Opinion of the European Economic and Social Committee on the 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — The External Dimension of EU Social Security Coordination'

COM(2012) 153 final

(2013/C 11/15)

Rapporteur: **José María ZUFIAUR**

In a letter dated 18 April 2012, the European Commission asked the European Economic and Social Committee, under Article 304 of the Treaty on the Functioning of the European Union, to draw up an opinion on the

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — The External Dimension of EU Social Security Coordination

COM(2012) 153 final.

The Section for External Relations, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 4 October 2012.

At its 484th plenary session, held on 14 and 15 November 2012 (meeting of 14 November 2012), the European Economic and Social Committee adopted the following opinion by 137 votes to 2 with 9 abstentions.

1. **Summary and recommendations**

1.1 The EESC believes that due to economic globalisation and the concomitant increase in international trade and migration flows, the internationalisation of social standards needs to be taken further in order to ensure that citizens in general and workers (whether migrant or sedentary) in particular, regardless of their nationality, are not denied their rights and can benefit from what might be termed *social globalisation*. There are losses and gains that also affect businesses.

1.2 As a result, the EESC welcomes the publication of the Commission's Communication on *The External Dimension of EU Social Security Coordination*. This Communication stresses the importance of a common EU strategy for coordinating social security systems with third countries, while respecting the national remit and ensuring the necessary coordination and compatibility with EU law of bilateral social security agreements concluded with third countries. It also advocates stronger cooperation between Member States in order to develop an international coordination policy in this area through the news and the media. Finally, it points out that non-EU businesses and nationals know that each Member State has its own social security system, which could hinder them when establishing themselves in the EU.

1.3 The EESC supports the external dimension of coordination rules set out in the Commission's Communication and advocating complementarity between national and EU approaches in order to avoid imbalances, loopholes and vacuums.

1.4 The EESC highlights the improvements resulting from the adoption of decisions on social security coordination with Morocco, Algeria, Tunisia, Israel, the Former Yugoslav Republic of Macedonia and Croatia. It also urges the EU Council to go further down this road with respect to the proposals for decisions relating to Montenegro, San Marino, Albania and Turkey.

1.5 The EESC points out that it makes sense to continue to develop the EU's global approach through EU agreements which respect the national remit but reduce certain dysfunctions resulting from the national approach and offer better prospects for all the Member States.

1.6 The EESC urges the Council to task the Commission with pushing forward and concluding, within the legal framework of the Treaties, international social security agreements in the context of negotiations with the EU's strategic partners and the emerging BRIC powers (Brazil, Russia, India and China), the Balkan States and the Eastern European neighbours, as well as with other States with a significant number of nationals working in the EU [1], which ensure reciprocal protection for EU nationals and the nationals of signatory States. In particular, the EESC recalls the need to protect the nationals of States that are not considered to be of strategic importance to the EU due to their geopolitical or economic situation and who might therefore be at the greatest disadvantage.

[1] Over 20 million third-country nationals work in the various EU Member States.

1.7 The EU's external action in this area could be developed through the deployment of a multilateral policy that establishes closer links with other international organisations or supranational regional entities. A good example of this type of multiregional cooperation is the Ibero-American Social Security Agreement between the Latin American countries, Spain and Portugal. As a result, the EESC supports the initiatives of the Commission and the Chilean presidency of the next EU-LAC summit to improve social security cooperation on both sides.

1.8 The EESC urges the association councils comprising the EU and the respective non-EU States to finalise their work towards the final approval of decisions on the coordination of social security systems established by the stabilisation and association agreements with Israel, Tunisia, Algeria, Morocco, Croatia and the Former Yugoslav Republic of Macedonia.

1.9 The EESC calls for existing or future trade or economic partnership association agreements to include bilateral clauses on social security, referring in particular to equal treatment, the export of pensions and the elimination of double contributions.

1.10 The EESC suggests that EU cooperation on social security should be directed in particular towards those States that want to meet the goals set out in the Social Protection Floor initiative of the International Labour Organisation (ILO) but need assistance to reach or improve on the required thresholds. This would also make it possible to conclude bilateral social security agreements based on the principles of equal treatment, maintenance of entitlements acquired or in the process of being acquired and administrative cooperation. To this end, Regulation (EC) No 883/2004 ([2]) and Convention 157 ([3]) and Recommendation 167 ([4]) of the ILO could serve as models, with the necessary adaptations.

1.11 The EESC calls on the Commission to monitor all existing bilateral agreements between EU and non-EU States by keeping a regularly updated list of these instruments and checking that they comply with EU principles and relevant case-law.

2. **Introduction**

2.1 The EESC realises that Member States have developed bilateral and multilateral policies on the coordination of social security systems through international agreements with third countries. Nevertheless this approach may suffer from being fragmentary and incomplete because in many cases it focuses exclusively on the protection of the nationals of the signatory States or responds to concrete interests which are not always shared by all Member States.

2.2 The EESC believes that although the importance of this edifice of international bilateral rules has to be recognised, it can lead to a scenario where not all third-country nationals are entitled to the same rights or guarantees within the EU. There could be situations where non-EU nationals working in a given State would not have access to social security or export of pensions unless they were covered by a bilateral agreement establishing the principle of equal treatment. As a result, the nationals of a country with a bilateral agreement would be entitled to social security whereas the nationals of a country without an agreement would not have this right even if they both happened to be working for the same company in the same staff category. There could also be situations where the nationals of one non-EU State would be protected under the national legislation of one Member State but not of another. This could impact on fair competition between States because contributions would be paid for third-country nationals in the first case, but not in the second. This would give the second State a financial advantage since it would cut social costs. This could undermine the concept of Europe as a non-discriminatory or anti-discriminatory level playing field.

2.3 It would also breach the principle upheld by the Posted Workers Directive, which calls for equal treatment between posted workers and the nationals of a Member State.

2.4 Similarly, the EESC believes that the external dimension of coordination rules must protect the rights of EU citizens when they are outside the EU or have worked or work in third countries.

2.5 The EESC believes that the idea of separately negotiated bilateral agreements between the various Member States and each and every third country constitutes a positive and commendable but incomplete initiative. This would involve a substantial, excessive and disproportionate effort with no guarantee of success; in addition to which, these agreements might not only differ but could actually contradict each other. Furthermore, negotiations, especially with strong emerging countries with high potential (e.g. BRIC), can result in a lopsided balance of power unless Member States work together on the basis of shared interests and positions. The possibility of the EU, as such, entering into social security negotiations with non-EU States or associations of third countries should therefore be looked at and, if appropriate, put into practice in accordance with the Treaties.

2.6 We believe that these instruments would avoid the need for double social security contributions, i.e. to the systems of the country of employment and the country of origin, especially for posted or seconded workers. It should be stressed that the

([2]) Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, 30.4.2004, p. 1).

([3]) Convention concerning the Establishment of an International System for the Maintenance of Rights in Social Security, Geneva, 68th session of the General Conference of the ILO (21 June 1982).

([4]) Recommendation concerning the Establishment of an International System for the Maintenance of Rights in Social Security, Geneva, 69th session of the General Conference of the ILO (20 June 1983).

elimination of double contributions would significantly reduce costs. This would benefit worker mobility and the competitiveness of our businesses outside the EU and, at the same time, encourage non-EU businesses to establish themselves in the EU. Furthermore, it would be possible to establish a single rule to avoid a discretionary and arbitrary application of the law of the country of employment or origin, as the case may be, and that tax and social security obligations do not coincide in the same State.

3. **General comments**

3.1 The EESC has expressed its views on the coordination regulations, which have had their personal (new groups) and material (new entitlements) scope of application extended within the EU. Furthermore, some European countries which are not EU members (Norway, Iceland, Liechtenstein, and Switzerland) are also included in the scope of these regulations, which have provided the basis and model for other multilateral instruments. The best example is the Ibero-American Social Security Agreement, a genuine offshoot of EU coordination laws. Consequently, the EESC believes that the Member States' or the Union's international coordination laws should be guided and informed by the main principles and mechanisms of Regulation (EC) No 883/2004.

3.2 The EESC points out that social security legislation, and social security provisions in particular, can transcend and be applied beyond the EU's borders. In this way, principles of equal treatment among the workers of the Member States can protect EU workers and have legal consequences outside the EU. In fact, the judgments of the Court of Justice of the European Union (CJEU) in a number of cases (cf. Boukhalfa (C-214/94 - a Belgian worker paid less than her German colleagues at the German Consulate in Algeria); Hirardin (C-112/75); Fiege (C-110/73); Ziemann (C-247/96); and van Roosmalen (C-300/84 - recognition by France and Belgium of social security contributions made in Algeria and in the Belgian Congo respectively for all EU nationals and not just their own) are solid evidence that the principle of non-discrimination can have extraterritorial application even in situations involving countries outside the EU. Furthermore, this *vis atractiva* has been confirmed by the judgments in the cases of Prodest (C-237/83) and Aldewered (C-60/93) since the CJEU recognised that Regulation (EEC) No 1408/71 ([5]) could be applied to the temporary posting of EU workers to third countries.

3.3 The EESC welcomes the adoption of the decisions on the position to be taken by the European Union within the stabilisation and association councils established by the stabilisation and association agreements with Israel, Tunisia, Algeria, Morocco, Croatia and the Former Yugoslav Republic of Macedonia with regard to the adoption of provisions on the coordination of social security systems. These instruments improve EU social security policy at the bilateral level (EU/other state signatory) by establishing and regulating the principle of equal treatment and the export of pensions. This affects the reciprocal obligations and rights of EU citizens who work or have worked in any of the abovementioned countries and of the nationals of States that have signed one of these agreements who work or have worked in the EU. These are not unilateral EU laws, applicable in one direction. They are international agreements that benefit both signatories. Furthermore, this type of agreement and the corresponding implementing decisions can reduce the effort involved by accomplishing through a single legal act what would otherwise take multiple bilateral agreements to achieve.

3.4 The EESC welcomes the ILO's Social Protection Floor initiative, which in the EESC's opinion cannot assume a single or standardised form, nor can it be used to straightjacket the development of social protection systems. It must be viewed as a minimum threshold to be developed. In fact, the "Social Protection Floor" should pose a permanent and continually evolving challenge to make progress and improvements with a set objective, i.e. the overall protection of citizens and workers.

3.5 The EESC supports the creation of a mechanism (working group) at EU level to strengthen cooperation between Member States in order to share information and good practice in the coordination of social security systems, study the best way to unite and ensure complementarity between national and EU policies, and develop future EU action with third countries.

3.6 The EESC believes that civil society organisations, especially workers' and employers' representatives, must be taken into consideration when developing the external dimension of coordination rules. The impact of these provisions on labour relations and the wide variety of groups affected point to the need to consider proposals from governmental as well as non-governmental partners. A number of calls to address the external dimension of social security and the need for more cooperation between Latin American, Caribbean and EU countries, and especially with countries that have a strategic partnership with the EU, such as Brazil and Mexico.

3.7 The EESC also draws attention to the EU-LAC meeting on the coordination of social security systems held between ministers and senior officials with responsibility for social security matters, held in Alcalá de Henares in May 2010, which can be considered as the starting point of EU efforts to coordinate the external dimension of social security and led to the Communication under consideration.

([5]) **Council Regulation (EEC) No 1408/71** of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ L 149, 5.7.1971, p. 2, English special edition Series V, Chapter 1952-1972, p. 89).

3.8 The EESC stresses that it makes sense to continue to extend the international and EU approach through agreements between the EU and other States and regional organisations because it is more suitable and efficient than a strictly national approach where Member States take unilateral action. In this context, we should recall the Ibero-American Agreement on Social Security ([6]) as a paradigm. In this regard, the EESC would like the Ibero-American Social Security Organisation to study the possibility of allowing other EU Member States, in addition to Spain and Portugal, to participate in this agreement so that social security relations can be established with various Latin American States through a single act of ratification, thereby avoiding multiple bilateral negotiations and agreements.

4. **Potential and weaknesses of the current situation**

4.1 An international and EU approach is needed in the area of international social security in order to complement the policies that Member States are pursuing with third countries, otherwise it will be impossible to fully implement obligations under EU law. A clear example of this is the judgment in the Gottardo case (Case C-55/00) whereby the CJEU, on the basis of the principle of equal treatment, extended the personal scope of application of all bilateral agreements concluded between an EU Member State and a third country to all EU citizens even if the legal instrument in question refers solely to the nationals of the signatory States.

4.1.1 At the same time, the judgment recognises that the obligations arising from the decision can only apply to Member States and not to third countries, over which the CJEU has no jurisdiction. This is where the difficulty in executing the decision becomes clear, since a third country can refuse to extend the agreement's personal scope of application to all EU citizens, and therefore to fill in certificates, or recognise the right to sickness benefits or simply to provide information to persons not covered by the agreement's scope of application.

4.1.2 As a result, the merit of the judgment in the Gottardo case is that it not only develops the external dimension of EU law but also establishes its limits and shortcomings because it requires cooperation from other States or supranational regional organisations.

4.1.3 This is why the EESC calls for a period of discussion on the need to strengthen a unified EU approach in the area of international social security through EU agreements or reciprocal cooperation policies with other global players.

([6]) Multilateral Ibero-American Agreement on Social Security of 10 November 2007.

4.2 The EESC welcomes the adoption of Regulation (EU) No 1231/2010 ([7]) extending the provisions of Regulation (EC) No 883/2004 to third-country nationals. Nevertheless, it still believes that there are loopholes and legal vacuums, which the new approach taken in the Communication specifically seeks to fill. Indeed, this regulation only applies in the presence of cross-border situations within the EU. Consequently, the regulation's principle of equal treatment only applies in general to situations where third-country workers have worked in more than one Member State. This means that the majority of third-country workers, who have worked in only one EU State, are not included in the personal scope of application of Regulation (EU) No 1231/2010. This means that they enjoy no EU guarantees with regard to equal treatment and non-discrimination, but depend on what is decided under national law. Furthermore, the regulation does not consider the aggregation of insurance periods in a worker's State of origin or the export of pensions to that State. Finally, this EU instrument does not call for or require reciprocity for EU citizens, who will not receive any corresponding treatment from third countries.

4.3 The EESC also believes that a very important step has been taken in the external dimension of the European Union through the directives ([8]) adopted on migration and the Commission proposals currently being debated by the Council and European Parliament. Indeed, the directives which have already been adopted extend the principle of equal treatment in the area of social security, subject to certain specific restrictions, to migrant workers from third countries. They also cover the exportability and portability of pensions to third countries under the same conditions applied to the nationals of the Member State in question, without the need for a bilateral agreement. Nevertheless, there are still a number of unregulated matters, such as reciprocity, the aggregation of insurance periods outside the EU or the export of pensions when a State's national law does not offer its own citizens this right. Furthermore, the EESC would like previously adopted directives on migration to be used, where social protection is concerned, as the general basis for the directives currently being negotiated, adjusting them to specific situations and to the groups to be protected.

5. **Concepts**

5.1 **International coordination of social security:** the purpose of coordinating social security systems is to protect people who have worked in two or more countries and have therefore come under different social security systems. To this

([7]) **Regulation (EU) No 1231/2010** of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality (OJ L 344, 29.12.2010, p. 1).

([8]) Especially **Directive 2011/98/EU** of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (OJ L 343, 23.12.2011., p. 1).

end, States conclude agreements with each other, which often include provisions on equal treatment, the principle that only the legislation of one Member State applies, continued social security coverage by the country of origin for posted workers, the export of pensions and the aggregation of insurance periods in the signatory States. Regulation (EEC) No 1408/71, and its successor, Regulation (EC) No 883/2004, establish the regulatory provisions for the application of these principles in the EU and serve as a starting point for agreements with third countries.

5.2 **The national perspective** of the external dimension of social security is put into practice through agreements concluded between a Member State and third countries intended to provide social security protection for workers who have worked in two States. In some cases, only the nationals of the signatory States are included in their personal scope of application.

5.3 **The EU perspective** of the external dimension of social security takes account of the interests of the EU as a whole. It refers to the negotiation of EU agreements with one or more third countries or other social security protection measures. As a rule, it concerns all EU citizens.

5.4 **Association and/or stabilisation agreements** can include the application of the principle of equal treatment and the export of pensions. They apply to EU nationals and the nationals of the signatory State. They are implemented through decisions.

5.5 **EU social security agreements with third countries** do not currently exist but could be introduced through the establishment of the applicable legislation to avoid double contributions, through the export of pensions and completed through the aggregation of insurance periods. These agreements are significantly different from the previous ones, which are far more general and deal only peripherally with social security issues.

5.6 **Association, trade, or economic partnership agreements** regulate economic and trade matters or even sustainable development and cooperation policies between the EU and third countries or regions. Some of these include social security clauses.

6. **Examples**

6.1 **Equal treatment and the export of pensions:**

6.1.1 Take the situation of nationals of Member States A and B working in non-EU country C, which does not make legal provision for the social security affiliation of non-nationals or for the export of pensions and has a bilateral agreement with Member State A, covering the maintenance of acquired social security rights (export of pensions) but not with Member State B. In such a case, the nationals of Member State A and Member State B are in completely different situations. Whereas the former will be entitled to social security from State C and, if entitled to a pension, will be able to receive it in their country of origin if they return, the latter will have no pension rights, and even if they do, they will not be able to receive their pensions in their country of origin. This is an example of different treatment due to the existence or non-existence of a bilateral agreement, which usually depends on whether State C has an interest in negotiating such an agreement with one or the other EU Member State. In view of this fact, it would make far more sense for a social security agreement to be negotiated directly between the EU and country C. Another possibility would be to include social security sections in broader agreements (regional, multipartite, partnership, etc.), containing clauses on equal treatment and the export of pensions.

6.1.2 Take the situation of nationals of Member States A and B, who are given a two-year posting to non-EU country C, whose legislation requires all people working in its territory to pay contributions. Furthermore, Member States A and B both require contributions to be paid for posted workers. For its part, Member State A has a bilateral agreement with State C, under which contributions are paid only in the country of origin whereas companies based in Member State B will have to pay double contributions, i.e. in their own country and in State C. In the latter case, companies posting workers will lose competitiveness because their social costs are higher, which could be avoided if the EU concluded a social security agreement directly with this non-EU country.

6.1.3 Take the situation of nationals of non-EU countries C and D working in Member State A, which has a social security agreement with State C but not with State D. The Member State makes no legal provision for equal treatment or the export of pensions and the nationals of countries C and D are not protected by any EU legislation (e.g. they could be seasonal workers). These workers will not receive the same protection (full rights for State C nationals and none for State D nationals), with the result that the principle of equal treatment will not be fully applied. This would not happen if the EU negotiated a social security agreement with State D.

6.1.4 Take the situation of nationals of non-EU country C working in Member States A and B. Member State A makes legal provision for the export of pensions or it has an agreement with State C on the export of pensions, but B does not. Both workers have acquired pension rights in the Member State where they worked and then returned to their countries. Those who had worked in Member State A will be able to receive a pension but those who had worked in Member State B will lose their pension rights. This would not happen either, if there were an EU agreement covering these and other social security rights.

6.1.5 Take the situation of nationals of a non-EU country working in Member States A and B. The social security legislation of State A recognises the principle of equal treatment in the area of social security, but not State B's. Thus contributions would be paid for third-country nationals in the first case, but not in the second. This would give State B a financial advantage and would undermine the concept of Europe as a non-discriminatory level playing field. An EU agreement would also solve this problem.

6.2 **Reciprocity**. Take the situation of nationals of non-EU country B working in Member State A, for whom, by virtue of domestic social security legislation or EU legislation, the principle of equal treatment is recognised. Then take the situation of nationals of Member State A working in non-EU country B, which does not recognise the principle of equal treatment. Since the principle of equal treatment is not recognised by domestic law or by EU legislation on reciprocity, a clear-cut situation of inequality is created. An EU-negotiated agreement would solve this problem if reciprocity were required of the parties.

6.3 **Repercussions of the Gottardo judgment**. Take the situation of a national of Member State A, who has worked in Member State B and in third country C, which has a bilateral social security agreement with B, which only covers the nationals of the signatory States, whereas there is no bilateral agreement between A and C. This national claims to have paid contributions in State B for eight years and in State C for ten years. In State B, 15 years of contributions are needed to receive a retirement pension. In compliance with the judgment in the Gottardo case, Member State B must aggregate the periods for which the worker paid contributions in State C. In order to do this, it needs the cooperation of State C and its formal notification of the insurance periods for which contributions were paid. Since State C is not bound by the Gottardo judgment, it can refuse to comply. In other words, this judgment cannot be applied without the good will of State C. In order to tackle this gap, the EU would have to cooperate with third countries to ensure its enforcement. The Commission would also have to be tasked with the follow-up and coordination of bilateral agreements to ensure that they were negotiated or renegotiated to include all EU citizens.

Brussels, 14 November 2012.

The President
of the European Economic and Social Committee
Staffan NILSSON