trESS Training and reporting on European Social Security

## Merry Christmas and a Happy New Year !


**E-newsletter December 2009**

## Welcome word

Dear **trESS** friends,

It is my pleasure to present to you the fourth and last newsletter of 2009.

For **trESS**, 2009 was in essence a year of consolidation, following important innovations that were implemented in 2008 (e.g. new website, extended Regulations database, new structure European Report etc.) The first half of the year was focused on the training and networking activities of the **trESS** network. 23 seminars were organised, of which 2 bilateral seminars and 1 regional, "Baltic" seminar. The number of participants at the seminars increases year-by-year, and has exceeded 50 on average in 2009. In general, the community of **trESS** members continues to grow.

Whereas one year ago, some 1,350 professionals in the field of social security coordination were registered for the contact database, by November 2009, this number had risen to 1,682. Also the e-newsletter subscriptions are on the rise: the issue which you have on your screen has been sent to more than 2,700 persons (up from less than 2,300 end 2008).

The second semester was dedicated to reporting activities, which for **trESS** implies both reporting on issues and problems of implementation arising in the Member States (via the yearly European Report) and writing analytical reports on selected topics varying from year to year. These analytical reports are written by the **trESS** Think Tank, an expert group established to analyse where the coordination rules need to be adapted in order to fulfil the overall aim enhancing the free movement of persons. Both the European Report 2009 and the Think Tank reports on intra-group mobility and on health care and pensioners are available for download on the **trESS** website. Further in this newsletter, the highlights of the first Think Tank report are presented.

In connection with the new regulatory framework of social security coordination, this issue also features a section on the new/revised series of decisions and recommendations of the Administrative Commission reflecting the new coordination provisions. To this effect, **trESS** interviewed Jörg Tagger, Secretary-General of the CA.SS.TM. Jörg Tagger also gives us an update on other activities undertaken within the CA.SS.TM over the last year.

Last but not least, you can find a summary of the recent ECJ judgement in the *Slanina* case, concerning family allowances.

We will be back in 2010 for another year of **trESS** activities, which, logically, will reflect the entry into force, on 1 May, of the new Regulations 883/2004 and 987/2009. You will find more information on our work plan for 2010 in our next issue, in March.

Meanwhile, I wish you a merry Christmas and all the best for 2010!

Yves Jorens
Project Director

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## I. Presentation of the Think Tank report on intra-group mobility

One of the most important changes that has taken place during the past 50 years in the field of social security for migrants concerns the nature of migration itself, where migrant workers move for short periods in an increasingly flexible labour market. These new patterns of migration, which are often described as "new forms of mobility", challenge the principles of the conflict rules on applicable legislation in the coordinating regulations. The growing mobility of workers within a network of companies and multinationals is gaining a considerable amount of interest both in the Member States themselves and at the level of the European Union. The European Commission has announced that a communication on intra-group mobility will be launched in 2010. Intra-group mobility is one of these examples which it is sometimes believed not to be adequately provided for in the Coordination Regulations and to require further investigation. The European Commission has, therefore, requested the trESS Think Tank to reflect on the possibility of developing a separate system of conflict rules for intra-group mobility.

The report describes the framework and the application of the current rules on applicable legislation in relation to intra-group mobility using examples to illustrate the difficulties and shortcomings of these rules. Employees who move within undertakings organised on a multinational level and belonging to the same group, might currently fall under different rules of conflict which is clearly not always to the benefit of the employee and/or the employer. But it is mainly when activities are performed in a Member State and the posting provisions cannot be applied (often these workers will have a local labour contract with the second employer which is considered to exclude application of the posting provisions), that difficulties arise in practice. These examples show that the distinct situations of posting, simultaneous employment in different Member States and intra-group mobility become increasingly blurred and that further clarification of the concept of intra-group mobility is needed to distinguish between the different situations.

Comparisons are made with the rules of conflict in the area of labour law. Looking at the position under labour law might be helpful for several reasons. Firstly, solutions under labour law might provide examples that may be applicable to social security law. Secondly, under labour law the place of business of an employer is also frequently used to determine which labour law is applicable. As a similar connecting factor might be an option under social security law, it may be helpful to see how this concept is interpreted in labour law. And finally, consistent solutions between labour law and social security law is advisable as - for the employee as well as for employer - it is often difficult to understand why they would be subject to country A for social security, but subject to country B with respect to labour law. The study of labour law has demonstrated how far these rules differ from the social security provisions.

Special consideration was further given to the question whether the possible introduction of new rules of conflict for intra-group mobility would imply the reorganisation of the structure of Title II or whether it would be sufficient to adapt the existing conflict rules to intra-group mobility.

When drafting a possible new conflict rule for intra-group mobility, it is important to give a functional definition that allows the application of the Regulation, i.e. to describe the particular, professional mobility of workers within the European Union. What makes this concept different from other forms of cross-border employment? An element that was clarified is the notion of group or network of companies (on the one hand this is a concept hardly defined in national law and if it is defined, the definition can only be found in commercial law and not in labour or social security law, and, on the other hand, the concept can be found in some EU provisions). The report examines further the main characteristics of intra-group mobility, how to distinguish between intra-group mobility and other categories of workers, and the circumstances in which the general rule and a separate conflict rule would be applicable.

The Think Tank finally outlines a proposal for a new rule of conflict, identifying the connecting factor (the place of first stable and effective work in a company of the group is considered as the most appropriate connecting factor) and the necessary conditions. Following elements are of crucial importance: the start of a career within a company that is part of the group; the continuation of a career path, as it is requested that the period is not interrupted by any activity for a company outside the group; the performance of successive periods of activity within other companies of the group in different Member States with however a maximum period of employment within each network group company and the condition that a labour contract would be concluded with each of the successive employers, while the employee concerned keeps a link with the connected company, regardless of how this link looks, i.e. without the necessity of still keeping a (frozen) labour contract. It has to be recalled that situations without a new work contract usually will be regarded as normal posting. For the Think Tank it might also be appropriate to explicitly decide that the application of this particular conflict rule would be optional.

This report was presented and discussed at the working party of the Administrative Commission in November 2009. This Working party concluded that intra-group mobility is an issue that should be further looked at and analysed in the future, depending on the praxis. At this stage, however, it is not felt necessary to develop a new specific conflict rule for intra-group mobility.

Yves JORENS (ed.), Jean-Philippe LHERNOULD (ed.), Jean-Claude FILLON, Kristina KOLDINSKA, Bernhard SPIEGEL, Think Tank Report 2009 on Intra-Group Mobility, Ghent, trESS, 2009.

## II. Interview with Jörg Tagger, Secretary-General of the Administrative Commission

A year ago, **trESS** interviewed Jörg Tagger, Secretary-General of the Administrative Commission on Social Security for Migrant Workers, on the preparatory work undertaken within this body with regard to the future regulatory framework on social security coordination.

A year later, with the final texts of both the amended basic Regulation and the new Implementing Regulation adopted, we come back to him for an update on the activities of this important entity which is the Administrative Commission. In particular, we are interested in the new / reviewed decisions and recommendations of the Administrative Commission regarding the new coordination provisions.

***trESS: Regulations 987/2009 and 988/2009 were adopted on 16 September 2009 and the new coordination Regulations will become applicable on 1 May 2010. What about the role of the Administrative Commission under this new regulatory framework? Will it be extended or otherwise changed?***

J. Tagger: Let me first say that in the past the role of the Administrative Commission has also adapted constantly to new developments and challenges. This occurred, for example, following the enlargement in 2004 or, more recently, with regard to the necessary preparatory steps for the introduction of the new Regulations which, for example, led to the creation of the Task Force and a number of ad hoc groups on electronic date exchange.

At a first glance, the tasks of the Administrative Commission under Regulation 883/2004 seem to be quite similar to the ones under the current Regulation 1408/71. However, I strongly believe that the Administrative Commission has to maintain this dynamic approach under the new Regulations to meet the new challenges such as to ensure the smooth introduction of the new social security coordination. In this context, a particular challenge facing the Administrative Commission will be to meet the demand for further clarification and interpretation of certain provisions of the new Regulations. The first thematic seminars organised by the European Commission with social security institutions highlighted the need for the Administrative Commission to take up its full responsibility in this task.

The role which has been particularly reinforced under the new Regulations is that of the Administrative Commission to foster dialogue and promote re-conciliation. This role has already been given to the

Administrative Commission by the case law of the Court of Justice and has been incorporated in several provisions of Regulation 987/2009, namely in the case of diverging views on the provisional application of legislation or the provisional granting of benefits. To this end, the revised Rules of Procedure provide for the possibility to establish a special Conciliation Board which will allow the Administrative Commission to deal properly with these cases.

The Administrative Commission is currently fine-tuning its working methods in order to meet the challenges of the future in the best of ways by, for example, establishing a new detailed Work Programme for all its activities over the next two years. This Programme will also include systematic planning of a number of long-term strategic questions, such as the changed pattern of mobility.

I believe, therefore, that under the new coordination rules, the Administrative Commission will play an even more prominent role in ensuring the functioning of the coordination system. The new Conciliation Board might open an additional dimension by having for the first time - also vis-a-vis the public - a special dispute settlement mechanism.

***trESS: The Administrative Commission is perhaps best known for its decisions regarding questions of interpretation of the coordination provisions. We are all familiar with the chronologically numbered decisions and recommendations of the CA.SS.TM. What will happen to these instruments? How will the new decisions and recommendations be referred to? And where can we find the list of new/reviewed decisions?***

J. Tagger: We have to be very clear on this point. The over 200 Decisions and Recommendations currently in force are based on Regulations 1408/71 and 574/72 and cannot therefore be applied to the new Regulations. However, they still remain in force with regard to those cases to which Regulation 1408/71 will continue to apply even after 1 May 2010. These can be, for example, cases in relation to the EEA countries Liechtenstein, Island and Norway or in relation to Switzerland, as long as the EEA and EU-Swiss agreements are not adapted to the new Regulations, or cases involving third-country nationals until the replacement of the current Regulation 859/2003 by a new Regulation extending Regulation 883/2004 to these persons.

With regard to the new Regulations, the Administrative Commission reviewed all the current Decisions and Recommendations and after several months of intensive discussions adopted a package of 15 Decisions and 4 Recommendations at its June meeting in Prague. This was a major achievement taking into account that, due to the unanimity required for such decisions, only one interpretative Decision had been adopted over the previous two year period. I am convinced that the timely adoption of this package will help social security institutions prepare for the application of the new Regulations.

The new Decisions and Recommendations are also numbered in a new way by using a combination of letters and numbers. For example, "P" denotes all pension related decisions and "F" denotes all decisions in the family benefit field. This system not only corresponds to the numbering system of the new Structured Electronic Documents (SEDs) to be used for the electronic data exchange, but should also make it easier to find relevant Decisions.

The new Decisions and Recommendations of the Administrative Commission will be published in the Official Journal in all languages probably in the second half of January 2010. However, you can already find the original English versions on our website at http://ec.europa.eu/social/main.jsp?catId=516&langId=en.

***trESS: Are any other initiatives planned (e.g. practical guides) as regards the interpretation of the new provisions?***

J. Tagger: We are currently working on a number of Explanatory Notes with regard to certain key concepts of the new Regulations. In addition, the so-called "small guide" for citizens will be updated and the current guide on posting will not only be revised, but also extended to all issues related to applicable legislation.

However, let us not forget that the provisions of the new Regulations are the result of a 10 year long negotiation process in the Council and with the European Parliament. The process of interpreting these provisions will therefore also be ongoing. In this context, for 2010, the Commission is also thinking about publishing a brochure for each social security sector where one could find, in a single place, all the material which may help with the interpretation of the new provisions, including a small number of selected expert articles.

***trESS: Can you give us a quick update of the other activities undertaken over the last year with regard to the new regulatory framework, including the Electronic Exchange of Social Security Information (EESSI).***

J. Tagger: Apart from the work on the new Decisions and Recommendations, the Administrative Commission is indeed working intensively on the preparations for the introduction of the electronic data exchange. With the help of the Technical Commission, the Task Force on electronic data exchange and many other national experts working on a voluntary basis, the Administrative Commission was able to agree on a first set of Business Flows and SEDs which are now the basis for a further review. The goal is to have a stable system in place when the new Regulations will enter into force.

In addition, an ad hoc group of the Administrative Commission produced a series of so-called Portable Documents. These are the documents which, under the new Regulations, citizens will physically have in their possession to prove their rights, such as those replacing the current E101 or E112 forms. These documents should also be available on our website at the beginning of next year.

Many thanks!

## III. Summary of the ECJ case *Slanina* (C-363/08), 26 November 2009

In reply to a question by the *Verwaltungsgerichtshof*, the Higher Administrative Court of Austria, the ECJ clarified the situation as regards entitlement to family allowances of a national of one Member State resident with her child in another Member State, while the father of the child works resides and works in the former State.

Romana Slanina, mother of a daughter born in 1991, resided in Austria and obtained family allowances for her daughter until the summer of 1997. She then moved to Greece following her divorce and exercised sole parental authority. Her ex-husband, an Austrian national, resided in Austria, where he was employed, and was required to pay maintenance but failed to do so. The Finanzamt (tax office) in Mödling (Austria) ordered her to repay the family allowances and tax credits paid from 1 January 1998 to 31 October 2003 on the grounds that she had been living permanently with her daughter in Greece and that, in order to obtain family allowances, the child's centre of interests and permanent residence must be in Austria. Until 2001, Ms. Slanina was neither in employment nor registered as seeking work in Greece, then she was working as a seasonal tourist guide from May until the beginning of October each year. Ms. Slanina claimed that, although under Austrian legislation she was not entitled to family allowances, Regulation 1408/71 should nonetheless apply; since her ex-husband was living and working in Austria, Slanina was entitled to family allowances under Article 73 of that regulation, despite the fact that she was living in Greece. The ECJ essentially followed this reasoning.

The ECJ started out by examining whether Ms. Slanina's daughter is in fact covered by the coordination Regulation. It observed that, under Article 2 of the Regulation, members of the family of employed persons come within the personal scope. The Court goes on to refer to Article 1(f)(i) of Regulation 1408/71, which gives a definition of "member of the family" and states that it is for the Austrian Court to establish whether the child, although not having lived with her father during the period at issue, could be regarded for the purposes of national law as a member of the family of her father and, if that is not the case, whether she could be regarded as being "mainly dependent on him". If it emerged that such was the case, so the ECJ argued, Ms. Slanina would maintain entitlement to the Austrian family allowances pursuant to Article 73 of Regulation 1408/71, even though she left that State and settled with her child in another Member State, where she does not work, and even though her ex-husband could receive those allowances in his Member State of residence. Indeed, for the ECJ, the fact that the child's parents are divorced and that the person to whom the family benefits are to be awarded is Ms. Slanina rather than the worker himself, namely Slanina's ex-husband, is irrelevant.

The *Verwaltungsgerichtshof* then asked the ECJ whether the fact that Ms. Slanina took up employment in Greece affected her entitlement to family allowances in Austria. According to the ECJ, the answer to that question depends on whether or not engaging in such employment would give rise to entitlement to Greek family allowances. The ECJ ruled that it is for the referring court to determine whether the fact that Ms. Slanina was in employment in the Hellenic Republic gave her an entitlement to family allowances in that State. If it emerged that such was the case, it would be necessary to apply the rule

against overlapping in Article 76 of Regulation 1408/71. Accordingly, the obligation to family benefits would in that case have fallen first of all on Greece (competence by priority), as the country where the child and her mother are resident. Entitlement to Austrian benefits, based upon Article 73, would have been suspended up to the sum provided for by Greek legislation.

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