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**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

The External Dimension of EU Social Security Coordination

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Introduction

In a globalised economic environment, labour mobility both within the EU and between the EU and the rest of the world is a growing reality and necessity. Social security coordination is a system of rules aimed at facilitating such mobility. The EU has had a system of social security coordination rules for mobility within the EU for over 50 years¹. More recently, these rules were extended to cover Iceland, Liechtenstein, Norway and Switzerland².

Social security coordination between the EU and the rest of the world is dealt with in two ways. On the one hand, there is the national approach, whereby Member States make bilateral agreements with selected third countries. This approach is patchy: there is an incomplete network of agreements, and agreements tend to have differing content from country to country.

On the other hand, a common EU approach to social security coordination with third countries is now developing.

Against this background, this Communication has four aims:

- to underline that migrants and businesses from third countries, who generally see the EU as a single entity, face fragmented social security systems which create obstacles in terms of entering, moving within and leaving the EU;
- to make the case for promoting and strengthening cooperation between Member States so that a less fragmented approach to social security coordination with third countries can be developed;
- to set out the various ways in which the EU rules already impact on the external dimension and to give clear guidance on the legal relationship between EU law and national bilateral agreements;
- to describe the existing components of a common EU approach and to make proposals for developing this further.

¹ The rules are currently contained in Regulation (EC) No 883/2004 on the coordination of social security systems and its implementing Regulation (EC) No 987/2009, OJ L166, 30.5.2004, p. 1; OJ L284, 30.10.2009, p. 1.

² The Agreement on the European Economic Area came into force on 1 January 1994 (but became applicable for Liechtenstein only on 1 May 1995), OJ L 1, 3.1.1994, p. 3. The EU-Switzerland Agreement entered into force on 1 June 2002, OJ L 114, 30.4.2002, p. 1.

1. MEMBER STATES' BILATERAL AGREEMENTS WITH THIRD COUNTRIES

1.1. What do national bilateral agreements cover?

The social security rights of persons moving into and out of the EU are still dealt with predominantly under national rules. Individual Member States conclude bilateral social security coordination agreements with third countries, and these agreements set up a system of coordination rules for persons moving between the two countries. The reasons behind such agreements vary: traditionally they are aimed at protecting citizens who are working in other states; increasingly, though, they are viewed as a way of attracting businesses and labour from third countries. Making an agreement can also be an expression of political friendship between countries. EU Member States are also parties to multilateral social security agreements, e.g. the Ibero-American Social Security Convention, to which both Spain and Portugal are parties.

Most agreements with third countries typically contain rules on applicable legislation, equal treatment and pensions. The pension provisions protect migrants' acquired rights when they leave the national territory and allow payment of the pension in the other territory. In some cases, provision is made for aggregating insurance, employment or residence periods. The applicable legislation rules generally include 'posting' provisions. These enable workers who fulfil certain conditions to remain subject to the social security legislation of the sending country and exempt them from paying social security contributions in their country of work. The principle of equal treatment guarantees migrant workers the same treatment as nationals of the country of work.

EU Member States generally negotiate bilateral agreements without reference to what their partner EU countries are doing. The process is highly fragmented. In practice, certain EU countries may be pinpointed by the EU's main trading partners for the conclusion of agreements, whilst other countries are left out. There is no mechanism for harmonising approaches, and similarly no mechanism whereby EU countries can get together to solve common problems they face with a particular country.

Moreover, the country-specific nature of these national bilateral agreements means that migrants and businesses based in third countries not only deal with fragmented social security systems when moving between EU countries, but are also confronted with distinctive national bilateral agreements when moving into and out of the EU. The network of bilateral agreements is by no means complete: depending on the third country in question, there may be no bilateral agreement in existence with the relevant EU country. This can mean loss of acquired social security rights for persons moving out of, or back into, the EU. This is just as likely to affect migrant EU citizens as migrants from third countries. Overall there is a lack of transparency as to what citizens' rights are.

1.2. The impact of EU law on national bilateral agreements

The Gottardo Judgment

National bilateral agreements, like any other type of Member State law, are subject to the supremacy of EU law. This was made clear in the field of social security in 2002 when the Court of Justice of the European Union held, on the basis of Article 39 EC (now Article 45 TFEU), that Member States may not limit the application of social security agreements made

with third countries to their own nationals and must treat other EU nationals equally under the terms of the agreement³. The result of this ruling, known as the *Gottardo* judgment, means that EU Member States which operate agreements based on nationality, need to adjust the application of their agreements with third countries to ensure that they can benefit nationals of other Member States likewise⁴.

Regulation No 1231/2010

The EU social security coordination rules also impact on the ability of Member States to apply rules they have set down in bilateral agreements. The EU rules, contained in Regulations (EC) No 883/2004 and (EC) No 987/2009 on the coordination of social security, contain a system of coordination for persons who move within the EU. The rules were extended in 2003 to cover all third country nationals legally resident in the EU and 'in a situation which is not confined in all respects within a single Member State'. The regulation in force is Regulation (EU) No 1231/2010⁵. It is in effect a 'bridge' that allows all persons legally resident in one EU country, but featuring a cross-border element of some sort, to benefit from the EU coordination rules. This covers practical issues such as enjoying the same rights as EU nationals to receive all necessary medical care during a temporary stay in another Member State (an entitlement evidenced by the European Health Insurance Card)⁶.

The existence of Regulation (EU) No 1231/2010 gives the EU exclusive competence as regards the social security coordination rights of nationals from third countries who are in a cross-border situation within the EU. In cases of conflict, EU Regulations take precedence over national rules contained in bilateral agreements with third countries. Where, for example, a national from a third country is sent to an EU state under the terms of a bilateral agreement with a third country and then moves to work in another Member State, Regulation (EU) No 1231/2010 will apply to this second move. Further, where a national from a third country works in two or more Member States for an employer established outside the EU, the EU rules on applicable social security legislation will apply⁷.

1.3. Common practical issues and challenges

Member States are required by the 'duty of loyal cooperation' in Article 4(3) TEU and by Article 351 TFEU to take all appropriate steps to eliminate incompatibilities between agreements they have with third countries and their duties arising from EU law. As regards the impact of both the *Gottardo* ruling and Regulation (EU) No 1231/2010 on bilateral agreements, Member States need to secure cooperation from the third country concerned in ensuring that EU obligations can be met. This gives rise to a number of common challenges.

To be in compliance with the *Gottardo* judgment, the bilateral agreement needs to be applied in accordance with the EU principle of non-discrimination. This may involve renegotiating the agreement, or simply obtaining consent that a non-discrimination clause be incorporated

³ Case C-55/00.

⁴ Recommendation No P1 of 12 June 2009 of the Administrative Commission for the Coordination of Social Security Systems, OJ C106, 24.4.2010, p 47.

⁵ OJ L 344, 29.12.2010, p. 1. The United Kingdom continues to be bound by and subject to the application of the previous Regulation (EC) No 859/2003. Denmark is not bound by or subject to the application of Regulation (EU) No 1231/2010 nor of Regulation (EC) No 859/2003. The EEA states and Switzerland do not apply either of these regulations.

⁶ Article 19 of Regulation (EC) No 883/2004.

⁷ See, for example, Article 14(11) of Regulation (EC) No 987/2009.

into the agreement. In practical terms, Member States may need to obtain social insurance records from third countries for nationals of EU states other than their own. This often raises administrative and legal difficulties. The fundamental problem remains that, whilst the EU Member State is obliged to comply with EU law, the third country is generally not bound to cooperate on these issues.

Ensuring that the way bilateral agreements are applied is compatible with Regulation (EU) No 1231/2010 raises similar issues. There is a need to explain to third countries that, in certain circumstances, bilateral agreements cannot be applied as EU law has primacy. This is a problem for all the Member States, but at present there is no common mechanism for Member States to deal with this. One possible simple solution is to include a clause in all agreements to the effect that, in cases of conflict, EU law will take precedence over the terms of the agreement.

In terms of substantive common concerns for Member States, one such concern is how to resist pressure to agree to long posting periods, which have the effect that workers from the third country are exempted from contributing to the Member State's social security system. In the EU, the maximum period for which a worker can remain insured in the Member State of origin is two years⁸. However, workers posted into the EU from third countries can remain insured in their country of origin for much longer periods, and this exemption from affiliation within the EU is frequently a sensitive point in concluding modern bilateral agreements.

Finally, obtaining data from the third country is a key concern for most Member States in the context of taking action to combat fraud. The EU social security coordination rules contain legal provisions which allow a Member State to request verification of information from the Member State where the beneficiary resides⁹. This enables paying institutions to ensure, for example, that the beneficiary of a pension is still alive or that a person still meets the conditions for receipt of an invalidity pension. Not many bilateral agreements contain this sort of verification mechanism. Many Member States would welcome the introduction of an efficient approach to combating fraud.

1.4. Strengthening cooperation on social security coordination with third countries

- In view of the practical issues and challenges outlined above, it is clear that better cooperation between Member States on social security coordination with third countries would be advantageous in many respects. If Member States cooperate and, where appropriate, act together, they will enjoy a stronger bargaining position vis-à-vis third countries, be better placed to solve common problems and together ensure that the way they apply bilateral agreements complies with EU law. In general terms, greater cooperation should lead to a more coherent overall approach by EU countries.
- In this respect, a mechanism is needed at EU level to strengthen cooperation between Member States. With this in mind, the Commission will give its backing to a results-orientated working group of experts from the Member States —meeting on an annual basis — in order to facilitate such cooperation. The working group will also be an opportunity for the Commission to share information on the state of play in the negotiation of EU agreements with third countries. The new mechanism will also

⁸ Article 12 of Regulation (EC) No 883/2004.

⁹ Article 5(3) of Regulation (EC) No 987/2009.

ensure complementarity between the national bilateral approach and the developing EU approach to social security coordination with third countries.

2. THE DEVELOPMENT OF A COMMON EU APPROACH

2.1. Regulation (EU) No 1231/10

Regulation (EU) 1231/10 applies the EU social security coordination regulations to legally resident third-country nationals who are 'in a situation which is not confined in all respects within a single Member State'. One effect of the Regulation is that citizens within its scope can benefit from the principle of equal treatment contained in Article 4 of Regulation (EC) No 883/2004. This means that any third-country national in a cross-border situation falling within the scope of Regulation (EU) No 1231/2010, who is entitled to an old-age pension from an EU state, will enjoy equal treatment with nationals of the paying state as regards payment of this pension outside the EU¹⁰.

The Commission believes there is a need for effective enforcement of the principle of equal treatment when it comes to paying pensions in a third country. This is all the more important given the case-law of the European Court of Human Rights, to the effect that the right to a pension which is based on employment can in certain circumstances be assimilated to a property right protected by the European Convention on Human Rights¹¹. To this end, the Commission will use its network of national social security experts to gather information about legislation and other measures at national level concerning the payment of pensions in third countries. This information will be added to the country-specific social security profiles on the Commission's website, and will be supplemented with information on Member States' bilateral agreements with third countries, again using information provided by national social security experts.

2.2. Rights given by EU migration instruments

EU migration rules have imposed standards that national social security legislation must meet in the case of third-country nationals who reside in a Member State. For example, after five years' legal residence in an EU Member State, and assuming certain conditions are met, third-country nationals acquire the same rights as nationals in respect of social security, social assistance and social protection as defined by national law¹². In addition, there are three EU migration directives, the so-called "Single Permit" Directive¹³, the so-called "Blue Card" Directive¹⁴ and a Directive dealing with third-country researchers¹⁵, which guarantee third-country nationals admitted to Member States – subject to certain limited exceptions - equal treatment in social security with nationals of the state where they reside. This guarantee

¹⁰ See Recital 13 of Regulation (EU) No 1231/2010.

¹¹ ECHR, *Klein v Austria* (App no. 57028/00), 3 March 2011.

¹² Article 11 of Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, OJ L16, 23.1.2004, p. 44.

¹³ Directive 2011/98/EU of the European Parliament and of the Council on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ L343, 23.12.2011, p. 1.

¹⁴ Council Directive 2009/50/EC on the conditions of entry and residence of third country nationals for the purposes of highly qualified employment, OJ L155, 18.6.2009, p. 17.

¹⁵ Council Directive 2005/71/EC on a specific procedure for admitting third-country national for the purposes of scientific research, OJ L 289, 12.10.05, p. 15.

includes equal treatment as regards the transfer of their state pensions to a third country and is not dependent on the existence of bilateral agreements¹⁶. The Commission's proposals for further EU migration directives contain similar equal treatment clauses¹⁷.

2.3. Association Agreements and Stabilisation and Association Agreements

Generally, Association Agreements (including the Stabilisation and Association Agreements concluded with the countries of the Western Balkans) contain a number of principles which are to govern the coordination of social security rules for workers and their families, who move between an EU country and the associated country. In addition, the Association Councils set up by these Agreements are given the task of adopting provisions to implement these principles.

In October 2010, the Council took a first step in this process by deciding on the position to be taken by the EU within the Association Councils set up by the Agreements with Algeria, Morocco, Tunisia, Israel, Croatia and the former Yugoslav Republic of Macedonia on the adoption by those Councils of decisions regarding the coordination of social security systems¹⁸.

These Association Council decisions should cover the following rights for legally employed workers: equal treatment with workers in the host state ; export of the full amount of old-age, survivors' and invalidity pensions and pensions in respect of accidents at work and occupational diseases outside the territory of the paying state; and equal treatment for legally resident family members. The rights should be reciprocal — EU workers enjoy the same rights both in the associated countries and on their return to the EU. Enjoyment of these rights should not depend on internal movement within the EU. These decisions should also provide for a reciprocal framework of cooperation and verification mechanisms to combat fraud. Provisions of bilateral agreements concluded between the associated countries and individual Member States, which provide for more favourable treatment of nationals of the associated countries or Member States, will continue to apply (taking into account, as the case may be, the above-mentioned *Gottardo* case-law of the Court).

Once the Association Council Decisions are adopted, the common EU approach to social security coordination will be effectively implemented, with direct effect in national law. Following on from this, the Commission will propose certain practical administrative arrangements of a non-legislative nature to facilitate the application of these Association Decisions. The Commission will help the Member States to apply these Decisions: it will organise annual meetings to discuss the coordination arrangements with the associated countries and to facilitate cooperation generally; it will monitor closely the way the Member States are applying the Decisions.

Finally, no discussion of EU association agreements and social security coordination would be complete without a mention of the Association Agreement with Turkey, and in particular

¹⁶ This right is granted explicitly by Article 14(1)(f) of Directive 2009/50/EC, but must also be inferred from the terms of Article 12(c) of Directive 2005/71/EC.

¹⁷ Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, COM(2010) 379 final; Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transferee, COM(2010) 378 final.

¹⁸ OJ L306, 23.11.2010.

the 1970 Additional Protocol to that Agreement¹⁹, which provide as an aim, to be achieved by progressive stages, the free movement of workers between Turkey and the EU. In this context, Article 39 of the Additional Protocol requires the Association Council to adopt social security measures for Turkish workers moving within the EU. This provision was executed by Association Council Decision No 3/80²⁰. Although the necessary implementing measures for this decision were never adopted, the Court of Justice has held that the equal treatment principle and the pension export clause in Decision No 3/80 are directly applicable²¹. Therefore, by virtue of the case-law of the Court of Justice, there is in effect already a certain common EU approach to social security coordination for Turkish workers in the EU.

2.4. Using association agreements to develop further a common EU approach

The EU and its Member States have not only taken on social security coordination obligations with respect to Turkey, but also in the agreements with Albania, Montenegro and San Marino. The implementation of these provisions is still outstanding. The Commission believes that the legal obligations set out in these agreements should be observed, so it will be proposing a second package of Council decisions on the position to be taken by the EU within the relevant Stabilisation and Association, Association or Cooperation Councils concerning the coordination of social security systems with these countries.

For Turkey in particular, the Commission believes that steps should be taken to replace and update Association Council Decision No 3/80²². This is all the more necessary in the light of the recent judgment of the Court of Justice in Case C-485/07, *Akdas*. The Commission's new proposal for implementing the social security aspects of the Association Agreement will, for example, take into account the principle in Regulation (EC) No 883/2004 that 'special non-contributory cash benefits' are not exportable.

As regards the negotiation of new Association Agreements with third countries, the Commission will seek to include a standard social security coordination clause, based on the principles of equal treatment, export of pensions and administrative cooperation.

2.5. New EU social security agreements

In order to take into account the needs of the globalised labour market, the Commission will open a debate in the Administrative Commission for the Coordination of Social Security Systems to consider whether, in certain circumstances, there may be a need for Member States to act jointly on social security coordination in respect of a given third country. This need could be addressed by a new instrument — an EU social security agreement. Such agreements would allow a more flexible approach to social security coordination than is possible under association agreements and could also be concluded with third countries with which no association or cooperation agreement exists. An EU agreement could be made as

¹⁹ Additional Protocol of 23.11.1970 to the Agreement establishing an Association between the EEC and Turkey, OJ L293, 29.12.1972, p. 3.

²⁰ Decision 3/80 of the Association Council of 19 September 1980 on the application of the social security schemes of the Member States of the European Communities to Turkish workers and members of their families, OJ C110, 25.4.1983, p. 60.

²¹ Case C-262/96, *Sürül*; Case C-485/07, *Akdas*; see also judgments in Case C-18/90, *Kziber*; C-103/94, *Krid*, concerning the equal treatment clause in the cooperation agreements with Maghreb countries, which are now replaced by Association Agreements.

²² The Commission will withdraw its earlier proposal to implement Association Council Decision No 3/80 (COM(83) 13).

and when a need arose — for example, to deal with difficulties arising with a particular third country from the application of Regulation (EU) No 1231/2010 or to address issues linked to double social security contributions. Such agreements would offer the possibility to integrate possible bilateral particularities between a Member State and the third country concerned and their application could be optional for the Member States.

The Commission foresees such made-to-measure agreements being concluded with some of the EU's strategic partners, in particular those with whom there are significant movements of labour. An agreement with the countries of a regional integration organisation could also be explored. The overall aim of such agreements would be to promote a coherent EU approach vis-à-vis the third country concerned.

2.6. Strengthening the EU's external profile on social security

Finally, as the Europe 2020 Strategy underscored, it is essential for the EU to look outwards and to participate in key discussions and actions on regulatory issues at a global level. As states increasingly move to work together on cross-border social security matters, the EU should, given its long experience of social security coordination, take a lead role. This should include cooperation with other international organisations, such as the ILO. The International Labour Conference in 2011 called upon ILO member states to consider the conclusion of agreements to provide equality of treatment, as well as access to and the preservation and/or portability of social security entitlements for migrant workers. Discussion on social protection and social security coordination with other regions in the world is of growing importance. The Commission will therefore promote cooperation on social security coordination with other international organisations and with other parts of the world.