trESS training and reporting on European Social Security

trESS e-newsletter September 2006

Dear,

It is our pleasure to present you our second e-newsletter of 2006. The first half year of 2006 has been a very interesting year in the field of social policy. We knew a very active Austrian presidency, during which - amongst others the first discussions on the proposal for the new implementing Regulation of Regulation 883/2004 took place. In our newsletter you will find an overview of the achievements of the Austrian presidency in the social field written by Mr Bernhard Spiegel, Head of the international division, Federal Ministry for social security, Generations and Consumer protection, Austria.

From time to time we will also keep you updated on the developments in the negotiations on Regulation 883/2004 and its implementing Regulation.

On the eve of 1 May 2006, a huge political debate took place in the different member states on the possible extension of the transitional period on the free movement of workers with respect to the new member states. The present e-newsletter includes an overview of the latest developments regarding this transitional period and an interview with Éva Lukács, of the Hungarian Ministry of Health (EU Co-ordination Department) on the Hungarian experience in particular.

Many of you will presumably have participated in one of the **trESS** seminars that took place in each of the 25 member states. In this respect, we would like to draw your attention to our continuously expanding contact database. During the last months hundreds of people have joined our big **trESS** family of people who are in one or another way professionally involved in the application of the Regulations. For those of you who have not joined us yet, we recommend you to contact us for registration and to find out the advantages of this contact database.

Kind regards

Yves Jorens
Project Director

> Content of this newsletter

> trESS website

As you may have noticed, the homepage of the **trESS website** now includes a news section with regular uploads of latest cases and news on regulation 1408/71.

The database which links the articles of Regulation 1408/71 and relevant ECJ case law and administrative decisions remains our most important information resource. Behind the curtain we continue working on the expansion of this database with national case law and on the development of e-learning materials which we hope to present you for the 2007 seminar season.

> I. Evaluation of recent developments in social security coordination Table of contents

The last year we have seen some developments in Regulation 1408/71 and 574/71. Since June 2005 Regulation 1408/71 has been amended due to some policy changes in the Member States, as a reaction to the case law of the ECJ. With the entry into force of Regulation 631/04, procedures for obtaining access to sickness benefits in kind	The European Commission responded with a proposal. This ECJ case law applied for all new Member States, but also the benefits that were listed by the old Member States had to be taken into reconsideration. The European Commission has deleted dozens of benefits and almost all Member States could agree to the final view of the EC, except the UK, Sweden and

during a temporary stay in another Member State were simplified. With Regulation 629/2006 (Miscellaneous amendments 2004) the simplified procedures to the provisions on benefits in respect of accidents at work and occupational diseases contained in regulation 1408/71 and 574/72 were extended. A second example is the recent EC proposal (document COM (2005)676) for a Regulation of the European Parliament and the Council amending Regulation 1408/71 and Regulation 574/72, intended to update some of the annexes to Regulation 1408/71 to reflect changes in Member States' national social security legislation and thus to facilitate application of the Community legislation coordinating social security schemes by ensuring that it correctly reflects the national legislation in force. As Member States frequently amend their national social security legislation, the references made to national legislation in EU legislation coordinating social security schemes become outdated and create legal uncertainty. The references in EU coordinating legislation, in particular in Regulations 1408/71 and 574/72, therefore need to be updated to reflect national legislation correctly. It is in the interest of the citizens concerned that the Community Regulations are updated soon after the changes to national legislation.

The main changes concern:

1. **Annex I** (the wording in the section on Sweden is brought into line with the new Social Insurance Act (1999:799) and a reference to the Social Insurance Contributions Act is added to identify self-employed persons and the wording in the section on the Netherlands is brought into line with the new Health Care Insurance Act);

2. **Annex IIa** (Annex IIa lists special non-contributory benefits granted to the persons concerned exclusively in the territory of the Member State in which they reside, under Article 10a of Regulation 1408/71. The amendments proposed reflect changes made to legislation in Lithuania and Slovakia);

3. **Annex III** (Annex III lists the provisions of existing bilateral agreements which were in force prior to the application of the Regulation in the Member States concerned. Part A lists the provisions of bilateral agreements which continue to apply, despite the fact that the provisions of bilateral agreements are generally replaced by Regulation 1408/71. The amendment proposed will delete the provision of the General Convention of 28 October 1952 between Italy and the Netherlands listed in Annex III, Part A);

4. **Annex IV** (Annex IV, Part A lists the legislations under which the amount of invalidity benefits is independent of the length of periods of insurance. The proposed amendments concern the legislation in the Slovak Republic. The Spanish law currently listed in Annex IV, Part B has been amended, and the relevant section has been updated; Changes to Annex IV, Part C concern the survivor's pension in Slovakia, and the guarantee pension in Sweden; Amendments to Annex IV, Part D reflect changes in the new Swedish pension legislation, and the bilateral agreement on social security between Finland and Luxembourg, which entered into force on 1 February 2002);

5. **Annex VI** (Annex VI sets out special procedures for applying the legislation of certain Member States. Proposed amendments reflect changes in the law in Estonia and the Finland. This was of course a difficult position, as Article 42 EC requires unanimity. Finally an agreement was found in the European Parliament and the Council and the text was adopted in April 2005.At the moment an EC action is pending before the Court (Case C-299/05) regarding the partial annulment of Regulation 647/2005 with regard to 5 inscriptions in the Annex from Finland, Sweden and the UK. According to the EC, the Council and the Parliament failed to draw all the consequences of the criteria laid down by the ECJ, when they included in the list of permitted benefits set out in Annex IIa of Regulation 1408/71 certain benefits from the three countries mentioned. These, in the EC's view do not satisfy the criteria of special non-contributory benefits within the meaning of Article 4.2a of the Regulation. The EC decided to this partial annulment procedure in accordance with the Ouzo-judgment of the Court (C-475/01), where it had rejected an infringement procedure against Greece because the European Commission should have asked for annulment of the Regulation before it started infringement procedures.

After Regulation 647/2005, Article 4.2a states that the Article shall apply to special non-contributory cash benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement has characteristics both of the social security legislation referred to in paragraph 1 and of social assistance. " Special non-contributory cash benefits " means those:

(a) which are intended to provide either:

(i) supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in paragraph 1, and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned;

or

(ii) solely specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned,

and

(b) where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary. However, benefits provided to supplement a contributory benefit shall not be considered to be contributory benefits for this reason alone;

and

(c) which are listed in Annex IIa.

Last but not least, we have to refer to Regulation 883/2004 and the proposal for a new Implementing Regulation that will replace Regulations 1408/71 and 574/72.

Regulation 883/2004 has entered into force on 20 May 2004, but is not yet applicable. Annexes to the new Regulation are still not filled in, as there was no time to finish them before 1 May 2004, the target date for all EU institutions and the Member States because of the planned enlargement with 10 new MS. To avoid voting the text with 25 MS, the Regulation was adopted under big pressure, resulting in 3 unfinished Annexes, which have to be finished before the Regulation

new health care reform in the Netherlands, and the reform of the Finnish employment pension legislation. Changes are also made to reflect new legislation regarding coverage under Swedish social security legislation and the reform of the Swedish pension legislation). Another main modification is the adoption of Regulation 647/2005, reflecting the case law of the ECJ in the cases Jauch (C-215/99) and Leclere (C-43/99). The judgments Jauch and Leclere, concerning the classification of special non-contributory benefits require, for reasons of legal safety, that the two cumulative criteria to be taken into account should be specified so that such benefits can feature in Annex IIa to Regulation (EEC) No 1408/71. The fact that a benefit is inscribed in the Annex IIa is not enough to conclude that it is a special non-contributory benefit. On this basis, there was a case for revising the Annex, taking into account legislative amendments in the Member States affecting this type of benefits, which are subject to specific coordination given their mixed nature.	becomes applicable. Regulation 883/2004 will become applicable when the new Implementing Regulation is adopted. The proposal for this new Implementing Regulation was thoroughly prepared by the European Commission and it was presented on 31 January 2006. This proposal is now under discussion. However, sometimes even the proposals made will have to be adapted to the case law of the Court of Justice. An example is Annex XI with regard to details on particularities of the different MS. For instance, when Regulation 883/2004 was adopted, the agreements of some MS were subject to certain inscriptions in Annex XI and this political agreement should be respected when drawing up the Annex. But some of these political agreements, as eg. the inscription with relation to certain regional benefits in Germany and Austria as being excluded from the scope of the Regulation, cannot be respected after the recent ECJ decision in the Hosse case (C-286/03).

> II. The Austrian Presidency in Council during the first half year 2006 in the field of social security for migrant workers

by Bernhard Spiegel, Head of the international division, Federal Ministry for social security, Generations and Consumer protection, Austria

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The Austrian presidency in the social policy field was influenced by the fact that Regulation (EC) No. 883/2004 was already published more than one and a half years ago but for the application a new implementing Regulation and also some Annexes of the Regulation itself were still outstanding. In late January the long awaited Commission's proposals for a new implementing Regulation and a first amendment to Regulation (EC) No. 883/2004 (called the Annex XI-Regulation) were forwarded to Council.

We started the work on these dossiers immediately. The first tricky question was how to handle these two dossiers which were separate and interdependent at the same time. To safeguard best results we split the proposal for the Annex XI-Regulation into the relevant parts of the implementing Regulation. So when dealing e.g. with Title II of the implementing Regulation on applicable legislation also the Annex XI entries concerning applicable legislation were dealt at the same time. As a result of very intensive work in the working party general agreement of social ministers (partial general approach) on the first 2 Titles of the implementing Regulation and the related parts of the Annex XI dossier was achieved, naturally depending on further work on the consequent parts.

For this purpose very important horizontal questions had to be settled as e.g. the new structure for co-operation between institutions and between institutions and persons concerned (principle of electronic exchange of information), provisions on provisional application of the legislation and provisional granting of benefits, laying down criteria (indicators) to determine the place of residence of a person (which was very important due to the inclusion also of non-active persons in the personal scope of Regulation (EC)No. 883/2004), additional clarifications concerning terms used in the field of applicable legislation etc.

But work on the new implementing Regulation was not reserved to the Council Working Party alone. The new principle of electronic exchange of information between institutions necessitated also a start of new work in the Administrative Commission for Migrant Workers. So the Austrian Presidency undertook to build up a new structure for co-operation between the Administrative Commission itself and its Technical Commission. The tremendous work which has to be done here is easy to understand when we consider that all the existing E-forms have to be replaced by means (documents) which can be exchanged also electronically. Also the existing paper Annexes of Regulation (EEC) No. 574/72 shall be replaced by electronic ones. One important task of this work will also be to examine if transitional provisions are necessary for specific sectors.

Besides that the Administrative Commission had to work on the usual tasks where we had to settle a lot of questions of interpretation and prepare the next amendments of Regulations (EEC) No. 1408/71 and 574/72 taking also into account recent decisions of the ECJ. But never expect "business as usual" in the Administrative Commission! Two Member States which joined the Union in 2004 confronted us with a question which should have been settled decades ago: Which Member State has to grant sickness cash benefits in case of previous frontier workers who fall ill during the so called protection period (period during which entitlement persist after the end of an employment relationship under the legislation of the previous state of employment) without having made themselves available to the employment services of their state of residence? The more we tried to find a sound legal base for a solution the more we saw how complex the issue really was. Although we spend much time and efforts on this question I have to admit that we did not succeed in finding a solution acceptable for all.

But also trESS was present in the work of the Administrative Commission. As a novelty we made a peer-review on the trESS-report 2005. Each Member State had to choose one part in the report where the relevant state was cited and elaborate together with a peering partner-Member State on the issue. So the report was analysed in depth during a whole day of the meeting of the Administrative Commission and a lot of very fruitful ideas were shared between the delegates. My impression was that the experts really enjoyed this exercise the Finnish presidency has already announced that this exercise will be continued.

So to sum up I have to say that we had a very busy presidency where a lot of fundamental questions for the future had to be solved. We all enjoyed this period of much but very interesting works where we could contribute towards a quick application of Regulation (EC) No. 883/2004. All of the Austrian experts are already looking forward to the next Austrian Presidency, may be in 2019!

> III. Some recent ECJ cases relating to the social security coordination Table of contents

1. Hosse case (Case C-286/03)

Mr Hosse, of German nationality, is a frontier worker employed in Austria as a teacher in the Province of Salzburg. He pays taxes and social security contributions in Austria and is affiliated to sickness insurance in that State. He resides in Germany, near the Austrian frontier, with his daughter Silvia Hosse, who is severely disabled. Silvia Hosse s mother was formerly in paid work in Germany which gave entitlement to German care allowance. Until her parental leave ended in September 2000, her daughter was able to receive that benefit, as her dependant. However, it ceased to be paid after the end of the parental leave, as the mother did not resume paid work. An application was then made for care allowance under the Salzburger law for Silvia Hosse. The Province of Salzburg refused the application on the ground that the person reliant on care must have his main residence in that province in order to receive the allowance. The Court judged on 21 February 2006 that a care allowance such as that provided for by the Salzburger Pflegegeldgesetz does not constitute a special non-contributory benefit

within the meaning of Article 4(2b) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community but a sickness benefit within the meaning of Article 4(1)(a) of that regulation.A member of the family of a worker employed in the Province of Salzburg who lives with his family in Germany may, where he fulfils the other conditions of grant, claim from the competent institution of the worker's place of employment payment of a care allowance such as that paid under the Salzburger Pflegegeldgesetz, as a sickness benefit in cash as provided for in Article 19 of Regulation No 1408/71, in so far as the member of the family is not entitled to a similar benefit under the legislation of the State in whose territory he resides.

2. Keller case (C-145/03)

The European Court of Justice has ruled that medically necessary treatment outside the EU must be reimbursed for the holders of valid E111 and E 112 forms. The ECJ judgement addressed the situation of Annette Keller, a German national resident in Spain who arranged for a 1 month E111 form to cover a trip back to her home country. During that period, she was diagnosed with a malignant tumour and required medical treatment. Ms Keller requested and was issued with an E112 (extended several times) Spanish health system issued her with an E112 form to cover the costs of her treatment in Germany. The doctors treating Ms Keller decided that she needed care at a specialist clinic in Switzerland and she consequently underwent an operation in Zurich. Ms Keller paid the ¬ 56 300 cost of the treatment and asked her Spanish health insurer to reimburse these expenses. The insurer refused because they had not been consulted by the German doctors about the decision to seek treatment in Switzerland and said that they should have had the opportunity to provide alternative options. Ms Keller died in 2001 and her family challenged the Spanish insurers in the national courts which referred the case to the ECJ. The ECJ ruled on 12 April 2005 that the Spanish insurers should pay for the cost of the treatment. The court stated that the doctors treating the patient are best placed to assess the treatment needed and that the health insurance structure of the home country places its confidence in the host country s institutions, that the doctors have the same levels of professional competence as the home country. Therefore, the home country is bound by decisions of the doctors treating the patient. If the host country doctors decide to send the patient outside the EU for urgent treatment that they cannot provide, the home country insurance must accept their judgement and pay for the treatment. The ECJ also re-stated the principle that in the case of a decision to send the patient outside the EU for treatment, it is the host country (eg. Germany) that would cover the cost of treatment in the same way that it pays for its own citizens. Afterwards, the host country is reimbursed by the home country, in this case Spain. Since Ms Keller had paid for the treatment in Switzerland herself, the ECJ ordered the Spanish health insurance to reimburse her family.

3. Herrera case (C-466/04)

Manuel Acereda Herrera v Servicio Cántabro de Salud Mr Acereda Herrera is insured as a self-employed worker with the Spanish national health service. In July 2002 he was urgently admitted to a hospital attached to the CHS, where he was diagnosed with a serious illness for which he received treatment in that hospital. Taking the view that, in the light of his medical condition, there were shortcomings in the treatment received, Mr Acereda Herrera requested the competent institution to issue a Form E 112 to enable him to receive treatment in a hospital in France. He was issued with that form, which was valid for one year. The CHS met the cost of the hospital treatment administered in France. In the course of that treatment, Mr Acereda Herrera travelled to France on several occasions, accompanied by a member of his family on account of his fragile health. He claimed reimbursement of the travel, accommodation and subsistence costs occasioned by those visits from the CHS. Those costs totalled EUR 19 594. The CHS refused that claim. Mr Acereda Herrera brought an action against that refusal before the Social Court, which dismissed that action. Mr Acereda Herrera appealed against that ruling to the High Court of Justice. Article 22(1)(c) and (2) and Article 36 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, must be interpreted as meaning that authorisation by the competent institution for an insured person to go to another Member State in order there to receive hospital treatment appropriate to his medical condition does not confer on such a person the right to be reimbursed by the competent institution for the costs of travel, accommodation and subsistence which that person and any person accompanying him incurred in the territory of that latter Member State, with the exception of the costs of accommodation and meals in hospital for the insured person himself. National legislation in which provision is made for entitlement to benefits additional to those provided for in Article 22(1) of Regulation No 1408/71, as amended and updated by Regulation No 118/97, in the situation covered by paragraph (1)(a) of that article, but not in that covered by paragraph (1)(c) thereof, does not obstruct the direct effect of that provision or infringe the principle of cooperation in good faith stemming from Article 10 EC.

4. Watts case (C-372/04)

On 16 May 2006 the ECJ delivered an important decision in a case involving the rights of EU nationals to travel to other member states to avail of services. Yvonne Watts, who because of the long NHS waiting lists had to go abroad to receive treatment, has a greater impact than simply allowing one person to have the costs of a hip operation reimbursed. The ruling paves the way for the EU to extend its powers into the area of health care. That case, (the Watts case) related to the rights of an EU national to apply for an E112 authorisation in order to travel abroad to avail of health services in another member state. Under the E112 scheme, a member state cannot refuse an application for an E112 authorisation where the health treatment is normally available in the home member state but cannot be provided in the individual's case without undue delay. The decision of the ECJ was that in order to refuse an E112 authorisation on the grounds of waiting times, the public health service must establish that the waiting time does not exceed the time acceptable, given an objective medical

assessment of the clinical needs of the person concerned in the light of all of the factors characterising his medical condition at the time when the request for authorisation is made or renewed, as the case may be. A refusal to grant prior authorisation cannot be based merely on the existence of waiting lists intended to enable the supply of hospital care to be planned and managed on the basis of predetermined general clinical priorities, without carrying out an objective medical assessment of the patient' s medical condition, the history and probable course of his illness, the degree of pain he is in and/or the nature of his disability at the time when the request for authorisation was made or renewed. Where the delay arising from such waiting lists appears to exceed an acceptable time having regard to an objective medical assessment of the abovementioned circumstances, the competent institution may not refuse the authorisation sought on the grounds of the existence of those waiting lists, an alleged distortion of the normal order of priorities linked to the relative urgency of the cases to be treated, the fact that the hospital treatment provided under the national system in question is free of charge, the obligation to make available specific funds to reimburse the cost of treatment to be provided in another Member State and/or a comparison between the cost of that treatment and that of equivalent treatment in the competent Member State.

> IV. Transitional arrangements and free movement of workers in EU Table of contents

Background information

Free movement of persons is one of the most fundamental freedoms guaranteed by Community law. It includes the right for EU nationals to move to another EU Member State to take up employment and to establish themselves in the host State with their family members.

According to paragraph 3(2) of the transitional arrangements (hereinafter: TA) on freedom of movement for persons annexed to the Treaty of Accession of 2003, the free movement of workers across the enlarged EU, may be deferred for a period of maximum 7 years. The transitional period is divided in three distinct phases, according to the "2 plus 3 plus 2" formula. Different conditions apply during each of these phases. The first phase of the transitional arrangements (TA) started on 1 May 2004 and ended on 30 April 2006. The transitional arrangements have been applied instead of EU-10 Member States, only for EU-8 Member States. Transitional arrangements have been set out in the Accession Treaty with regard to: Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia, and Slovakia. For Cyprus and Malta, there are no restrictions on the free movement of workers.

The transitional arrangements will apply to anyone who wants to sign an employment contract with an employer in one of the Member States. It does not apply to those wishing to reside in one of the Member States for purposes such as study, or those who wish to establish themselves as self-employed persons, with the exception of self-employed persons providing certain services. However, job-seekers will be entitled to assistance from public employment services. The current rules on entitlement to look for work in another Member State for up to three months will also apply to nationals of new Member States. Such job-seekers will claim unemployment benefit in their own country and arrange for it to be paid in the country where they are looking for work, if they have access to the labour market of this country according to the transitional arrangements. The level of benefit will be that of their home country.

The 12 months rule is another exemption from the main rule. A national of a new Member State, who legally worked in an old Member State on 1st May 2004 and had a work permit or authorisation from 12 months or longer could continue to have access to the labour market of that Member State. However, he or she will not have automatic access to the labour markets of the other old Member States.

The posted workers Directive, which relates to the freedom of services, is not subject to transitional arrangements although Germany and Austria are allowed to apply restrictions on the cross-border provision of services in certain sensitive sectors involving the temporary posting of workers as set out in paragraph 13 of the TA (agriculture, construction area, ...).

The first two years of TA

The Commission produced several documents explaining the legal framework of the TA. The Accession Treaty provided that for the first two years of the TA, EU-15 Member States apply national measures, or those resulting from bilateral agreements to regulate access to their labour markets by EU-8 nationals. (EU-8, because Malta and Cyprus were exceptions from TA.) The diverse national measures taken during this first phase of the TA resulted in legally different regimes for access to the labour markets of the EU-25. Sweden and Ireland decided not to apply restrictions on access to their labour markets by EU-8 nationals. The UK has no ex-ante restrictions either but has a Workers Registration Scheme. All other EU-15 countries maintained a work permit regime, sometimes combined with quotas.

On the other hand, Poland, Slovenia and Hungary apply reciprocal restrictions to nationals from the EU-15 Member States. All EU-10 Member States (the new Member States) have opened their labour markets to workers of EU-10 Member States.

EU-15 Member States all agreed on the need for solid data to underpin such decisions. Those that had decided not to apply any restrictions during the first phase were generally positive about the effects of this decision on their labour markets, emphasising the positive contribution made by workers from the EU-8 to their national economies.

As for those EU-15 Member States that apply restrictions, some reported that these allow them to manage migration from neighbouring EU-8 Member States. Two Member States continued to view the measures as necessary in the near future,

taking into account national absorption capacity, the need to integrate all migrants, including those from non-EU countries, and to accompany internal structural reforms. Nevertheless, it was acknowledged that the restrictions may have encouraged EU-8 nationals to look for other ways to perform economic activity in EU-15 Member States, reflected in an exceptionally high influx of posted workers or workers claiming to be self-employed.

The EU-8 Member States, virtually all called for lifting the restrictions. They stressed the fundamental nature of their citizens' right to freedom of movement as workers in the EU-25 and pointed to statistical evidence showing that their citizens had not, in fact, flooded EU-15 labour markets nor had they caused any surge in welfare expenditure by EU-15 Member States. They also underlined the role of their citizens in alleviating problems caused by the EU-15's ageing workforce.

The first phase of these transitional arrangements ended on May 1st, 2006.

Free movement of workers and Accession: The second phase 2006-2009

Paragraph 2 of point 3 of the country-specific annexes to the 2003 Act of Accession requires all EU-15 member States to notify the Commission "no later than at the end of the two year period following the date of accession" (April 30th, 2006) whether they will continue applying national measures or measures resulting from bilateral agreements, or whether they will apply Community law on access to their labour markets. The annexes also state that in the absence of such notification by a particular Member State, Community law on free movement of workers shall apply in that Member State from 1 May 2006 onwards.

The Commission's February 2006 report said that very few citizens from the new member states were actually moving to the EU-15 countries. According to the report, EU-10 citizens represented less than one percent of the working age population in all old EU member states except Austria (1.4%) and Ireland (3.8%).

At the end of the first two-year "transition period" on 1 May 2006 the policies relating to the free movement of workers of the EU-15 states can be classified into three categories:

1. ***Keeping the restrictions*** in place for at least three more years (i.e. until 2009): Austria, Germany and Italy

2. ***Lifting the restrictions gradually*** , within the next three years (i.e. until 2009): Belgium, Denmark, France, Luxembourg, and the Netherlands.

3. ***Keeping labour markets open*** removing restrictions: Finland, Greece, Ireland, Portugal, Spain, Sweden, United Kingdom and Italy.

The Accession Treaty also lays down that, notwithstanding restrictions applied by Member States, they shall give preference to workers who are nationals of EU-8 Member States over workers who are nationals of third countries as regards access to their labour market.

Closing remarks

It can be experienced that community and national legislation may indeed have created an adverse and wrong impression of enlargement and of the benefits of free movement of workers in some countries.

During the second phase of TA the Member States which still keep the restrictions should increase their efforts to ensure proper enforcement of existing EC legislation, labour standards and in particular the provisions of the posted workers directive, with appropriate reinforcement of administrative cooperation where justified.

The statistical analysis of the national data permits the following conclusions:

1. Mobility flows between the EU-10 and the EU-15 are very limited and are simply not large enough to affect the EU labour market in general. In addition, mobility flows from EU-15 to EU-10 Member States and between EU-10 Member States are generally negligible.

2. The percentage of EU-10 nationals in the resident population of each EU-15 Member State was relatively stable before and after enlargement, with increases in the UK and, more conspicuously, in Austria and in Ireland. In Austria, however, there is evidence to suggest that the stock of EU-8 nationals stabilised in 2005.

3. There is no evidence to show a direct link between the magnitude of mobility flows from EU-10 Member States and the TA in place. Ultimately, mobility flows are driven by factors related to supply and demand conditions. If anything, TA will only delay labour market adjustments, with the risk of creating "biased" destination patterns even on a more permanent basis.

4. The employment rate of EU-10 nationals in EU-15 Member States is similar to that of country nationals, and it is even higher in Ireland, Spain and the UK.

5. The migration flows following the enlargement have had positive effects on the economies of the EU-15 Member States: EU-10 nationals positively contribute to the overall labour market performance, to sustained economic growth and to better public finances.

6. The employment rate has increased in several countries since enlargement. Enlargement has helped to formalise the underground economy constituted by previously undocumented workers from the EU-10, with well-known beneficial effects, such as greater compliance with legally sanctioned labour standards, improved social cohesion and higher State income from tax and social security contributions. This also improves the integration of EU-10 nationals due to a change in employers' attitudes, greater opportunities to set up private businesses, better information and regulation.

7. The sectoral composition of the EU-15 national workforce has not shown significant changes since enlargement showing no evidence of crowding out of national workers by the limited inflow of workers from EU-10 Member States. EU 10 nationals have a complementary role to play.

8. EU-10 nationals alleviate skills bottlenecks in the EU-15 Member States and contribute to long-term growth through human capital accumulation.

(This article is mainly based on the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Treaty (period 1 May 2004 to 30 April 2006) (Commission of the European Communities Brussels, 8.2.2006 COM(2006) 48 final)

> Persons mobility in EU-25: the example of Hungary
Interview with Dr. Éva Lukács
(EU Co-ordination Department, Ministry of Health, Budapest, Hungary)

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Dr. Éva Lukács, JD, MSs is working since 1998 in the Hungarian Ministry of Health. She has a master degree in International Business Law (LLM-CEU), she is a PHD candidate, her research topic is the free movement of persons. She is the author or co-author of several books and articles on this issue. At European level Éva Lukács is the member of the Administrative Commission and the Technical Committee for the Free Movement of Workers. In 2006 she became head of unit responsible for preparation of International and EU legislation.

trESS: Some background information

Free movement of persons is one of the fundamental freedoms guaranteed by community law (Article 39 of the EC Treaty) and is also an essential element of European citizenship. Community rules on free movement of workers also apply to member states of the European Economic Area (i.e. to Iceland, Liechtenstein and Norway). The relevant rights are complemented by a system for the co-ordination of social security schemes and by a system to ensure the mutual recognition of diplomas.

The Accession Treaty allows for the introduction of "transitional measures" . Commonly referred to in EU circles as the "2+3+2-year arrangement", this scheme obliges the member states to declare themselves in May 2006, and again in May 2009 and May 2011, on whether they will open up their labour markets or keep restrictions in place.

Hungary started the accession to EU in 1999-2000. From the beginning it was emphasized that after the date of the accession there is no need for transition period. Instead of transitional period the free movement of persons, including workers as well can be introduced without any special restrictive conditions. The basis of this stand point was that the migration potential in Hungary is insignificant. In Hungary both direction of migration (inflow and outflow) is very low. Even so, the majority of the EU-15, based mainly on political intention, introduced a long transitional period. The only exception was in 2004 Great Britain, Ireland and Sweden.

Some of the EUs strongest, so called, "old" member states continued to restrict access to their labour markets by workers from Eastern and Centre Europe. As the two-year transition period ended on 1 May 2006, only seven of the EU-15 states have decided to open their borders.

The Commission's February 2006 report said that very few citizens from the new member states were actually moving to the EU-15 countries.

The above mentioned elements are one side of the coin. On the other hand, Europe is facing a combination of skills shortages, bottlenecks, unemployment and ageing. However, "mobile" workers - people with experience of working in different countries or changing jobs - tend to be better at learning new skills and adapting to different working environments. From various reasons the EU member states really need a more mobile workforce. But rates of both geographic and job mobility remain very low. At present only around
1.5 % of Europeans live and work in a member country other than their own, roughly the same percentage as 30 years ago. And when it comes to occupational or job mobility, we see that in nine EU countries, over 40% of workers have been in the same job for more than ten years.

Within the European migration context, the Hungarian migrant worker can be characterised as traditional migrant worker who migrat es to different member states for better financial conditions, higher wages and sometimes for p ossible future

career interests. The majority of migrants (app. 85-90 per cent) are short-term migrants, who return to Hungary after shorter or a little bit longer employment. The vast majori t y of Hungarian migrant workers are hired in construction, meat processing and catering industries , and in health sector. The most preferred destination areas for them are Germany and Great Britain.

trESS: What is the trend and quantity of in-flow migrant workers to Hungary ?

Éva Lukács (ÉL): Due to the absence of public data base of judgements and labour permits no one can analyse and draw conclusions on jurisprudence on free movement or relating authorisation issues to migrant workers. Therefore the guarantees for obtaining relevant information have to be improved. However, there are some statistical data about Hungarian in-flow and out-flow migration. In 2004, the valid number of labour permits issued to migrant workers was 51 210, and from those 1 594 belonged to EEC citizens (3.1 per cent of all permit holders). One year later, on 31 December 2005 from the total number of all labour permits issued to migrant workers was only 44 274 valid but its 4 per cent was issued for the EEA nationals. It means a small growth among the labour permit holders within one year.

Migrant workers employed on the basis of reciprocity with requirement of registration arrived only from Slovakia in great number in 2005. Their number was 11 402 on 1 st January 2005. In certain northern regions of the country their presence and concentration has pushing out impact. Besides these local, sporadic protective arrangements (registrations), other measures had not been introduced.

Cross-border commuters' movement remained a stable component of labour migration on the Slovak-Hungarian and Austrian- Hungarian borders pending on economic prosperity.

If the number of labour permit holders are analysed it can be stated that the majority of EU-15 migrant workers came from Austria and Germany. For example, in 2005 142 persons from Austria had labour permit in the processing and building industry. Majority of them were white collar workers. The internal proportion of unskilled employee is below 2 per cent while the graduated self-employed is almost 20 per cent and 23 per cent was the rate of graduated employees. The other good example is the finance, where the number of German employees is considerable.

In summary, influx of Community workers and their family members in comparison to third country nationals has not grown in a significant extent. Inside of its migratory movement participation of citizens of new Member States are more visible as registered workers, but far from outstanding in the labour market regardless in some (border) regions. The rate of unskilled migrants is also limited. Migrant workers are basically employed in trade and in tourism. There is no responsible authority or government agency working on collection and analysis of data on outflow migration, its economic effects on certain regions, on economic sectors, on preparation of possible migrant workers how to protect own rights and interests, there is only moderated information on brain drain and undeveloped policy combating shortage of labour force in research, health care, IT and engineers in Hungary. Empirical research proved the severe shortage in health care due to the overlapping impacts of outflow of low-paid medical staff and transposition of the 2003/88/EC directive.

The law gives the impression that, from the point of view of general recognition system, third country national family members are not expressly entitled to make use of the advantages guaranteed for nationals of a Member State.

trESS: There is a program called MobiKid. What do you think about the MobiKid project?

ÉL: The MobiKid is an important project that looks at the impact of geographical mobility in Europe on children's performance at school. When the EU promotes greater academic and professional mobility particularly among high-skilled workers it's often forgotten that workers tend to move with their families. Very little work has actually been done in Europe on how mobility affects children and in particular their performance at school during the elementary years, when they build basic skills. Mobility has a great potential for influencing a child's development but academic research shows that it can sometimes have negative aspects. Changing schools particularly when it happens within a school cycle could imply that children's academic performance may suffer, for example through having to repeat a year. But given the right conditions, we can ease the school transition process and transform it into a positive experience. One of MobiKids priority themes aims to tackle learning difficulties in education and training. Moreover, we want our work to tie in with the wider political objective in Europe of enhancing professional mobility.

trESS: What else is the EU doing to address the barriers to workers' mobility?

ÉL: I would like to underline only few pragmatic elements. For many workers, the main barrier to mobility is simply not knowing where or how to look for work abroad. The EURES job mobility portal has had a major impact. Coordinated by the European Commission, and involving the public employment services of all 25 Member States, this service acts as a gateway to thousands of job opportunities across Europe. Not surprisingly, it is one of the most visited sites on the European Commission's website. According to my opinion it is a real success story in the European persons' movement. We should also mention the European Health Insurance Card. It is available in all 25 Member States. In addition, in the last couple of years the issue concerning migration of third country nationals into the EU member states becomes very heated point in EU. From a demographic point of view the majority of EU member states are in an extremely difficult situation. Usually the migrant workers (persons) belong to the young generations. They are considered to be a strong support for the greying European societies. Therefore, it is very important to encourage third country nationals' migrants to settle and to find a job in their new host country. This is one side of the coin. However, this question is more sophisticated and sensitive. The other side of the coin is that majority of EU member states face massive unemployment, social unrest, nationalist movement, etc. Attention should also be paid to the public opinion which in a majority of cases is not in favour of the third country nationals' migration. The next step for EU Member States could be to devise a common immigration policy that will promote EU mobility while simultaneously regulating non-EU movements from the outside. Also, they

trESS: What benefits for migrant workers are provided?

ÉL: Article 7 (2) of Reg. 1612/68/EEC requires Member States to provide for equal treatment in the field of social and tax advantages. There are series of cases of the ECJ that deals with the definition of social advantages stating that "social advantages should be interpreted as meaning all advantages which, whether or not linked to a contract of employment, are generally granted to national workers because of their objective status as workers or by virtue of the mere fact of their residence on the territory, and whose extension to workers who are nationals of other Member States therefore seems likely to facilitate the mobility of such workers within the Community. [Even (207/78) para 22., Meints (C-57/96) para 39.] The ECJ extended the scope of this term not only to the benefits available for the workers themselves, but for their family members too (educational rights, benefits for disabled children, loans, etc.).

Many of the existing obstacles to mobility stem from the practical difficulties experienced by workers while moving to another country: learning a new language, finding a house and a school for their children, finding a job for their partner or spouse. Another major difficulty is the lack of convergence between national regulations. The EU has 25 different social security, taxation and pension systems. Every Member State determines how to operate its own social security system, the benefits and conditions. Prior to the EU accession, EEA nationals were not entitled to claim their entitlements to social advantages. Relevant changes occurred upon accession or at later stage.

For example, Community workers and their family members in Hungary can be entitled to all benefits enshrining in Act III of 1993 on social administration and social benefits. The Act contains both in cash and in kind benefits, most of which are means tested and awarded by local governments. One exception is the non-contributory old-age allowance which is a special, non-contributory benefit in terms of Reg. 1408/71/EEC. The Act entails the opportunity for all Community workers and their family members to make use of social assistance benefits in Hungary.

Another example is the housing benefit. Government decree No. 112 of 2001 on the housing-related state subsidies aims at regulating the subsidies that can be accorded to married couples, families with more children and other persons in need. The subsidy can take the form of state contribution to the price of the house (flat), contribution to the interest payable, beneficial methods of payment etc. The supported persons are Hungarian nationals and Community workers in terms of Reg. 1612/68/EEC who possess a valid residence permit during their employment relationship.

Summing up, the browsing of Hungarian law shows that Hungarian law clearly provides for the most important benefits attached to the concept of social disadvantages, namely social assistance, disability benefits, access to state subsidies and some transport benefits. It is beyond doubt that the Hungarian legislator is fully aware of the existence of the concept and applies it.

In connection to the transition period a general question occurs: is it practically possible to apply Article 7 (2) of Reg. 1612/68/EEC when Articles 1-6 are suspended?

need to focus on the integration of second, third and fourth generation immigrants. They could learn a lot by looking to the US. Why has the US been more successful in integrating the knowledge and skills of these groups than Europe? Diversity could be extremely important as a motivator for change but how can we capitalise on such diversity in the EU?

trESS: How will the European Workers Year help raise the profile of mobility?

ÉL: The European Year's principal aim is to increase people's awareness of the rights and opportunities for workers interested in changing job or moving abroad. The Year will offer a wide discussion platform where ideas and good practice will be exchanged. Hundreds of events will take place throughout the EU at local, regional and national level.

trESS : How will the Hungarian Government implement the European Workers' Year? What kind of projects or activities will be funded?

ÉL: According to my information both public administrations and academic institutions take part in the achievement of the objectives of the European Workers' Year. So far, the first event in Hungary was the seminar organised in the framework of the European Year of Workers' Mobility by the European Studies Centre of the Faculty of Law of Szeged University, Hungary, in cooperation with the European Citizen Action Service (ECAS) and Citizens Advice International (CAI) in Szeged, 16-17, June 2006. The title of the seminar was: "A regional approach to free movement of workers labour migration between Hungary and its neighbouring countries".

trESS: Taking into consideration the East-West European migration flows, what has been the impact of the EU enlargement on such flows?

ÉL: There was a sharp but only short increase in East to West migration following accession of many eastern European countries to the EU. But this is a "hump" that will start to tail off in about 510 years time when the economies of the eastern countries start to take off. As incomes and standards of living in these countries rise, migration to Western Europe will become less attractive.

In relations to Hungary it can be stated that the experts were right after all when they did not predict dramatic growth in migration after the date of the EU accession. The general trend shows that the number of migrant and immigrant persons is equally very moderate. The majority of the migrant Hungarian workers are going to find a job in Austria, Germany and Great Britain.

trESS: Are there any negative aspects of mobility?

ÉL: It is very rare, for example, that unqualified people with few or no skills move within the EU. Intra-EU migration tends to be among highly qualified young Europeans who can have a very positive impact on the countries they are migrating too. However, during the last couple of years we saw in Hungary the so called "brain-drain effect". However, it can be stated that the majority of the highly qualified Hungarian researchers', specialists' -mainly within the sphere of natural science- target not one of the EU member states, but USA, Japan, Australia and nowadays China. Naturally, there are some world-wide famous European research institutes where Hungarian researchers work in a great quantity. According to my information there are 6000 Hungarian researchers who

Seemingly, the Hungarian law only awards social advantages to those persons who are able to fall within the personal scope of that Regulation.

trESS: What, for you, are the key reasons why persons' mobility is important ?

ÉL: Mobility is important for the economy and employers, but it also offers huge benefits for individual persons. Most people who have experienced working in a different country say that they have benefited greatly from the experience. Mobility opens the door to new skills, a new culture, possibly a new language and a new working environment.

In Hungary different migration types , which come to Hungary, can be distinguished . The most widely prevailing forms of in-flow "migrations" from different member states to Hungary are tourists, students and recently the migrant pensioners, and persons who simultaneously have multiple properties both in Hungary and in other member states. However, in terms of qualitative figures, the smallest amount of migrant pe ople in the category is the migrant workers.

trESS: Very often migration policies only deal with the migrant workers, however their family members are excluded from the interest of official policies. What do you think about the effort on mobile workers and mobile families?

ÉL: Greater mobility is good for many people from various reasons, but we also need to better understand what this means in practice for the individuals and families involved. Very often the migrant persons are in focus and their family members are forgotten. Therefore, their status and living circumstances must be taken into account more widely in the future. It is to be admitted that the extension of family members' rights along the same lines as workers or self-employed persons took some time in Hungary. Their residence rights and their extensive access to the labour market were remarkably enhanced only in 2004 upon Hungary's accession to the EU. Their social rights were also tackled upon accession in accordance with Reg. 1408. However, there are still some open questions. In case of social advantages it is interesting to tackle upon the entitlement of third country family members as regards the recognition of diplomas. In Hungary the most relevant law in the field of recognition is Act 2001 on Recognition of Foreign Diplomas and Qualifications. According to this law, EC law has to be applied "if a national of a Member State is intended to pursue a regulated profession in Hungary and s/he is entitled to pursue that activity in his/her country of origin".

work in one of the foreign countries.

trESS: Many people in the older Member States are concerned about the impact of workers from the new EU Member States. What would you say to them?

ÉL: If properly managed, migration of workers can be beneficial for all states and societies. If left unmanaged, it can lead to the exploitation of individual migrants, and to be a source of social tension and insecurity in society.

trESS: How do you evaluate the rate of worker's mobility from the next enlargement (Rumania and Bulgaria)?

ÉL: Rumania is the biggest migration partner of Hungary. Through common history and sharing a common border there are app. 40,000 Rumanian citizens who work in Hungary. The number of migrant Rumanian workers doubled during the last couple of years. The majority of Rumanian migrant workers mainly take employment in agriculture (seasonal work) and in construction industry. In the last couple of years a vacuum effect occurred in Hungary and even within all of EU. As a first step the member states of EU-15 encouraged the Hungarian medical doctors to take a job in one of EU-15 Member States (mainly Ireland, Great Britain, Sweden, etc.) for a higher salary. Their jobs and positions remain empty and in many cases it can be seen that medical experts come from Rumania to fill the gap in Hungarian hospitals, clinics etc.

There is significant social security coordination between Bulgaria and Hungary. On 1 July 2006 the relations between the two countries were renewed: a new social security agreement entered into force that operates on the basis of the principles enshrining in Reg. 1408/71. Even Bulgaria was open to enable Hungarians to use their European Health Insurance Cards when they travel to Bulgaria's beautiful shores. A new social security agreement with Rumania is just about entering into force.

The Hungarian Government has not yet decided if a transition period will be installed with respect to the new Member States (Rumania and Bulgaria).

trESS: Thank you very much for your kind cooperation.