

III

(Preparatory acts)

COMMITTEE OF THE REGIONS

124TH PLENARY SESSION, 12-13 JULY 2017

Opinion of the European Committee of the Regions — Coordination of Social Security Systems

(2017/C 342/10)

Rapporteur:	Ulrike Hiller (DE/PES), Member of Bremen Senate
Reference document:	Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (Text with relevance for the EEA and Switzerland)
	COM(2016) 815 final

I. RECOMMENDATIONS FOR AMENDMENTS

Amendment 1

Proposal for a Regulation

Recital 6

Text proposed by the Commission	CoR amendment
Long-term care benefits have so far not been included explicitly within the material scope of Regulation (EC) No 883/2004 but coordinated as sickness benefits, leading to legal uncertainty both for institutions and persons claiming long-term care benefits . There is a need to develop a stable legal framework appropriate to long-term care benefits within the Regulation to include a clear definition of such benefits .	Long-term care benefits have so far not been included explicitly within the material scope of Regulation (EC) No 883/2004 but coordinated as sickness benefits. There is a need to develop a stable legal framework appropriate to long-term care benefits within the Regulation.

Reason

Increased coordination of long-term care benefits is to be welcomed. Moreover, it is not currently possible to draw a clear and uniform distinction between nursing and long-term care benefits, as the rules of the various Member States differ.

Further coordination requires that long-term care benefits be recognised and developed in all Member States as a form of benefit complementary to sickness benefits. At present, therefore, adaptation of Article 34 should be preferred to the introduction of a separate chapter covering long-term care.

Amendment 2

Proposal for a Regulation
Article 1(3), first paragraph

Text proposed by the Commission	CoR amendment
<p>After Recital 5, the following is inserted:</p> <p>(5a) The Court of Justice has held that Member States are entitled to make the access of economically inactive citizens in the host Member State to social security benefits, which do not constitute social assistance within the meaning of Directive 2004/38/EC subject to a legal right of residence within the meaning of that Directive. The verification of the legal right of residence should be carried out in accordance with the requirement of Directive 2004/38/EC. For these purposes, an economically inactive citizen should be clearly distinguished from a jobseeker whose right of residence is conferred directly by Article 45 of the Treaty on the Functioning of the European Union. In order to improve legal clarity for citizens and institutions, a codification of this case law is necessary.</p>	<p>After Recital 5, the following is inserted:</p> <p>(5a) The Court of Justice has held that Member States are entitled to make the access of economically inactive citizens in the host Member State to social security benefits, which at the same time constitute social assistance within the meaning of Directive 2004/38/EC subject to a legal right of residence within the meaning of that Directive. The verification of the legal right of residence should be carried out in accordance with the requirement of Directive 2004/38/EC. For these purposes, an economically inactive citizen should be clearly distinguished from a jobseeker whose right of residence is conferred directly by Article 45 of the Treaty on the Functioning of the European Union. In order to improve legal clarity for citizens and institutions, a codification of this case law is necessary.</p>

Reason

The CJEU has held in its judgments referred to above that social security benefits which, pursuant to Article 70 of Regulation (EC) No 883/2004, qualify as special non-contributory cash benefits shall also be considered to constitute social assistance benefits within the meaning of Article 24(2) of Directive 2004/38/EC. To the extent that they also constitute social assistance benefits, the Member State competence provided for there will apply. The proposed amendment seeks to clarify this.

Amendment 3

Proposal for a Regulation
Article 1(3), third paragraph

Text proposed by the Commission	CoR amendment
<p>(5c) Notwithstanding the limitations on the right to equal treatment for economically inactive persons, that arise from the Directive 2004/38/EC or otherwise by virtue of Union law, nothing within this Regulation should restrict the fundamental rights recognised in the Charter of Fundamental Rights of the European Union, notably the right to human dignity (Article 1), the right to life (Article 2) and the right to healthcare (Article 35).'</p>	<p>(5c) Notwithstanding the limitations on the right to equal treatment for economically inactive persons, that arise from the Directive 2004/38/EC or otherwise by virtue of Union law, nothing within this Regulation should restrict the fundamental rights recognised in the Charter of Fundamental Rights of the European Union, notably the right to human dignity (Article 1), the right to life (Article 2), the right to social security and social assistance (Article 34) and the right to healthcare (Article 35).'</p>

Reason

Self-explanatory.

Amendment 4

Proposal for a Regulation

Article 1(13)

Text proposed by the Commission	CoR amendment
<p>Article 12 is replaced by the following:</p> <p><i>Article 12</i></p> <p>Special rules</p> <p>1. A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted within the meaning of 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 ⁽¹⁾ or sent by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 24 months and that the person is not posted or sent to replace another employed or self-employed person previously posted or sent within the meaning of this Article.</p> <p>2. A person who normally pursues an activity as a self-employed person in a Member State who goes to pursue a similar activity in another Member State shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such activity does not exceed 24 months and that the person is not replacing another posted employed or self-employed person.[.]</p> <p>⁽¹⁾ OJ L 018, 21.01.1997 p. 1.</p>	<p>Article 12 is replaced by the following:</p> <p><i>Article 12</i></p> <p>Special rules</p> <p>1. A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted within the meaning of 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 ⁽¹⁾ or sent by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 12 months and that the person is not posted or sent to replace another employed or self-employed person previously posted or sent within the meaning of this Article.</p> <p>2. A person who normally pursues an activity as a self-employed person in a Member State who goes to pursue a similar activity in another Member State shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such activity does not exceed 12 months and that the person is not replacing another posted employed or self-employed person.[.]</p> <p>⁽¹⁾ OJ L 018, 21.01.1997 p. 1.</p>

Reason

The proposed reduction in the time limit beyond which the law of the host country must apply in full to a posted worker is in line with the adopted CoR position with regard to the Posting of Workers Directive (COR-2016-02881).

Amendment 5

Proposal for a Regulation

Article 1(16)

Text proposed by the Commission	CoR amendment
Article 34 is deleted.	<p style="text-align: center;"><i>Article 34</i></p> <p>Overlapping of long-term care benefits</p> <p><u>1. If a recipient of long-term care benefits in cash, which have to be treated as sickness benefits and are therefore provided by the Member State competent for cash benefits under Articles 21 or 29, is, at the same time and under this Chapter, entitled to claim benefits in kind intended for the same purpose from the institution of the place of residence or stay in another Member State, and an institution in the first Member State is also required to reimburse the cost of these benefits in kind under Article 35, the general provision on prevention of overlapping of benefits laid down in Article 10 shall be applicable, with the following restriction only: if the person concerned claims and receives the benefit in kind, the amount of the benefit in cash shall be reduced by the amount of the benefit in kind which is or could be claimed from the institution of the first Member State required to reimburse the cost.</u></p> <p><u>2. The Administrative Commission shall draw up a detailed list of long-term care benefits which meet the criteria contained in Article 1 (vb) of this Regulation, specifying which are benefits in kind and which are benefits in cash.</u></p> <p><u>3. Two or more Member States, or their competent authorities, may agree on other or supplementary measures which shall not be less favourable for the persons concerned than the principles laid down in paragraph 1.</u></p>

Reason

If a chapter 1a is not introduced (amendment 5), Article 34(2) will need to be redrafted in order to make it clear what form the list to be drawn up by the Administrative Commission should take. See reason for amendment 1 (recital 6).

Information for the secretariat: The original text of Article 34(2) of Regulation (EC) No 883/2004 on the coordination of social security systems reads as follows: '2. The Administrative Commission shall draw up the list of the cash benefits and benefits in kind covered by paragraph 1'.

Amendment 6

Proposal for a Regulation

Article 1(17)

Text proposed by the Commission	CoR amendment
<p>After Article 35, the following Chapter is inserted:</p> <p>'CHAPTER 1a</p> <p>Long-term care benefits</p>	

Text proposed by the Commission	CoR amendment
<p>Article 35a</p> <p>General provisions</p> <p>1. Without prejudice to the specific provisions of this Chapter, Articles 17 to 32 shall apply <i>mutatis mutandis</i> to long-term care benefits.</p> <p>2. The Administrative Commission shall draw up a detailed list of long-term care benefits which meet the criteria contained in Article 1 (vb) of this Regulation, specifying which are benefits in kind and which are benefits in cash.</p> <p>3. By way of derogation from paragraph 1, Member States may grant long-term care benefits in cash in accordance with the other Chapters of Title III, if the benefit and the specific conditions to which the benefit is subject are listed in Annex XII and provided that the outcome of such coordination is at least as favourable for the beneficiaries as if the benefit was coordinated under this Chapter.</p> <p>Article 35b</p> <p>Overlapping of long-term care benefits</p> <p>1. If a recipient of long-term care benefits in cash granted under the legislation of the competent Member State receives, at the same time and under this Chapter, long-term care benefits in kind from the institution of the place of residence or stay in another Member State, and an institution in the first Member State is also required to reimburse the cost of these benefits in kind under Article 35c, the general provision on prevention of overlapping of benefits laid down in Article 10 shall be applicable, with the following restriction only: the amount of the benefit in cash shall be reduced by the reimbursable amount for the benefit in kind which is claimable under Article 35c from the institution of the first Member State.</p> <p>2. Two or more Member States, or their competent authorities, may agree on other or supplementary measures which shall not be less favourable for the persons concerned than the principles laid down in paragraph 1.</p> <p>Article 35c</p> <p>Reimbursement between institutions</p> <p>1. Article 35 shall apply <i>mutatis mutandis</i> to long-term care benefits.</p> <p>2. If the legislation of a Member State where the competent institution under this Chapter is situated does not provide for long-term care benefits in kind, the institution which is or would be competent in that Member State under Chapter 1 for the reimbursement of sickness benefits in kind granted in another Member State shall be deemed to be the competent one also under Chapter 1a.’</p>	

Reason

See reason for amendment 1 (recital 6)

Amendment 7

Proposal for a Regulation

Article 1(22)

Text proposed by the Commission	CoR amendment
<p>2. By way of derogation from paragraph 1, a wholly unemployed person who, during the last activity as an employed or self-employed person, resided in a Member State other than the competent Member State, and who had not completed at least 12 months of unemployment insurance exclusively under the legislation of the competent Member State shall make himself or herself available to the employment service of the Member State of residence. Such a person shall receive benefits in accordance with the legislation of the Member State of residence as if he or she had completed all periods of insurance under the legislation of that Member State. Those benefits shall be provided by the institution of the Member State of residence. Alternatively, a wholly unemployed person referred to in this paragraph, who would be entitled to an unemployment benefit solely under the national legislation of the competent Member State if he or she resided there, may instead opt to make themselves available to the employment services in that Member State and to receive benefits in accordance with the legislation of that Member State as if he or she were residing there.</p>	<p>2. By way of derogation from paragraph 1, a wholly unemployed person who, during the last activity as an employed or self-employed person, resided in a Member State other than the competent Member State, and who had not completed at least 12 months of unemployment insurance exclusively under the legislation of the competent Member State shall make himself or herself available to the employment service of the Member State of residence. Such a person shall receive benefits in accordance with the legislation of the Member State of residence as if he or she had completed all periods of insurance under the legislation of that Member State. Those benefits shall be provided by the institution of the Member State of residence.</p>

Reason

The exception has no effect if no entitlement arises from a short (less than twelve months) period of employment. It would then be superfluous. If, however, an entitlement were to arise, i.e. in connection with periods of employment in other Member States which are to be taken into account under Article 6, it would need to be shown why the Member State of residence should be required to provide the benefits, given that other Member States had received the contributions. This provision is also out of step with the rules proposed in Article 64, which provide for the export of benefits in such cases.

Amendment 8

Proposal for a Regulation

Article 2(11), first paragraph

Text proposed by the Commission	CoR amendment
<p>The following paragraphs are inserted after Article 19(2):</p> <p>3. Whenever an institution is asked to issue the attestation referred to above, it shall carry out a proper assessment of the relevant facts and guarantee that the information on the basis of which the attestation is provided is correct.</p>	<p>The following paragraphs are inserted after Article 19(2):</p> <p>3. Whenever an institution is asked to issue the attestation referred to above, it shall carry out a proper assessment of the relevant facts.</p>

Reason

Institutions cannot guarantee that the information is correct. They have to rely on the information duly provided by the employer. In particular, the issuing authorities cannot be held liable for any incorrect information, if they themselves have been misinformed.

II. POLICY RECOMMENDATIONS

THE EUROPEAN COMMITTEE OF THE REGIONS (CoR)

General comments

1. expresses its support for free and fair labour mobility and therefore welcomes the revision of the rules on coordinating social security against the background of the increasing mobility of EU citizens within the EU;
2. notes that the free movement of workers, being negative single market integration, has to be complemented by coordination of social security, which is positive integration, in line with the European Charter of Fundamental Rights and the case law of the European Court of Justice (CJEU);
3. considers the European Commission's proposal for a Regulation (EC) No 883/2004 on the coordination of social security systems and its proposal for a Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 to be generally appropriate and helpful and therefore approves them;
4. would remind the Commission about its better regulation initiative and points out that the complex set of rules in Regulations 883/2004 and 987/2009 must remain understandable so that the legal situation is clear to both the authorities and the public;
5. stresses the importance of regional advisory and support networks for mobile EU citizens. These are essential to prevent the exploitation of mobile workers and organised fraud. The CoR calls for these networks to be strengthened;
6. stresses that the Commission's proposal is necessary in order to ensure freedom of movement of workers. Due to the clear legal basis in TFEU Article 48, there are no subsidiarity issues in relation to the Commission proposal. Indeed, the objectives of the proposed action cannot be sufficiently achieved by the Member States, but can by reason of the scale and/or effects of this action be better achieved at EU level, as the proposed action involves trans-national aspects that cannot be properly regulated by Member States and/or regional and local authorities acting alone;
7. stresses its strong interest in the continuation of the technical dialogue with the Commission on this issue and, in this connection, underlines the importance of the impact assessment report that the Commission will submit in due course, on the basis of its cooperation agreement with the CoR;

Posting of workers

8. takes note of the progress in regulating posting and certification of posting. It welcomes the fact that the Commission, with the introduction of Article 76a, is to be empowered to adopt implementing acts in accordance with TFEU Article 291, under which a standard procedure is to be laid down for the issuance, contestation and withdrawal of the portable document A1 (also known as an A1 attestation), so as to hinder misuse thereof. The aforementioned procedure can in particular be suitable for helping avoid various procedures, from lengthy litigation to infringement proceedings, and thus contribute to a stable legal situation within European Union;
9. would point out that the proposal in hand for amending Regulation No 883/2004 with an update to the arrangements for issuing the A1 attestation constitutes a key element for better protection against the social abuse of posted employees, as part of parallel work revising the Posted Workers Directive 96/71/EC. With a view to the importance of this aspect, each step towards a binding, clear and direct shaping of the way the A1 attestation is granted in the future is particularly important and should be given due consideration;
10. in connection with the posting of workers, would point out that social security depends to a considerable extent on the clarification of rules and definitions, for which reason an unambiguous definition of key terms such as 'self-employment' and 'place of business' would be helpful for dealing effectively with problems relating to 'bogus' self-employment or letterbox companies;

11. reiterates in this regard the Committee's view that the time limit beyond which the law of the host country applies in full to employment relationships in posting situations should be 12 months ⁽¹⁾;

12. regrets the delay in introducing the Electronic Exchange of Social Security Information (EESSI); considers pan-European electronic data interchange to be essential;

Sickness and long-term care benefits

13. notes that the coordination of long-term care benefits extends the scope of coordinating law, which is necessary in order to achieve the objectives of the proposed action; the ban on overlapping of sickness and long-term care benefits is likely to be difficult to implement, however;

14. notes that the protection of a sick person residing in a Member State has to be ensured, even if that person does not have legal right of residence; points out, however, that it is often difficult to obtain recognition of foreign sickness insurance cover under current EU law and that in some Member States people in precarious employment are often — wrongly — refused any kind of sickness insurance cover;

15. welcomes, therefore, the fact that entitlement to sickness insurance cover for economically inactive and needy EU citizens will be conditional merely on actual residence in a Member State rather than legal residence. In this regard, the host Member State's right to reimbursement by the competent Member State must be established;

Unemployment benefits

16. considers the new rules on coordination of unemployment benefits to be appropriate. Although the exception concerning short-term employment of less than twelve months provided for in Article 65(2) of Regulation No 883/2004 may not be necessary strictly speaking, it clarifies the text;

17. welcomes the planned extension of the possibility to export unemployment benefits from three to six months. It would, however, point out that this should be coupled with appropriate active labour market policies (ALMPs), constituting a key element of the so-called 'activation strategies', which address the interplay between unemployment insurance and assistance systems, ALMPs and benefit conditionality. The CoR considers it necessary to clarify how Member States should be able to extend the export period beyond the applicable provisions of European law. The CoR has concerns about the special provision regarding employment periods shorter than twelve months;

Family benefits

18. stresses that all EU citizens have a right to family-social benefits in the country where they are registered, employed or subject to tax, although there may be considerable divergences about family-social entitlements amongst Member States;

Special non-contributory cash benefits

19. acknowledges the competence arising from the CJEU's case law on the powers of the Member States to determine the social assistance entitlements of economically inactive persons and welcomes the statement that these determinations shall comply with European fundamental and human rights. It is welcome that these persons will in future not be excluded from sickness insurance cover on the basis of actual residence and notes that they may be allowed to contribute in a proportionate manner to a scheme for sickness coverage on the basis of their habitual residence. The question remains, however, as to what justification would be needed for restriction of, or complete exclusion from, social assistance. At the same time, the extension of this principle to persons who are actually resident in a Member State other than their own entails regulating its application, also with a view to establishing equal conduct and responsibility for Member States;

Cross-border workers

20. regrets the lack of reliable data and information on the number of cross-border workers as described in the legal definition in Regulation (EC) No 883/2004;

⁽¹⁾ Opinion on the Revision of the Posting of Workers Directive (COR-2016-02881).

21. points out that the border regions have extensive experience of mobile workers. The CoR calls on the Commission and the Member States to make use of this experience. In this connection, the Committee invites the Commission to strengthen the support services for cross-border labour mobility provided by EURES — including through existing EURES Cross-border Partnerships, while encouraging the creation of new ones — and to enable these services to gather reliable information on the number and profile of cross-border workers and their employers.

Brussels, 12 July 2017.

*The President
of the European Committee of the Regions*
Markku MARKKULA
