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REPORT

From:	Permanent Representatives Committee
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Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (Text with relevance for the EEA and Switzerland) - Partial general approach

I. INTRODUCTION

On 13 December 2016, the Commission submitted its proposal to amend Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004. The general objective of the proposal is to continue the modernisation of EU social security coordination rules by making them clearer and fairer, and by improving their enforceability, thus contributing to the facilitation of free movement of persons within the EU.

In particular, the proposal focuses on five areas: (i) unemployment benefits, (ii) long-term care benefits, (iii) access by economically inactive mobile citizens to certain social benefits, (iv) family benefits and (v) applicable legislation for posted and sent workers and persons working in two or more Member States.

The proposed legal basis is Article 48 of the Treaty on the Functioning of the European Union, which requires that the European Parliament and the Council act in accordance with the ordinary legislative procedure.

The European Parliament is still to deliver its position at first reading.

The European Economic and Social Committee delivered its opinion on 5 July 2017.

The Committee of Regions delivered its opinion at its session on 12-13 July 2017.

II. DISCUSSIONS IN THE COUNCIL PREPARATORY BODIES

The Social Questions Working Party (SQWP) started its examination of the proposal in January 2017. The MT Presidency addressed parts of the proposal concerning equal treatment and access by economically inactive mobile citizens to certain social benefits and applicable legislation. On the majority of provisions, substantive progress was achieved. However, by the end of its term, there was still need for further work on these two legally and technically very complex areas. The progress report presented to the EPSCO June Council contained a list of 6 main issues for further technical discussions (doc. 9524/17, p. 18). The Estonian Presidency continued examining the above mentioned two open areas.

In the area of **equal treatment**, delegations had different views on how to codify the recent case law¹, in particular, whether to codify the recent case law in full, partially or not at all. While the majority of Member States acknowledged the impossibility of reaching a compromise regarding full codification of the recent case law, there were also some Member States opposing a partial codification.

¹ Cases C-140/12 Brey, C-333/13 Dano, C-67/14 Alimanovic, C-299/14 Garcia-Nieto and C-308/14 Commission v the United Kingdom.

On 11 October, the Committee of Permanent Representatives had confirmed the general understanding that no codification was the best way forward. Based on the debate in Coreper, the Presidency submits the text to the Council without Recital (5aa) on 3rd country nationals covered by the Regulation, which lost its "*raison d'être*" without the operative provisions codifying the case-law through references to the Citizens Rights Directive. In Recital (5-a), the Presidency has deleted the word "general" in relation to the principle of equal treatment to make the wording of the recital clearer.

AT has maintained a reservation on the non-codification.

In the area of **applicable legislation**, the Presidency tried to achieve a greater balance in the text by addressing the concerns of different Member States, based on the work under MT Presidency. While broad agreement was reached on a number of issues at technical level (SQWP), the Committee of Permanent Representatives focused its discussion (on 11 October) on three outstanding issues as set out in the Report to Coreper (doc. 12844/17).

With regard to prior affiliation and time period between consecutive postings (Article 14(1) and (1a)) respectively, PT circulated a note whereby the condition of prior affiliation of three months should only apply to 60% of the persons sent by the employer. Questions about the possibility to apply this in practise were raised. Whereas some delegations asked for shortening the period of prior affiliation to one or two months, others requested prolonging the period between consecutive postings to three months. The Presidency also noted a rather large support for its compromise proposal. Nevertheless, it maintains the number of months for both paragraphs in brackets for the Council level.

As for the issue of activities in more Member States (Article 14(5a)), AT, BE, DE, FR, LU and NL submitted a joint note concerning Article 14(5a) based on the original Commission proposal, with a clause on a revision mechanism of determination of the applicable legislation every 24 months. The Presidency noted, nonetheless, that a large number of delegations are supportive to the Presidency proposal.

Regarding the issue of retroactive effect of a decision to withdraw or rectify a document (Article 19(2)), some delegations asked for making a difference between error and fraud, expressing concerns about the potential administrative burden and the effects on the rights of the persons concerned. The Presidency noted, however, that, once again, many delegations were supportive to its text.

Taking into account the discussion in Coreper and the diverging views of delegations on different issues, the Presidency considers that the compromise text, as it was presented to Coreper, strikes the right balance and modifications to any of the three sensitive and complex issues would require reconsidering the other elements.

The Presidency therefore upholds its compromise proposal on applicable legislation to the Council (EPSCO).

The compromise text is in the Annex to this Report (Annex I (equal treatment) and Annex II (applicable legislation)). The numbering of the paragraphs is in relation to the Commission proposal (doc. 15642/16).

Remaining reservations: CZ, DK, IE, NL, PL and UK have maintained parliamentary reservations, PL a specific reservation on Article 12 and SK a linguistic reservation.

The Commission has affirmed its original proposal at this stage and maintained a reservation on any changes thereto.

IV. CONCLUSION

The Council (EPSCO) is invited to examine the compromise text as set out in Annex I and II to this Report with a view to reaching a partial general approach at its session on 23 October 2017.

Provisions in proposal related to: *Equal treatment and access to social benefits*

Regulation (EC) No. 883/2004

Recital 2

The Treaty does not provide powers other than those of Article 308 to take appropriate measures within the field of social security for persons other than employed persons.

Recital 2a

Articles 45 and 48 of the Treaty of the Functioning of the European Union ensure free movement of workers entailing the abolition of any discrimination based on nationality and provide for the adoption of the necessary measures in the field of social security to secure that freedom. In addition, under Article 21 of the Treaty of the Functioning of the European Union, every Union citizen has the right to move and reside freely within the territory of the Member States subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

Recital 5

It is necessary, within the framework of such coordination, to guarantee within the Union equality of treatment under the different national legislations for the persons concerned.

Recital 5(-a)

In applying the principle of equal treatment provided for in this Regulation, the case-law of the Court needs to be respected. The Court has interpreted that principle and the relationship between this Regulation and Directive 2004/38/EC in its judgements in recent cases C-140/12 Brey, C-333/13 Dano, C-67/14 Alimanovic, C-299/14 Garcia-Nieto and C-308/14 Commission v the United Kingdom.

Recital 5a

[...]

Recital 5b

[...]

Recital 5c

[...]

Recital 47

This Regulation respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union and the European Convention of Human Rights.

Recital 48

[...]

Article 4

Equality of Treatment

Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.

Provisions in proposal related to: *Applicable Legislation*
Regulation (EC) No. 883/2004

Recital 18b

In Annex III, Subpart FTL to Commission Regulation (EU) No 965/2012 of 5 October 2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and the Council, as amended by Commission Regulation (EU) No 83/2014/EU of 29 January 2014 amending Regulation (EU) No 965/2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and the Council, the concept of ‘home base’ for flight crew and cabin crew members is defined as the location, assigned by the operator to the crew member, from where the crew member normally starts and ends a duty period or a series of duty periods and where, under normal circumstances, the operator is not responsible for the accommodation of the crew member concerned.

Article 11

General rules

5. An activity as a flight crew or cabin crew member performing air passenger or freight services shall be deemed to be an activity pursued in the Member State where the home base, as defined in Annex III, Subpart FTL to Commission Regulation (EU) No 965/2012 of 5 October 2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and the Council as amended by Commission Regulation (EU) No 83/2014/EU of 29 January 2014, is located.

Article 12
Special rules

1. A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there, and who is sent by that employer to another Member State to perform work on that employer's behalf, shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 24 months and that the person is not replacing another previously sent employed person covered by this paragraph or a self-employed person covered by paragraph 2.

2. A person who normally pursues an activity as a self-employed person in a Member State who goes to pursue a similar activity in another Member State shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such activity does not exceed 24 months and that the person is not replacing another previously sent employed person covered by paragraph 1 or a self-employed person covered by this paragraph.

- 2a. Where an employed person covered by paragraph 1 or a self-employed person covered by paragraph 2 does not complete the work or activity and is replaced by another person, the other person shall continue to be subject to the legislation of the Member State from which he/she is sent or in which he/she normally pursues an activity as a self-employed person provided that the total duration of work or activity by all persons concerned in the second Member State does not exceed 24 months and the other conditions laid down in paragraph 1 or 2 are fulfilled.

Article 72

Tasks of the Administrative Commission

- (ea) provide opinions to the European Commission on the draft implementing acts referred to in Article 76a prior to their adoption in accordance with the procedure referred to in that Article, and make any relevant proposals to the European Commission for the revision of the said implementing acts;

Article 75a²

Obligation of competent authorities

1. The competent authorities shall ensure that their institutions are aware of and apply all provisions, legislative or otherwise, including the decisions of the Administrative Commission, in the areas covered by and within the terms of this Regulation and the implementing Regulation.
2. In order to ensure the correct determination of the applicable legislation, the competent authorities shall promote, where appropriate, the cooperation between their institutions and other relevant bodies, such as labour inspectorates, in their Member States.

Article 76a

Power to adopt implementing acts

1. The Commission shall adopt implementing acts to specify the procedure, including where appropriate, time limits, to be followed in order to ensure the implementation under uniform conditions of Articles 12 and 13 of this Regulation. Those implementing acts shall establish standard procedures for:

² Please note that this provision is placed under Miscellaneous, as proposed by the Commission in its proposal.

- the issuance, the format and the contents of a portable document certifying the social security legislation which applies to the holder,
 - the elements to be verified before the document can be issued, withdrawn or rectified,
 - the withdrawal or rectification of the document by the issuing institution in accordance with Articles 5 and 19a of the implementing Regulation.
2. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 76 b(2) of this Regulation.
 3. [...]

Article 76b

Examination procedure

1. The Commission shall be assisted by a committee. The Committee is a committee within the meaning of Regulation (EU) No 182/2011.
2. Where reference is made to this Article, Article 5 of Regulation (EU) No 182/2011 shall apply.
3. Where the committee delivers no opinion, the European Commission shall not adopt the draft implementing act and the third subparagraph of Article 5(4) of Regulation (EU) No 182/2011 shall apply.

Regulation 987/2009

Article 1

Definitions

- 2(ea) ‘fraud’ means any intentional act or intentional omission to act, in order to obtain or receive social security benefits or to avoid paying social security contributions, contrary to the law of the Member State(s) concerned, the basic Regulation, or this Regulation;

Article 5

Legal value of documents and supporting evidence issued in another Member State

1. Documents issued by the institution of a Member State and showing the position of a person for the purposes of the application of the basic Regulation and of the implementing Regulation, and supporting evidence on the basis of which the documents have been issued, shall be accepted by the institutions of the other Member States for as long as they have not been withdrawn or declared to be invalid by the Member State in which they were issued.
- 1a. Where not all sections indicated as compulsory are filled in, the institution of the Member State that receives the document shall without delay notify the issuing institution of the defect in the document. The issuing institution shall either rectify the document as soon possible or confirm that the conditions of issuing the document are not fulfilled. If the mandatory information missing is not provided within 30 working days the requesting institution may proceed as if the document had never been issued and shall in that case inform the issuing institution thereof.³

³ *Possible transition clause may be needed at the later stage regarding the validity of document issued before the entry into force of this amending Regulation.*

2. Without prejudice to Article 19a, where there is doubt about the validity of a document or the accuracy of the facts on which the document is based, the institution of the Member State that receives the document shall ask the issuing institution for the necessary clarification and, where appropriate, the withdrawal or rectification of that document. The issuing institution shall reconsider the grounds for issuing the document and, if necessary, withdraw or rectify it.
3. Where there is doubt about the information provided by the person/s concerned, the validity of a document or supporting evidence or the accuracy of the facts on which the document is based, any institution concerned shall, insofar as this is possible, at the request of the competent institution, proceed to the necessary verification of this information or document.
4. Where no agreement is reached between the institutions concerned, the matter may be brought before the Administrative Commission by the competent authorities no earlier than one month following the date on which the institution that received the document submitted its request. The Administrative Commission shall endeavour to reconcile the points of view within six months of the date on which the matter was brought before it. In doing so and in accordance with Article 72(a) of the basic Regulation, the Administrative Commission may adopt a decision on the interpretation of the relevant provisions of the basic Regulation and this Regulation. The competent authorities and institutions concerned shall take the necessary measures to apply such decision of the Administrative Commission, without prejudice to the right of the authorities, institutions and persons concerned to have recourse to the procedures and tribunals provided for by the legislation of the Member States, by this Regulation or by the Treaty.

Article 14

Details relating to Articles 12 and 13 of the basic Regulation

1. For the purposes of the application of Article 12(1) of the basic Regulation, a ‘person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is sent by that employer to another Member State’ shall include a person who is recruited with a view to being sent to another Member State, provided that for a period of at least [three] months immediately before the start of his employment, the person concerned has already been subject to the legislation of the Member State in which his employer is established.
 - 1a. Once a person has been sent in accordance with Article 12(1) of the basic Regulation or pursued an activity as self-employed in another Member State in accordance with Article 12(2) of the basic Regulation for 24 months in total, either continuously or with interruptions not longer than [two] months, no new period under Article 12 (1) or Article 12(2) for the same employed or self-employed person and the same Member State may start until at least [two] months have elapsed from the end of the previous period.
 - 5a. For the purpose of the application of Title II of the basic Regulation, ‘registered office or place of business’ shall refer to the registered office or place of business where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out. In determining the location of the registered office or place of business, a series of factors shall be taken into account, including:
 - (i) the place of residence of the main directors,
 - (ii) the places where general meetings are held,
 - (iii) the place where administrative and accounting documents are kept,
 - (iv) the place where financial and particularly banking transactions mainly take place,
 - (v) the turnover, working time, number of services rendered and/or income,
 - (vi) the habitual nature of the activity pursued.

The determination shall be carried out in the framework of an overall assessment, giving due weight to each of the criteria mentioned above. The Administrative Commission shall lay down the detailed arrangements for the determination.

12. For the purposes of applying Article 13 of the basic Regulation, in relation to a person who resides outside the territory of the Union and pursues his/her activities as an employed or self-employed person in two or more Member States, the provisions of the basic Regulation and the implementing Regulation on the determination of the applicable legislation shall apply *mutatis mutandis* subject to the provision that his or her residence shall be deemed to be in the Member State where the person pursues the major part of his/her activities in terms of working time within the territory of the Union.

Article 15

Procedures for the application of Article 11(3)(b) and (d), Article 11(4), Article 11(5) and Article 12 of the basic Regulation (on the provision of information to the institutions concerned)

2. Paragraph 1 shall apply *mutatis mutandis* to persons covered by Article 11(3)(d) and Article 11(5) of the basic Regulation.

Article 16

Procedure for the application of Article 13 of the basic Regulation

1. A person who pursues activities in two or more Member States shall inform the institution designated by the competent authority of the Member State of residence thereof. This information may also be provided by the employer on the person's behalf.

2. The designated institution of the place of residence shall without delay determine the legislation applicable to the person concerned, having regard to Article 13 of the basic Regulation and Article 14 of the implementing Regulation. If this institution determines that the legislation of the Member State where this institution is situated applies, it shall inform the designated institutions of each Member State in which an activity is pursued and/or in which the employer is situated of its determination of the applicable legislation.
3. If the designated institution of the place of residence determines that the legislation of another Member State applies, that determination shall be provisional, and this institution shall without delay inform the designated institutions of each Member State in which an activity is pursued and/or in which the employer is situated of this provisional determination of the applicable legislation. The provisional determination shall become definitive two months after the institutions designated by the competent authorities of the Member States concerned being informed of it, unless at least one of these institutions informs the designated institution of the place of residence by the end of this two month period that it cannot yet accept the provisional determination or that it takes a different view on this.
5. The competent institution of the Member State whose legislation is determined to be applicable either provisionally or definitively shall without delay inform the person concerned and his/her employer of the determination.

Article 19

Provision of information to persons concerned and employers

3. Whenever an institution is asked to issue the attestation referred to above, it shall carry out a proper assessment of the facts relevant for the application of the rules set out in Title II of the basic Regulation and confirm that the information contained in the attestation is correct.

Article 19a

Cooperation in case of doubts about the validity of issued documents concerning the applicable legislation

1. Where there is doubt about the validity of a document showing the position of the person for the purposes of the applicable legislation or the accuracy of the facts on which the document is based, the institution of the Member State that receives the document shall ask the issuing institution for the necessary clarification and, where appropriate, the withdrawal or rectification of that document. The requesting institution shall substantiate its request and provide relevant supporting documentation that gave rise to the request.
2. When receiving such a request, the issuing institution shall reconsider the grounds for issuing the document and, where an error is detected, withdraw it or rectify it within 30 working days from the receipt of the request. The withdrawal or rectification shall have retroactive effect. However, in cases where there is a risk of disproportionate outcome, and in particular, of the loss of status as an insured person for the whole or part of the relevant period in all Member States concerned, the Member States shall consider to apply Article 16 of the basic Regulation. Where the issuing institution considers that, on the basis of the available evidence, there is no doubt that the applicant of the document has committed fraud, it shall withdraw or rectify the document without delay and with retroactive effect.
3. If the issuing institution, having reconsidered the grounds for issuing the document is unable to detect any error it shall forward to the requesting institution all available evidence within 30 working days from the receipt of the request. In urgent cases, where the reasons for urgency have been clearly indicated and substantiated in the request, this shall be done within ten working days from the receipt of the request, notwithstanding that the issuing institution may not have completed its deliberations pursuant to paragraph 2 above.

4. Where the requesting institution having received the available evidence continues to have doubts about the validity of a document or the accuracy of the facts on which the particulars contained therein are based or that the information upon which the document was issued is not correct, it may submit evidence to that effect and make a further request for clarification and where appropriate the withdrawal or rectification of that document by the issuing institution in accordance with the procedure and timeframes set out above.
5. If the doubts of the receiving institution persist and no agreement is reached between the institutions concerned, Article 5(4) applies accordingly.

Article 73⁴

Settlement of benefits in cash and in kind and contributions unduly provided or paid in case of provisional award of benefits or retroactive change of the applicable legislation

⁴ The SQWP decided to postpone the debate on Article 73 to when TITLE IV of the implementing Regulation will be discussed.