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MEETING DOCUMENT

From: To:	General Secretariat of the Council Delegations
N° Cion doc.:	15642/16
Subject:	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)

In view of the Social Question Working Party meeting of 8 February, Delegations will find attached the contribution from the NL delegation.

Comments by the NL Delegation

Pluriactivity:

- Concerning the criteria mentioned:

  the number and value of contracts performed in the Member State of establishment […]

  This drafting could be improved. These criteria are meant to determine the member state where the employer is established. If you already know the member state of establishment there is no sense in determining the number and value of contracts performed there. We understand this article in the sense that you always need to compare the situation in two or more member state and determine in which member state the criteria are fulfilled better.

- Concerning the non-exhaustive nature of the list of criteria. In that context: what is the value of the criteria mentioned? Are we correct in understanding that a member state has the obligation to take into account the criteria listed, but is also allowed to take other factors into account? Is this even possible since we are dealing with a regulation that is directly applicable in all MS? What happens when the listed criteria point to another member state than the other factors that a member state takes into account?
  And what role will the AC play in this regard? Can the AC come up with a tie-breaker rule?

- How do we ensure that the contract is not concluded by an entity of an multinational enterprise in one country and performed by another entity of the MNE Group in another country? How do we take into account subcontracting?

  Taxation
- What kind of taxes are referred to? How do we deal with a company being active in different Member States and being liable to pay corporate taxes in more than one Member State? E.g. a branch of a bank

  Use of office space
- To what extent do the factors take into account the rise of (crossborder) telework? Would regularly homework constitute office space?

Prior notification:

- Does the member state in which the activity is pursued gets informed by the competent member state 'without delay' after the moment the prior notification has been made or after the PD A1 has been issued. We assume the first, because otherwise we do not see any improvement of this complete system of prior notification on the information position of inspections services in the member state in which the activity is pursued. If our assumption is correct, this should be clarified in the following paragraph by replacing the two actions:

  > That institution shall without delay make information concerning the legislation applicable to that person, pursuant to Article 11(4) or Article 12 of the basic Regulation, available to the institution designated by the competent authority of the Member State in which the activity is pursued and shall issue the attestation referred to in Article 19(2) of the implementing Regulation to the person concerned. ~~and shall without delay make information concerning the legislation applicable to that person, pursuant to Article 11(4) or Article 12 of the basic Regulation, available to the institution designated by the competent authority of the Member State in which the activity is pursued."~~

- If our assumption is incorrect, why is the competent member state not forwarding the Prior Notification information to the member state in which the activity is pursued?

- What does 'without delay' mean? What could be the reason that an institution that has implemented EESSI can't forward information from the prior notification immediately to the member state in which the activity is pursued?

  - There are 4 exemptions to the obligation to notify in advance. 1) The first is the business trip. 2) The second is the temporal exemption. 3) The third is the exemption for activities with an urgent nature. (These need to be notified, but not necessarily in advance). 4) The fourth exemption is the fact that the prior notification is not addressed to pluriactivity situations. With all these exemptions we are wondering whether there are still any added values of this proposal in comparison with the status quo. Under the status quo a posting already has to be notified whenever possible in advance. Does the Presidency still see the added benefits?

- How do we address the rise of workations in which the employee combines work and vacation in another Member State or combines a journey throughout different Member States with work?

Digitalization

What is the current implementation period (delayed entry into force) of the prior notification? Is this considered sufficient in order for competent institutions to prepare for the intensified digitalization mentioned?

Unemployment

Article 65 (1)

- Many MS have in their national unemployment legislation the requirement to "stay" or "be present" in the territory of the competent MS. We take the position MS should be able to require such a stay or presence when a cross border worker claims unemployment benefits on the basis of Article 65 (1).

  Previous proposals stipulated that "Such a[…] person[…] shall receive benefits in accordance with the legislation of the competent Member State as if he or she were residing in that Member State**[…] and shall be entitled to the rights and comply with the obligations laid down in the legislation**

  The current proposal stipulates that "Such a[…] person[…] shall receive benefits in accordance with the legislation of the competent Member State as if he or she were residing in that Member State**[…]**

- **Question**: Can the Presidency explain if the text proposal allows MS to require the beneficiary to stay or to be present in its territory? Or is such a national requirement overruled by the conflict rule in Article 65 (1) (*as if he or she were residing in that MS*)?

  F.e: can a person living a 1000 miles away from the competent MS be required to be present / or stay in the competent MS ? And: what about a person living a 100 miles or 10 miles away?

- **Question**: What is the reason the Presidency proposes to strike the words "and shall be entitled to the rights and comply with the obligations laid down in that legislation".

Article 65 (2) third paragraph (alternatively…)

- **Question**. Are we correct in assuming that MS can pose the requirement to stay/be present in the competent MS situations referred to in Article 65 (2) third paragraph on the basis of the following word "solely under the national legislation of the competent MS"?

  Alternatively, a wholly unemployed person […] referred to in this paragraph, who would be entitled to unemployment benefits **solely under the national legislation of the competent Member State [...]** may make himself or herself available to the employment services in that Member State and receive benefits in accordance with the legislation of that Member State as if he or she were residing there, without the application of Article 6 […].

Article 65 3b (shared competence model)

The introduction of the shared competence model is useful if it would protect unemployed person's rights as a result of the application of the national requirements to stay / be present in the competent state. That way, a gap in protection is overcome.

However, it is not clear if the proposed Article 65 (1) would allow MS to require a presence or stay.

If MS are not allowed to require a presence or stay in their territory, a shared competence model would only:
* cost extra money (for the MS of residence)
* add to the complexity for the administrations
* put cross border workers in a more favourable position than non migrant workers.

The proposed shared competence model also contains perverse incentives:

- **Question**: Why has the duration of the benefit on the basis of this Article not been maximized? To prevent that the duration of the benefits from MS A and MS B exceed the maximum duration of benefits from MS A?

- Example 1) *Frontier worker makes himself available to MS of work (MS A) and claims benefits there on the basis of Article 65 (1). Max duration of the benefit in MS of work is 24 months. Frontier worker makes himself / herself available to MS A during 23 months. After these 23 months the frontier worker exports the benefit one month to MS of residence (MS B). After the expiration of the export period MS B pays unemployment benefit up to the retirement age.*

- **Question:** After the expiration of the export period, do beneficiaries have a right of choice? In other words: can they continue to reside in the MS of residence and choose to either
  * make themselves available to the MS of work (while residing and staying in the MS of residence) and receive benefits on the basis of Article 65 (1)
  * or make themselves available to the MS of residence (provided they have completed insurance periods there) and receive benefits from the MS of residence on the basis of Article 65 3) b).

- **Question:** In case there is indeed a choice and the beneficiary can make himself available to the MS of work, how can that MS make sure he / she really is available and looking for work, especially in case the person lives a 1000 miles away?
