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From:	Presidency
To:	Delegations
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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)

I. INTRODUCTION

The Presidency has submitted a proposal for compromise[1] to the Social Questions Working Party on 27 January 2023 on the two chapters still open in the negotiations with the European Parliament on Applicable Legislation and Unemployment Benefits. The Presidency assumes that, as a result of previous negotiations, the other chapters as laid out in document 15068/21 ADD1 are acceptable for a broad majority of Member States.

On basis of comments and issues raised by delegations on the Presidency`s proposal, an adapted compromise proposal is presented in view of the Social Questions Working Party on 29 March 2023. This compromise proposal covers the entire proposal for an amending Regulation and is laid out in ADD1 to this document. In this document, changes compared to the preliminary political agreement of December 2021 (set out in document 15068/21 ADD1) are marked in **bold** and deletions by **[…]**. Deletions of whole paragraphs or articles compared to the Commission proposal are marked by […].

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Questions raised by Member States on the Presidency compromise text are addressed below in part II of this document and in the Q & A document, which is to be found in ADD2 to this note.

Delegations will be asked to state in the Social Questions Working Party meeting on 29 March 2023, whether they will be able to support the Presidency compromise proposals set out in ADD 1 to this note as a package.

In the Presidency's view the compromise package still respects the spirit of previous Coreper mandates. The Presidency strives however for a more detailed mandate which should be the expression based on a clear commitment of Member States and would constitute a more solid ground for taking up negotiations with the European Parliament again, as it ascertains that the final agreement will find a majority among Member States.

Therefore, the Presidency intends, based on the outcome of the Social Questions Working Party meeting, to present such a complete and detailed compromise package to Coreper.

II. APPLICABLE LEGISLATION CHAPTER

A. PLURIACTIVITY

The aim of Article 14(5a) in Regulation 987/2009[2] is to clarify how the expression 'registered office or place of business' should be interpreted for the purposes of Title II of the basic Regulation, in order to allow the social security institution to determine the applicable legislation of an individual person. To the Presidency's understanding, the first subparagraph of Article 14(5a) clarifies what is meant with the wording 'registered office or place of business'. Here the Presidency has inserted the expression 'where the activity of the undertaking performs genuine activity' since not only elements related to the 'registered office' but also those related to the 'place of business' are to be taken into account according to Article 13 (1)(b)(i) of the basic Regulation.

[2] Article 2 (8) (a) of the amending Regulation as laid out in ADD1 to this document.

The second subparagraph states that a series of factors and the habitual nature of the activity pursued shall be taken into account. As the non-exhaustive list of exemplary factors, which might be taken into account in the assessment, was subject to extensive discussions, the Presidency moved it to a recital to make the non-binding and indicative character of this list clearer. The habitual nature of the activity should be considered since different branches have their characteristics; a production company might for example have to be assessed differently than an IT-company or a construction company. There might also be cases, in which one factor is not relevant, e.g., if the company is seated in a country outside the EU/EEA or Switzerland and pays company taxes there.

The third subparagraph clarifies how the determination of the 'registered office or place of business' shall be carried out and notably that it is according to the circumstances of the case that the institution shall give due weight to each of the relevant factors.

B. PRIOR NOTIFICATION

The understanding of the Presidency is that the initial main objectives of Article 15 Regulation 987/2009[3] are, firstly, that the competent institution should be informed about an activity in another Member State before the start of the activity, so that an assessment can be performed on whether the employed person should be considered as being posted and therefore continue to be covered by that Member State's legislation or not and, secondly, to inform the person concerned of the result of the assessment/the determination of the competent state through the issued attestation.

Furthermore, the institution in the Member State of activity shall be informed without delay, to allow this institution to fulfil its functions of control and supervision.

The Presidency intends with its proposed amendments to underline that the prior notification is mandatory in principle. However, in order not to hinder businesses in their cross-border activity by imposing rules that would lead to excessive administrative burden, the compromise proposal entails two exceptions to the requirement of notification. These concern business trips and activities of a short duration, in which the employed person typically continues to be covered by the competent Member State's legislation.

[3] Article 2 (9) of the amending Regulation as laid out in ADD1 to this document.

In addition, a possibility to delay the notification by three days in cases of impossibility due to an urgency situation is introduced.

The Presidency has considered, as requested by some Member States, not to apply the exceptions to prior notification (business trips and activities of a short duration) for a limited number of specific sectors. Such a carve out would, to cover an entire sector without making any distinctions between different categories of employees or, in the case of fraud and error, the undertakings, need to be justified based on clear, comparable, and relevant data. Such data would for example need to make it evident that there is a relation between the number of mobile posted workers in high-risk employments without an established social security coverage in these sectors compared to other sectors, which would not be subject to such a carve out. In absence of such data, the Presidency abstained from adding such sectorial carve outs.

The Presidency has also looked into the question whether an additional transitional period for the application of Article 15 would be required. Considering that the amendments to Article 15 Regulation 987/2009 apply anyway only 24 months after the entry into force of the amending Regulation[4], the Presidency considers that an additional transitional period is not required. In addition, digitalisation is already progressing. EESSI can be used already today to inform the institution in the other Member State. In most Member States it is also possible to apply for a PDA1 online. With the entry into force of Article 6 of the Single Digital Gateway Regulation[5] by 12 December 2023 Member States will be obliged to provide for access and completion of that procedure provided that the relevant procedure already has been established in the Member State concerned.

In response to the concerns of delegations regarding the complexity of a post notification, the second subparagraph of Article 15(1a) was taken out of the Presidency compromise text compared to document WK 1232/23[6].

4 Article 3 of the amending regulation

5 Regulation (EU) 2018/1724 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

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III. UNEMPLOYMENT BENEFITS CHAPTER

Article 65 of the basic Regulation[7] lays down the rules for unemployment benefits for cross-border and frontier workers, as well as the length of the export of benefits for workers in cross-border situations. The principle of *lex loci laboris* is strengthened in paragraph 1, 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. According to the proposal of the Presidency, this would be the case when the wholly unemployed cross-border or frontier worker's last activity has been shorter than 6 uninterrupted months. The Presidency is of the view that this period of 6 months presents the centre of gravity between the diverging views of Member States. Understandingly, Member States who are typically Member States of last activity have concerns about increased costs due to a possible increase of cases vis-à-vis the current legislative regime, while those Member States who are more likely to be Member States of residence call for a shorter period or a dual approach to have more workers, and notably seasonal and temporary workers, covered by the Member State of last activity.

The Presidency's proposal strikes a balance as it provides, on the one hand, a cushioning of the effect of the *lex loci laboris* principle for the Member State of last activity and, on the other hand, improves the situation compared to the *status quo ex ante* for the Member States of residence. Actually, the consequences of retaining the current legislative regime would be inefficient processing of unemployment benefits, uneven distribution of financial burden and potential barriers for unemployed persons reintegrating into the labour market. It must be remembered that Article 65 provides for coordination, rather than harmonisation, of the Member States' national legislation in this area.

[7] Article 1 (22) of the amending Regulation as laid out in ADD1 to this document.

According to Article 65(1) basic Regulation, persons residing in a Member State other than the competent state shall receive benefits in accordance with the legislation of the competent State as if they were residing in that State. The Presidency initially proposed to delete the phrase clarifying that these persons shall be entitled to the rights and comply with the obligations laid down in the applicable legislation as it is considered redundant, in light of the principle of equal treatment and non-discrimination in Article 4 of the basic Regulation. However, after listening to delegations and in line with the December 2021 provisional agreement, the Presidency proposes to reintroduce the clause clarifying that an unemployed person shall be entitled to the rights and comply with the obligations laid down in the legislation of the competent Member State. The Presidency does not propose any change in substance as the requirement for unemployed persons to comply with the obligations laid down in the applicable legislation already exists in Article 65(1) of the current basic Regulation.

As to the export period of unemployment benefits, the Presidency proposes to maintain the longer export period as set out in Article 65(3a) basic Regulation in the provisional agreement of 2021. However, in order to address comments by delegations on the requirement of having most recently completed a minimum period of 24 months, the Presidency proposes to specify that the period of the most recent 24 months is to be completed uninterruptedly. This serves to ensure that there is a genuine link to the social security system of the State responsible for the prolonged export period as a condition for a longer export period.