



COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. INTRODUCTION

Regulations (EEC) Nos 1408/71 and 574/72 were updated by Regulation (EC) No 118/97¹ and most recently amended by Commission Regulation (EC) No 89/2001² and Regulation (EC) No 1386/2001³ of the European Parliament and of the Council.

This proposal is intended to update these Community Regulations to take account of changes in national legislation, clarify the legal situation with regard to certain Articles of the Regulations and take account of recent developments in the case law of the Court of Justice of the European Communities.

2. COMMENTS ON THE ARTICLES

Article 1

Amendment of Regulation (EEC) No 1408/71

Amendment of Article 4(2a)

Bearing in mind the recent case law of the Court of Justice of the European Communities in its judgements of 8 March 2001 in case C-215/99, *Friedrich Jauch v Pensionsversicherungsanstalt der Arbeiter* (ECR 2001 I-1901) and of 31 May 2001 in case C-43/99, *Ghislain Leclere, Alina Deaconescu and Caisse nationale des prestations familiales* (ECR 2001 I-4265), the need to specify the elements comprising special non-contributory cash benefits is apparent.

The Court of Justice declared in its judgement of 8 March 2001 in the Jauch case that it was not sufficient for a benefit to be entered in Annex Ila for it to qualify as a "special non-contributory benefit" and that the elements characterising such benefits (special and non-contributory) should be examined.

The Court of Justice also considered that derogations from the principle of exportability of social security benefits, such as the provisions coordinating the special non-contributory benefits laid down in Article 10a of Regulation No 1408/71, needed to be interpreted strictly. This means that they can only apply to benefits meeting the conditions laid down by them. It follows that Article 10a can only refer to those benefits meeting the conditions laid down in Article 4(2a) of Regulation No 1408/71, namely benefits with both a special and non-contributory character and which are mentioned in Annex Ila to the Regulation.

Thus the Court of Justice invalidated the entry of Austrian care benefit (care allowance) in Annex Ila to Regulation (EEC) No 1408/71, denying it a special character as the conditions for granting the care allowance and the way in which it is financed cannot have the intention or the effect of changing the character of the care

¹ OJ L 28, 30.1.1997.

² OJ L 14, 18.1.2001.

³ OJ L 187, 10.7.2001.

allowance as analysed in the judgement of 5 March 1998 in case C-160/96, Manfred Molenaar, Barbara Fath-Molenaar and *Allgemeine Ortskrankenkasse Baden-Württemberg*, in which it was held that benefits of that type are essentially intended to supplement sickness insurance benefits, to which they are, moreover, linked at the organisational level, in order to improve the state of health and quality of life of persons reliant on care. In those circumstances, even if they have their own characteristics, such benefits must be regarded as 'sickness benefits' in cash within the meaning of Article 4(1)(a) and (b) of Regulation No 1408/71.

Finally, account should be taken of the judgement of the Court of Justice on 31 May 2001 in the Leclere case, in which the Court, while admitting that a condition of residence in the State in which the competent institution is based may legitimately be demanded for the granting of benefits closely linked to the social environment, invalidated Annex IIa to the Regulation in so far as it features the Luxembourg maternity allowance, denying this allowance a special character.

The Court judged that the Luxembourg maternity allowance laid down in the Act of 30 April 1980, being payable to every pregnant woman and every woman who has given birth on the sole condition that she is legally resident in Luxembourg when entitlement is established, cannot be regarded as having, in relation to the benefits referred to in Article 4(1) of Regulation No 1408/71, the character of a special allowance. The actual terms of Article 4(2a) of Regulation No 1408/71 lay down that only benefits not falling within the framework of general legislation on the schemes referred to in Article 4(1) of the Regulation can be considered as being referred to by this provision.

Amendment of Article 9a

Article 9a concerns the extension of the reference period where, under the legislation of a Member State, recognition of entitlement to a benefit is conditional upon completion of a minimum period of insurance during a specific period preceding the contingency insured against (reference period) and where the aforementioned legislation provides that the periods during which the benefits have been granted under the legislation of that Member State or periods devoted to child-rearing in the territory of that Member State shall prolong the reference period. In this instance, Article 9a also requires the Member State to extend the reference period to cover the payment of invalidity pensions, old-age pensions, sickness benefits, unemployment benefits or benefits for industrial accidents (except for pensions) awarded under the legislation of another Member State and periods devoted to child-rearing in the territory of another Member State. There is therefore an exception relating to periods of payment of industrial accident pensions.

Bearing in mind the judgement of the Court of Justice of the European Communities on 18 April 2002 in case C-290/00, *Johann Franz Duchon v Pensionsversicherungsanstalt der Angestellten* (ECR 2002 I-3567), Article 9a should be amended to bring it into line with this judgement, which has been declared partially invalid "*in so far as it (Article 9a) expressly excludes the possibility of taking into account, for the purposes of prolongation of the reference period under the legislation of a Member State, periods during which industrial accident benefits have been paid under the legislation of another Member State.*"

Amendment of Article 10a

Article 10a sets out the specific coordination rules applying to special non-contributory cash benefits. To ensure legal safety, it appeared necessary to specify that these rules apply to these benefits to the exclusion of the provisions of Article 10 and of Title III of Regulation (EEC) No 1408/71.

Amendment of Article 23

Article 23 concerns the calculation of cash benefits for sickness and maternity insurance.

Paragraph 1 lays down that "the competent institution of a Member State whose legislation provides that the calculation of cash benefits shall be based on an average wage or salary, shall determine that average wage or salary exclusively by reference to wages or salaries confirmed as having been paid during the periods completed under the said legislation". Paragraph 2 provides for a similar rule where the calculation of cash benefits is based on a standard wage or salary.

A new paragraph 2a is proposed whereby the rules laid down in paragraphs 1 and 2 shall apply where the reference period provided for under the applicable legislation covers in full or in part a period completed under the legislation of one or more other Member States.

Amendment of Article 33(1)

Article 33(1) establishes in spirit the principle of parallelism between sickness and maternity benefits paid out and contributions paid in, stipulating that such contributions can only be operated by an institution in a Member State with regard only to the pensioners who, in return, receive sickness and maternity benefits from the institution in that Member State.

The aim of amending paragraph 1 of Article 33 is to specify that the deduction of such contributions may be carried out on all pensions paid to the said pensioners if national legislation provides for this. In addition, the situation of the pensioner is thus aligned with that of the employed worker who, by virtue of Article 14d, is for the purposes of the application of the legislation deemed applicable by the Regulation considered to carry out all of his occupational activity or activities in the territory of the Member State concerned. However, it is important in calculating the contributions in question to make provision for taking into account the amounts actually paid to the persons concerned. These are therefore net amounts, taking into account any deduction from the amounts paid to the pensioner in question in the debtor Member State. This essential clarification corresponds on the one hand to the Sehrer judgement,⁴ and on the other is intended to avoid the amount of sickness contributions deducted from the pensions in question being greater than the amount due from a person with the same income obtained in the sole competent Member State. It is worthwhile ensuring that the right of free movement of the persons in question is not unduly affected. Requiring the taking into account of the net amounts of pensions received by the persons concerned appears to be appropriate and

⁴ Judgement of 15 June 2000, case C-302/98, ECR p. I-4585.

proportionate in the context of coordination, in order to prevent any difficulties which could arise in certain cross-border situations owing to the diversity of social security systems and, more precisely, of methods of funding in the different Member States.

Deletion of Article 35(2)

Article 35(2) designates the scheme applicable to working or retired self-employed persons in the country of temporary stay or residence where, both in this country and in the country where the persons concerned are insured (competent State), one or more special sickness or maternity insurance schemes apply to self-employed persons, granting benefits in kind less favourable than those which employed persons receive.

The provisions of Article 35(2) are no longer justified, as Belgium is the sole Member State still with a special scheme for self-employed persons with regard to sickness and maternity benefits in kind which offers less extensive protection than the one for employed persons.

Deletion of Article 69(4)

The judgement of the Court of Justice of the European Communities of 13 June 1996 in case C-170/95, *Office national de l'emploi v Calogero Spataro* (ECR 1996 I-2921), giving Article 69(4) a restrictive interpretation, should be taken into consideration.

Addition of Article 95f

Under the terms of the fourth indent of Article 1j) of Regulation (EEC) No 1408/71, the provisions governing special schemes for self-employed persons, the creation of which is left to the initiative of the persons concerned or the application of which is limited to a part of the territory of the Member State in question, are excluded from the scope of the Regulation and, to this end, are referred to in Annex II. Germany has asked for the reference to the schemes in question (pension schemes of professional associations or similar institutions), currently entered in Annex II under the heading "C. Germany", to be deleted. This inclusion makes transitional provisions necessary.

Addition of Article 95g

In its judgement of 8 March 2001 in case C-215/99, *Friedrich Jauch v Pensionsversicherungsanstalt der Arbeiter* (ECR 2001 I-1901), the Court of Justice of the European Communities declared the entry in Annex IIa to Regulation (EEC) No 1408/71 of the Austrian care allowance to be invalid, stating that it was a "normal" sickness cash benefit within the meaning of Article 4(1a) and b)) of Regulation (EEC) No 1408/71 and not a non-exportable special non-contributory benefit. As a result, the rights of persons who, on the basis of Article 10a(3) of Regulation (EEC) No 1408/71, obtained or requested before 8 March 2001 a care allowance under Austrian legislation should be protected. To this end, Article 5 of the Regulation contains a transitional provision stipulating that entitlement to the care allowance will be maintained under the terms of Article 10a(3) as long as the persons concerned continue to reside in Austria.

Annexes II, IIa, III, IV and VI to Regulation (EEC) No 574/72 shall be amended in accordance with Annex I to this Regulation.

Second Article

Amendment of Regulation (EEC) No 574/72

Amendment of Article 4 and Article 32a

Item 11 of Article 4 and Article 32a refer to Annex 11, in which there should be a reference to the schemes referred to in Article 35(2) of Regulation (EEC) No 1408/71. As paragraph 2 of Article 35 has been deleted, item 11 of Article 4, Article 32a and Annex 11 to Regulation (EEC) No 574/72 should also be deleted.

Addition of Article 10c and amendment of Article 12a

Article 13(2d) of the Regulation lays down that civil servants and persons treated as such shall be subject to the legislation of the Member State to which the administration employing them is subject.

Article 14(2a) of the Regulation lays down the rules for determining the legislation applicable to workers who are members of the travelling or flying personnel of an undertaking which, for hire or reward or on its own account, operates international transport services for passengers or goods by rail, road, air or inland waterway. Depending on the situation, the legislation applicable to the worker will be that of the Member State in whose territory the registered office, branch or permanent representation which employs him is situated, or the place where he resides and is principally employed.

Out of concern for legal safety, there should be a provision for these two categories of workers stating that the institution of the Member State whose legislation is applicable shall issue to the civil servant or worker a certificate stating that he is subject to its legislation.

Annex 4 to Regulation (EEC) No 574/72 shall be amended and Annex 11 to the Regulation shall be deleted.

3. COMMENT ON ANNEX I

1. Amendment of Annex II, section I

Deletion of the reference under the heading "C. GERMANY" means that the pension schemes of professional associations and similar pension institutions (special schemes for self-employed workers) are included in the scope of Regulation (EEC) No 1408/71 from 1 January 2004.

2. Amendment of Annex II, section II

The Spanish legislature, in the context of its policy to promote the birth rate, grants two benefits which meet the same objectives as the special childbirth allowances cited in Article 1u) i) of Regulation (EEC) No 1408/71 and referred to in Annex II, section II. This is a cash benefit in the form of a single payment for the birth of a third child and subsequent children and a cash benefit in the form of a single payment in the event of a multiple birth. These benefits should be referred to under the heading "D. SPAIN".

Finnish law on maternity allowances has been extended to include a benefit which consists of aid in the form of a flat-rate sum intended to compensate for the cost of international adoption. The reference under the heading "M. FINLAND" should be amended to take this into account.

3. Amendment of Annex II, section III

The reference to the "social supplement under the Law of 28 June 1990 on the alignment of pensions" should be deleted from the heading "C. GERMANY", as this benefit was granted until 31 December 1996.

4. Amendments to Annex IIa

Annex IIa contains special non-contributory benefits granted to the persons concerned exclusively in the territory of the Member State in which they reside, under the terms of Article 10a of Regulation (EEC) No 1408/71.

This Annex is amended to take account on the one hand of new benefits of this type introduced in national legislation, and on the other of recent developments in the case law of the Court of Justice of the European Communities with regard to the classification of "special non-contributory benefits", namely the judgement of 8 March 2001 in case C-215/99, *Friedrich Jauch v Pensionsversicherungsanstalt der Arbeiter* (ECR 2001 I-1901) and the judgement of 31 May 2001 in case C-43/99, *Ghislain Leclere, Alina Deaconescu and Caisse nationale des prestations familiales* (ECR 2001 I-4265).

In the light of this case law, it appears essential not only to delete from Annex IIa the benefits declared invalid by the Court (Austria's care allowance and Luxembourg's maternity allowance) but also to carry out a new analysis of the elements comprising each benefit in Annex IIa in order to verify whether these elements meet the "special" and "non-contributory" criteria defined by the case law of the Court of Justice which a benefit should possess in order to be entered in Annex IIa and be coordinated by specific coordination rules laid down for special non-contributory benefits.

Analysis of the benefits currently entered in Annex IIa, or whose entry is requested, is based on a teleological interpretation by the Court of Justice of the provisions of Article 4(2a) and Article 10a of Regulation (EEC) No 1408/71. When called upon to give its opinion on the classification of a benefit, the Court looks for the aim pursued by the benefit in question.

The first essential characteristic of a "*special non-contributory benefit*" is by definition its "special" nature, which must be apparent. This applies in all branches of social security.

"Special" benefits are half-way between "conventional" social security benefits and social assistance and are similar to social assistance "*in that need is an essential criterion in its implementation*" (see the third and fourth recitals of Regulation No 1247/92).⁵

⁵ OJ L 136, 19.5.1992.

The first aim pursued by the benefit is essentially to meet the financial needs of the person concerned and, with the aim of preventing poverty, guarantee an income providing the necessary means of subsistence, having regard to the economic and social context of the Member State concerned. In its Leclere judgement, the Court of Justice referred to its judgements of 27 September 1988 in the Lenoir case (C-313/86, ECR 1988 I-5391) and of 4 November 1997 in the Snares case (C-20/96, ECR 1997 I-6057) to make the point that “it is open to the Community legislature when implementing Article 51 of the Treaty (now Article 42) to adopt provisions which derogate from the principle of exportability of social security benefits. In particular, (...), a condition of residence in the State of the competent institution may legitimately be required for the grant of benefits closely linked with the social environment” (paragraph 32).

Therefore, the level of minimum income guaranteed by the benefit in question must be close to or linked to the minimum subsistence income as calculated or applied in the Member State concerned, in such a way that it is closely linked to the socio-economic environment in that Member State.

In assessing this criterion of financial need, the application of means testing prior to granting the benefit in question is an important factor. This condition is tantamount to ensuring that the main aim is to guarantee a minimum income. However, meeting this condition is not an absolute and decisive criterion in terms of recognising a benefit as a “special” benefit. It must be borne in mind that some countries' legislation implicitly presumes, in view of the identity of benefit recipients, that they do not have sufficient resources. Secondly, the granting of “conventional” social security benefits may also be subject to means testing.

In any event, a benefit must be of a supplementary, substitutive or ancillary nature in relation to a benefit covering one of the conventional social security risks listed in Article 4(1) of Regulation No 1408/71. This excludes any scheme providing a conventional benefit which is available to all inhabitants to cover a specific risk.

The factor which determines when a benefit may be listed in Annex IIa as a **benefit intended exclusively to provide specific protection for disabled people** is the need for social integration. A disabled person's need for social integration, which is normally closely linked to the person's social environment, must be the sole purpose of the benefit, to the exclusion of any other objectives.

As regards the criterion of financial need, the Court of Justice, in the Newton case (C-356/89, ECR 1991 I-3017), recognised the dual nature of the UK's “mobility allowance”, even though the legislation introducing it did not make it subject to means testing. The existence of a close link with the social environment, as referred to by the Court in the Lenoir case to justify the non-exportability of a benefit, is usually verified in the case of benefits designed to meet specific needs in terms of the integration of recipients into society where this is rendered more difficult by their disability.

Of course, this criterion of a disabled person's need for social integration, like all essential characteristics of special non-contributory benefits, must be interpreted and applied in a restrictive manner. The sole purpose of benefits for the disabled in this category is to promote the social integration of disabled persons. They are not

intended to cover any of the conventional social security risks listed in Article 4(1) of Regulation (EEC) No 1408/71.

This approach excludes:

- benefits under Article 4(1b) of the Regulation: "invalidity benefits, including those intended for the maintenance or improvement of earning capacity";
- benefits granted to children with a disability where the main objective is to compensate for the additional family expenses incurred by the presence in the household of a disabled child;
- care allowances classified by the Court of Justice in the Jauch case as sickness benefits in cash, with the aim of improving the state of health and the life of dependent persons, even though the benefits may cover a number of aspects totally independent of the illness itself.

Concerning the horizontal criterion of the non-contributory nature of the special benefit, reference should be made to the judgements of the Court of Justice of 15 February 2000 (CRDS, C-34/98, ECR 2000 I-995 and CSG, C-169/98, ECR 2000 I-1049) in which the Court of Justice declared that:

“The fact that a levy is categorised as a tax under national legislation does not mean that, as regards Regulation No 1408/71, that same levy cannot be regarded as falling within the scope of that regulation and caught by the prohibition against overlapping legislation”.

As the Court has held, in particular in its judgement of 18 May 1995 (Rheinhold & Mahla, C-327/92, ECR I-1223, paragraph 15), Article 4 of Regulation No 1408/71 determines the matters covered by this regulation in terms which make it clear that the national social security schemes are subject in their entirety to the application of the rules of Community law. At paragraph 23 of that judgement, the Court stated that the decisive factor for the purposes of applying Regulation No 1408/71 is that there must be a link between the provision in question and the legislation governing the branches of social security listed in Article 4 of the same regulation, and that link must be direct and sufficiently relevant” (case C-34/98, paragraphs 34 and 35, and case C-168/98, paragraphs 32 and 33).

The Court of Justice has ruled that there is a direct and sufficiently relevant link between the CRDS/CSG and the general French social security scheme, that their purpose is specifically and directly to discharge the deficit of the general French social security scheme, and that they form part of a comprehensive reform of social protection in France aimed at ensuring the future financial equilibrium of that scheme, the branches of which are indisputably among those covered by Article 4(1) of Regulation No 1408/71 (Case C-34/98, paragraphs 36 and 37, and Case C-168/98, paragraphs 34 and 35).

The Court of Justice has concluded that “the decisive criterion is that of the specific allocation of a contribution to the funding of the social security scheme of a Member State” (Case C-34/98, paragraph 40, and Case C-168/98, paragraph 38).

Finally, it should be noted that the same analysis of course prevailed when examining new requests for entry in Annex IIa of benefits adopted in national legislation in certain countries. As a result, the following benefits may be entered:

- for Germany, "benefits pursuant to the law on a minimum needs-based provision in old age and in the event of reduced earning capacity";
- for Italy, the "social increase" (Article 1(1) and (12) of Act No 544 of 29 December 1988 and subsequent amendments);
- for the Netherlands, "supplements allocated to benefit recipients" (Act 6 November 1986 and subsequent amendments);
- for Sweden, "financial support for the elderly" (Act No 2001/853);
- for the United Kingdom, pension credit (this benefit replaces income support for elderly people currently referred to in Annex IIa).

5. Amendment of Annex III

With regard to Annex III, part A, maintaining in force the provisions of existing bilateral agreements prior to the entry into force of the Regulation can only be justified in two cases: where the provisions in question produce *favourable effects* for the beneficiaries of the agreement concerned, thus reflecting the case law of the Court; or where the provisions in question respond to specific, exceptional circumstances, usually *historical*, and the effects are limited in time by the exhaustion of potential rights for the persons concerned by the specific situation in question.

The entries in Annex III, part B, should be limited to exceptional, objective situations, justifying derogation from Article 3 (1) of the Regulation and Articles 12, 39 and 42 of the Treaty.

Entries relating to the export of benefits to a *third country* should be deleted. Either the payment of a pension in a third State falls within the scope of the Regulation (if the pension falls within its material scope and the beneficiary within its personal scope) and the principle of equal treatment applies; or it does not, and this matter can no longer be dealt with in Annex III but in the body of the Regulation. Consequently, these provisions should be deleted from parts A and B of Annex III.

6. Amendment of Annex IV, part B

Annex IV, part B, contains the list of "special schemes for self-employed workers within the meaning of Article 38(3) and Article 45(3) of the Regulation".

In Italy, new occupational categories benefit from a special scheme for self-employed workers, which implies an amendment to the heading "H. ITALY".

The Old-Age Insurance for Farmers Act (*Gesetz über eine Altershilfe für Landwirte – GAL*) of 14 September 1965 was replaced by a similar Act of 29 July 1994 (*Gesetz über die Alterssicherung der Landwirte*), with effect from 1 January 1995. The reference under the heading "C. GERMANY" should therefore be amended to bring it into line with the new law.

7. Amendments to Annex VI

Annex VI sets out particular methods for applying the legislation of certain Member States.

The references under point 6b) under the heading "B. DENMARK", and under point 5 under the heading "G. IRELAND", have become superfluous owing to the fact that the situations they covered have a general solution stipulated in the new paragraph 3 inserted by this Regulation in Article 23 of Regulation (EEC) No 1408/71.

The German Act of 10 October 2001 transposing the social security agreements and amending various ratification acts provided a legal basis for the procedure for imposing levies on certain sickness insurance institutions arising from the application of Regulations (EEC) Nos 1408/71 and 574/72, enabling point 3 under the heading "C. GERMANY" to be deleted.

The Old-Age Insurance for Farmers Act (*Gesetz über eine Altershilfe für Landwirte – GAL*) of 14 September 1965 was replaced by a similar Act of 29 July 1994 (*Gesetz über die Alterssicherung der Landwirte*), with effect from 1 January 1995. Point 11 under the heading "C. GERMANY" is deleted; its justification was contained in the provisions of Article 27 of the former Act which are not contained in the new one.

Point 17 under the heading "C. GERMANY" is deleted. It concerns legislative provisions which have been repealed and replaced by the care insurance provisions in Book XI of the German social code, which grants benefits which, under the terms of the judgement of 5 March 1998 by the Court of Justice of the European Communities in case C-160/96, *Molenaar* (ECR I-843), are governed by the coordination of sickness benefits.

The reference to "parental child-raising allowance" is deleted from point 7 under the heading "E. FRANCE", as this benefit cannot be subject to a condition of residence in France as it should be considered a social advantage within the meaning of Article 7(2) of Regulation (EC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community. Social advantages are exportable in accordance with the judgement of 27 November 1997 by the Court of Justice of the European Communities in case C-57/96, *H. Meints v Minister van Landbouw, Natuurbeheer en Visserij*, ECR 1997 I-6689.

Point 2 under the heading "O. UNITED KINGDOM" is amended technically to take account of the fact that the legislative provisions ("Welfare Reform and Pensions Act 1999") establishing new survivor's benefits from 9 April 2001 are extended to widowers.

Point 11 under the heading "G. IRELAND" and point 21 under the heading "O. UNITED KINGDOM" are no longer justified. These special arrangements concerning application had been necessary because no rule on overlapping was laid down in Regulations (EEC) Nos 1408/71 and 574/72 for a specific overlapping of benefits arising from the application of two legislations linked to the carrying out of an occupational activity and from the fact that the activity carried out in the territory of the other Member State concerned is taken into consideration. This related to United Kingdom legislation relating to family credit and to Irish legislation relating to the family income supplement. A new family benefit, a child tax credit, was

established in the United Kingdom from 6 April 2003. The aim of the United Kingdom legislature was to unify the system of income-related support for children, with the consequence of abolishing the former benefits with the same aim, in particular the family credit. As entitlement to child tax credit is not subordinate to the carrying out of an occupational activity, and the benefit paid by Ireland, the family income supplement, is, the overlap between the two benefits is governed by Article 10 of Regulation (EEC) No 574/72.

4. COMMENT ON ANNEX II

1. Amendment of Article 4

The heading "C. GERMANY" in Annex 4 is supplemented by a point 9, designating the liaison body for special schemes for self-employed workers administered by the accident insurance associations.

2. Deletion of Annex 11

Annex 11 lists the schemes referred to in Article 35(2) of Regulation (EEC) No 1408/71, i.e. schemes covering self-employed workers for sickness and maternity benefits in kind, which are less favourable than the one for employed workers. Application of Article 35(2) is based on the premise that at least two Member States are familiar with such schemes, which is no longer the case. This provision is therefore abolished under the terms of this Regulation, which justifies the abolition of Annex 11.

5. APPLICATION IN THE COUNTRIES OF THE EUROPEAN ECONOMIC AREA AND IN THE SWISS CONFEDERATION

The free movement of persons is one of the objectives and principles of the Agreement on the European Economic Area (EEA) which came into force on 1 January 1994.⁶ In Chapter 1 of the third part, concerning the free movement of persons, services and capital, Articles 28, 29 and 30 deal with the free movement of employed and self-employed workers. Article 29, more specifically, restates the principles listed in Article 42 of the EC Treaty in respect of social security for persons moving within the Community. Consequently this proposal for a Regulation must, if it is adopted, apply in the EEA member countries.

The agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, on the free movement of persons, which came into force on 1 June 2002, contains an Article 8 which restates the principles listed in Article 42 of the EC Treaty in respect of social security for persons moving within the Community. Consequently this proposal for a Regulation must, if it is adopted, apply in the Swiss Confederation.

⁶ OJ L 1, 3.1.1994, as amended by Decision of the EEA Joint Committee No 7/94 of 21.3.1994 (OJ L 160, 28.6.1994).

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 42 and 308 thereof,

Having regard to the proposal from the Commission,⁷

Having regard to the opinion of the European Economic and Social Committee,⁸

Having regard to the opinion of the Committee of the Regions,⁹

Acting in accordance with the procedure laid down in Article 251 of the Treaty,¹⁰

Whereas:

- (1) Certain amendments should be made to Council Regulation (EEC) No 1408/71¹¹ and Council Regulation (EEC) No 574/72¹², in order to take account of recent developments in the case law of the Court of Justice of the European Communities, facilitate the application of those Regulations and reflect changes in the social security legislation of the Member States.
- (2) In order to take account of recent developments in case law, the conclusions of judgements should be drawn, particularly in the cases of *Johann Franz Duchon v Pensionsversicherungsanstalt der Angestellten*¹³ and *Office national de l'emploi v Calogero Spataro*.¹⁴

⁷ OJ C [...], [...], p. [...].

⁸ OJ C [...], [...], p. [...].

⁹ OJ C [...], [...], p. [...].

¹⁰ OJ C [...], [...], p. [...].

¹¹ OJ L/2002/149/2 of 5.7.1971 Regulation updated by Regulation (EC) No 118/97 (OJ L 28, 30.1.1997, p. 1) and last amended by Regulation (EC) No 1399/1999 (OJ L 164, 30.6.1999, p. 1).

¹² OJ L/2002/74/1 of 27.3.1972 Regulation updated by Regulation (EC) No 118/97 (OJ L 28, 30.1.1997, p. 1) and last amended by Regulation (EC) No 1399/1999 (OJ L 164, 30.6.1999, p. 1).

¹³ Judgement of 18 April 2002 in case C-290/00, *Johann Franz Duchon v Pensionsversicherungsanstalt der Angestellten* (ECR 2002 I-3567).

¹⁴ Judgement of 13 June 1996 in case C-170/95, *Office national de l'emploi v Calogero Spataro* (ECR 1996 I-2921).

- (3) The judgements in *Friedrich Jauch v Pensionsversicherungsanstalt der Arbeiter* and *Ghislain Leclere, Alina Deaconescu and Caisse nationale des prestations familiales*,¹⁵ concerning the classification of special non-contributory cash benefits require, for reasons of legal safety, that the two cumulative criteria to be taken into account be specified so that such benefits can feature in Annex IIa to Regulation (EEC) No 1408/71. On this basis, there is a case for revising the Annex, taking into account also legislative amendments in the Member States affecting this type of benefits, which are subject to specific coordination given their mixed nature. In addition, it is important to specify the transitional provisions relating to the benefit which was the subject of the judgement in the Jauch case in order to protect the rights of beneficiaries.
- (4) On the basis of case law relating to the relationships between the Regulation and the provisions of bilateral social security agreements, and in particular of the *Rönfeldt* judgement,¹⁶ it is necessary to review Annex III to Regulation (EEC) No 1408/71. The entries in part A of Annex III are only justified in two cases: where they are more favourable to migrant workers or where they relate to specific and exceptional situations, usually linked to historical circumstances. In addition, it is not appropriate to accept entries in part B except where exceptional and objective situations justify a derogation from Article 3(1) of the Regulation and from Articles 12, 39 and 42 of the Treaty.¹⁷
- (5) In order to facilitate the application of Regulation (EEC) No 1408/71, there should be certain provisions concerning on the one hand civil servants and persons treated as such and, on the other, members of the travelling or flying personnel of an undertaking which operates international transport services for passengers or goods by rail, road, air or inland waterway, and also to specify the methods for determining the average amount to take into account in the context of Article 23 of the Regulation.
- (6) In order to re-establish, at the request of those Member States whose institutions are responsible for sickness benefits, parallelism in the treatment of pensioners who are former migrant workers and who receive pensions paid by the institutions of other Member States and settled pensioners who receive the same income in full solely from the institutions in their State of residence, reference should be made to the text of Article 33(1) of Regulation (EEC) No 1408/71 to indicate that social security contributions for sickness insurance may be calculated taking into account all pensions paid to “socially insured” persons, where the legislation of the competent State provides for this. However, only the actual amounts of the pensions paid by the institutions of other Member States are taken into account for this calculation, i.e. the net amounts, which take account of any deduction from these amounts in the Member State of the paying institution,

¹⁵ Judgements of 8 March 2001 in case C-215/99 (ECR 2001 I-1901) and 31 May 2001 in case C-43/99 (ECR 2001 I-4265).

¹⁶ Judgement of 7 February 1991, case C-227/89, *Ludwig Rönfeldt*, ECR 1991 I-323, the principle of which has since been used, particularly in the judgement of 9 November 1995, case C-475/93, *Jean-Louis Thevenon*, ECR 1995 I-3813; the judgement of 9 November 2000, case C-75/99, *Edmund Thelen*, ECR 2000 I-9399; and the judgement of 5 February 2002, case C-277/99, *Doris Kaske*, ECR I-1261.

¹⁷ - Judgement of 30 April 1996, case C-214/94, *Ingrid Boukalfa*, ECR 1996 I-2253;
- Judgement of 30 April 1996, case C-308/96, *Cabanis-Issarte*, ECR 1996 I-2097;
- Judgement of 15 January 2002, case C-55/2000, *Elide Gottardo*, ECR 2002 I-413.

HAVE ADOPTED THIS REGULATION

Article 1

Regulation (EEC) No 1408/71 shall be amended as follows:

1) Article 4 (2) shall be replaced by the following:

"2a The provisions of this Article shall apply to special non-contributory cash benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement has characteristics both of the social security legislation referred to in Article 4(1) and of social assistance.

Special non-contributory cash benefits are benefits:

(a) which are intended to provide either :

(i) supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 2(1), and which guarantee to the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned;

or

(ii) solely specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned,

and

(b) the financing of which exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for granting and for calculating the benefits are not dependent on any contribution in respect of the beneficiary. However, benefits granted to supplement a contributory benefit shall not be considered to be contributory benefits for this reason alone,

and

(c) which are listed in Annex IIa."

2) Article 9 is replaced by the following:

"Article 9a

If the legislation of a Member State subordinates recognition of entitlement to a benefit to the completion of a minimum period of insurance during a determined period preceding the contingency insured against (reference period) and lays down that periods during which benefits were paid under the legislation of that Member State or periods devoted to child-rearing in the territory of that Member State shall extend this reference period, the periods during which invalidity or old age pensions

or sickness, unemployment or industrial accident benefits were paid under the legislation of another Member State and periods devoted to child-rearing in the territory of another Member State shall also extend this reference period."

3) In Article 10, paragraph (1) shall be replaced by the following:

"1. The provisions of Article 10 and of Title III shall not apply to the special non-contributory cash benefits referred to in Article 4(2a). The persons to whom this Regulation applies shall receive these benefits exclusively in the territory of the Member State in which they reside and under the legislation of that State, in so far as these benefits are mentioned in Annex IIa. Benefits shall be paid by, and at the expense of, the institution of the place of residence."

4) In Article 23, the following paragraph 2a shall be inserted:

"2a. The provisions of paragraphs 1 and 2 shall also apply where the legislation applicable to the competent institution provides for a specific reference period and this period coincides, where appropriate, with the whole or part of the periods completed by the person concerned under the legislation of one or more other Member States."

5) In Article 33, paragraph (1) shall be replaced by the following:

"The institution of a Member State responsible for payment of a pension which applies legislation providing for the deduction of contributions payable by a pensioner to cover sickness and maternity benefits for which he is responsible under the terms of Articles 27, 28, 28a, 29, 31 and 32 shall be authorised to make such deductions, calculated in accordance with the said legislation, from pensions payable by it or by another Member State. This institution shall take into account the actual amounts of the pensions paid by the other Member States."

6) In Article 35, paragraph 2 shall be deleted.

7) In Article 69, paragraph 4 shall be deleted.

8) The following Articles 95f and 95g shall be inserted:

"Article 95f

Transitional provisions relating to Annex II, section I, under the heading "C. GERMANY"

"1. Annex II, section I, under the heading "C. GERMANY, as amended by Regulation...[*this Regulation*] shall not establish any entitlement for the period prior to 1 January 2004.

2. Any period of insurance and, where appropriate, any period of employment, self-employment or residence under the legislation of a Member State prior to 1 January 2004 shall be taken into consideration in determining acquired rights in accordance with the provisions of this Regulation.

3. Subject to the provisions of paragraph 1, a right shall be acquired under this Regulation even where it relates to a contingency that occurred prior to 1 January 2004.
4. Any benefit that has not been awarded or that has been suspended on account of the nationality or the residence of the person concerned shall, at the latter's request, be awarded or resumed from 1 January 2004, provided that the rights for which benefits were previously awarded did not give rise to a lump-sum payment.
5. The rights of persons to whom a pension was awarded prior to 1 January 2004 may, on the application of the persons concerned, be reviewed, taking account of the provisions of this Regulation. This shall also apply to other benefits pursuant to Article 78.
6. If an application referred to in paragraph 4 or 5 is submitted within two years from 1 January 2004, the rights acquired under this Regulation shall have effect from that date, and the provisions of the legislation of any Member State concerning the forfeiture or limitation of rights may not be invoked against the persons concerned.
7. If the application referred to in paragraph 4 or 5 is submitted after the expiry of the two-year period after 1 January 2004, rights which have not been forfeited or barred by limitation shall have effect from the date on which the application was submitted, except where more favourable provisions of the legislation of any Member State apply."

Article 95g

Transitional provisions relating to the deletion of the entry in Annex IIa of the Austrian care allowance (Pflegegeld)

"In the case of applications for care allowances under Austrian federal law (Bundespflegegeldgesetz) submitted not later than 8 March 2001 on the basis of Article 10a(3) of this Regulation, this provision shall continue to apply as long as the beneficiary of the care allowance continues to reside in Austria after 8 March 2001."

9) Annexes II, IIa, III, IV and VI shall be amended in accordance with Annex I to this Regulation.

Article 2

Regulation (EEC) No 574/72 shall be amended as follows:

- 1) In Article 4, paragraph 11 shall be deleted.
- 2) Article 10c shall be inserted as follows:

"Article 10c

Formalities laid down in the event of the application of Article 13(2d) of the Regulation to civil servants and persons treated as such.

For the application of Article 13(2d), the institution designated by the competent authority of the Member State whose legislation is applicable shall issue a certificate stating that the civil servant or the person treated as such is subject to its legislation."

3) Article 12a shall be amended as follows:

a) The title of Article 12a shall be replaced by the following text:

"Rules applicable to the persons referred to in Article 14(2) and (3), Article 14a(2-4) and Article 14c of the Regulation who normally carry out an employed or self-employed activity in the territory of two or more Member States"

b) The introductory sentence shall be replaced by the following text:

" For the application of the provisions of Article 14(2) and (3), Article 14a(2-4) and Article 14c of the Regulation, the following rules shall apply:"

The following paragraph 1a shall be added:

"1a. Where, in accordance with Article 14(2)(a) of the Regulation, a person who is on the travelling or flying personnel of an international transport undertaking is subject to the legislation of the Member State in whose territory the registered office of the undertaking, or the branch or permanent establishment employing him is located, or where he resides and is predominantly employed, the institution designated by the competent authority of that Member State shall issue to the person concerned a certificate stating that he is subject to its legislation."

4) Article 32a shall be deleted.

5) The Annexes shall be amended in accordance with Annex II to this Regulation.

Article 3

This Regulation shall enter into force on the day following its publication in the *Official Journal of the European Union*. Article 1(8) of this Regulation, relating to Article 95f of Regulation (EEC) No 1408/71, shall apply from 1 January 2004.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, [...]

For the European Parliament
The President

For the Council
The President

ANNEX I

The annexes to Regulation (EEC) No 1408/71 shall be amended as follows:

- 1) Annex II shall be amended as follows:
 - a) In section I, under the heading "C. Germany", the text shall be replaced by the words "Does not apply".
 - b) Section II shall be amended as follows:
 - i) under the heading "D. Spain", the word "None" shall be replaced by:
"Childbirth allowances (one-off cash benefits for the birth of the third child and subsequent children and one-off cash benefits in the event of a multiple birth)"
 - ii) under the heading "M. FINLAND", the text shall be replaced as follows:
"Maternity package, maternity lump-sum grant and assistance in the form of a lump sum intended to offset the cost of international adoption pursuant to the Maternity Grant Act."
 - c) In section III, under the heading "C. GERMANY", point b) shall be deleted.
- 2) Annex IIa shall be replaced by the following text:

"Annex IIa

SPECIAL NON-CONTRIBUTORY CASH BENEFITS

"Article 10(a)

A. BELGIUM

- a) Income replacement allowance (Law of 27 February 1987);
- b) Guaranteed income for elderly persons (Law of 1 April 1969).

B. DENMARK

Accommodation expenses for pensioners (Law on individual accommodation assistance, consolidated by Law No 204 of 29 March 1995).

C. GERMANY

Benefits pursuant to the law on a minimum needs-based provision in old age and in the event of reduced earning capacity.

D. SPAIN

- a) Minimum income guarantee (Law No 13/82 of 7 April 1982);

- b) Cash benefits to assist the elderly and invalids unable to work (Royal Decree No 2620/81 of 24 July 1981);
- c) Non-contributory invalidity and retirement pensions as provided for in Article 38(1) of the Consolidated Text of the General Law on Social Security, approved by Royal Legislative Decree No 1/1994 of 20 June 1994.

E. FRANCE

- a) Supplementary allowance from the National Solidarity Fund (Law of 30 June 1956);
- b) Disabled adults' allowance (Law of 30 June 1975);
- c) The special allowance (Law of 10 July 1952).

F. GREECE

Special benefits for elderly persons (Law 1296/82).

G. IRELAND

- a) Unemployment assistance (Social Welfare (Consolidation) Act 1993, Part III, Chapter 2);
- b) Old age and blind pensions (non-contributory) (Social Welfare (Consolidation) Act 1993, Part III, Chapters 4);
- c) Widow's (non-contributory) pension, widower's (non-contributory) pension (Social Welfare (Consolidation) Act 1993, Part III, Chapter 6 as amended by Part V of the Social Welfare Act 1997);
- d) Disability allowance (Social Welfare Act 1996, Part IV).

H. ITALY

- a) Social pensions for persons without means (Law No 153 of 30 April 1969);
- (b) Pensions and allowances for the civilian disabled or invalids (Laws No 118 of 30 March 1974, No 18 of 11 February 1980 and No 508 of 23 November 1988);
- (c) Pensions and allowances for the deaf and dumb (Laws No 381 of 26 May 1970 and No 508 of 23 November 1988);
- (d) Pensions and allowances for the civilian blind (Laws No 382 of 27 May 1970 and No 508 of 23 November 1988);
- (e) Benefits supplementing the minimum pensions (Laws No 218 of 4 April 1952, No 638 of 11 November 1983 and No 407 of 29 December 1990);

- (f) Benefits supplementing disability allowances (Law No 222 of 12 June 1984);
- g) Social allowance (Law No 335 of 8 August 1995);
- h) Social increase.

I. LUXEMBOURG

None.

J. NETHERLANDS

- a) Incapacity benefits for disabled young people (Law of 24 April 1997);
- b) Law concerning the provision of supplements up to the relevant social minimum to recipients of benefits under the Unemployment Benefits Act, the Sickness Benefits Act, the Invalidity Insurance (Self-employed Persons) Act, the Invalidity Insurance (Young Disabled Persons) Act, the Invalidity Insurance Act and the Military Personnel Invalidity Insurance Act (*Toeslagenwet*, 6 November 1986).

K. AUSTRIA

Compensatory supplement (Federal Act of 9 September 1955 on General Social Insurance — ASVG, Federal Act of 11 October 1978 on Social Insurance for Persons engaged in Trade and Commerce — GSVG and Federal Act of 11 October 1978 on Social Insurance for Farmers – BSVG).

L. PORTUGAL

- a) Non-contributory State old-age and invalidity pension (Decree-Law No 464/80 of 13 October 1980);
- b) Non-contributory widow's pension (Regulatory Decree No 52/81 of 11 November 1981).

M. FINLAND

- a) Disability allowance (Disability Allowance Act, 124/88);
- b) Housing allowance for pensioners (Act concerning the Housing Allowance for Pensioners, 591/78);
- c) Labour market support (Labour Market Support Act 1542/93).

N. SWEDEN

- a) Housing supplements for persons receiving a pension (Law 1994: 308);
- b) Financial support for the elderly (Law 2001: 853).

O. UNITED KINGDOM

- a) Pension credit;
 - b) Income-based allowances for jobseekers (Jobseekers Act 1995, 28 June 1995, Sections I, (2) (d) (ii) and 3, and Jobseekers (Northern Ireland), Order 1995, 18 October 1995, Articles 3 (2) (d) (ii) and 5).
- 3) Annex III shall be amended as follows:
- a) In part A, the following points shall be deleted:

Points 1, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27, 29 a) and b), 30 a) and c), 31, 32, 35 a), b), c), d), e), f), g), 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 93, 94, 95, 96, 97, 98, 99, 100, 101, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 152 and 153.
 - b) In part B, all references shall be deleted.
- 4) In Annex IV, section B shall be amended as follows:
- a) Under the heading "C. GERMANY", the text shall be replaced as follows:

"Farmers' old-age insurance (*Alterssicherung der Landwirte*)"
 - b) Under the heading "H. ITALY", the text shall be replaced as follows:

"Pension insurance schemes for (*Assicurazione pensioni per*):
 - medical practitioners (*medici*)
 - pharmacists (*farmacisti*)
 - veterinarians (*veterinari*)
 - nurses, medical auxiliaries, children's nurses (*infermieri, assistenti sanitari, vigilatrici infanzia*)
 - engineers and architects (*ingegneri ed architetti*)
 - surveyors (*geometri*)
 - solicitors (*avvocati*)
 - economists (*dottori commercialisti*)
 - accountants and business experts (*ragionieri e periti commerciali*)
 - employment consultants (*consulenti del lavoro*)

- notaries (notai)
- customs agents (spedizionieri doganali)
- biologists (biologi)
- agricultural technicians and scientists (agrotecnici e periti agrari)
- sales representatives (agenti e rappresentanti di commercio)
- journalists (giornalisti)
- industrial technicians (periti industriali)
- actuaries, chemists, agronomists, foresters, geologists (attuari, chimici, dottori agronomi, dottori forestali, geologi)".

5) Annex VI shall be amended as follows:

- a) Under the heading "B. DENMARK", point 6b) shall be deleted.
- b) Under the heading "C. GERMANY", points 3, 11 and 17 shall be deleted.
- c) Under the heading "E. FRANCE", the words "and the parental child-rearing allowance" in point 7 shall be deleted.
- d) Under the heading "G. IRELAND", points 5 and 11 shall be deleted.
- e) Under the heading "O. UNITED KINGDOM", the text shall be amended as follows:
 - i) In point 2b), points i) and ii) shall be replaced by the following text:
 - (i) a spouse or former spouse where a claim is made by :
 - a married woman or
 - a person whose marriage has terminated otherwise than by the death of the spouse,
 - or

(ii) a former spouse, where a claim is made by:

- a widower who immediately before pensionable age is not entitled to widowed parent's allowance; or

- a widow who immediately before pensionable age is not entitled to widowed mother's allowance, widowed parent's allowance or widow's pension, or who is only entitled to an age-related widow's pension calculated pursuant to Article 46(2) of the Regulation, and for this purpose "age-related widow's pension" means a widow's pension payable at a reduced rate in accordance with section 39(4) of the Social Security Contributions and Benefits Act 1992."

iii) Point 22 shall be deleted.

ANNEX II

Regulation (EEC) No 574/72 shall be amended as follows:

1) In Annex 4, under the heading "C. GERMANY", the following point 9 shall be added:

"9. Pension schemes of professional associations:

Arbeitsgemeinschaft Berufsständischer Versorgungseinrichtungen, Köln".

Annex 11 shall be deleted.