Integration of migrants, its effects on the labour market and the external dimension of social security coordination

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PURPOSE: to establish an EU common approach as regards the external dimension of EU social security coordination.

BACKGROUND: 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 years**.

Social security coordination between the EU and the rest of the world is dealt with in two ways: (i) there is the national approach, whereby Member States make bilateral agreements with selected third countries but this approach is patchy: there is an incomplete network of agreements, and agreements tend to have differing content from country to country; (ii) a common EU approach to social security coordination with third countries is now developing.

CONTENT: against this background, this Communication has four aims:

1. 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;
2. 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;
3. 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;
4. to describe the existing components of a common EU approach and to make proposals for developing this further.

Member States' bilateral agreements on social security systems with third countries: the social security rights of persons moving into and out of the EU are still dealt with predominantly under national rules. 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. These agreements traditionally aim at protecting citizens who are working in other states. 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.

EU Member States generally negotiate bilateral agreements without reference to what their partner EU countries are doing. **The process is highly fragmented**. 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. 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 as regards this issue.

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 agreement. 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 likewise.

Regulation No 1231/2010 : the existence of this Regulation 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.

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 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.

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. In this respect, a mechanism is needed at EU level to strengthen cooperation between Member States. The new mechanism will also ensure complementarity between the national bilateral approach and the developing EU approach to social security coordination with third countries.

The development of an EU common approach : the proposed strategy identifies the following elements:

- solving the problem of paying pensions to third country nationals: 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’. 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**. 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;

- 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 law. This guarantee includes equal treatment as regards the transfer of their state pensions to a third country and is not dependent on the existence of bilateral agreements. The Commission's proposals for further EU migration directives contain similar equal treatment clauses;

- Association Agreements and Stabilisation and Association Agreements: generally, Association Agreements 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. According to the Commission, these Association Council decisions should cover the following rights for legally employed workers so that EU workers should enjoy the same rights both in the associated countries and on their return to the EU. These decisions should also provide for a reciprocal framework of cooperation and verification mechanisms to combat fraud. The Commission will propose certain practical administrative arrangements of a non-legislative nature to facilitate the application of these Association Decisions. 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;

- 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** allowing 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 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. 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;

- strengthening the EU's external profile on social security: as Member 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 Commission will therefore promote cooperation on social security coordination with other international organisations and with other parts of the world.