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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 the trilogue

I. INTRODUCTION

The free movement of workers, as established in the treaties, is a fundamental right of the European Union. It is laid down in Article 45 of the Treaty on the Functioning of the European Union (TFEU) and complements the free movement of goods, capital and services within the European single market.

The EU rules on social security coordination directly contribute to the free movement of workers and, therefore, encompass legislation on a myriad of themes: sickness, maternity and equivalent paternity benefits, old-age pensions, pre-retirement and invalidity benefits, survivors' benefits and death grants, unemployment benefits, family benefits, benefits in respect of accidents at work and occupational diseases.

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 within the framework of the Mobility Package. 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 and, on the other hand, the fight against fraud and abuse.

In particular, the proposal introduced significant changes on six areas: (i) access by economically inactive mobile citizens to certain social benefits, (ii) applicable legislation for posted and sent workers and persons working in two or more Member States, (iii) long-term care benefits, (iv) family benefits and (v) unemployment benefits; as well as (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 2017[1].

The Committee of Regions delivered its opinion at its session on 12-13 July 2017[2].

The Council adopted its general approach on 21 June 2018[3].

The European Parliament adopted its negotiations mandate on 11 December 2018[4].

II. STATE OF PLAY

So far fifteen informal trilogues have taken place on this file. During 2019 eight trilogues took place under the Romanian Presidency, three further trilogues under the Finnish Presidency and four under the German Presidency. At the ninth trilogue, the co-legislators agreed to focus the political negotiations only on the outstanding issues. This position was broadly supported by Coreper on 16 October 2019.

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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 ST 10295/18
4 A8-0386/2018

The German Presidency conducted four trilogues under its mandate, pursuing the negotiations, as agreed under the Finnish Presidency, based on a limited scope:

In the chapter on Applicable Legislation:

1) The obligation for *"prior notification"* and possible exemptions from this obligation.

2) 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:

3) 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.

On 21 October 2020, Coreper updated its mandate based on Germany's Presidency proposal. Under the German Presidency significant progress has been made. Nevertheless, the co-legislators were not in a position to reach a final agreement. Therefore, it has been decided to continue the negotiations under the current Portuguese Presidency.

III. PRESIDENCY COMPROMISE SUGGESTIONS

To prepare future trilogues, the Portuguese Presidency has conducted extensive informal bilateral consultations. The Presidency took note of Member States positions, with a view to resuming the negotiations.

In order to explore further possible avenues for a compromise with the European Parliament, delegations are asked to consider a way forward on the basis of the following elements:

In the **Applicable Legislation** chapter:

1) "Prior notification" and exceptions thereof:

Many delegations voiced concerns about the obligation of **"prior notification"** to the competent institution in the Member State whose legislation is applicable, as it adds a layer of complexity to an already complicated process and thus might hinder the freedom of movement. At the same time, this is one of the foremost priorities for the European Parliament.

Some of the concerns regarding “prior notification” are due to the absence of a definition of this instrument and the lack of clarity on the related procedural aspects, since delegations in the Council do not oppose to the protection of mobile workers and the combat against fraud and abuse. Therefore, the concept of “prior notification” needs to be clarified and a viable solution avoiding increased administrative burden to Member States should be found.

Article 15(1) of Regulation 987/2009 already entails an obligation to inform the competent institution of the Member State whose legislation is applicable (the sending Member State) whenever possible in advance.

It follows that the competent institution of the Member State whose legislation is applicable carries out an assessment of the situation and, if the conditions are met, issues a Portable Document A1 (the attestation referred to in Article 19(2) of the same Regulation). In addition, the competent institution shall, without delay, make the information about the legislation applicable to that person available to the institution of the Member State where the activity will be pursued (Article 15(1) of Regulation 987/2009).

In accordance with paragraphs 2 and 3 of Article 15 of Regulation 987/2009 this procedure applies not only to employers of posted workers, self-employed persons and civil servants (Articles 12 and 11(3)(b) of Regulation (EC) 883/2004), but also to military personnel and mariners (Articles 11(3)(d) and 11(4) of Regulation (EC) No 883/2004).

Therefore, what we currently call “notification” is actually the process through which the employer or the self-employed informs the competent institution of the sending Member State that an activity will be pursued in another Member State.

The European Parliament proposed the deletion of the expression “whenever possible” in Article 15(1) of Regulation 987/2009.

The deletion would make compulsory to inform the competent institution before the commencement of an activity abroad, within the framework of the existing procedure already foreseen in the same Article 15(1) of Regulation 987/2009. This represents the so called “prior notification”.

In this context, it should be noted that the declaratory nature of the Portable Document A1 and the possibility for it to be issued retroactively are not questioned.

The Presidency deems that a digital notification could be a simple and efficient way to inform the competent institution before the activity in another Member State starts, by enabling employers and self-employed persons to comply with this obligation swiftly, also alleviating the administrative burden for institutions.

The European Parliament also proposed that, if the institution of the hosting Member State so requests, the employer or the self-employed person shall make available evidence that he/she has informed the competent institution in the sending Member State prior to the start of the activity (new paragraph (1)(a) of Article 15). Member-States should create the means so that this evidence can be presented in a digital format.

In the context of digitalisation, the Commission issued a *Non-paper* aiming at assessing digital tools and containing specific references to the Regulation (EU) No 2018/1724 establishing a Single Digital Gateway (SDG)[5]

The SDG Regulation will enable online access to the information, administrative procedures and assistance services that citizens and businesses need, in order to exercise their rights in the internal market.

Article 6 of the Regulation (EU) No 2018/1724 establishing the SDG sets out that Member States shall ensure that users can access and complete a number of procedures online, including the request for determining the applicable legislation in accordance with Title II of Regulation 883/2004 (the so called “notification”).

The SDG is expected to become available to all employers and self-employed persons across the Union by the end of 2023. The output of these procedures (i.e. the Portable Document A1) will also be provided in a digital format, where possible under applicable Union and national law (Article 6(1)(c) of the SDG Regulation). Most Member States already offer online procedures to request and issue the Portable Document A1, although there are still differences with regard to the level of digitalisation and the access to such procedures.

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5 Regulation (EU) 2018/1724 of the European Parliament and of the Council of 2 October 2018 establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services and amending Regulation (EU) No 1024/2012

Therefore, the Presidency wishes to explore that the entering into force of the provisions concerning "prior notification" would coincide with the digital solution foreseen in the SDG Regulation.[6]

The Presidency proposes to continue the negotiations with the European Parliament on the basis of "prior notification" to the competent institution in the Member State whose legislation is applicable, under Article 15 of Regulation 987/2009.

In addition, in order not to hinder the freedom of movement and to avoid excessive administrative burden, the Presidency suggests to continue working on two categories of exceptions:

(1) An exception to the notification process for **"business trips", the definition of which the Presidency suggests to further shape** in order to ensure legal clarity;

(2) An **horizontal time-based exception from the obligation to <u>notify in advance</u> ("prior notification")**: Since an obligatory "prior notification" for very short-term trips is disproportionately burdensome and could hinder free movement of persons and provision of services in an unjustified way, the Presidency proposes that "prior notification" would not be mandatory for activities whose duration is less than a limited time period.

Questions:

1.i) Can delegations agree that the Presidency continues working with Parliament based on the above-mentioned approach?

1.ii) Can delegations support to further clarify the concept of business trips?

1.iii) Can delegations support to have an exception to the "prior notification" for activities whose duration would be inferior to a certain limited time period? Delegations are encouraged to indicate a number.

1.iv) Can delegations support to further explore a possible sector-based derogation to the exceptions?

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6 The Presidency recalls that, as referred to in the document 7698/19, the amendments relating to Articles 15(1) and 15(1a) shall enter into force 24 months after the entry into force of the revised Regulations.

2) Activity in two or more Member States:

With regards to the determination of the location of the registered office or place of business in case of activity in two or more Member States, the "working time performed in each Member State where the activity is pursued" criterion seems problematic to many delegations, primarily as it could in many cases lead to a fragmentation of the worker's insurance history. Furthermore, this criterion is very difficult, if not impossible for institutions to verify, which might give rise to fraud.

The European Parliament showed flexibility towards Council's proposal to completely delete this criterion. The European Parliament was also open to use an alternative criterion to determine the registered office or place of business as long as it equally contributes to fight against letter-box companies.

The Presidency proposes to delete the working time criterion in line with the Coreper mandate from 6 November 2019.

In the **Unemployment Benefits** chapter:

3) Unemployment benefits of cross-border workers:

Most delegations have reaffirmed that a compromise solution should respect the principle of lex loci laboris and protect equally frontier and other cross-border workers. It should be ensured that those frontier and cross-border workers who register with the competent institution of the competent Member State without seeking to export the benefits should face the same obligations (apart from residence) as a domestic unemployed worker. The duration of the export of benefit for frontier and other cross-border workers should be proportionate and linked to the affiliation period to the social security system of the Member State competent for the unemployment benefits.

Considering that the Council demonstrates broad flexibility, as a starting point the Presidency suggests to keep the Coreper mandate from 21 October 2020 with regards to the uninterrupted affiliation period and the 6 months of export.

At the same time, the Presidency proposes to allow for a longer export 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 unemployment benefits. In this regard, as a starting point the Presidency suggests to keep the Coreper mandate from 21 October 2020.

IV. <u>CONCLUSION</u>

The Committee of Permanent Representatives is invited

- to examine the Presidency's compromise suggestions as set out above; and
- to agree on an updated Presidency negotiation mandate for future trilogues.