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PROGRESS REPORT

from: Presidency

to: Council (EPSCO)

No. Cion prop.: 5063/11 SOC 7 CODEC 8

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
- Progress Report

I. INTRODUCTION

1. On 20 December 2010, the Commission submitted the above-mentioned proposal which is intended to update Regulations (EC) No 883/2004 and (EC) No 987/2009 to reflect changes in Member States' national social security legislations and to keep track with developments in social reality that affect the coordination of social security systems. It also includes proposals from the Administrative Commission for the Coordination of Social Security Systems that are aimed at improving and modernising the social security *acquis* in accordance with Article 72(f) of Regulation (EC) No 883/2004.

2. The proposal is based on Article 48 TFEU (qualified majority and ordinary legislative procedure).
3. The European Parliament has not yet delivered its Opinion.
4. The proposed Act has relevance for the European Economic Area and for Switzerland and should therefore be extended to the European Economic Area and Switzerland.
5. At the initiative of the Hungarian Presidency, the Social Questions Working Party undertook to start examining the proposal in January 2011. Subject to a number of outstanding reservations, at its meeting on 6 June 2011, the Social Questions Working Party reached a broad measure of agreement on the text of the draft Regulation.
6. The Working Party accepted some adjustments of the Annexes reflecting the changes of national legislations and also discussed and agreed on some necessary technical modifications and clarifications which turned out to be necessary after the adoption of the Regulations. Among small technicalities, the more relevant is Article 13(1) of Regulation 883/2004/EC, which had to be modified to extend the examination of substantial activity in the Member State of residence to those pursuing activity in two or more Member States for various undertakings or employers. This amendment has been agreed by the Working Party to take shape in a better understandable new structure of this Article. Another important improvement is the agreed modified rules of Article 14(5) and a new 14(5b) regarding marginal activity where the deletion of the distinction between “simultaneous” or “alternating” activities and some clarification could help to avoid possible misuse of the provisions on applicable legislation.
7. At its meeting on 9 June, the Permanent Representatives Committee examined the outstanding issues on the basis of the Social Questions Working Party's report (doc. 10641/11). The outcome of these discussions is reported under Section II below.

8. FR, DK, MT, SI and UK maintain parliamentary scrutiny reservations and DK a general scrutiny reservation.
9. While reserving its position at this stage, pending availability of the European Parliament's Opinion, the Commission took a favourable stance on the text of the draft Regulation as proposed by the Presidency, as a whole.
10. All delegations also maintain linguistic scrutiny reservations pending availability of the text in their own language versions.

II. OUTSTANDING ISSUES

11. Special provisions for wholly unemployed self-employed persons (Article 1(8) of the proposal to amend Article 65(5) of Regulation 883/2004):

a) Objective of the Commission proposal:

Under Article 65 of Regulation (EC) no 883/2004, wholly unemployed workers shall receive unemployment benefits from the Member State of residence subject to the legislation of that Member State if they resided and continue to reside or return to the Member State of residence.

According to these provisions, self-employed persons who have been insured against unemployment in a Member State which has unemployment insurance for self-employed persons, whilst residing in a Member State which does not have unemployment insurance for self-employed persons, do not receive unemployment benefits in the event of becoming wholly unemployed. Not providing for access to benefits would mean a restriction to the right of free movement contrary to the basic principles of social security law and would not correspond to the case law of the European Court of Human Rights.

In this framework, the proposed amendment to Article 65 of Regulation 883/2004 provides that in cases where the Member State of residence does not have unemployment insurance for self-employed persons, the Member State of last activity should pay unemployment benefits to unemployed persons, while they should primarily be registered and available in the Member State of residence.

The reasoning behind the proposed amendment is that since unemployed self-employed persons have the best prospects of reintegrating the labour market of their Member State of residence, due to their close ties there, their right to social benefits should not be restricted, especially where those benefits represent the counterpart of contributions which they have paid.

b) Presidency proposal

In the light of the outcome of the discussions, the Presidency has presented an overall compromise proposal stipulating that a new Article 65a and an accompanying recital No 6 should be inserted into Regulation 883/2004, together with some necessary technical changes in related articles, to provide that self-employed persons who resided in a Member State other than the competent State and who continue to reside in that Member State, or return to that Member State, shall receive benefits if they have been insured against the risk of unemployment in the competent State and if no insurance against this risk exists for self-employed persons in the Member State of residence.

According to the proposal, unemployment benefits would be granted to this group of people by the legislation of the Member State to whose legislation the respective person was last subject. These persons have to register and make themselves available to the employment services of that Member State, and adhere to the conditions laid down under its legislation with a possibility of supplementary registration in the Member State of residence. If the person does not wish to become, or remain, available to the employment services of that Member State and wishes to seek work in the Member State of residence, he/she can get the benefit for a period of 3 months with a possible extension to the whole period of eligibility by the competent authority.

The majority of delegations could support the Presidency's compromise proposal in order to find a solution regarding the situation of a small group of people paying contributions but receiving no benefits.

The majority of those Member States who have no such system of insurance and methods of calculation strongly oppose any solution which would require them providing and calculating the benefits, considering that such a solution would go beyond coordination.

DE, DK, FI, LU, SE and SK maintain reservations of substance on the Presidency's overall compromise proposal. These delegations stress that the coordination rules of the Regulation would be used to compensate the lack of national legislation regarding unemployment insurance schemes for the self-employed, which is not the purpose of the Regulation. They also consider that the proposal puts more burden on Member States who have insurance for the self-employed.

These delegations, together with NL, SI and UK, are of the view that the proposed amendment constitutes a rather substantive change, thus requiring a careful assessment.

In the course of the meeting of the Permanent Representatives Committee, on 9 June, BE, FR, MT and SI have expressed sympathy for the Danish delegation's position.

12. **Use of the "home base" criterion for the determination of the legislation applicable to aircrew members (Article 2(3) of the proposal to add a new paragraph 5a in Article 14 of Regulation No 987/2009)**

a) Objective of the Commission proposal:

The aim of the proposed amendment is to clarify the notion of "registered office or place of business" as "home base" for flying personnel, the notion of a "home base" being defined in Regulation (EEC) No 3922/91 on the harmonisation of technical requirements and administrative procedures in the field of civil aviation. The home base is a place from which the air crew member habitually carries out his or her work in performance of his or her contract. In the Commission's views, it is more closely linked to the actual place of work of the person concerned and constitutes a more suitable element for the determination of the applicable legislation than the registered office or place of business of the employer or undertaking.

b) Presidency's proposal on the "home base"

In the light of the outcome of the discussions, delegations saw the need to go beyond the proposal of the Commission and use the home base concept as the basic rule for determining applicable legislation for aircrew members performing air passenger and freight services.

The Presidency, taking into account Member States request, presented a proposal on the basis of a proposal by the French delegation, the approach of which was supported by delegations.

The Presidency proposal would add a new Article 11(5) providing as a main rule that an activity as an aircrew member shall be deemed as an activity in the Member State where the home base as defined in Annex III of Regulation (EEC) No 3922/91 is located. In the exceptional cases of having two or more home bases, the rules of Article 13 could apply mutatis mutandis together with a clarification through a new Article 14(5a) in Regulation 987/2009, providing that for the application of Article 13(1) in case of aircrew members, "registered office or place of business" should be deemed to be the home base. A new recital would also be introduced as recital 18b in Regulation 883/2004, to justify the need for this amendment.

Two delegations (DK and IE) maintain reservations of substance on the Presidency text proposal and consider that the proposed amendments would require an impact assessment. DK is of the view that these are substantial amendments which would have an impact on a large number of persons thus involving major costs. IE also considers them a substantial change as, in its views, using the "home base" criterion to determine the applicable legislation would lead to frequent changes of applicable legislation as airline workers are very mobile, which would result in very fragmented social insurance records thus complicating matters when a person is claiming benefits.

FR and UK maintain scrutiny reservations. FR also maintains a scrutiny reservation on recital No 18b.

FR submitted a proposal with regard to the second indent of Article 14(5a) of Regulation No 987/2009 at the meeting of the Permanent Representatives' Committee.¹ BE, CY, DE, EL, IT, LV, MT, NL, PT, SE, SK and UK could agree with that proposal. AT, CZ and LT entered scrutiny reservations.

13. **Transitional provisions (Article 1(9a) of the proposal, new Article 87a to be inserted in Regulation 883/2004.**

Upon request by a number of delegations, in order to secure acquired rights of citizens transitional provisions have been added regarding changes in the legislation applicable under the draft Regulation. According to these provisions, who would be under different legislation according to the new rules, shall stay under the current rules if the relevant situation remains unchanged and in any case for no longer than 10 years unless they request otherwise.

The vast majority of delegations can accept the Austrian delegation's amendments to the text for the new Article 87a of Regulation 883/2004, as presented at the meeting of the Permanent Representatives Committee on 9 June².

¹ *"For the purposes of Article 13(1) of the basic Regulation, an employed aircrew member normally pursuing air passenger or freight services in two or more Member States shall be subject to the legislation of the Member State where the home base is located."*

² *Article 87a : "If, as a result of Regulation (EU) xxx, a person is subject to the legislation of a Member State other than the one determined in accordance with Title II of this Regulation, as applicable before ... [insert the date of entry into force of Regulation (EU) xxx] , that legislation shall continue to apply as long as the relevant situation remains unchanged and, in any case, for no longer than 10 years from [insert the date of entry into force of Regulation (EU) xxx], unless the person concerned requests that he/she be subject to the legislation applicable under this Regulation as amended by Regulation (EU) xxx. The request shall be submitted within three months after [insert the date of entry into force of Regulation (EU) xxx] to the designated institution of the Member State of residence if the person concerned is to be subject to the legislation determined under this Regulation as amended by Regulation (EU) xxx as of [insert the date of entry into force of Regulation (EU) xxx]. If the request is made after the time limit indicated, the change of applicable legislation shall take place on the first day of the following month."*

14. **Legal basis**

The proposed legal basis is Article 48 TFEU which enables the Council to take measures in the field of social security that are necessary in order to provide freedom of movement for workers, both employed and self-employed.

Following the Opinion of the Council Legal Service (doc. 6143/11), the vast majority of delegations can accept this proposed legal basis. However, NL still maintains a reservation of substance as it considers that there is a remaining category of persons falling under the personal scope of Regulation 883/2004 which is not covered by Article 48 TFEU and that it could be argued that recourse to Article 21(3) TFEU would be necessary. IE, MT and UK maintain scrutiny reservations.

15. **Voting procedure of the Administrative Commission on the Coordination of Social Security Systems (proposed amendment to Article 71(2) of Regulation 883/2004):**

The proposal aims to amend Article 71(2) of Regulation 883/2004 to clarify the voting procedure of the Administrative Commission in the light of the new developments introduced by the Lisbon Treaty, in particular Article 48 TFEU.

Following the Opinion of the Council Legal Service (doc. 6143/11), most delegations can accept the proposed amendment. However, BG and MT maintain a reservation of substance. IE, NL, and UK maintain scrutiny reservations.

The vast majority of delegations can agree with the following draft Statement for the Council Minutes, as suggested by the Italian delegation and amended by the UK delegation in the course of the meeting of the Permanent Representatives Committee on 9 June:

"The Council considers that a consensus should be sought within the Administrative Commission for the Coordination of Social Security Systems, especially for measures aimed at facilitating the uniform application of European Union law."

DK, IE and PT have entered scrutiny reservations on the draft declaration.

III. CONCLUSION

While very significant progress has been made under the Hungarian Presidency on the text of the draft Regulation, and in spite of the high level of support for the overall compromise proposal submitted by the Presidency, the Presidency nevertheless considers, in the light of the outcome of the discussions in the Permanent Representatives Committee, that it would be appropriate to allow for further work on the outstanding issues in view of their importance for a number of delegations which cannot agree with the Presidency's overall compromise proposal. By submitting this Progress Report the Presidency wishes to accentuate its dedication towards consensus that has always characterised the field of social security coordination.

Delegations find attached in the Addendum to this Report (doc. 11077/11 ADD 1) the overall compromise proposal of the Hungarian Presidency, where to all outstanding issues a justifiable solution is presented in accordance with the rules and principles of social security coordination as a basis for future work of upcoming Presidencies.