

## ETUC Position on the EC proposal for the revision of Regulation 883/2004 on the coordination of social security systems

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### INTRODUCTION

Since 1958 (Regulations 3 and 4/1958<sup>1</sup>) the objectives of the coordination of social security systems, enshrined in the Treaties, are political and social ones. The coordination essentially allows workers and their families to move in the EU while guaranteeing their rights. It must not reduce their rights. In addition to that, a basic and fundamental principle is that these rights are linked to employment.

The proposal is part of the 2016 European Commission's Labour Mobility Package. The ETUC would have preferred a proper consultation but contributed in some detail to the informal consultation on labour mobility

The ETUC stands for fair and freely chosen mobility for all. Under free and fair conditions, mobility is a great opportunity for personal, economic and social development of EU citizens and workers.

Several obstacles still stand in the way of EU citizens moving to another Member State, particularly related to work, despite the existing EU legal framework for the free movement of workers. Mobile workers often experience discrimination or unequal treatment in fields such as social security, working conditions and wages, access to welfare and education, taxation, etc. Frontier workers encounter particular discrimination since their status is not properly protected, recognised or even defined.

Mobile workers run into a very complex legal framework. The European legislation and regulations are, despite their size, relatively modest in their intentions. The often very different national laws and regulations in Member States remain largely in place. The sole aim on the European level is to establish a number of basic principles, and to coordinate the different legislative frameworks in specific areas. There is no intention to harmonise and/or standardise national legislation.

In recent years we have seen a rise in propaganda against mobile EU citizens and workers and concerning supposed abuses of EU and national law for social benefits linked to the right of free movement. This has pushed some EU Member States and/or local public administrations to limit the access of mobile EU citizens/workers to social benefits, to expel them from the territory of the hosting country, and to persecute and/or discriminate them on the basis of their nationality or their residence (if it is out of the country of employment).

This is particularly serious when it comes to workers who have lost their job and are not entitled to social and unemployment benefits which they (and/or their employers) have paid for through social security contribution. This is the fundamental principle of the coordination of social security systems.

Such treatment of EU citizens is in contradiction with the EU law and the provisions of the TFEU. Furthermore, little statistical evidence exists of such abuses in any EU Member State, and when it exists it is limited to specific groups of people or to individuals and is due in most cases to weaknesses in national legislation. On the contrary, migrants contribute more than they receive<sup>2</sup>.

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<sup>1</sup> <http://ec.europa.eu/social/main.jsp?catId=867>

<sup>2</sup> <http://wol.iza.org/articles/welfare-magnet-hypothesis-and-welfare-take-up-of-migrants/long>  
<http://www.oecd.org/migration/international-migration-outlook-1999124x.htm>

In addition, several abuses happen from the employers' side, particularly in the framework of posting of workers, through unfair competition on social contribution.

The objective of the European Commission is to continue the process of modernisation of the EU law on social security coordination and to thus achieve a modernised system of social security coordination that responds to the social and economic reality in the Member States.

The proposal focuses on four areas of coordination:

- Economically inactive citizens' access to social benefits
- Long-term care benefits
- Unemployment benefits
- Family benefits.

The proposal also intends to clarify the conflict of rules on applicable legislation and the relationship between the Regulations and Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

In addition, the proposal includes a number of technical amendments and periodic technical updates to reflect developments on national legislation that affect the application of the EU rules. We develop hereafter these proposals and the ETUC position and demands to this respect.

## **ETUC POSITION AND DEMANDS**

The ETUC considers that workers and their families should not be disadvantaged by working in another Member State. Much of the political debate seems to be about potential fraud and abuse, but workers who pay their dues deserve their rights. Particular attention should be paid to the enforcement of Regulation 492/2011 with regard to equal treatment of mobile workers.

As stated by the EUCJ: "Articles 46(2) and 47(1) of Regulation No 1408/71 must be interpreted in the light of the objective laid down by Article 48 TFEU, which implies in particular that migrant workers must not suffer a reduction in the amount of their social security benefits as a result of having availed themselves of their right of free movement"

The right of EU citizens and their families to move freely and reside in any EU country is one of the four fundamental freedoms enshrined in the EU Treaties (free movement of persons, capitals, goods and services). Free movement of persons is the first established but the only one facing obstacles and not fully respected. Free movement of persons would not be possible unless the social security rights of mobile Europeans and their family were protected.

We recognise the Commission's efforts to clarify the social security coordination rules but we don't support the new approach referring to "a fair and equitable distribution of the financial burden among the Member States" whereas, as mentioned in the explanatory memorandum, the costs concerned are very low and, in most cases, covered by the country of origin.

Some proposals are positive but concerns remain over details. The proposal fails to deal comprehensively with the many problems faced particularly by Europe's 1.3 million workers in frontier regions who work in a country and live in another.

Over 11.3 million people of working age live in a different EU country to the one where they have citizenship.

## **1. ACCESS BY ECONOMICALLY INACTIVE MOBILE EU CITIZENS TO SOCIAL BENEFITS**

Recently there have been cases of thousands of EU mobile workers who have been expelled after they had lost their jobs. In many cases that also meant that they also lost their rights to social benefits. The ETUC has denounced this situation, and will continue to do so, during the meetings of the Advisory Committee on the Free Movement of Workers.

We demand that a coherence between Directive 2004/38 (rights of residence) and Regulation 883/2004 (social security rights) is established.

Consequently, the ETUC opposes the Commission's proposal which aims to clarify that Member States may decide not to grant social benefits to mobile citizens which are economically inactive citizens – this means those who are not working nor actively looking for a job, and do not have the legal right of residence on their territory. Economically inactive citizens have a legal right of residence only when they have means of subsistence and comprehensive health coverage.

In order to avoid abuses, the distinction between economically inactive mobile EU citizens and unemployed has to be clarified.

## **2. COORDINATION OF LONG-TERM CARE BENEFITS**

The ETUC supports the proposal to consider long-term care benefits as part of social security systems and introducing a separate chapter on the coordination of these benefits aligned with the existing provisions on sickness benefits thus applying both to elderly and disabled people.

Nevertheless, we demand the full and proper involvement of social partners in the drawing up of the detailed list of long-term benefits. It is essential to define what will be reimbursed (nursing, support, home assistance) in all Member States.

## **3. COORDINATION OF UNEMPLOYMENT BENEFITS**

First, we want to underline that the current Regulation 883/2004 does not stipulate any minimum qualifying period. This would be contrary to the coordination of social security systems and contrary to the principle of insurance.

The basic and fundamental principle of the coordination of social security systems is the totalisation of the periods of insurance.

The existing problem is not that some Member States have changed the rules concerning unemployment allowances – which could be understandable – but they have changed, unilaterally, the rules of aggregation, without taking into account the limits imposed by Regulation 883/2004.

(a worker who has worked five years in Germany and five in France has the same rights as somebody who had worked 10 years in France or in Germany)

The proposals cover three aspects.

Concerning the aggregation of unemployment benefits, the ETUC opposes the proposal to require a minimum qualifying period of three months' insurance in the Member State of most recent activity before a right to aggregate past periods of insurance. The proposal is contrary to the principle of equal treatment of facts. (Definition: Equal treatment of facts. Member states are to take account of facts or events occurring in another member state as though they had taken place in their own territory. For example, if an accident in your own member state result in you being able to draw an incapacity benefit, then this benefit must also be provided should you suffer an accident in another member state.)

Concerning the export of unemployment benefits, we fully support the proposal to extend the minimum period for an export of unemployment benefits from three to six months while providing for the possibility to export the benefit for the whole period of entitlement. Nevertheless, also under the current Regulation, the question still stands concerning the mobile worker who loses his/her job within 3 months and is treated as a “mobile unemployed”.

Concerning the coordination of unemployment benefits for frontier and other cross border workers, we fully support the proposal of making the Member State of the more recent employment responsible for the payment of unemployment benefits in order to overcome obstacles linked to the residence of the worker. Nevertheless, we oppose the proposal to introduce the requirement of having worked in this Member State for a minimum period

#### **4. FAMILY BENEFITS**

The ETUC supports the proposal to better coordinate child-raising allowances intended to compensate parents for loss of income during child-raising periods by changing the current coordination provisions so that child-raising allowances are considered individual and personal rights and to permit an optional right for the secondary competent Member State to pay the benefit in full.

In addition, we propose to ensure coherence with the Parental Leave Directive 2010/18, which could be revised shortly by the European Commission. ETUC’s demands in this respect are :

- Ensure that there is adequate pay or salary replacement for parental leave, preferably fully paid. At the moment, the average paid parental leave is 50 per cent of the last salary;
- Consider increasing the length of the individual right to parental leave from the current 4 months (16 weeks) to 6 months (24 weeks), given that only one Member State has less than 24 weeks;
- Consider increasing the current, non-transferable period of the leave. This would be an additional incentive for men to take up parental leave;
- Consider raising the age of the child above the current limit of 8 years as several Member States already provide for higher age;
- Increase the flexibility in uptake, in particular in the form of part-time to be taken at different stages of the child’s development.

#### **5. POSTING OF WORKERS**

The ETUC wants to ensure more and better coordination between the social security rules and posting. Circumvention of social security rules constitutes an important motivation for the abusive use of posting by undertakings. Directive 2014/67 on the enforcement of Directive 96/71 has introduced a number of elements to try to narrow down the use of posting to clear cut cases of transnational provision of services. These efforts should be mirrored in the social security regime.

The ETUC supports the proposal to clarify the conflict rules on applicable legislation and the relationship between the Regulations and Directives 96/71. We also support the proposal to strengthen the administrative rules on social security coordination in the fields of information exchange and verification of the social status of such workers in order to prevent potentially unfair practices or abuse.

Therefore, as mentioned in our first contribution to the debate (September 2015), we repeat that we recommend that Articles 11 to 16 of Regulation 883/2004 and Article 14 of Regulation 987/2009 are amended with a view to better fighting fraud and abuse of posting by unscrupulous employers.

Areas for amendments should include:

- improve the notion of establishment to better fight letterbox companies (Art 14.2 Regulation 987/2009, point 1 of Administrative Commission Decision A2).
- strengthen the requirement of stable period of employment in the country of origin. In line with the enforcement Directive, the social security regulations should also require that the worker resumes working in the Member State of origin (Art 14.7 of Regulation 987/ 2009, point 1 of Administrative Commission Decision A2).

As a consequence, neither Directive 96/71 nor Article 12 of Regulation 883/2004 would enable undertakings such as temporary work agencies to hire workers and immediately post them to another Member State.

Introduce new rules on bogus self-employment. Social security coordination rules could contribute to the fight against fake self-employment by better circumscribing the notion of self-employment. In this regard, ECJ case law and the 2006 ILO Recommendations on the employment relationship can provide a useful source of inspiration. Necessary precaution must be taken to ensure that the falsely self-employed workers are not penalised for a situation that they very often were not in a position to influence. The proposal is not ambitious enough to fight bogus self-employment. It aligns two notions but does not provide for guidelines to discern the employment relationship from bogus self-employment.

Introduce binding obligations upon the Member States to secure better enforcement. A key problem in many Member States is insufficient inspections. Special attention should be paid to fraudulent A1 declarations to verify that contributions are actually paid in the issuing country of the A1 form.

The country of employment should be entitled to assess that the A1 form is genuine and if necessary to reverse it, if there is no reaction or statement of content by the issuing authority within 3 month after the first complaint.

Finally, the time limit of 24 months is too long and should be changed in coherence with the revised Posting Directive. If average duration of posting is 3-5 month, then a limit of 24 months only creates more opportunities for employers in host countries to play on different levels of social contributions. Furthermore, within the revision of Directive 96/71 the ETUC demands that after 6 month the social security rules of the country of employment should apply.

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