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THE EUROPEAN UNION**

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**SOC 922  
NT 30**

**"I/A" ITEM NOTE**

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from : General Secretariat of the Council  
to : Permanent Representatives Committee (Part I)/Council (Employment, Social  
Policy, Health and Consumer Affairs)

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No. prev. doc.: 13988/12 SOC 763 NT 27

No. Cion prop.: 8556/12 SOC 263 NT 8 - COM(2012) 152 final

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Subject: Proposal for a Council Decision on the position to be taken on behalf of the  
European Union within the Association Council set up by the Agreement  
establishing an association between the European Economic Community and  
Turkey with regard to the provisions on the coordination of social security  
systems  
= Adoption

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1. On 30 March 2012, the Commission submitted the above-mentioned proposal which aims at establishing the position to be taken by the European Union within the Association Council set up by the Agreement establishing an association between the European Economic Community and Turkey<sup>1</sup> (the "Ankara Agreement"). This draft Decision is part of a package of four proposals including similar proposals with regard to Albania, Montenegro and San Marino<sup>2</sup> which are largely based on the decisions which were adopted by the Council in 2010 with regard to Algeria, Croatia, the Former Yugoslav Republic of Macedonia, Israel, Morocco and Tunisia<sup>3</sup>.

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<sup>1</sup> OJ 217, 29.12.1964, p. 3687/64.

<sup>2</sup> Docs 8553/12, 8554/12 + COR 1 and 8555/12.

<sup>3</sup> OJ L 306 of 23 November 2010, respectively p. 14, p. 35, p. 28, p. 21, p. 1 and p. 8.

2. This proposal consists of a Council Decision on the position to be taken on behalf of the Union within the Association Council established by the Agreement with Turkey and, in the Annex, of a draft Decision of the Association Council in the social security field.
3. Article 12 of the Ankara Agreement and Article 36 of the Additional Protocol<sup>4</sup> to the Ankara Agreement (the "Additional Protocol") foresee that freedom of movement for workers between the Union and Turkey is to be secured by progressive stages. While as a first step Decision No 3/80 of the Association Council on the application of the social security schemes of the Member States of the European Communities to Turkish workers and members of their families was adopted by the Association Council on 19 September 1980<sup>5</sup> ("Decision No 3/80"), the second step – namely the adoption of a Regulation to implement the provisions of Decision No 3/80 – has not been taken.<sup>6</sup>
4. In order to provide legal certainty and to give full effect to the principles of social security coordination contained in the Ankara Agreement and its Additional Protocol, it is necessary that a new decision is adopted by the Association Council, to replace Decision No 3/80. The Commission's previous proposal to implement Decision No 3/80 will be withdrawn, as it is envisaged that the new Association Council decision will implement in one step the obligations in the Agreement and its Protocol.
5. Unlike for the three other proposals, the legal basis proposed by the Commission for the decision concerning Turkey is Article 48 TFEU (qualified majority) in conjunction with Article 218(9) TFEU.

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<sup>4</sup> OJ L 293, 29.12.1972, p.3.

<sup>5</sup> OJ C 110, 25.4.1983, p.60.

<sup>6</sup> The Commission presented on 2.2.1983 a proposal for a regulation to implement Decision No 3/80, COM(83) 13.

6. The proposal for a Decision contains implementing provisions with regard to those provisions of Article 39 of the Additional Protocol to the Agreement with Turkey which are not already covered by Regulation (EU) No 1231/2010. In addition, specific provision is made – as was made in Decision No 3/80 – to implement Article 9 of the Agreement in the field of social security coordination providing that within the scope of the Agreement any discrimination on grounds of nationality shall be prohibited. The proposed decision further lays down a number of provisions on cooperation between the Member States and Turkey concerning, inter alia, the procedures for administrative checks and medical examinations.
7. By way of reciprocity, these principles are also applicable to EU nationals legally employed in Turkey as well as to their family members legally resident therein.
8. Besides the legal basis, the main differences as compared to the three other decisions are the scope of the equal treatment clause (in the case of Turkey all social security benefits) and the provisions on exportable benefits, in particular with regard to invalidity benefits.
9. In accordance with Article 218(10) TFEU, the European Parliament shall have to be immediately and fully informed at all stages of the procedure.
10. In view of the importance of securing the principle of free movement for workers set out in Article 12 of the Agreement with Turkey, the Danish and the Cyprus Presidencies held discussions<sup>7</sup> on this proposal with a view to the Council (EPSCO) reaching a political agreement on the text at its session on 4 October 2012.
11. At its meeting on 4 October 2012, the Council (EPSCO) reached a political agreement on the text of the draft Decision as set out in doc. 13988/12 +COR1, adopting a Council Statement and furthermore taking note of a joint Statement by IE, NL and UK and of a Statement by BG to be entered in the Council Minutes (see Annex).

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<sup>7</sup> See outcomes of proceedings in documents 11123/12 + COR1 + COR2 + COR3 and 12364/12 + COR1.

12. The text of the draft Decision, as finalised by the lawyer-linguists, is to be found in doc. 14798/12.
13. The Permanent Representatives Committee therefore recommends the Council (EPSCO) to:
- adopt the draft Decision, as set out in doc. 14798/12, as an "A" item at its session on 6 December 2012;
  - enter in its Minutes the Council Statement, the Joint Statement by Ireland, the Netherlands and the United Kingdom and the statement by Bulgaria, as set out in the Annex to this note.
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Statements for the Council Minutes

Council Statement

The Council recalls cases C-431/11 and C-656/11 pending before the Court of Justice, where the Court is examining the question of the correct legal basis for adopting, respectively, Council Decision 2011/407/EU of 6 June 2011 on the position to be taken by the European Union within the EEA Joint Committee concerning an amendment to Annex VI (social security) and Protocol 37 to the EEA Agreement, and Council Decision 2011/863/EU of 16 December 2011 on the position to be taken by the European Union in the Joint Committee established under the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons as regards the replacement of Annex II to that Agreement on the co-ordination of social security schemes.

As the proposed legal basis for the Decision of the Council establishing its position within the Association Council set up by the Agreement establishing an association between the European Economic Community and Turkey is the same as for the two above Decisions, the European Union will accept a Decision to be adopted by the Association Council only after the judgement of the Court of Justice is issued on these two cases.

## **Joint Statement by Ireland, the Netherlands and the United Kingdom**

Title IV of Part Three of the Treaty on the Functioning of the European Union (TFEU) and Article 45(1) clearly states that "Freedom of movement for workers shall be secured within the Union". Article 45(2) TFEU provides that "such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States". Article 48 TFEU provides the Council with the power to adopt measures in the field of social security which are necessary to give effect to this free movement of workers. Ireland, the Netherlands and the United Kingdom and therefore do not accept that Article 48 can provide a legal base for measures intended to apply to persons other than employed or self employed Member State workers and their dependents moving within the Union.

The view of Ireland, the Netherlands and the United Kingdom, which is consistent with the legal base cited for other measures of this type, is that such measures correctly fall within the scope of Title V of Part Three of the TFEU and in particular Article 79(2)(b). This specifically provides a legal base for the adoption of measures defining the rights of third country nationals who come to the Union.

Ireland, the Netherlands and the United Kingdom therefore do not consider that Article 48 TFEU is the correct legal base for the Council Decision and that Article 79(2)(b) TFEU should be the correct legal base for this measure. Ireland, the Netherlands and the United Kingdom reserve their right to take action necessary to ensure the inclusion of the correct legal base.

## Statement by Bulgaria

### **on Article 39 paragraph 2 of the Additional Protocol to the Agreement creating an Association between the Republic of Turkey and the European Economic Community and Article 11 paragraphs 1 and 2 of the transitional and final provisions of the Draft Decision**

1. With regard to Article 39 paragraph 2

Article 39 paragraph 2 of the Additional Protocol introduces an obligation for all Member States when determining entitlement to old-age pensions, death benefits and invalidity pensions, and the provision of health services for workers of Turkish nationality and their families residing within the Community, to take into account only periods of insurance completed under the legislation of a Member State, but not those completed under the legislation of Turkey.

Bulgaria, bearing in mind Article 39 paragraph 2 of the Additional Protocol, which is the legal basis for the adoption of the Decision, and Regulation (EU) No 1231/10, according to both of which the aggregation of periods is possible only by Member States, but not with periods completed in Turkey and, states that in determining the entitlement of workers of Turkish nationality of some of these types of pensions and benefits will only take into account periods of insurance completed exclusively under the legislation of a Member State and will not take into account periods of insurance completed in Turkey.

2. With regard to Article 11 paragraphs 1 and 2

Article 11 paragraph 1 states that no rights shall be acquired pursuant to this decision for the period before its entry into force.

Article 11 paragraph 2 stipulates that subject to paragraph 1 (i.e. the rights are acquired only for the period after its entry into force), a right shall be acquired under this Decision even if it relates to a contingency arising before its date of entry into force.

The Republic of Bulgaria declares that the benefits, mentioned in Article 1(1)(h) of the draft Decision will be determined and granted at the earliest from the date of entry into force of the decision, even in cases where the entitlement is based on a contingency arising before that date.