trESS

Your latest update on European Social Security

Editorial

Dear **trESS** friends,

It is with great pleasure that I present to you this spring 2013 **trESS** E-newsletter, which will give you an insight in the latest developments in the project as well as in the ever developing field of EU social security coordination.

In this edition, we will present you the activities you can expect from the project in the newly started working year, which will be filled with interesting events and publications. The analytical branch of the network will focus on burning issues like the key challenges for the Coordination Regulations in the near future, but will also analyse very specific topics such as 'prioritising of the right to sickness benefits in kind' or 'medical examination and administrative checks'. Besides this, you can also expect a new 'European report' in 2013, taking stock of the current implementation problems with regard to EU coordination of social security at the national level. This report will also put particular focus on new developments and emerging issues.

We are very pleased to present you the new round of **trESS** seminars, as we are confident that they will be as fruitful and enjoyable as in previous years. In 2013, six seminars will be organised in the framework of the project and one with logistical support from **trESS**. Two of these will be bilateral seminars and we will even have a trilateral seminar this year. This concept of multilateral seminars has already proved to be very interesting, as experts from neighbouring countries can debate face-to-face about concrete implementation problems.

Besides the presentation of our upcoming **trESS** activities, we can present you three ECJ cases on quite technical topics with relation to family benefits for orphans and to pensions. Moreover, we have included a short comment from our Luxembourg national expert on a social security related ECJ case with regard to unemployed persons.

We are also delighted to have had the opportunity to interview Ms Fleur Veltkamp, a seconded national expert in the Unit 'Free movement of workers and coordination of social security systems' of DG Employment, Social Affairs and Inclusion. She has taken the time to talk to our **trESS** reporter on the latest developments with regard to the determination of the applicable social security legislation in cross-border cases.

I wish you a very pleasant read, and I hope you will find this new newsletter both informative and pleasurable.

Kind regards,

Yves Jorens
Project Director

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News from trESS > trESS 2013 kick-off

Reporting on the implementation of the Coordination Regulations at national level continues to be one of the most important activities of **trESS**. In the **trESS** III project, this yearly reporting can take two forms: either a general legal report, taking stock of the problems and issues arising in the Member States with regard to the application of the Coordination Regulations as a whole; or a thematic report on issues and problems arising in the Member States with regard to a specific EU social security coordination topic. In either case, the reports are based on input from the national experts ('national reports'). In 2013, **trESS** will again deliver a European report, so you will be provided with the most recent overview of implementation problems in the field of EU coordination. The national report, and consequently also the European report, will put particular focus on very recent developments, e.g. the implementation or follow-up of decisions in preliminary rulings by the ECJ.

The **trESS** Think Tank will carry out its usual legal strategic long-term analysis and will reflect upon the most important challenges for EU social security coordination in the next decade. In its analysis, this group will dedicate particular attention to the issues with regard to EU mobility and societal changes.

Furthermore, **trESS** will contribute to an impact assessment with regard to the possible revision of several provisions of both Regulation 883/2004 and Regulation 987/2009, as selected by the European Commission. The selection is the result of a collection of requests for revision of the Articles concerned by delegations of the Member States and a specific request for revision from the Commission. The envisaged provisions are Article 13 (applicable legislation when unemployed in one Member State and pursuing an economic activity in another) and Article 32 (prioritising of rights to sickness benefits in kind) of Regulation 883/2004 as well as Article 65 (notification of annual average costs for reimbursement on the basis of fixed amounts) and Article 87 (medical examination and administrative checks) of Regulation 987/2009.

Finally, **trESS** will produce a report on monitoring the use of the European Health Insurance Card (EHIC) in the EU/EEA/Switzerland in 2012. The report will be based on an analysis of Member States' replies to a questionnaire drawn up by the Secretariat of the Administrative Commission. The report will be written in Spring and presented at the AC meeting in June.

Our statistical team will further provide support to the Administrative Commission with a view to investigating the type of statistical data that should be collected in accordance with Article 91 of Regulation 987/2009 as well as to selecting a limited set of key indicators and a statistical methodology for each of those indicators. The final report will be presented at the AC meeting of June 2013.

To conclude, as announced in our 2012 December newsletter, we enthusiastically welcome a new member to the trESS network, as Professor Nada Bodiroga-Vukobrat (University of Rijeka) has joined the project as the national expert for Croatia. As Croatia is set to become the 28th Member State of the European Union on 1 July 2013, our new expert has already been introduced in the network as from the start of the working year. She will immediately buckle down to it and organise a **trESS** seminar in 2013, as you will notice in the **trESS** seminar calendar in this newsletter.

Of course, we will keep you in the loop on the result of all these activities via our various – traditional and new – communication channels.

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News from trESS > trESS 2013 seminar calendar

	COUNTRY	DATE	CITY
	United Kingdom	26/Jun	Nottingham
	Bilateral Luxembourg/France	2/Jul	Luxembourg
	Bilateral Denmark/Germany	13/Sep	Padborg (DK)
	Trilateral Austria/Czech Republic/Slovenia	26/Sep	Salzburg (AT)
	Ireland	2/Oct	Dublin
	Croatia	8/Nov	Opatija
	Seminar outside trESS scope, with logistical support from trESS		
	Poland	14/Jun	Warsaw

This seminar calendar can also be found at the seminar section of our website. The agenda of the different seminars will be posted ca. four weeks prior to the seminar date. Soon after the seminar, the PowerPoint presentations used at the seminar will be linked in the agenda.

You can register for participation in a seminar until three weeks before its date by completing an online subscription form available on the website.

Participation in **trESS** seminars is free of charge. Any travel and accommodation expenses cannot be borne by **trESS**.

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Inside the Commission: recent developments in the determination of the applicable legislation

Ms Fleur Veltkamp is a seconded national expert in the Unit 'Free movement of workers and coordination of social security systems' of DG Employment, Social Affairs and Inclusion. She took up this post in 2010. Before, she worked at the Ministry of Social Affairs and Employment in the Netherlands. She was prepared to give us in-depth information about the recent update of the 'Practical Guide on the legislation that applies to workers' and the Commission's recent initiatives in the area of highly mobile workers.

trESS: **Ms Veltkamp, thank you for your time. Your personal field of specialisation in the European Commission is the chapter on the determination of applicable legislation in the EU Regulations on social security coordination. Can you enlighten the reader why this is an important aspect of social security coordination?**

Fleur Veltkamp (FV): Well, when you decide to work, study or live in another EU country, this has an impact on your social security coverage. The rules on applicable legislation are a set of conflict rules that determine which Member State is responsible for your social security coverage. They appoint one Member State which is responsible for your social security coverage and where you will have to pay your social security contributions. Their aim is to avoid difficulties which could arrive if two social security systems apply, or none apply as a result of a move to another State. Moreover, they lie at the basis of the other coordinating provisions of the Regulations concerning specific benefits.

trESS: **To people working in the domain of EU social security coordination and specifically with the rules on the determination of the applicable legislation, the 'Practical Guide on the legislation that applies to workers' is a well-known instrument. However, why was such a guide necessary for 'Title II' of the Regulation and not for the other chapters? In other words, where does the initiative come from?**

FV: Institutions, employers and citizens can be faced with many questions when they have to decide which legislation is applicable in a specific situation as it has important consequences for a person's social security rights. Until 1 May 2010 they could consult the so-called 'Posting Guide', a practical working tool to assist these stakeholders in applying the rules on applicable legislation. When Regulation 883/2004 replaced Regulation 1408/71, the Administrative Commission for the coordination of social security systems decided that a new practical working tool was needed to explain the amended rules on posting and working in two or more Member States. With the new Practical Guide, we are trying to ensure that all institutions across the Member States apply the rules on applicable legislation in a uniform manner. As for other chapters, we have explained the basic rules in the 'Small Guide' and in the so-called 'Explanatory notes' which are available at the Commission's website.

trESS: **The 'Practical Guide' was updated in 2012. What has changed?**

FV: The reason for updating the Practical Guide in 2012 was that on 28 June of that year, a number of changes to the rules on applicable legislation that were made with Regulation 465/2012 came into force. For example, it was clarified that a posted person cannot be replaced by another posted person. Secondly, when a person is working in two or more Member States, the institution in the Member State of residence should always assess if a person works a 'substantial part' of his/her activity in that Member State. And last but not least, the social security situation of members of air or cabin crew will be attached to their 'home base', that is to say the place where they normally start and end their duties.

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Inside the Commission: recent developments in the determination of the applicable legislation

trESS: These are indeed the most recent legislative changes in the rules on the determination of the applicable legislation, but how were these changes then translated in the 'Practical Guide'?

FV: In order to explain the new rules in a comprehensive manner, we illustrated the new rules with specific examples. For instance, when we were discussing the changes to the Practical Guide, the Court of Justice issued a judgement in the *Format* case, in which it clarified that the institution that needs to decide if a person works in two or more Member States must not only look at the employment contract, but alternatively also at the actual anticipated work situation. We have established guidelines in the Practical Guide on how to interpret the rules on working in two or more Member States in the light of that judgement. Also, the 'home base' concept is new to the Regulations and all new employment contracts that were concluded for flying personnel after 28 June 2012 will have to be assessed on the basis of the new rules. In the 'Practical Guide' it is explained how to apply the 'new rule', but also what to do in exceptional and transitional situations.

trESS: The Regulations and the Practical Guide cannot deal with every specific case and there will always be cases for which the EU instruments do not produce a solution. An example illustrates this. A pensioner lives in Egypt, but has director's mandates in a Belgian company (self-employed activity), a Swiss company (employed activity) and a Spanish company (employed activity). According to the coordination rules, he would be subject to the legislation of his Member State of residence. However, in his case this is a non-Member State (Egypt). How should such a case be solved and which role should the national administrations play?

FV: That's a complex situation indeed. The application of the rules on applicable legislation is, as the Regulation itself, restricted to the EU territory, the EEA-EFTA States and Switzerland. When we apply the rules for working in two or more Member States in this case, normally the Member State of residence should be competent. In this situation, however, there is no 'Member State of residence', as the person is living in Egypt. In order to avoid that the person will be subject to the social security legislation of Belgium, Switzerland or Spain simultaneously, the competent institutions of all the Member States involved can reach an agreement on which legislation should apply in the interest of the person concerned. To that end, the Member States will actively have to work together to find a common agreement.

trESS: Another area in which the coordination rules are sometimes difficult to apply in practice is the area of 'highly mobile workers'. The Commission wants to address this topic. Who are these 'highly mobile workers' and how will their issues be tackled?

FV: 'Highly mobile workers' are workers for whom high and frequent levels of mobility are an integral part of their profession or career. Their high and frequent levels of mobility combined with factors such as low predictability of work assignments, different employment statuses, and the use of short-term contracts could keep them back from establishing their international professional career. Legal, administrative and practical barriers to high levels of mobility have been recognised in different domains, such as the artistic and cultural sector, research and international transport. So far, a common EU approach to address and tackle these barriers has, however, not been taken. What the Commission now plans to do is to collect evidence from all the domains in which barriers to their mobility exist and to start a collective process of reflection on how to address the challenges that they are facing.

trESS: How will the concerned workers and their employers be involved in the process of reflection?

FV: In the first instance, an internal 'Task Force' of the Commission will identify what the legal, administrative, practical and information barriers are from the evidence that already exists. On the basis of this inventory and analysis, the Task Force will produce an internal discussion paper. In the second phase, a public consultation could be launched on the basis of this paper.

trESS: What would your advice be to all mobile workers who are confronted with problems concerning the applicable legislation?

FV: I would advise them to always contact the competent institution. There is a special procedure at EU level for situations where the institutions in different Member States cannot agree on the legislation that needs to be applied. Moreover, they can always contact the European problem solving tools such as Solvit or Your Europe or write a complaint to the Commission if the problems continue to persist.

trESS: That is very clear. Thank you, Ms Veltkamp!

FV: My pleasure!

News from the Commission > Information on social protection: MISSOC

Since it was established in 1990, the Mutual Information System on Social Protection/Social Security (MISSOC, www.missoc.org) has grown into a central information base for up-to-date, comprehensive and comparable data on social protection systems in all EU Member States, the three countries of the European Economic Area and Switzerland. MISSOC is based on a close cooperation between the European Commission (EC DG EMPL, unit D/3), a network of representatives from the national competent authorities (the "National Correspondents") and a secretariat appointed by the Commission.

The MISSOC information base is entirely electronic and available free of charge. Its target groups include researchers, civil servants, policy-makers, organisations advising on mobility issues, citizens moving within Europe etc. As it supplies the source information needed to apply the EU coordination rules, MISSOC is of particular interest to those involved in EU social security coordination.

Among the main MISSOC outputs is the Comparative Tables database, which contains detailed information on 12 main social protection areas in 31 countries, presented in the form of comparative tables: financing, healthcare, sickness, maternity-paternity, invalidity, old-age, survivorship, accidents at work and occupational diseases, family, unemployment, guaranteed minimum resources and long-term care. The Tables database is complemented with separate, country-specific information on the organisation of social protection (charts and descriptions) and on the social protection arrangements for self-employed persons. The aforementioned information is available in English, French and German, and is updated twice a year. The information currently available is updated to reflect the situation on July 2012. The update for January 2013 will become available by the end of June 2013.

The Social Security Guide is a recent MISSOC product, first produced in 2010 on the basis of the existing guides "Your social security rights when moving in the EU". The Social Security Guides are aimed at explaining the national social protection systems in an accessible language to a broad audience, particularly citizens moving within Europe. The Guides are complementary to the more detailed information in the Comparative Tables, and follow a common structure. They are updated once a year. The 2012 edition is available in English, French and German on the MISSOC website. A translation of the Guides in 21 other EU/EEA languages can be downloaded from the European Commission website.

Another significant MISSOC product is the MISSOC Analysis. Drafted by the MISSOC Secretariat's academic experts, the MISSOC Analysis reports intend to provide a legal-analytical overview of significant developments on selected topics of social protection. The reports are based on information in the MISSOC Tables, next to other sources. Since 2012, the MISSOC Analysis is published in principle on a bi-annual basis. The latest issue is dedicated to an analysis of gender differences in social protection. The next issue, which will be available by summer 2013, will deal with a detailed description and evolution of means testing in Europe.

If you want to stay informed of MISSOC news and social protection developments in Europe, you can subscribe to the MISSOC E-newsletter, which is circulated twice a year (past issues can be consulted here).

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News from the Commission > Commission requests Romania to pay pensions to Greek citizens corresponding to the time worked in Romania

The Commission has requested Romania to comply with Regulation 1408/71 and Regulation 883/2004 on social security coordination when calculating the pension rights of Greek citizens who worked in Romania before its accession to the European Union.

The Romanian authorities currently refuse to take into consideration the periods of work of Greek migrants before the accession of Romania to the EU. This refusal is based on a bilateral agreement signed between Romania and Greece in 1996. In the context of that agreement, Romania paid Greece a fixed amount of USD 15 million and Greece is taking charge of the pensions corresponding to maximum 15 years worked. This means that working periods exceeding 15 years are currently lost in terms of pension rights for the workers.

The Commission considers that the bilateral agreement cannot be used to deprive the rights of individuals that are directly granted by EU law and that Romania owes the workers the additional pension rights even if they correspond to periods prior to the accession of Romania to the EU.

The request takes the form of a reasoned opinion under EU infringement procedures. Romania now has two months to notify the Commission of the measures taken to fully implement the Regulations. Otherwise, the Commission may decide to refer Romania to the European Court of Justice.

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News from the Commission > Commission refers The Netherlands to Court for discriminating against pensioners abroad

The European Commission has referred The Netherlands to the EU's Court of Justice for failing to notify measures to stop discriminating against pensioners who live abroad when paying out an allowance for elderly taxpayers. This results from a discriminatory condition under Dutch law for entitlement to the 'koopkrachttegemoetkoming oudere belastingplichtigen' (purchasing power allowance for elderly taxpayers).

Dutch legislation which entered into force on 1 June 2011 provides that the allowance is paid to persons aged 65 years and above who can show that at least 90% of their world income is taxable in The Netherlands. This condition means that in practice the allowance is not granted to people living outside The Netherlands. The Commission has received a large number of complaints from citizens.

Under EU law on social security coordination, entitlement to an old age benefit cannot be conditional on the pensioner living in the Member State where he or she claims the benefit. This rule enables pensioners to move to another Member State when they retire whilst retaining their pension.

As the purchasing power allowance is paid to people 65 years of above, which coincides with retirement age in The Netherlands, the allowance is classed as an old-age benefit under EU social security coordination rules as interpreted by the EU's Court of Justice. Therefore The Netherlands is required to pay the allowance to recipients of a Dutch statutory old-age pension who live in another EU Member State, Iceland, Liechtenstein, Norway or Switzerland.

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News from the Commission > Survey on the performance of the PROGRESS programme

The European Commission is starting the annual performance monitoring of the PROGRESS Programme by launching the Performance Survey for the year 2012.

PROGRESS is the EU employment and social solidarity programme established to support the implementation of EU objectives in the fields of employment, social affairs and equality and to contribute to the Europe 2020 Strategy.

PROGRESS is committed to results-based management, which involves the continuous measurement of the programme's achievements towards its objectives. This process relies on a variety of monitoring and information sources.

An internet-based survey is designed to collect data on the performance of the programme. You are invited to participate in the survey by filling out the questionnaire which should take approximately 15 minutes. The responses to this survey are strictly confidential and will not be divulged to anyone. This survey is executed on behalf of the European Commission by an external contractor (Public Policy and Management Institute).

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News from the Commission > Commission authorises Spain to extend existing temporary restrictions on Romanian workers

The European Commission has approved a request from the Spanish authorities made on 13 December 2012 to extend the temporary restriction on access for Romanian workers to the Spanish labour market until 31 December 2013 due to serious disturbances on its labour market. These restrictions cannot be continued after the end of 2013 as temporary restrictions on the free movement of Romanian and Bulgarian workers must be lifted in all Member States as from 1 January 2014.

The Commission's decision is based on a specific safeguard clause in the 2005 Treaty on the accession of Bulgaria and Romania. This clause allows Member States that have lifted restrictions on workers from Bulgaria and Romania to subsequently re-impose restrictions if there are serious disturbances on their labour market, subject to the Commission's agreement.

Spain opened its labour market to Romanian and Bulgarian workers in 2009, but in August 2011 the Commission authorised Spain to temporarily restrict the free movement of Romanian workers until 31 December 2012.

The number of Romanian nationals residing in Spain is currently 913,000 (September 2012) which represents 17% of the foreign population in Spain, and is a year-on-year increase of 12,000. According to the EU Labour Force survey, Romanian nationals living in Spain are strongly affected by unemployment, with 36.4% of the (economically active) Romanians in Spain unemployed – compared to 23.3% of Spanish nationals. The employment rate among working-age (15-64) Romanian citizens is only 50.8%.

The Commission will monitor the situation through updates provided by Spain every three months on the labour market situation. The Commission reserves the right to repeal its decision to allow a restriction to the access of the labour market at any time based on developments on the Spanish labour market.

See www.ec.europa.eu/social

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News from the ECJ > (Case C-619/11) Dumont de Chassart v ONAFTS

This request for a preliminary ruling concerns the interpretation of Articles 72, 78(2)(b) and 79(1)(a) of Regulation 1408/71. It has been made in proceedings between Mrs Dumont de Chassart and the Office national d'allocations familiales pour travailleurs salaries ('ONAFTS') concerning the latter's refusal to grant her family benefits for orphans in relation to her son. Mrs Dumont de Chassart, a Belgian national, is the widow of Mr Descampe, who was also a Belgian national. The couple had a son, Diego Descampe, also a Belgian citizen, who was born in France. Both had worked in Belgium and in France. Mr Descampe, on early retirement, passed away in France.

Mrs Dumont de Chassart and her son moved to Belgium, where, after working for about a month, Mrs Dumont de Chassart became unemployed. She applied to the Belgian ONAFTS for a family benefit for orphans in respect of her son and for a supplementary allowance for single-parent families. Both were granted. However, later on, ONAFTS decided to deny the applicant the family allowance for orphans on the ground that, during the 12 months immediately preceding the death of Mr Descampe, the latter had not fulfilled the conditions for claiming six flat-rate monthly payments of the allowance under Belgian legislation.

An important question in the national proceedings was whether Articles 72 and 79(1) of Regulation 1408/71 only referred to periods completed by the deceased person and thus precluded the Belgian ONAFTS to take into account periods of insurance and employment completed by the surviving parent in France, whereas such periods completed by a surviving parent in Belgium could be taken into account based on national legislation. When it reached the Belgian Labour Court, it decided to stay the proceedings and ask the ECJ whether Articles 72, 78(2)(b) and point (a) of the second subparagraph of 79(1) of Regulation 1408/71 must be interpreted as permitting account to be taken of, for the aggregation of periods of insurance and employment necessary in a Member State to gain entitlement to benefits for orphans, only of periods completed solely by the deceased parent in another Member State, excluding those completed by the surviving parent. If that is the case, the national court asks whether those provisions of Regulation No 1408/71 are compatible with the general principle of equal treatment and non discrimination.

The ECJ held that the rules laid down in Article 78 of Regulation 1408/71 seek to determine the Member State whose legislation governs the granting of those benefits. It is clear from Article 78(2)(b)(i) that, where the deceased parent was subject to the legislation of several Member States, the Member State of residence is specified as having the sole competence to grant the benefits in question. Those provisions are intended not only to prevent the concurrent application of a number of national legislative systems and the complications which might ensue, but also to ensure that persons covered by that regulation are not left without social security cover because there is no legislation which is applicable to them. By contrast, those provisions are not intended to lay down the conditions creating the right to benefits for orphans. It is for the legislation of each Member State to lay down those conditions.

For the purposes of Article 78(2) and the first subparagraph of Article 79(1) of Regulation 1408/71, the status of 'deceased employed person' constitutes merely a connecting factor which determines, first, whether those provisions are applicable and, second, in conjunction with the orphan's place of residence, which national legislation is applicable. Pursuant to the first subparagraph of Article 79(1) of Regulation 1408/71, it is thus for the competent Belgian authorities to pay the benefits concerned in accordance with Belgian law, as if Mr Descampe had been subject to that legislation alone. Once the Belgian legislation has been designated as the applicable legislation pursuant to which benefits for orphans are to be allocated, the existence of a right to benefits for orphans then depends on the content of the applicable Belgian legislation.

In that regard, it is not disputed that that national law authorises, in order to determine the existence of a right to benefits for orphans, account to be taken of periods of insurance and employment completed by both the deceased parent and the surviving parent. In those circumstances, pursuant to the rule laid down in point (a) of the second subparagraph of Article 79(1) of Regulation 1408/71, the competent Belgian authorities must take account, in accordance with the principle of aggregation of periods of insurance and employment, of periods of insurance and employment completed by the surviving parent in another Member State. Article 79(1) in no way restricts the scope ratione personae of that national legislation.

The Belgian Government submitted that the taking into account by the competent Belgian authorities, for the purposes of their aggregation, of periods of employment completed in another Member State requires a minimum period of employment to have taken place in Belgium during the reference period. However, a Member State which is competent to award a family benefit cannot demand that an insurance period must have been completed in its own territory in addition to periods of insurance and employment completed in another Member State.

It follows that Articles 72 and 79(1)(a) of Regulation 1408/71, far from precluding account being taken of periods of insurance and employment completed by the surviving parent of a child of a deceased employed person in another Member State, require, on the contrary, such account to be taken where the legislation of the competent Member State provides that a right to benefits for orphans can arise not only from the deceased parent, but also the surviving parent, provided that they have the status of employed persons.

News from the ECJ > (Case C-282/11) Salgado González v INSS and TGSS

This request for a preliminary ruling concerns the interpretation of Article 47 of Regulation 1408/71. It has been made in proceedings between Ms Salgado González and the Instituto Nacional de la Seguridad Social ('INSS') and the Tesorería General de la Seguridad Social ('TGSS') in relation to the amount of the old-age pension of the applicant in the main proceedings.

Ms Salgado González paid contributions in Spain to the Special Scheme for Self-Employed Persons from 1 February 1989 to 31 March 1999, i.e. a total of 3 711 days, and in Portugal from 1 March 2000 to 31 December 2005, i.e. a total of 2 100 days. She applied for a retirement pension in Spain. This retirement pension was granted to her by the INSS. Initially, the INSS fixed the amount of that benefit at EUR 371.36 per month (i.e. basic amount + adjustments and supplements). After an application for review by Ms Salgado Gonzalez, that amount was fixed at EUR 336.86 a month. That amount was obtained, pursuant to Spanish legislation, by adding the Spanish contribution bases paid between 1 April 1984 and 31 March 1999, namely, the 15 years preceding payment of the last contribution by Ms Salgado González in Spain, and by dividing them by 210. The applicant in the main proceedings having, however, started to pay contributions to Spanish social security only on 1 February 1989, those contributions paid between 1 April 1984 and 31 January 1989 were calculated as zero.

The action of Mrs. Salgado Gonzalez was brought to the High Court of Galicia, which asked the ECJ whether Article 48 TFEU, Article 3 of Regulation 1408/71 and Heading H, paragraph 4, of Annex VI, to that regulation, or paragraph 2(a) (Spain), of Annex XI to Regulation 883/2004 preclude legislation of a Member State, pursuant to which the theoretical amount of the retirement pension of the self-employed worker, migrant or non-migrant, is invariably calculated on contribution bases paid by that worker over the fixed reference period of 15 years preceding the payment of his last contribution in that Member State, divided by 210, when it is impossible for either the duration of that period or the divisor used to be adapted so as to take account of the fact that the worker concerned has exercised his right to freedom of movement.

In the case in the main proceedings, it is common ground that the INSS, in order to ascertain whether Ms Salgado González paid contributions during the minimum period of 15 years required under Spanish legislation, took account both of the periods completed in Spain and those completed in Portugal, in accordance with Article 45 of Regulation No 1408/71. In contrast, the referring court raises the question whether EU law precludes the methods for calculating the theoretical amount of the benefits concerned which are used by the INSS. In that regard, it should be noted that under Article 46(2)(a) of Regulation No 1408/71, the theoretical amount of that benefit must be calculated as if the insured person had worked exclusively in the Member State concerned. In addition, Article 47 (1)(g) provides that where, under the legislation of a Member State, benefits are calculated on the basis of average contributions, the competent institution is to determine that average by reference only to those periods of insurance completed under the legislation of that State. On top of that, Heading H of Annex VI to Regulation 1408/71, which sets out the specific rules for the application of the Spanish legislation, states at subparagraph (4)(a) that under Article 47 of that regulation, the calculation of the theoretical Spanish benefit is to be carried out on the basis of the insured person's actual contributions during the years immediately preceding payment of the last contribution to Spanish social security.

The ECJ held that, when calculating the theoretical amount of the benefit, the INSS did not calculate Ms Salgado González's average contribution by reference only to the insurance periods in Spain during the years immediately preceding the payment of the last contribution to Spanish social security, as required by Article 47(1)(g) of Regulation No 1408/71 and Heading H, paragraph 4(a), of Annex VI thereto. In fact, Ms Salgado González contributed to the Spanish social security system from 1 February 1989 to 31 March 1999, for a total of 3 711 days, i.e. approximately 10 years and 2 months, whereas the INSS adds a credited period running from 1 April 1984 to 30 January 1989 in order to fulfil the requirement of contributions spanning a period of 15 years preceding Ms Salgado González's last Spanish contribution. This calculation allowed the INSS to obtain a numerator to which to apply the divisor of 210 set out in Spanish legislation, and thus ascertain the average contribution basis required to calculate the basic amount of the retirement pension. Nonetheless, as Ms Salgado González did not pay contributions between 1 April 1984 and 31 March 1989, the INSS in its calculation took account of insurance periods which were not completed in Spain. Those periods having necessarily been calculated as zero, taking them into account had the effect of reducing Ms Salgado González's average contribution basis. No such reduction would have been made if Ms Salgado González had paid contributions only in Spain, without exercising her right to freedom of movement.

In the light of all of the foregoing, the answer to the questions referred is that Article 48 TFEU, Articles 3, 46(2)(a) and 47(1)(a) of Regulation 1408/71 and Heading H, paragraph 4, of Annex VI to that regulation must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, under which the theoretical amount of the retirement pension of a self-employed worker, migrant or non-migrant, is invariably calculated on contribution bases paid by that worker over a fixed reference period preceding the payment of his last contribution in that Member State, to which a fixed divisor is applied, when it is impossible for either the duration of that period or the divisor to be adapted so as to take account of the fact that the worker concerned has exercised his right to freedom of movement.

News from the ECJ > (Case C-127/11) van den Booren v RvP

This request for a preliminary ruling concerns the interpretation of Article 46a of Regulation 1408/71 and of Article 4(3) TEU and Articles 45 TFEU to 48 TFEU. It has been made in proceedings between Mrs van den Booren and the Rijksdienst voor Pensioenen (RvP, Belgian National Pensions Office; hereafter 'NPO') concerning the application of the Belgian rules against overlapping of benefits at the time of determination of the amount of the Belgian survivor's pension received by Mrs van den Booren.

Mrs van den Booren resides in the Netherlands. Her husband, Mr Bartels, who died, worked as an underground miner in Belgium. The Belgian NPO granted Mrs van den Booren a Belgian survivor's pension and from the same date Mrs van den Booren also received a Netherlands old-age pension. At a certain moment,

Mrs van den Booren's Netherlands old-age pension was increased with retroactive effect, due to a change in the Dutch legislation. After that, the NPO notified Mrs van den Booren that its decision had been revised, to the effect that, as a result of the increase in her Netherlands old-age pension, her Belgian survivor's pension, was being reduced. The NPO also requested reimbursement by Mrs van den Booren of the benefits overpaid.

When confronted with Mrs. van den Booren's appeal against this decision, the Labour Court of Antwerp appealed to the ECJ to ascertain whether the provisions of Regulation No 1408/71, and more specifically Article 46a thereof, must be interpreted as precluding the application of legislative rules of a Member State containing a provision under which a survivor's pension received in that Member State is reduced as a result of the increase in an old-age pension received under the legislation of another Member State, and whether, in the event of a negative reply, the primary law of the European Union, and more specifically Article 4(3) TEU and Articles 45 TFEU to 48 TFEU, prevents the application of such legislative rules.

It follows from Article 12(2) of Regulation 1408/71 that provisions on reduction laid down in the legislation of a Member State may, unless that regulation provides otherwise, be invoked against persons who receive a benefit from that Member State if they can claim other social security benefits, even when those benefits are acquired under the legislation of another Member State. An exception to the principle laid down in Article 12(2) of Regulation 1408/71 is contained in Article 46b(1) of that regulation, which provides that, in the case of overlapping of benefits of the same kind, provisions on reduction laid down by the legislation of a Member State do not apply to benefits calculated in accordance with Article 46(2) of that regulation.

In so far as it transpires that the Belgian survivor's pension received by Mrs van den Booren was calculated on the basis of the professional career of her late husband and that she receives the Netherlands old-age pension in her own right, those two benefits cannot be considered to be benefits of the same kind coming within the abovementioned exception. Consequently, Regulation 1408/71 does not prevent the application of a national rule against overlapping such as that referred to by the national court, provided that the limits imposed by Regulation No 1408/71 are observed.

In that regard, Regulation 1408/71 provides, in particular in Article 46a(3)(d), that, if a rule against overlapping is applicable under the legislation of only one Member State on account of the fact that the person concerned receives benefits of the same kind or of a different kind payable under the legislation of another Member State, the benefit payable under the legislation of the first Member State may be reduced only within the limit of the amount of the benefits payable under the legislation of the other Member State. Accordingly, pursuant to that rule, the Belgian survivor's pension of the person concerned may be reduced only within the limit of the amount of the Netherlands old-age pension. In those circumstances, the conclusion on that point must be that Article 46a of Regulation No 1408/71 does not preclude the application of legislative rules of a Member State containing a provision under which a survivor's pension received in that Member State is reduced as a result of the increase in an old-age pension received under the legislation of another Member State, provided, in particular, that the conditions set out in Article 46a(3)(d) are observed.

However, the Court added that the finding that a national measure may be consistent with a provision of a secondary law measure, in this case Regulation 1408/71, does not necessarily have the effect of removing that measure from the scope of the Treaty's provisions. Accordingly, it is for the national court to assess the compatibility of the rules of national legislation at issue with the requirements of European Union law by determining whether the Belgian rule against overlapping, which admittedly applies without distinction to Belgian nationals and to nationals of other Member States, does not in fact lead, in respect of the person concerned, to an unfavourable situation in comparison with that of a person whose situation has no cross-border element, and, if such a disadvantage is established in the present case, whether the national rule at issue is justified by objective considerations and is proportionate to the legitimate objective pursued by national law.

News from the ECJ > Comment on ECJ case C-379/11 'Caves Krier Frères' by Nicole Kerschen, Luxembourg trESS expert

In the *Caves Krier Frères* case, the ECJ states that "Article 45 TFEU precludes" Luxembourg legislation, "which makes the grant to employers of a subsidy for the recruitment of an unemployed person aged over 45 years subject to the condition that the recruited unemployed person has been registered as a jobseeker" in Luxembourg, "in the case where such registration is subject to a condition of residence in the national territory, this being a matter for the referring court to verify". Although Regulation 1408/71 is not directly involved, this case law is an example of the complexity of the position of a frontier worker who seeks a job in the Member State of last employment and who intends to benefit from activation measures promoting the recruitment of special categories of unemployed workers in that Member State.

Beyond the particular case, the importance of this case-law is three-fold:

- the EJC considers that a practice, which imposes indirectly a residence condition for the grant of a recruitment subsidy, restricts the workers' freedom of movement and conflicts with Article 45 TFEU;
- the ECJ also recalls the conditions that Member States have to fulfil if they want to make restrictions to the workers' freedom of movement acceptable;
- in addition, the ECJ specifies the discretionary power of the Member States regarding the shaping of their social policy and develops the theory of "the sufficient link of integration with the society", which allows frontier workers to benefit from the principle of equal treatment as compared with national workers and residential workers.

A Luxembourg wine producer recruits a Luxembourg national, aged 52, who resides in Germany. This worker has spent her entire working life in Luxembourg and has been temporarily unemployed before being recruited. The employer submits an application to the Luxembourg employment office ADEM for a subsidy in respect of the recruitment of an unemployed person over 45 years of age. ADEM rejects the application on the ground that the worker did not fulfil the condition of having been registered as a jobseeker with ADEM for at least one month.

The employer appeals against the decision of ADEM before the Administrative Court, pleading the breach of the principle of equality before the law. The Administrative Court dismisses that action. The employer appeals against that judgment to the Higher Administrative Court. The latter states that "it is common ground that only residents may register with ADEM," but also that the recruitment subsidy is conditional on such registration and, in fact, the subsidy is reserved for employers who recruit resident unemployed workers. The Court refers the following question to the Court of Justice for a preliminary ruling:

'Is the first paragraph of Article L. 541 1 of the Luxembourg Labour Code compatible with EU law, and more particularly with Articles 21 [TFEU] and 45 [TFEU], in so far as it subjects the right of private-sector employers to reimbursement of both the employer's and the employee's share of social security contributions upon the recruitment of unemployed persons aged over 45 years, regardless of whether they were receiving unemployment benefit, to the condition that the unemployed persons must have been registered as job seekers with a placement office of [ADEM] for at least one month, while employers who recruit unemployed persons registered as job seekers with equivalent foreign bodies do not benefit from that measure?'

The ECJ answered to this question by developing three main arguments.

Condemnation of a practice that imposes a residence condition

The ECJ does not condemn the Luxembourg legislation because it imposes a residence condition for the registration of a jobseeker to ADEM. No provision in Luxembourg legislation prescribes such a residence condition. However, it condemns a practice on which the Luxembourg court based its interpretation of the national law: "it is common ground that only residents may register with ADEM". Therefore, it sought several pieces of evidence: the fact that Luxembourg courts accepted that interpretation, the indication of a residence condition on ADEM's internet site and preparatory documents from the Luxembourg Parliament relating to the reform of ADEM from 2012, suggesting that before 2012 access to all the services of ADEM was not possible for workers residing outside Luxembourg.

As a consequence, the ECJ held that this practice introduces a difference of treatment between nationals of the Member States who have the status of jobseekers residing in Luxembourg and nationals of the Member States who are residents in another Member State (in casu Germany). It places these workers at a disadvantage: access to employment in Luxembourg will be more difficult in case of unemployment, because employers established in Luxembourg may not obtain the recruitment subsidy provided by Luxembourg legislation. The ECJ decides that the concerned legislation constitutes a restriction of the workers' freedom of movement guaranteed by Article 45 TFEU.

News from the ECJ > Comment on ECJ case C-379/11 'Caves Krier Frères' by Nicole Kerschen, Luxembourg trESS expert

Reminder of the conditions of the acceptability of restrictions of the workers' freedom of movement

The ECJ recalls that a measure restricting the freedom of movement of workers may be acceptable, but only if it pursues a legitimate aim compatible with the Treaty and if it is justified by overriding reasons in the public interest. In this case, Luxembourg had to show that the measure was appropriate for securing the attainment of the objective relied upon and that it did not go beyond what is necessary to attain it. But Luxembourg did not put forward any evidence to justify the residence condition in terms of overriding reasons in the public interest.

The theory of "the sufficient link of integration with the society"

Finally, the ECJ tackles the discretionary power of the Member States shaping their social policy. On the one hand, Member States have a broad discretion in exercising their power. On the other hand, their discretionary power may not conflict with the "rights granted to individuals by the Treaty provisions in which their fundamental freedoms are enshrined". Inside this framework, the ECJ develops the theory of the sufficient link of integration established by a migrant worker or a frontier worker with the society of a Member State. This sufficient link of integration arises particularly from two facts: participation in the employment market of the Member State and payment of taxes, which means contributing to the financing of social policy. It allows migrant workers and frontier workers to benefit from the principle of equal treatment with national workers and resident workers.

In this case-law, the ECJ applies the theory of the sufficient link of integration to registration as a jobseeker in the Member State of last employment. Are we to interpret this as a warning directed towards the Member States, in particular Luxembourg, regarding their attempts to exclude frontier workers from some of the benefits of the welfare state?

Since the ECJ judgment, ADEM has changed its Internet site on jobseekers registration. The residence condition has been replaced by the social insurance card. A jobseeker, who wants to register with ADEM must either present a Luxembourg social insurance card or a U2-form. Does this mean that ADEM considers the social insurance card as a material evidence of "the sufficient link of integration with the Luxembourg society"?

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SSC literature corner

Please find a selection of recent publications in the field of EU social security coordination below:

HIESSL, C., Basics on European Social Law, Linde Verlag, Wien, 2012.

ROBERTS, S., "An Introduction to the UK National Health Service" in Klein, H. and Schuler, R. (eds), Krankenversicherung und grenzüberschreitende Inanspruchnahme von Gesundheitsleistungen in Europa, Nomos, Baden-Baden, 2011.

SCHOUKENS, P., "Explicit Competence to Coordinate Social Security of Highly Mobile Workers – The Case of the Moving Researchers in the EU", Pravnik, Nos. 5-6/2012, 351-390.

STRBAN, G., "Distinctive long-term care schemes as a response to changed family structures and demographic situation", Pravnik, Nos. 3-4/2012, 249-278.

USCINSKA, G., Instrumenty prawne swobody przemieszczania się obywateli UE. Koordynacja systemów zabezpieczenia społecznego. Aktualne problemy i wyzwania, w: Prawo pracy w świetle procesów integracji europejskiej: księga jubileuszowa Profesor Marii Matey-Tyrowicz, red. J. Wratny, Magdalena B. Rycak, [Legal instruments of freedom of movement of EU citizens. Coordination of social security schemes. Current problems and challenges, in Labour law in the light of the processes of European integration: the anniversary book of Professor Maria Matey-Tyrowicz, ed. J. Wratny, Magdalena B. Rycak, aut. Krzysztof Wojciech Baran [et al.] Wolters Kluwer Polska, Warsaw 2011, page 141-158].

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