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CHALLENGES FOR TURKEY IN SOCIAL SECURITY PERTAINING TO EU ACCESSION



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The EU social acquis

Introduction

When Turkey accedes to the EU, it becomes bound by the whole body of EU law, commonly referred to as the EU *acquis* and consisting of the treaties and a multitude of legal acts of the European legislature and cases of the European Court of Justice. A part of this body of law is concerned with the wider field of mobility of persons, employment, social affairs, inclusion and equality, and is called the EU social *acquis*. Within the framework of the ongoing accession negotiations, the social *acquis* broadly corresponds to the matters dealt with in Chapter 2 (free movement of workers), part of Chapter 3 (right of establishment and freedom to provide services) and Chapter 19 (social policy and employment). The EU social *acquis* covers a broad range of binding measures as varied as: minimum safety and health requirements for the workplace; labour law protection of part-time workers and temporary agency workers; employees' protection in case of employer insolvency or collective dismissal; and tackling discrimination on various grounds. It also includes an important soft-law pillar, where the EU coordinates and encourages national governments to achieve certain jointly agreed goals, such as combating poverty, creating more and better jobs, and ensuring the sustainability of social security systems.

Internal market

An important part of the EU social *acquis* is concerned with the internal market, i.e. with ensuring that the territory of the EU is an area without internal frontiers where persons can move, reside and work freely without being hampered by unjustified restrictions. The right of freedom of movement follows directly from primary EU law (Treaty on the Functioning of the EU - TFEU) and extends not only to workers and their family members (free movement of workers, free provision of services, right of establishment) but also to economically inactive persons (EU citizenship). The freedom of movement of persons is implemented through a series of regulations and directives (secondary EU law), designed to give effect and to frame various aspects of mobility. These include the following:

- Directive 2004/38/EC deals with the right to move and reside within the EU, and provides, among other things, that Union citizens may travel to other Member States and reside there up to three months without any conditions or formalities other than holding a valid identity card;
- Regulation (EEC) 1612/68 implements the freedom of movement of workers and prescribes equal treatment for migrant workers in accessing employment and exercising it, including as regards working conditions and social advantages;
- Directive 2006/123/EC promotes the free provision of services and the right of establishment, notably by fostering administrative simplification and by removing legal and administrative barriers to the (temporary and permanent) pursuit of cross-border self-employed or business activities. An older instrument, Directive 96/71/EC, is specifically concerned with supporting the cross-border provision of services by businesses using employees normally employed in the home State;
- Directive 2005/36/EC addresses a very common obstacle faced by persons wishing to exercise their profession (temporarily or permanently, on an employed or self-employed basis) in another Member State, and consisting of the fact that States tend to subject access to particular professions to specific professional qualifications issued in its territory. The Directive overcomes this obstacle by requiring national authorities to mutually recognise, subject to certain conditions, qualifications issued in another Member State for access to the same profession.

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The impact of the EU on social security

Social security is largely a matter for the Member States. The EU does not have direct competences in this field. It remains up to the Member States - and that would include Turkey - to decide which social security benefits they provide, to whom they are provided and under which conditions - as long as they comply with EU law (see below). For example, this implies that the EU cannot oblige Turkey to set up a general family benefits scheme or to extend its sickness cash benefits scheme to self-employed persons.

That is not to say that the EU and its policies do not have an impact on national social security systems. In the context of the Europe 2020 strategy, the vision for Europe's social market economy for the second decade of the 21st century, the EU and the Member States are committed to reducing social exclusion and to reforming social protection systems. Within this framework, including through the transformed Open Method of Coordination in Social Protection and Social Inclusion ("Social OMC"), Turkey will need to continue down the road of policy reform in order to lower the number of persons at risk of poverty and social exclusion and to safeguard the accessibility, quality and financial sustainability of its healthcare and pension systems in particular. Through the Joint Inclusion Memorandum (JIM), which prepares candidate countries for future participation in the Social OMC, this type of policy coordination should already come into effect prior to accession.

The EU also has binding measures (hard law) in place that directly affect national social security systems. These are essentially twofold. A first series is designed to ensure equality and prohibit discrimination in matters of social security, notably on the grounds of gender (Directives 79/7/EEC and 86/378/EEC) and racial or ethnic origin (Directive 2000/43/EC)¹. A second set of binding measures - Regulations (EC) 883/2004 and 987/2009 - coordinate national social security systems in order to avoid that migrant persons are disadvantaged in terms of social security only because they made use of the right of freedom of movement. Unlike the first set, these regulations are instrumental to the internal market - intra-EU mobility would remain an illusion if as a result persons would lose out on social security rights - and as such they belong in the bullet list mentioned above. These "coordination regulations" are the focus of this brochure. In the following lines, the main challenges connected with the implementation of these regulations by Turkey will be discussed.

Challenges connected with implementation of the coordination regulations

Scope

The EU social security coordination regulations will *fully and directly apply* in Turkey as of the date of accession, without there being a need for any Turkish implementing legislation. They will, moreover, override any incompatible provision of Turkish legislation. It follows that implementation of the coordination regulations will not require substantial legislative efforts for Turkey. Nevertheless, for reasons of legal certainty, incompatible Turkish provisions need to be removed from the legislation, and replaced by provisions that are in keeping with EU law.

¹-A ban on discrimination on other grounds - disability, religion, belief, age and sexual orientation - in this field is under preparation [COM(2008) 426].

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The coordination regulations not only have direct, but also *broad application*. As their personal scope extends to all persons that are or have been insured under the social security scheme of a Member State, virtually the entire Turkish population could be covered by them. Concerning material scope, the coordination regulations will apply to the bulk of the social security schemes in Turkey. This is the case for the universal health insurance and the short- and long-term social insurance schemes, but also for the unemployment insurance and for the family benefits scheme for civil servants. A series of non-contributory benefits would also be covered by the coordination regulations, notably the benefits aimed at specific professional categories and rewarding certain professional achievements. Some benefits would be excluded, such as the birth grant and certain non-contributory benefits which cannot be connected to a social security risk. This last element is not the case for the benefits under Law No 2022, which incorporate elements of both social security and social assistance, and therefore could constitute special non-contributory cash benefits.

It is important to keep in mind that the national classification of a benefit - as social security or social assistance; or as pertaining to a specific branch - is not relevant for the purposes of the coordination regulations. To assess whether a benefit is or is not covered by the coordination regulations, and in the former case, in which branch it is covered (e.g. maternity benefit or family benefit), one needs to look mainly at the purpose of the benefit and the conditions on which it is granted. It follows; for example, that the duty invalidity benefit in the long-term social insurance branch of Law No 5055 is probably a benefit in respect of accidents at work and occupational diseases within the meaning of the regulations. Conversely, the benefit for survivors within the short-term insurance branch of the same Law is likely to constitute a survivor's benefit for the purposes of the regulations.

Applicable legislation and general principles

The regulations contain a set of rules determining *which country's social security legislation applies* to the persons covered by it. It is understood that, when these rules would designate Turkish legislation as applicable to a person, this would not automatically result in effective affiliation to the Turkish schemes, let alone entitlement to Turkish benefits; it would do so only if the person satisfies the conditions for affiliation and entitlement laid down in Turkish legislation. These conditions, however, have to comply with EU law, which implies that they should not deprive the regulations' conflict rules of all practical effect, or put at a disadvantage persons who have made use of their right to free movement. Some Turkish rules currently have this effect, and should therefore be adapted. An example is the condition to reside in Turkey for affiliation to the universal health insurance, which under the regulations cannot be applied to persons working in Turkey - and thus subject to Turkish legislation - but residing in another country.

Equality of treatment on the basis of nationality is one of the *general principles* of the coordination regulations. This implies that persons covered by the regulations, whatever their nationality, should enjoy the same benefits and be subject to the same obligations under Turkish legislation as Turkish nationals. Some instances can be identified where Turkish legislation contains elements of direct discrimination, for example as regards access to optional insurance under Law No 5510 and benefit conditions under the universal health insurance. Indirectly discriminatory measures can also be found in Turkish legislation, mainly in relation to residence conditions and qualifying periods (i.e. a required minimum number of premium days for entitlement to benefits).

The regulations themselves provide for mechanisms to neutralise the indirectly discriminatory effect of such measures, i.e. *the principles of exportability of benefits, aggregation of periods and assimilation of facts*. In accordance with the *principle of exportability of benefits*, Turkey will have to pay cash benefits falling under the regulations also to people otherwise entitled to them and residing outside Turkey, on the territory of the EU. Some exceptions exist, notably for special non-contributory cash benefits (see above, benefits under Law No 2022). The second principle, *aggregation of periods*, is specifically concerned with qualifying periods and implies that Turkish authorities will need to take into account, for the purposes of establishing entitlement to Turkish benefits, periods (of insurance, of work, of residence) completed in other Member States (and counting towards entitlement there), as though they were completed under Turkish legislation. Finally, *assimilation of facts* implies, among other things, that, where Turkish legislation attributes certain legal effects to facts or events occurring in Turkey, like facts or events occurring anywhere in the EU should be taken into account as if they had taken place in Turkey. This principle has several concrete consequences in relation to a number of Turkish provisions, such as the period of liability for occupational diseases and the calculation of the reference period for completion of the minimum number of premium days for the purposes of Law No 5510.

Administrative capacity

Having the legal system prepared for the application of the coordination regulations, notably by removing incompatible national provisions, is not in itself sufficient for their successful implementation. Of equal importance is to have set up the appropriate institutional and administrative structures and processes through which the implementation is to be effected.

In this regard, it is of capital importance that those who will have to apply the coordination regulations have received proper *content training*, which is at the same time targeted according to the sector and level of responsibility, and sufficiently comprehensive to take account of the fact that social security coordination cannot be seen in isolation of other branches of (European and national) law. In addition, the capacity of the units dealing with EU and international affairs at the level of the competent authority (Ministry of Labour and Social Security) and of the competent institutions (SGK and ISKUR) will need to be further increased, so as to enable these units to play their crucial role as specialised coordination sections, notably to act as centres of expertise responsible for the overall coordination and monitoring of the implementation of the coordination acquis, and to formulate Turkish policy with regard to the decision-making process at the relevant EU institutions and bodies (e.g. the Administrative Commission).

Implementation of the coordination regulations will not be neutral in budgetary terms. This is particularly true as regards the healthcare chapter, not only because it is expected to be among the most important in terms of actual application, but also because of the special coordination mechanism for benefits in kind, which notably implies that Turkish authorities will have to pay the costs of healthcare received by Turkish insured persons in other Member States, at the – on average significantly higher – rates applied in the EU countries.

Apart from the impact on the expenditure of social security schemes, there is also the administrative cost associated with application of the coordination regulations. Their practical implementation involves a huge amount of administration and information exchange, resulting in additional administrative workload and thus requiring increased staff numbers in the institutions and authorities tasked with the implementation of the regulations.

The above elements warrant *comprehensive cost and staff needs assessments*, in order to ensure that financial and human resources are allocated in sufficient amounts and at appropriate levels. The impact of accession and the ensuing removal of barriers on migration between Turkey and the Member States, constitutes a crucial factor in these analyses.

This Capacity Building of Social Security Institution Project has been a first step in putting Turkey on the way to the effective implementation of the coordination regulations. Building on it, *follow-up projects* should be set up, whereby it is sensible to seek the involvement of Member States' social security administrations experienced in applying the regulations. Experts from counterpart authorities or institutions are capable of transferring hands-on knowledge and practical insight, and can provide invaluable assistance in designing processes and structures, reviewing existing ones and testing Turkey's implementation capacity. Twinning is the obvious vehicle for this kind of capacity-building, and indeed also the appropriate framework for effecting some of the recommendations made in the Strategy Report, such as performing a cost assessment, setting up training modules for staff, developing administrative manuals etc.

Turkey has concluded *bilateral social security agreements* with 22 countries, 13 of which are countries that apply the coordination regulations. The implementation of these 13 agreements, which are based on quite similar principles as the coordination regulations, has allowed Turkey to gain valuable experience and build networks which undoubtedly will prove useful once the country will have acceded to the EU. Until that time, Turkey should consider to continue entering into bilateral agreements with the remaining 18 Member States so as to complete the network of bilateral social security agreements with all 31 countries covered by EU coordination. This will allow the Turkish administration to familiarise itself with the systems of these countries and to establish contacts and relations with the people administering them. To take full advantage of this experience, the provisions of future bilateral agreements should be as similar as possible to those of the new currently applicable coordination regulations, i.e. Regulations 883/2004 and 987/2009. In the same vein, it is recommendable for Turkey to undertake the gradual adaptation of the existing agreements with Member States in accordance with the provisions of the latest coordination regulations.

Practical information

This brochure is based on the Strategy Report written by Michael Coucheir and Harald Hauben written in the framework of the project "Technical assistance for capacity-building of Social Security Institution". Reference is made to this report for more extensive and detailed information on the challenges in social security pertaining to EU accession. The Strategy Report can be found on the appropriate section of the <http://www.sgk.gov.tr>. The website also contains a database with a wealth of information on the EU social acquis, including the full PDF text (in English) of all regulations and directives mentioned in this brochure. Further relevant information can be found on the *Europa* server of the EU, notably:

- the <http://ec.europa.eu/social/home.jsp> of the European Commission, Directorate-General for Employment, Social Affairs and Inclusion (which includes a section dedicated to social security coordination) :
<http://ec.europa.eu/social/main.jsp?langId=en&catId=849>
- the http://ec.europa.eu/enlargement/index_en.htm of the European Commission, Directorate-General for Enlargement;
- the http://europa.eu/legislation_summaries/employment_and_social_policy/employment_and_social_affairs of the "Summaries of EU legislation" pages.