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Contents

INTRODUCTION

1. Informing and training the social security bodies and the European citizens
 - 1.1 Informing the public and the social security bodies: preparing for action
 - 1.1.1 From documents for the wider public to targeted information
 - 1.1.2 Information for the social security institutions: the development of circulars
 - 1.2 Training of staff
 - 1.3 Some conclusions

2. Transitional provisions
 - 2.1 Problems of interpretation
 - 2.1.1 Extent of problems
 - 2.1.2 Circulars as tools
 - 2.1.3 Some issues of interpretation
 - 2.2 Preparation for the Electronic Exchange of Data (EESSI)
 - 2.3 Some conclusions

3. Implementing issues during the first months
 - 3.1 General Principles
 - 3.1.1 Aggregation of periods/assimilation of facts
 - 3.1.2 Applicable legislation
 - 3.1.3 Export of benefits
 - 3.1.4 Other issues
 - 3.2 Different Risks
 - 3.2.1 Sickness benefits in kind
 - 3.2.2 Unemployment benefits
 - 3.2.3 Family Allowances
 - 3.3 Some conclusions

INTRODUCTION

Preparations for the application of Regulations 883/2004 and 987/2009

The European report 2010 is not a traditional report like the previous years, aiming to inform the reader on implementing problems of the Regulatory framework on coordination of social security schemes. On the contrary, the recent entry into force of the new Regulations, 883/2004 and 987/2009, on 1 May 2010 makes it very difficult to inform the reader at this early stage about issues of application and to draw any conclusions.

However, this new Regulatory Framework poses different challenges for the social security institutions that will have to implement the new provisions. The dissemination of information is certainly one of the most important challenges. The wider public, and also the administrations dealing with the implementation of the Regulation, must receive all the necessary information on the new developments and the associated guidance and instructions for national implementation of these new texts. Public tools have to be developed to inform the citizens as well as concrete instructions for staff. The first chapter of this report therefore focuses on the methods used to prepare staff for the application of the new Regulations as well as to inform the wider public.

During a “transitional” period the old Regulations 1408/71 and 574/72 and the new ones 883/2004 and 987/2004 will apply alongside each other. The second chapter will look at the special transitory provisions foreseen in the new Regulations that deal with the interrelationship with the provisions of the old-regulations. One of the most important new features of the Regulatory framework and one of the centrepieces of the new Regulation is the electronic data exchange System (EESSI). Already in our previous report of 2009 we have indicated that social security institutions have had to take decisions on the competences and the rights and obligations of the institutions involved in relation to the administration of the exchange of data and the access points. Different institutions are preparing the process of translating messages, defining prioritisation criteria (i.e. which message first), as well as seeking partners in other Member States to test the new processes. Several countries also gave some indication of the problems encountered with the preparation of this new tool of exchange of data, which is the reason why we have included at the end of this second chapter some examples of the concerns expressed in the Member States.

Notwithstanding the short period of time that has elapsed between the entering into force of the new Regulations and writing these reports (May to October 2010), some countries have already mentioned problems encountered in the application of the new provisions. It is for this reason that we have decided to include a third chapter informing the reader about the first months of application of the Regulations without however drawing any general conclusions.

1. INFORMING AND TRAINING THE SOCIAL SECURITY BODIES AND THE EUROPEAN CITIZENS

1.1 Informing the public and the social security bodies: preparing for action

The greatest challenge facing the various stakeholders during the first months is how to prepare staff to work with the new texts, modifications, and new procedures etc.

The Netherlands developed a communication strategy to inform about the new Regulatory Framework which includes identifying roles. In his co-ordinating role, the Ministry of Employment and Social Affairs took the initiative to organise regular meetings to which the communication advisors of the key-players were invited. The participants in these meetings conferred on the strategy to be followed to disseminate relevant information with the aim to make sure that the activities developed in this area are attuned to one another. These meetings resulted, inter alia, in a mutual agreement on the division of tasks. According to this agreement, the Ministry of Employment and Social Affairs is primarily responsible for distributing information at the national level, whereas the competent institutions are charged with ensuring that their 'clients' are well-informed. Whereas the Ministry of Employment and Social Affairs will concentrate on providing general information on the overall purpose of the reforms, the competent institutions jointly agreed that each will inform its own clients about the reforms, including the consequences the reforms may have in certain situations, taking the transitional provisions into account. In the United Kingdom the Department for Work and Pensions (DWP) developed a plan whose objective was to identify and plan any future changes that would arise as a consequence of associated changes that were scheduled to take effect following the introduction of the new regulations. To achieve these aims each Department affected by the changes set up their own individual projects to reflect their own interests and concerns and contribute to an over-arching cross-departmental team to take an overview of the UK's overall interests and position. The Project identified a total of 29 activities that would require change as a consequence of the introduction of the new EU Regulations from 1 May 2010. For every key change identified the Project has delivered a series of activities or products to facilitate the introduction of the relevant change. These related to technical/awareness communication products; E-Learning training modules; revision of DWP guidance; revision of DWP internal documentation; revision of DWP customer letters; revision of small DWP IT systems and updates to relevant websites.

1.1.1 From documents for the wider public to targeted information

A wide variety of documents have been drafted in order to reach different groups of stakeholders. While some documents are targeted more generally towards the wider public, others were written for the members of staff involved in the application of the new Regulations.

1.1.1.1 How to reach people?

One problem with regard to the initiatives to inform the wider public is that the development of general brochures or leaflets does not always guarantee that the appropriate groups of persons are reached. Usually people only seek information when they have a specific need. Therefore there is a need to target individualized information, either directly or indirectly via their representative organizations, to those people who are confronted with the EU-Regulations.

In order to provide information to the persons concerned the specialized office of the Romanian National House for Pensions and other Social Security Rights has sent letters to all employers who usually post their employees to other EU Members States, informing them about the changes of the

provision of the Regulations regarding the applicable legislation and the procedures to be followed by them. As the Regulations have the most immediate impact on the posting of employees, priority has been given by the Department of Social Protection to ensuring that employers and others who are active in this area are fully aware of the revised provisions that affect posting and their likely impact. While awaiting the issue of the revised version of the EU Guide, the Department has developed and issued a national guide on procedures and entitlements in relation to posted workers. The Austrian Health Insurance Institutions produced a special booklet which is dealing with the issue of applicable law in cross border situations for those employers who provide services also in other Member States. In Malta meetings with employers' organisations and accountancy firms have also provided an opportunity to exchange relevant information on the new regulations. Similar initiatives were taken in the Czech Republic and in Belgium. In the latter the National Social Security Office (NSSO) has organised road shows in collaboration with employers' organisations and consultancy companies and the development and distribution of a flyer (in Dutch and French) with basic and accessible information on the main innovations in the field of applicable legislation. However, it was reported that full detailed guidance for employers was not provided as past experience has taught that they tend to use external consultancy (for example, lawyers, "social secretariats") when confronted with complex and technical information. The Finnish Centre for Pensions (ETK) has also given training in relation to the provisions concerning the applicable legislation to employers and other relevant organisations including the tax authority and supervisory authorities such as the occupational safety and health administration. In Sweden, the social security institutions have developed 'facts-sheets' for employers on different issues to inform them about the legislation and legal issues.

In Estonia, information has been offered pro-actively to employer and employee representatives, but this has not met with much interest. The Polish Social Insurance Institution (ZUS) is making efforts to publicise knowledge of the legal provisions by providing legal advice to entrepreneurs undertaking an economic activity on the territory of another Member State and workers who are employed or self-employed in other countries. In the Netherlands, the Social Insurance Institute Offices for German and Belgian Affairs, for example, are actively communicating with frontier workers to inform them about the implications that the new regulatory framework may have for them. Furthermore, specific meetings have been organised to give information to branch-organisations in the transport sector.

1.1.1.2 Migrant workers abroad

An important challenge is how to reach migrant workers, who are by definition often abroad. For that reason, stakeholders have not only organized events in the country concerned, but have also frequently set up mechanisms to reach their migrant workers in countries where they are mostly working and/or residing. In Ireland, liaison procedures have been set up with the Department of Foreign Affairs to ensure that Irish Embassies abroad are aware of the changes and the processes in place, as it is envisaged that residents are likely to be approaching the Embassies for guidance. The Polish Embassy in Belgium has initiated a project aimed at providing advice in the area of social security entitlements for Polish citizens residing in Belgium; the counselling is planned to expand to cover other Member States – in the first instance, France. Since Polish citizens residing abroad often turn to the Polish diplomatic offices and consulates for the information on their rights to health care services, communications were sent to the Ministry of Foreign Affairs with a request to publish this information on the official websites of the diplomatic offices and consulates operating on the territory of other EU Member States. The Department for the International Cooperation of the Polish National Health Fund (NFZ) works together with an internet portal ("Powroty" or "returns" portal), through which Polish citizens who plan to return to their country can obtain a number of practical guidelines that deal with the formalities necessary in order to return to Poland. Information on the "Powroty" portal has also been updated in the area of the new coordination provisions.

In Belgium, the institution responsible for unemployment benefits, the RVA-ONEM, has developed a checklist for unemployed persons looking for work in another Member State that contains an overview of the requirements to be fulfilled, and which is circulated via the trade unions. For the trade unions (responsible for paying unemployment benefit), the RVA-ONEM has sent an instruction which gives an overview of the main changes introduced by the new Regulations in the field of unemployment, and their impact on the existing rules and procedures including the use of European forms. In Belgium some of the national social security institutions did not initiate any information campaigns directed towards the insured persons, this being mainly the responsibility of the cooperating institutions, such as sickness insurance funds or family benefits funds. This is an example of how the internal organisation of a social security system can have an impact on who will be responsible for the distribution of information on the new Regulations.

Other stakeholders also took specific initiatives to address their members' interests. For example, in autumn 2010 the Dutch employers organisation AUVN organized a cycle of five workshops focused on specific issues in regard to labour migration to clarify the implications of the new Regulations for employers. While the Luxembourg Bankers' Association (ABBL) published on its website an article 'on impacts of the Regulations on coordination of social security systems for the Luxembourg financial sector'.

1.1.1.3 Individualised information

In anticipation of an increase in the number of questions from individuals about the new provisions, several initiatives have been taken to provide more individualized information. Romania has increased the numbers of the working hours dedicated by the staff of the National House for Pensions and other Social Security Rights to direct contact (face to face and phone calls) with the public on the issues of coordination of social security systems. In Ireland, Poland and Slovenia special contact persons have been designated with email/postal address/and telephone details made public to deal with queries and to facilitate applications. In Sweden, the online service 'Hanna' to which an individual can ask anything about the social security system or the Swedish Pension Agency has set up a telephone service to deal with coordination questions.

The Austrian Pension Insurance Institutions have initiated regular "consultation-days" where individual information about international pension issues can be obtained. These consultation-days take place in Austria as well as in neighbour countries in cooperation with the respective pension institutions (Germany, Italy, Liechtenstein, Croatia, Switzerland, Slovakia and Hungary).

To optimise information to persons who are immediately affected by the new Regulations, Austria provides specific information with regard to the new obligation to pay contributions to the Austrian Health Insurance from foreign pensions. The pensioners with residence in Austria who are affected by these new rules have been informed by the Austrian Health Insurance Carriers by means of individual letters sent out in June. The Ministry of Health in Cyprus has also sent letters to the relevant retired persons providing information on the changes concerning the European Health Insurance Card. Residents in Ireland for whom another Member State is now competent for their healthcare costs have been advised by letter to apply to their competent state for their EHIC. In Slovenia too social security organisations have contacted and informed insured persons to whom the major changes relating to EHIC and Slovenian health insurance card apply, directly by post. Estonian authorities have also contacted pensioners and their dependants who previously would have obtained a European Health Insurance Card from the authorities of the Member State to which they moved and will now automatically received this card from the Estonian Health Insurance Fund, by letter explaining the new rules and arrangements. However, persons to whom the right to choose under article 87 (8) of Regulation 883/2004 (on applicable legislation) applies are at present not

being directly informed about the new rules and the related options. The Estonian Social Insurance Board would welcome information about procedures in other Member States concerning this matter.

1.1.1.4 Tools used

Some countries have organised special media events. In Romania, a public information campaign using the radio has taken place to disseminate information on the coordination of family benefits. In Austria on the other hand, the only topic which has been discussed in the media was the new obligation to pay contributions to health care insurance for foreign pensions. In Cyprus it was reported that the short film (DVD) prepared by the European Commission on the new regulatory framework was translated into Greek and was used as an important resource in all the seminars organized by Social Insurance Services. This task was financed by EURES Cyprus.

The use of the internet is seen as the most important tool to inform citizens. Several countries therefore emphasize how the websites of the key-institutions have been updated (Austria, Bulgaria, Czech Republic, Estonia, Ireland, Latvia, Luxembourg, Netherlands, Poland, Portugal, Romania and Sweden). In several cases a list of frequently asked questions and answers has been developed (for example, in Romania, by the National Employment Agency). In France the CLEISS made up an interesting tool for posting: by defining various parameters, (country of establishment of the employer, country from where the employee is posted, country where the employee is posted, nationality of the employee, duration of the posting), an internet user can know which rules are applicable and which legislation is competent. The CLEISS website also invites all the users to visit other relevant websites for more information: EC website, trESS website, etc.

Some countries have developed brochures in paper format. In Luxembourg the National Health Fund (CNS) published first a press release highlighting the most important new provisions and then put a Document with questions and answers, named 'Foire aux questions', on Internet. In Slovenia, the two biggest social security institutions, issued special brochures in paper format. In Belgium, a flyer was developed for the general public, explaining in a citizen-friendly manner the rationale of coordination, its scope and the main changes compared to the previous system. In Malta the Department of Social Security has included information about social security rights when moving within the Union. It is intended to augment the information made available on the website with leaflets. In the Czech Republic the Ministry of Labour and Social Affairs has published a book which contains a short introduction to the coordination principles and basic coordination rules, the full text of both new regulations, and also some selected decisions of the Administrative Commission. This book is likely to be more useful for people who administer coordination in the various institutions, but could also be of relevance to some citizens with an interest in coordination.

In other countries however the development of flyers was not believed to be essential (Czech Republic, Estonia and Portugal).

In summary, while in some countries the initiatives taken were considered to be sufficient and proportional (Estonian), other countries had more doubts and were more critical. In Spain it was considered that adaptations made to the web-site were very limited (only a few pages with for example no information on unemployment benefits) and very general so that it is unlikely that it will be useful to citizens with specific social security problems.

1.1.2 Information for the social security institutions: the development of circulars

Internal manuals and circulars are important instruments to inform the different social security institutions – and sometimes also the wider public - about reforms. The development of circulars was a common approach amongst Member countries. In Italy, for example, the National Authority for

Social Security (Istituto nazionale di Previdenza sociale- INPS) adopted ten administrative acts in order to inform the officials, the citizens and the entities involved in the application of social security coordination provisions. These documents aim also at coordinating the new regulation with the specificities of the Italian social security system. In France the Ministry of Social Security or the social security institutions (the CNAV, The French old age scheme for employees of the private sector or the ARRCO-AGIRC compulsory retirement schemes) have issued several administrative circulars. Several circulars have also been published in Belgium, Cyprus, Finland, Germany and Luxembourg. Finland will publish guidelines for the public in the near future.

Some countries went even further and developed an extensive guide to the new Regulations. For example the Netherlands, within the framework of the CVA (Committee of Social Security Issues that unites delegates of the departments and institutions of social security and that serves as a consultation body for cross-border social security matters), the Dutch key-players joined forces in order to design an explanatory statement which is meant to serve as a guide for those to whom the new Regulations apply and/or for those who are involved in the implementation of the new rules. The work of the CVA has resulted in a large and impressive document (245 pages for Regulation 883/2004 and 161 pages for Regulation 987/2009). Other countries, however, did not follow this approach. The Belgian competent Ministries (Social Security; Labour, Employment and Social Dialogue) have not (or at least not yet) elaborated comprehensive guidelines for the competent institutions on the implementation and interpretation of the new coordination Regulations' provisions. Plans for the development of such guidance have been postponed due to extra workload in connection with the Belgian presidency of the EU Council in the 2nd half of 2010. At this stage, provided that the institutions - as seems to be the case today - do not report major problems in the coming months - the production of such guidance is likely not to go ahead.

1.2 Training of staff

Another crucial issue is the training of staff in the various social security administrations which is a very important condition for the successful implementation of the new regulations (Bulgaria). Many countries started well in advance (Netherlands, Slovenia...) also taking into account the large time period between the adoption of the Regulations and their entry into force. Perhaps paradoxically, the long time that was required to agree on the implementing regulation was beneficial (Slovenia). It allowed enough preparation time to get acquainted with the new basic regulation.

Through the trainings sessions, knowledgeable persons at the ministries and social security organisations are cascading that knowledge to colleagues. In Finland, for example, the Kela (The Finnish Social Insurance Institution) organised training for its staff concerning the new Regulations through seven identical one day sessions. The objective of the general training day was to give an overall picture of the changes. The aim was that people who did not have an understanding about the coordination rules would nevertheless also be able to follow the training. All seven general training days were followed by specialised training targeted to clerks who work in Kela's specialised units for handling international cases. A general presentation of the new regulations is available for the entire staff in the form of an e-learning training course on the Kela intranet.

The trESS seminars played an important role in this respect. In Slovenia it is emphasized that although, at first there was an idea to organise a common conference by the two responsible ministries, it has not been realised also due to the very good organisation and participation at the trESS national seminar. Instead, at the special request of the Ministry of Labour, Family and Social Affairs, the Minister and his general director gave presentations at the trESS seminar. A special invitation to participate at the trESS seminar was sent by the Minister to the directors and other high level officials of the social security institutions.

In some countries external expertise was called in to give training. In France training was given by the EN3S, the French national school for social security managers, which has been required by the Ministry of Social Security to organize the training of staff at national and local level on the subject of the impact in French law of the new regulations. Malta opted for a more cautious approach similar to that which was adopted when Malta became a member of the EU when staff training had been provided on a small scale prior to membership with more intensive training programmes taking place after implementing the EU co-ordination rules commenced. In support of these in-house training courses, the Social Security Department has sub-contracted the services of an expert from the UK on co-ordination matters.

1.3 Some conclusions

Informing the staff of the social security institutions as well as the wider public is of paramount importance for the good functioning of the new Regulations. It is crucial that targeted actions are undertaken that reach, in particular, those people who are directly involved in the new Regulatory Framework. The development of websites with questions and answers as well as brochures and circulars are important tools in this respect.

2. TRANSITIONAL PROVISIONS

2.1 Problems of interpretation

2.1.1 *Extent of problems*

A second issue concerns the transitional provisions foreseen under the Regulations. The transitional periods do not seem to pose too many problems for several countries (Estonia, Cyprus, Italy, Poland, Portugal, Spain, Sweden ...); although this might be due to the short term nature of the provisions (Poland) or perhaps that no targeted effort has been made to inform potentially affected persons of their right of choice.

This is different in comparison to previous occasions when the Regulation entered into force. For example, claims that there were problems were more common when Regulation 1408/71 was implemented for the first time in a country, as noted by Slovenia and Austria. In the latter, the Austrian Pension Insurance Institutions in particular noted the difference with the situation in 1994, when Austria joined the EU. While on the first of January 1994 a very large number of proceedings concerning the reassessment of benefits had to be carried out due to the transitional provisions of Regulation 1408/71 (Art 95 (5)) and Regulation 574/72 (Art 118), no comparable rush of claims for reassessment of benefits is expected with the implementation of Regulation 883/2004. This is of course also the result of the provisions of article 87 (4) and (7) Regulation 883/2004 according to which an obligation of reassessing benefits is only imposed in cases where there was no entitlement to benefits because of residence or nationality before May 2010. The Austrian Pension Insurance institution nevertheless is considering an broad interpretation for implementing the transitional provisions to take into account all kinds of reasons apart from residence and nationality, which may produce entitlement to benefits for the first time or under better conditions than under Regulation 883/2004. According to the Austrian Pension Insurance institution, other reasons which could entitle a person to a reassessment of benefits are – depending on the approach of the involved foreign institutions as well - extension of the personal scope (Art 2 Regulation 883/2004); different consideration of insurance periods subject to possible amendments at Community level (Art 6 and Art 45, 57 Regulation 883/2004 and Art 12, 13 Regulation 987/2009); new evaluation of minimum insurance periods (Art 57 Regulation 883/2004) and (pro-rata) children allowance (Art 69 (2) Regulation 883/2004).

2.1.2 *Circulars as tools*

In some Member States, circulars were developed for explaining the transitional provisions. In Belgium for example, the National Institution for Family Allowances has instructed the funds to examine all existing cases of overlapping entitlements in the light of the priority rules contained in Regulations 883/2004 and 987/2009, and to adapt to the new situation as necessary. In case the priority situation changes, the other State concerned has to consent. The circular states that, even though this is not explicitly mentioned in the new Regulations, the former priority arrangements continue to apply pending this agreement. The circular goes on to state that situations in which award of benefits was refused or suspended because of the nationality or the place of residence of the person concerned - as was the case for guaranteed family benefit - are to be reassessed after 1 May 2010 on the basis of the new Regulations at the request of the person concerned or upon the regular (annual or biannual) review by the fund. In cases where an entitlement is identified, the benefit is granted as of 1 May 2010. In France a circular contains a full description of all the transitional rules. The circular introduces rules on the determination of the applicable legislation, the coordination of benefits and electronic data exchange. As regards the rules on conflict of law rules

and the transitional period, the French central administration underlines the fact that the period of 10 years during which the rules of conflict of law of Regulation 1408/71 can continue to apply depends entirely on the will of the benefit recipient. Therefore, there is no need of a declaration or request by individuals to remain subject to rules of conflict of the old regulation, or letter of approval by the social security institution. On the contrary, it is only if the person expresses a wish that the new rules of conflict will apply before 1 May 2020. However, if the situation of the person changes, the new rules will automatically become applicable. The circular notes that the conditions under which a situation is changed needs further explanation by the Administrative Commission. In the meantime, the French administration considers that a situation remains unchanged if no new element occurs which would have led to a different legislation being applicable under Regulation 1408/71. The circular also explains the solutions applicable to ongoing postings at the date of 1 May 2010. « Article 17 agreements » in force on 1 May 2010 become « Article 16 agreements » automatically. In Greece two circulars from the Social Security Institution and the Insurance Organisation of self employed persons have been drawn up that describe the transitional provisions that apply to posting.

2.1.3 Some issues of interpretation

In some other countries questions were raised with respect to the interpretation of the transitional provisions. In Estonia, a (thus far) theoretical issue was discussed where the transitional arrangements lead to situations for which special provisions previously existed in Regulation 1408/71. As only title II of Regulation 1408/71 can remain applicable (and not the other provisions), the question is in how far the new rules are relevant and applicable to these cases - and which rules should be applied if they are not. In the Czech Republic questions have risen recently in connection with self-employed persons registered as such in the Czech Republic and employed in another Member State. These people participated in the Czech health care system, but if they were only registered but not earning, they could be provided health care in the Czech Republic without contributing to the system. Czech health care insurance companies are currently reflecting on how to apply Article 87 paragraph 8, and to find out how the situation of such insured persons has changed. In Finland, the provisions have been considered in situations where there is activity in two or more Member States and in situations where a person works for diplomatic missions and consular posts as the special rule for legislation applicable for these persons have been abolished. It has been considered in which circumstances the situation remains unchanged and in which it should be considered to have changed. In Cyprus, some difficulties were experienced around the applicable legislation and the pace of the procedures. Some administrations in other Member States were reported by the Cypriot administration to take too long to deal with documents.

Another problem encountered is the accumulation of documents in printed form (for example, with regard to the particular category of drivers involved with road transportation and the document A1 issued by all the Member States in the event where the transportation takes place all over Europe) and the difficulties relating to the control of the information contained in the documentation.

In Luxembourg problems arose with respect to the provision of Article 87 (10) according to which the provisions of the second sentences of Article 65(2) and (3) (unemployment benefits for persons residing in a State other than the competent State) shall be applicable to Luxembourg at the latest two years after the date of application of this Regulation. Do these provisions only allow the frontier workers to register as a jobseeker in Luxembourg or do they open a right for the frontier workers to access to active back to work measures organized by or for the Luxembourg Public Employment Service? It should also be remembered that Luxembourg got, during the negotiations of the new Regulation, an exception to article 65 (7), which extended the period of reimbursement of unemployment benefits from three to five months when the person concerned has, during the preceding 24 months, completed periods of employment or self-employment of at least 12 months

in the Member State of last employment. As far as relations between, on the one hand, Luxembourg and, on the other hand, France, Germany and Belgium are concerned, the application and duration of the period referred to in Article 65(7) shall be subject to the conclusion of bilateral agreements. Until now, only Germany has asked Luxembourg to open bilateral negotiations on the application and the duration of the period referred to in article 65 (7). Finally, in the Netherlands the UWV (one of the institutions responsible for the payment of the benefits) indicates that the only major change the new Regulations introduce is that the Dutch invalidity benefit scheme will be regarded as a B-system for the calculation of these benefits, whereas it used to be a A-type system under Regulation 1408/71. The same goes for Belgium. The German invalidity benefit scheme was already regarded as a B-type system. Given the experience of Belgium and the Netherlands with the German B-type system, no specific problems are expected as a result of this change. The perspective changes somewhat when the transitional provisions are taken into account. Accordingly, every Belgian person with an invalidity benefit and a Dutch 'labour history' can, theoretically, ask for a recalculation of his or her benefit on the basis of Article 87 of Regulation 883/2004. The UWV realised that, consequently, a sort of 'preliminary' calculation needs to be made in order to enable the person concerned to make an informed decision on what to do. By the end of September 2010 the Belgian institution responsible for sickness cash benefits had received around ten requests for review of pension rights from persons who have been subject to Belgian and Dutch legislation or to Belgian and French legislation (all of which have become type B-legislations under the new coordination system).

2.2 Preparation for the Electronic Exchange of Data (EESSI)

Several countries however mention (expected) problems with the electronic exchange of data. The key players in the Netherlands, as one of the 'EESSI-testing countries', emphasised that they were involved in the implementation process from an early stage. This had several advantages. For example, serving as a 'guinea pig' for testing the EESSI directory service offered the opportunity to discover possible shortcomings in the national system for exchanging information on social security issues between institutions. However, in the process of testing the new EESSI system it became clear that some of the business flows could not be traced. Changes in pension rights, for example, may also bring about changes in health care insurance coverage. This sort of information needs to be exchanged but the test revealed that the respective business flows could not be found. This experience showed that it cannot be taken for granted that existing business flows will work under the new system of exchanging social security information. The transitional period will also be used for developing clear guidelines and instructions for those who are to use the new electronic documents. This is regarded as essential in complicated areas, such as the pensions and unemployment sectors.

In several countries however, problems and confusion are encountered with respect to the question of which forms should be used in this transitional period prior to introduction of the SEDs. In Ireland it is reported that some countries are using the new S-forms while others are using the old E-forms. This leads to confusion for respondents trying to realign the E and S forms. Malta has questioned should continue to use the electronic e-form system should continue to be used or whether paper SEDs should be used instead? In Lithuania some minor inconvenience arises in preparation for the replacement of the former E-forms with Structured Electronic Documents under EESSI system. The Lithuanian form A1 is ready but people working with new forms claim that former E-forms had an advantage that they referred to the relevant articles of the Regulation. In the new forms these references are not present, and this appears to be less convenient for users.

Slovenia notes the delay in using SEDs. As the final version and official translations have not yet been provided, some institutions fear problems due to a potentially too short period for the preparation of technical support and establishing the new system. It is also mentioned that some beneficiaries are

well informed (browsing the internet site of the European Commission) and already request the new U forms (when claiming unemployment benefits). The Czech social security institutions also fear that it will be very difficult to apply smoothly the whole of EESSI, as it appears that there is not sufficient time remaining.

The Swedish authorities have chosen to start working with the SED documents already. At the Swedish trESS Seminar it was revealed that there were great hopes related to the future EESSI system. At the same time, experiences so far were somewhat mixed. Documents were now known to be greater in number and more complicated than before. For instance, as regards family benefits three 'old' E certificates of about three pages each had been replaced by no less than 27 SED documents, often of 12 pages or more. These SED documents also, often turned out to be unknown to institutions in other Member States, who frequently returned them with the questions: What form is this? What do you want us to do with this? It was also common that SED documents were sent back with the information requested but not with the pertinent decision by the institution of the other Member States. Hungary also emphasized with respect to unemployment insurance that the new forms (SEDs) consist of 6-8 pages compared to the previous 1-2 page E-forms, which makes the administrators' work considerably harder and more time consuming. Previously the E301 form (for the certification of employment relationship abroad) contained both the period of the employment relationship abroad and average wages - figures which are necessary for awarding unemployment benefit. In the new system the U002 certifies the period of the employment relationship and another SED, U004 gives information on wages. This is seen as an unnecessary complication of a situation which is already not simple, in which the Member States usually send only an U002 upon request, which may itself take a long time, following which an U004 has to be requested before being able to award the benefits. This may result in unemployed persons having to wait an unreasonably long time before receiving their benefit, which understandably leads to complaints about delay and unnecessary 'bureaucracy'. Finland notes that the SEDs for the implementation of the recovery provisions are yet not available. It is also problematic that in the Master directory no clear liaison institutions are identified for the implementation of the recovery provisions.

Other countries report that they are preparing fully for the new system. In Finland the Primula Project coordinates the preparation for the electronic exchange. Estonia expects to participate fully in the new system at the end of the transition period. However, the communication of updated technical details about the project is thought to be lacking, as information is fragmented across different sources and the communication plan does not seem to result in the right persons being aware of the right information in a timely fashion. Latvia notes that the introduction of the new system will require significant financial investment. At this point it is very difficult to acquire the necessary means from the state budget. Therefore it has been agreed to ask for financial assistance from the European Bank of Reconstruction and Development. Until the problem of financial investment is resolved the competent institutions will not be able to start the development of the EESSI system. In Hungary it is noted that EESSI requires further development of existing IT systems and consequently financial resources from governments and institutions, which are not easy to find in a difficult financial environment strongly affected by the economic crisis.

2.3 Some conclusions

Fewer problems are anticipated with the transitional provisions under the new Regulation than were experienced under previous modifications. This does not, however, mean that there is complete clarity with respect to the interpretation of some of these provisions.

3. IMPLEMENTING ISSUES DURING THE FIRST MONTHS

As several Member States have already given an overview of some actual or anticipated problems of application in their national reports with respect to the entry into force of the Regulations, we have decided that it would be useful to present an overview of these issues as the final part of this report.

3.1 General Principles

3.1.1 Aggregation of periods/assimilation of facts

The introduction of the new principle of assimilation of facts and in particular its relationship to the other principle of aggregation of periods is known to be a point of discussion. In Sweden this was recently at the origin of a preliminary question to the European Court of Justice. The question concerns the Swedish requirement of 240 days of insurance prior to the child's birth for a right to income-related benefits during the first 180 days of parental leave. The questions referred to the EU Court of Justice concern 1) whether a qualification period for family benefit in the form of income-related benefit for childcare can be completed in its entirety through employment and insurance in Switzerland, and, 2) whether the income earned in Switzerland is to be equated with domestic income in the determination of entitlement to family benefit in the form of income-related benefit for childcare (Bergström C-257/10).

The opinion of the Swedish Försäkringskassa is that the 240 days of insurance may be completed in another Member State in its entirety but that this applies only to an active person for who is entitled to a sickness-insurance benefit (relates to expected income during the following year and is the basis not only for income-related sickness-benefits but parental benefits). Finally, the question has been raised how Article 11.2 of the Basic Regulation shall be interpreted in relation to the Swedish Parental Benefit Scheme? Does it only apply for the period of parental benefits claimed or for as long as there is eligibility i.e. up to a total of 480 days until the child is 8 years of age?

3.1.2 Applicable legislation

Many issues were raised with respect to the new rules on applicable legislation. In Estonia, for example, problems arise with the wording and understanding of article 14 (11) of Regulation 987/2009 where it contains the phrase "on behalf of an employer established outside the territory of the Union". It is proposed to re-word the article into "outside the territory to which this Regulation applies" (or a wording similar in meaning).

The posting provisions already pose some issues. In Sweden problems are encountered with the posting of self-employed persons and the requirement that the self-employed should pursue 'a similar activity' in the State of posting as in the country of origin (Article 12.2 Reg. 883). This is considered to pose a problem in that Sweden does not require a formal and detailed registration of the activity of a self-employed person. Whether activities are 'similar' thus requires a rather general appreciation of the activities hitherto carried out. Problems have also been identified in Lithuania. An enterprise established in Lithuania intended to post several of their workers to Germany and applied for an E101/A1 form. The Foreign Benefit Office of State Social Insurance Board, as the competent institution, refused, however, to issue the required form as the person had not worked in Lithuania for at least one month before the posting. The decision was based on Decision A2 of the Administrative Commission of 12 June 2009, which states, that "for the application of Article 14(1) of Regulation (EC) No 987/2009, as an indication, having been subject to the legislation of the Member State in which the employer is established for at least one month can be considered as meeting the

requirement referred to by the words 'immediately before the start of his employment' ". Nevertheless, the State Social Insurance Board questioned this decision. These employees have resided in Lithuania for more than a month before the posting and were consequently subject to the health insurance. As health insurance is, according to the Lithuanian legislation, one of the branches of social insurance, it could be said that they were subject to the Lithuanian social insurance legislation. On the other hand, the Foreign Benefit Office argued, that as the persons in question de facto did not pay health insurance contributions (despite the fact that they ought to pay), they were not insured under the health insurance and so consequently they were not subject to the Lithuanian social insurance legislation.

The interpretation of the concept of 'place of residence' causes difficulties in several states. In the Finnish report some problematic situations were described. In one example an employee is posted from Finland to Member State A for three years (exception according to article 16) and the family members follow the worker. According to Finnish national legislation the family members can still be considered to be residing in Finland although they are staying abroad with a posted worker. In a second example a person has worked and resided in Finland and is now unemployed. Member State B, which is the country of origin of the employee, however, considers that the employee resided in MS B when he was working in Finland. This means that Member State B has considered the employee to be a cross border worker for the whole period contrary to Finland which has considered the person to be residing and working in Finland. Member State B has now started to apply article 65 of Regulation 883/2004 and to pay unemployment benefits and is seeking reimbursement from Finland. This case shows that it is important to have a common understanding concerning residence in the case of employed persons. It should be noted that the proposal for a new Nordic conventions includes a provision concerning residence for conflict situations. In conflict situations the country of residence is the country where the person is registered in the population data register.

The Czech Republic also anticipates problems regarding the definition of residence. There is an ongoing discussion among Czech national institutions regarding the definition of residence, or rather, regarding the form through which residence in the Czech Republic should be identified. A questionnaire regarding residence is being prepared in order to make it as easy as possible to take a decision. The issue is connected with the wording of Article 11 of Regulation 987/2009. After the new regulations entered into force, the Czech labour offices started to check whether the condition of residence is fulfilled for the purposes of parental allowance, which is based on the place of residence. Some people are living abroad but are registered for long term residence – according to the Czech legislation – in the Czech Republic. Until now they were provided with the allowance, but after the new regulations entered into force, the place of residence as defined in Article 11 of Regulation 987/2009 will be decisive. Some families may therefore rely on the system of the other country , where they have their place of residence.

Problems also arise with the situation of people who work simultaneously in two States. In Finland it is reported that the implementation of article 16 in Regulation 987/2009 is problematic in situations of work in two or more Member States. According to paragraph 1 of article 16 the information concerning employment in two or more Member States must be provided to the institution of the country of residence. According to paragraph 2 the institution of the place of residence shall determine on a provisional basis the legislation applicable to the person concerned. It is very likely, however, that this information is given to the institution in the Member State where the employer has its place of business when the place of residence of the employee is in another Member State. In this case it will have to be decided how the case will be transferred to the institution of the place of residence of the employee and whether the institution of the place of residence of the employee will take the case without a new claim (see article 16 (6)). The situation is considered to be particularly challenging if the Finnish Centre for Pensions (ETK) considers that there is no ground for issuing an A1 certificate. According to Finnish national legislation the person concerned has a right to get a

national appealable decision from the ETK of this rejection. According to its established practice, the ETK always issues an appealable decision in cases where it rejects the application for an A1 certificate. If the application is issued in Finland, which is not the place of residence of the employee, it would seem that Finland could not issue the decision concerning legislation applicable as Finland would, according to the new rules, not be competent to decide upon the legislation applicable. In this situation the legal protection of the person concerned should be secured adequately and it should be clear that a Member State takes up the case and defines the legislation applicable to the employee.

The implementation of article 14 (5) points (a) and (b) of Regulation 987/2009 – when someone works in two States simultaneously (a) or continuously alternating (b) as employee) - is also considered to be unclear. According to discussions with different Member States (for example, at the conference in Helsinki in June 2010) it became evident that point (a) is to be applied in situations where the employee has several employers in different Member States and that point (b) should only be applied in a situation where there is only one employer. This is, however, not clear from the wording of the provision. Therefore, the provision should be amended to be more transparent.

3.1.3 *Export of benefits*

In Luxembourg, there has been a long discussion on the law which abolished the right to family allowance and the child addition for children aged 18, unless they are still in secondary education, and replaced it by a new financial aid for young people in higher education. This financial aid is an individualized and universal right, which means that the income of the parents is not taken into account. This right has been limited to young people who have their legal residence in Luxembourg and de facto the law excludes the children of frontier workers. Beneficiaries of this financial aid will be students residing in Luxembourg and in higher education in Luxembourg and students residing in Luxembourg and in higher education abroad. Students in higher education in Luxembourg, who do not reside in Luxembourg, will not be entitled to this financial aid. Moreover, students in higher education in Luxembourg or abroad, who reside in Belgium, France or Germany, and whose parents work as frontier workers in Luxembourg, will not be entitled. This limitation is also applicable to Luxembourg nationals, who decide to reside just across the border in Belgium, France or Germany, and who want to pursue higher education in Luxembourg or abroad. It is questioned if this is in conformity with the principle of equal treatment.

3.1.4 *Other issues*

In Spain, concerns exist about the relation between the Regulation and bilateral conventions. According to Article 8 of Regulation 883/2004, the Regulation has precedence over the provisions of a social security convention not included in Annex II. This matter is particularly sensitive in the case of Spanish migrants, as can be seen by the number of judgments given by the Spanish Supreme Court accepting the demands of migrant workers that their benefits be calculated under the terms of the most favourable bilateral social security conventions and not the EU Regulations.

3.2 *Different Risks*

3.2.1 *Sickness benefits in kind*

Some problems of interpretation have been reported. In Belgium, one problem identified concerns the lack, in the new set of Regulations, of a provision similar to Article 8(3) of Regulation 574/72 (possible accumulation of sickness rights). It could be argued that, according to Article 87(8) of Regulation 883/2004, persons who were subject, according to Article 14c of Regulation 1408/71, to

two legislations can remain so until 2020 unless they request otherwise or unless the relevant situation changes. However, no substantive coordination rules are provided in the new Regulations to accommodate the provision of sickness benefits in kind to persons who came within the remit of Article 14c of the old basic Regulation. The RIZIV-INAMI is in the process of preparing a circular stating that the rules contained in Article 8(3) of the former implementing Regulation continue to apply for lack of equivalent rules in the new Regulations.

The second interpretation problem concerns an issue of divergent interpretation between the Belgian and the Dutch authorities regarding the right to sickness benefits in kind for pensioners. The RIZIV-INAMI is receiving signals that Dutch pensioners residing in Belgium are being encouraged to forego their right to (a small) AOW-pension, in which case, so they are told, the costs of their healthcare are to be borne by the Belgian institution and they do not have to pay the fairly expensive Dutch care insurance contribution. This interpretation stems from the difference in formulation between Article 28 of Regulation 1408/71 and Article 25 of Regulation 883/2004. Whereas in the old text, reference is made to entitlement to a pension, the new provision refers to receipt of a pension. The Belgian authorities do not concur with this interpretation which in their view could lead to “legislation-picking”.

Problems also arise in Sweden with regard to sickness insurance (benefits in kind) for Swedish pensioners residing in Finland. Pensioners are required to pay contributions for such benefits out of their pensions, whereas from the Swedish point of view this can be said to have been paid throughout the years of building-up the pension through (mainly) a pay-roll tax by employers. Moreover, Swedish healthcare in kind is not built on contributions but is a right for all those residing in Sweden.

3.2.2 Unemployment benefits

The Belgian unemployment institutions have requested greater clarity with respect to some provisions. These include notably the reimbursement arrangements between States as referred to in Article 65(6-8) of Regulation 883/2004 (on unemployment benefits for persons who resided in State other than the competent State) and the question as to whether or not the Huybrechts and Miethe case law is still relevant. As regards Miethe, the RVA-ONEM has provisionally adopted the position that it is no longer relevant given the provision of Article 65(2) and the preamble to Regulation 987/2009. At the same time, it questions some aspects of the Dutch policy, notably as regards transitional measures. According to the Dutch policy, the application of Miethe to an individual case would end after a period of sickness, whereas it might be more reasonable to require a period of employment of the person concerned for the application of Miethe to her or his case to cease. It is also noted that, insofar as export of unemployment benefits is concerned, the extension to six months is applied very differently in the Member States. According to the Belgian policy, as set out in the instruction, the duration remains set at three months but can be exceptionally extended to six months. This extension can also be applied for from abroad, in which case the insured person should enclose a positive opinion of the employment service in the State of stay.

In Slovenia some problems were reported with frontier workers, who may register at two employment agencies (in the State of residence and in the State of last employment). In this case they have to meet the obligations of both Member States. Closer cooperation of employment agencies (for instance from Slovenia and Austria or Italy), better trained employees and more intensive information to the beneficiaries appears to be required.

3.2.3 Family Allowances

Belgium and Luxembourg have requested more clarity about the basis for the comparison of the calculation of the differential amount including whether the family or the individual should be taken as the unit? A long discussion has also taken place EU-level about this problem, but no agreement could be reached. This is already leading to a growing number of problems. It should be noted that in the proposal for the Nordic Convention the Nordic countries have agreed that family benefits that are meant for income compensation shall not be taken into account for the calculation of the differential amount and that the differential amount for the more traditional family benefits will be calculated per child and not per family.

The Swedish Parental Benefit Scheme was originally considered as a maternity benefit by Swedish authorities. In the well known Kuusijärvi case, C-275/96, the European Court of Justice ruled it to be a family benefit, which is how it has been treated ever since. As a consequence many mothers/parents leaving Sweden have lost their benefits in accordance with Article 13.2.f of the old regulation and the Kuusijärvi case since they are no longer insured in Sweden. The new regulation introduces a change here since a person who receives a cash benefit because of their activity as an employed person is considered to still pursue the said activity (article 11.2).

3.3 Some conclusions

Notwithstanding the short period of application, it has already become apparent that not all of the new provisions are clear. There is a perception that further information is needed on the interpretation of some of the new concepts and provisions under the Regulation and also to what extent interpretations followed under the former Regulations are still valid today.