



6 June 2017

## Revision of social security coordination regulation

### KEY MESSAGES

- 1 Mobility can improve the way labour markets function and help companies recruit workers with the skills they need, thereby contributing to growth and employment.
- 2 The regulation on coordination of social security systems supports two fundamental freedoms – freedom of movement and freedom to provide services.
- 3 Better coordination of social security systems can help to safeguard and support these two fundamental freedoms, to promote mobility within the EU and sustain its political acceptance, by addressing situations of abuse, eliminating loopholes and ensuring better implementation of the rules.
- 4 Overall the Commission's proposal goes in the right direction. We support the codification of relevant ECJ case law and the requirement of a minimum period of work for access to unemployment benefits. However, we have concerns regarding elements on unemployment benefits and posting of workers, where some changes to the proposals are needed. Finally, the revision is an opportunity for changes to improve coordination of family benefits.

### WHAT DOES BUSINESSEUROPE AIM FOR?

- BusinessEurope aims to promote free movement, by overcoming barriers, fostering employment of mobile workers and making sure that the appropriate policies and rules are in place at European and national level and that they are properly enforced and implemented.
- We aim for the current revision of regulation 883/2004 and its implementing regulation to find the right balance between meeting the needs of those who are mobile within the EU and those who are not, as well as between countries of destination and sending countries.
- To strengthen the political acceptance of mobility in Member States and across the EU as a whole, the current revision should set the conditions for workers to be mobile, for those who want to get jobs and have the appropriate skills and qualifications. It should also tackle abuse linked to mobile citizens that are not in work or not looking for work, where they have the primary intention to receive benefits in another Member State or to exploit existing loopholes in EU or national regulatory frameworks.

### KEY FACTS AND FIGURES

14 million citizens are mobile across the EU.	3.4% of the total European workforce is economically active and lives in another EU country.	69% of mobile citizens of working age are in employment compared to 65% of nationals, but 11.7% of mobile EU citizens are unemployed, compared to 9.9% of nationals.
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## **Revision of regulation on coordination of social security systems**

### **I. Introduction**

1. On 14 December, the European Commission published a proposal to revise regulation 883/2004 on coordination of social security systems and its implementing regulation 987/2009. The proposal concerns only some provisions of the existing regulations, specifically unemployment benefits and long-term care benefits and certain groups of people, i.e. frontier workers, posted workers and economically inactive citizens.
2. The aim of the Commission is to introduce more fairness into the rules on coordination of social security, ensure more security for those moving around the EU and for those tax payers that are not mobile, to modernise the rules so they are fit for purpose, and to make them simpler to apply and easier to enforce.

### **II. General remarks**

3. The freedom of movement – of capital, goods, services and people – are the corner stones on which European integration is built. Furthermore, mobility can improve the way in which European labour markets function, contributing significantly to economic competitiveness, growth and employment in Member States and the EU as a whole. For companies, mobility is positive when it means that they can recruit workers with the skills needed from other Member States. Mobility can provide companies with access to a wider pool of workers, where needed to fill skills gaps and to help grow their business. This is particularly important in view of skill mismatches and demographic change. Mobility and having the possibility to work in another country can also be beneficial for workers, by allowing them to move where their skills are valued and giving them the opportunity to upgrade their skills through new jobs.
4. BUSINESSEUROPE therefore believes that there is a need to promote free movement by overcoming barriers in this area, by fostering mobile workers' employment participation and encouraging circular mobility to maximise the benefits of mobility for countries of origin and destination. Making sure that the regulation on coordination of social security and its implementing regulation work well is important to achieve this. The regulation also supports free movement of services, by ensuring that workers who are temporarily posted to another Member State can remain under their home country social security system. This is beneficial for both workers and companies as it avoids frequent changes in workers' social security situation in the case of limited periods of work abroad. It results in less administrative burden and more clarity for both parties, thereby facilitating mobility.



5. Mobile workers make a positive contribution to the economy and labour market in destination countries, and statistics provided for example by Eurostat<sup>1</sup>, show that mobile EU citizens are generally net contributors to the host country's welfare system. At the same time, specific situations can arise when there is a concentration of mobile workers in particular regions. This can result in increased demand for certain services, notably health care and put pressure on local authorities' budgets. On the other hand, there are regions where it is difficult for companies and public services to attract sufficient workers with the right skills and where workers from other EU Member States are essential for meeting the demand.
6. In this context, a key challenge for the EU, Member States and for companies is to sustain and improve political acceptance of mobility within the EU. Central to achieving this is ensuring that the appropriate policies and rules are in place at European and national level and that they are properly enforced. Improving the coordination of social security, including better cooperation between national unemployment services, is an important element of this. It can help to promote mobility within the EU and improve its political acceptance by ensuring that any abuse of the systems is tackled, by eliminating loopholes, and by ensuring correct interpretation and implementation. It is also important to make sure that the legal situation is aligned in respect of other related EU legislation, specifically directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.
7. The current revision of regulation 883/2004 and its implementing regulation should aim to ensure that the conditions for workers to be mobile are facilitated, for those who want to get jobs and have the appropriate skills and qualifications. At the same time, it should tackle abuse linked to mobile citizens that are not in work or not looking for work, where they have the primary intention to receive benefits in another Member State or to exploit existing loopholes in EU or national regulatory frameworks. It should also lead to improved cooperation between national authorities on social security rules, to improve coordination and control of access to welfare benefits.

### **III. General remarks on the Commission's proposal**

8. We share the view that more fairness needs to be introduced in the rules on coordination of social security, to find a balance between answering the needs of those who are actually mobile within the EU, but also the needs and/or concerns of those who are not mobile. It is also important to ensure that the needs of both countries of destination and sending countries are met. All these elements are important in terms of strengthening the political acceptance of mobility in Member States and across the EU as a whole.
9. Overall, we find the Commission's approach fairly balanced. We support in particular the proposals to reflect within the regulation the recent jurisprudence of the European

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<sup>1</sup> EC communication COM(2013) 837, 25.11.2013, 'Free movement of EU citizens and their families'



Court of Justice, to bring clarification in terms of interpretation and implementation of the rules.

10. At the same time, we have concerns with some aspects of the proposals, in particular regarding the extension of the period for export of unemployment benefits and a number of the aspects regarding posted workers and coordination of social security, where changes to the proposals are needed. There are also elements which require further clarification. We also believe that some aspects on family benefits, which have not been proposed by the Commission, should in fact be included in the proposed revision, as well as considering possible improvements to the rules regarding calculation of unemployment benefits for mobile workers.

#### **IV. Remarks on specific proposals**

- ***Codifying EU law as interpreted by the European Court of Justice on access to social assistance for economically inactive citizens***

11. We support the Commission's proposal to codify in regulation 883/04 the recent jurisprudence of the European Court of Justice concerning conditions for access to social assistance for economically inactive persons (i.e. those not working and not actively looking for a job).
12. We agree that it is important to clarify that free movement within the EU does not mean automatic access to social assistance for economically inactive persons. And it is appropriate to give Member States the possibility to exclude economically inactive EU citizens from obtaining certain social benefits under certain conditions. We agree that the specific condition in such cases should be that the person holds legal residence in the Member State of destination. The specific proposal to amend article 4 of regulation 883/04, to make the principle of equal treatment subject to the requirement to hold legal residence in the Member State of destination, in line with directive 2004/38 on the right of Union citizens and their family members to move and reside freely in the member states, is therefore a good solution. This proposal would also create more clarity and legal certainty regarding inconsistencies between the provisions of directive 2004/38 and regulation 883/2004, which have created confusion in the past.
13. Furthermore, one of the conditions for a right of residence for economically inactive persons, is that they must have sufficient resources of their own. This relates to rulings in the European Court of Justice (e.g. Dano, Brey), which referred to the statement in the preamble of directive 2004/38 that individuals should not become an 'unreasonable burden on the social assistance system of the host Member State' because they do not have resources sufficient to meet their own basic needs and those their family. Member States may not lay down a fixed amount which they regard as 'sufficient resources', however, the amount cannot be higher than the threshold below which nationals of the host Member State become eligible for social assistance. This proposal will also therefore avoid economically inactive persons using welfare benefits in other Member States to fund their subsistence, whereas this is not the goal of the rules on coordination of social security.



- ***Unemployment benefits***

14. We support the Commission's proposal to require a worker to have worked at least three months in a Member State to have access to unemployment benefits there, irrespective of how long they have worked previously in their country of origin and/or other Member States.
15. It is appropriate in the context of EU mobility, that when granting unemployment benefits to mobile workers, authorities take account of employment and earnings received in other Member States, and we are pleased to see that the Commission has retained this provision in the regulation. At the same time, it is also appropriate in terms of achieving fairness and avoiding abuses of the rules where they may exist, to introduce a minimum period of work in the country of destination.
16. Therefore, the specific proposal to revise article 61 to include a minimum qualifying period of insurance in the Member State of most recent activity before a worker has the right to aggregate past periods of insurance spent in other Member States is a good solution and three months is proportionate in this respect. In terms of achieving fairness and avoiding abuses of the rules where they may exist, it may also be necessary to look at possible changes to article 62 as part of the revision, in terms of allowing authorities to take account of employment and earnings received in other Member States, also when calculating unemployment benefits for mobile workers.
17. We also support the introduction of a new article 64a, to stipulate that when the period is shorter than three months, the Member State of previous activity would only have to provide unemployment benefits if the person makes himself/herself available to the employment services of that Member State. This would be an important provision to ensure a control function of the Member State which is providing the unemployment benefits. However, it is not clear whether this would mean that the same conditions for access to benefits apply for all people entitled to unemployment benefits at national level, in particular the measures aiming to encourage or set a condition of active job search. Whereas, we believe that this is also important.
18. The accompanying proposal to include a new article 55a in the implementing regulation, which would oblige, in such cases, the institution of the Member State of most recent insurance to immediately send a document to the institution of the member state of previous insurance containing personal information on the unemployment situation/periods of insurance of the person concerned, is also positive.
19. On the other hand, we do not support the Commission's proposal to amend article 64 of regulation 883/2004 to extend as a general rule the period for exporting unemployment benefits from three to six months, when someone goes to look for work in another Member State. Member States already have the possibility to extend it to six months, which allows for different national situations to be taken into account. It should remain the choice of each Member State whether to extend the export period or not, rather than having a blanket extension at EU level. Providing this choice to Member States gives them the possibility to take account of current labour market



realities, including job availabilities and unfilled vacancies or skills gaps. It allows national authorities in individual cases to evaluate after the first three months whether, despite an unsuccessful job search, a job-seeker still has a better chance of finding a job in the country rather than in their home country. Moreover, this proposal would make it even more difficult for the national authority which is providing the unemployment benefits, to keep track of the unemployed person. Whereas this is an essential part of the responsibility of the member state paying the unemployment benefits in terms of control.

20. Furthermore, whereas the intention is to give people a better chance to find a job abroad, there is no evidence that a longer export period would actually achieve this. For example, a survey done by the European Commission<sup>2</sup>, (albeit in a limited number of countries), showed that in those Member States where a longer export period had been granted, this made hardly any difference in terms of successful job search: during the first three months, the success rate was 8.3% and during the first six months, 8.5%. Furthermore, we believe that Member States should be encouraged to set conditions for the export of unemployment benefits. The above-mentioned survey showed that those Member States which grant a prolongation of the export period generally set criteria for this, e.g. proof of job opportunities or the chance of finding a job abroad.

21. The Commission does however propose in article 65, that an unemployed person wishing to export their unemployment benefits would have to register for a period of at least four weeks with the employment services of the Member State which is exporting the benefits. We support this proposal, as it can help improve the control function of the national authorities and improve exchange of information. However, it would still be difficult for the Member State exporting the unemployment benefit to control whether the person is still unemployed or not and whether they are complying with the criteria for receiving the benefit (e.g. active job search). Also, a 4-week waiting period is a very short period for a successful job search in the country where the person became unemployed – for mobile as well as national workers – whilst it can lead to high costs for transfer of unemployment benefits for the unemployment insurance fund in that country. Therefore, while Member States currently have the possibility to reduce this waiting period, they should also be allowed to extend it.

- ***Frontier workers***

22. We are concerned that the Commission's proposals regarding frontier workers' access to unemployment benefits make fundamental changes to the rules governing coordination of social security in this area, which raises a number of questions for which the answers have not yet been provided. Currently, the Member State of residence of the frontier worker is competent for unemployment services and therefore pays the unemployment benefits if a frontier worker becomes unemployed. At the same time, the Member State where the frontier worker has worked most

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<sup>2</sup> Presentation to Advisory Committee on Coordination of Social Security, 24 October 2014, on 'Survey on use of portable document U2 for export of unemployment benefits'.



recently, contributes towards the payment of these benefits, be transferring a lump sum to the country of residence.

23. The Commission proposes to change this rule, so that the Member State where the frontier worker has worked most recently, as long as the work period is at least 12 months, is the one that pays the totality of the unemployment benefits. Whilst we see merit in this proposal, given that the worker has contributed to the social security system in the country, it raises a number of issues which are different for different Member States, due to the specificities of the national social protection systems. These include the control of unemployed persons by the national authorities in the country of residence and country of work, access to training or other labour market integration measures, and financial balance. There may be some possibilities to tackle issues in this area through bilateral solutions and we encourage Member States to use article 16 of the regulation in this respect. The Commission should also promote this.

- ***Child benefits***

24. The Commission only proposes minor changes in the area of coordination of child benefits. Whilst acknowledging the statistics presented by the Commission, that less than 1% of child allowances in the EU are exported from one EU member state to another, we see this as a missed opportunity. This is one of the areas where the case law of the European Court of Justice is most prevalent, thereby causing a lack of clarity. We believe it is also an area which has led to a weakening of political acceptance of EU mobility.

25. We support the current rule that child benefits are provided by the Member State where the parent works, irrespective of where the child resides. This is appropriate and fair, given that the parent of the child is contributing to the social security system and labour market by working in the country. We therefore welcome that the Commission is not proposing to change this rule.

26. However, the Commission should also have included proposals which give the possibility for Member States to adapt child benefits to the cost of living in the country where the child resides. We support the possibility, which already exists in regulation 883/2004 for Member States to provide higher benefits where the cost of living in the country where the family member resides is more than in the country where the parent works. At the same time, to help strengthen political acceptance of mobility, we would also support giving Member States the possibility to adapt benefits to lower costs of living. The way to do this should be a decision for the Member States, taking into account the importance of avoiding extra administrative burden, which can hamper the efficient coordination of social security and bring costs.

- ***Long-term care***

27. The Commission proposes to create a new chapter in regulation 883/2004 related to the coordination of long-term care benefits. The Commission also proposes a change in the rules regarding coordination of such benefits, which follows the same logic as the rules for coordination of sickness benefits. This would mean that the Member



State where the person is insured would provide the long-term care benefits in cash, whereas, when a person lives in another Member State than the one in which they are insured, the Member State of residence would provide such benefits in kind and the Member State where the person is insured would provide a cash reimbursement to the Member State of residence.

28. Whilst we agree on the principle to improve coordination of long-term care in the context of intra-EU mobility, we are concerned that this proposal would in fact hamper the performance of the social security coordination system. This is due to the diverse national rules in this area, in particular whether Member States provide such benefits in cash or in kind. In fact, only 11 Member States actually make a distinction in their social security system between in kind and cash benefits; in some Member States, there is a mixture of both types of benefits; in others, they are only provided in kind; and in others only in cash. Given this diversity, it would be very complicated to lay down one set of rules which determine the way in which long-term care benefits are provided to insured persons living in another Member State. And putting in place such a new system is likely to lead to bureaucratic burdens in some Member States. This would negatively affect the efficiency and effectiveness of the social security systems and may even lead to gaps in provision of long-term care benefits for some mobile citizens.

29. We believe that a simpler solution is possible. Rather than introducing a new chapter and new rules on coordination of long-term care benefits, such benefits could remain part of the chapter of regulation 883/2004 dealing with coordination of sickness benefits, whilst adding a list of the national institutions dealing with such benefits in the respective annex of the regulation.

- **Posted workers**

30. Part of the Commission's approach in the proposal to revise regulation 883/2004 and its implementing regulation regarding social security provisions for posted workers is to be welcomed. Other parts need to be amended or require further clarification.

31. We welcome that the Commission retains the rule that the payment of social security contributions for posted workers is in the country of origin. We also welcome that the Commission retains the rule that two or more Member States can by common agreement provide for exceptions to the rules for example to provide a period longer than two years when posted workers can be covered by the social security system of the country of origin. Such a possibility is important for companies and their workers involved in long-term cross-border projects, e.g. opening a subsidiary in another country or a long running research project. We also agree with the clarification proposed by the Commission in the implementing regulation (987/2009), article 14(1), that the requirement for a posted worker to be affiliated to the social security system of the sending Member State does not mean that he/she has to be affiliated in the same Member State where his/her employer is established.

32. However, we are against the amendment of Article 12 of Regulation 883/2004 to include the reference to the notion of "*posting within the meaning of Directive 96/71/EC*" and a new term "a worker sent by an employer". We are concerned that





this proposal may blur the division of competences between authorities responsible for the application of social security coordination regulation, and those responsible for labour law. This would lead to controversies and disputes and introduce legal uncertainty for companies posting workers. Moreover, the technique of referencing in a regulation (binding in its entirety and directly applicable in all Member States) to a directive (binding Member States as to the result to be achieved) raise legal doubts. The proposal to introduce in the regulation the reference to the Posting of Workers Directive goes thus against the Commission's aim to ensure legal clarity.

33. It is also a major concern that the Commission proposes to retain the rule in Article 12 of regulation 883/2004 that a posted worker sent to replace another posted worker cannot continue to be covered by the social security system of the sending Member State. The Commission also proposes to extend this rule to cover self-employed. We have concerns with these proposals, as they mean that the social security situation of a posted worker depends on whether another worker has been posted previously. They therefore discriminate between one posted worker and another by not taking account of the individual circumstances of each posted worker. Furthermore, these rules would be very unclear as they raise questions, for example, who, when and how will determine what 'replacement' means. They would also be difficult to apply in practice. Further complications are created in the proposal by mixing posted workers and self-employed, whereas these two groups are completely different. We understand that the Commission's aim was to address the issue of abuses but this can be best done by improving reliability of A1 forms as well as efficient controls.
34. The proposed rules on replacement should therefore be deleted as they go against the purpose of the EU coordination rules to facilitate the exercise of citizens' rights, secure equality of treatment and ensure legal clarity and effective administrative coordination.
35. We welcome the intention of the Commission regarding article 5 of the implementing regulation 987/2009, to clarify the procedures for national authorities for certifying which social security legislation applies to the posted worker. The rules in this area need to be applied better, including through improved procedures linked to the use of A1 forms. It is crucial that A1 forms work in a reliable and efficient way for both companies and workers and that the rules concerning them are well enforced by national authorities. The aim should therefore be to increase the reliability of the forms and build trust between national authorities from different Member States. It is, however, unclear, whether the proposal by the Commission to establish a standard procedure for the issuance, format and contents of a portable document aims at making improvements to the A1 form or introducing a new form. Without further information, it is difficult to provide comments on this before the Commission clarifies its proposals.
36. Furthermore, it seems that these proposed changes to Article 5 may interfere too much with the powers of the issuing institutions, leading to legal uncertainty and potentially disturbing free movement. This regards especially the obligation on the issuing institution to forward all supporting evidence to the requesting institution within two working days. This very short deadline risks leading to hasty and incorrect withdrawals of issued A1 forms, which would be to the detriment of workers and



companies. Companies and their workers need to be sure that the decision of the competent authority for social security systems in the sending country is binding and will not be undermined or put into question by the authority controlling the application of labour law in the host country. Therefore, a more balanced solution, supporting mutual trust between institutions and ensuring legal certainty for companies and workers, needs to be found.

37. The Commission proposes to insert a new article 19.3 in regulation 987/2009 obliging the institution issuing an A1 to carry out a proper assessment of the relevant facts and to guarantee that the information is correct. Given that more than two million A1 forms were issued in 2015, mostly to posted workers, with only a few cases of fraud, this seems to be a very bureaucratic and unnecessary general requirement that would lead to serious delays in issuing A1 forms. Inspiration should therefore rather be taken from article 4 in the enforcement directive on posting of workers concerning identification of a genuine posting and prevention of abuse and circumvention, where competent authorities shall carry out checks and controls where they have reason to believe that there is a need to do so.
38. Finally, the proposal for a new Article 76a in regulation 883/2004 and a new article 20a in regulation 987/2009 give the European Commission the power to adopt implementing acts specifying the procedure to be followed to ensure uniform conditions for application of the specific rules on coordination of social security regarding posted workers. This includes the determination of situations in which A1 forms shall be issued, elements to be verified before issuing and the withdrawal when contested. Given these aspects can be crucial for the practical application of Articles 12 and 13 of Regulation 883/2004, we are concerned with conferring on the EC such unclearly defined powers.