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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)

- *Preparation for the trilogue*

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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 was 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 in six areas: (i) access by economically inactive mobile citizens to certain social benefits, (ii) applicable legislation for posted 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 proposal is based on Article 48 TFEU, which requires that the European Parliament and the Council act in accordance with the ordinary legislative procedure.

## **II. STATE OF PLAY**

The adoption of the general approach by the Council in June 2018 and the endorsement of the mandate by the European Parliament in December 2018 made it possible to start trilogues. Between January 2019 and December 2023, 18 trilogues took place, during which a compromise text was agreed on four chapters: equal treatment, long-term care benefits, family benefits and transitional and final provisions. However, the chapters on applicable legislation and unemployment benefits have not been finalized.

In October 2019, during the Finnish Presidency, Coreper endorsed the scope for further negotiations with the European Parliament<sup>1</sup>, limited to three issues only:

- the obligation to notify in advance the intention to post a worker to another Member State (prior notification);
- the determination of the "registered office or place of business" for the purpose of determining the applicable legislation (pluriactivity); and
- the rules for the payment of unemployment benefits to frontier and other cross-border workers.

Despite such a narrow scope of negotiations, it has remained impossible to bring the positions of the Council and the European Parliament closer together for over five years.

On 24 February 2021, Coreper agreed on an updated negotiation mandate based on the Portuguese Presidency's proposal.<sup>2</sup>

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<sup>1</sup> ST 12917/19

The last, 18th trilogue on the file was held under the Spanish Presidency on 21 November 2023. It took stock of the positions and margin of manoeuvre of co-legislators, in order to identify possible avenues for an agreement. On 8 December 2023, the Spanish Presidency presented to Coreper a proposal for a compromise package, intended as a basis for a subsequent trilogue.<sup>3</sup> However, the proposal did not gather the necessary qualified majority and no further trilogue took place.

Considering a lack of time until the end of the legislative term of the Parliament, the Belgian Presidency put forward the idea of “splitting” the proposal, which would have meant proceeding at this stage with a more limited scope of the revision, comprising those chapters or provisions already agreed with the European Parliament<sup>4</sup>. In the Social Questions Working Party (SQWP) on 18 January 2024, delegations broadly signalled certain willingness to accept this proposal, which however was not met positively by the European Parliament negotiation team. Due to the EU parliamentary election period, the Hungarian Presidency did not undertake any further work. Given the time that had elapsed since the last substantial works on the file, the Polish Presidency decided to take stock of the Member States’ positions and their possible updates. To that aim, it scheduled a meeting of the SQWP on 30 January 2025, followed by a meeting of the SQWP on 17 March 2025 during which the Council Legal Service addressed various legal questions raised in the context of that first meeting. These meetings were followed by an orientation debate at the Coreper on 19 March 2025 to receive political guidance for possible further work. The Presidency proposed to take as basis for its work the text that was presented by the Spanish Presidency in December 2023.

Based on the results of these meetings, the Polish Presidency acknowledges that the majority of Member States expressed their willingness to continue working on this dossier and that this work resumes on the whole package. The “splitting” of the file was indicated by most Member States as last resort option, to be used only in the event of the inability to reach an agreement with the European Parliament on an overall basis. In addition, the Presidency takes note that some Member States became more flexible in their positions, which may increase chances for reaching a compromise. In view of these Member States’ positions, the Presidency proposes to resume negotiations with the European Parliament.

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<sup>3</sup> 16202/23 + COR 1 + COR 2, 16202/23 ADD 1 + COR 1 + COR 2

### **III. PRESIDENCY'S PROPOSAL FOR A REVISED MANDATE**

Four years after the last update of the negotiation mandate, the Presidency considers a revised and updated mandate as necessary. With the backing of Member States, the Presidency would be able to resume negotiations with the European Parliament in the perspective of finding a compromise which would be agreeable to both European Parliament and Council.

As mentioned above, the Presidency proposes to base its further work on the text presented by the Spanish Presidency in December 2023, which is summarised below. **The Polish Presidency also proposes elements which constitute necessary improvements reflecting current positions of the Member States.** Delegations are asked to consider the following elements for a revised mandate:

In the **Applicable Legislation** chapter:

#### **1) "Prior notification" and exceptions thereof:**

The Commission proposal and the Council's general approach did not introduce the requirement for a mandatory prior notification. However, it became one of the priorities for the European Parliament and, therefore, the Presidency acknowledges that it is one of the elements that are necessary to reach a compromise between the co-legislators.

The Spanish Presidency's proposal was based on mandatory prior notification, with two exemptions aimed at avoiding excessive administrative burden on the institutions, companies and citizens: for business trips and for activities with a duration of no more than 3 consecutive days within a period of 30 consecutive days. With regard to this second exemption, the Spanish Presidency proposed to exclude from its scope activities in the construction sector, based on the Parliament's position that the sector in question is particularly prone to accidents at work. Furthermore, the proposal envisaged a possibility of "delayed notification", no later than 3 days after the start of the activity, in emergency situations.

Furthermore, according to the Spanish Presidency's proposal, if the A1 document is not delivered immediately, the competent institution would be obliged to issue an acknowledgement of receipt of the request for this document to the employer or the person concerned.

The proposal also put the requirement on the competent institution - in the event of doubts as to the information provided by the employer or the person concerned, or the validity of a document or supporting evidence or the accuracy of the facts on which the document is based - to provide the information at its disposal, upon request from the institution of the Member State where the activity is carried out, within 30 working days.

Moreover, a number of recitals and a review clause were included in the Spanish Presidency's proposal in order to take into account the opportunities offered by the digitalisation to facilitate the administration of prior notifications.

During the above-mentioned meetings held under the current Polish Presidency, most Member States supported (or expressed full flexibility for) a horizontal derogation for business trips and postings of up to 3 days, without sectoral exemptions. Only a few delegations supported maintaining the exclusion for the construction sector.

In line with the relevant case law of the Court of Justice, although the legislature enjoys a broad discretion in areas in which its action involves political, economic or social choices and in which it is called upon to undertake complex assessments and evaluations, it must be able to show before the Court that in adopting the act it actually exercised that discretion, which presupposes the taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate. Accordingly, differential treatment of the construction sector should be based at least on some basic facts, which could be produced and clearly set out in case of a legal challenge.

Several Member States stressed that categories under Article 11 of Regulation (EC) No 883/2004, like civil servants, should not be subject to the obligation of mandatory prior notification (given the low risk of abuse). It was also indicated by some that seafarers and air crew members could additionally be exempted, to avoid unnecessary administrative burden.

At the same time, most of the Member States noticed the positive role of digitalisation in the process of simplification and reduction of administrative barriers, emphasizing, however, that the digitalization process itself is not a solution to all problematic issues and would not automatically lead to simplification. As an option, a possibility of using and possibly strengthening currently available digital tools, i.e. based on the Electronic Exchange of Social Security Information (EESSI) system and the solutions implemented under the Single Digital Gateway Regulation (SDG)<sup>5</sup>, was highlighted by some Member States and support was offered in this regard by the Commission, who presented possible solutions in the SQWP.

In view of the above, the Presidency proposes the following:

- to continue working on the basis of a mandatory prior notification, coupled with the possibility to notify the competent institution **no later than 3 days after the start of the activity in cases of emergency situations.**
- to maintain the **two general exemptions** from the mandatory prior notification, namely for:  
i) business trips and ii) activities with a duration of no more than 3 consecutive days within a period of 30 consecutive days.

Regarding the first general exemption, the Presidency proposes using the definition of business trips **as laid down in the provisional agreement of December 2021<sup>6</sup>**, which gathered broad support.

Regarding the second general exemption, the Presidency proposes that it applies horizontally, **including to the construction sector**, given there is insufficient data supporting the exclusion of this particular sector from the general exemption from the obligation of prior notification for activities with a duration of no more than 3 consecutive days within a period of 30 consecutive days.

The Presidency also proposes that prior notification **would not be mandatory for civil servants.**

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<sup>5</sup> 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.

As regards the digital solutions aiming at maximising the transparency of prior notification to contribute to the fight against fraud, the Presidency proposes to consider the feasibility of the solution proposed by the Commission based on the already operational solutions under EESSI and SDG<sub>2</sub>, with particular reference to the requirement to issue an automatic **acknowledgement of receipt**.

**Question:**

**1. Can delegations support this approach?**

**2) Activity in two or more Member States:**

The Spanish Presidency's text, following up on the provisional agreement under the Slovenian Presidency, proposed to determine that the relevant registered office or place of business is where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out. It was proposed to include in a recital the non-exhaustive list of factors which should be taken into account in this assessment, with the indication that due weight should be given to each relevant factor according to the circumstances of the case. The proposed examples of factors to consider in the framework of an overall assessment were: the turnover, the length of time that the undertaking has been established in the Member State and the place where the undertaking uses office space, the places where general meetings are held and the habitual nature of the activity pursued.

During the meetings of SQWP and Coreper held under the Polish Presidency, the majority of Member States were in favour of (or expressed full flexibility for) dividing the definition of "registered office or place of business" between the normative part and the preamble and accepted the currently proposed non-exhaustive list of indicative factors for its assessment. Only a few delegations were in favour of keeping the list of such factors in the normative part.

A reservation was also expressed regarding the "turnover" factor, as some argued that it may lead to frequent changes of the applicable legislation. There was also a proposal to add the factor of "genuine activity" to the list.

The Presidency considers it crucial to give due consideration to the needs of workers pursuing activity in two or more Member States without a stable work pattern, including hypermobile workers. Taking the above discussions into account, the Presidency proposes to maintain the proposal of the Spanish Presidency<sup>7</sup> to:

- divide the definition of "registered office or place of business" between the normative part and the preamble,
- maintain that the relevant registered office or place of business is where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out, and,
- include a non-exhaustive list of indicative factors for its assessment, comprising the following: the turnover, the length of time that the undertaking has been established in the Member State and the place where the undertaking uses office space, the places where general meetings are held, and the habitual nature of the activity pursued.

**Question:**

**2. Can delegations support this approach?**

In the **Unemployment Benefits chapter:**

**3) Unemployment benefits of cross-border workers:**

The Commission proposal for the revision of the Regulations introduces the principle of *lex loci laboris* for unemployed persons who resided in a Member State other than the competent State, provided they have contributed to the social security system in that latter State for at least a specified period of time.

Establishing a consensus on the length of this affiliation period has proven difficult. Moreover, in the context of the discussion on the possible longer period of export of unemployment benefits for frontier workers and other cross-border workers, the main challenges for the Member States were to determine whether such possibility for prolonged export for these categories of workers should be introduced and, if so, to decide on a sufficiently long period of affiliation as a condition of eligibility for prolonged export.

The Spanish Presidency suggested basing negotiations with the European Parliament on, on the one hand, an uninterrupted affiliation period of 25 consecutive weeks for the application of the *lex loci laboris* principle and, on the other hand, an export period of 10 months for the frontier and other cross-border workers who choose to seek work in the Member State of residence, provided that they had an uninterrupted period of affiliation to the social security system of the Member State of last activity of at least 24 months.

Furthermore, the Spanish Presidency proposed introducing a recital touching upon the importance of providing seasonal workers with relevant information regarding their rights and obligations in a clear and understandable language.

Further to the meeting of the SQWP on 30 January 2025, where Member States expressed their views on the preferred length of the minimum continuous affiliation period and on the export period, the Polish Presidency presented to the Coreper, at the meeting of 19 March 2025, a package solution as a basis for the discussions with the European Parliament. This solution was to consist of the reduction of the (continuous) affiliation period to less than 25 weeks and of the establishment of the same export period (6 months) of unemployment benefits for all categories of workers who exercised their right to free movement. Most Member States declared significant flexibility for that package solution, indicating maximum and minimum margins of the possibly acceptable duration of the affiliation period that can be overall summarised between 16 and 25 weeks. Member States showed also overall flexibility as regards the export period reduced for frontier/cross-border workers from 10 to 6 months, therefore set at 6 months for all mobile workers.

In that respect, it is to be noted that, in so far as frontier/cross-border workers are in comparable situation with other mobile workers as regards the export of unemployment benefits, their differential treatment would have to be justified in light of the principle of equal treatment and in line with the case-law of the Court of Justice. Comparability of situations for this purpose would have to be done in light, on the one hand, of the subject-matter and objective of the act/provision in question and, on the other hand, of the principles and objectives of the field to which the provision/act relates.

Finally, some Member States expressed concerns regarding monitoring and control in case of export of unemployment benefits, and thus stressed the need to ensure that the competent Member State is adequately informed about changes affecting the entitlement to benefits by the person concerned and the Member State where the person is seeking employment.

In view of the above discussions, the Polish Presidency proposes to resume the negotiations with the European Parliament on the basis of the following package approach:

- the minimum affiliation period in the Member State of last activity in order to acquire entitlement to unemployment benefits is based on a margin of **18-22 weeks**, with the final number of weeks to be determined within that margin **and**,
- flexibility is shown as to the reduction of export period of unemployment benefits to **6 months for all categories of mobile workers**.

**Question:**

### **3. Can delegations support this approach?**

Finally, the Presidency invites delegations to answer the following general question:

### **4. Can delegations support the overall package for an updated negotiation mandate as described in points 1) – 3) above?**

#### **IV. CONCLUSION**

The Committee of Permanent Representatives is invited to:

- examine the Presidency's proposal for a revised mandate as set out above; and
- agree on this proposal as an updated Presidency negotiation mandate for future trilogues.

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Agence Europe