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trESS training and reporting on European Social Security

trESS e-newsletter November 2006

Dear **trESS** Friends,

Enclosed you will find our third newsletter of 2006. The last months the different national experts in the member states have provided us with their national report on the problems with the application and implementation of the EU regulations on social security in the different member states. A European report based on all these thousands of pages of important information has been drafted and presented to the European Commission.

In this newsletter you will find a summary of this European report 2006. The full European report will shortly be available at our well-know website address. At the same moment, I would also like to encourage you to have a closer look at our completely renewed website. Our database on the Coordination Regulation has been further updated and made user-friendly. Even a quicker search tool has been installed. Special attention may also be paid to a completely new element in our website, i.e. the e-learning tool.

The intention of this e-learning tool is to guide the reader in an easy-understandable way through the difficult concepts and rules of European Coordination Regulation by easy explanations, Questions & Answers on how the system of the regulations works and for those looking for more details on the basic characteristics of different concepts of European social security coordination as interpreted by the Court of Justice or the Administrative Commission. A chapter has also been introduced, where you can find some national case law on different articles on the EC Coordination Regulations.

As you can notice, more and more information on EC Coordination for migrant workers is being introduced and we sincerely hope that this will further contribute to developing our trESS website into an indispensable reference website for all people, who are interested in this important topic of European law.

Kind regards

Yves Jorens
Project Director

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trESS 2006 European report outlines developments

The **trESS** network was set up to ensure a constant flow of accurate information from all parties involved in the coordination of European social security law and to give a global picture of the implementation and application of Regulations 1408/71 and 574/72 in the member states.

The European Report gives an overview on the implementation of the EC Coordination rules in all 25 Member states. The issues identified are taken from the national reports. The National Reports show that the current system of social security coordination at EU/EC level generally works well. However, a number of gaps, shortcomings and inconsistencies still exist and are highlighted in the European Report in order to enable the European Commission and all the other actors involved in the implementation of the rules of European social security coordination to fill existing gaps in these rules, to remove inconsistencies and to improve coordination.

Key issues highlighted in the report include:

- The impact of European Citizenship
- The introduction of residence clauses as a condition of entitlement
- Ongoing problems in categorising benefits especially new and non-contributory benefits

- A challenge for the new Member States

In the new member states - where the coordination of social security system is relatively new - implementation sometimes cause difficulties for national institutions. Only one and a half years since accession most of the Central and Eastern European countries (CEECs) still have little experience in dealing with international social security coordination by bilateral or multilateral agreements. Due to their recent accession to the European Union, it is clear that the provisions of the coordination Regulations constitute new material for the bodies involved with its application.

After one and a half years of implementation of Regulation 1408/71 things have gone relatively smoothly. Many of the new Countries have prepared detailed instructions for the application of Regulation 1408/71 and Regulation 574/72. Nevertheless, the need for further information on the application of the Regulations has been highlighted; with a special emphasis on the use of the E-Forms, delays due to gathering data on entitlement from other Member States, and on the case law of the Court of Justice. Coming to terms with the Regulations is also a challenge for the judiciary which will have to familiarize itself with the plethora of issues stemming from the application of the coordination Regulations and the extremely high volume of relevant case law issued by the European Court of Justice, which has an impact on the interpretation of the provisions on migrant workers.

...and for the Old!

This does not imply that the Regulations are implemented fully and smoothly in the old Member States. In the old Member States also, Regulation 1408/71 is not always well-known and sometimes forgotten. Awareness concerning the Coordination Regulations has to be raised. Tribunals and courts play an important part in the implementation of the Regulation, although their role will differ "to a large extent" between the Member States. In some countries, the highest courts are quite reluctant to engage in direct dialogue with the Court of Justice of the European Communities, when it comes to the crucial area of European social law.

The impact of European Citizenship

Many reports made clear that the influence of European Citizenship is a new burning issue, which definitely cannot be ignored, but remains hard to evaluate. Some reports show that several restrictions and secondary legislation are now challenged by the impact of European citizenship and that future challenges are unpredictable as citizenship rights appear to be very powerful. Another question raised in some reports has to do with the different new forms of living together and homosexual "marriage", appearing in some Member States. Much attention has also to be paid to the relationship between Regulation 1408/71 and the Residence Directive 2004/38.

Equality of Treatment?

One of the most important legal protections offered by the Regulations is the guarantee that people within its personal scope will receive equal treatment in whichever Member State they are insured. Most national reporters were unable to find evidence of direct discrimination between nationals and non-nationals from EU countries. However, different forms of indirect discrimination and in particular the residence requirements to qualify for benefit are more problematic. Issues were raised with respect to residence clauses in a number of countries including Finland, Ireland, and UK.

Which laws apply?

Rules which designate the national legislation which is applicable to a person are an essential part of social security coordination. It is well known that, in principle, the law of the place of work regulates most aspects of social security legislation. These rules were conceived for the traditional migrant worker, who is, however, more and more a phenomenon of the past. The national reports clearly point out some questions with respect to the interpretation of some of the concepts of these provisions so that, in some cases it is not clear which country's law applies.

... and when is a worker posted?

Posting is an important instrument in the context of the growing international need for mobility within business and industry and an exception to the country of work principle and therefore there is growing use of the posting provisions.

Many of the conditions that have to be fulfilled for the application of the posting rule, were however very unclear and difficult to interpret. One of the most problematic areas is the concept of "significant business activity" . Social insurance institutions should check if a given employer posting his or her employees to other Member States habitually carries out "significant business activity" in the country concerned. However, it has proved very difficult to check this in some countries.

The authorities seem to have become somewhat suspicious towards the posting of workers. This is particular the case when dealing with interim activities or in relation to posting happening under the free movement of services between the new and the old Member States.

It is also not always clear if the rules on posting or other provisions on applicable legislation apply. Questions have arisen with regard to the difference between successive postings (Article 14(1)(a) and normal employment in the territories of several Member States (Article 14(2)(b)). Several questions arose with regard to the posting of self-employed persons. Even after te adoption of the practical guide on posting by the Administrative Commission, still some problems remain.

The administrative formalities to be fulfilled in case of posting are sometimes considered to be complicated. The question is asked whether the E101-form is totally superfluous and whether the administrations of other Member States should look for evidence, when it is not given by the sending Member State. This also leads to a very sensitive debate on whether posting is automatic and an obligation or an exception and a choice. If a worker is sent to another Member State and falls under the definition of posting, is he or she a posted worker according to the Regulation and is that the end of the story? It is, however, suggested that the competent authorities in the 21st century should treat this segment of labour market with the necessary open-mindedness and flexibility and not lose themselves in a witch hunt for posted workers.

Which benefits are covered?

An ongoing problem is the classification of benefits under the Regulations. Whenever new benefits are introduced, the question arises as to how to distinguish between social security, social assistance, mixed benefits and benefits which do not fall under the field of application of the Regulation.

Most problems relate to atypical benefits such as non-contributory benefits or the introduction of specific benefits. Several of the National Reports highlighted that the distinction between social security, special non-contributory benefits and social assistance under the Regulation is not clear enough. Traditional elements which were seen as criteria to make a difference between social security and social assistance, as for instance the fact if these benefits are means-tested or not or that non-contributory benefits provide only supplementary cover with regard to contributory benefits, are no longer valid. In addition, social assistance benefits are today as a rule no longer discretionary. It is also well known that even inclusion in Annex II a of Regulation 1408/71 does not solve all problems due to the fact that comparable benefits (even within a State or between States) are not treated consistently in this Annex. There is definitively a need for clearer criteria that allow Member States to categorise their benefits.

As national social security systems develop in a very dynamic and, progressively, in a more autonomous ("unstructured") way, it is apparent that the risks, as enumerated under Article 4(1) can not directly cover all national regulations or practices nor can "new social risks" be dealt as "new" for the purposes of Community coordination. In other words, as long as the list of risks remains as it stands, nothing can be considered as a "new risk" , in spite of the fact, that at national level a separate scheme may be organized.

The list of benefits and schemes that cause problems in relation to categorisation remains long. Its no surprise that most problems occur with non-contributory benefits. Examples include long-term care benefits, special benefits for disabled persons and rehabilitation measures.

Pension reforms lead to new issues

The new fundamental reforms in different Member States in the pensions' sector cause great concern. In many countries we see new measures that give greater importance to private pension insurance. However this causes fundamental problems in applying the Coordination rules. The gist of the problem is that the coordination mechanism provided in the Regulations is tailored to the public first-tier pension system organised on a pay-as-you-go basis, whereas the reformed pension system put in place in the majority of the new Member States, are fully funded and privately managed. There is a great deal of uncertainty as to how to apply the Regulations principles to the schemes, for example, in Estonia and Lithuania. It is generally believed that the Coordination Regulations are not adapted to these funded schemes.

> II.Case Law of the ECJ **Table of contents**

Kersbergen-Lap The decision of the grand chamber of the Court of Justice in Hosse(Case C-286/03) appeared, at least to	Having stated that social security and special non-contributory benefits are mutually exclusive, the

some observers, to have marked an important shift in the Court's approach to the analysis of special non-contributory benefits. However only five months later the third chamber of the Court has taken a different approach. The case of involved a benefit under the Dutch law on incapacity benefit for disabled young people (the Wajong). The law provided for the payment of the benefit to young persons who were already affected by total or partial long-term incapacity for work before entering the labour market. The amount of the benefit depended on the rate of incapacity and could be up to 70% of the minimum legal wage in the case of total incapacity for work. Entitlement was not dependent on payment of contributions but neither was it means tested although it might be reduced if paid work was undertaken or where the benefit were paid in addition to other work incapacity benefits. The Wajong was only exportable in very limited circumstances. The two claimants involved in the case had been in receipt of the benefit, but having taken up residence in France and Germany the benefit had been withdrawn.

It was not disputed that the benefit was non-contributory in nature. Accordingly, the Court considered whether or not it was a special benefit. The Court reiterated its statement in *Skalka* (Case C-160/02 [2004] ECR I-5613) that a special benefit must either replace or supplement a social security benefit and be by its nature social assistance justified on economic and social grounds. It pointed out that the benefit was a replacement allowance intended for those who did not satisfy the conditions of insurance for obtaining invalidity benefits under Dutch law. The Court also held that by guaranteeing a minimum income to a socially disadvantaged group, the benefit was by its nature social assistance justified on economic and social grounds.

The Court pointed out that the benefit was closely linked to the socioeconomic situation in the Netherlands since it was based on the minimum wage and the standard of living in that state. It recalled that it had in the past accepted that the grant of benefits closely linked with the social environment might be made subject to a condition of residence in the state of the competent institution. Accordingly, the Court ruled that the Wajong must be classified as a special non-contributory benefit and therefore not exportable.

There would appear to be two different lines of approach in relation to the analysis of special non-contributory benefits. Firstly, there is the approach adopted in *Skalka* and *Kersbergen* If a benefit is non-contributory, the Court will go on to examine whether or not it is special in the sense that it replaces or supplements a social security benefit and is, by its nature, social assistance justified on economic and social grounds. Secondly, we have the *Hosse* approach. Here the Court adopted an entirely different line of analysis. Court, rather than examining the care allowance to see if it was special, analysed its characteristics to see if it fell within the category of social security.

There is something to be said for either interpretation. The *Skalka* approach certainly reflects the intention of the member states in adapting the 1992 regulation and would allow member states to provide "special" benefits to their residents without the risk of having to export the benefit. Conversely, the approach in *Hosse* is in line with the overall approach of regulation 1408 of encourage free movement by removing national boundaries to the payment of benefits. However, there is very little to be said for the continuing lack of clarity and inconsistency of the Court's judgments on this issue (which is not one of them more complicated issues before it). The Court has a number of pending cases which may allow it to clarify the legal position in relation to this important issue.

C-406/04 de Cuyper

The Court ruled that freedom of movement and residence, conferred on every citizen of the Union by Article 18 EC, does not preclude a residence clause which is imposed on an unemployed person over 50 years of age who is exempt from the requirement of proving that he is available for work, as a condition for the retention of his entitlement to unemployment benefit.

This is another example of the extent to which the rights of Citizens are now being raised in cases before the ECJ although in this case this did not lead to any charge in the traditional limitations on the payment of unemployment benefits abroad.

Another recent case highlights again the importance of the principle of equal treatment for Regulation 1408. In *Chateignier* (Case C-346/05), the Court accepted an argument that making the grant of Belgian unemployment benefit to non-Belgian nationals subject to the condition of completion of a period of employment in the competent Member State was unlawful. The Court ruled that Article 39(2) EC and Article 3(1) of Council Regulation (EEC) No 1408/71 are to be interpreted as precluding national legislation under which the competent institution of the Member State of residence denies unemployment benefits to a national of another Member State on the ground that the person concerned had not completed a specified period of employment in that Member State of residence, whereas there is no such requirement for nationals of that Member State. While Article 67(2) and (3) of Regulation No 1408/71 permit Member States to make the acquisition, retention or recovery of the right to unemployment benefits subject to the completion of periods of employment in accordance with provisions of the legislation under which the benefits are claimed, they cannot do so in a manner which discriminates on the basis of nationality

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Poland	30/3

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Latvia	23/4
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> MAY

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Belgium	07/5
Portugal	11/5
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