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REPORT

from: Permanent Representatives' Committee (Part I)
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
- *General Approach*

I. INTRODUCTION

1. On 20 December 2010, the Commission submitted the above-mentioned proposal which is intended to update Regulations (EC) No 883/2004 (the "basic Regulation") and (EC) No 987/2009 (the "implementing Regulation") 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 position at first reading.
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 (SQWP) undertook to start examining the proposal in January 2011. The Working Party reached a broad measure of agreement on the text of the draft Regulation (as set out in doc. 10641/11 ADD 1) subject to a number of outstanding reservations (as outlined in doc. 10641/11). On the basis of the SQWP's report, the Permanent Representatives' Committee decided to submit a progress report (doc. 11077/11) accompanied with the Hungarian Presidency's overall compromise proposal to the Council (EPSCO) 17 June session.
6. In view of the need for a swift adoption of the Regulation, the Polish Presidency continued the work in the SQWP, taking as the starting point the results achieved during the Hungarian Presidency, with the objective of paving the way for the Council (EPSCO) to reach a general approach at its session on 1 December 2011. Special attention was drawn to the main outstanding issues, i.e. special provisions for wholly unemployed self-employed persons and the use of the “home base” criterion for the determination of the legislation applicable to aircrew members.

7. In order to undertake an in-depth analysis of the personal scope of the proposed provisions on unemployment benefits, the Polish Presidency submitted a questionnaire on this issue (doc. 13343/11). The replies received from delegations (doc. 13685/11) were the basis for the first Presidency proposal (doc. 13690/11). Subsequent compromise proposals and explanatory notes were submitted in order to accommodate the concerns raised by delegations in the course of negotiations in five meetings of the Social Question Working Party (docs. 14394/11, 15809/11, 16008/11, 17013/1/11 REV 1, 14377/11, 16140/11, 16611/11).
8. The Polish Presidency also held intensive bilateral consultations with a number of delegations in order to explore the ways for reaching an agreement acceptable to the widest possible majority of delegations.
9. At its meeting on 18 November 2011, subject to a number of remaining reservations as outlined below, the SQWP reached a broad measure of agreement on the text of the draft Regulation as set out on the basis of the Presidency's overall compromise proposal (doc. 17043/11 ADD 1).
10. On 23 November 2011 the Permanent Representatives' Committee examined the outstanding issues as outlined in doc. 17043/11 and 17043/11 COR1 in order to pave the way for the Council (EPSCO) to reach a general approach on the text of the draft Regulation at its session on 1 December 2011.
11. DK and SI maintained parliamentary reservations.
12. While reserving its position at this stage, pending availability of the European Parliament's position at first reading, the Commission took a favourable stance on the text of the draft Regulation as proposed by the Presidency, as a whole.
13. All delegations maintain linguistic scrutiny reservations pending availability of the text in their own language versions.

II. OUTSTANDING ISSUES

A. Special provisions for wholly unemployed self-employed persons (Article 1(8) of the proposal to add a new Article 65a into 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) Polish Presidency proposal

In the light of the replies to its questionnaire and of the outcome of the discussions, the Presidency presented an overall compromise proposal stipulating that Article 65a would only apply where the unemployed person resides in a Member State whose legislation does not provide for any compulsory or voluntary payment of unemployment insurance contributions by any category of self-employed persons.

In this respect, the Presidency suggested amending the wording of Article 65a (as proposed by the Hungarian Presidency in doc. 11077/11 ADD 1) in relation to the scope of application of that provision in order to stress its very exceptional nature. According to the Presidency's proposal, Article 65a should only be applied where there is absolutely no possibility of unemployment insurance for self-employed persons in the Member State of residence and, consequently, the institutions in that Member State are not able to grant unemployment benefits to any unemployed – formerly self-employed – frontier worker.

The Presidency explained that the objective of its proposal would be to provide for rules based on the principle of the state of residence in accordance with the basic Regulation. These provisions should allow for a uniform interpretation and should be easy to apply for institutions as well as transparent for citizens.

The Presidency stressed that its compromise proposal provided for legal certainty as, in a given situation, only one rule (either the Member State of last activity or the Member State of residence being competent to pay for the unemployment benefits) would be applied in a particular Member State.

In addition, the Presidency proposed adding a review clause in Article 87a(2).

c) Delegations' positions

AT, BG, CY, CZ, DE, DK, ES, LU, LV, RO, SE, SK and UK support the Presidency's compromise proposal in view of the need to find a solution to address the situation of a small group of self-employed persons paying unemployment insurance contributions but not receiving unemployment benefits in return in the event of becoming wholly unemployed. They consider that those persons should not be without any social protection when they exercise their right to free movement.

While still maintaining doubts about certain aspects of the Presidency's proposal, in particular as regards the limitation of the scope of Article 65a to frontier workers, another group of delegations (BE, EL, EE, HU, LT and SI) can accept the Presidency's proposal in a spirit of compromise. LT would have a preference for other alternative proposals (such as the Hungarian Presidency's compromise proposal, or proposals submitted by FR¹, IE², UK³ and MT⁴ in the course of the discussions) but can nevertheless also accept the Presidency's text in view of the lack of sufficient support for those proposals.

¹ Docs. 16542/11 and 16851/11.

² Doc. 14457/11.

³ Doc. 14543/11.

⁴ Doc. 17243/11.

While acknowledging the need to find a solution for this category of self-employed persons, FR, IE, IT, MT, NL and PT cannot accept the Presidency's proposal, as they consider, in particular, that this proposal goes beyond the principles of coordination and is not in keeping with the general rules as set out in Regulation 883/2004. They therefore consider that another approach should be taken.

FI cannot accept the Presidency's compromise proposal for other reasons of principle and maintains a reservation of substance.

In the course of negotiations proposals by IE, UK, FR and MT were presented. They were based on so-called sectoral approach, i.e. that the Member State of residence would be obliged to pay unemployment benefits only to the categories of self-employed cross-border workers who would have been covered by its unemployment benefits scheme.

FR reintroduced its proposal during the Permanent Representatives' Committee meeting on 23 November 2011, gaining support from IE, IT, MT, NL and PT. BE, EL and LT declared their openness to also support FR's proposal if it could lead to an overall compromise agreement.

AT, CZ, DE, DK, EE, ES, FI, HU, LU, RO, SE, SK and SI cannot accept this sectoral approach, as it leads to the situation where two rules (the competence of the Member State of last activity or of the Member State of residence) would apply in one Member State depending on the category of self-employment in another Member State. Such a solution could result in a certain degree of legal uncertainty, especially as regards the possible problems for the citizens while assessing whether or not their self-employment would be covered by one of the categories eligible for unemployment coverage in their Member State of residence as there are no common categories of professions that apply to all Member States. Moreover, in certain Member States there are very limited unemployment benefits schemes covering the self-employed which are not based on the profession of the person concerned but on other factors.

CION stresses that the aim of Article 65a is to prevent a situation where a self-employed person, who was covered against the risk of unemployment in the Member State of last activity, has no right to unemployment benefits whatsoever in the Member State of residence, and to find a solution in line with Article 48 TFEU and the case law of the European Court of Human Rights. It underlines that any solution should serve the objective of the Unemployment Benefits Chapter to reintegrate unemployed persons into the labour market and to ensure that the unemployed self-employed persons can receive their benefits for the entire period. CION reaffirmed in Statement the need to fill the gap in social security protection for this group of persons (doc. 15898/11) and declared its readiness to open a broader discussion on the current provisions in the unemployment field on the occasion of the review of Article 65a, as foreseen in Article 87(2).

B. 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"

The Hungarian Presidency's compromise proposal aimed at adding a new Article 11(5) to Regulation No 987/2009 providing as a main rule that 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 was also introduced as recital 18b in Regulation 883/2004, to justify the need for this amendment.

On the basis of a proposal by the French delegation, the Polish Presidency suggested replacing the second paragraph in Article 14(5a) as set out in doc. 11077/11 ADD 1 to ensure the overall coherence of the provisions regarding aircrew members in Article 11(5) of the basic Regulation and Article 14(5a) of the implementing Regulation. The objective is to cover all air navigation personnel in an appropriate way. Moreover, as the result of discussions, the definition of “home base” was inserted into recital 18 b.

The very vast majority of delegations can accept the Presidency's proposal.

IE maintains a reservation of substance on the Presidency's proposal and FR a scrutiny reservation on accompanying recital 18b.

IE is against the use of the “home base” as a criterion for the determination of the legislation applicable to aircrew members. IE considers that it is not in the interest of airline personnel as it will lead to frequent changes in applicable legislation which will result in very fragmented social insurance records thus complicating matters when a person is claiming benefits. In its view, the introduction of the "home base" would add to the administrative burden and costs for employers.

FR maintains a scrutiny reservation on accompanying recital 18b as it stresses that if the definition of a home base should change, it would remain unchanged in Regulation No 883/2004 and an amending regulation would be required to make any amendments to it. This would be damaging, particularly for aircrew and the relevant institutions, and a source of complexity.

C. **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.

MT maintains a scrutiny reservation on the legal basis.

D. **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 reservations of substance. NL maintains a scrutiny reservation.

All 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 2011:

"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."

III. CONCLUSION

As it results from the discussion in the Permanent Representatives' Committee, two different positions with regard to Article 65a remain.

The Council (EPSCO) is invited to reach a general approach on the text of the draft Regulation at its session on 1 December 2011 on the basis of the Presidency's proposal (doc. 17421/11 ADD 1).
