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CRITICAL VIEW ON SOME ISSUES OF THE EU-COMMISSION'S 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

PERSPECTIVA CRÍTICA DE ALGUNOS ASPECTOS DE LA PROPUESTA DE LA COMISIÓN DE LA UNIÓN EUROPEA DE REGLAMENTO DEL PARLAMENTO EUROPEO Y DEL CONSEJO POR EL QUE SE MODIFICA EL REGLAMENTO (CE) 883/2004 SOBRE LA COORDINACIÓN DE LOS SISTEMAS DE SEGURIDAD SOCIAL Y EL REGLAMENTO (CE) 987/2009 POR EL QUE SE ESTABLECE LA PROCEDIMIENTO DE EJECUCIÓN DEL REGLAMENTO (CE) 883/2004

HELMUT WEBER[1]
Head of Unit for Coordination of Social Security Systems
Bundesministerium für Arbeit und Soziales

[1]The author's opinion in no way presents the opinion of an authority or government. It is only a personal opinion.

ABSTRACT

The Commission presented on 13 December 2016 new proposals for amending the coordination of social security systems. For frontier workers there should be a shift of competence for unemployment benefits: according to the current regulation the country of residence is competent. The Commission wants to make the country of former employment competent after one year of employment in that country. The Commission proposes also the extension of the period an unemployment benefit has to be exported.
The Commission intends with the proposal to render the coordination rules of LTC more transparent and visible for the citizen. In terms of LTC the Commission therefore proposes mainly the following modifications: definition of LTC; establishing a detailed list of LTC benefits and creation of a new chapter on coordination of LTC.

KEYWORDS: unemployment benefits, long-term care benefits, export of benefits, residence

RESUMEN

La Comisión presentó el 13 de diciembre de 2016 nuevas propuestas de modificación de la coordinación de los sistemas de seguridad social. Para los trabajadores fronterizos debería haber un cambio de competencia para las prestaciones de desempleo: según la normativa vigente, el país de residencia es competente. La Comisión desea que el país de empleo anterior sea competente después de un año de empleo en ese país. La Comisión propone también la prórroga del período de exportación de la prestación de desempleo.
La Comisión aspira con la propuesta de reforma hacer las normas de coordinación de las prestaciones de cuidados de larga duración (dependencia) más transparente y visible para el ciudadano. Por lo tanto, en lo que se refiere a las prestaciones por cuidados de larga duración, la Comisión propone principalmente las siguientes modificaciones: definición de la prestación, establecimiento de una lista detallada de beneficios de dependencia y la creación de un nuevo capítulo sobre coordinación de esta prestación.

PALABRAS CLAVE: prestaciones por desempleo, prestaciones de dependencia, exportación de prestaciones, residencia

SUMMARY

I. INTRODUCTION

The Commission presented on 13 December 2016 new proposals for amending the coordination of social security systems. They concern many chapters of the coordination regulations as for example also the rules on applicable legislation and rules on how to deal with Article 4 on equal treatment in the light of the recent case law of the European Court of Justice (ECJ).

In the following only two, but crucial proposals are outlined critically: the proposals on coordination of unemployment benefits and on long-term care benefits.

The Commission´s position is only outlined in so far as to render counterpositions understandable. The Commission has published large volumes of information which can be consulted on their homepage.

II. UNEMPLOYMENT BENEFITS

The Commission proposes the following modifications:

For frontier workers there should be a shift of competence for unemployment benefits: according to the current regulation the country of residence is competent. The Commission wants to make the country of former employment competent after one year of employment in that country.

Main argument for such a change is that the country of former employment has received the social security contributions from the worker and/or his employer. Now the situation is not just, as the country of residence has to pay the unemployment benefits, but has not received any contributions. There is a limited reimbursement system which obliges the country of former employment to reimburse the country of residence for a certain time and thus mitigates the financial consequences for the state of residence. The complicated rules for reimbursement of contributions from the former country of employment to the country of residence would become superfluous with a shift of competence to the former state of employment for paying unemployment benefits.

Before an assessment of the proposal is undertaken, a short review on the status quo is given:

The principle under which unemployment benefits have to be provided as a rule by the state of residence in the case of frontier workers (category of persons pursuant to Article 65 of Regulation No 883/2004) has worked well as a fundamental coordination rule for over 40 years. No major difficulties have arisen neither for the Member States nor for the persons concerned. Minor problems in the implementation of the law can be removed either by decisions/recommendations of the Administrative Commission on the interpretation of the regulations or by small legal amendments.

In its judgment in Case C-443/11 Jeltes the ECJ explicitly confirmed the principle of the state of residence for frontier workers.“The rules on the freedom of movement for workers, contained in particular in Article 45 TFEU, must be interpreted as not precluding the Member State where the person was last employed from refusing, in accordance with its national law, to grant unemployment benefit to a wholly

unemployed frontier worker whose prospects of reintegration into working life are best in that Member State, on the ground that he does not reside in its territory, since, in accordance with Article 65 of Regulation No 883/2004, as amended by Regulation 988/2009, the applicable legislation is that of the Member State of residence." (no 2 of the operative part of the judgment).

A shift to the principle of the state of employment's competence would be justifiable if proof could be established that it would improve migrant workers' rights without considerably obstructing major numbers of persons in the exercise of their freedom of movement.

There are different situations frontier workers are in. In the following only two situations are outlined:

Situation of a frontier worker living "relatively far away" of the border: The question arises, if the Commission's proposal really improves the free movement of workers, if the former frontier worker lives further away from the frontier. By definition "frontier worker" covers also those workers who return to their country of living regularily at least once a week. Therefore also those workers are covered who live far away from their workplace and commute - often by budget airlines-home only once a week.

Example: A considerable number of workers live in the eastern part of Germany, work in the Netherlands during the week (in slaughterhouses, for example) and return to their German residence over the weekend. The workers normally commute a distance of 500 km (one way) on weekends. If they become unemployed, they register as unemployed at their German place of residence and seek jobs in the proximity of their residence.

If the principle of the state of employment applied, the Netherlands would be responsible for the provision of benefits, provided the worker has worked there for at least 12 months.

The philosophy behind the proposal seems to suggest that the worker prefers to work abroad and likes to commute every weekend home to his/her family and there for also wants to look for work there in case of unemployment.

But is it not true, that the large majority of the workers concerned would prefer to work close to their family, where the children go to school and where most of his/ her social environment is situated?

The German residence would be more than 500 km away from a Dutch institution and the unemployed persons would suffer considerable disadvantages as a result:

With the proposal the following situation arises: The worker would be required to appear in person at the employment agency in the Netherlands at least for his/her first registration as unemployed. The travel expenses would have to be borne by him-/herself.

The question as to whether the employment services of the state of employment would have to cover increased expenses for persons whose residence is far away in another country has not been tackled in the draft modification. The Dutch institution would only

pay unemployment benefits and not provide any supportive services aimed at reintegration into the German labour market. It would not cover the costs of work familiarisation in a German enterprise, for example. Nor would it finance any further training or retraining measures in Germany.

The Dutch employment agency is not knowledgeable about the German labour market and would thus not be able to make placement proposals for the German labour market. Nor does it know which measures are required to make up for deficits on the part of the worker so that he/she can apply for available jobs in Germany which is why the agency could not help the worker with his/her reintegration into the German labour market.

The worker concerned would probably be unemployed for a longer period of time than comparable workers who receive comprehensive subsistence benefits and benefits to help them reintegrate into the labour market from the institution of the state of residence.

To shed some more light on this:

Without solutions on how to deal with active labour measures, the proposal is not mature to be decided on:

If the state of employment had to finance integration measures in another Member State, it would have to be decided whether the integration measures should be designed in accordance with the rules of the state of employment or of the state of residence. It would have to be avoided that the institution of the state of employment has to pay for comprehensive/expensive integration measures (set up by the institution of the state of residence) if the national law of the state of employment provides for less comprehensive/less expensive measures. Would the institution of the state of residence have to carry out monitoring functions to ensure that unemployed persons fulfil their duties of cooperation in integration measures (that they regularly attend a retraining course, for example)?.

Regardless of the kind of solution that would be chosen to implement the principle of the state of employment, there would be the risk that the persons concerned would have fewer possibilities for participation in measures because of the much more complicated implementation of such measures. As a result, their integration into the labour market would be considerably obstructed.

Further Situation/Example: If a frontier worker lives close to the border the shift of competence could be justifiable. However, also in these cases the problem of active employment measures arises.

Additional elements which need to be taken into account (cost of living; language skills):

The shift of competence might be a possible measure to take in closely related frontier regions with similar level of costs of living. However, this often is not the case.

Case: the worker concerned worked in a country with low unemployment benefits, but lives in a country with high costs of living. Could he/she receive social assistance in his

country of residence? Other questions arise, if the situation is vice-versa. The worker would receive a relatively higher amount of benefits than workers who never have moved into another Member state. For at least 6 months according to the proposal, he/she could lead a relatively better life than the "local" unemployed person. His/her intention to be re-employed would be low in this time, Also the local employment agency would presumably not concentrate too much to find him/her work as the benefit is financed by another country.

Another element is the language factor. By far not everybody has high language skills, nevertheless the unemployed would be confronted with a foreign placement agency for -often- the first time in his/her life and in a foreign language.

On top of this it should not be forgotten, the requirement that the worker concerned needs to be employed beforehand for 12 months in the country of former work, renders the legal situation even more complicated, raises the administrative costs to check this and delays the proper case management.

III. EXPORT OF UNEMPLOYMENT BENEFITS[2]

The Commission proposes also the extension of the period an unemployment benefit has to be exported from now 3 months with the discretion to extend it up to 6 months, in the future to obligatorily 6 months with the option to extend for the whole time it can be claimed in the competent country.

1. Positive is that the people concerned have more time and flexibility to look for work in the other country.

However, the longer the export period the more difficult it becomes for the competent country to supervise the unemployed person. The competence to check the "employability" of the person concerned is transferred to the country chosen for longer period than now. In order to cope with this the Commission proposes that the labour administration of the "guest" country is obliged to inform the labour organisation of the competent country every months on the situation. But how is the standard of information? Will the guest country help the person concerned as it helps its own people also before the background that it does not spend its own money on the person concerned? It needs to be presumed that less active labour measures would be granted to him/her.

When fixing the length of the export period, account should also be taken of the fact that for the institution that is competent to provide benefits, it is only possible in its own country to call for unemployed persons to cooperate and to support them actively in their reintegration into the labour market (for example, by tailor-made integration measures fitting the requirements of the unemployed persons and of the labour market) This is why a search for work is often more successful in the state of residence than in another Member State.

[2]C. Sánchez-Rodas Navarro "Good Legal Practices in Spanish Law? Clauses Governing Residence and the Export of Spanish Social Security Benefits" in: in: T. Velasco Portero (Coord.); Good Practices in Social Law .Thomson-Aranzadi. 2015. Madrid.; pp. 23-45.https://idus.us.es/xmlui/handle/11441/47317.

The Commission argues- in the general sense- that the unemployment would not cost more money, it would not matter if the unemployed person received the benefits for 6 months or longer at home or abroad. In the light of the arguments given above this has to be doubted. It is more probable that he/she can find work in the competent country in most cases and much quicker.

As a result, the obligatory prolongation remains doubtful. Many member States now never use the extension to 6 months, others apply very narrow measures for discretion to prolong.

The solution might lie in a binding catalogue of principles for prolongation to 6 months export.

The framework conditions for unemployed persons who want to seek work in another Member State differ considerably. By way of example, the following three scenarios are described:

-Scenario a): In the country where the person wants to seek work the labour market situation is much better than in the state of residence. If unemployed persons with appropriate qualifications/language skills/age/etc. make an effort, it will be easy for them to find work within three months.

=> An export period of 3 months is sufficient. An export period of 6 months could act as a disincentive in so far as workers might initially postpone an intensive search for work.

-Scenario b): In the country where the person wants to seek work the labour market situation is somewhat better than in the state of residence. Unemployed persons with legitimate integration prospects in the country where they want to seek work normally need between 3 and 6 months to find a new job.

=> An export period of 6 months is appropriate.

-Scenario c): In the country where the person wants to seek work the labour market situation is much worse than in the state of residence. Unemployed persons have considerably worse integration opportunities in the export country than in the state of residence. Still, there are unemployed persons who want to export their benefit entitlement into the other Member State for as long a period as possible.

=> The legal entitlement to the export period of 3 months is completely sufficient. As a matter of priority, the competent institution should have the possibility to integrate the unemployed persons into the labour market in the state of residence.

The length of the export period should be flexible and use the concrete situation of the job seeker and the concrete situation abroad and in the state of residence as a guideline.

2. Possible solution

Instead of an obligatory extension of payments a catalogue of criteria could be developed with the help of the following key questions:

a) Does the unemployed person give reasons for his/her intention to seek work abroad (for example, leaving the country together with his/her spouse who takes up employment abroad or joining his/her spouse who resides abroad)?

b) Is there a special need in the state of residence (e.g. a shortage of skilled labour) to fill jobs with the unemployed person who would like to leave the country?

c) Compared to the state of residence, are the integration opportunities abroad: worse, similar, somewhat better or much better?

d) In case of an application for an extension of the export period: Is the person concerned likely to take up work abroad in the foreseeable future?

IV. FURTHER PROPOSALS OF THE COMMISSION

Furthermore, the Commission proposes to introduce a period of 3 months of employment in the new country before former insurance periods from other member states can be taken into account for a claim in the new member state.

Under the current regulation insurance periods from other member States have to be taken into account if the person concerned has worked in this country directly before he became unemployed. The length of the required pre-insurance time is not specified. Most member states require at least 1 day, a very few about a month. As this proposal would be less favourable for the unemployed person concerned the Commission also proposes that he/she does not need to return to the former country to register unemployed and draw benefits from there but can apply in the new country to trigger the responsibility of the former country for 6 months with the option of prolongation until the right is exhausted.

In favour of the proposal it can be said that it requires a closer relation to the new country before this country needs to pay on its own account than in the current approach.

However, also this proposal obliges the former country to export without having the capability to control. After all, it should not be forgotten, that these benefits are financed by the contributions of workers and employers. It is necessary to observe strict rules on spending. If the person concerned could be brought back quicker in employment in the former country, it is a breach of this principle of prudent spending. With the current rules the new country becomes responsible after a minimum period of employment of one day in most member states.

Both situations could be manipulated fraudulently. Often workers move home to their country of residence when they get unemployed. They forget to apply for export of regularly 3 months of unemployment benefits beforehand. Afterwards it is too late. Thus they take up employment in order to qualify for social security insurance and benefits. With the proposal the work contract could be ended before the 3 months period has elapsed. Then the former country of employment would become responsible to pay out the benefit and also cover social security as a whole for at least 6 months.

In addition this proposal can lead to several continues shifts of competence: firstly the new country of employment would become competent - e.g. for pension-, sickness insurance; family benefits - and then after less than 3 months the former country of employment again. if he/she then finds again employment in the new country, competence would shift again. Presumably no administration can cope with this sequence of different competences.

The problem behind all of this is that now the unemployment benefit is calculated on the basis of the wages earned in country of very last employment. And indeed one day or maybe one month or so as a timeframe to calculate the amount of benefits which need to be paid then for a rather long period of unemployment is not a just basis. Why not introduce objective measures of calculation as for example: the average wage for the job in the country concerned could be taken into account as the basis of calculation of unemployment benefits for a specified period of employment before dismissal and leave at the same time the 1 - day rule as applied in most member States as it is? This could help prevent manipulation.

V. LONG-TERM CARE BENEFITS (LTC)

Already the Luxembourg Court of Justice ruled that the German long-term care insurance needs to be coordinated in the same way as sickness benefits (C-160/96 - Molenaar; C-208/207 Chamier-Glisczinski): These benefits intend to improve the health and living conditions and are therefore closely related to sickness benefits with which they are closely interlinked in terms of organization.

The Commission intends with the proposal to render the coordination rules of LTC more transparent and visible for the citizen.

In terms of LTC the Commission therefore proposes mainly the following modifications:

I. Definition of LTC

II. Establishing a detailed list of LTC benefits

III. Creation of a new chapter on coordination of LTC

To I: the new definition of LTC benefits brings a welcomed clarification to citizens and institutions. However, there is concern that the definition could go too far and also further than the ECJ has intended: a wide interpretation could extend the coordination to areas which should not be covered: As e.g. in many Member States ancillary benefits are granted by the municipalities, the municipalities could suddenly be confronted with the problem of being involved in coordination. On top of this uncertainty would arise which other benefits of a member State could be considered as LTC by the ECJ.

To II: in order to have legal certainty the proposal for a detailed list of LTC benefits in kind an/or cash as per member State is welcomed. The only question which arises is, whether this list is added as an annex to the Regulation itself or left for the Administrative Commission to be established after the adoption of the modified regulation. In order to have legal certainty on which benefits are coordinated, a list in an

annex to the regulation itself is needed. A list established by the Administrative Commission is legally not binding, not even for the administration of the member State concerned, not to speak of courts.

In addition it could be considered to extend Article 3 (5) of Regulation 883/2004 in order to clarify that also social assistance LTC benefits are excluded from coordination.

Such a list provides clarity as to the existence of corresponding benefits in each Member States. What is however uncertain is the relationship between the list of LTC benefits and the proposed Annex XII of the Regulation, which is to contain the LTC benefits that can be coordinated in accordance with other chapters of the regulation.

To III: there is concern that the introduction of a separate chapter for LTC benefits could lead to unwanted changes in the coordination rules. The consequence of the introduction of a separate chapter for LTC is that the branch of sickness benefits and LTC need to be kept strictly separate in future. The application of Articles 17 to 32 Regulation 883/2004 mutatis mutandis to LTC benefits as a separate branch of social security in its own chapter could lead in some constellations to the splitting of competences for sickness and LTC benefits or even the loss of entitlements. To apply the provision of the sickness Chapter 1 mutatis mutandis would mean, that each time those provisions use the term "benefits in kind" it has to be read as "LTC in kind".

For instance, the determination of competence for long-term care benefits relating to pensioners, who are the group most likely to be affected, may only be based on whether an entitlement to LTC in kind exists in the country of residence. Since 10 Member States have no LTC in kind, there may be a change in competences for LTC and a loss of entitlements where pensions are received from one of these other 10 Member States.

To make this clearer the following examples are outlined:
Example for changes in competence

A pensioner, who resides in Portugal, receives a pension from Germany and Portugal. Portugal is competent for sickness benefits in kind [Article 23 REG (EC) No 883/2004].

Since there exist no long-term care benefits in kind in Portugal as per the list set out in Article 34(2) of Regulation (EC) No 883/2004, according to the Commission's proposal Germany would be competent for long-term care benefits in kind and in cash [Article 24 REG (EC) No 883/2004]. The pensioner would have the right to long-term care benefits in cash exported from Germany to Portugal.

According to the case-law of the European Court of Justice a person

- who receives pensions both from his Member State of origin and from the Member State in which he spent most of his working life and

- who has moved from that Member State to his Member State of origin

can by reason of optional continued affiliation to a separate care insurance scheme receive a cash benefit corresponding to that affiliation, in particular where cash benefits

relating to the specific risk of reliance on care do not exist in the Member State of residence.

According to the Commission's proposal the affiliation to the long-term care insurance scheme had to be compulsory without an existing affiliation to the sickness insurance scheme in Germany.

Status quo	Commission's Proposal
Competent for sickness benefits: Portugal	Competent for sickness benefits: Portugal
Competent for long-term care benefits: Portugal Possibility of continuing to be insured in the German care insurance scheme on the basis of optional continued affiliation	Competent for long-term care benefits: Germany (compulsory affiliation)
In case of optional continued affiliation: Export of long-term care benefits in cash from Germany	Compulsory affiliation: Export of long-term care benefits in cash from Germany

Example for loss of entitlements

A pensioner, who resides in Belgium, receives a pension from Belgium and the Netherlands. Belgium is competent for sickness benefits in kind [Article 23 REG (EC) No 883/2004].

Since there exist no long-term care benefits in kind in Belgium as per the list set out in Article 34(2) of Regulation (EC) No 883/2004, according to the Commission's proposal the Netherlands would be competent for long-term care benefits in kind and in cash [Article 24 REG (EC) No 883/2004].

In the Netherlands there exist long-term care benefits in kind but not exportable long-term care benefits in cash. As a consequence the pensioner has to pay contributions in the Netherlands, but can neither receive benefits in kind in Belgium nor benefits in cash from the Netherlands. So far the pensioner receives long-term care benefits in cash from the Belgian institution.

Status quo	Commission's proposal
Competent for sickness benefits: Belgium	Competent for sickness benefits: Belgium
Competent for long-term care benefits: Belgium	Competent for long-term care benefits: Netherlands
Benefits: long-term care benefits in cash (Belgium)	Benefits: No

As a result the introduction of an own chapter of coordination of LTC triggers in many constellations a change of the competent member State and new burdens for the insured person with regard to access to benefits. This would also in the light of the often elderly pensioners who need LTC be a disaster.

To make this a bit clearer, in other words:

According to the current Regulation 883/2004 LTC are coordinated as sickness benefits. The member State of residence grants the sickness insurance benefits in kind and also the LTC in kind if any: the institutions of the member State of residence are always competent for granting sickness benefits in kind as all member States have sickness insurance schemes. Therefore as a result only one member State is competent. The Commission's proposal for a separate chapter automatically triggers the consequence that if a member State of residence has no LTC in kind it needs to be examined whether another member State granting a pension would be competent for LTC in kind if the pensioner lived there. As sickness benefits in kind cannot be exported this other member State would become responsible for exporting its LTC in cash if any. If there are no such benefits, the pensioner would receive no LTC at all. In the case there are such benefits in the other member State which pays the pension, the pensioner concerned would need a new set of additional forms in order to get these benefits exported from this state.

The introduction of a new chapter would also imply more bureaucracy: the use of a LTC-specific set of documents for registration and separate cost-settlement. National health insurance providers should be the only institutions in charge with the implementation of Regulation (EC) No 883/2004 in both areas - sickness benefits and LTC - in order to rely on a well-established network of institutions.

All in all, it should be considered whether the objective of making the legal status quo more transparent and more user-friendly cannot be achieved better and with less disadvantages for EU citizens by laying down specific provisions or references on LTC in chapter 1 on sickness benefits in Regulation (EC) No 883/2004.

VI. CONCLUSION

The retention of the state of residence principle has its advantages because the state of residence principle is a tried and tested principle whereas the concepts striving for a shift to the state of employment principle do not provide solution approaches for the

fundamental problems of the state of employment principle. Quite a lot of frontier workers would lose important rights which they currently have according to the state of residence principle if the state of employment principle applied and they would be seriously prevented from exercising their freedom of movement.

The obligatory extension of unemployment benefit export is not helpful as in many cases not required and could also lead to lose chances on the labour market in the competent country.

The 3-months rule of pre-employment before gaining access to employment benefits of the new country of employment deteriorates the legal rights of the unemployed and can lead to absurd results.

All 3 proposals for modification lead in principle to a deterioration of the free movement of workers.

The initiative to modernise the coordinating legislation, especially to make the complex coordinating legislation fairer, more user friendly, clearer and easier to enforce is welcomed. However, establishing autonomous coordination rules for LTC could appear premature at this point. A comparison with sickness benefits shows that all Member States did at least provide for comparable benefits in kind as Regulation No 3 and later Regulation (EC) No 1408/71 came into force. In contrast to this, LTC differ widely across the Member States and follow heterogeneous patterns, which will ineluctably cause unwished gaps in coordination and trigger a difficult and bureaucratic situation for mainly old helpless people and could lead to a deprival of all benefits under the current rules. Certainly, the Commission did not foresee these consequences when making the proposals.