



COMMISSION OF THE EUROPEAN COMMUNITIES

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**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT**

pursuant to the second paragraph of Article 251(2) of the EC Treaty

concerning the

**common position of the Council on the adoption of a Regulation of the European
Parliament and of the Council amending Council 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 Council Regulation
(EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No
1408/71 (miscellaneous amendments)**

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common position of the Council on the adoption of a Regulation of the European Parliament and of the Council amending Council 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 Council Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (miscellaneous amendments)

1. BACKGROUND

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| Date of transmission of the proposal to the EP and the Council (document COM(2003) 468 final — 2003/0184 COD): | 31 July 2003. |
| Date of the opinion of the European Economic and Social Committee: | 10 December 2003. |
| Date of Parliament's opinion at first reading: | 11 March 2004. |
| Date of transmission of the amended proposal: | 22 April 2004. |
| Common position adopted | 15 November 2004. |

2. OBJECTIVE OF THE COMMISSION PROPOSAL

Regulation (EEC) No 1408/71 and the relevant Implementing Regulation (EEC) No 574/72 ensure the coordination of Member States' social security schemes in order to protect the rights of people moving within the European Union.

On 31 July 2003 the Commission presented a proposal for amendment of these Regulations. The proposal seeks to update these Community Regulations in order to take account of changes in national law and to clarify the legal position concerning certain Articles of the said Regulations. It also seeks to take account of recent developments in the case law of the Court of Justice of the European Communities, in particular rulings concerning the identification criteria for special non-contributory cash benefits subject to specific coordination (which are non-exportable if they meet the above-mentioned criteria and are entered in Annex IIa of the Regulation), as well as rulings concerning the relationship between the Regulation and the provisions of bilateral social security agreements (which will continue to apply if they meet the requirements for inclusion in Annex III of the Regulation).

3. COMMENTS ON THE COMMON POSITION

3.1 General comments

The common position of the Council, adopted unanimously in accordance with Article 42 EC, maintains the essential aspects of the Commission's proposal, which relates principally to two points:

- Revision of the list of special non-contributory cash benefits in Annex IIa to Regulation (EEC) No 1408/71 on the basis of the criteria laid down in Article 4(2a) of the Regulation, taking account of Court of Justice case law. Although the Council has been unable to agree on the list of benefits proposed by the Commission in its proposal, the number of benefits (benefits which, owing to their special features, are the subject of specific coordination and are paid only in the territory of the Member State in which the beneficiary resides) retained in the Annex as per the common position has been very much reduced compared with the present list. Furthermore, depending on future Court of Justice case law, the Commission reserves the right to table a new proposal to revise Annex IIa so as to ensure uniform treatment of all comparable benefits.
- Revision of Annex III to the Regulation, which lists the bilateral conventions remaining applicable after entry into force of Regulation (EEC) No 1408/71. This list has been reduced significantly, also on the basis of criteria established by the Court of Justice, cf. Article 7(2) of the Regulation.

3.2 Amendments made by the European Parliament at first reading

At the plenary part-session on 11 March 2004, the European Parliament adopted four amendments which the Commission has incorporated in full into its amended proposal of 22 April 2004.

These four amendments are also included in the common position of the Council.

The oral amendment has been taken into account in recital 6 of the common position, which invites Member States to take measures to ensure that the prejudicial effects of certain amendments made to the list of benefits in Annex IIa, specifically when a benefit becomes non-exportable due to its inclusion in the Annex, are mitigated with regard to persons who previously received these benefits, possibly by introducing a transition period.

Amendments 1, 2 and 3 have been included in Annex I, section 2), headings G Spain, I Ireland and Y United Kingdom, as the benefits concerned are perfectly consistent with the criteria laid down in Article 4(2a) of the Regulation.

3.3 New provisions introduced by the Council, and the Commission's position

3.3.1 *Annex I, section 2) of the common position – Special non-contributory cash benefits listed in Annex IIa to Regulation (EEC) No 1408/71*

The Council has agreed on the list of non-contributory cash benefits to be included in Annex IIa on the basis of the criteria laid down in Article 4(2) of the Regulation. However, some Member States (United Kingdom, Sweden and Finland) felt that

their benefits¹ should be retained in Annex IIa owing to their special characteristics distinguishing them from the other benefits deleted from the Annex. As a compromise, the Council has agreed to retain these benefits in the Annex pending the Court of Justice's findings on the question of the special characteristics of these benefits compared with those already examined by the Court and in the light of the criteria laid down in Article 4(2) of the Regulation.

In a statement for the Council minutes, the Commission continues to consider, having regard to Court of Justice case law and the criteria laid down in Article 4(2) of the Regulation, that the benefits concerned should not be included in Annex IIa. It therefore reserves the right to refer the matter to the Court of Justice and to present a proposal, if necessary, to revise the list of entries in Annex IIa, based on the findings of the Court.

The Commission can accept this solution, as it ensures in the long term the uniform and objective treatment of all equivalent benefits.

It should also be emphasised that criteria identical to those in Article 4(2) of the Regulation were applied when examining the new Member States' requests for the inclusion of benefits in the Annex during the accession negotiations. For reasons of transparency and legal certainty, the current entries of the new Member States included in the Accession Treaty have also been incorporated.

Luxembourg's "Income for the seriously disabled" (Article 1(2) of the Act of 12 September 2003) and Finland's "Special assistance for immigrants" (Act on special assistance for immigrants, 1192/2002) have also been added to the Annex. These entries are justified in that both these benefits are intended to guarantee the persons concerned a subsistence income and therefore meet the criteria laid down in Article 4(2) of Regulation (EEC) No 1408/71.

3.3.2 *Article 1(3) and Annex I section 3) of the common position – Bilateral conventions listed in Annex III to Regulation (EEC) No 1408/71 remaining applicable after the entry into force of Regulation No 1408/71*

The change to Article 7(2) of Regulation No 1408/71 proposed by the common position sets out, in line with Court of Justice case law, the conditions under which conventions predating the Regulation may remain applicable. This is welcomed by the Commission.

Annex III to the Regulation lists the bilateral conventions which meet these conditions and therefore remain applicable.

¹ United Kingdom:
- Disability living allowance (Disability Living Allowance and Disability Working Allowance Act of 27 June 1991, section 1, and Disability Living Allowance and Disability Working Allowance (Northern Ireland) Order of 24 July 1991, section 3).
- Attendance allowance (Social Security Act of 20 March 1975, section 35, and Social Security (Northern Ireland) Act of 20 March 1975, section 35).
- Carer's allowance (Social Security Act of 20 March 1975, section 37, and Social Security (Northern Ireland) Act of 20 March 1975, section 37).
Sweden: disability allowance and care allowance for disabled children (Act No 703 of 1998).
Finland: child care allowance (Child care Allowance Act, 444/69).

As the Regulation takes the place of conventions which predate it and fall within its scope, a comment is added at the top of Annex III to the effect that conventions which do not fall within the scope of the Regulation and therefore remain in force are not included in Annex III.

The terminology used in certain entries currently included in the Annex has been amended for the purposes of clarification, without changing the substance of those entries.

3.3.3 Article 1(1)(b) of the common position – Amending of Article 3 of Regulation No 1408/71

The amendments proposed by the Council in the common position consolidate the conditions for application of the principle of equal treatment. They are acceptable to the Commission.

3.3.4 Article 1(5) of the Commission proposal – Amending of 33 of Regulation No 1408/71

The common position of the Council does not include the amendments to Article 33 proposed by the Commission. The Council feels it is preferable to await the entry into force of the new simplified Regulation (EC) No 883/2004, which, on the basis of Article 5 (assimilation of facts) and Article 30 (contributions by pensioners), will make it possible to deduct contributions on the basis of all the pensions paid to a pensioner, but necessitates implementing provisions in the future implementing regulation (cf. Council statement in the minutes). In a statement for the minutes, the Commission reaffirms its intention to include provisions implementing Article 30 of the new Regulation No 883/2004 in the new implementing regulation. The Council's position on this point is therefore fully acceptable to the Commission.

3.3.5 Article 1(9); Article 3; Annex I, section 1(b), section 4(c), section 5(c) and (f); Annex II, section 4) of the common position

Like Germany, Austria has also asked for the removal of the entry in Annex II, heading R Austria, which excluded certain special schemes for self-employed workers from the scope of the Regulation, pursuant to Article 1(j), fourth paragraph, of Regulation (EEC) No 1408/71. The Commission welcomes this initiative, which allows the provisions of Regulation No 1408/71 to be applied to these special schemes. This measure necessitates a transitional period, extended in the common position to 1 January 2005, which is fully acceptable, taking account of the time needed to adopt the Regulation. It also requires the introduction of provisions on the calculation of benefits and clarification regarding the competent institutions.

3.3.6 Annex I, section 1(c)(ii) and section 5(d), and Annex II, sections 1 and 3 of the common position

The amendments made are purely formal and based on a change in the terminology used in French legislation on family benefits and on changes to the competent institutions in Sweden and Denmark.

3.3.7 Annex I, section 5(b) of the common position – Entry for Denmark

Following the removal from Annex IIa of the Danish benefit “Temporary benefit for unemployed persons who have been admitted to the “flexible-job” scheme for 12 months (ledighedsydelse)”, it has been considered necessary to include an entry in Annex VI requiring this benefit to be coordinated in accordance with the provisions of the chapter on unemployment benefits.

4. CONCLUSIONS

The Commission approves the common position in its entirety, as it meets the objectives of the Commission’s proposal and takes account of the European Parliament’s amendments.

5. COMMISSION STATEMENTS

See annex.

ANNEX

STATEMENTS FOR THE COUNCIL MINUTES

Commission Statement ad Article 1(5) of the Commission Proposal

"The Commission envisages including some measures in the implementing Regulation to deal with the practical consequences of Article 30."

Commission Statement ad Annex IIa

"The Commission has proposed to revise the list of entries in Annex IIa (in particular the following group of benefits: Child care allowance (Finland); Disability Allowance and care allowance for disabled children (Sweden); Disability Living Allowance; Attendance Allowance; Carer's Allowance (United Kingdom)) and continues to consider that this will be necessary in order to meet the criteria of the jurisprudence of the Court and the criteria agreed in the Council's Common Position on the Miscellaneous Amendments proposal of 2003. It entirely reserves therefore its right to seize the Court and to present a proposal, if necessary, to revise the list of entries in Annex IIa, based on the findings of the Court."