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NOTE

From:	General Secretariat of the Council
To:	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) - Preparation for trilogue

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 six areas: (i) access by economically inactive mobile citizens to certain social benefits, (ii) applicable legislation for sent workers and persons working in two or more Member States, (iii) long-term care benefits, (iv) family benefits, (v) unemployment benefits, and (vi) miscellaneous amendments.

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

The European Economic and Social Committee delivered its opinion on 5 July 2017¹.

The Committee of Regions delivered its opinion on 12-13 July 2017².

The Council adopted its general approach on 21 June 2018³.

The European Parliament adopted its negotiations mandate on 11 December 2018⁴.

II. STATE OF PLAY

To this day, 17 informal trilogues have taken place on this file. The negotiating teams of the Council, the Parliament and the Commission have reached provisional agreements in March 2019⁵ and December 2021⁶. However, no qualified majority could be found in Coreper on the agreements and no further trilogues have taken place since the end of 2021.

Against this background, and in view of the forthcoming end of the legislative cycle, the Presidency considers that it is the responsibility of both co-legislators to make an honest effort to find agreement on this important file during the remaining months of the Parliament's term. The Presidency is fully aware of the challenges this file presents, which have led to the current deadlock. However, after two years without any trilogues taking place, the Presidency considers that it is of the utmost importance to resume negotiations with the Parliament and to present an updated mandate demonstrating the Council's good faith and willingness to reach a compromise before the end of the legislative term.

¹ <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/coordination-social-security-systems>

² <http://cor.europa.eu/en/activities/opinions/pages/opinion-factsheet.aspx?OpinionNumber=CDR%20849/2017>

³ Doc. 10295/18

⁴ P8 A(2018)0270

⁵ Doc. 7698/19 + ADD1 REV1

⁶ Doc. 15068/21 + ADD1

Towards this end, the Spanish Presidency has worked intensely over the past months both in the Social Questions Working Party and through informal exchanges with the Parliament. The Presidency considers that this simultaneous work within the Council and with the Parliament is key to present compromise solutions that are realistic and reflect the views of both co-legislators to the broadest extent possible. Certainly, in a file as technically complex and politically sensitive as the revision of the Social Security Coordination Regulations no party can be fully satisfied. Compromises are necessary and any possible agreement will undoubtedly include elements that might not reflect each and every request. Nonetheless, at this crucial point before the end of the Parliament's mandate, it is necessary to view the compromise proposal as a package in an effort to deblock the file and find common ground.

At the ninth trilogue under the Finnish Presidency, the co-legislators agreed to resume the political negotiations on a limited mandate. This was accepted by Coreper on 16 October 2019. The Presidency has therefore focused its efforts on the outstanding issues on the Applicable Legislation and the Unemployment Benefits chapters, as agreed under the Finnish Presidency:

In the chapter on Applicable Legislation:

- A) The obligation for prior notification and possible exemptions from this obligation.
- B) The method to determine the location of the registered office or place of business for a business in case of activity in two or more Member States.

In the chapter on Unemployment Benefits:

- C) Rules on unemployment benefits for cross-border and frontier workers as well as on the length of the export of the entitlements for workers in cross-border situations.

III. GUIDANCE FOR TRILOGUE PREPARATION

Based on the abovementioned discussions at the Social Questions Working Party and the informal exchanges with the Parliament, the Presidency has identified some areas of flexibility and possible ways forward, as outlined below. The intention of the Presidency is to pursue an agreement with the Parliament on the main political lines in a compromise package.

With a view to exploring a possible avenue for a compromise with the Parliament, Member States are asked to consider a way forward on the basis of the following elements:

A. “PRIOR NOTIFICATION” AND EXEMPTIONS

1. Mandatory prior notification and exemptions

The Presidency recognises that the Commission proposal and the Council’s general approach did not introduce the requirement for a mandatory prior notification. Although Article 15 of Regulation 987/2009 already includes the obligation for a prior notification to the competent authority in the Member State whose legislation is applicable “*whenever possible*”, delegations have voiced concerns that the introduction of a **mandatory prior notification** might create additional administrative burden for citizens, businesses, and social security institutions. However, this is one of the priorities for the Parliament and has been a consistent request throughout the negotiations. It is therefore the Presidency’s understanding that it is an essential element of any compromise package that could be accepted by both co-legislators.

In addition to the above considerations, the Presidency would like to underline that the reasoning behind the prior notification provision in Article 15 of Regulation 987/2009 is to ensure legal certainty and protect the employed person’s rights, by notifying the competent institution before the start of the activity and determining which legislation applies. Nonetheless, the Presidency fully understands the concerns expressed regarding the risk of disproportionate administrative burden in the case of an inflexible rule of mandatory prior notification. Member States have requested that, if an obligation for a prior notification is introduced, rules and exceptions should be *clear and easy to implement*.

Therefore, the Presidency proposes to continue working on the basis of **a mandatory prior notification**. To avoid creating a cumbersome system that might lead to non-compliance, the Presidency proposes however establishing **two general exemptions for: i) business trips⁷ and ii) activities with a duration of no more than three days within a period of 30 consecutive days**. These exceptions are broad enough to cover most situations where this obligation for notification would lead to an unnecessary administrative burden and could hinder the cross-border activity of undertakings.

2. 'Post-notification'

Delegations also expressed their wish to maintain the possibility to notify the activity after its start in certain cases but expressed concerns about creating a complex system with too many exceptions and derogations. The Presidency has therefore decided to **maintain the possibility to notify the competent institution no later than three days after the start of the activity**. However, **limited to 'situations of urgency and unpredictability'**.

3. Review clause

In addition to the above, the Social Questions Working Party has discussed extensively the potential benefits of digitalisation in simplifying the prior notification procedure. Delegations have acknowledged that digitalisation has the potential to considerably simplify the process for and compliance with the rule of prior notification procedure but have also stressed that it should not be viewed as a panacea but as part of the overall package on the issue of prior notification.

⁷ The Presidency proposes using the definition of business trips as laid down in the December 2021 provisional agreement, which has gathered broad support.

The Presidency considers that the potential benefits of digitalisation cannot be overlooked in the context of the revision of the Social Security Coordination Regulations. Nonetheless, as many of the relevant digital tools are currently under development, the extent of simplification thanks to digitalisation can only be speculated at this point. The Presidency therefore proposes **introducing a ‘review clause’ calling on the Commission, taking into account the latest technological developments and after appropriate consultation with Member States and relevant stakeholders, to re-examine the rules on prior notification set out in Article 15 of Regulation 987/2009 and take any necessary action in this regard.** Such review clauses are common in legislation that is intrinsically linked with rapid developments, such as the digital transition, so as to keep the legal framework up to date and fit for purpose.

4. *Recital on further development of EESSI*

With the same objective of streamlining and simplifying the prior notification procedure as much as possible, the Presidency is of the view that the existing digital tools should be fully implemented and further enhanced. Already today, EESSI is used for rapid, secure and paperless exchanges between social security institutions across Europe, including the transmission of an issued Portable Document A1 to another Member State. In its recent Communication on the digitalisation of social security coordination⁸, the Commission called on Member States to ensure that EESSI is fully implemented by the end of 2024. To highlight the importance of further enhancing and making full use of EESSI in the future, the Presidency proposes **introducing a recital highlighting the role of and encouraging the Commission to explore, with interested Member States, the possibility of developing new functionalities of EESSI**, which will make it possible to notify the competent institution at an early stage of the process, when the request for the determination of applicable legislation in accordance with Title II is made.

⁸ Doc. 12798/23 (COM(2023) 501 final)

5. Recital on ESSPASS

Delegations have stressed the importance of having a comprehensive view of all the available tools and mechanisms aiming to promote digitalisation, the exchange of information and data, and fight against fraud, as this could help better understand the complementarities among them and how each tool contributes to each process. The Presidency therefore proposes **introducing a recital underlining the aim and potential benefits of ESSPASS, also in connection with the European Digital Identity framework, once implemented.**

6. Recital on ELA

The role of EU-level institutions in the correct implementation of and compliance with social security coordination rules is of key importance. In particular, the role of the European Labour Authority (ELA) is fundamental in assisting the Member States and the Commission in the effective and coherent enforcement of Union law related to labour mobility and the coordination of social security systems so as to ensure the protection of persons exercising their right to free movement and tackle irregularities with a cross-border dimension. **The Presidency therefore proposes to introduce a recital highlighting the role of the European Labour Authority** in promoting the regular exchange of best practices between national administrations regarding the use of digital tools in social security, including in the case of cross-border services.

7. Recital on EU funding

Lastly, delegations have requested more information on how the Union will support their efforts for further digitalisation in the area of social security coordination. In line with such requests, the Presidency proposes introducing **a recital focusing on the EU funding available to support Member States.** The recital should also emphasise that measures aimed at the digitalisation of public services and the modernisation of public administration processes are present in all national Recovery and Resilience Plans, which need to allocate at least 20% of the total resources to digital objectives.

8. Automatic acknowledgment of receipt

The Presidency recalls that the Single Digital Gateway Regulation foresees **the requirement to issue an automatic acknowledgment of receipt** to the applicant for fully online procedures. The SI provisional agreement already included a provision empowering the Commission to adopt implementing acts to establish standard procedures for the issuance, the format and the content of the attestation certifying the applicable social security legislation.

B. PLURIACTIVITY: DETERMINATION OF THE MEMBER STATE OF THE REGISTERED OFFICE OR PLACE OF BUSINESS

The aim of Article 14(5a) of Regulation 987/2009 is to clarify how the term ‘registered office or place of business’ should be interpreted for the purposes of Title II of Regulation 883/2004 (‘basic Regulation’).

Delegations stressed that the criteria to determine the location of the registered office or the place of business of an undertaking in cases where a person pursues activity in two or more Member States should be *clear and easy to implement*. Member States signalled their preference for the criteria set out in the SI provisional agreement, complemented by certain elements in the compromise proposal presented by the SE Presidency⁹.

Considering the above, the Presidency **proposes using the text of the SI provisional agreement** in Article 14(5a) subparagraph 1, which states that the registered office or place of business is where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out, and **deleting the additional criterion of ‘where the undertaking performs genuine activity’ introduced in the SE compromise text**. The essential decisions and the functions of the central administration of an undertaking might not necessarily be carried out in the same Member State as the one(s) where the undertaking also performs genuine activity. Therefore, in the Presidency’s view, the additional criterion of ‘where the undertaking performs genuine activity’ might create ambiguity and lead to conflicting results among Member States.

⁹ Doc. 10958/23 + ADD1

The second and third subparagraphs of Article 14(5a) state that a series of factors shall be taken into account to determine the applicable legislation in the framework of an overall assessment. The Presidency **proposes moving the list of these non-exhaustive factors to a recital** to remove any doubts about the non-binding character of that list. The Presidency also proposes **stating explicitly in the recital that the list of factors is non-exhaustive**.

As regards the exemplary factors set out in this list, several delegations expressed their wish to return to the factors set out in the SI provisional agreement, while others stated their preference for some factors introduced by the SE compromise text. Bearing in mind the feedback received on each factor, the Presidency **proposes using elements of both the SI provisional agreement and the SE compromise text**, and highlighting the fact that due weight should be given to each relevant factor according to the circumstances of the case.

The examples of factors to consider in the framework of an overall assessment would be: *the length of time that the undertaking has been established in the Member State, the turnover, the place where the undertaking uses office space or where general meetings are held, and the habitual nature of the activity pursued*.

C. **UNEMPLOYMENT BENEFITS**

The principle of *lex loci laboris* is strengthened in paragraph 1 of Article 65 of the basic Regulation, which specifies that as a general rule, unemployed persons who had their last activity in a Member State other than their state of residence, shall make themselves available to the employment services of the state of last activity and shall be entitled to receive unemployment benefits in accordance with that Member State's legislation. It is only by way of derogation as set out in Article 65(2) that the state of residence might become the competent state, in cases where the wholly unemployed cross-border or frontier worker's last activity has been shorter than a specific period of time.

Throughout the negotiations, it has proven difficult to agree on an affiliation period that could be agreeable to most Member States. Firstly, the Presidency proposes **maintaining as criterion only one period of last activity of uninterrupted insurance, employment or self-employment**, in order to remove the uncertainty for cross border workers, ease the administrative burden for the institutions and facilitate the implementation of the rules.

As regards the length of the period, the Council general approach and subsequent compromise texts have proposed affiliation periods of 3 or 6 months, or a combination of both. The main challenge is to find the right balance between the length of the affiliation period and the longer duration of the export of unemployment benefits for frontier and other cross-border workers, ensuring both a genuine link with Member State that would provide such benefits and a fair distribution of the financial burden between Member States. Trying to find this delicate balance, the Presidency proposes to **base the negotiations with the Parliament on proposing an affiliation period of 25 uninterrupted weeks**.

In line with the SI provisional agreement, the Presidency also proposes **maintaining a longer export period for those frontier and other cross-border workers having a longer affiliation period** to the social security system of the Member State competent for the provision of unemployment benefits. When the unemployed person has completed an uninterrupted period of at least **24 months in the Member State of last activity, his or her entitlement to unemployment benefits shall be retained for 10 months**.

IV. NEXT STEPS

Delegations are asked to share their assessment of these areas of flexibility and possible ways forward as identified by the Presidency. The feedback of delegations will help the Presidency to decide how to pursue the negotiations with the European Parliament.