POSITION PAPER – UPDATED 08/2019

Revision of social security coordination regulation: a step forward for labour mobility

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On 13 December 2016, the European Commission published its proposal for a revision of Regulation 883/2004 on the coordination of social security systems and Regulation 987/2009 laying down the procedure for implementing Regulation 883/2004.

Labour mobility is essential for the Metal, Engineering and Technology-based industries (MET) and is a strong asset of the Single Market. Therefore, Ceemet welcomes the European Commission's proposal in general. In this position paper, Ceemet focusses on labour mobility, and more in particular posting – or sending – of workers.

Ceemet's key messages

- Ceemet welcomes the Commission's proposal to keep the social security of a worker sent abroad, in the home state for the duration of 24 months. The duration of minimum 24 months is key in order not to fragmentise a workers' social security CV and helps to facilitate labour mobility within the EU.
- Ceemet proposes to replace the term 'posted' in the current article 12 by 'sent', in order to avoid that the scope of the notion 'posted worker' within Regulation 883/2004 would be confused with its scope within Directive 96/71/EC and to avoid any legal uncertainty regarding the implementation and application of article 12 of Regulation 883/2004.
- The Portable Document A1 (PDA1) has declarative nature, not constitutive nature: it is not necessary to first obtain a PDA1 before a worker can commence carrying out work in another Member State. The PDA1 cannot be a prerequisite to work in another EU Member State. This should be clearly mentioned in Regulations 883/2004 and 987/2009 with regard to both employed and self-employed persons.
- In order to make an immediate end to too much bureaucracy and red tape on companies, Ceemet considers it important to delete the PDA1 requirement for business trips with immediate effect after the entry into force of the Regulation.

About Ceemet

Ceemet represents the metal, engineering and technology-based industry employers in Europe, covering sectors such as metal goods, mechanical engineering, electronics, ICT, vehicle and transport manufacturing.

Member organisations represent 200,000 companies in Europe, providing over 17 million direct and 35 million indirect jobs.

Ceemet is a recognised European social partner at the industrial sector level, promoting global competitiveness for European industry through consultation and social dialogue.

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Preliminary observation

This position paper only focusses on labour mobility of economically active persons, and more in particular posting – or sending – of workers. It does not comment on the proposed changes regarding the coordination of specific social security benefits, notably long-term care benefits, unemployment benefits, social benefits and family benefits.

Nevertheless, Ceemet agrees with the changes proposed by the Commission and welcomes the legal clarification that the conditions in order to exercise the right to reside in another Member State as set out in Directive 2004/38/EC must first be complied with before a person can access social security benefits.

1. Key concerns

Posted – or sent – workers

KEY CONCERNS

- Posted -or sent- workers
- A1 forms
- Place of registered office

Ceemet welcomes the fact that – in essence – the special rules in article 12 of Regulation 883/2004 for workers temporarily sent to another Member State to perform work on their employer's behalf, remain unchanged. Ceemet is of the opinion that it is not in the interest of neither the employee nor the employer, to change to another social security system in a period of less than 24 months. Shortening the duration to less than 24 months would jeopardize the free movement of workers. It has the undesirable effect that employees would have to pay social security contributions in several countries, each with a different social security system, which fragmentizes the social security "CV" of mobile workers. Therefore, we want to highlight the necessity of keeping the duration to remain under the social security system of the home country to 24 months as it actively supports and facilitates labour mobility within the EU.

However, Ceemet has concerns with regard to the following changes proposed by the Commission:

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- Ceemet notes the wish of the Commission to clarify the difference between posted workers within the framework of the Directive 96/71/EC of the European Parliament and the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services on the one hand, and posted workers as referred to in the current text of article 12 of Regulation 883/2004.

  However, while it appears that the Commission is seeking to clarify that posted workers within the meaning of Regulation 883/2004 are not necessarily posted workers within the meaning of Directive 96/71/EC, an unnecessary confusion is created by referring to a directive that only concerns the applicable labour law in a regulation that only concerns social security coordination. The text as proposed by the Commission also raises questions with regard to the implementation and application, while there is no added value of the change in wording as proposed by the Commission. The clarity sought by the Commission by referring to definitions of the proposed revised posting of workers directive in the regulation on coordination of social security will create legal uncertainty. Also, from a legal perspective, reference to a directive within the scope of a regulation, will create unnecessary legal issues due to the direct applicability of Regulation 883/2004, as opposed to the Posting of Workers Directive, which needs to be transposed in national legislation in each Member State. Therefore, Ceemet cannot agree with this change.

  Ceemet suggests replacing the term 'posted' in the current article 12 by 'sent', in order to avoid that the scope of the notion 'posted worker' within Regulation 883/2004 would be confused with its scope within Directive 96/71/EC, but also to avoid any legal uncertainty regarding the implementation and application of article 12 of Regulation 883/2004.

- Furthermore, an unreasonable layer of complexity and confusion is added to article 12: the replacement rule now provides that, in order for the special rule of article 12 to apply, the person should not be sent to replace another employed or self-employed person previously sent within the meaning of article 12. Hence, a company who considers sending a person to the host Member State, should not only verify whether this person would replace another employed person, but also whether another self-employed person performed the same activities prior to this sending. This will be impossible to control in practice and will lead to inacceptable difficulties in application. Therefore, Ceemet cannot support these new rules on replacements. Host companies will not be able to obtain 100% legal security about the current, let alone previous, status of a person. Companies won't be able to obtain any information, due to privacy and data protection reasons.

  The ratio behind this proposed change appears to be the wish of the Commission to combat bogus self-employment. Whilst it is a Member State's competence to determine the employment status to define the applicable social security system, the Commission should combat fraudulent sending (or posting) of persons, but at the same time ensure that genuine sending (or posting) of persons can take place without unnecessary barriers.

  Ceemet is of the opinion that the focus should be on the full implementation Electronic Exchange of Social Security Information project (hereinafter "the EESSI project"), allowing a better, more efficient, and uniform exchange between administrations throughout all Member States, instead of introducing any further complexities to the replacement rule.

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A1 forms

Ceemet is an advocate for standard procedures for the issuance, contestation and withdrawal of the PDA1. Ceemet fully supports the fact that there will be uniform practices throughout the EU with regard to the PDA1.

Currently, huge differences exist between Member States in the processing time needed to issue a PDA1. Some Member States have an online application and an IT-automated centralised procedure, with very short issuance times of merely a few hours. In other Member States, it can in practice take up to several months before a PDA1 is issued.

Taking into account these differences, it is a clear burden to the freedom of workers and the freedom to provide services across borders, if employees cannot start working in another Member State if they do not first have a PDA1.

Ceemet has therefore the following observations with regard to the Commission's proposal:

- The PDA1 has declarative nature, not constitutive nature: it is not necessary to first obtain a PDA1 before a worker can commence carrying out work in another Member State. The PDA1 cannot be a prerequisite to work in another EU Member State. This should be clearly mentioned in Regulations 883/2004 and 987/2009 with regards to both employed and self-employed persons. Whilst a prior notification of the sending of a person to another Member State is in general already required, allowing the host Member State to control persons performing activities on its territory, the PDA1 only serves as a confirmation of the applicable national social security system.
- With regard to the amendments proposed by the Commission to articles 15 and 16 of Regulation 987/2009, Ceemet is of the opinion that the designated institution should not only inform the person concerned, but also to the employer(s), without delay concerning the applicable legislation as determined by the designated institution. It is of great importance that the companies concerned immediately receive the information regarding the applicable legislation, because this has an immediate impact on the correct payroll administration for their employee.
- Even though Ceemet welcomes that clear time limits are set in the Commission's proposal – notably 25 days, reduced to 2 days in cases of demonstrable urgency – for issuing institutions to provide evidence to the requesting institutions, this may not lead to situations that issuing institutions request this information in these tight deadlines of companies. According to the proposed article 19 of Regulation 987/2009, the issuing institution should already have all the necessary information before delivering a PDA1 in the first place. Any issuing institution who is requested to provide further evidence, should not have to forward any questions it has to the employer, and certainly not wait until the deadline to provide information is on the brink of expiring. This would be a disproportionate additional administrative burden for all companies, especially for SME's.
- Ceemet fully supports the proposed amendment of article 73, paragraph 4 of Regulation 987/2009 which clarifies that the existence of time limits under national legislation shall not be a valid ground for the refusal of the settlement of claims between institutions under the aforementioned article.
- With regard to the modifications proposed to article 80, paragraph 2 of Regulation 987/2009, Ceemet suggests that information about interests for late

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payment, as well as sanctions in case of non-compliance to social security legislation should be made available on the Mutual Information System on Social Protection.

- Ceemet supports the Commission's wish to combat fraud. From the proposed changes, it is clear that the Commission wants to combat both fraud and error. The notion of "fraud" is even being defined for the purpose of this Regulation. For Ceemet it is of utmost importance that situations of "fraud" and situations of "error" are not dealt with in the same way. Whereas situations of fraud should evidently be sanctioned by retroactively repairing the situation, it would be a big mistake to treat all cases of errors automatically in the same way. In cases of error, the change of the applicable legislation should not be retroactive. A retroactive change of applicable legislation, resulting in the change of payroll calculations for the employee concerned and change of the social security rights for the employee and possibly his/her family, can only be supported in case of fraud. The retroactive change in case of error would lead to a disproportionate sanction for companies in case of an error, whether made by the company itself, the employee or the issuing institution: such change would require that all pay slips of the employee must be annulled and replaced, with different social security contributions, potentially leading to a different net salary, as well as to a change in acquired rights of the employee and possibly his/her family members.

Business trips

A specific concern as regards the PDA1 concerns the notification for business trips.

According to the annual report of the Verband Deutsches Reisemanagement (VdR), there are approximately 30 million business trips from Germany to other EU Member States per year. On a European scale, that easily translates to more than 100 million business trips to other Member States per year. It is needless to say that, in case every single business trip would need to be notified, this would create a huge unnecessary administrative burden on companies and on the competent social security institutions. Moreover, as business trips are not the subject of illegal postings, the goal of tackling illegal employment and illegal postings will not be resolved by requiring a notification for every single business trip.

Therefore, business trips should be explicitly exempted from the requirement of prior notification in article 15 of Regulation 987/2009.

In order to have legal clarity regarding the meaning of a business trip, it is vital to have a clear definition of a business trip. In this regard, Ceemet supports the definition as agreed upon during the interinstitutional negotiations, i.e. "a temporary working activity of short duration organised at short notice, or another temporary activity related to the business interests of the employer and not including the provision of services or the delivery of goods, such as attending internal and external business meetings, attending conferences and seminars, negotiating business deals, exploring business opportunities, or attending and receiving training".

Furthermore, in order to make an immediate end to too much bureaucracy and red tape on companies, Ceemet considers it important to delete the PDA1 requirement for business trips with immediate effect after the entry into force of the Regulation.

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Place of registered office

In order to determine the applicable social security system of people employed in two or more Member States, as laid down in Article 13 of Regulation 2004/883, the Member State where the registered office is situated, is an important criterium. Therefore, defining the notion "registered office" is crucial.

In the ongoing revision process, and more in specific, in the latest trilogue agreement, Article 14 paragraph 5a of Regulation 987/2009 lays down certain criteria to be considered in determining the location of the registered office. These criteria include turnover, the number of services rendered by its employees and/or income, the working time performed in each Member State where the activity is pursued, the places where general meetings are held and the habitual nature of the activity pursued.

Even though certain criteria such as the turnover and the working time to be performed in each Member State are the easiest to quantify, these are also factors which can shift very regularly. This is especially the case for SME's which are located in border regions and can have big projects in a different country several years in a row. These changes in the country where most of their turnover and working time in a certain year, due a big project, can lead to the unintended consequence of changes of the applicable legislation, thereby shifting the social security system of their workers.

In order to resolve these issues and have a stable applicable legislation, Ceemet considers the list of elements set out in Article 4 paragraph 2 of Directive 2014/67 to be more stable and pragmatic. Furthermore, it remains essential to have an overall assessment of all the criteria concerned, taking into account the special situation of SME's.

2. Other concerns

Activities in two or more Member States

1) Determination of applicable social security system

ACTIVITIES IN ≥ 2 MS

1) Determination of applicable soc. sec. system
2) Unemployment benefits
3) Notion of subst. activities

It is beneficial for both the employer and the employee not to fragmentise the social security "CV" of employees. It is therefore important to ensure that the criteria, taken into account in order to determine the applicable social security in case of multi-state employment, are predictable and stable, i.e. not subject to regular change. If the legislation of the country of residence cannot be applied because the employee does not pursue a substantial part of his activities there, it is vital to take criteria into account which do not regularly shift the applicable social security system from one Member State to another. Ideally this includes the place of the registered office or place of business and the place of residence of the employee. Taking into account criteria such as the Member State where the employee performs the largest share of his work activities is not at all predictable nor stable as employees who work on projects in different countries will see a shift in their social security system if all at once, they take on a larger share of work in another country. Moreover, if they have big consecutive projects and therefore work in other countries frequently, it would mean that they change social security systems every time they go to another project in a different country. ≥ 2

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2) Unemployment benefits

The Commission's proposal adds a new paragraph 4a to article 13 of Regulation 883/2004. According to this new paragraph, a person who receives unemployment benefits in cash from one Member States, and who is simultaneously employed by a company in another Member State, will be subject to the social security system of the Member State paying the unemployment benefits.

First and foremost, Ceemet is in favour of combatting social fraud, illegal employment and illegal competition. It is nevertheless inacceptable that a company could be held liable for the social fraud committed by a person in another Member State where the company is not employing that person.

Also, Ceemet is genuinely concerned that a company will not be able to know that social security contributions should be paid in another country for their new employee.

If an employee doesn't voluntarily inform the new employer of the fact (s)he also receives and will continue to receive an unemployment benefit from another Member State, the employer will not be able to have this information. It is impossible for a company to obtain this information due to privacy and data protection rules and practices. Yet, a company will be responsible and liable if they pay social security contributions in the wrong – their own – country.

It is not realistic, nor desirable, that companies throughout the EU will be obliged to ask for a Portable Document A1 (PDA1) for every single employee they hire, and especially those new employees who live in another Member State, in order to have legal certainty about the Member State where their employee will be subject to the social security system. This would undermine the usefulness and the aim of the PDA1.

It cannot be the intention of the Commission that every company would in fact be obliged to check all their new employees, and especially new employees who live in another Member State. One can question whether this does not constitute a discrimination, and whether this is not a burden to the free movement of workers in general. Ceemet believes it is important to ensure that companies shouldn't hesitate to employ persons from another Member State. The proposed amendment will in particular impact companies who are established in border regions.

Ceemet is therefore of the opinion that there are other means and ways to combat fraud that will be less burdensome for companies, employees, and administrations of Member States. Ceemet therefore asks the deletion of article the new paragraph 4a of article 13.

3) The notion of substantial activities

Article 14, paragraph 5a of Regulation 987/2009 clarifies that the employer must carry out substantial activities in the Member State of their registered office or place of business.

Since there are in reality and for many reasons price differences between Member States as well as between regions within the same Member State, Ceemet suggests taking into account the percentage of activities in a Member State (e.g. manhours worked), rather than taking into account the total revenue. Activities performed in the capital of some Member States will likely raise more revenue than the same activities performed in a far-away region of another Member State, even if the number of manhours spent on the projects would be equal or lower.

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Implementing and delegated acts

The Commission proposes a new article 76a in Regulation 883/2004, as well as a new article 20a of Regulation 987/2009, granting far-reaching powers to the Commission to adopt implementing acts following article 291 TFEU: the Commission is granted the power to establish through implementing acts the procedure to be followed to ensure uniform conditions for the application of articles 12 and 13 of Regulation 883/2004.

In article 88 and 88a the Commission also proposes amendments, expanding thereby the existing powers provided by article 92 of the implementing Regulation, enabling the European Commission to adopt delegated acts in accordance with article 290 TFEU.

Whilst Ceemet welcomes further harmonisation of the conditions for the application of articles 12 and 13 of Regulation 883/2001, Ceemet demands transparency and control on the decision-making process with regards to essential elements to apply articles 12 and 13 of Regulation 883/2004, due to the impact such decisions may have in practice for companies and workers.

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