



Council of the  
European Union

Brussels, 21 April 2023  
(OR. en)

8394/23

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**Interinstitutional File:  
2016/0397(COD)**

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**LIMITE**

**SOC 247  
EMPL 173  
CODEC 632**

## **NOTE**

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From: Presidency

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)

*Revision of Council mandate*

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## **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 and (v) unemployment benefits; as well as includes further (vi) miscellaneous amendments.

## II. STATE OF PLAY

The negotiating teams of the Council, the Parliament and the Commission have twice reached provisional agreements<sup>1</sup> (in March 2019 and December 2021), which were rejected by Coreper.

In the second Semester 2019, under the Finnish Presidency, the Council and the European Parliament agreed to resume the political negotiations on a limited scope of issues on Unemployment Benefits and Applicable Legislation chapters. This was accepted by Coreper on 16 October 2019<sup>2</sup>. The Presidency therefore considers all other chapters of the amending regulation as agreed.

No further trilogues have taken place since the provisional agreement reached under the Slovenian Presidency at the thirteenth trilogue of 16 December 2021<sup>3</sup> was rejected by Coreper.

Against this background, the Swedish Presidency has worked in the Social Question Working Party<sup>4</sup> in view of finding a compromise which would reach a solid mandate in Coreper and thus allow for the resumption of negotiations with the Parliament. At working party level, many Member States supported the Presidency's effort to move the negotiations forward and expressed the importance of viewing the proposal as a package, recalling the importance to deblock the file in order to reap the benefits of the revision on all areas encompassed in the negotiations. The chapters already agreed contain important amendments to fight fraud and error and to simplify the application of the coordination rules for the citizens, businesses and the social security institutions, which cannot enter into force pending the adoption of the amending regulation.

The Presidency submits to Coreper the full text of the amending regulation in Addendum 1 to this note. A renewed mandate would enable the Presidency to pursue negotiations based on a detailed and complete text, which a majority of Member States support. This text would represent a solid basis on which to seek agreement with the Parliament.

Although the Presidency requests, for the first time, the support of Coreper for a mandate

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<sup>1</sup> ST 7698/19 + ADD1 REV1 and 15068/21 + ADD1

<sup>2</sup> ST 12917/19

<sup>3</sup> ST 15068/21 ADD1

<sup>4</sup> ST 7489/23 + ADD1

covering the whole text of the amending regulation, the Presidency considers that this text remains within the margins of the mandates Coreper has granted earlier to successive Presidencies<sup>5</sup> in a less detailed and comprehensive manner.

### **III. PRESIDENCY COMPROMISE SUGGESTIONS**

The Presidency compromise text in Addendum 1 to this note is based on the latest complete text of the amending regulation available, which is the preliminary political agreement of December 2021 (ST 15068/21 ADD1). Changes compared to this text are marked in **bold** and deletions by [...]. Deletions of whole paragraphs or articles compared to the Commission proposal are marked by [...]. Changes compared to the latest Presidency text presented to the Social Questions Working Party (ST 7489/23 ADD1) are marked in **bold underlined** and deletions by **[...]**. As delegations will realise, changes - except for the recital on digitalisation - are limited to the chapters dealing with Applicable legislation and Unemployment benefits.

The Presidency has carefully listened to delegations and has tried to accommodate to the extent possible the positions of Member States. Where these contradict each other, the Presidency has proposed solutions representing the centre of gravity between the diverging positions. The Presidency thinks that its compromise proposal represents clear progress for a large majority of Member States compared to the legislation currently in force.

#### **A. APPLICABLE LEGISLATION CHAPTER:**

##### **1. “PRIOR NOTIFICATION” AND EXCEPTIONS THEREOF**

###### *Article 15 Regulation 987/2009<sup>6</sup>*

Although currently there is already an obligation for prior notification “*whenever possible*”, many delegations have voiced concerns about the obligation of prior notification to the institution of the competent Member State without that “*whenever possible*” clause. They fear an additional administrative burden for the citizen, businesses and the social security institutions. At the same time, this is a priority for the European Parliament.

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<sup>5</sup> Latest under PT Presidency, ST 6051/21

<sup>6</sup> Article 2 (9) of the amending Regulation as laid out in ADD1 to this document.

This discussion takes place in an era when digitalisation increasingly facilitates many processes. Indeed, already today, the Electronic Exchange of Social Security Information (EESSI) can be used to inform the institution in the other Member State. In most Member States it is also possible to notify work abroad and to apply for the Portable Document A1 online. With the entry into force of Article 6 of the Single Digital Gateway Regulation<sup>7</sup> 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. Further progress will be made until Article 15 of Regulation 987/2009 becomes applicable<sup>8</sup>.

Therefore, the Presidency proposes to continue working on the basis of an obligatory prior notification to the competent institution in the Member State whose legislation is applicable under Article 15 of Regulation 987/2009.

However, in order to avoid unnecessary administrative burden which might hinder the free movement of workers the Presidency suggests two exceptions, for business trips and for short-term activities, to require a notification for activities whose duration do not exceed a limited number of days within a set reference period. In addition, the Presidency suggests a possibility to delay notification by three days in urgent cases.

The Presidency also suggests recognising the specific situation of seafarers by reinserting Article 15(3).

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<sup>7</sup> 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

<sup>8</sup> Article 3 of the amending regulation: 24 months after the entry into force of the amending Regulation

## **2. PLURIACTIVITY: DETERMINATION OF THE MEMBER STATE OF THE REGISTERED OFFICE OR PLACE OF BUSINESS**

### *Article 14(5a) of Regulation 987/2009<sup>9</sup>*

The determination of the location of the registered office or place of business pursuant to Article 13 of the basic Regulation shall be made in the framework of an overall assessment, taking into account a series of factors, giving due weight to each of them, which is relevant in the case, as well as the habitual nature of the activity pursued.

The Presidency compromise acknowledges that there are two elements to be considered when determining the competent Member State, that is the registered office and the place of business. Given the diverging views on the factors to be taken into account in the framework of a global assessment and their limited importance given that the list is neither exhaustive nor mandatory, the Presidency suggests moving these to a recital.

## **B. UNEMPLOYMENT BENEFITS CHAPTER (RULES FOR CROSS-BORDER WORKERS)**

### **1. MINIMUM REQUIRED PERIOD OF INSURANCE (AFFILIATION PERIOD)**

#### *Article 65 of Regulation 883/2004<sup>10</sup>*

Article 65 of Regulation 883/2004 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.

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<sup>9</sup> Article 2 (8) (a) of the amending Regulation as laid out in ADD1 to this document.

<sup>10</sup> Article 1 (22) of the amending Regulation as laid out in ADD1 to this document.

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 represents the centre of gravity between the diverging views of Member States. Member States who are typically 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 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.

The Presidency recalls that the consequences of retaining the current legislative regime would include inefficient processing of unemployment benefits, uneven distribution of financial burden and potential barriers for unemployed persons reintegrating into the labour market, as laid out in more detail in the Commission Impact Assessment<sup>11</sup>.

## 2. **EXPORT OF UNEMPLOYMENT BENEFITS**

*Articles 64(1)(c), 65(3b) of Regulation 883/2004<sup>12</sup>*

With regard to the export of unemployment benefits for frontier and other cross-border workers, most Member States maintain that these categories of workers should have an equal right to export the benefit, and that the duration of the export should be proportionate and linked to the affiliation period to the social security system of the Member State competent for the unemployment benefits.

Frontier workers currently enjoy a specific protection pursuant to Articles 65 and 65a of regulation 883/2004. In its proposal, the Commission has proposed to discontinue this protection. In line with the provisional agreement of December 2021 and give the support of a number of

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<sup>11</sup> 15642/16 ADD2

<sup>12</sup> Article 1(20) and (22) of the amending Regulation as laid out in ADD1 to this document.

Member States, the Presidency has kept an export period of 10 months, instead of 6 months, for those frontier and other cross-border workers having an affiliation period of at least 24 months to the social security system of the Member State competent for the unemployment benefits. It has however been clarified that this period needs to be uninterrupted and be accomplished immediately before the person become unemployed.

### 3. A MODEL OF SHARED COMPETENCE

#### Article 65(3b) of Regulation 883/2004<sup>13</sup>

The model of shared competence between the Member State of last employment and that of residence allows mobile workers to claim benefits in the State of residence after the end of the export period from the competent Member State. Most Member States have voiced that it should be made mandatory that the qualifying period shall have been completed also under the legislation of the Member State of residence.

Therefore, the Presidency proposes, in accordance with the provisional agreement of 2021, a model of shared competence requiring that the mobile worker must have completed periods of insurance under the legislation of the State of residence in order for the principle to apply.

### IV. CONCLUSION

The Committee of Permanent Representatives is invited to agree on an updated Presidency negotiation mandate as laid out in document 8394/23 ADD1 for future trilogues with the European Parliament.

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<sup>13</sup> Article 1(20) and (22) of the amending Regulation as laid out in ADD1 to this document.