Submission on the Labour Mobility Package

The European Citizen Action Service has the pleasure of submitting this written response following the invitation for comments received by the Commission at the consultation meeting held on 17 June 2015. This response is based upon verbal comments made at the meeting by ECAS's Director Assya Kavrakova and Legal Consultant Anthony Valcke.

ECAS is an international non-profit organisation, based in Brussels with a pan-European membership and 24 years of experience in working on EU issues. ECAS's mission is to strengthen the European strategy of NGOs in the European Union; defend peoples' free movement rights and promote a more inclusive European citizenship; and campaign for transparency and institutional reforms to bring the EU closer to the citizen.

ECAS has an extensive track record in helping EU citizens to exercise their rights of free movement and in-depth knowledge of the practical problems associated with their implementation. For the last 18 years, ECAS has been running "Your Europe Advice", an EU advice service provided by ECAS's team of 59 legal experts in all 24 official EU languages and in all 28 EU member states. The service provides advice to citizens on their rights under EU law covering social security, residence and visas, work issues, and taxes among other issues. In 2014, ECAS legal experts responded to over 20,000 enquiries from citizens. The statistics reported here draw on this experience.

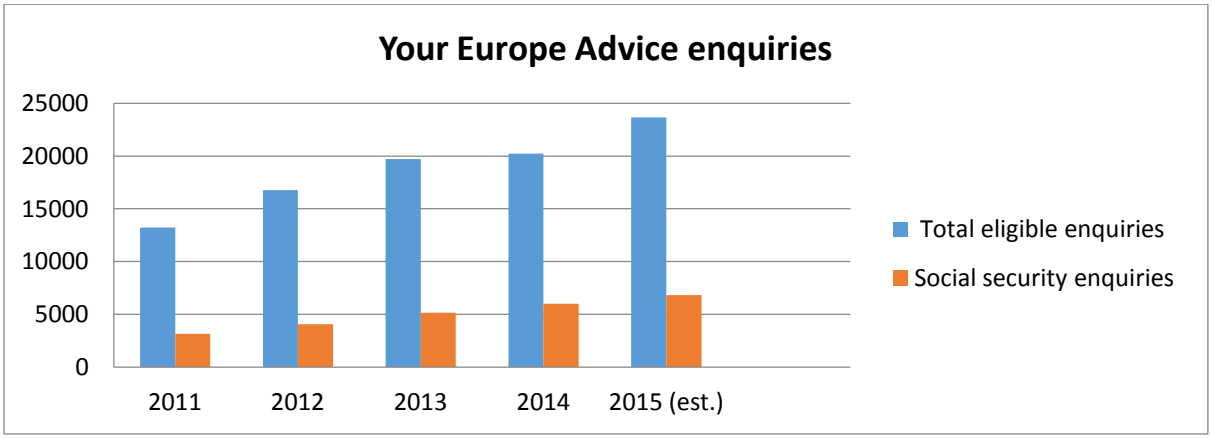
In addition, ECAS in partnership with the University of Kent in Brussels established the EU Rights Clinic, which aims to help EU citizens and their family members who are faced with complex problems when moving around the EU. The Clinic handles around 70 cases annually. This assistance is provided free of charge by postgraduate students enrolled on the EU Migration Law course at the University of Kent in Brussels who work in collaboration with qualified lawyers and volunteer advisers and researchers. The case studies reported here draw on this experience.

We hope these comments will be useful in the development of the package and we remain at your disposal should you require any further information.

I – COMMENTS ON THE REVISION OF REGULATION 883/2004

1. General Comments

Social security remains an important issue for EU citizens who choose to exercise their free movement rights in the EU. At present, almost 30% of Your Europe Advice enquiries relate to social security representing over 6,000 enquiries per year. Annexed to this submission, you will find statistical data relating to cases handled by Your Europe Advice in the last five years corresponding to the period during which Regulation 883/2004 has been in force.

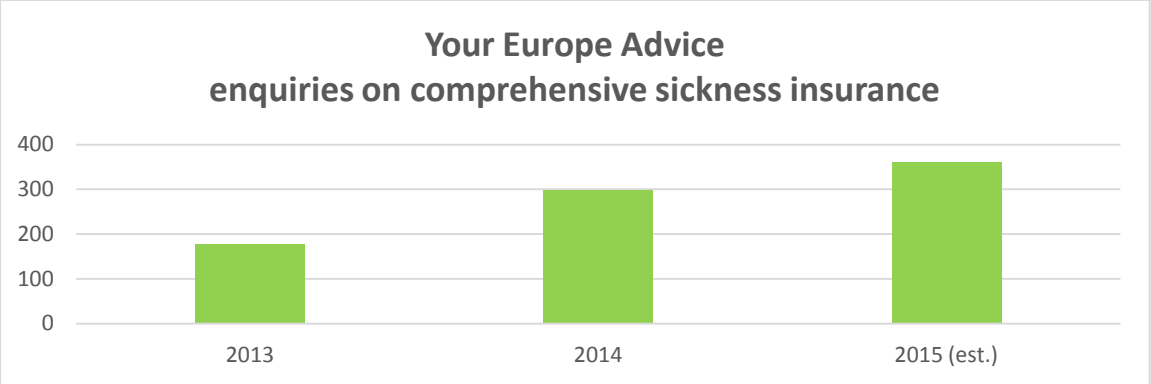


ECAS's work in the area of free movement has enable it to gain substantial insights into the nature of the problems experienced by mobile EU citizens. Based upon this experience, ECAS proposes a number of recommendations in respect of the revision of Regulation 883/2004.

2. Access to healthcare is a significant issue following the entry into force of Directive 2004/38

The Court of Justice has consistently held that the purpose of the rules on the coordination of social security is to prevent persons from losing the protection of social security when moving around the EU.[1] Yet despite these aims, citizens who move from one country continue to experience problems in maintaining social security coverage when they move from one country to another. As a result, citizens who exercise free movement rights may fall into a legal limbo without social security coverage because they no longer meet the conditions for coverage from their home member state while at the same time being unable to integrate the social security system of the country to which they have moved. One such significant problem relates to the exclusion of EU citizens from public healthcare systems.

About 2,000 enquiries on sickness benefits are being handled by Your Europe Advice every year. In addition, the number of enquiries concerning issues with comprehensive sickness insurance under Directive 2004/38 has been growing steadily every year (data only available since 2013).



Member States have used the entry into force of Directive 2004/38 as a pretext to adopt exclusionary restrictions on EU citizens who do not work and without giving them a basis for affiliating with the public healthcare system or providing a basis for them to 'pay their way' trough contributions.

[1] See, for example, C- 2/89 *Kits van Heijningen*, para 12: *"Those provisions are intended not only to prevent the simultaneous application of a number of national legislative systems and the complications which might ensue, but also to ensure that the persons covered by Regulation No 1408/71 are not left without social security cover because there is no legislation which is applicable to them."* See also Case C-196/90 *De Paep*, para 18; Case C-619/11 *Dumont de Chassart*, para 38; Case C-140/12 *Brey*, para 40.

Case Study – Early retiree moving to Sweden

Emma is a British citizen living in the UK. After 15 years serving in the army, she has decided to take early retirement. She wants to move to Sweden without keeping any ties to the UK. As a result of moving to Sweden, she will lose her entitlement to healthcare coverage under the UK's National Health Service which reserves healthcare to people who are ordinarily resident in the UK. Given that she cannot maintain health coverage in the UK, Emma is informed by the Swedish authorities that she must take out healthcare insurance in Sweden in order to meet the condition for having comprehensive sickness insurance coverage. This means she should take out private healthcare insurance in Sweden. She contacts many Swedish insurance providers, but none of them offers any insurance that meets the conditions stipulated by the Swedish authorities. Emma therefore finds herself without healthcare cover and therefore unable to register herself as a student with the Swedish immigration authorities.*

**Note: The names of individuals named in the case studies have been changed.*

Such problems affect citizens who move to a country with a residence-based healthcare system, such as Sweden[2] and Norway. Problems are also being reported in other Member States such as France[3], Italy[4] and Spain, which deny healthcare coverage to EU citizens who do not work and do not offer them the possibility to affiliate to their healthcare system by making monthly contributions. In the UK, inactive citizens who live in the UK and rely on the National Health Service – as they are entitled to do under the NHS Act[5] – are penalised by the UK's immigration authorities who then refuse to recognise they have a right of residence or have acquired permanent residence. The UK authorities have refused to divulge how many citizens are affected on the basis that they do not collate this information.[6]

It appears that the loose drafting in the Regulation and ambiguity in the way it interacts with Directive 2004/38 are being exploited by Member States to deny coverage and exclude students or inactive persons from public healthcare systems. There is therefore an urgent need to address head on the interaction with Directive 2004/38. This is not a matter for the Court of Justice to have to clarify, which would in any case prove excessively difficult given that attempts to bring the issue

[2] National Trade Board, "Moving to Sweden - Obstacles to the Free Movement of EU Citizens" (May 2014): <http://www.kommers.se/Documents/In_English/Publications/PDF/Moving-to-Sweden.pdf> accessed 7 July 2015. The National Trade Board whose staff operate SOLVIT Sweden reports that none of the Swedish healthcare insurance providers are able to provide policies that meet the conditions imposed by Skatteverket and also required by the Migrationsverket, page 8: "In evaluating private insurance policies, the Tax Agency requires that several conditions be met. The policy must be personal, and must not have a monetary ceiling for necessary health care. Private insurance poilicies may contain no dicslaimers that deny coverage for certain complaints, and they must cover health care for injuries resulting from sports, risky activities and so on.
The National Board of Trade contacted about twenty insurance companies to learn whether they sell insurance policies that comply with these criteria. None of them do."

[3] The existence of discriminatory exclusion of inactive EU citizens from the national health service in France has been the subject of a number of complaints to the European Commission, as reported by the Petitions Committee of the European Parliament: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/peti/cm/929/929916/929916en.pdf

[4] For example, Italy does not allow inactive EU citizens (other than students) from affiliating with the Servizio Sanitario Nazionale. Paradoxically, this possibility is offered to non-EU citizens who are required to pay the same annual contribution that Italians pay under Article 36 of Legislative Decree 286/98 (Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero Dlgs 286/98).

[5] Under s. 1(3) of the National Health Service Act 2006, treatment on the NHS is free for all residents of the UK.

[6] UK Visas and Immigration Response to Freedom of Information request No 35185, 7 May 2015.

before the Court have failed due to resistance from the national courts.[7] It is the responsibility of the EU legislator to clarify the interaction between the two legal texts. The only way this can be initiated is for the Commission to include this in its proposal for an amendment.

***Recommendation 1:* A new provision should be inserted into Regulation 883/2004 that explicitly provides for the right of EU citizens who are not working to be able to affiliate with the public healthcare system of the Member State where they reside under the same conditions that apply to nationals.**

3. Long-Term Care Benefits

The assimilation of long-term care benefits with sickness benefits can create problems in practice. When a citizen moves to another EU country without working, the country of origin uses this to claim person is no longer covered by their system because they now reside elsewhere – in a way that circumvents the exportability principle – and advises them they should apply for long-terms care benefits in the country of residence. However, the Member State of residence will then deny support on the basis that inactive persons have no right to social assistance because it is a condition for having a right of residence for them to have sufficient resources so as not to become an unreasonable burden on social assistance.[8]

Case Study - Long-term benefits

Adrian is a British national who has been in receipt of disability living allowance for several years. He decides to move to Hungary in order to obtain specialist treatment for his disability and be closer to his family who have emigrated there. Before leaving, he was advised by the UK's Department for Work and Pensions over the telephone that he would not lose his entitlement to his benefit if he moved to Hungary for treatment. When the client did move, his entitlement was promptly stopped by the UK authorities, on the basis that he was no longer subject to the UK's rules on social security because the applicable law was now Hungarian law.*

**Note: The names of individuals named in the case studies have been changed.*

There is a need to include a new provision in the chapter on sickness benefits that confirms change of place of residence does not affect the exportability of long-term care benefits.

***Recommendation 2:* A new provision should be inserted into Regulation 883/2004 that explicitly provides for the exportability of long-term benefits.**

4. Unemployment Benefits

Given the prevailing economic climate, we consider that the rules on the export of unemployment benefits should be revised to reflect the realities of the labour market today. Three months may have been a sufficient period of time to find employment in another Member State back in the seventies, but this is no longer the reality. We therefore suggest that the period during which unemployment benefits may be exported under Regulation 883/2004 should be extended to at least six months, if not more.

[7] See for example, as regards the UK, *Ahmad* [2014] EWCA Civ 98, where the Court of Appeal found in favour of the Home Office's policy on comprehensive sickness insurance and refrained from referring the case to the EU Court of Justice for a binding judicial opinion: http://www.bailii.org/ew/cases/EWCA/Civ/2014/988.html

[8] Article 7(1)(b) of Directive 2004/38 read in conjunction with recital (16).

***Recommendation 3:* the period for the exportability of Article 64(1)(c) of Regulation 883/2004 should be increased to six months (if not longer) and allow the competent services or institutions to extend that period by another six months (if not longer).**

5. Family benefits

This is a highly controversial issue at present given that certain Member States are calling for the disappearance of the rules contained on the Regulation that allow family members residing in other Member States to receive family benefits from the country where they work. However, it will be recalled that such an issue has previously come before the Court of Justice, which ruled that the EU rules should not be creating new distinctions in law and annulled Article 73(2) of the predecessor Regulation 1408/71 insofar as it prevented an Italian citizen working in France from being able to claim family benefits because his children resided in Italy.[9] This case law needs to be taken into account in order to ensure respect for the principle of equality which is a fundamental principle of EU law.[10]

Case Study – What form do I need?

Estelle is a Belgian citizen who has returned to Belgium after working four years in the UK. In order to register her into the Belgian system, the Belgian authorities are asking her for Form E104 (certificate concerning insurance periods). However this form was discontinued from May 2010. There is no corresponding Portable Document that has replaced Form E104. As a result, the UK authorities issue their own record of national insurance contributions. However, Estelle has to get this officially translated into French or Dutch in order for this to be accepted by the Belgian authorities.*

**Note: The names of individuals named in the case studies have been changed.*

***Recommendation 4:* reform of the rules on family benefits must give due consideration to the established case law of the Court of Justice on this point in order to ensure full respect for the principle of equal treatment.**

6. Cooperation between national authorities

Problems in cooperation between the Member States are often the subject of enquiries relating to management or country of insurance, which comprises over a third of social security enquiries handled by Your Europe Advice.

The Internal Market Information System **(**IMI) should be used as a tool for better communication between national authorities.

While the establishment of Portable Documents was intended to facilitate the exchange of information between authorities, a number of problems suggest that authorities which were used to handling E Forms are not aware of the corresponding Portable Document number. In some cases there is no corresponding Portable Document number. The proposed Electronic

[9] Case 81/84 *Pinna*, para: "*the achievement of the objective of securing free movement for workers within the Community, as provided for by Articles 48 to 51 of the Treaty, is facilitated if conditions of employment, including social security rules, are as similar as possible in the various Member States. That objective will, however, be imperilled and made more difficult to realize if unnecessary differences in the social security rules are introduced by Community law. It follows that the community rules on social security introduced pursuant to Article 51 of the Treaty must refrain from adding to the disparities which already stem from the absence of harmonization of national legislation.*"

[10] See for example Case C-300/04 Eman and Sevinger, para 57: *"it must be observed that the principle of equal treatment or non‑discrimination, which is one of the general principles of Community law, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified."*

Exchange of Social Security Information was intended to allow for the exchange of Structured Electronic Documents which replaces the remaining E Forms.

In order to help citizens and national authorities, an official correlation guide to link the old E Forms to their corresponding Portable Documents and Structured Electronic Documents should be published in the Official Journal and on the Commission's website.

> ***Recommendation 5:*** ***an official table of correspondence should be published that identifies old E Forms and the corresponding Portable Documents and Structured Electronic Documents***

7. Enforcement

Despite the higher visibility given by the national authorities to the rules on determining applicable law under Regulation 883/2004, Your Europe Advice has continued to receive complaints about employers not complying with these rules. In some cases, the national administrations turn a blind eye, while they are content to keep receiving social security contributions from the employer and worker concerned.

This kind of problem affects workers who are originally covered by one country's system but are then sent to work indefinitely in another Member State. The employer will not register them with the institution of the place where the worker resides and works, but will keep them registered under the system of the country where the employer is registered.

This leads to problems for the workers concerned later down the road in case they become unemployed. The host Member State will decline paying them unemployment benefit because they never contributed to their social security system and the Member State that incorrectly affiliated the worker to their system will decline unemployment benefit because the worker is not residing on their territory.

There is therefore a need to enhance the protections given to worker under the EU social security rules by allowing the worker to be temporarily affiliated in the Member State of residence and receive benefits there while awaiting for the Member States concerned. Given that the Member States often finally agree that the worker was wrongly affiliated, Member States decline to have recourse to Article 6 of the Implementing Regulation 987/2009 which would allow for temporary registration of the worker and temporary entitlement to benefits.

Moreover, rules should be put into place to require the institution which incorrectly collected contributions to transfer them to the competent institution within a maximum period of three months so that the worker does not face an unreasonable period of time for their social security contributions to be regularised.

> ***Recommendation 6:*** ***Article 6 of Regulation 987/2009 needs to be bolstered, so it also covers employees wrongly affiliated to a Member State in breach of the rules on applicable law, irrespective of whether Member State disagree under whose system the worker should be affiliated. In such cases, the institution with which the worker was incorrectly affiliated should be under a legal obligation to transfer incorrectly paid contributions to the competent institution within three months of the problem being identified.***

The matter is exacerbated if unemployment is the result of the employer's insolvency. The current scope of Directive 2008/94 on the protection of employees in the event of insolvency allows Member States to exclude social security contributions from national guarantee schemes. Moreover,

the Directive is silent on the issue of employers becoming insolvent who have failed to make social security contributions. In such cases, a worker may become liable for payment of the balance of outstanding social security contributions due from both the worker and the employer. Moreover, payment of unemployment benefit may be suspended by the Member State until the worker's social security contributions have been regularised.

***Recommendation 7:* Regulations 883/2004 and 987/2009 need to provide additional safeguards for employees who have become unemployed following insolvency and whose employers did not make compulsory social security contributions.**

8. Statistics

The Regulation on social security does not contain any obligation on Member States to collate information on the number of EU citizens (and EEA nationals) claiming benefits. Many Member States do not collate such information or collates statistics using different parameters. This represents an obstacle to having timely and comparable data in order to monitor developments in the Member States. This will prevent also prevent Member States from making unsubstantiated claims about "rampant" benefits tourism without having the evidence.

***Recommendation 8:* An obligation on Member States to collate statistical information on the number of EU citizens (and EEA nationals) claiming benefits should be inserted into Regulations 883/2004 or 987/2009. Such data should be disaggregated by gender, age and type of benefit. There should be an obligation to make this information public.**

II – COMMENTS ON THE REVIEW OF POSTING DIRECTIVE

We note that at present, the circumstances in which a posting may take place differs under Directive 96/71 on the posting of workers and Regulation 883/2004. The former only require that the worker be engaged under an employment contract,[11] whereas more onerous conditions apply under the latter as further specified in Regulation 987/2009 and Decision A2 of the Administrative Commission on Social Security Coordination.[12]

The following conditions do not feature in the Directive: (1) immediately before the start of employment, the worker must have already been subject to the social security legislation of the sending Member State, which means the worker must have worked there and made national insurance contributions for at least a month prior to working as a posted worker;[13] (2) the posting undertaking must normally carry out its activities in the sending Member State, which means the employer must be considered as established there and must ordinarily perform substantial activities there, other than purely internal management activities;[14] (3) the posting must be limited in time to a maximum period of two years;[15] and (4) the posted worker is not hired to replace another posted worker.[16]

[11] Article 1 of Directive 96/71.
[12] Decision No A2 of 12 June 2009 concerning the interpretation of Article 12 of Regulation (EC) No 883/2004 on the legislation applicable to posted workers [2009] OJ C 106/5.
[13] Regulation 987/2009, Article 14 (2) and Decision A2, at point 1., fourth paragraph.
[14] Regulation 987/2009, Article 14 (2).
[15] Regulation 883/2004, Article 12.
[16] Ibid.

The Directive on the posting of workers does not contain any obligation on Member States to collate information on the number of postings being made. Given the controversy which postings continue to generate, consideration should be given to imposing an obligation to publish this data.

<u>Recommendation 9:</u> Consideration should be given to aligning the conditions under which a posting may take place under Article 1 so that these are aligned to the rules for the posting of workers under the EU social security rules. The inclusion of an obligation to publish statistics on posted workers should also be considered.

Anthony Valcke, 7 July 2015