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MEETING DOCUMENT

From:	General Secretariat of the Council
To:	Working Party on Social Questions (Social Policy and Related Legislation)
N° Cion doc.:	15642/16
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)

In preparation of the meeting of the Social Questions Working Party on 8 February 2023, delegations will find attached a steering note, setting out presidency compromise proposals.

Steering note

Revision of Social Security Coordination

SQWP meeting on 08 February 2023

A. Introduction

In order to maintain and further develop competitiveness in the European Union, it is crucial to modernise the coordination rules aiming to facilitate the free movement of persons. The Commission proposal of 2016 on the revision of the social security coordination rules has been negotiated for quite some time. Only a limited number of issues remain open in negotiations, for which there is still the need to find compromise solutions agreeable to both Member States and the European Parliament.

The following text:

- comprises proposals and their justifications, inspired by three main principles:
 1. a fair balance between the objective to fight fraud and error and the necessity to avoid unnecessary administrative burden,
 2. a well-functioning and sustainable labour market, including for cross-border workers, and
 3. clear and transparent rules for the citizens, employers and the authorities,
- presents proposals in comparison to document 15068/21 ADD 1, presented to Coreper in December 2021. Changes compared to this document are marked in **bold**, and deletions by [...]. Other provisions set out in document 15068/21 ADD1 remain unchanged.
- reflects the spirit of the latest Coreper mandate of 24 February 2021¹ and has been inspired by later Presidency proposals as well as the provisional agreement of March 2019².

At the SQWP meeting scheduled for 8 February 2023, the Presidency intends to discuss the amendments proposed below to ascertain the support of Member States for the continuation of the negotiations with the European Parliament. The Presidency would appreciate, if delegations would send in written comments by 6 February in order to allow for a focused and result-oriented discussion.

To ensure that the negotiations with the European Parliament are conducted on the basis of a clear and robust mandate, depending on the outcome of the SQWP, the Presidency intends to present the results of the discussions to the Committee of Permanent Representatives for its approval.

¹ ST6051/21

² ST7698/19 ADD1 REV 1

B. Applicable Legislation Chapter

Proposal for Article 14 (5a), Regulation 987/2009

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, such as **the length of time that the undertaking has been established in the Member State, the place where the undertaking uses office space and pays taxes, the number and value of contracts performed in the Member State of establishment [...]** and 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 **relevant factor according to the circumstances of the case [...]**. The Administrative Commission shall lay down the detailed arrangements for the determination.

***Justification:** The factors used in the assessment should address the level of business activity serving to steer the undertaking in the Member State of establishment. The factors laid down in the General Approach are difficult to determine in practice and do not take into account the recent changes in work pattern due to digitisation like cloud computing. The Presidency believes that the factors should be measurable, and should take into account the further digitisation of business processes, resulting in data that should be easy to collect for concerned parties. The suggested factors meet these requirements. The reason for including ‘the value of contracts’ is that the number of contracts would not in itself indicate the level of business activity, since the value of a contract can differ. The factors proposed by the Presidency are mainly drawn from Article 4(2) of the Posting Enforcement Directive³ and from the “Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland”, issued by the European Commission in December 2013, page 36.*

³ Directive 2014/67/EU

Proposal for Article 15, Regulation 987/2009

1. Unless otherwise provided for by Article 16 of the implementing Regulation [...], where a person pursues his or her activity in a Member State other than the Member State competent under Title II of the basic Regulation, the employer or, in the case of a person who does not pursue an activity as an employed person, the person concerned, shall inform the competent institution of the Member State whose legislation is applicable thereof **before the start of the activity [...]**. That institution shall issue the attestation referred to in Article 19(2) of the implementing Regulation to the person concerned and shall without delay make information concerning the legislation applicable to that person, pursuant to Article 11(4) or Article 12 of the basic Regulation, available to the institution designated by the competent authority of the Member State in which the activity is pursued. **This paragraph shall not apply to business trips or to activities with a duration of no more than three days within a period of 30 calendar days.**

1a. In cases where, due to the urgent nature of the activity, it is not possible in practice to inform the competent institution before the start of the activity in another Member State, the employer or, in the case of a person who does not pursue an activity as an employed person, the person concerned, shall inform the competent institution of the Member State whose legislation is applicable no later than three days after the start of the activity.

In cases where an activity in a Member State other than the Member State competent under Title II of the basic Regulation with an initial duration of no more than three days is prolonged due to unforeseeable reasons, the employer or, in the case of a person who does not pursue an activity as an employed person, the person concerned, shall inform the competent institution of the Member State whose legislation is applicable no later than on the third day of the activity. The employer or, in the case of a person who does not pursue an activity as an employed person, the person concerned, shall duly substantiate the reasons for such unforeseeable prolongation to the competent institution of the Member State whose legislation is applicable thereof.

1aa. In situations falling under Article 11(4) or Article 12 of the basic Regulation, where the attestation referred to in Article 19(2) of this Regulation is not yet issued under paragraph 1, at the request of the institution of the Member State in which the activity is pursued, the employer or, in the case of a person who does not pursue an activity as an employed person, the person concerned, shall provide that institution with evidence showing either that he or she has informed the competent institution of the Member State whose legislation is applicable pursuant to paragraph 1 of this Article, **or that he or she falls under one of the exceptions laid down in paragraph 1 of this Article.** Such evidence may be provided in paper or **in** electronic form.

1ab. [...] ⁴ The coordination rules laid down in Articles 19a and 20(4) shall apply to the institutions referred to in this Article for the purposes laid down herein.

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

Justification: *Even though the requirement of prior notification will not eliminate the risk of fraud and error entirely, it still serves to enable social security institutions to address fraud and error.*

At the same time, obligations for employers need to be clearly set out. Member States have raised the need for a horizontal time-based exception in addition to the exception of business trips to alleviate employers, employees, and the institutions concerned of the administrative burden. In addition to cases where there is no need for prior notification, the proposed text encompasses cases where the notification can take place after the start of the activity. These are cases where, due to the urgent nature of the activity, it is not possible in practice to inform the competent institution before the start of the activity and cases where an activity with an initially foreseen duration of no more than three days needs to be prolonged. In both cases, the employer or person concerned must notify the competent institution no later than 3 days after the start of the activity. The Presidency suggests that the reference to the building sector is taken out as it is problematic to single out only one sector out.

⁴ This is mainly an editorial change. The Presidency suggests 1) to refer to Articles 19a and 20(3) of Regulation 987/2009 (in their version of doc 15058/21 ADD1) as these cover the same cases and 2) to align the time-limits in Article 20(3) and 20(4) with the time-limit of the Article 19a (30 days – see below).

Proposal for Article 20, Regulation 987/2009

3. "For the purposes of application of Title II of the basic Regulation, the institutions of the Member States shall respond to queries received from the institutions of the other Member States within **30** working days from the receipt of the request."

4. In case a person pursues an activity as an employed or a self-employed person in another Member State without the attestation referred to in Article 19(2) of this Regulation, **in accordance with Article 15(1) of the Implementing Regulation [...]**, the relevant institution in that Member State can request institution of the Member State whose legislation is applicable information concerning the legislation applicable to that person.

If the requested institution does not reply within **30** working days from the receipt of the request, the requesting institution may proceed as if no document has been issued and shall inform the requested institution accordingly. If subsequently, the attestation is issued by requested institution that attestation shall have, were appropriate, retroactive effect.

Proposal for Recital 40a, Regulation 883/2004

In accordance with the principles laid down in Article 6 of Regulation (EU) 2018/1724, as from 12 December 2023 Member States are to ensure **that users**, subject to the establishment of the relevant procedures, **can access and complete a request [...]** for the determination of applicable legislation in accordance with Title II [...] fully online. The procedure [...] should be user-friendly and implemented in accordance with Article 39 of Regulation (EU) 2018/1724. **The present regulation and Article 4 of the Implementing Regulation require Member States to progressively use new technologies for the exchange, access and processing of the data required to apply the coordination rules. These include [...]** the procedures referred to in Articles 15, 16 and 19 [...] of the implementing Regulation [...]. **It is of outmost importance to respond to the potentials of new technology and digitalisation in relation to the coordination rules, including via the** Electronic Exchange of Social Security Information (EESSI).

***Justification:** The digitisation of processes is key for conciliating the need to fight fraud and abuse, while keeping red tape to the strict minimum. Therefore it should be recognised in the regulation that digitisation needs to be intensified and further developed by the Administrative Commission, as well as by the European Commission and the Member States. This also represents an important request of the European Parliament.*

Proposal for Recital 40b, Regulation 883/2004

Where a person pursues his or her activity in a Member State other than the competent Member State, the competent institution of the Member State whose legislation is applicable should **as a main rule** be informed thereof in advance. However, exceptions to the rule of prior notification **should [...]** be allowed **in relation to business trips and activities with a duration of no more than three days within a period of 30 calendar days. In such situations there is no requirement of an attestation.[...]** In addition, in cases where, due to the urgent nature of the activity or, it is not possible to inform the competent authority in advance, it should be possible to exceptionally notify the competent authority no later than three days thereafter. In cases where an initial period of three days needs to be prolonged for genuine unforeseeable reasons, the competent authority should be informed accordingly, pursuant to the main rule of prior notification. In such instances, it should be possible to notify as of the third day of activity, in accordance with the rules and time limits laid down in the Implementing Regulation.

***Justification:** The amendment refers to the suggested changes in Article 15 in Regulation 987/2009.*

C. Unemployment Benefits Chapter

Proposal for *Article 65*

Article 65 paragraph 1

1. A **person who is** wholly, partially or intermittently unemployed [...] **and** who, during his or her last activity as an employed or self-employed person resided in a Member State other than the competent Member State, shall make himself or herself available to the employment services in the competent Member State, or **where applicable** [...], in the case of partially or intermittently unemployed persons, [...] **to his or her employer.**

Such a[...] person[...] shall receive benefits in accordance with the legislation of the competent Member State as if he or she were residing in that Member State[...]. Such benefits shall be provided by the institution of the competent Member State.

***Justification:** No substantive changes are proposed compared to the provisional agreement of December 2021⁵. The proposed changes aim to align the text to the prevailing wording in the basic regulation, to make some clarifications and better link the two clauses in paragraph 1.⁶*

Article 65 paragraph 2

2. By way of derogation from paragraph 1, a wholly unemployed person [...] **who, during his or her last activity as an employed or self-employed person**[...] resided in a Member State other than the competent Member State[...] **and continues to reside in or has returned to that Member State [...] after becoming unemployed, and who**[...] **during that last activity** did not complete[...] an uninterrupted **six-month** period of insurance, employment or self-employment [...] exclusively under the legislation of the competent Member State,[...] **shall make himself or herself available to the employment services in the Member State of residence.**

[...] **The unemployed person**[...] referred to in the first subparagraph shall receive benefits in accordance with the legislation of the Member State of residence as if he or she had completed all periods of insurance, employment or self-employment under the legislation of that Member State. Such benefits shall be provided by the institution of the Member State of residence.

⁵ ST 15068/21 ADD 1

⁶ The addition of 'where applicable' is reintroduced to clarify that the obligation of partially or intermittently unemployed persons to be available to the employer depends on the requirements of the national legislation of the competent Member State. Furthermore, it is proposed to remove the reference to 'the rights and obligations laid down in the applicable legislation' in light of the current legislative regime and in accordance with the principle of equal treatment.

[...]

Justification: *The Presidency proposes as criterion only one period of the last activity of uninterrupted insurance, employment or self-employment in order to shorten the processing time, remove the uncertainty for cross border workers, as well as ease the administrative burden for the institutions and facilitate the implementation.*

The Presidency moreover proposes the length of the affiliation period to be six months, as originally proposed in the provisional agreement of March 2019⁷. The main reason is to reach a fair 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 thereby ensuring a genuine link between the labour market of the Member State competent for unemployment benefits and the job-seeker. This is a substantive change compared to the provisional agreement of December 2021. If the cross-border activity was shorter than the defined 6 uninterrupted months, the person concerned should apply for and receive unemployment benefits in the Member State of residence, provided that the last subparagraph of paragraph 2 is not applicable. In cases where the Member State of residence becomes the competent Member State, there is however always the possibility to make a supplementary registration in the Member State of last activity under paragraph 4, while the competence to provide benefits rests with the Member State of residence. This is similar to the current legislative regime for frontier workers who likewise shall apply for unemployment benefits strictly in the Member State of residence. The third subparagraph on the return is furthermore proposed to be removed as was proposed by the Commission and accepted in the General Approach. Persons might search for employment in a third Member State and export their benefits, if the conditions of Article 64 are fulfilled. All other changes are of editorial nature.

[...]Alternatively, a wholly unemployed person [...] referred to in this paragraph, who would be entitled to unemployment benefits solely under the national legislation of the competent Member State [...] may make himself or herself available to the employment services in that Member State and receive benefits in accordance with the legislation of that Member State as if he or she were residing there, without the application of Article 6 [...].

Justification: *The Presidency proposes to reintroduce the previous formulation from the Provisional Agreement of March 2019 stating that persons covered by Paragraph 2 might alternatively apply for unemployment benefits in the competent Member State even if the affiliation period of 6 uninterrupted months has not been fulfilled⁸. The element of non-aggregation of periods is reintroduced because otherwise, this subparagraph would not constitute a derogation to the principle of Paragraph 1 anymore. This is a substantive change compared to the provisional agreement of December 2021.*

⁷ ST 7698/19 ADD 1 REV 1.

⁸ Provided that the the person would be entitled to unemployment benefits solely under the national legislation of the competent Member State.

Article 65 paragraphs 2a. to 3b

2a. Paragraph 2 shall not apply to a wholly unemployed person who has [...] **most recently** completed periods of insurance as a self-employed person or periods of self-employment recognised for the purposes of granting unemployment benefits in a Member State other than his or her Member State of residence and whose Member State of residence has submitted notification under Article 9 of the basic Regulation that there is no possibility for any category of self-employed persons to be covered by an unemployment benefits system of that Member State.

Justification: *In line with the provisional agreement of March 2019 the element of 'most recently' is reintroduced to clarify that it must be the last insurance/employment periods that shall have been completed.*

3. If a wholly unemployed person as referred to in paragraph 1, the **third** subparagraph of paragraph 2 or paragraph 2a does not wish to become or remain available to the employment services of the competent Member State after having been registered there and decides to seek work in the Member State of residence, Article 64, with the exception of point (a) of paragraph 1 thereof, shall apply *mutatis mutandis*.

Justification: *Purely editorial change.*

3a. Where a wholly unemployed person as referred to in paragraph 3 has completed **most recently** a period of at least 24 months of insurance, employment or self-employment exclusively in the Member State to whose legislation he or she was last subject prior to becoming unemployed, his or her entitlement to unemployment benefits shall be retained for a period of 10 months, provided that the total duration for which the benefits are provided does not exceed the total duration of the period of entitlement to benefits under the legislation of the competent Member State. The competent institution may extend the period of 10 months until the end of the period of that person's entitlement to benefits.

Justification: *The Presidency proposes to maintain 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 unemployment benefits in accordance with the provisional agreement of December 2021. Furthermore, 'most recently' is added to clarify that the period of 24 months required should be completed most recently in order to be entitled to the retainment of benefits for 10 months.*

3b. Where a wholly unemployed person as referred to in paragraphs 3 or 3a decides to seek work in the Member State of residence and he or she completed periods of insurance, employment or self-employment under the legislation of that Member State, aggregated with periods completed in the Member State of the last activity and other Member States of other previous activities, he or she may, **after the end of the period during which he or she received benefits from the institution of the competent Member State under paragraphs 3 or 3a**, claim unemployment benefits under the legislation of the Member State of residence, as if he or she had completed all periods in that Member State.

The competent institution of the Member State of residence shall[...] grant unemployment benefits in accordance with the legislation of that Member State. The period during which the unemployed person received benefits under the legislation of the competent Member State shall be deducted from the period of entitlement to benefits under the legislation of the Member State of residence.

***Justification:** The Presidency proposes to retain the principle of shared competence, as agreed with the European Parliament in December 2021. In accordance with views previously expressed by Member States, the Presidency proposes to retain the requirement that the wholly unemployed person should have completed periods of insurance, employment or self-employment in the Member State of residence, if he or she wishes to claim unemployment benefits there. A change in the structuring of the paragraph is proposed, to clarify that an unemployed person can claim unemployment benefits from the state of residence only after the export period ended.*

Proposal for Recital 10, Regulation 883/2004

There is a need to ensure greater parity of treatment for frontier and cross-border workers by ensuring they receive unemployment benefits from the Member State of last activity provided that they have completed a period of insurance, employment or self-employment in that Member State for[...] an uninterrupted [...]six-month period[...].

***Justification:** The amendment refers to the suggested changes in Article 65.2 in the basic regulation.*