order in particular to take account of objections raised by the Commission. Basically, the Commission challenged the compatibility with Community law of the condition of residence in the said regions, to which affiliation to that care insurance scheme was made subject.

The criterion of residence was, therefore, adapted by the Decree of 30 April 2004. That Decree essentially

extended the scope *ratione personae* of the care insurance scheme to persons working in the territory of those regions and residing in a Member State other than Belgium.

The Governments of two other entities of the Belgian federal State, namely the Government of the French Community and the Walloon Government, claimed that to exclude from that scheme persons who, although working in the Dutch-speaking region or in the bilingual region of Brussels-Capital, reside in another part of national territory, amounts to a restrictive measure hindering the free movement of persons. On this point the Constitutional Court has referred several questions to the EJC.

The ECJ found, first of all, that the benefits provided under the Flemish long-term care insurance scheme fall within the scope *ratione materiae* of Regulation 1408/71.

Next, the Court, as the Advocate General, makes a distinction between two situations:

On the one hand, application of the legislation at issue leads, *inter alia*, to the exclusion from the care insurance scheme of Belgian nationals working in the territory of the Dutch-speaking region or in that of the bilingual region of Brussels-Capital but who live in another part of national territory and who have never exercised their freedom to move within the European Community. Unlike the Advocate General, who had suggested that the application of the affiliation criteria in this situation might run counter to Article 18 EC, the ECJ held that Community law, including Article 18 EC, cannot be applied to such purely internal situations.

On the other hand, the legislation at issue may also exclude from the care insurance scheme employed or self-employed persons falling within the ambit of Community law, that is to say, both nationals of Member States other than Belgium working in the Dutch-speaking region or in the bilingual region of Brussels-Capital but who live in another part of the national territory, and Belgian nationals in the same situation who have made use of their right to freedom of movement. In this respect, the ECJ considered that the legislation at issue is such as to produce restrictive effects. Migrant workers, pursuing or contemplating the pursuit of employment or self-employment in one of those two regions, might be dissuaded from making use of their freedom of movement and from leaving their Member State of origin to stay in Belgium, by reason of the fact that moving to certain parts of Belgium would cause them to lose the opportunity of eligibility for the benefits which they might otherwise have claimed. In other words, the fact that employed or self-employed workers find themselves in a situation in which they suffer either the loss of eligibility for care insurance or a limitation of the place to which they transfer their residence is, at the very least, capable of impeding the exercise of freedom of movement for workers and freedom of establishment.

The ECJ found that there is nothing in either the file sent to the Court by the referring court or the observations of the Flemish Government capable of justifying the application, to persons working in the Dutch-speaking region or the bilingual region of Brussels-Capital, of a requirement of residence either in one of those two regions or in another Member State, for the purpose of eligibility for the care insurance scheme.

This case touches upon the interesting question of the application of Community law to Member States with a decentralised structure. It might have resonance beyond Belgian borders, in other Member States where decentralised or federated entities have competence over social security matters.

[Case C-331/06 Chuck](#)

This reference for a preliminary ruling concerns the interpretation of Article 48 of Regulation 1408/71 and was made in the course of proceedings between Mr. Chuck and the *Raad van Bestuur van de Sociale Verzekeringsbank* (SVB) concerning calculation of insurance periods of a national of a Member State who has worked in two other Member States and who resided in a third country at the date of retirement.

Mr. Chuck, a UK national, worked and was resident in the Netherlands from 1972 to 1975 and from 1976 to 1977. In the nine months between those two periods, he worked and paid contributions in Denmark. Mr. Chuck has been resident in the United States since 1978.

The SVB awarded Mr. Chuck a pension but refused to take account, for the calculation of the pension, of the periods of insurance completed in Denmark, on the grounds that Mr. Chuck did not reside in the territory of a Member State and therefore, in the SVB's opinion, article 48 of Regulation 1408/71 could not be applied. According to this Article, even though Member States are not as a rule obliged to award benefits in respect of insurance periods of less than one year, such periods are to be taken into account for the purposes of calculating the theoretical pension.

The question was raised whether the SVB's was right to refuse to apply Article 48 to the present case.

The ECJ found that the Regulation does not expressly address the situation at issue, concerning the effect of the place of residence of the pension claimant on the calculation of his pension rights in respect of periods worked in various Member States. Referring to the objective set out in Article 42 EC, the ECJ considered that the provision of Article 48 of the Regulation contributes to guaranteeing freedom of movement for workers between the Member States. Consequently, that provision – whose application, moreover, does not depend on the place of residence of the work when he claims a pension – cannot be interpreted as meaning that the mere fact that he moved to a non-Member State will call into question his right to have his old-age pension calculated in accordance with the rules of Article 48.

Furthermore, the ECJ noted that it is apparent from Article 36 of the implementing Regulation that the Community legislature did envisage a situation such as that of Mr. Chuck, notably by providing that pension

claims can be submitted by a non-resident in a Member State.

Having regard to the abovementioned considerations, the ECJ decided that Article 48(2) of Regulation 1408/71 requires the competent institution of the last Member State in which a worker who is a national of a Member State resided to take into account, in calculating the old-age pension of that worker, who, when he submits his pension claim, is resident in a non-Member State, of the periods worked in another Member State under the same conditions as if that worker still resided in the European Community.

The ECJ added, however, that Regulation 1408/71 does not oblige the last Member State to pay the pension in the third country. This is indeed a matter of national law and/or bilateral agreements.

VI. trESS user survey

As you could read earlier on in this e-newsletter, we are planning to improve and redesign the **trESS** website and for this we would greatly welcome your feedback!

[Click here](#) to be directed to an online form containing eight questions, to which you are kindly invited to respond. Participation in this user survey is anonymous and should only take a couple of minutes of your time. The questions are multiple-choice, but each time you are given the possibility to state remarks (facultative).

Thank you in advance for your participation. It will help us to perfect the **trESS** website and the various activities undertaken in the framework of **trESS**.

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

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