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Comment on the Commission's Proposal, submitted December 13th, 2016,

on renewing EU social security coordination rules

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I. Topics and Objectives

The Commission's proposal[1] to revise and reorient the EU social security coordination rules - unveiled as a part of the "mobility package" on December 13th, 2016 - reflects the recent case law of the European Court of Justice (ECJ)[2] . As to this the Member States are competent to restrict the access to social assistance for non-active and needy EU-citizens or of those EU-citizens who are not adequately protected in health care. Insofar the proposal intends to clarify the interrelation between the coordination of social security rights - enshrined in the regulations (reg.) (EC) No 883/2004 and 987/2009 - and the freedom of movement rights - emerging from the Directive (dir.) (EC) No 2004/38 on the EU-citizen freedom of movement status.

[1] 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 *COM(2016)815 final.*

[2] *EuGH*-19.9.2013 - C-140/12 (Brey) ;11.11.2014- C-333/13 (Dano) ; 15.9.2015- C-67/14(Alimanovic) ;-8.4.2016-C-299/14 (Garcia Nieto)*;14.6.2016- Rs C- 308/14 (Commission./.United Kingdom).*

The second objective is to establish explicit rules for the EU-wide coordination of long-term-care benefits. This objective is also driven by the ECJ case law, as to which benefits in cash or kind for long term care are to be conceived as social benefits in case of sickness. Therefore, the coordination rules for health care benefits apply also to benefits for long term care (article 17- 20 of the reg. (EC) No 883/2004).

The third target is to revise the coordination rules for unemployment insurance benefits substantially by erecting for them a new conceptual basis. The current legislation exempts the unemployment insurance in many respects from the general principles of EU social security coordination. The proposal for a revision aims at lowering these differences by approaching the coordination of unemployment benefits' rules on the coordination of social security benefits in general. This comment emphasizes, addresses and comments the therein proposed changes.

II. Social Assistance Entitlements for non-working EU citizens

In the first instance the reform intends to explicitly ascertain the right of the Member States to exclude non-active EU-citizens from social assistance under their legislation, if these persons are needy or do not dispose of an adequate protection in health care. These suggestions are accompanied in the proposal by the suggestion to integrate into the preliminary remarks of the reg. (EC) No 883/2004 new recitals.

One of them reads:"(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 recognized 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)."

This means, that each of such exclusions made by the Member States should concur with the fundamental social human rights guaranteed by the EU human rights legislation. This means as to article 6 II of the Treaty of the European Union (TEU), that also the European Charter on Human Rights (ECHR) and its interpretation by the European Court of Human Rights (ECourtHR) should be observed, when and if the Member States make use their legislative power to reduce the access to social assistance benefits for non- nationals – above all other EU-citizens.

As to the proposed new rules Member States can make an entitlement to social assistance dependent on a right to residence. Such rule differ from the general rule in the coordination system (article 10 of the reg. (EC) No 987/2009).According to this the concept of residence is a factual one. It indicates the social integration of a person in a given Member State's society; it does not establish any relation to a right of taking residence.

The new category "right of residence" for determining a genuine link to a special Member State's social security system stems from the ECJ's observation, that under article 24 II of the dir. (EC) No 2004/38 the Member States can hinder needy EU-citizens and/or those persons with lacking protection in health care to take residence

in the Member State. Based on this assumption, the right of residence becomes a new and hitherto unknown concept within the system of EU coordination law.

This new genuine link plays a role in the context of social assistance in the meaning of article 24 II dir. (EC) 2004/38; but the substantial scope of this provision is not clear – due to the broad and wide understanding of this concept by the ECJ, as it incorporates social security matters in the meaning of article 3 reg. (EC) No 883/2004. Hence, the concept of social assistance has different meanings: a narrow one in article 3 V reg. (EC) No. 883/2004 and much broader one in article 24 II dir. (EC) 2004/38.

From the new recitals on the human rights' basis of both EU coordination and freedom of movement law follows , that all restrictions on EU-Citizen's entitlements as to social assistance have to meet the requirements of article 34 para.3 of the EU Charter of Fundamental Human Rights, which guarantees the right to social assistance to each EU-citizen. In addition, those restrictions have to respect the human rights' requirements stemming from article 1 of the Additional Protocol to the EHCR. As to this provision "property" is to be guaranteed. As to the case law of the ECourtHR also social rights are to be conceived as "property".

As to the judgments made in the past, the right to social assistance cannot be denied even if the residence is unlawful[3] . Art. 14 ECHR does not permit any legal differences based on nationality in relation to property (article 1 of the Additional Protocol of the ECHR) .From this can be deducted that means tested benefits for the unemployed cannot differ on the basis of the nationality[4], the same applies to a benefit for the handicapped persons[5] .In the judgment Kuric[6] the ECourtHR held, that its unlawful to differ in legislation on the nationality when it comes to social assistance, housing benefits or family allowances without a substantial and objective justification[7].A distinction based on nationality had been conceived as unlawful also in old age pension legislation[8] . In rendering family benefits it is, however, not forbidden to treat children living outside the competent state different from the ones living in the competent state[9].

From this follows albeit clearly, that the Member States are not free to decide under which circumstances an EU- citizen, residing in another Member State than the one he /she adhere to, can be excluded from social assistance, because social assistance is to be conceived as a fundamental social and human right and in this dimension also to be respected by the Member States when excluding EU-Citizens from fundamental social rights under their own domestic legislation.

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[3] Anakomba Yala v. Belgium application no. 454313/07
[4] Bah v. United Kingdom application no. 56328107
[5] Poirrez v. France application 40892/98
[6] Kuric v. Slovenia application no. 26828/06
[7] Stec v. United kingdom application no. 65731/01; 65900/01
[8] Andrejeva v. Latvia no. 55707/00
[9] Efe v. Austria no. 9134/06

III. New Patterns for Coordinating Benefits on Long Term care

Despite the proposal provides for new rules on the coordination of long term care benefits, the underlying rules are embedded in the case law of the ECJ as to which long term care benefits are bound to correspond with some of the rules on health care coordination[10]. The proposal is about to define the need for long term care as a special risk. In addition, the exportation of benefits in cash is provided, a rule on the non-accumulation between health care and long term care shall be established. And finally, the compensation of long term care services according to the compensation health care is stipulated. These provisions can strengthen legal clarity and give by this the coordination rules a more precise and explicit content.

The main provisions refer to the exportation of benefits and the aggregation of periods of coverage in the various systems of the Member States. These requirements are to be respected as to the case law of the ECJ already today. The effect induced by the new rules is, hence, not to make coordination anew, but to improve the clarity and explicitness of EU coordination. That is to be highly appreciated, but does not represent a substantial change of the law.

The proposal has limited effects. It is restricted to conserve entitlements for long-term care which had been acquired under the legislation of a Member State, which provides for those benefits specifically. The suggestions, however, do not open access to long term care services in kind. Above all, they do not open the door to benefits in countries, where those special benefits do not exist. Due to a lack of harmonization in the long term care insurance or comparable institutions the coordination cannot bring about a complete coordination.

IV. New Rules for the Coordination of Unemployment Insurance Benefits

The most far reaching reforms affect the unemployment insurance schemes. When it provides for prolongation of the export of unemployment insurance benefits from – as at the moment - three to six months it fosters the freedom of movement for job seekers and by virtue of the adoption of this rule strengthens the insurance character of the unemployment protection scheme. Both aims are worthwhile to be addressed and they should also be achieved.

For the aggregation of periods of coverage a minimum employment of three months is foreseen. This rule shall avoid, that a Member State becomes competent for compensating the loss of employment without any substantial preliminary employment link to this Member State. This rule can be justified with the insurance character of the unemployment protection scheme.

[10] ECJ (1998) ECR I 843 (Molenaar);(2001) ECR I 1901(Jauch); (2004)ECR I 6483 (Gaumain-Cerry, Barth);(2006) ECR I 1771 (Hosse) ; (2008) ECR I 1683 (Gouvernement de la Communauté Française);(2009)ECR I 6095 (Chamier-Gliszenski);(2011)ECR I 5737 (da Silva Martins)

When it provides for frontier workers and other beneficiaries, who work in another Member State than the ones they are residents of , new rules, as to which the state of the previous work is also responsible for administering the benefits, it strengthens again the insurance character of the unemployment protection. It safeguards that the Member State, who received the contributions has also to pay the benefits. By allowing such an export of unemployment benefits the general rule on the coordination of benefits in kind is ascertained that all benefits in cash are to be exported (article 7 reg.(EC)No 883/2004) – without any restriction.

These suggestions contribute, in addition, to overcome the existing obstacles created by the given legislation – which intends to compensate the competent state of residence for the additional charges imposed it by supporting former frontier workers or other workers from abroad. The given rules are clumsy, cumbersome and therefore difficult to administer and unprecise as to their cost compensating potential. In this respect, the proposed law makes coordination more easy going and concurs more with both the insurance character of the unemployment protection scheme and leads – at the same time – the rules on the coordination of unemployment insurance benefits more to the core principles of social security coordination in general.

The proposal is, however, not strict enough. As it upholds the competence of the Member State of residence, instead of the Member State of previous work, if the employment was carried out less than twelve months, it is not consequent. This compromise can be reckoned with the insurance principle, as to which a substantial protection can only mature on the basis of a substantial employment link, which might be doubtful for employments of less than a year's duration. The compromise's price, however, is not to be underestimated. It abandons a clear distributional role as it separates the link between contribution and benefit – which prevails in the unemployment insurance ever since. The existing law gets rid of it – with meagre results. To reform them is, therefore, worthwhile. But when doing this, it seems better to do it consequently, i.e. uniquely, instead of doing it partially.

The new legislation should avoid creating ambiguities and inconsistencies. Finally, it should circumvent provisions, which might open rooms for discretion, which can be intentionally used by the partners of a work contract to shift burdens between the unemployment insurances of different Member States.

V. Conclusions

The reform initiates a necessary debate. It should be on how the EU can improve the freedom of movement and avoid at the same time a possible forum shopping in relation to social assistance. The proposed changes draw adequate consequences from the existing case law and contain good suggestions to make coordination easier to be grasped, clearer as to their principles and more oriented towards strengthening the freedom of movement within the EU.