

Opinion of the European Economic and Social Committee on the 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 determining the content of Annex XI

COM(2006) 7 final — 2006/0008 (COD)

(2007/C 161/18)

On 10 February 2006 the Council decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the above-mentioned proposal.

The Section for Employment, Social Affairs and Citizenship, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 22 February 2007. The rapporteur was Mr Greif.

At its 434th plenary session, held on 14/15 March 2007 (meeting of 14 March), the European Economic and Social Committee adopted the following opinion by 163 votes to 0 with 5 abstentions.

1. Summary

1.1 The EESC believes that it would be advisable to work to ensure that the new regulation on the coordination of Member States' social security systems comes into force as quickly as possible, which would also involve the draft implementing regulation taking effect without delay and agreement being reached on the regulation under consideration here, which lays down the content of Annex XI of Regulation 883/2004.

1.2 The EESC is aware that unconditional application of the principle of equal treatment of facts, under which national authorities may not limit themselves to facts occurring in their own territory, would be accompanied by major consequences for social security systems.

1.3 The EESC acknowledges therefore that certain entries in Annex XI concerning particular facts in Member States are necessary to ensure that there is no conflict between national rules and the text of Regulation 883/2004. The Committee requests, however, that the entries do not proliferate and that their number is kept to a minimum by ensuring that specific entries are in fact necessary for the implementation of the coordination rules in the relevant Member State and adhere to the proportionality principle.

1.4 For the EESC, it is especially important to emphasise that under no circumstances should the process of coordination lead to a situation whereby entries included in Annex XI work to the disadvantage of the public.

1.5 In the EESC's view, the approved entries do not present any obvious problems, either for insured persons moving from one country to another or for businesses and social security institutions. The benefits of coordination for recipients must not be undermined by the entries.

1.6 The EESC acknowledges the successful efforts of all those involved to simplify Annex XI. As a result, it contains far fewer

entries than the equivalent annex (Annex VI) to the current coordinating Regulation 1408/71.

1.7 To facilitate the rapid practical implementation of the basic regulation, the EESC therefore calls on the Member States to provide their social security institutions, without delay, with the necessary human and technical resources.

2. Introduction and background to proposed regulation

2.1 The Community rules on the coordination of national social security systems are currently laid down by Regulation (EEC) No 1408/71 (basic regulation) and its implementing regulation, Regulation (EEC) No 574/72, which have been modified and updated several times since coming into force over 30 years ago.

2.1.1 These regulations are intended to define the necessary measures for the persons covered to travel, stay or reside in another Member State without losing their social security entitlements. Insured persons who move from one country to another should not suffer any disadvantage and should not be treated worse than insured persons who remain in one country. To ensure that rights are safeguarded, the regulations lay down the practicalities of coordination and also the different procedures to meet specific needs in the various branches of social security.

2.2 Regulation 1408/71 is to be replaced by Regulation (EC) 883/2004 of the European Parliament and the Council, which was adopted on 29 April 2004.

2.2.1 Article 89 of new Regulation 883/2004 provides that a further regulation shall lay down the procedure for its implementation, which will replace the current implementing Regulation 574/72. This implementing regulation ⁽¹⁾, which was published in draft form on 31.1.2006, is currently being examined in the European Parliament and the Council and has already been the subject of a separate EESC opinion ⁽²⁾.

⁽¹⁾ OJ C 318, 23.12.2006.

⁽²⁾ Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems COM(2006) 16 final — 2006/0006 (COD). Rapporteur: Mr Greif. OJ C 324, 30.12.2006.

2.2.2 Only after the implementing regulation has come into force can Regulation 883/2004 be applied and its numerous simplifications, clarifications and improvements in the area of social security coordination, which have already been approved, take effect for all users. Until then, Regulation 1408/71 and its implementing Regulation 574/72 remain fully in force.

2.3 Recital 41 of Regulation 883/2004 states that 'it is necessary to lay down special provisions which correspond to the special characteristics of national legislation in order to facilitate the application of the rules of coordination.' And it is these *special provisions for the application of the legislation of the Member States* that are contained in Annex XI of Regulation 883/2004, which is the subject of this opinion.

2.3.1 The basic Regulation 883/2004 therefore lays down the basic rules of coordination. The implementing regulation is a form of 'user manual' for the basic regulation and lays down rules on matters of a more administrative nature. Annex XI of Regulation 883/2004 contains specific rules, adapted to the legal systems of individual Member States, in order to facilitate the smooth application of the new coordination rules.

2.3.2 Annex XI therefore serves to ensure that the social security systems of individual states and the coordination rules are not at odds with one another. Certain rules peculiar to national systems must be safeguarded through entries included in Annex XI, so as not to impede coordination. Annex XI should therefore serve to ensure a smooth interaction of national and Community legislation with regard to the coordination of social security systems in Member States.

2.4 There will be a separate section in Annex XI for each Member State. The scope of the entries for individual Member States will vary widely and depends upon national legislation.

2.5 When the new coordinating Regulation 883/2004 was adopted in 2004, provisionally Annex XI was left completely blank. It was agreed at the time that its contents would be determined in a subsequent regulation. This regulation now exists in draft form ⁽³⁾.

2.5.1 Annex XI relates not only to Regulation 883/2004 itself, but also to the implementing regulation. The three texts cannot be considered separately. Accordingly, Annex XI is being examined in the Council Working Group on Social Issues alongside those parts of the implementing regulation that are relevant to it. Both draft regulations submitted by the Commission in January 2006 will therefore be discussed in the Council at the same time.

⁽³⁾ COM(2006) 7 final.

2.5.2 Before the implementing regulation comes into force, the content of Annex XI must be determined by the European Parliament and the Council. The finalisation of Annex XI is therefore a further condition for the application of the new rules on coordination. The legal basis for the regulation is Articles 42 and 308 of the EC Treaty. These articles stipulate that implementation requires unanimity in the Council in conjunction with the codecision procedure in the European Parliament.

2.6 On 24 January 2006, the Commission put forward a proposal amending certain points in Regulation 883/2004 and laying down the content of Annex XI. The proposal came about following consultation with Member States. The amendments to specific points in Regulation 883/2004, which is still not applicable, are based upon the fact that some of the questions which Member States requested be included in Annex XI were acknowledged to be of a horizontal nature, so that the rules on these questions should cover all Member States. By including them in the basic regulation, there is no need for similar entries from several Member States in Annex XI.

3. General and specific comments of the EESC

3.1 The EESC has already welcomed the new rules on the coordination of Member States' social security systems in several opinions as an important step towards improving freedom of movement in the Union, and is particularly pleased about the expansion of the scope to cover more matters and persons, the simplification of the current rules and also all measures to improve cooperation between social security institutions.

3.1.1 The EESC believes that it would be advisable to work to ensure that the new coordinating regulation comes into force as quickly as possible, which would also involve the draft implementing regulation taking effect without delay and agreement being reached on the content of Annex XI. In that connection, the EESC calls upon all stakeholders to press ahead as quickly as possible with the outstanding examination of the draft implementing regulation and also of the regulation under consideration here, which lays down the content of Annex XI ⁽⁴⁾.

3.1.2 Furthermore, the EESC has already stipulated in its opinion on the implementing regulation that any period of time foreseen between the final adoption of the implementing regulation and its entry into force must under no circumstances exceed the six months envisaged in the Commission draft ⁽⁵⁾.

⁽⁴⁾ Most recently also requested in the EESC opinion on *Social security schemes for employed and self-employed persons* (Rapporteur: Mr Rodríguez García-Caro), OJ C 24 of 31.1.2006 and the EESC opinion on the *Proposal for a Regulation of the European Parliament and of the Council laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems* COM(2006) 16 final — 2006/0006 (COD). Rapporteur: Mr Greif. OJ C 324, 30.12.2006.

⁽⁵⁾ OJ C 324, 30.12.2006, rapporteur: Mr Greif — point 4.4.1.

3.2 Member States may request that entries be included in Annex XI so that certain sensitive national rules can be maintained. The basis for this is, first and foremost, the comprehensive equal treatment of facts laid down in Regulation 883/2004, under which Member States must in principle take account of all facts and events with legal effects in the area of social security occurring in another Member State as though they had taken place in their own territory ⁽⁶⁾.

3.2.1 Equal treatment of facts means, for example, that drawing a pension from a social security institution in another Member State must have the same legal effects as drawing a pension in one's own Member State. And should, for instance, having 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.

3.2.2 In the past, the European Court of Justice has nearly always decided in favour of a broad interpretation of equal treatment of facts in order to guarantee the protection of migrant workers. In the current draft of Regulation 1408/71, there is no general equal treatment of facts, only rules for certain specific cases. Where no specific rules exist, the matter has occasionally been brought before the Court of Justice. For example, the Court found it to be inadmissible when the length of time for which orphan allowance can be claimed may only be extended on the basis of military service completed within the relevant Member State ⁽⁷⁾, or when periods of incapacity are taken into account in an old-age pension only if the person concerned was subject to the laws of the relevant Member State when he/she became incapable of working ⁽⁸⁾.

3.2.3 The EESC is aware that unconditional application of the principle of equal treatment of facts, under which national authorities may not limit themselves to facts occurring in their own territory, would be accompanied by major consequences for social security systems. Furthermore, recitals 9 to 12 of Regulation 883/2004 show that limits are set to the equal treatment of facts. For example, 'care should be taken to ensure that the principle of assimilation of facts or events does not lead to objectively unjustified results or to the overlapping of benefits of the same kind for the same period' (recital 12). And recital 11 stipulates that 'The assimilation of facts or events occurring in a Member State can in no way render another Member State competent or its legislation applicable.'

3.2.4 In order to eliminate undesired effects arising from the equal treatment of facts, horizontal waivers applicable to several Member States were included in the basic regulation (883/2004). Specific undesired effects on the system of one

Member State can be prevented by including an entry in Annex XI.

3.3 Annex XI is based upon the contributions of Member States. There are certain provisions on specific facts that Member States cannot introduce or leave in force at national level without there being a potential conflict with the text of Regulation 883/2004. Annex XI should therefore ensure that the points in the regulation relating to particular Member States are adapted in a way that enables a smooth application in individual Member States.

3.3.1 Given that it might contain quite a number of entries, Annex XI is key to the implementation of Regulation 883/2004. The EESC acknowledges that certain entries are necessary but requests that the entries do not proliferate and that their number is kept to a minimum by ensuring that specific entries are in fact necessary for the implementation of the coordination rules in the relevant Member State and adhere to the proportionality principle. For the EESC, it is especially important to emphasise that under no circumstances should the process of coordination lead to a situation whereby entries included in Annex XI work to the disadvantage of citizens.

3.3.2 The EESC is aware of the complexity of the issues to be settled here, but in spite of this requests that the pursuit of vested interests should not lead to any further delay in the application of the new rules, particularly in view of the fact that the Council must decide unanimously and in accordance with the codecision procedure in the European Parliament.

3.4 Even during the consultations on Regulation 883/2004, Member States were asked to submit proposals aimed at ensuring the smooth application of the individual provisions. Member States put forward some 150 proposals for entries to be included in Annex XI. The Commission evaluated the proposals and discussed them with officials from the relevant Member States. In the end, about 50 were incorporated into the proposed annex. This process led to the drafting of the annex which now appears in the Commission proposal under discussion here. A final assessment of the entries in Annex XI and the corresponding chapters in the implementing regulation is currently being carried out in the Council Working Group on Social Issues.

3.4.1 Given the complexity of the material, which covers questions of detail in the social legislation of individual Member States, the EESC will not comment in detail on specific entries. On first sight, the approved entries do not, in the EESC's view, present any obvious problems, either for insured persons moving from one country to another or for businesses and social security institutions.

⁽⁶⁾ See Article 5 of Regulation 883/2004.

Equal treatment of benefits, income, facts or events:

'Unless otherwise provided for by this Regulation and in the light of the special implementing provisions laid down, the following shall apply:

(a) where, under the legislation of the competent Member State, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation shall also apply to the receipt of equivalent benefits acquired under the legislation of another Member State or to income acquired in another Member State;

(b) where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory.'

⁽⁷⁾ Case C-131/96, *Mora Romero*, [1997], ECR 3676.

⁽⁸⁾ Cases C-45/92 and C-46/92, *Lepore and Scamuffa*, [1995], ECR 6497.

3.5 Furthermore, it also seems clear why most of the entries were not included: Some proposals were not included in Annex XI, either because of redundancy or because of incompatibility with Regulation 883/2004. Some of the other proposals for entries in Annex XI have become proposals for amendments to Regulation 883/2004. These proposals are not specific to a country but are of a general nature.

3.5.1 These proposed amendments to Regulation 883/2004, which have also been incorporated into the draft regulation, ensured that Annex XI did not include several similar entries for various Member States. This keeps the annex shorter and the overall regulation clearer.

3.5.2 Article 1 of the draft regulation is an example of this consolidation of horizontal matters. The clarifications it contains are relevant to many Member States and are therefore logically added as amendments to the regulation itself, rather than as a large number of entries in Annex XI.

3.5.2.1 Article 1 (1) amends Article 14 of Regulation 883/2004 on *voluntary insurance or optional continued insurance*. On the basis of this new provision, all Member States may stipulate in their national legislation that voluntary insurance in their own social security system, under which residence or previous employment in that Member State is a condition for voluntary insurance, is only possible if at an earlier stage the person had been insured in the system of that Member State on the basis of activity as an employed person. Without such a possible waiver, anyone who had resided or worked anywhere in the European Union could take out voluntarily insurance in this Member State by virtue of the comprehensive equal treatment of facts laid down in Article 5 of Regulation 883/2004. As voluntary insurance under the systems of certain Member States confers some real advantages, unconditional access could lead to the destabilisation of the systems of these Member States, and therefore present serious problems for insured persons there. It was therefore agreed that all Member States may stipulate that previous employment is a prerequisite for voluntary insurance.

3.5.2.2 Article 1(3) amends Article 52 of Regulation 883/2004 on *award of benefits*.

The amendment applies to all Member States and stipulates the cases in which the so-called *pro-rata-temporis* method is not used to determine the amount of the entitlement ⁽⁹⁾.

- The aim is to ensure in all cases that insured persons who move from one country to another are treated no worse than those who remain in one country.

⁽⁹⁾ Under the *pro-rata-temporis* method, a person's part pension from his/her own Member State is calculated on the basis of a pro-rata calculation. First of all, a credited calculation is made on the basis that the person concerned spent all insured periods in his/her own country. The part pension that this person receives from his/her own country is then calculated as the percentage of this credited pension that corresponds to the share of the total period of insurance spent in his/her own country. However, there are cases where the calculation based upon insured periods spent in one's own country (independent benefit) is always higher than the entitlement based upon the pro-rata calculation. These cases are referred to in Annex VIII. Under these circumstances, the competent institution may waive the calculation of the pro-rata entitlement.

- For the sake of completeness, it should be mentioned here that the proposed Commission text was revised during examination in the Council.

- According to the provisional partial agreement reached in the Council, systems in which periods of time are not taken into account when calculating the amount of an entitlement should not use the *pro-rata-temporis* method of calculation, provided they are referred to in Annex VIII of Regulation 883/2004.

- This includes defined contributions schemes, as referred to in the original Commission document.

3.5.3 Other horizontal matters were taken into account in the proposal for the implementing regulation. These are first and foremost proposals of a technical nature. The entries in Annex XI should therefore be limited to specific measures for individual Member States.

3.6 The EESC acknowledges the successful efforts of all those involved to simplify Annex XI. As a result, it contains far fewer entries than the equivalent annex (Annex VI) to the current coordinating Regulation 1408/71.

3.6.1 Building on this, due consideration should go on being given, in particular with regard to any future requests for entries to be included in Annex XI (*inter alia*, from Romania and Bulgaria, which are in the process of joining the EU), as to whether the matter is of a horizontal nature which should more logically be addressed in the basic regulation or in the implementing regulation.

This is the case for example with the protection clauses that exist under the state welfare systems of numerous Member States, to help people who have suffered in their social security situation for political or religious reasons or for reasons of their descent ⁽¹⁰⁾, or even the special rules for people injured in war, former prisoners of war, victims of crime and terrorism or those who have suffered at the hands of a former totalitarian regime. Such protection clauses, while they offer the protection of social security (e.g. health insurance, pensions) or compensation payments to specific groups of individuals, are as a rule not part of the social security system. It would therefore be appropriate if the basic regulation were to include an article on this subject too, applicable to all Member States, so as to exclude altogether from the regulation those provisions which provide for state entitlements or compensation but do not come under the social security system.

⁽¹⁰⁾ See entry No 5 from Austria in Annex XI.

3.6.2 At the same time, the EESC calls upon experts in individual Member States to examine in detail the legislation of their respective countries in the light of the new rules on coordination. Further entries should be included in Annex XI wherever there might be problems for the smooth application of Regulation 883/2004. If national social security legislation is at odds with the coordinating rules, this could lead to a large number of proceedings being brought before the ECJ.

4. Further remarks on coordination

4.1 Cross-border mobility in Europe is right at the top of the EU agenda. Effective coordination in the area of social security is essential if EU citizens are to make use of it. They rightly expect practical benefits from Community cooperation.

4.2 The EESC believes that the Commission and Member States should, in that connection, strengthen measures to raise awareness among all potential users of the regulation of the arrangements for and advantages of the coordination of social security systems. The Committee believes that the necessary preparations for this should be made without delay. Existing tools for providing advice on the subject of mobility ⁽¹⁾ should be publicised more widely and strengthened.

Brussels, 14 March 2007.

4.3 In this connection the EESC has also pointed out that staff employed in social security institutions must be prepared in good time for the new rules and all the supporting arrangements. It is essential that staff in the Member States receive instruction and training in this area.

4.4 To facilitate the rapid practical implementation of the basic regulation, the EESC therefore calls on the Member States to provide their social security institutions, without delay, with the necessary human and technical resources. The existing instruments available to stakeholders and users at national level — in particular the existing TRESS networks, which bring together the interested parties and stakeholders in the Member States ⁽¹²⁾ — should be used to carry out an appropriate evaluation of the practical implementation of this regulation in individual Member States once it enters into force.

4.5 The EESC reserves the right to return to the practicalities of coordination in a separate own-initiative opinion. The opinion should, in particular, provide an assessment of the extent to which the public are actually able to profit from intended benefits (associated, amongst other things, with the European Health Insurance Card) in the area of cross-border mobility.

The President
of the European Economic and Social Committee
Dimitris DIMITRIADIS

⁽¹⁾ See, *inter alia*: The Community provisions on social security — Your rights when moving within the European Union: http://ec.europa.eu/employment_social/emplweb/publications/publication_en.cfm?id=25; and also the MISOC database on the social security systems of the Member States: http://ec.europa.eu/employment_social/social_protection/misoc_en.htm.

⁽¹²⁾ Training and Reporting on European Social Security (see also: <http://www.tress-network.org/>).