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**NOTE**

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) - Presidency paper

Delegations will find attached the note on the above subject prepared by the Presidency.

**Portuguese Presidency paper regarding the negotiations of the Revision of the Regulations regarding the Coordination of Social Security Systems**

*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*

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 modernization 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 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.

Important landmarks have been reached on this file. The Bulgarian Presidency reached a General Approach at the June 2018 Council (EPSCO). So far, 16 trilogues have taken place. Under the Romanian Presidency, eight trilogues were held January-March 2019. At the last trilogue a preliminary political agreement was found, which, however, was rejected in Coreper.

Since then, the discussions with the European Parliament have continued and other four Presidencies worked on this legislative proposal. In October 2019, the Finnish Presidency resumed trilogues with the new European Parliament. At the ninth trilogue, under the Finnish Presidency, the co-legislators agreed to focus the political negotiations on a limited scope. Therefore, the Council continued discussions with the European Parliament with a view to finding a compromise on three outstanding issues:

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.

The Portuguese Presidency, under its motto “*time to deliver*”, has put social Europe at the centre of its priorities: the Commission 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 has been a major priority. The Presidency has assiduously and constructively worked since the beginning of its mandate to reach an agreement with the European Parliament.

## I – The work in the Council

Since January 2021, the Portuguese Presidency has carried out informal consultations with all delegations at different levels.

Following this consultation process, on 24 February Coreper supported the Presidency proposal for renewed mandate for negotiations<sup>1</sup>.

The renewed mandate included:

- a) The introduction of an obligation of prior notification, with:
  - An exception for *business trips*, defined as temporary activities which do not entail the provision of services or the delivery of goods;
  - An *horizontal time-based exception from the obligation to notify in advance* (“prior notification”) for activities whose duration is less than a certain number of days;
  - The link to the *Single Digital Gateway* Regulation as a means to facilitate the request and issuance of the Portable Document A1.
- b) The deletion of the *working time criterion* of the list of criteria to be used in the *determination of the location of the registered office or place of business in case of activity in two or more Member States*.
- c) The continuation of negotiations on the basis of the proposals made under the German Presidency for the *unemployment benefits of cross-border workers*, namely by agreeing on the *lex loci laboris* principle and working on proportionate insurance and export periods.

The majority of delegations supported the proposed mandate and counting on this support, the Portuguese Presidency moved on to the negotiations with the European Parliament.

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<sup>1</sup> ST 6051/21

## II – Negotiations with the European Parliament

### a) Political trilogue

On the 1<sup>st</sup> of March 2021, the Portuguese Presidency and the European Parliament held a trilogue, the sixteenth since the start of the negotiations on this legislative proposal.

The Presidency negotiated with the European Parliament in line with the renewed Coreper mandate. During the trilogue, the Rapporteur, Ms. Gabriele Bischoff (S&D/DE), invited the Presidency to a bilateral negotiation, which revealed that the Presidency's proposal was considered insufficient.

In this context, the European Parliament presented a proposal for a mandatory “prior notification” that would work as follows:

- A general rule for a mandatory "prior notification" with few exceptions:
  - An exception for “business trips”, defined as activities which do not entail the provision of services or the delivery of goods.
  - An exception for activities of limited duration which should be defined by the following elements:
    - i. in a Member State other than the Member State whose legislation is applicable under Title II of the basic Regulation;
    - ii. in sectors other than construction, transport logistics and agriculture;
    - iii. for no more than a certain and very short number of days;
    - iv. no more frequently than once every three calendar months.
- The determination that, in the case of an activity of a limited duration, the person concerned shall inform the competent institution no later than by the end of the first working day after the commencement of the activity, the so-called “post notification”;

- An evidence that the employer/self-employed has informed the competent institution prior to the commencement or no later than by the end of the first working day after the commencement of the activity for the cases where the Portable Document A1 has not been issued in advance;
- A supporting evidence which shows why it is not required to follow the procedure of “prior notification” as established above.

Regarding the determination of *the centre of interest of the registered office or place of business* and *the Unemployment Chapter*, the European Parliament stated that its position would depend on the agreement on “prior notification” and the relevant “safeguards” thereof.

Building on the European Parliament's proposal, the Presidency made another effort to reach a political agreement and has elaborated a counter-proposal, which included:

- An obligation for notifying the competent institution (sending Member State);
- An exception from the notification for “business trips”, defined as activities which do not entail the provision of services or the delivery of goods;
- A 3-day temporal exception from a mandatory “prior notification”, for which the notification in advance (“prior notification”) would be done whenever possible;
- A derogation from the temporal exception for the construction sector;
- The need to present evidence that the employer/self-employed has informed the competent institution, for the cases where the Portable Document A1 has not yet been issued.

Despite the Presidency's sincere efforts, as well as the possible risks taken for going beyond the renewed mandate, the Rapporteur rejected this proposal for compromise. The Rapporteur argued that the acceptance of the *lex loci laboris* principle in the Unemployment Benefits chapter should be counter-balanced by other elements, namely a mandatory “prior notification” and “safeguards” to the inclusion of exceptions.

Under these circumstances, it was not possible to reach a preliminary political deal during the sixteenth trilogue. The co-legislators decided to continue the discussions informally and bilaterally.

b) Informal bilateral discussions

The Portuguese Presidency and the Rapporteur held several bilateral informal meetings at different levels, between the teams, the Rapporteur, and the Portuguese Deputy Permanent Representative, Ambassador Pedro Lourtie, as well as with the Portuguese Minister of Labour, Solidarity and Social Security, Ms. Ana Mendes Godinho, and the Deputy Minister for Labour and Vocational Training, Mr. Miguel Cabrita.

The Portuguese Presidency and the Rapporteur continued to discuss the compromise proposals. Both sides acknowledge the importance of this legislative proposal to improve the free movement of workers in the Union, as well as increasing the protection of mobile workers. Both sides also recognized the need to combat fraud and abuse.

During these informal negotiations, the Rapporteur insisted on a list of safeguards, while the Presidency reiterated again that these elements went beyond the renewed Coreper mandate and would again fail to reach the required majority.

The Presidency highlighted that the introduction of a mandatory “prior notification” with a very short exception would clarify and improve current rules and would provide workers with increased protection levels and would also significantly contribute to the fight against fraud and abuse.

Upon request of the European Parliament and notwithstanding the limits of the mandate, the Presidency informally consulted some delegations on the elements requested by the European Parliament, with a view to find a way forward.

These elements included:

*Unemployment benefits*

- A switch of competence to the Member State of the last employment after 6 interrupted months or 3 uninterrupted months;
- A two-step model for export periods – 6 months of export [under article 64(1)(a)] and 10 (or 12) months of export period, in case of a minimum uninterrupted 24-month in the Member State of last employment;
- A model of shared competence between the Member States of last employment and of residence, in those cases where the unemployed person previously completed periods also under the legislation of the Member State of residence in accordance with its legislation, allowing the same person to claim unemployment benefits in the Member State of residence after the end of the export period from the competent Member State.

*Prior notification*

- An obligation for notifying the competent institution (sending Member State);
- An exception from the notification for “business trips”, defined as activities which do not entail the provision of services or the delivery of goods.
- A very short temporal exemption from prior notification (3 days) with the following safeguards:
  - Obligation to notify before the end of the activity abroad;
  - Derogation from temporal exemption for critical sectors (namely, construction, transport logistics and agriculture);
  - Evidence that the “prior notification” has been made in cases where the Portable Document A1 has not yet been issued by the competent institution.



*Determination of the location of the registered office or place of business in case of activity in two or more Member States*

Agreement to delete the working time criterion, depending on the acceptance of the aforementioned elements.

After informal consultations with some delegations, the Presidency considered that such a package would most likely not have enough support in the Council.

Still hoping to reach an agreement, the Presidency elaborated a new proposal, based on a different logic than the previous ones. Should this proposal find the necessary support, the Presidency would then ask Coreper for a renewed mandate.

This new proposal implied:

*Prior Notification*

- An exemption from the notification for “business trips”, defined as activities which do not entail the provision of services or the delivery of goods;
- The introduction of a mandatory “prior notification”, which would imply the communication from the employer or the self-employed person to the competent institution (sending MS) prior to the start of the activity. The competent institution should automatically issue a receipt (acknowledgement of notification), ideally to the worker, which should include basic information regarding the person concerned and the posting (i.e. name, social security number, duration of the posting). The information contained in the receipt shall be decided by the Administrative Commission.
- For activities exceeding a certain number of days, the prior notification would automatically initiate the process of issuing the Portable Document A1. In the cases where the Portable Document A1 is required and has not yet been issued, the receipt would serve as an evidence that it has been requested prior to the commencement of the activity.

*Determination of the location of the registered office or place of business in case of activity in two or more Member States*

- Deletion of the “working time” criterion;
- Introduction of a reference to the “equal” value/weight of the remaining criteria.

*Unemployment Benefits*

- Switch of competence to the Member State of the last employment after 3 uninterrupted months;
- A two-step model for export periods – 6 months of export [under article 64(1)(a)] or 10 months of export period, in case of an uninterrupted period of at least 24-month in the Member State of last employment.
- A model of shared competence between the Member States of last employment and of residence, in those cases where the unemployed person previously completed periods also under the legislation of the Member State of residence in accordance with its legislation, allowing the same person to claim unemployment benefits in the Member State of residence after the end of the export period from the competent Member State.

The Presidency reiterated that the issuance of receipt would allow competent authorities to verify if the employer or the self-employed person had complied with the obligations prior to the commencement of the activity abroad and would protect workers which, when obligations are fulfilled, would immediately have in their possession a document containing the necessary information regarding her/his posting, and.

Nonetheless, this proposal for compromise has not been accepted by the Rapporteur. The exception to the issuance of the Portable Document A1 in specific and limited circumstances under which the “prior notification” would have remained mandatory, were considered to be insufficient and therefore, the Rapporteur did not show willingness to further negotiate under these terms.

### III – The future of negotiations

The Union rules on social security coordination directly contribute to the free movement of workers and 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.

In practice, the majority of the elements included in this revision have been already provisionally agreed between the co-legislators and three outstanding issues remain under discussion.

The Presidency considers that this revision is of utmost importance for improving the free movement of workers, a fundamental right of the European Union, and has been committed to finding an agreement since the beginning.

The contacts with the European Parliament revealed the difficulties to find a solution that could be accepted by the European Parliament and also by a majority in the Council. Nevertheless, our discussions with the European Parliament have always been constructive and the Presidency believes that we have come closer to reaching a final overall agreement.

Therefore, and adding up to the efforts of our predecessors, the Presidency supports the conclusion of this file and believes that all the efforts to reach an agreement should be pursued. The Presidency strongly believes in the improvements that this revision would bring to the lives of mobile workers, an essential pillar of our Union.

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