



Hauptverband der  
österreichischen  
Sozialversicherungsträger



Deutsche Sozialversicherung  
Europavertretung



To:

**Commissioner Elżbieta Bieńkowska**

European Commission  
DG Internal Market, Industry, Entrepreneurship and SMEs  
B-1049 Brussels  
BELGIUM  
[GROW-GENERAL-INFORMATION@ec.europa.eu](mailto:GROW-GENERAL-INFORMATION@ec.europa.eu)

Cc:

**Commissioner Marianne Thyssen**

European Commission  
DG Employment, Social Affairs & Inclusion  
B-1049 Brussels  
BELGIUM  
[cab-thyssen@ec.europa.eu](mailto:cab-thyssen@ec.europa.eu)

Brussels, 31 March 2017

**Clarifications regarding the potential impact of a European services e-card on statutory social security systems; COM(2016) 823 final, COM(2016) 824 final**

Dear Commissioner Bieńkowska,

On January 10<sup>th</sup>, 2017 the European Commission presented a legislative proposal introducing a European Services e-card. We have notice that the proposal only applies to services (and thus service providers) listed in the Annex to the Directive, including many forms of construction services. As you may be aware, the construction sector is particular prone to different forms of cross-border evasion of social security contributions, undeclared work and the broader issue of wage and social dumping. Tackling these problems has been one of the priorities of European social security coordination throughout the last years and has led to numerous initiatives in order to improve cross-border cooperation between European social security institutions as well as the fight against social fraud. In December 2016 the European Commission presented a proposal for the revision of EU rules on social security coordination trying to strengthen administrative rules by making sure national authorities have the right tools to verify the social security status of posted workers and to address potentially unfair practices or abuse (COM[2016] 815 final).

While we are welcoming the overarching goal of making better use of the Single Market for services in order to create additional jobs and growth, we would however, like to point out a number of questions and concerns. Most of those questions arise because the current proposals do not clearly address if and how they would affect the European regulations on the coordination of social security systems (Regulations 883/2004, 987/2009). Taking into account the numerous references in order to clarify the relationship of the services e-card with the legal regime of the Posting Directive (96/71/EC) and its Enforcement Directive (2014/67/EU), we think this to be one of the major shortcomings of the current proposals. Thus, we would like to bring the following issues to your kind attention.

### **1. General scope of the proposal**

Recital 8 and Article 2 of the Directive as well as Recital 11 and Art 2 of the Regulation state that the proposals do not affect matters, activities and fields excluded from the scope of Directive 2006/123/EC, including social security and health and safety at work. If the provisions of the Directive conflict with a provision of another Union act governing specific aspects of exercise of a service activity, the provision of the other Union act shall prevail (Article 2 [3] of the Directive). Nevertheless, Article 6 iii) of the Directive holds that Member States authorities shall not require the card holder to provide any information already contained in the card, including registration *with mandatory social insurance schemes*. Furthermore, Article 4 (a) of the Regulation introduces a multilingual standard form consisting of *registration numbers for social security purposes*.

### **2. Social security institutions as competent authorities**

Article 3 (5) of the Directive provides a definition of the term „competent authority“. One of the options refers to the definition included in Directive 2006/123/EC, which reads „any body or authority which has a supervisory or regulatory role in a Member State in relation to service activities, including, in particular, administrative authorities, including courts acting as such, professional bodies, and those professional associations or other professional organisations which, in the exercise of their legal autonomy, regulate in a collective manner access to service activities or the exercise thereof“. Do statutory social security institutions fall within the scope of this or any other definition included in Article 3 (5) of the Directive, especially when they are conducting audits or inspections concerning a service provider established in a another Member State in order to verify compliance with social security provisions?

### **3. Services e-card as proof of establishment**

Article 4 of the Directive states that a valid European services e-card shall be accepted as proof that its holder is established in the territory of his home Member State and is „entitled to provide the service activities covered by the e-card. In the framework of social security coordination the assessment of the service providers' activities is often crucial in order to guarantee compliance with Title II Regulation 883/2004. For instance, one of the legal requirements for posting in the sense of Article 12 Regulation 883/2004 is that the employer normally carries out activities in his home state, i.e. he has to carry out substantial activities there. Another example would be the provisions of Article 13 Regulation 883/2004 on activities in one or more Member States, relying on the registered office or place of business

of the employer in order to determine the applicable legislation. To what extent may the proof of establishment impact upon those assessments or, in more general terms, on the substantive criteria in order to determine the applicable system of social security?

#### **4. Binding effect of the services e-card**

The services e-card shall be valid for an indefinite duration unless suspended, revoked or cancelled, in accordance with Articles 15 to 17 (Art 7[2] of the Directive). Reasons may include the use of fraudulent, inaccurate or falsified documents or cases of bogus self-employment. In any case, the validity of the card can only be terminated after a final decision of either home or host Member State, which is not subject to appeal under the applicable national law. The proposals do not specify, however, if the suspension or revocation would have retroactive effect, i.e. if the validity of the services e-card would be halted only for the future (*ex nunc*) or also for the past (*ex tunc*). We fear that in cases of cross-border social security fraud or bogus self-employment, the services e-card may only be suspended or revoked after lengthy administrative or even criminal court proceedings. Furthermore, if eventually a final decision on national level on the question of fraud or bogus self-employment is taken, the follow-up decision to suspend or revoke the services card „shall be subject to appeal under national law of the Member State concerned“ (Art 17 [3] of the Directive). This framework may further exacerbate existing problems arising from the binding effect of European social security documents (especially the portable document A1) and hamper inspection efforts of social security institutions in the host Member State.

#### **5. Using the IMI (Internal Market Information System)**

The proposals suggest that „[c]ooperation between the administrations of different Member States should in principle take place via the Internal Market Information System (IMI), an IT-platform offered for cross-border exchange of information and mutual assistance between authorities in different Members States under that Directive“ (Recital 3 of the Directive). We would like to stress that social security institutions are currently not using the IMI. Exceptions may only exist in Member States where social security institutions are also competent for labour law inspections in the framework of Directive 96/71/EC and Directive 2014/67/EU. Moreover, the cross-border exchange of social security data is currently being implemented within the framework of EESSI (European Exchange of Social Security Information) requiring significant resources and administrative preparation on behalf of national social security administrations. Do the current proposals require that social security institutions will have to use the IMI system? If so, on what legal basis?

#### **6. Disclosure requirements of services e-card holders and information included in the services e-card**

Article 6 of the Directive provides that information already contained in the European services e-card (e.g. registration with mandatory social security schemes) cannot be required again from the service provider. If this includes social security numbers (Article 4 of the Regulation), what kind of conclusions could be drawn from them? What other information will be included in the e-card? To what extent will Article 6 of the Directive have an impact on social security inspections and audits of the e-card holder in the host state? How can this be reconciled with Article 2 (3) of the Directive? This provision states that the „Directive [...] shall

be without prejudice to the rights of workers, the obligations of service providers and related controls in Member States laid down in Directives 96/71/EC and 2014/67/EU“, but fails to mention related controls in the framework of social security.

Given the importance of replacing current practices with clear improvements on the technical side of the problem, we would highly appreciate to have a proactive exchange on those issues with you and relevant experts from the European Commission and are sincerely looking forward to hearing from you on these matters. Please be informed that we will also share those concerns and questions with Members of DG Employment, Social Affairs, Skills and Labour Mobility, the Council and the European Parliament.

Sincerely,



Ilka Wölfle  
Director General  
(HVB)



Ilka Wölfle  
Director (DSVEV)



Arnaud Emériaux  
Permanent Delegate (REIF)

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#### **Hauptverband der österreichischen Sozialversicherungsträger (HVB)**

The HVB (*Main Association of Austrian Social Security Institutions*) is responsible for safeguarding general social security interests and for representing the statutory Austrian social security institutions in matters of common concern (e.g. concluding contracts with doctors, hospitals, etc.). It also represents the Austrian social security system in dealings with similar organisations abroad and, in an international context, acts as an access point and liaison body in matters of health, accident and pension insurance. The HVB is a member of the European Social Insurance Platform (ESIP) and is listed in the European Union's transparency register (ID-number 685141118619-24).

Hauptverband der österreichischen Sozialversicherungsträger  
Kundmangasse 21, 1031 Vienna, Austria  
Contact: [europavertretung@sozialversicherung.at](mailto:europavertretung@sozialversicherung.at)

#### **Deutsche Sozialversicherung Arbeitsgemeinschaft Europa (DSVAE)**

The DSVAE (*Deutsche Sozialversicherung Arbeitsgemeinschaft Europa e.V.*) consists of the federal umbrella associations of the German statutory pension insurance, statutory accident insurance, statutory health and long-term care insurance, and the federal associations of the health and long-term care insurance. The association represents the interests of its members vis-à-vis the European Institutions and gives advice to the relevant actors in the framework of European legal procedures and other initiatives. In order to carry out its tasks and to manage the business of the association, a liaison office (European Representation) was set up in Brussels in 1993 (<http://dsv-europa.de/en/news.html>). The DSVAE is listed in the European Union's transparency register (ID-number 917393784-31) and is a member of the European Social Insurance Platform (ESIP).

Deutsche Sozialversicherung Europavertretung (DSVEV)  
Rue d'Arlon 50, 1000 Brussels, Belgium  
Contact: [dsv@dsv-europa.de](mailto:dsv@dsv-europa.de)

## Représentation européenne des Institutions françaises de sécurité sociale (REIF)

The Representation of the French Social Security institutions to the European Union (REIF) was created in May 2003 to represent the French social security agencies to the EU institutions. Since April 2015, REIF gathers all the Branches of the general scheme together with the scheme for farmers and self-employed people: the health insurance (CNAMTS), the old-age insurance (CNAV), the Family fund (CNAF), the social security collection body (ACOSS), the farmer scheme (CCMSA), the self-employed scheme as well as the Centre of European and International Liaisons for Social Security (Cleiss), the French University for Social Security (EN3S) and the Union of the National social security funds (UCANSS). The REIF is listed in the European Union's transparency register (ID-number: 493485518698-13. ACOSS, CCMSA, CNAF, CNAM, CNAV and CNRSI are members of the European Social Insurance Platform (ESIP).

REIF – Maison européenne de la protection sociale  
Rue d'Arlon,50, 1000 Brussels, Belgium  
Contact : [arnaud.emeriau@reif-eu.org](mailto:arnaud.emeriau@reif-eu.org)

