DGUV
Deutsche Gesetzliche Unfallversicherung
Spitzenverband

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Statement of the German Social Accident Insurance (DGUV) regarding the Proposal for an 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 made on 13 December 2016 - COM(2016) 815 final

In general terms, the DGUV welcomes the intention of the EU-Commission regarding the modernising and updating of the provisions of Regulation (EC) No 883/2004. It hereby refers to the following aspects:

Regarding Art. 1 No 9 lit. c):

When defining benefits in kind, the proposal refers to the new Chapter 1a with regard to long-term care benefits and the sentence that exists in the current law, "This includes long-term care benefits in kind" should be deleted.

As the recommended amendment does not result in more legal clarity, but mixes different types of benefits with each other, the current wording of Art. 1 lit va) number i) of Regulation (EC) No 883/2004 should be fully retained. This would also ensure that long-term care benefits as a result of an accident at work and an occupational disease would continue to be coordinated as benefits for accidents at work and occupational diseases in accordance with Title III Chapter 2.

Regarding Art. 1 No 13:

The proposal regarding a new version of Art. 12 of Regulation (EC) No 883/2004 provides for a person who works for an employer in a Member State and "who is posted within the meaning of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services or sent by that employer to another Member State to perform work on that employer's behalf", continues to be subject to the provisions of the first Member State. A new aspect here is in particular the reference to *Directive 96/71/EC* (Posting Directive) *and the extension to employees who are "sent" to another Member State*.

Even if the harmonization of the posting period of 24 months in *Directive 96/71/EC* with the period of posting in Regulation (EC) No 883/2004 is to be welcomed on grounds of harmonization and legal certainty, the DGUV is of the opinion that the reference in the wording of Art. 12 is unfitting. The regulatory content of the Posting Directive and Regulation (EC) No 883/2004 differs. Regulation No (EC) No 883/2004 and 987/2009 foresee detailed and comprehensive rules regarding which social insurance law is applicable in the case of postings. The unauthorised replacement of posted employees is hereby of special importance for the social accident insurance institutions, especially in the butchery trade and the construction industry. A referring to the Posting Directive can result in future uncertainties as to whether its requirements or exception rules are also applicable in the social security coordination law. The DGUV is of the opinion that the reference hereto does not contribute to legal certainty. An added value with regard to the coordination of social insurance law is not discernible.

It is also not clear why it is proposed to include persons who are "sent" to another Member State, especially it remains unclear which particular cases will be covered by this extension.

For this reason, the DGUV is of the opinion that the reference to the Posting Directive and the differentiation between "posted" and "sent" persons should be deleted.

Regarding Art. 1 No 14:

It is intended that a provision is to be included in Art. 13 para. 4a of Regulation (EC) No 883/2004, according to which a person who receives unemployment benefits in cash from a Member State and at the same time, is in salaried employment or is self-employed in another Member State, is to be subjected to the legal provisions that have validity in the Member State that pays unemployment benefits.

The question is how proof is to be provided of the applicable law, should an occupational accident occur during employment in Germany for which benefits in kind are to be provided, when unemployment benefits are being paid by another Member State at the same time, for example. Taking into consideration the proposals concerning long-term care benefits, the question also arises as how to prove the applicable law for persons providing care outside their country of residence without this being of a commercial nature.

The DGUV suggests that with regard to situations for which the A1 is to be issued upon application, this should be expanded to the group of persons covered by Art. 11 para. 3 lit. e) of Regulation (EC) No 883/2004. This affects situations in which school pupils, students, interns and persons who do not provide care on a commercial basis continue to be subject to the legal provisions of their country of residence, despite the fact that they perform activities in another Member State. By all accounts, it is planned that the A1 should also be issued for cross-border commuters who only work in one Member State outside their country of residence. In the interest of legal certainty, it would therefore make sense to also make the certificate A 1 available to other groups of persons.

Regarding Art. 1 No 17:

There is an intention to create a separate chapter for long-term care benefits.

It is the opinion of the DGUV that a dedicated coordination chapter for long-term care benefits is not necessary. The benefits provided by the German social accident insurance system include benefits for long-term care resulting from an accident at work or an occupational disease. The coordination provisions of Title III Chapter 2 have proven to be adequate with regard to accidents at work and occupational diseases benefits. The coordination of individual types of benefits provided by a social insurance branch on the basis of an additional benefits chapter would make the cross-border cooperation unnecessarily complicated and also render the start of the Electronic Exchange of Social Security Information (EESSI) considerably more difficult with the creation of additional business processes and documents.

Regarding Art. 2 No 8 lit. b:

Art. 14 para. 5a of Regulation (EC) No 987/2009 is to be amended so that the principle that persons pursuing activities in more than one Member State are to be subjected to the legal provisions of the Member State in which the employer or the company has its legal domicile only if the employer concerned or the company concerned habitually provide a substantial activity in this Member State.

It is in general to be welcomed when the principle of the substantial activity is also to be applied to employers of employees who work in two or more Member States. Should a company not exercise a substantial activity in the state in which it has its legal domicile however, then the reference to para. 9 in Art. 14 para. 5a provided in the 2nd sentence is not of any further help. Paragraph 9 refers to self-employed persons for whom the place at which the fixed and permanent branch is located, serves amongst others as the "focus of their activities". It would be more target-oriented and workable if the legal provisions of the country of residence were also to be applicable to the persons concerned in such cases.

Regarding Art. 2 No 8 lit. c:

Art. 14 is to be supplemented with a para. 12 comprising a conflict of laws provision for cases in which a person who has his or her place of residence in a non EU Member State outside the scope of application of the Regulations, but pursues activities as an employed or self-employed person in two or more Member States and is subject to the legislation of one of those Member States.

The DGUV would also advocate to extend the coordination regulations to nationals from non-EU Member States who do not have their legal place of residence within the EU. This could be in the form of a corresponding amendment of Regulation (EU) No 1231/2010 for example. As is proven by the final report from the "Posting" expert group (see AC 340/16 Annex, Chapter 7), clear coordinating rules would also be desirable for nationals from non-EU Member States for which Regulation (EC) No 883/2004 is not applicable. The expert group recommended that such rules should be worked on by the Administrative Commission. This recommendation should be followed up on.

Regarding Art. 2 No 12:

The new Art. 20a of Regulation (EC) No 987/2009 gives the European Commission the power to pass implementing acts. These implementing acts should also include the "time limits for... the withdrawal of the document when its accuracy and validity is contested by the competent institution of the Member State of employment".

In view of the established jurisprudence of the ECJ regarding certificate A1, according to which a Member State is bound by the information provided in the certificate regarding the applicable legal provisions until it is withdrawn by the issuing body (see Case C-202/97, Fitzwilliam; Case C-178/97; Banks and Case C-2/05, Herbosch Kiere), it appears to be questionable whether the proposed instrument is able to ensure harmonized conditions for the implementation of the coordinating rules (see recital No. 17 of the draft amendment Regulation from 13 December 2016). From the point of view of the DGUV, it would make sense that the committee (comprising the Member States) that shall be established under the implementing act would be enabled to declare that a document is invalid if necessary.

After Art. 2 No. 26:

Art. 67 para. 5, 1st sentence of Regulation (EC) No 987/2009 is to be reworded as follows:

"The claims are paid to the liaison office of the creditor Member State stated in Article 66 of the implementation Regulation within a period of 12 months after the end of the month in which they have been submitted to the liaison office of the debtor Member State."

The current deadline of 18 months is a burden to the assisting institution as it has to pre-finance the costs over this long period. The time allowed for payment should be shortened. This

would reduce the pressure of costs that the assisting social accident insurance body is subjected to, in case it offers benefits in kind to persons who are insured abroad, if the reimbursement of the benefits in kind by the responsible body is only paid with a delay.

Article 68 para. 2 of Regulation (EC) No 987/2009 should be reworded as follows:

"(2) The interest shall be calculated on the basis of the reference rate by the European Central Bank to its main refinancing operations with an addition of eight percentage points. The reference rate applicable shall be that in force on the first day of the month on which the payment is due."

Many claims are only settled by the debtor institution after expiry of the payment deadline. Such a payment delay reduces the liquidity of the creditor institution. German social accident insurance institutions are not permitted to avail themselves of debt financing as a result of the payment default. The outstanding receivables have a direct effect on the calculation of the accident insurance contributions. A legal enforcement of claims in the event of payment defaults is not provided in the Regulations. It is therefore necessary to determine supplementary provisions so that a non-adherence to the payment deadline can be avoided in the reimbursement proceedings. The higher interest rate for a payment default should be eight percentage points over the reference interest rate of the European Central Bank analogue to Directive 2011/7/EU regarding the combatting of late payment in commercial transactions.

Regarding Art. 2 No 29:

The German wording of the definition of a "claim" in Art. 75 para. 1 of Regulation (EC) No 987/2009 should be corrected. The correct definition is as follows:

*„alle Forderungen im Zusammenhang **mit Beiträgen oder nicht geschuldet gezahlten oder erbrachten Leistungen…**". ("all claims relating **to contributions or to benefits paid or provided unduly…**")*. Please also refer to the note from the Administrative Commission AC 074/2017.

Regarding Art. 2 No 30:

It would appear that a clarifying rule is desirable for states with a tax-financed social security system, in which regulations for the collection of social insurance contributions are completely lacking (e.g. Denmark). Art. 84 para. 1 of Regulation (EC) No 883/2004 would otherwise have no effect. The reference to the procedures for "owed contributions" should be clarified. In the event of there being a lack of such procedures in the national law of the requested party, it should be possible to apply collection procedures for tax debts and/or civil collection proceedings that are provided for in such Member States to foreign requests for contribution collections. The DGUV therefore suggests that Art. 76 para. 1 of Regulation (EC) No 987/2009 be supplemented with a third sentence:

"Should no legal and administrative regulations for the collection of social security contributions exist in a Member State, the requested party is to apply the legal and administrative regulations for the collection of tax debts that exist in this Member State."

Regarding Art. 2 No 33:

Art. 79 para. 1 of Regulation (EC) No 987/2009 refers to a uniform instrument permitting enforcement. A mandate regarding who is to be responsible for the creation of the uniform instrument permitting enforcement as a standardised or portable document does not exist however.

After Art. 2 No 39:

Art. 85 para. 1 of Regulation (EC) No 883/2004 forms the basis for recourse abroad for the institutions within the scope of application of the Regulation. All other Member States are to acknowledge the cession of right as defined in Sections 116 et seq. of Vol. X of the German social security code (SGB X) and the corresponding provisions in the German Civil Servant Acts (e.g. Section 76 BBG). These transfer existing compensation claims the victim has (e.g. after a car accident abroad) pursuant to foreign liability law to the (accident insurance) institution. The result is that foreign tort law or liability law and German cession law generally have validity.

It would appear that a clarifying rule is desirable with regard to what is meant under the "Rights of institutions" pursuant to Art. 85 of the Basic Regulation. The delimitation of the regulatory areas should be made clear in the meaning of the ECJ jurisprudence (see Case C-397/96, Kordel and C-428/94, DAK).

The DGUV suggests the following new Art. 86a of Regulation (EC) No 987/2009:

"Article 86a
Rights of institutions

(1) The legal provisions with regard to the transferring of claims for compensation for damages against a third party that are applicable to the institution responsible for providing benefits are especially decisive with regard to

a) the type and scope of the claims for compensation that have been transferred to the institution responsible for providing benefits;
b) the distribution of the claims for compensation between the victim and the institution, especially in as far as the amount is restricted by an act of law or by a partial fault of the victim;
c) the possibility of the liable institution to assert a claim for compensation against certain persons, especially against third parties that have injured a member of the family;
d) the legal consequences of a payment being made to the victim despite the claims having been transferred to the institution;

e) the time at which the claims are transferred;
f) the commencement of period of limitation with the institution.

(2) Paragraph 1 has analogous validity for claims that the liable institution can assert against the third party directly.“

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